# Jahrbuch für Recht und Ethik

# Annual Review of Law and Ethics

Band 3 (1995)

Herausgegeben von
B. Sharon Byrd
Joachim Hruschka
Jan C. Joerden

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Themenschwerpunkt:

Rechtsstaat und Menschenrechte
Human Rights and the Rule of Law

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# Preface

Professor *Mary Gregor*'s sudden death in October 1994 was a grave loss for the editors of the *Annual Review of Law and Ethics*. She was a regular contributor to our journal, a valuable and reliable source of intellectual stimulation, and a loyal, dear friend. We had the good fortune to meet her in 1992 as a participant in a symposium we held in Jena on "Prepositive Law as a Means of Orientation in Times of Political Upheaval". Her article "Kant on Obligation, Rights and Virtue", which grew out of that symposium and was published in volume 1 of the *Annual Review*, was significant in getting the journal off to a solid start. After that first meeting, we remained in close contact and were always grateful for her valuable advice and support. Shortly before her death, *Mary Gregor* attended our most recent symposium, the contributions to which are published in this volume of the *Annual Review*. Her paper, "Natural Right or Natural Law?", which is the lead article in this volume, again represents a profound contribution to Kantian scholarship and a highly valued addition to our journal. All those who were fortunate enough to have known *Mary Gregor* will miss her warmth and generosity of spirit. We deeply miss her friendship.

Participants in our symposium, "Human Rights and the Rule of Law", which was held in Buckow / Märkische Schweiz from July 31, to August 6, 1994, included lawyers, philosophers and economists from Austria, England, Germany, Italy, Taiwan, and the United States: *Arno Baltes* (Erlangen), *Gunther Biewald* (Jena), *Winfried Brugger* (Heidelberg), *B. Sharon Byrd* (Augsburg), *Thomas W. Crofts* (Frankfurt an der Oder), *Angelika Drescher* (Erlangen), *George P. Fletcher* (New York), *Georg Geismann* (Firenze), *Mark F. Grady* (Los Angeles), *Mary Gregor* (San Diego), *Joachim Hruschka* (Erlangen), *Jan C. Joerden* (Frankfurt an der Oder), *Gau-jeng Ju* (Taipei), *Matthias Kaufmann* (Halle), *Peter Koller* (Graz), *Geoffrey Marshall* (Oxford), *Thomas W. Merrill* (Chicago), *Thomas W. Pogge* (New York), *Christoph Reichert* (Augsburg), *Peter Stanglow* (Frankfurt an der Oder), *Annette Windmeißer* (Frankfurt an der Oder), *Arnulf Zweig* (Eugene).

We as symposium organizers would like to express our gratitude to the State of Brandenburg, the Fritz Thyssen Stiftung and the Dr. Alfred Vinzl-Stiftung for their generous support in financing this symposium. We would also like to thank the Rektor of the Europa-Universität Viadrina in Frankfurt an der Oder, Professor Dr. *Hans N. Weiler*, for his gracious reception of the symposium participants at the Europa-Universität. Finally we would especially like to thank *Ayke Darius* at the Institute for Criminal Law and Legal Philosophy in Erlangen, *Susen Hempel* at the Chair for Criminal Law, Comparative Criminal Theory and Legal Philosophy in

Frankfurt an der Oder, and *Heike Frank* at our publisher's Duncker & Humblot for their assistance in the publication of this volume.

The fourth volume (1996) of the *Jahrbuch für Recht und Ethik/Annual Review of Law and Ethics* will primarily concentrate on the issue: "Biotechnological Challenges for Law and Ethics".

*The Editors*

# Inhaltsverzeichnis

*Zur Staatsphilosophie*



**Abhandlungen**



**Diskussionsforum**

**Rezensionen**

# In Memoriam
# Mary J. Gregor
# (1928-1994)

Allen W. Wood

On October 31, 1994, Mary J. Gregor, a leading scholar and translator of Kant's philosophy of right and moral philosophy, died in San Diego, California.

