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Kant's Concept of Law

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I. Introduction

Kant's concept of law forms the centrepiece of *The Doctrine of Right*, which in turn forms the first half of his late work *The Metaphysics of Morals* (1797). Although it has precursors, not least in his *Lectures on Natural Right* (1784),¹ this is where his legal philosophy is finally and fully developed. Yet it is fair to say that Kant's concept of law has given his commentators considerable trouble. At various points he seems to work with several different concepts of law – moral, juridical, ethical and, in modern language, instrumental – and it is by no means easy to reconcile all the textual material. Efforts to do so have tended towards a reconstruction of his concept of law which insulates it from the rest of his practical philosophy. Commonly, we are offered an interpretation of the authority of law which is rooted in the *instrumental benefits* of living under legal order by reference to various important general interests persons have, such as their interests in security or welfare. These interests are not derived strictly from moral duty; legal obligation is not a type of moral obligation. Rather, law is a useful institution which at most renders the general interests of individuals compatible with moral requirements. Law for Kant – so they say – is related to morality, but not part of it.

In this article we challenge this dominant reconstruction. We claim that at the centre of Kant's *Doctrine of Right* lies an argument for a moral concept of law. Here he reveals his understanding of political authority, which is, in turn, shown to be embedded entirely within his broader practical

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¹ These lectures were not published, and are based upon notes taken by Gottfried Feyerabend, which were translated by Lars Vinx in 2003, but remain unpublished in English.

philosophy. In sum, Kant argues that the authority of law can only arise from our categorical moral duty to respect other persons as such. However, the moral concept of law is one of several concepts which operate within *The Doctrine of Right*. These different concepts allow Kant to view law in different ways, to account adequately for its multifaceted nature as a professional discipline, a system of coercive norms, a type of social rule that allows us to pursue our interests, and a moral phenomenon.

Kant's concept of law is not only epistemologically complex, it is also substantively nuanced. Like many 17th and 18th century philosophers, Kant used the device of a state of nature to understand the authority of law and political institutions. Such an approach raises the question of the relationship between those rights imaginable in a state of nature without government and those which are actually present in the civil condition. Once again, Kant is capable of being read by his modern commentators in ways which assert continuity between natural Right and positive law, or which deny any substantive connection. We argue that Kant's multiple concepts of law allow him a considerable degree of flexibility in identifying how positive law relates to morality.

In short, Kant's work discloses a complex, and admittedly difficult, jurisprudential theory. However, reconstructing his thought *simply*, by disregarding some of the elements that he explicitly develops, leads to confusion, is uncharitable to his stated project, and ultimately misreads him.

In what follows we set out the dominant instrumental reconstruction of Kant's concept of law and show how this overlooks passages which indicate his intention to offer his readers a moral concept instead (II). We then explain the moral problem Kant sees with the unilateral pursuit of ends by individuals and its rational solution in an omnilateral will of which law is the institutionalised expression (III). Living under law in a civil condition means living under a constitution which both secures participation in omnilateral will formation and sets limits to that will (IV). It also has

implications for the way in which we understand private and administrative law (V). Finally, we show how in the *Metaphysics of Morals*, particularly in the *Introduction to The Doctrine of Right*, Kant distinguishes this moral concept of law from two related concepts: a juridical and an ethical concept (VI). It is the complexity – both epistemological and substantive – of this material which gives rise to such varied readings of his philosophy.

One potential source of confusion needs to be addressed up front. Whereas in English we use the word ‘law’, Kant, and indeed modern German as well, use two basic terms: *Gesetz* and *Recht*. We will have cause to return to his definition of *Gesetz* later on,² but for now we can take it to mean any sort of rule, whether moral or legislative. By *Recht*, or *Right*, he means that branch of morality which concerns the duties which bind us to *each other*, as distinct from those we owe to ourselves or imperfect duties such as virtues.³ This is why his *Metaphysics of Morals* is divided into *The Doctrine of Right* and *The Doctrine of Virtue*. When he wants to talk unambiguously about the law which derives from the will of a human legislature or judge he uses a number of terms such as external laws (*äussere Gesetze*, or *leges externae*),⁴ *positive Gesetze*, *positives (statutarisches) Recht*,⁵ or even just *Statuten*.⁶ Our argument is that Kant gives interpretative priority to a concept of *law* (i.e. human, positive law) which, without foreclosing the possibility of other concepts,⁷ treats law as a necessary expression of *Right*.

² Section V below.

³ We refer to Kant’s works as found in the Academy edition of the *Gesammelte Schriften*, and cite the volume and page number. In this case, 6:390-391.

⁴ 6:224.

⁵ 6:224, 6:237.

⁶ 6:291; 6:324.

⁷ See below **XX-XX**.

II. The instrumental concept of law and its problem

Kant does not explicitly describe an instrumental concept of law, but it is one that some of his leading interpreters have developed out of his discussion of law.

The puzzle which the instrumental concept of law purports to answer is as follows: Whenever we choose to act, that choice is determined both by our interests (which Kant defines as our positive valuation of our desires⁸) and by our sense of obligation. When choosing, we weigh these desires, interests and obligations internally. However, one feature of legal obligations is that they flow from directives which are imposed externally by officials. In this sense, legal directives are artificial and coercive. Our preferred choices may be inconsistent with the content of the directives issued and applied by legal officials. Theories of *political authority* seek to establish the sufficient reasons for us to subordinate our wills to the will of directive issuing and applying legal officials, when such inconsistencies arise. In modern terminology, these theories explain why we should treat the will of legal officials as pre-empting our own.⁹

There is a long tradition, from Thomas Hobbes to Joseph Raz,¹⁰ of seeking to justify political authority by reference to the important general interests we have. Hobbes famously argues that we have sufficient reason to subordinate our will to a system of sovereign commands (law) because it is instrumentally advantageous in the pursuit of the interest we have in, at its absolute crudest, survival.¹¹ In Raz's version, a system of legal directives can play a useful mediating role within a community, in that those directives simplify and answer complex practical questions in the face of

⁸ See **XX-XX**, below and 5:204, 7:251 and 7:330.

⁹ Willaschek thinks the problem is one of warrant to impose law (M. Willaschek, 'Which Imperatives for Right? On the Non-Prescriptive Character of Juridical Law in Kant's Metaphysics of Morals', in *Kant's Metaphysics of Morals: Interpretative Essays* (Oxford: Oxford University Press, 2002) Ch. 3). We are not convinced that anything turns on adopting this perspective as opposed to that of legal subjects and their obligation to obey.

¹⁰ On this connection see G. Postema, *Legal Philosophy in the Twentieth Century: The Common Law World* (New York: Springer, 2011) at 364-365.

¹¹ R. Harrison, *Hobbes, Locke and Confusion's Masterpiece* (Cambridge: Cambridge University Press, 2003) at 119-124.

profound disagreements about the ultimate foundations of morality.¹² These accounts are instrumental because we do better in respect of important general interests under a system of law, than otherwise. Law is the means to our shared ends, and political authority is justified by reference to this instrumental advantage.

Kant has sometimes been considered to offer a version of the instrumental account of political authority that has similarities to the accounts just mentioned. There are places where he considers Hobbes's work, and sometimes his language appears rather Hobbesian.¹³ But important general interests for Kant are not limited to survival or security; elsewhere he mentions others such as welfare and happiness.¹⁴ Those who offer a Hobbesian account of Kant tend to focus on the following paragraph from *The Doctrine of Right*:

...however well-disposed and law-abiding men might be, it still lies a priori in the rational idea of such a condition (one that is not rightful) that before a public lawful condition is established individual human beings, peoples, and states can never be secure against violence [*Gewalt* = wrongful force] from one another, since each has its own right to do *what seems right and good to it* and not be dependent upon another's opinion about this. So, unless it wants to renounce any concepts of Right, the first thing it has to resolve upon is the principle that it must leave the state of nature, in which each follows its own judgment, unite itself with all

¹² See Raz, *The Morality of Freedom*, 58-59 and also see E. Mian, 'The Curious Case of Exclusionary Reasons' (2002) 15 *Canadian Journal of Law and Jurisprudence* 99-124 at 102. More recently Raz appears to have distanced himself from this form of argument: See G. Postema, 'Law's Autonomy and Public Practical Reason', in *The Autonomy of Law* (Oxford: Clarendon Press, 1996), pp. 79-118; J. Raz, 'Postema on Law's Autonomy and Public Practical Reasons: A Critical Comment' (1998) 4 *Legal Theory* 1-20; and M. Martin, *Judging Positivism* (Oxford: Hart, 2014) 151-180.

