WHY INDEED?

by

Johannes Climacus

Responsible for publication
Robert Paul Wolff

The Workshop in Kantian Legal Theory, of which the papers reproduced here are a partial record, was a curious event, withal. Nineteen men and one woman, closeted - and cossetted - for three days in Columbia University's Arden House for the avowed purpose of discussing the jurisprudential theories of the greatest philosopher who ever lived, Immanuel Kant. Fifteen hundred dollars plus expenses for the six authors of the papers circulated in advance for discussion, five hundred for those charged with participating in the discussion, the bill to be paid by the right-wing Liberty Fund, whose minatory representative, eerily resembling the Jehovah's Witnesses who every day radiate from their home in Brooklyn Heights to prosyletize the faith, attended each session to make sure that the hired hands put in a full day's work.

Five of the nineteen were professional philosophers, four of them Kant scholars who had made their reputations struggling with one or another of Kant's great works. Twelve hours of concentrated discussion on Kant's philosophy was, in Eliza Doolittle's words, mother's milk to them, and Philosophy being what it is, the pay wasn't bad either. But the remaining fourteen were professors of law - two from Canada, one from England, a lone representative of the German Federal Republic, and the rest from the United States. What, one could not help but wonder, were they doing there? What could Kant possibly have to say to them that would justify three days of unrelenting Kantshtick?

The cast of characters itself was more than passingly interesting. Leading the group, the organizer of the conference, diminutive, erect, rather military in bearing, looking like nothing so much as the Major in BEAT THE DEVIL, was George Fletcher, Professor of Law at Columbia University. Kant clearly had a powerful valence for Fletcher, and one felt that the in-

vocation of his name was code for intensely felt hostility to unspecified, but dangerously lax, tendencies in modern legal thinking. He seemed to draw strength from even garbled allusions to significant texts in Kant's ethical writings.

Most voluble of the nineteen was Fletcher's colleague, Bruce Ackerman, brilliant, precocious, enormously - and on occasion, with some justification - pleased with himself. Antaeus-like, Ackerman would draw renewed strength from the sound of his own voice, so that launched upon a comment of finite scope, he would be refreshed by his words, and extend his remarks to fill all available space and time. Competing with Ackerman for the floor most often was the radical philosopher and sometime Kant scholar Robert Paul Wolff, whose face, contorted by a persistant facial tic, showed excitement, disgust, irritation, and exasperation in quick succession. Ackerman and Wolff, like the two youngest boys at a Seder, frequently competed to see who could ask the most questions from a reclining position, both of them manifestly expecting an indulgent Jewish mother to pat them on the head and offer them another piece of cake.

Intervening with impassioned criticisms that often outran their target somewhat was newly-tenured Andrzej Rapaczynski, also of Columbia Law School. Rapaczynski, quite possibly the philosophically quickest mind at the conference, had many years earlier been a brilliant student in the Columbia philosophy department, and had studied with Wolff. Now that he is safely tenured, it can perhaps be acknowledged that Rapaczynski is really a philosopher, not a Jurisprude, and in his youthful enthusiasm he was frequently less successful than his fellow philosophers in concealing his dismay at the appallingly low level of understanding of Kant manifested around the table.

Across from Ackerman and Wolff sat tall, thin Mary Gregor, bent in a

question mark of deference to her neighbor, Douglas Dryer, a long-time Kant scholar from Canada. As the only real expert present on the subject of the conference - she is the author of the major commentary on the work under discussion - Gregor was of course almost silent during the three days. Genuine technical knowledge was in short supply, and would, if too often displayed, have tended to inhibit the free flow of conversation.

Casting something of a pall on the proceedings was Professor Dr. Wolfgang Naucke of Frankfurt University, a Professor of Law and a Judge. For Naucke, it appeared, Kant constitutes the last barrier separating western civilization from barbarism, although whether from the left or from the right remained for a while unclear. Naucke's discussion of Kant was couched in a grammatical mode that might be dubbed the incantatory imperative, inspiring in the listener contradictory impulses to cheer and salute. Naucke's true colors were revealed almost by accident, midway through the discussion of his paper. Asked directly and flatly whether he considered Kant's jurisprudence incompatible with the welfare state, he replied, laconically, yes. At that, Wolff, who had been dozing, sat bolt upright like the dormouse at the Mad Hatter's tea party and confessed himself suddenly to have recaptured an interest in the proceedings.