Mary Jeanne Gregor was born in Portland, Oregon, on January 1, 1928. She began the study of philosophy at Creighton University, Omaha, Nebraska, where she received her B.A. degree in 1949. The same year she began graduate study at St. Louis University, St. Louis, Missouri, and received an M.A. in 1952, before continuing at the University of Toronto. There she studied with Professor H. J. Paton, who was visiting from Oxford University, and in 1957 Gregor completed her Ph. D. with a dissertation on Kant's applied ethics in the *Doctrine of Virtue.* Between 1959 and 1962 she lectured in the University of Maryland Overseas Program, in Germany, Spain and Morocco, and in 1967 she began teaching at Atkinson College, York University, Ontario, Canada. In 1982 Gregor moved from Canada to southern California to become a member of the faculty of San Diego State University. She taught there until becoming emerita in 1992. In the Spring of 1994 she was visiting professor at the University of Oklahoma.

In 1963 Gregor published *Laws of Freedom,* a study of Kant's moral philosophy in the *Doctrine of Virtue.* At the time this work was almost alone, at least in English language Kant scholarship, in stressing the indispensability of *The Metaphysics of Morals* for a proper understanding of Kant's ethical theory. Today the importance of Kant's last great ethical work is universally acknowledged among students of Kantian ethics. Her scholarly writing after this time included over a dozen articles, chiefly on Kant's philosophy of law, society and politics. Here again she was well ahead of her time, at least among English speaking Kant scholars, in giving careful and meticulous attention to Kant's *Doctrine of Virtue,* discussing such topics as Kant's theory of individual rights, property rights, the relation of the state to social welfare, and the Kantian conception of both constitutional and civil law. Her later work dealt with the complex relation of Kant's theory of right to the natural law tradition, usually stressing the departures of Kant's legal philosophy from that tradition. She also continued to write on Kant's moral philosophy, as well as on Kant's aesthetic theory.

Mary Gregor made a major contribution to Kant scholarship in English speaking countries through her English translations of Kant's writings: *The Doctrine of Virtue* (1964), *Anthropology from a Pragmatic Point of View* (1974), *The Conflict of the Faculties* (1979), „On the Philosopher's Medicine of the Body" (1985) and the entire *Metaphysics of Morals* (1991). Gregor's translations are characterized not only by meticulous linguistic accuracy and care, but also an unfailing sense of English style and an uncanny ability to render even the most difficult of Kant's prose into readable and even elegant English. Shortly before her death she had completed the manuscript of a translation of all Kant's writings on practical philosophy to be included in the Cambridge Edition of the Writings of Immanuel Kant.

Gregor's teaching career spanned three decades. She was an especially distinguished, honored and beloved teacher at San Diego State University, where during the 1980s she three times won the Most Influential Professor Award and once the Exceptional Merit Service Award; she delivered the Phi Beta Kappa lecture there in 1989. Gregor was also honored by Creighton University in 1984, receiving their Alumni Merit Award and delivering the Henri Renard Lecture. At San Diego State, she taught a variety of upper division and graduate courses on modern philosophy, Kant, ethical theory and the philosophy of law, as well as introductory courses in philosophy. As a teacher she was reputed to be always extremely knowledgeable, meticulously well-prepared and demanding, impressed but never daunted by the difficulty of texts and the complexity of philosophical problems. Yet she is said to have been modest about her own knowledge and accomplishments and patient and encouraging to her students, instilling in them the confidence that, with care and effort, even the most difficult questions were within their power to answer.

Scholarly colleagues also had reason to show Gregor respect and gratitude for her service to them. She served on the editorial boards of *Kant-Studien* and the Creighton University Press, and the Advisory Boards of the Cambridge Edition of the Writings of Immanuel Kant and the North American Kant Society. Gregor served as chair of the committee refereeing submitted papers for the Eighth International Kant Congress in Memphis, March, 1995, to which she had also been selected to deliver the opening plenary address.