¹³ Admittedly, some of Kant's political writings do adopt a more Hobbesian tone. For example, he describes the state of nature as being characterized as 'barbarous freedom' (8:26 and 8:35) and 'a mad freedom' (6:354) and also see 8:115; 307-308. Elsewhere credits Hobbes's approach (see 6:95-97). That said, he argues directly against some of Hobbes's claims in *On the Proverb: That May be True in Theory but is of no Practical Use* from 1793 (at 8:289-305), and the first part of the paragraph about the violence in the state of nature in *The Doctrine of Right* appears to distance Kant's formulation from that offered by Hobbes (6:312). On this point, see also B. Byrd and J. Hruschka, *Kant's Doctrine of Right: A Commentary* (Cambridge: Cambridge University Press, 2010), pp. 71-76. For discussion, see A. Pinheiro Walla, 'Human Nature and the Right to Coerce in Kant's *Doctrine of Right*' (2014) 96 *Archiv für Geschichte der Philosophie* 126-139

¹⁴ E.g. 6:316.

others (with which it cannot avoid interacting), subject itself to a public lawful external coercion, and so enter into a condition in which what is to be recognized as belonging to it is determined *by law*...¹⁵

In this passage, on the instrumental account, the ‘violence’ in the state of nature describes the persistent and on-going co-ordination problems that emerge from persons’ differing *unilateral* judgments and actions. This violence can only be avoided by establishing legal and political institutions that express the ‘concurring and united will of all’,¹⁶ ‘general (unified) will’¹⁷ or ‘*omnilateral will*’¹⁸ in a set of legal directives. On this reading of Kant, a person has a sufficient reason to subordinate his will to that of an official because the official applies coercive legal directives that, taken together, provide security against violence.

Various leading commentators on *The Doctrine of Right* advance an instrumental concept of law as Kant’s account of legal obligation. They vary somewhat in the degree to which their exposition follows a Hobbesian formulation. Thomas Pogge emphasizes self-interest in rather strongly Hobbesian terms:

Kant holds that persons have reasons to take an interest in the *Rechtslehre* game because of their prior interest in securing the external freedom of (at least some) persons against obstructing actions of others. When *Recht* is not instantiated, persons’ attempts to act are likely to be obstructed in multifarious and unpredictable ways, and they will often fail to complete the actions they want to perform on account of such obstructions and will frequently not even attempt to do what they want to do from fear of being so obstructed.¹⁹

¹⁵ 6:312.

¹⁶ 6:313.

¹⁷ 8:295.

¹⁸ 6:259-260.

¹⁹ T. Pogge, ‘Is Kant’s *Rechtslehre* Comprehensive?’ (1997) 36 *Southern Journal of Philosophy* 161-187 at 172.

He also writes that

Playing the *Rechtslehre* game is supported insofar as persons have an interest in having a large and stable set of valued options that are secure from obstructing actions by other persons.²⁰

Robert Alexy takes a similar view, although he quickly notes that this creates significant difficulties for an attempt to reconcile natural right with positive law:

One might think that this argument for the necessity of positive law leads to the conclusion that the natural rights that are supposed to be secured by positive law are somehow incorporated into the basic norm. But that is not the case. Kant's basic norm is exclusively oriented to legal certainty and civic peace.²¹

Sharon Byrd and Joachim Hruschka appear to take a similar view, albeit highlighting the element of reciprocity involved:

The juridical state is the state in which my rights are secure, the state in which *everyone's* rights are secure. This security is reciprocal: "No one is obligated to refrain from interfering in another's possessions, unless the latter gives the former security that he will observe the same restraint toward him." By entering a juridical state, everyone gives everyone else this security from interference. We, meaning those of us who can come into contact with each other, are thus obligated *together* and *with all others* to enter a juridical state.²²

²⁰ Ibid, at 173.

²¹ R. Alexy, *The Argument from Injustice* (Oxford: Oxford University Press, 2002, first published in 1994) at 118.

²² B.S. Byrd and J. Hruschka, note 13, above, at 169-170.

Jeremy Waldron gives this reciprocity a relational overtone. He begins his essay on Kant's legal theory by citing the Hobbesian quotation above. He then argues that, for Kant, conflicts in persons' desires produces conflict more generally. The avoidance of conflict is to be understood as an important *collective* general interest (rather than a subjective, unilateral, calculation of self-interest as it is for Hobbes) which gives rise to an obligation to obey the law:

So a person is not to regard his allegiance to the state as a voluntary commitment intelligible purely in terms of benefit to his own interests alone. If the subject wants to think about the advantages of membership in civil society, then he must think relationally about what that membership secures, so far as the reciprocity and mutual assurance between his rights and others' rights are concerned. In other words, he is to be aware that his presence in the civil society is as necessary for the interest and advantage of others – others who would be entitled to compel him to enter if he did not want to enter – as for his own interest and advantage.²³

Arthur Ripstein's exposition is not Hobbesian, but even he gives his account an instrumental gloss at times. Both in *Force and Freedom*, and elsewhere,²⁴ Ripstein argues that for Kant the state is essential to repair the defects of a state of nature such as unilateralism, lack of enforcement and indeterminacy. This repair gives us a reason to obey the law – we each have an interest in agreeing on laws, determining their specific content, and being assured that they will be enforced. However, Ripstein also argues specifically that this repair to the state of nature should be made because to not will to do so is to treat another person as a means to one's own end, or to be one's 'own master'²⁵ which is a violation of the categorical imperative.²⁶ In other words, Ripstein accepts that for Kant there is a reason to leave the state of nature which is fundamentally moral. However,

²³ J. Waldron, 'Kant's Legal Positivism' (1996) 109 *Harvard Law Review* 1535-1566 at 1563.

²⁴ A. Ripstein, *Force and Freedom* (Cambridge: Harvard University Press, 2009); A. Ripstein, 'Authority and Coercion' (2004) 32 *Philosophy and Public Affairs* 1-35, especially 26-35.

²⁵ A. Ripstein, *Force and Freedom*, note 24, 9.

²⁶ *Ibid.*, pp. 164-165, 196-197 and 9.

Ripstein gives the objective, systemic character of Kant's argument a subjective, individualistic interpretation, as if we each have an interest in leaving the state of nature. Such an interpretation instrumentalises morality in a quite unKantian fashion.

Pogge makes the implications of his own instrumental reconstruction for the relationship between law and morality completely clear.

...Kant wants his argument for *Recht*, and for a republication instantiation thereof, to be independent from his morality. This morality may well give its adherents moral reasons for supporting *Recht* and a republican constitution in particular. But it does not therefore have a special status with respect to *Recht*, because it is...just as true that selfishness gives its immoral adherents selfish reasons for supporting *Recht* and a republican constitution in particular.²⁷

The tendency of all instrumental readings is that they produce what Pogge calls a 'non-comprehensive theory'. Instead of showing how law is necessarily implied by moral obligation they detach law from its grounding in morals, giving it a non-moral logic of its own.

If this agenda is indeed Kant's, there is a problem. To understand this problem, we must understand Kant's concept of personhood. Kant writes that the 'faculty of desire whose inner determining ground...lies within the subject's reason is called the *will (Wille)*'.²⁸ But then he immediately writes that the 'will itself, strictly speaking, has no determining ground; insofar as it can determine choice, it is instead practical reason itself'.²⁹ What Kant means is that there are two aspects to a person's will. The first aspect is that we have *particular* desires which we have an interest

²⁷ Pogge, note 19, above at 175.

²⁸ 6:213.

²⁹ 6:213.

in achieving, and these form motivations for us to act; in part, these desires make us each who we are. These particular desires may not, and need not, be shared by others.³⁰ But our ultimate choice of action is only ‘affected’, not ‘determined’, by our desires.³¹ Instead, our choice of action can, and should, be guided by an objective moral principle, which is the categorical imperative. This principle allows us to distinguish between various desired actions in terms of whether they are required, prohibited or permitted as a matter of duty.³² The second aspect of our will, then, is the categorical imperative, which can be said to be a *general* property of the will of all rational beings, of which we each understand ourselves to be but one instance.³³ The general and particular aspects of our will come together when we are sufficiently self-aware to understand that we are rational beings obligated to pursue only those desires that are rational, which means those that are consistent with moral duty. When this occurs, we each of us are *persons*³⁴ who, while obviously not morally omniscient, possess a will that is capable of exercising free choice (or what Kant called *Willkür*³⁵), and thus has a capacity for autonomy. To be fully *free* is to select and pursue our particular, personal, ends in accordance with the categorical imperative.