In striking contrast to Naucke, Herbert Morris, Dean of Humanities at UCLA, brought a welcome touch of laid-back California cool to the conference, taking the sting out of the Morningside Heights intensity of Ackerman, Rapaczynski, et al. Morris is well known for his philosophical discussions of the theory of punishment, and had in previous years carried on a debate in the literature on that subject with one of the Kant scholars present, Jeffrie Murphy of Arizona State. Prompted by a question during the discussion of Murphie's paper, Morris treated the conference to an exquisite illustration of how to expound a systematic philosophical position while ap-

pearing merely to reminisce about an experience on a California freeway. Morris' impromptu remarks were one of the few moments of genuine style in an otherwise pedestrian three days.

The non-Canadian North Americans around the table were intermittently chivvied, with ironic deprecation, by crypto-Thomist Ernest Weinrib from the University of Toronto. Weinrib, and his killer rabbit sidekick Peter Benson from McGill, were the only lawyers at the conference who appeared seriously to be interested in the substance of the law. Weinrib's complaint, the internal incoherence of tort law south of his border, and the contrasting beauty and elegance of Canadian tort law, utterly mystified the philosophers around the table, but appeared to be an old familiar tune to the other lawyers.

As Spinoza noted, the self comes to know itself only as it sees itself reflected in others. Hence lovers need the beloved, actors crave audiences, and professors tolerate students. Fletcher, understanding these needs, had, like a good host, provided a symbolic student presence in the form of the editorial board of the Columbia Law Journal. They were of course enjoined from interrupting the heavenly discourses by juvenile interventions, but they were permitted to be present at the proceedings, with the understanding that they would in due course turn over the pages of their journal to the finished products.

The relation of the students to the conference participants, peripheral though it was to the main action, offered a lovely example of the sort of ironic misperception of which Jane Austen made such elegant sport. The students were of course perceived by their mentors as adoring acolytes, consumed by academic primal scene scopophilia [a technical term from psychiatry, meaning the obsession to observe one's intellectual parents in rational

intercourse]. The students, all of whom had done philosophy either as graduates or as undergraduates, were in a state of shocked dismay, quite well aware of the philosophical shambles unfolding before them, and unable to imagine how they could in good conscience feed the audience of their journal so thin a gruel.

And there they all were, removed from the distractions of Manhattan, fed and cared for by a silent, efficient Arden House staff, serenaded by a chamber trio on the second evening, and embarked on twelve hours of investigation of the Rechtslehre, Part One of Kant's late, minor work, THE METAPHYSICS OF MORALS.

Each two-hour session was devoted to one of the prepared papers, which all conference participants had received in advance. Robert Paul Wolff led off on the first afternoon. Wolff, accustomed to the terse prose style of the philosophical world, and mistakenly expecting to have to read his paper aloud, had been well along in the drafting of eighteen or twenty carefully crafted pages when a chance phone call to Fletcher had revealed that the other participants were producing 'fifty to eighty pages.' Panicked by the potential mortification of showing up with the shortest paper on the block, Wolff discarded his draft and began again. Since the paper was intended for non-philosophers, he reasoned, a fair amount of space could usefully be devoted to teaching them something about Kant. Having written two books on Kant's philosophy, and having taught Kant for thirty years, Wolff found it no great strain to churn out fifty pages in the next four days, and it was this effort that the conferees had all read. [Wolff was inordinately pleased with his effort, and much excited by the prospect of publishing a fifty-page paper in the Columbia Law Journal. The students, not fooled for a moment, spoke many kind words to him but chose not to publish.]

The gravamen of Wolff's effort was that just as Kant's moral philosophy

has to be read in the light of the deeper doctrines of the CRITIQUE OF PURE REASON, in which context it becomes clear that there are fundamental contradictions between the two which mortally undermine the moral philosophy, so too Kant's legal philosophy must be interpreted through its relation to Kant's fundamental epistemological teachings, with equally disastrous consequences. The implication of Wolff's remarks was that the Kantian legal philosophy was without defensible foundation. Consequently, although the session was pronounced a great success, and was said to have started the conference off in fine style, Wolff's argument was henceforth completely ignored.

A break for drinks and dinner, and the participants returned, fueled and lubricated, for an evening discussion of Fletcher's 89 page note. Fletcher's paper bearing only a parametric relation to Kant, there was considerable hermeneutical space between object-text and subject-discourse within which an unfettered conversation could develop, and everyone pitched in with enthusiasm.