As a teacher, scholar and translator, Mary Gregor was always characterized by her rigorous and many-sided approach. She seldom regarded any question, whether exegetical or critical, as finally settled, but was always returning to issues with renewed vigor, bringing new arguments to bear on them and seeing them from new angles. After the cerebral hemorrhage that suddenly hospitalized her late in September, 1994, she at first seemed to be making a rapid recovery, and in the two weeks or so between then and a following stroke, from which she never recovered, students said that she was still worrying about questions regarding Kant's relation to the natural law tradition. The tenacity with which she clung to philosophical issues was indistinguishable from the tenacity with which she clung to life.

Perhaps Mary Gregor's most lasting contribution to scholarship is one of those which still has not appeared: the comprehensive English translation of all Kant's writings on practical philosophy, brought together in a single volume for the first time. It should be the definitive English version of all Kant's moral and political writings for many years to come. As Gregor's greatest gift to students of Kant's philosophy, it speaks more eloquently about her scholarly accomplishments than could any eulogy.

# Tagungsbeiträge

# Begrüßung

durch den Rektor der Europa-Universität Viadrina Frankfurt (Oder)
aus Anlaß des Symposions „Rechtsstaat und Menschenrechte"
am 1. August 1994 in Frankfurt an der Oder

Hans N. Weiler

Distinguished guests and colleagues –

Verehrte Gäste, meine Damen und Herren –

Es ist mir eine ganz besondere Freude, heute abend im Rektorat der Viadrina einen so illustren Kreis von Gästen aus nah und fern – von Los Angeles bis zum Landgericht gerade gegenüber – begrüßen zu dürfen. Gleichzeitig bin ich etwas ratlos, in welcher Sprache ich mich äußern sollte. Einerseits möchte ich mich gerne unseren Kollegen aus dem englischsprachigen Ausland verständlich machen – andererseits freue ich mich, daß meiner Einladung auch so viele deutsche Kollegen gefolgt sind, von denen ich ebenfalls gerne verstanden sein möchte. Dabei bin ich besonders froh, daß wir heute an diesem Ort juristischer Gelehrsamkeit auch so prominente Vertreter der Welt des real existierenden Rechts unter uns zu Gast haben. Denn ich glaube, daß die Metapher von der Viadrina als einer Brückenuniversität sich ja nicht nur auf die Brücke zwischen Deutschland und Polen bezieht, sondern wohl auch darauf, daß sich an dieser Universität – und in allen ihren Fakultäten – ein reges und lebendiges Hin und Her zwischen Forschung, Lehre und Anwendung entwickelt, bei dem sich Wissenschaft und Praxis gegenseitig anregen und sich einerseits um neue Fragestellungen, andererseits um neue Lösungs- und Erklärungsmöglichkeiten anreichern. Sie, meine Damen und Herren der Gerichtsbarkeit, der Rechtspflege, der Staatsanwaltschaft sollen wissen, daß Sie in diesem Hause immer besonders gern gesehene Gäste sind – und eigentlich mehr als Gäste, nämlich Teilnehmer an einer gemeinsamen Aufgabe, in diesem Lande Recht zu begründen und Recht zu pflegen.

Ich begrüße herzlich aber auch die anderen Freunde der Universität aus Stadt und Region, die wir besonders gerne in das wissenschaftliche Leben dieser Universität einbeziehen, weil nur so, aus Ihrem Mitdenken und Mittun, die Symbiose von Universität und Region, von Town and Gown, Wirklichkeit werden kann.

Having greeted our German friends and colleagues who have joined us tonight, let me now turn to our special guests whom we have come together today to honor and to greet – the participants in the international conference on human rights, organized by the *Annual Review of Law and Ethics*, the distinguished editors of which include our own Professor and – as of a few weeks ago – Prorektor Jan Joerden. I am delighted that you have come to this part of the world for this year's conference, and that I am thus given the privilege of welcoming you to the site of one of the world's oldest and, at the same time, one of the world's newest universities.