To provide security, (as an example of a general interest), may or may not coincide with subjective desires: a person may prefer to engage in risky activities which threaten their security. Then again, to provide security may well be inconsistent with moral duty: certain legislative acts that aim to provide security from violence may lead to very significant restrictions on a person’s autonomy. If

³⁰ Kant defines desire as ‘a faculty which by means of its representations is the cause of the actuality of the objects of desire’ (5:178n1). See also see 4:447-448, 5:25 and 7:251.

³¹ 4:447-448.

³² 6:223; 5:11n*.

³³ See H. Allison, *Kant’s Theory of Freedom* (Cambridge: Cambridge University Press, 1990) 88-89, and chapters 5 and 7 generally. The difference, and relationship, between *Willkür* and *Wille* are complex and confusing in Kant’s work (See L.W. Beck, *A Commentary on Kant’s Critique of Practical Reason* (Chicago: Chicago University Press, 1963) chapter 11). On this point, we rely upon Henry Allison’s discussion and formulation of the differences and relationships between these two aspects of the will: ‘the positive concept of freedom of *Willkür* is its capacity to act on the basis of the dictates of pure reason or, equivalently, pure *Wille*. To say this is to say that it has the capacity to select its maxims in virtue of their conformity to universal law, which is, of course, precisely what the categorical imperative requires’ (See Allison, at 132).

³⁴ See B. Ludwig, ‘Sympathy for the Devil(s)? Personality and Legal Coercion in Kant’s Doctrine of Law’ (2015) 6 *Jurisprudence* 25-44 at 34-35.

³⁵ See note 33.

the directive of a legal official – who has authority on the instrumental account by reference to general interests such as security – runs contrary to freedom, either in the sense of our personal pursuit of ends within the constraints of the categorical imperative, or in the sense of compliance with the categorical imperative itself in respect of our treatment of others, then to subordinate our wills to those directives seems irrational. There is no guarantee that when the state seeks to fulfil important general human interests it will do so both in accordance with each person’s subjective desires and with the categorical imperative. Given everything else Kant argues for in his practical philosophy, it would be distinctly odd for him to argue that the reason for complying with legal directives is that they further general interests, even where this is inconsistent with free choice as he conceives it. Security, happiness, welfare, etc. is not the point.

The problem goes deeper than a potential mismatch between particular positive laws and our rational desires. Suppose we are governed by a benign dictator. Even supposing the dictator manages to fulfil our desires to secure our general interests by providing us with security and welfare, and by making each one of us happy, the dictator will not legislate in a way that *systematically* takes account of our free choice. It is not only that the form of governance we are under gives us no opportunity to choose the legislation we prefer; it also gives us no opportunity to raise an objection to the content of the legislation if it happens to be inconsistent with our moral obligations. For the benign dictator cannot avoid legislating in accordance with *her* interpretation of our general interests. We may well have subjectively chosen to act in accordance with the content of the dictator’s legislation, and that legislation may even happen to be consistent with our moral duty, but the instrumental account of law requires us to obey the dictator regardless. Congruence with both aspects of our wills would be entirely accidental. This problem is serious for Kant because it raises a model of political authority that requires us systematically to deny or disregard our respective personhoods – our free choice in accordance with moral duty – when it comes to answering questions of how to act.

Elsewhere in his practical philosophy, Kant explicitly rejects the possibility of relating morality to important general interests. In the *Critique of Practical Reason* he says this:

The principle of happiness can indeed furnish maxims, but never such as would be fit for laws of the will, even if universal happiness were made the object. For, because cognition of this rests on sheer data of experience, each judgment about it depending very much upon the opinion of each which is itself very changeable, it can indeed give general rules but never universal rules, that is, it can give rules that on the average are most often correct but not rules that must hold always and necessarily; hence no practical laws can be made on it.³⁶

In short, generality is not universality. So it is not surprising to find passages in *The Doctrine of Right* in which Kant also deliberately disavows any attempt to provide a justification for political authority based upon the instrumental value of law in achieving individual or general interests. Early on in the work, Kant says this:

...in this reciprocal relation of choice no account at all is taken of the matter of choice, that is, of the end each has in mind with the object he wants; it is not asked for example, whether someone who buys goods from me for his own commercial use will gain by the transaction or not.³⁷

Here, he is denying that law is concerned with individual advantage. A few pages on from the seemingly Hobbesian passage which does so much work for his instrumentalist interpreters,³⁸ he makes the same point in general terms:

³⁶ 5:36.

³⁷ 6:230.

³⁸ See above, and 6:312.

By the well-being of a state must not be understood the welfare of its citizens and their happiness; for happiness can perhaps come to them more easily and as they would like it to in a state of nature (as Rousseau asserts) or even under a despotic government.³⁹

On the contrary, the question of political authority is fundamentally a moral one:

All that is in question is the *form* in the relation of choice on the part of both, insofar as choice is regarded merely as free, and whether the action of one can be united with the freedom of the other in accordance with a universal law....Right is therefore the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom.⁴⁰

This is why Kant flatly denies that securing welfare legitimizes law:

By the well-being of a state is understood, instead, that condition in which its constitution conforms most fully to principles of Right; that is that condition which reason, *by a categorical imperative*, makes it obligatory for us to strive after.⁴¹

It is important to remember that *Right* for Kant is not simply morality as a whole. Rather, it is limited to resolving the problems inherent in the fact that as free agents inhabiting space and time we impact on each other:⁴²

³⁹ 6:318.

⁴⁰ 6:230.

⁴¹ 6:318.

⁴² See note XX, below.

The concept of right, insofar as it is related to an obligation corresponding to it (i.e. the moral concept of right), has to do, *first*, only with the external and indeed practical relation of one person to another, insofar as their actions, as deeds, can have (direct or indirect) influence on each other. But, *second*, it does not signify the relation of one's choice to the mere wish (hence also the mere need) of the other, as in actions of beneficence or callousness, but only a relation to the other's *choice*.⁴³

The externality of Right is an important idea for Kant. It connects to his attempt to distinguish various types of moral duty in the *Groundwork* and in the *Doctrine of Virtue*, where 'external' duties are ones owed to others (they are 'outer' duties owed to others, rather than 'inner' duties owed to one's self⁴⁴). The second sentence makes the point that the concept of Right is not concerned with 'beneficence or callousness' either, which seems to suggest that it is not to do with imperfect duties, such as virtues of compassion and generosity. Right is only concerned with the perfect, narrow or strict duties we owe others as a result of the categorical imperative.

In short, there is very little evidence in *The Doctrine of Right* beyond the quotation about 'violence' in the state of nature, to support the instrumental account of law, and even here, is it far from clear that this passage can actually be used in this way.⁴⁵ Rather, Kant's aim is to demonstrate that there is a moral duty for each person to subordinate their will to an omnilateral will expressed by legal institutions under a constitution that conforms 'most fully to principles of right'. This is the only way by which a *relationship* between persons can be established in which their external actions can be rendered consistent with the free choice of each. Put another way, the subordination of our will to the legal directives of officials arises as a matter of moral duty because it depends upon a system which secures the rational alignment of each will with the wills of other members of a

⁴³ 6:230.

⁴⁴ 4:421-423 and 6:390-391.

⁴⁵ See 6:312 and **XX-XX** below.

community in respect of their external actions.⁴⁶ Law is morally obligatory because it is the only condition under which universal external free choice is possible, which is to say that it is the only condition under which we can comply practically with the categorical imperative.

⁴⁶ Ripstein writes of ‘a relation of equivalence’ (See Ripstein, *Force and Freedom*, note 24, above, at p. 35).