And so it went for two more days. The next morning, Naucke's apocalyptic warnings were followed by Weinrib's animadversions, with Murphy's scholarly and professional addendum to his well-known writings on Kant's retributive theory of punishment preparing the group for the chamber music to follow. The conference was brought to a close with an elegantly evasive defense, by the cultivated Oxford homophobe John Finnis, of his utterly appalling paper. David Richards, a principal target of Finnis' crabbed and ungenerous remarks, conducted himself with a restraint that was made all the more effective by the eloquence of his reply. The Finnis session was graced by the one moment of genuine scholarship: in rebuttal of Finnis' implausible attempt to claim Kant's support for his own sectarian views, Mary Gregor,

apparantly from memory, conjured an obscure Kantian text that decisively demonstrated the incorrectness of Finnis' interpretation. Finnis, his hands contorted into twisting claws of emphasis in the characteristic third-generation Wittgensteinian manner, was momentarily reduced to silence.

And so we return to the question that provoked Wolff to a restless quizzing of his fellow conferees: why Kant? What were busy, successful, worldly lawyers [worldly, at the very least, by philosophical standards] doing locked in three days of debate about Kant?

Some of the participants suggested that they were looking for a stick to beat the utilitarianism of the left. Others identified the 'law and economics' of the right as their target. But neither group gave any indication of a serious interest in the arguments with which Kant had sought to establish his arcane and rather paradoxical philosophical theses. Arguments, unlike sticks, not being adaptable to purposes other than those for which they were fashioned, what did anyone at the conference hope to get from Kant?

The answer is this: lawyers, unlike serious philosophers [but, in this regard, quite like second-rate philosophers], do not actually seek to demonstrate the positions they defend. Rather, they aim to assimilate issues with which they are concerned to the existing structure of laws and precedents in hopes that courts will construe those issues in ways that favor their clients. For this purpose, lawyers need a large and versatile armamentarium of concepts, categories, distinctions, and argument-fragments with the aid of which they can articulate intuitions, convictions, or interests to which they are already committed. Both utilitarianism and cost/benefit analysis provide just such weapons to advocates of the left or the right, none of whom can be said ever to prove their positions, but all of whom gain argumentative leverage from their ability to embed their advocacy in a pre-existing proof-structure.

Kant's philosophy is a rich resource of arguments, concepts, and distinctions, already elaborated into an architectonic of subordinations and coordinations, incomparably high in intellectual and academic status, and lying entirely within the public domain. Philosophically speaking, it is to utilitarianism, cost/benefit analysis, or Rawls' THEORY OF JUSTICE what a strategic nuclear weapon is to a medium tank. Invocations of the Categorical Imperative or the noumena/phenomena distinction instantaneously confer on the author vast quantities of what teen-age players of Dungeons and Dragons call 'hit points.' In the jargon of the old gangster movies, Kant is the Equalizer. Since lawyers are a combative lot, and good lawyers are winners, three days at Arden House probably seemed like a pretty fair price to pay for a chance at a secret weapon.

Did the Liberty Fund get its money's worth? One hopes not, considering that organization's political orientation. Perhaps the readers of this journal can decide for themselves, having read the best of the papers revised and refined in the light of three days of debate. After the participants had left for their several homes, the following notes were discovered at the seat that had been occupied by Robert Paul Wolff. Wolff apparently found the Weinrib paper philosophically suggestive and worthy of serious consideration. His fragmentary jottings have been Englished, as editors like to say, and are offered here for what they might be worth.

Comments by Robert Paul Wolff on Ernest Weinrib's Paper

A very interesting piece of work. W. is clearly a Thomist who sees in K.'s notion of an 'Idea of Reason' a modern rationale for the Aristotelian-Thomist conception of the telos or internal purpose of a natural kind. Except that the law, being a human product, can have no other telos than what

its makers impute to it.

W. seems hesitant to come out from behind Kant's skirts and declare himself. It is difficult, merely from the text, to tell whether he endorses the notion that the unity of the law is an idea of Reason, or merely attributes it to Kant. But the evident passion with which W. advances his views decides clearly for the former.

W. is certainly correct in his diagnosis of Fletcher and Calabresi on torts [whatever they are], but a diagnosis is not yet a condemnation, let alone a refutation. Why shouldn't those two merely grant W.'s point, and agree that, absent a purposeful God who has set for Mankind the task of articulating an internally coherent Law, our legal institutions quite properly reflect the fundamental disunity of our society? [Probably Calabresi would be more comfortable with that response than Fletcher.]