The old Viadrina, Brandenburg's first university, was founded in Frankfurt (Oder) – in Francofurtum ad Viadrum, hence the Latin name of the University – in 1506. It flourished, as a center of scholarship, for the better part of three centuries, and counts among its alumni some of the more famous humanists like Ulrich von Hutten (author of the Motto „the wind of freedom blows" – which, interestingly enough in its German version „ Die Luft der Freiheit weht", adorns the seal of the president of Stanford University), the composer Philip Emanuel Bach, the brothers Humboldt, and the poet Heinrich von Kleist. In 1811, in an early manifestation of distributive educational policy, the Prussian state, anxious to have a university in its capital, Berlin, felt that two universities at such close proximity was too much density and proceeded to relocate the Viadrina to the capital of Silesia, Breslau, where it has become the Universitas Leopoldina of Wroclaw, now one of our Polish partner universities.

When the state of Brandenburg reemerged from the upheaval of 1989, the idea of reestablishing the old Viadrina in its original home town had a great deal of immediate appeal, and in 1991 the new Viadrina was founded, combining the legacy of a link and a bridge between the West and the East with a more explicit European orientation.

Welcome, ladies and gentlemen, to the new Viadrina.

You may not have intended it this way, but I am sure you realize that there is a poignant significance in opening a conference on the rule of law on the 1st of August, 1994. Eighty years ago, on the 1st of August, 1914, Germany declared war on Russia, unleashing the first of two wars that destroyed much of the world as we knew it. Towards the end of the second of these wars, on the 1st of August 1944, in a last desperate attempt to save their country and its dignity, the home army of Poland rose up against the German occupation of Warsaw – which ended, as we know, 63 days later in a crushing defeat and the loss of 200,000 Polish lives, many of them those of civilians, women, young people.

It is difficult (at least for me) not to be affected by these memories as we think about human rights in 1994. Killing innocent people as the ultimate violation of their human rights, while not an invention of this century, has become one of its starkest hallmarks, punctuated by the two world wars and many smaller wars. This endemic cynicism with respect to human life and dignity – from Warsaw and

Auschwitz to Bosnia and Rwanda – has made human rights and the rule of law not only into a matter of eminent moral and political concern, but also into an issue that is more than ever in need of dispassionate understanding.

That understanding can only come from a concerted intellectual effort that transcends simultaneously the boundaries of nations and the boundaries of established fields of academic pursuits. As the composition of your own group and the range of topics you discuss so admirably show, the task of inquiry into the complex relationship of law and ethics, into the moral fabric of our societies, stands to benefit greatly from comparative analysis and from the cooperation of different disciplines. I am delighted to see in the program of your conference analyses of human rights issues in such critical and instructive cases as China and South Africa – even though I wish that the growing preoccupation, academic and otherwise, with human rights in Eastern Europe would soon find its way into your deliberations as well.

There are many fine examples of the value of work across disciplines in the first volume of your *Annual Review.* I liked particularly the fascinating analysis that Frederick Will provided on the American debate over the rights of the fertilized human egg and abortion – an almost paradigmatic case of how the analysis of an intensely normative issue is dependent on the contribution not just of legal scholars, but of sociologists, geneticists, historians and, indeed, philosophers (pp. 341–342).

You have come to a university where these kinds of concerns and approaches have a ready home, where both the boundaries between countries (most notably, the one between Germany and Poland) and between disciplines are not seen as limits, but as challenges, and where there is a strong interest in overcoming one of the more unfortunate schisms in the history of modern scholarship – that between cognitive and normative domains of knowledge.

You should therefore feel at home in more than one sense here at the new Viadrina. We are delighted to have you with us, we wish you well for your deliberations over the next few days and for the continued success of your *Review.* And do come back to Frankfurt (Oder).

# Natural Right or Natural Law?

Mary Gregor

This paper will discuss an issue in Kant's *Rechtslehre*[1] relevant to the theme of this conference, „Human Rights and the Rule of Law." Kant does not speak of „human rights." If a human right is one that all human beings have merely as human beings, Kant would call this an innate right, innate in the sense that it does not have to be acquired by an act of choice.[2] As for „the rule of law," he puts forward, as the norm of a state, a republican constitution, „in which law itself rules and depends on no particular person" (341) or „in which power belongs not to men but to laws" (355). [3] More specifically, it is generally assumed that „human rights" include not only rights to non-interference but also rights to goods and services.[4] The question to be discussed here is whether Kant's account of the one innate right he recognizes can be connected, by way of the rule of law, with socioeconomic

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1 More precisely, his Metaphysische Anfangsgründe der Rechtslehre, Part I of Die Metaphysik der Sitten. The full title of Part II, which I shall refer to as the Tugendlehre, is, again, Metaphysische Anfangsgründe der Tugendlehre. That Kant intends to provide only „metaphysical first principles" will turn out to be of some importance.