III. The moral necessity of law

The difference between the instrumental reading of Kant and the moral concept turns on the precise problem with the state of nature. Should we escape from it and enter a civil condition under law because it is damaging to our general interests in such things as security, welfare and happiness, or do we have an unconditional moral duty to leave it? As outlined above, Kant argues for the latter.⁴⁷

Kant postulates the existence of embodied rational beings who physically affect each other as we each act in accordance with our own will.⁴⁸ For Kant, to act in ways that obstruct another person in the expression of their free choice is to engage in a form of *coercion* which is a violation of the moral duties we owe them. This is why he can make the analytical claim that ‘right and the authorization to use coercion mean one and the same thing’.⁴⁹ Actions that deny free choice are not to be restricted to particular forms of coercion associated with the state, or certain types of physical force. There is no clear evidence that Kant ever restricted coercion in this way. Rather, any action in pursuance of our *unilateral will* that affects others is to be understood as coercive, and is a denial of their free choice. This is because such acts subordinate the desires of others to our own desires, and violate the moral duty we have not to treat others as a means to our own end.⁵⁰

⁴⁷ This, as it happens, is most clearly shown in international law. This is because Hobbes argues that because ‘states don’t sleep’ they don’t need to enter into the civil condition (whereas strong men do). Kant argues that there is an unconditional moral duty to enter into the civil condition in international relations regardless of whether security, happiness can be achieved another way. See P. Capps and J. Rivers, ‘Kant’s Concept of International Law’ (2010) 16 *Legal Theory* 229-257.

⁴⁸ Ripstein puts this this postulate (which is ‘incapable of further proof’ (6:231)) as the existence of ‘rational beings [persons] who occupy space’ (*Freedom and Force*, note 24, at 214). See also R. Pippin, ‘Dividing and Deriving in Kant’s *Rechtslehre*’ in O. von Höffe, Immanuel Kant, *Metaphysische Anfangsgründe der Rechtslehre* (Akademie Verlag, 1999) chapter 4 at 74 ‘...the argument must be: absent such allegiance, given the single empirical assumption that human actors affect and impede each other, I could not truly act as the free, rational, morally agent I am.’ Given what Kant writes elsewhere about practical postulates, (see *Critique of Practical Reason* (5:12n* and 5:132-134) conjoined with the section of the *Doctrine of Right* entitled ‘Postulates of Practical Reason as Applied to Right’ (6:252-255) it is unlikely that these summaries of Kant’s position fully capture the profundity of Kant’s understanding of postulates as applied to right. We think it likely that this section in the *Doctrine of Right* shows how right is inexorably a necessary part of Kant’s general practical philosophy, and is an apodictic rational necessity of a coherent self-understanding of one’s agency. This problem warrants fuller discussion than it can be given here.

⁴⁹ 6:232.

⁵⁰ 4:429. Others have noted that Kant’s Formula of the End in Itself (which consider the application of the categorical imperative given other persons in time and space (see *ibid*)) forms the moral core of Kant’s moral concept of law

Understanding the nature of Kant's unilateral will – or, more precisely, external acts in pursuit of a unilateral will – is critical to this point. The problem tends to be glossed only in terms of the possession of property, but it is in fact a more general problem of human agency. The following argument offered by Kant outlines the inadequacy of the unilateral will:

...a unilateral will cannot serve as a coercive law for everyone with regard to possession that is external and therefore contingent, since that would infringe upon freedom in accordance with universal laws. So it is only a will putting everyone under obligation, hence only a collective general (*common*) and powerful will, that can provide everyone this assurance. – But the condition of being under a general external (i.e., public) lawgiving accompanied with power is the civil condition. So only in a civil condition can something external be mine or yours.⁵¹

The 'assurance' given by the civil condition not only corresponds to a system of property rights, but more specifically it corresponds to a system of property rights which does not infringe a person's free choice. Kant is drawing a threefold distinction here. He distinguishes first between (a) merely empirical, factual possession, as in the Roman law concept of *detentio*, which he calls *possessio phaenomenon*; and (b) rightful or intelligible possession (*possessio noumenon*), which can be claimed even when the possessor has no physical control over the object.⁵² Intelligible possession can be further divided into (b1) provisional and (b2) conclusive forms. In a state of nature, intelligible possession can only ever be 'provisional', 'presumptive', or 'comparatively rightful'.⁵³ In a civil condition, intelligible possession has been reconciled with the parallel legitimate claims

developed in the *Doctrine of Right*. See, especially, R. Pippin, 'On the Moral Foundations of Kant's *Rechtslehre*' in R. Pippin, *Idealism and Modernism, Hegelian Variations* (Cambridge: Cambridge University Press, 1997).

⁵¹ 6:256.

⁵² 6:246.

⁵³ 6:257.

of others and becomes conclusive.⁵⁴ Kant's argumentative strategy is then two-fold: first, he must explain why a unilateral will cannot, and, second, why an omnilateral will can, provide the assurance each of us needs that our claim has been reconciled with those of others.⁵⁵

Kant's argument arises from an analysis of a person's agency. He considers that agency is how we 'actualize' those ends that we desire 'in the sensible world': it is the cause of the realisation of our desires.⁵⁶ More specifically, in both the *Groundwork* and *The Critique of Practical Reason*, Kant's analysis of agency distinguishes between subjective and objective principles of action, and these principles reflect the two aspects of the will, which come together in his concept of personhood, which was set out above.⁵⁷ A subjective principle of action, or a *maxim*, corresponds to subjective

⁵⁴ Kant's argument (at 6:255-257) may well run as follows: (1) I must make use of the world in order to achieve my desires (whatever they may be); (2) given that I cannot physically hold onto all the objects I need to achieve my various and concurrent desires, I must will intelligible possession or give up my desires; therefore, (3) I must necessarily will intelligible possession given that I will my desires. (3) then implies that I must claim, or give up my desires, (4) 'When I declare (by word or deed), I will that something is mine, I thereby declare that everyone else is under an obligation to refrain from using that object of my choice, an obligation no one would have were it not for this act of mine to establish a right' (6:255). Kant then applies the categorical imperative to (4): I must accept (5) I am 'reciprocally bound to everyone else to an equivalent restraint regarding external things that are their own...' (6:255). One way of formulating the move from (4) to (5) is to show that the universalization of the negation of (5) is a contradiction of (4). So, if I accept $\sim(5)$ (I am not reciprocally bound to respect the intelligible possession of others), this implies that I accept that it is permissible for me to interfere with the objects claimed by others as necessary to their purposes. The universalization of $\sim(5)$ leads to: $\sim(5)(a)$ all persons have permission to interfere with the objects claimed by others as necessary to their personhood. To accept $\sim(5)(a)$ is to accept (6) it is permissible for my intelligible possession to be interfered with by others. (6) is a negation of (4), and if I reject (4), I do not will the means to my ends, and, by implication, I must give up my ends. This is something that I cannot rationally do, and so I must will conclusive intelligible possession. (On this point see, for example, K. Westphal, "A Kantian Justification of Possession" in *Kant's Metaphysics of Morals* (Oxford: Oxford University Press, 2002) at 98; A Ripstein, *Force and Freedom*, note 24, above, pp. 14-15, 61-63, 66-67; A. Brudner, 'Private Law and Kantian Right' (2011) 61 *University of Toronto Law Journal* 279; K. Flikschuh, 'Freedom and Constraint in Kant's *Metaphysical Elements of Justice*' (2002) 20 *History of Political Thought* 250-271; and Hruschka (note 75, below) Weinrib (note 75, below). Kant envisages intelligible possession to be a postulate of practical reason. This means that it is an '...assumption necessary with respect to the subject's observance of its objective but practical laws, hence merely a necessary hypothesis'(5: 12n*) or which gives 'objective reality to the ideas of speculative reason in general (by means of their reference to what is practical) and justify its holding concepts even the possibility of which it could not otherwise presume to affirm' (5:132-133) (also see note 48, above).

⁵⁵ Alan Brudner argues that provisional intelligible possession rests on an implicit omnilateral will. In other words, that some sort of omnilateral willing is already going on within the state of nature (See note 54, above at n. 38). If that is correct it undermines Kant's whole argument for the moral necessity of entering the civil condition. But the passages he relies on (one of which is now generally regarded as an alien interpolation) only establish that we must hypothesise a collective possession in common of the whole world by humanity as a whole. This possession in common is what makes unilateral appropriation permissible (i.e. not wrongful) and indeed provisionally rightful until such time as the civil condition is entered. If there were really omnilateral consent to possess rightfully whatever we appropriate empirically, there would be no provisionality about our possession. 6:267 makes this clear.

⁵⁶ See, e.g. 5:178:n1 and 4:417-418.

⁵⁷ See **XX-XX** above.

rules that are expressive of various deeper unique desires that are aspects of a person's will.⁵⁸ An objective principle of action, or a practical law, is a property of the will of all rational beings.