But leaving aside such considerations, which bear merely on the truth of W.'s position, there are serious difficulties with his appropriation of Kant. The problems center on the Critical doctrine of Ideas of Reason.

According to Kant, the intellectual powers of the human mind have both a merely logical and a real employment. In their merely logical employment, our rational capacities are used to compare, contrast, order, and systematise such mental contents as they are presented with, from whatever source. So the arrangement of objects of perception by genera and species, the classification of sense-contents into the familiar five senses, the rearrangement of judgments into the form of syllogisms, and so forth, are all instances of the merely logical employment of intelligence. Nothing is created thereby, and the result is no more than a sorting out and neatening up of the materials presented to intelligence.

The real employment, on the other hand, is genuinely creative, resulting in cognitively significant thoughts, or representations, as Kant calls

them, that did not exist before, and could not have been arrived at by any process of the comparison, reorganization, or abstraction from presented materials of consciousness.

In the CRITIQUE OF PURE REASON, Kant differentiates between two intellectual powers of the mind, which he labels Understanding and Reason. The real use of Understanding, he says, produces the Pure Concepts of Understanding, or, as they are usually referred to, the categories, among which are Substance and Accident, Cause and Effect, Possibility, Necessity, and so forth.

Reason, personified by Kant as a purposive agent, is said always to strive to complete the processes of organization and arrangement which it undertakes in its merely logical employment, seeking everywhere for the first cause in the series of causes, for the necessary being on whose existence rests the possibility of contingent beings, the first premise from which all syllogistic reasoning descends, and so forth. Kant calls this the quest for the unconditioned, and he claims that the product of the real employment of reason is the concept of the unconditioned. For reasons of piety and historical pendulation [to use Harnack's lovely neologism], Kant resurrects the Platonic term 'Idea,' and calls the various articulations of the concept of unconditionality 'Ideas of reason.'

Kant knows, of course - indeed, he insists - that such Ideas can never find instantiation in experience, for on Kant's own teaching, all experience is conditioned by the mind-dependent constraints under which things can be objects for us in space and time. Hence we can never find a first cause, a free will, a necessary being, or, for the same reasons, a system of law that achieves full inner coherence.

Nevertheless, Kant claims, with absolutely no justification whatsoever,

Nature would not instill in us the unconquerable urge to seek the Unconditioned unless She had some useful purpose thereby. So we may conclude that although the search can never be completed, the quest is set us as a task. The search for an internally coherent tort law, like the search for a single unified theoretical foundation for the sciences, or a single set of logical premises from which all true mathematical theorems follow as logical consequences, or a first cause, a free will, a necessary being, is a search dictated by the inner telos of reason, setting for us, as an unattainable goal, an Ideal of Reason. [It is not clear why Wolff reminds himself here of certain elementary facts about Kant's philosophy with which he would be thoroughly familiar. J. C.]

But though Kant talks this way all the time, he offers no argument at all for the repeated invocation of Nature's purposes with which the introductory and less central portions of his writings are filled. In fact, of course, Kant himself, through his devastating refutations of the traditional attempts at proving the existence of God, is, together with David Hume, the Enlightenment executioner of this way of speaking. It is entirely incompatible with the deeper teaching of the CRITIQUE to speak of the inner coherence of tort law as though its achievement were an objectively necessary task set us by the inner purposes of Reason itself. Rather, we must recognize that ideal for what it is: one ideal among many that lawyers or theorists of law may set for themselves, for their own political, aesthetic, moral, or professional purposes.

So, in the end, W.'s essay is little more than a cri de coeur, and Fletcher's two-stage process of considerations of right followed by considerations of humanity is as legitimate as any other. W.'s use of Kant here illustrates a more general difficulty with the too-quick appropriation of portions of a philosophy, as though they were bits and pieces of material

that could be separated from the main body of theory and bent to purposes of one's own. The philosophy of a great thinker like Kant is an organic unity unfolding from one, or at most a very few, central insights. One's understanding of every element in that philosophy, however secondary or peripheral, is thoroughly conditioned by one's construal of those central insights. Before we can 'use' the Kantian notion of an idea of reason, for example, we must decide how we understand the revolutionary teaching that concepts are rules for the organization of a diversity of sense-contents, and hence have not even problematic application beyond the limits of sense experience.

W. cannot escape the necessity of stating, and defending, his aesthetic, moral, political or professional reasons for seeking internal coherence in the tort law, or in any other set of institutional practices, for that matter. But this was simply the message of my opening presentation. I guess it really was the waste of time it seemed.