2 The term *Recht* can signify both a system of laws and „a right," in Kant's terms, an authorization to use coercion. I have marked this distinction by using „Right" to signify what Kant calls a system of external laws. Strictly speaking, *Naturrecht* refers to a system of laws which can be known a priori, as distinguished from a system of positive laws, and „rights" are divided into the innate right that everyone has merely by virtue of his „humanity" and the rights that one can acquire provisionally in a state of nature, i.e., apart from civil society (237). In keeping with contemporary usage I shall, however, transfer „natural" to the rights one has in accordance with *Naturrecht* and use „natural rights" to include both innate and acquired rights in the sense just specified.

3 Unless otherwise indicated, references are to volume VI of the Akademie edition of Kant's works. The translation used is my own, The Metaphysics of Morals (Cambridge, Cambridge University Press, 1991), which includes the Akademie pagination. A republican constitution is, for Kant, the only one fully in keeping with the Idea or rational concept of a state as securing the natural rights referred to in the preceding note. See below, fns. 58 - 62 and accompanying text.

4 Various terms have been proposed for the latter, including „manifesto rights," „entitlements," and „claim rights" (as distinguished from „liberty rights"). Since all these terms have other uses, I shall on the whole refer to such rights as „socioeconomic rights" while occasionally adopting the distinction specified between „liberty rights" (to non-interference) and „claim rights" (to goods and services). Whether the „rhetoric of rights" is appropriate with regard to them will be discussed later in the paper.

rights. What this has to do with the question raised in the title of this paper – whether Kant holds a „natural Right" theory or a „natural law" theory – requires further explanation.

For the purposes of this paper I take it that a „natural law" theory, though it might admit natural rights, would stress the „responsibilities" and „obligations"[5] (or duties) agents have to others, arising from the duty to promote „the human good."[6] If Kant held a natural law theory there would be no difficulty in deriving from it the socioeconomic rights contained in, e.g., the United Nations Universal Declaration of Human Rights or its subsequent Declaration of the Rights of the Child. By a „natural Right" theory I understand one limited to a particular division of moral laws, those prescribing duties corresponding to the rights of others. If a natural Right theory is derived directly from a formal principle, socioeconomic rights would require a very different argument. Even a casual reading of the *Rechtslehre* shows that the system of laws with which it is concerned are derived from a restricted version of the formal principle of action expressed in the categorical imperative (not from the „material" first principle of the *Tugendlehre*)[7] and that such laws prescribe only duties correlative to rights. Hence it may seem superfluous to labor the point that in the *Rechtslehre* Kant puts forward a natural Right theory. Yet it has been suggested that Kant's term *Naturrecht* should be translated as „natural law," in order to show the affinities of Kant's „theory of justice" with „early modern Natural Law theory."[8] In the same spirit, though in a different con-

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5 The terminology is that of *Onora O'Neill*. See „The Great Maxims of Justice and Charity" in the collection of her essays entitled Constructions of Reason (Cambridge, Cambridge University Press, 1989). For Kant, there are two kinds of duties: those correlative to rights of others (*Rechtspflichten*) and those to which no such rights correspond (*Tugendpflichten*). The point of substituting „obligations" for „duties" may be to limit the discussion to laws prescribing what Kant calls „ethical duties," „duties of virtue" or „imperfect duties," which are not rules for actions.

6 The most comprehensive treatment of the place of rights within a classical (generally Thomistic) natural law theory is to be found in *John M. Finnis*, Natural Law and Natural Rights (Oxford, Clarendon Press, 1980).

7 Kant calls an end „the matter" of choice, and the first principle of the Tugendlehre – „Act in accordance with a maxim of ends that it can be a universal law for everyone to have" (395) – prescribes the adoption of objective or obligatory ends.