This distinction is critical to a full understanding of Kant's argument for law. To explain, it is the successful pursuit of desires that gives us satisfaction or brings us happiness. But if a maxim expresses desires it need not be shared by another person, because desires are (or may be) unique to the person. As we have already seen,⁵⁹ maxims such as 'pursue security, welfare and happiness' cannot give rise to practical laws for this reason.

By contrast '...an objective principle (that is, one which would also serve subjectively as a practical principle for all rational beings if reason had full control over the faculty of desire) is a practical *law*'.⁶⁰ The practical law Kant has in mind is *independent* of any particular desire we have, not least because, as just mentioned, desires are always specific to our personal self-understanding as a unique, desirous, person. However, to understand correctly that each of us has a unique personal self-understanding implies that we accept that we are each a 'rational being' or, 'a being with a will' that is *capable* of having a personal self-understanding. A practical law is one which inheres in all rational beings and is 'equally valid for all rational beings'.⁶¹ As such beings, our maxims must be consistent with this practical law. This practical law is the categorical imperative in the form of the Formula of Universal Law, analytically equivalent to the Formula of the End in Itself (given the existence of other persons in time and space), which requires that a person does not merely treat another solely as a means to his own ends.

⁵⁸ Here, we employ Allison's interpretation of the nature of Kant's maxims. See Allison, note 33, above at 90-92.

⁵⁹ 5:36.

⁶⁰ 5:25

⁶¹ 4:428.

Taking possession of objects is *coercive* in the specific and technical sense that it alters our capacities to pursue our separate and distinct desires: taking possession alters the world and the world becomes reflective of the desires of the possessor. Critically, though, Kant's point goes beyond intelligible possession; his discussion is an illustration of a more general argument. That is, taking possession is only one way by which we 'actualize' the ends that we desire 'in the sensible world'.⁶² Any successful action, and not just taking possession of objects, is coercive to the extent that it alters the capacity of others to achieve their desires. The point goes further still: even our very being *here* and not *there* affects the free choice of others and is 'coercive'.⁶³ As Robert Pippin recognises, the state of nature is for Kant inherently morally problematic, even before we start taking possession of objects, and the problem is how to render its inescapable and pervasive coercion rightful.⁶⁴

It is sometimes thought that moral duty operates as a *side-constraint* in Kant's argument: we should pursue only those desires that do not violate the moral duties we owe others.⁶⁵ If this were the case, it would be possible for a person to act unilaterally in a way that would not infringe 'freedom

⁶² 5:177.

⁶³ See his reference to the problems inherent in our state or condition (*Zustand*) as well as actions in 6:230-231 (See J. Pallikkathiyil, 'Persons and Bodies' in S. Kisilevsky and M. Stone (eds), *Freedom and Force: Essays on Kant's Legal Philosophy* (Oxford: Hart Publishing, 2017) chapter 2). For Kant, the idea of coercion just outlined as a matter of fact cannot be contained within conventional communities. This observation leads to the conclusion that the political rights he thinks should be granted to those well beyond the confines of that community, to possibly include all those affected by a state policies and laws. However, it is this observation (which has been a source of considerable recent discussion by political philosophy of borders) that drives Kant's vision of world citizenship, cosmopolitanism and international law. This point cannot be considered in detail here, but suffice to say that state sovereignty is, following Kant's argument in this article, a form of *juridical property right*, against foreigners and other states, to dispose of a territory under juridically specified conditions, where that right is, by implication, the result of a system of global omnilateral willing. Sovereignty is not a pre-political right between a group of persons and a territory, although provisional state rights can survive under a system of international law, just as provisional claims to possession can survive the move to civil society. See A. Stilz, 'Provisional Right and Non-State Peoples' in K. Flikschuh and L. Ypi, *Kant and Colonialism* (Oxford: Oxford University Press, 2015) and L. Ypi, 'A Permissive Theory of Territorial Rights' (2011) 22 *European Journal of Philosophy* 288-312. See R. Goodin, 'Enfranchising All Affected Interests, and its Alternatives' 35 *Philosophy and Public Affairs* (2007), pp. 40-68, who adopts a view which is very similar to Kant's. For a review of recent literature on the relationship between political rights and coercion, see A. Abizadeh, 'Democratic Theory and Border Coercion' 36 *Political Theory* (2008), pp 37-65, especially at 48.

⁶⁴ See **XX-XX** above.

⁶⁵ See, for example, 4:341 and Allison (note 33, above, at 105) who writes: '...although self-interest cannot ground the categorical imperative, self-interested action is morally permissible, subject to the limiting condition that it does not conflict with universal interests'.

in accordance with universal laws'. But this argument cannot be easily squared with another of Kant's claims considered already: '...a unilateral will cannot serve as a coercive law for everyone with regard to possession that is external and therefore contingent, since that would infringe upon freedom in accordance with universal laws'.⁶⁶ It does seem that for Kant it is the exercise of a *unilateral will per se* that violates moral duty, and not just some instances of its exercise. Furthermore, if the opposite were the case – and moral duty did operate only as a side-constraint – Kant's argument that regardless of how '...well-disposed and law-abiding men might be' they must leave the state of nature⁶⁷ would not work, because there could be a benign state of nature in which only those acts of unilateral willing take place which are consistent with moral duty. The moral problem of action in the state of nature is too pervasive to allow for this. It is a systemic problem. As Kant points out, to be legitimate, claims of provisional intelligible possession must be at one and the same time attempts to enter a civil condition.⁶⁸ Claims cannot be divided into the legitimate and illegitimate by reference to some moral side-constraint (such as the Lockean proviso). All must be made with a view to confirmation in the civil condition.

Some commentators focus instead on the moral fallibility of the unilateral will. This is the theme of Kant's moral phenomenology: that is, while a person should understand rationally that he may believe in good faith that his taking of particular objects is morally authorized, he may actually be mistaken because, for example, he may simply not fully recognize the content of the duties he owes to others. Bielefeld notices this as a feature of Kant's understanding of personhood when he writes: '[m]oral autonomy means the existential experience of an unconditional responsibility, a responsibility that, at the same time is inextricably connected with awareness of human frailty and finiteness.'⁶⁹ This also is a natural interpretation of Kant's claim that '...when someone

⁶⁶ 6:256.

⁶⁷ 6:312.

⁶⁸ 6:264.

⁶⁹ See H. Bielefeldt, *Symbolic Representation in Kant's Practical Philosophy* (Cambridge: Cambridge University Press, 2003) p. 4. See also 6:379-380.

[unilaterally] makes arrangements about *another*, it is always possible for him to do the other wrong...'.⁷⁰ While this interpretation is very close to Kant's real view, it is not actually adequate. The fallibility argument is correct in the sense that it identifies that it is the unilateral – as in the subjective, personal, or phenomenological – aspect of agency which is morally problematic. But it still leaves open the question of whether it is only the perception of moral side-constraints which fallible persons sometimes judge incorrectly, or whether it is the exercise of a *unilateral will per se* which violates moral duty.

Nor is the principal advantage of the civil condition the fact that it enables open-ended precepts of the natural law to be rendered precise and workable (*determinatio*). This is a classic justification for political authority in the natural law tradition but it appears to find no place in Kant's argument.⁷¹ The problem for Kant is that even if a person in the state of nature acts in good faith and in fulfilment of moral duty, the *relation*⁷² between them and another is unacceptably coercive unless that other also wills the act in question. What is needed is a system of willing which systematically brings the wills of all into relation with each other. That is why 'a categorical imperative makes it obligatory for us to strive after' a state whose 'constitution conforms most fully to principles of right'.⁷³ The moral authority to coerce (and that means, in effect, to exist as a human person) can only authentically arise in a system which has an omnilateral, and not a unilateral, character.⁷⁴

⁷⁰ 6:313 and also see Ripstein, note X, above at 35-37, 54-55.

⁷¹ Arthur Ripstein's suggestion that Kant sees a problem of a lack of determinacy in the state of nature ('Authority and Coercion', note X, above, at 26-27) is not supported by any citations.

⁷² 6:230.

⁷³ 6:318 and also see 27:66-67 and A. Wood's introduction to I. Kant, *Practical Philosophy* (Cambridge: Cambridge University Press, 1996, trans M. Gregor), p. xvii-xix.