8 See *O'Neill's* review of my translation of Die Metaphysik der Sitten (British Journal for the History of Philosophy, Volume 1, 1993), pp. 159 - 61. What these affinities are supposed to be is not clear, though it is suggested that the use of „Natural Law" would show that Kant, unlike „contemporary liberals," is not preoccupied with rights and acknowledges the importance of other duties. In the Rechtslehre, however, Kant is preoccupied with rights (as in the Tugendlehre he is preoccupied with virtues); and he draws a much more radical distinction between *Rechtspflichten* and *Tugendpflichten* than did any of the „Natural Law" philosophers. This is the distinction that O'Neill would apparently like to break down. I have discussed Kant's relation to „early modern Natural Law tradition," specifically Hugo Grotius and Samuel Pufendorf, in „Kant on Obligation, Rights and Virtue," Jahrbuch für Recht und Ethik / Annual Review of Law and Ethics (Berlin: Duncker & Humblot), Band I (1993), pp. 69 - 102.

text, it has been said that Kant's inclusion of *Rechtslehre* in a metaphysics of morals was a mistake.[9] When the *Rechtslehre* is just beginning to attract interest in English-speaking countries it would be unfortunate if it were consigned to oblivion. Why one of Kant's major works in moral philosophy should provoke such hostility as would eliminate it from the Kantian corpus or – if this can no longer be done – at least soften its import invites conjecture.

Since the publication of his *Groundwork of the Metaphysics of Morals* Kant has been recognized as a major figure in moral philosophy. But the perspective from which his moral philosophy is approached varies from time to time. In English-speaking countries two trends are now prominent, stemming respectively from the rather amorphous movement known as „virtue ethics" and from the influence of John Rawls. To the extent that both question familiar caricatures of Kant's ethics – for example, his „deontology" and his conception of acting from duty – they have common ground. For present purposes, however, I shall treat them as diverging in focus, the one intent upon Kant's view of the emotions and their role in the moral life, the other upon the function of Kant's supreme principle of morals, the categorical imperative, in determining what one ought to do. The latter is more directly relevant to the question, whether Kant holds a theory of natural Right or of natural law.

Even as Rawls himself has moved away from the quasi-Kantian basis of political philosophy adopted in *A Theory of Justice*, a number of his students have adapted his notion of „the CI procedure" to Kant's ethics, taking it as the process by which rational agents „filter" their maxims through the formal principle of the categorical imperative to determine whether the action they propose to do is morally worthy.[10] In other words, the categorical imperative is taken as the principle controlling an agent's moral appraisal of his maxims. So understood, it can provide a reading of Kant's *Groundwork* that illuminates the text and does much to obviate

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9 *O'Neill*, op. cit. fn. 5, p. 158. I interpret „Rechtslehre" here as referring to the work whose truncated title it is. In another essay it is said that „Kant no doubt thought that it was possible to derive specific principles of justice from the Formula of Universal Law; but the success of this derivation and of his grounding of *Rechtslehre* is beyond the scope of this chapter" (103; see also 155). If „Rechtslehre" is being used in the sense of a theory of „right action" generally, such a theory at least includes the material covered in this work. The question whether Kant thinks that there are „laws for actions" other than those to which the rights of others correspond lies beyond the scope of this paper.

10 This characterization of „the CI procedure" is taken from *Barbara Herman*, Morality as Rationality: A Study of Kant's Ethics (New York & London, Garland Publishing, 1990), p. 276. As *Henry Allison* notes, Kant begins the Groundwork with the concept of „a good will" but then shifts the discussion to the concept of the moral worth of an action, and does not pursue the question of the agent's „disposition" (*Gesinnung*) or enduring character until Religion within the Bounds of Reason Alone and, later, the second part of The Metaphysics of Morals, the „Metaphysical First Principles of the Doctrine of Virtue" (Kant's Theory of Freedom (Cambridge, Cambridge University Press, 1990), pp. 107 ff). So Herman's procedure is, basically, Kant's procedure in the Groundwork.