⁷⁴ If this is Kant's argument, it is plain that he owes a considerable debt to Rousseau. Rousseau argues that domination – a mastery of the will of others – arises from a complex moral anthropology which is based upon one's drive to have their standing recognised by others (See F. Neuhaus, *Rousseau's Theodicy of Self-Love* (CUP, 2008) at pp. 267-278). Freedom is a form of non-domination that is 'closely connected to an ideal of free agency – determining for oneself what to do, or obeying only oneself.' Thus, '...there is still domination even if what that will commands me to do serves my interests: regularly obeying a will other than my own constitutes a deficiency in free agency, even when the will I obey is benign.' (F. Neuhaus, 'Rousseau's Critique of Economic Equality' (2013) 41 *Philosophy and Public Affairs* 193-225 at 199 and M. Simpson, *Rousseau's Theory of Freedom* (London: Continuum Press, 2006) p. 49) Like Rousseau (but unlike modern republican philosophers such as Pettit (P. Pettit, *Republicanism: A Theory of Freedom and Government*

Kant's worry about the pervasiveness of coercion and the illegitimacy of the unilateral will is demonstrated by the way in which he tackles the long-standing category of *permissive law*. This is a well-known area of complexity in Kant's different texts.⁷⁵ An intuitive way of characterising permissive law is as an absence of law: we are permitted to do that which is neither commanded nor prohibited. For Kant, as for the long natural law tradition before him, at first sight permissive law seems to exist in the interstices between the commands and prohibitions of natural law. But then the domain of permissive law seems also to be one in which one person may lawfully be subjected to the unilateral will of another. How can that be correct?

Clearly, what is permitted to the individual may be permitted to persons collectively. So one solution to the problem of permissive law is that it is a domain within which we as citizens decide to render matters which are indifferent from the perspective of natural law prohibited or commanded within a community, just as we fix unilaterally on a particular course of action when acting on maxims and pursuing desires. For example, we might institute a certain regime of property rights. This appears to coincide with Kant's view expressed in the preliminary notes to *The Doctrine of Virtue* where he writes that '*Lex permissiva* is the law by which something is permitted by natural law that is forbidden by civil law.'⁷⁶ In turn, this might seem to imply that all matters of morally permitted choice should be rendered legally as either commands or prohibitions. It solves the problem of unilateral willing, but it is implausible and Kant actually rejects it. In Vigilantius's

(Oxford: Clarendon Press, 1997) Kant regards coercion as a restriction of my free choice regardless of whether it furthers my interests (A. Ripstein, note X, above, at e.g. pp. 15-16 and 35-36).

⁷⁵ R. Brandt, 'Das Problem der Erlaubnisgesetze im Spätwerk Kants', in Otfried Höffe (ed.), *Zum Ewigen Frieden* (Berlin: Akademie Verlag GmbH, 2004) 69–72 and 'Das Erlaubnisgesetz, oder: Vernunft und Geschichte in Kants Rechtslehre', in R. Brandt (ed.) *Rechtsphilosophie der Aufklärung* (Berlin: Walter de Gruyter, 1982) 233–285; K. Baynes, 'Kant on Property Rights and the Social Contract' (1989) 73 *The Monist* 433–45 B. Tierney, 'Permissive Natural Law and Property' (2001) 62 *British Journal of the History of Ideas* 381-399; A. Szymkowiak, 'Kant's Permissive Law: Critical Rights, Sceptical Politics' (2009) 17 *British Journal for the History of Philosophy* 567-600; J. Hruschka, 'The Permissive Law of Practical Reason in Kant's *Metaphysics of Morals*' (2004) 23 *Law and Philosophy* 45-72; J. Weinrib, 'Permissive Laws and the Dynamism of Kantian Justice' (2014) 33 *Law and Philosophy* 105-136.

⁷⁶ 23:385.

lecture notes, it is written that: ‘It would be a “cruel restriction” if every human action was either commanded or forbidden’.⁷⁷

At this point, commentators have observed that Kant draws a distinction between genuinely indifferent actions (*adiaphora*) on one hand, and legal liberties and powers on the other.⁷⁸ Genuinely indifferent actions are entirely outside the scope of morality; they concern actions which do not subordinate one person to the will of another. But even within the scope of morality in general, and law more specifically, there are zones of freedom. Hruschka gives an example of a law that allows the ownership of condominiums within real property.⁷⁹ Until the law that allowed persons to purchase condominiums was established, there could be no possibility of persons making that choice. Marcus Willaschek uses the example of money to similar effect.⁸⁰ Laws in areas of permitted choice establish the *conditions* by which each person in a community can exercise choice on certain matters. The power-conferring dimension of permissive law becomes most apparent when the permissive law implies consequential commands and prohibitions towards others.

Whether the zones of freedom established by permissive law are liberties or powers in a strict Hohfeldian sense, they are no longer the gaps left by the absence of natural rights and obligations. They are created by the unilateral will. Sometimes laws render what was morally permitted legally obligatory, sometimes they confer powers to create legal obligations on others, and sometimes they create bounded areas of free choice. But even where the laws leave a choice of action open they do so deliberately, as it were. As Ripstein correctly concludes:⁸¹

⁷⁷ 27:331. See B. Tierney, *Liberty and Law. The Idea of Permissive Natural Law 1100-1800* (Washington: The Catholic University of America Press, 2014) at 331.

⁷⁸ Here Kant appears to draw on the system of deontic logic developed by Gottfried Achenwall in *Jus Naturae* (See Syzmkowiak, ‘Kant’s Permissive Law: Critical Rights, Sceptical Politics’ (2009) 17 *British Journal for the History of Philosophy* 567-600, and Tierney, *ibid*, chapters 15 and 16).

⁷⁹ Hruschka, note 75, above.

⁸⁰ M. Willaschek, note 9, above at 82.

⁸¹ See Ripstein, note 24, above, at 154 and 165.

[A] permissive law that entitles me to acquire things makes a merely permissive act have rightful consequences for others. However, it could only have this status provided it is authorized by everyone, so that my unilateral act is also the exercise of a publicly conferred power. If the public authority is entitled to confer the power on me in the name of everyone, then my specific exercise of the power is also in everyone's name.

In short, apart from truly indifferent actions, which are non-moral, permitted actions fall within the purview of the omnilateral will. The problem of coercive heteronomy has been solved.⁸²

⁸² There is thus a close structural parallel in Kant's mind between the individual human person and the omnilateral will. Just as the former adopts maxims determining on the pursuit of permitted ends in accordance with the categorical imperative, so also the latter harmonises all wills into one establishing collective maxims under similar constraints. This is why Kant talks regularly of a 'united general will' (*allgemein vereinigte Volkswille*) (6:313-314) and only rarely of an omnilateral will (*allseitiger Wille*) (6:259-263), although the terms capture the same idea. Positive laws arising from such a will do not merely have the force of law; they have the force of moral imperatives.

IV. Kant's Constitution

So far, we have seen that a system of omnilateral willing is necessary to provide law with moral justification. The next question is how Kant envisages this omnilateral will being brought to expression in practice.

Kant defines the omnilateral will as follows: It is '...the concurring and united will of all ..., insofar as each decides the same thing for all and all for each'.⁸³ He continues, '...only the general united will of the people, can be legislative...'.⁸⁴ His reference to legislation should not be taken too narrowly. On a rather strained analogy with the logical syllogism, Kant thinks that all three institutions of the sovereign state (legislature, executive and judiciary) are necessary to the articulation and application of the omnilateral will.⁸⁵ The principal institutions of the state are, as legal institutions, independent of the human beings out of whom they are constituted. So the legislature is not simply a human being or a collection of human beings. It is a distinctive institution which has the role of articulating the substantive norms that comprise the omnilateral will. The judiciary bring the norms of this omnilateral will to bear on individual cases. The executive enforces this will against individuals who might otherwise be disposed not to comply with its requirements. The moral duty to create a system of omnilateral willing leads directly to the need for a constitution establishing legal institutions with these three functions.

As the institution which brings the omnilateral will to expression, the legislator is bound by certain procedural constraints. Kant rejects the long tradition of thinking about political authority in paternalistic terms and derives instead a concept of citizenship:

⁸³ 6:234.

⁸⁴ 6:234.

⁸⁵ 6:316.

...the state...does not treat its subjects as members of one family but it also treats them as citizens of the state, that is, in accordance with laws of their own independence: each is in possession of himself and is not dependent upon the absolute will of another alongside him or above him.⁸⁶

Three specific constraints on the legislator require institutionalisation ‘[i]n terms of rights’ that are ‘...the attributes of a citizen, inseparable from his essence (as a citizen)’.⁸⁷ The first constraint is ‘lawful consent’ to positive laws. Secondly, each citizen must have ‘[c]ivil equality’. Rightful law-making should not recognise ‘...among the *people* any superior with the moral capacity to bind him as a matter of right in a way that he could not in turn bind the other’.⁸⁸ Jointly lawful consent and civil equality are the basis for political rights that allow each person *qua* citizen to have an equal chance to influence the content of laws. Thirdly, ‘the attribute of civil independence, of owing his existence and preservation to his own rights and powers as a member of the commonwealth, not to the choice of another among the people’⁸⁹ Kant requires that each citizen must be able to *participate as a citizen* in the institutions that form the omnilateral will. Kant’s view is that these three conditions, institutionalised as rights, make the omnilateral expression of free choice possible. As he says,

Every true republic...is and cannot be other than a representative system of the people in order to attend to the rights of the citizens through their delegates (deputies) and doing that in the name of the people with all citizens united.⁹⁰

⁸⁶ 6:317.

⁸⁷ 6:314.

⁸⁸ 6:314.

⁸⁹ 6:313-314.

⁹⁰ 6:341. In *Theory and Practice* he writes: ‘the only attainable outcome that one can foresee is to obtain a majority of the vote, and (in a large population) not even a majority of the direct vote, but only a majority of those delegated as representatives of the people’ (8:296).

For some Kantian scholars, civil independence seems to indicate a requirement for certain substantive goods: those goods necessary to be able to exercise free choice.⁹¹ It would follow that the state is under a duty to secure the conditions under which active citizens may be formed. The problem for modern sensibilities is that Kant saw the question of civil independence as socially pre-determined. He believed that active citizens are those who, as a matter of fact, possess ‘civil independence’, that is, are ‘fit to vote’ in the formation of the omnilateral will by virtue of being able to act ‘from [their] own choice’.⁹² Passive citizens, by contrast, are ‘associates’ of the state. They, like their active counterparts, have the ‘capacity to demand that all others treat them in accordance with the laws of natural freedom and equality’, but ‘it does not follow that they also have the right to manage the state itself as *active* members of it, the right to organise it or to cooperate for introducing certain laws’.⁹³ There is, for Kant, no obvious obligation on the state to turn passive citizens into active ones, and he is prepared to deny the former political rights. The most that can be said is that there might be an imperfect duty on each person to raise himself, and others, to the status of active citizenship.⁹⁴

Quite apart from the question of how ‘thick’ Kant’s conception of civil independence is, there is another question of the extent of the legislature’s competence. Can the legislature pass laws with any content, or is it constrained in some way? Elsewhere, Kant tells us that we could imagine

⁹¹ See Ripstein, note 24, above, pp. 40-41 and 283-284 and A. D. Rosen, *Kant’s Theory of Justice* (Ithaca: Cornell University Press, 1993), pp. 26- 33 and chapter 5. See also Kant’s discussion of the relation of inequality and freedom at 8:291-292.

⁹² 6:315.

⁹³ 6:315.

⁹⁴ Kant follows these ideas with some pretty unsavoury comments. Several people (including apprentices, domestic servants, minors, all women, hired labourers and private tutors) are ‘mere underlings’ (6:315). Here he goes wrong, but this should not be used to detract unduly from his theory of citizenship and how it accords with his moral philosophy. The issue, really, is that he sees civil independence empirically (i.e. this is the distribution of civilly independent people – they get the vote), without seeing it as a problem for the instantiation of omnilateral willing (i.e. except where justified, each person should be civilly independent). Kant only goes so far, and produces some relatively circumspect views, which do not include a proposal to alter substantially existing empirical distributions of passive and active citizenry as he saw them, such as when he writes ‘anyone can work his way up from this passive condition to an active one’ (6:315). A slightly stronger view is advanced in *Theory and Practice* (1793, e.g. 8:293) in which movement from a passive to active condition should not be blocked by others. This also goes to the problems he has with the idea of welfare – in some sense it is a precondition for the possibility of omnilateral willing, in another sense it is only the result of virtue: see below at **XX-XX**

legislation ('external lawgiving') as consisting solely in positive laws, which he defines here narrowly and precisely as those which cannot bind without actual lawgiving.⁹⁵ He points out that there would still have to be a natural law grounding to law as a whole – this would be his argument for the moral necessity to enter a civil condition – but the content of law could conceivably be left entirely open.

It would simplify his theory considerably if that were the case. Hegel took the view that the categorical imperative is purely formal, and this is followed, at least as a reading of Kant's *innate right* in modern times by Katrin Flikschuh.⁹⁶ Flikschuh argues that innate right leads only to a right 'to juridical equality in relation to all others',⁹⁷ and is thus purely formal. Her point is that the state of nature is a state of juridical inequality where persons unilaterally claim rights to the external world over others. The civil condition cures this institutional defect. This allows her to conclude that the only constraints on law-making are purely formal, and, although she does not make, or indeed accept, this connection, those constraints are presumably spelt out in the three political rights Kant describes as the basis for articulating the omnilateral will. An additional advantage of this purely procedural reading of Kant's constitution is that it harmonises well with his rejection of any individual right to disobey apparently unjust laws. If the constitution is purely procedural, the outcome of that process cannot be unjust in any relevant sense, and the problem of civil disobedience goes away. But it is important to keep separate in our minds the question of whether there are any substantive constitutional limits on the legislature in an ideal polity from the moral problem of what individuals are to do when faced with laws they consider unjust – whether made under a procedurally legitimate republic, or a despot.⁹⁸

⁹⁵ 6:224. The AA has understandably corrected the original from 'natural' to 'positive' here.

⁹⁶ See K. Flikschuh, 'A Regime of Equal Private Freedom? Individual Rights and Public Law in Ripstein's *Force and Freedom*' in S. Kisilevsky and M. Stone, note 63, above, chapter 3.

⁹⁷ *Ibid*, 71.

⁹⁸ See below at **XX-XX**.

In order to assess the plausibility of this view of innate right, it is as well to turn to what Kant actually says about it. Kant does not define innate right directly, but instead defines ‘innate freedom’: ‘Freedom (independence from being constrained by another’s choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity.’⁹⁹ This formulation indicates that innate right is a logical correlative of the duty each of us has not to subordinate the will of others to our own, which in turn is an expression of duties contained in the Formula of the End in Itself. This duty, it will be recalled, forms the basis of the argument set out in the previous section that there is a moral duty to enter into the civil condition. This is what Kant means by the ‘violence’ of the state of nature in that seemingly Hobbesian passage:¹⁰⁰ it is the violation of innate right which occurs whenever another acts unilaterally in accordance with their will. What might this right substantively entail, if anything?

Many commentators have sought to explain the substantive content of innate right in terms of natural rights. That is, if innate right embraces all the conditions under which persons can participate in omnilateral will formation as citizens, it must also include substantive elements such as protection for ‘life, limbs, and liberty’.¹⁰¹ This would be entirely in line with the natural law tradition preceding Kant, and it is followed by HJ Paton in his old book on the *Groundwork*. He argues that for Kant legal obligation arises from the consistency of legal norms with perfect moral duties, both to self and to others. Paton explains that the Formula of the End in Itself ‘...is the basis of perfect duties, and it forbids such wrongs as murder, violence, and fraud, [and] also suicide and lying. It lies at the root of Kant’s philosophy of legal obligation.’¹⁰² Paton goes a little awry here as Kant explicitly regards Right as being concerned with perfect duties to others, and not to

⁹⁹ 6:237.

¹⁰⁰ 6:312.

¹⁰¹ See n.16 to Mary Gregor’s translation of 6:238 at p. 30.

¹⁰² H. J. Paton, *The Categorical Imperative: A Study in Kant’s Moral Philosophy* (New York: Harper and Row, 1965), p. 171.

oneself. He writes in the *Doctrine of Virtue* that the ‘doctrine of right dealt only with the *formal* condition of outer freedom (the consistency of outer freedom with itself if its maxim were made universal law), that is, with right.’¹⁰³ In the *Groundwork*, ‘outer’ refers to ‘duties to others’.¹⁰⁴ Elsewhere in the *Doctrine of Virtue* he writes that the duties under the doctrine of right are ‘narrow’,¹⁰⁵ which are perfect duties. Thus, right is not concerned with suicide, as it is an example of a perfect duty to oneself,¹⁰⁶ although the other examples Paton gives are duties that are part of right. Paton’s discussion accords with what Kant identifies as a category of laws which are ‘obligatory *a priori* by reason even without external lawgiving’.¹⁰⁷ He calls these ‘external [i.e. posited and enforced] but natural laws’.¹⁰⁸ Persons should choose freely to act in accordance with these laws; for some laws ‘man is not coerced, but convinced’.¹⁰⁹ The positive act of legislation adds no new reasons to those persons already have: persons should choose freely to act in accordance with perfect duties to others, and they cannot rationally complain if they are coerced (using proportionate force) to do so by the state.¹¹⁰

¹⁰³ 6:380.

¹⁰⁴ 4:421n**.

¹⁰⁵ 6:390.

¹⁰⁶ 4:429.

¹⁰⁷ 6:224.

¹⁰⁸ 27:1417 and 6:237.

¹⁰⁹ 27:1417 and 6:237.

¹¹⁰ The idea of coercion by state institutions is rooted in a Newtonian idea of equal forces that Kant discusses in the Preface to *The Doctrine of Right*. On this point, Willaschek writes convincingly: ‘...in order to prevent wrongful behaviour, what is necessary (and therefore, ‘right’) is a coercive force precisely as strong as the resistance against rightful uses of freedom: a weaker force would not achieve its end of securing rightful uses of freedom, a stronger than necessary force would itself amount to a hindrance of rightful freedom (if a creditor coerces a debtor into paying by breaking his bones, he violates the rights of the debtor – that is, his freedom in accordance with universal laws....Coercion must be equal to the hindrance of rightful freedom....[T]his can be achieved if the coercion connected with the law is such that it elicits in people that degree of inclination of which one believes that human freedom will not have sufficient power for [overcoming] it...As long as a system of coercion is consistent with everyone’s freedom under universal laws, it does not restrict the rightful use of freedom at all. Rather, if effective, it secures everyone’s freedom by restricting it to the conditions of its rightful use.’ Thus, physical coercion is a pathological incentive, that ‘...connects a ground for determining choice to this action subjectively with the representation of the law.’ (See M. Willaschek, note 9, above, at p 84 and also see 6:233. Also see Gregor, in *The Metaphysics of Morals*, pp. xii-xiii; and, *The Laws of Freedom*, p. 121; S. Byrd, ‘Kant’s Theory of Punishment: Deterrence in its Threat, Retribution in its Execution’ (1989) 8 *Law and Philosophy* 151-200 and A. Ripstein, ‘Hindering a Hindrance to Freedom’ (2008) 16 *Jahrbuch fur Recht und Ethic* 227-250).

But do these moral duties set limits to the legislature? For Kant, unilateral free choice in the state of nature is bounded by moral duty, and, insofar as the categorical imperative is capable of establishing substantive limits on the will we might expect to find some account of substantive limits on what can be willed omnilaterally as well. The omnilateral will is a way, indeed the only way, of securing *Right*. It would seem to follow not only that some positive laws ought to be willed to prohibit conduct that violates moral duty, but that other positive laws ought not to be willed, since they themselves also violate moral duty.

This point leads several commentators to reject accounts of a purely procedural republic such as Flikschuh's. Ripstein claims that Kant endorses a set of innate substantive entitlements which survive the move into civil society, and establish the limits of possible law-making.¹¹¹ The Right to Freedom is a right to free choice against others, and this does not simply cash out in terms of juridical equality (i.e. to have what is ours determined omnilaterally) but rather as a right to the entire set of conditions by which we might be said to have free choice. In Brudner's view there is a clear contrast between different types of right: the right to bodily integrity is innate and protected within the civil condition, while the right to property is acquired and entirely at the disposal of the legislature.¹¹²

Both Ripstein and Brudner, and others, treat innate right as a set of natural rights present both in the state of nature and the civil condition. As ever, Kant's position is complex. What he *actually* says about innate right seems to have been overlooked. In the definition which is set out above, innate right (in the singular) is a matter of freedom and equality, but only in a negative or defensive sense. Freedom is independence from being constrained by another's choice; equality is

¹¹¹ Ripstein, *Force and Freedom*, note 24, above, at 36, 44-45, 133 (on forms of contract that violate moral duty). Also J. Hruschka, note 75, at 66.

¹¹² Brudner, note 54, above.

independence from being bound by others to more than one can in turn bind them.¹¹³ Innate right protects the individual from being made the means to another person's end, and as mentioned above, it is on this basis that the argument for the categorical moral duty to enter into the civil condition is made. Apart from the consent of others in occasional acts of bilateral willing, innate right confers only a freedom from coercion by others, not a right to coerce. In other words, innate right cannot solve the logical problem of pervasive coercion in the state of nature. I have an innate right to be free from coercion by you while at the same time being unavoidably coercive towards you, which violates your innate right to be my equal in freedom. This is what makes the move to a civil condition a matter of rational necessity.

Once the civil condition has been entered, the practical significance of innate right is

...that when a dispute arises about an acquired right and the question comes up, on whom does the burden of proof (...) fall, either about a controversial fact, or, if this is settled, about a controversial right, someone who refuses to accept this obligation can appeal methodically to his innate right to freedom (which is now specified in its various relations), as if he were appealing to various bases for rights.¹¹⁴

Innate right establishes the normative starting-point in any legal dispute. It is what tells us who needs to provide justification. Thus the one who assaults another needs to show legal warrant (assault is a violation of innate right), but the one who merely tells a lie does not (you remain free not to believe it). Rather, it is the person who is told a lie who needs to show warrant for taking any legal action in respect of it. As Kant explains in a footnote, certain lies do indeed harm the subject of the lie, and these are actionable.¹¹⁵ In the case of assault, justification can obviously be

¹¹³ 6:237-8.

¹¹⁴ 6:238.

¹¹⁵ 6:238.

provided by the legislature in an act of omnilateral willing, as when police are authorised to arrest a suspected criminal. Innate right is substantive, but it is also presumptive.

The difficult question is whether innate right is *only* presumptive. This is to say, can the content of innate right always be disposed of by the legislature, or are there any absolute limits, any aspects in which consent is irrelevant? In the only other use of the idea of innate right in the *Doctrine of Right*, Kant appeals to it to explain why utilitarian theories of punishment are immoral. A person must never be used as a means to their own or any other social end; criminals are to be punished because they have committed a crime and for no other reason.¹¹⁶ This no longer seems presumptive, as if the legislature could decide to punish for rehabilitative or deterrent purposes.

As has already been noted, it is important to distinguish the problem of legislative limits from the problem of the right to resist unjust laws. Of course, if the individual carries certain substantive rights into the civil condition which warrant resistance to incompatible laws, then those same rights also set limits to legislative action. But we should be careful before concluding that individual citizens have a remedy against all forms of injustice by the legislature. Recall that innate right only confers a negative right not to be coerced; it does not of itself warrant coercive action to remedy the wrong. As we shall see below,¹¹⁷ it makes sense to relate the absolute limits of legislative action to violations of duties to self, such as the ‘enforcement of a religion’, ‘compulsion to unnatural sins’, ‘assassination’¹¹⁸ and the giving of ‘false testimony’.¹¹⁹ Refusing to comply with such problematic legal duties is not coercive. A connection with the concept of duties to self would make sense, because we cannot consent to violations of such duties. If we cannot consent, it must

¹¹⁶ 6:331. Kant talks here of ‘innate personality’, but as he earlier points out there is only one innate right which has several dimensions (See 6:237-9).

¹¹⁷ At **XX-XX**.

¹¹⁸ 19:594-5 (*Reflexion 8051*).

¹¹⁹ 5:155-157. See K. Westphal, “Kant’s Qualified Principle of Obedience to Authority in the Metaphysical Elements of Justice” in *Akten des 7. Internationalen Kant-Kongress* (Bonn: Bouvier, 1991) pp. 53-66.

be impossible for the omnilateral will to provide justification either. However, this leads to a fairly narrow set of limits based around what would destroy one's own agency. Clearly, each of us *can* consent to a range of *prima facie* wrongs, and so too can the legislature on our collective behalf. The idea of presumptive innate right captures rather well the idea that certain restrictions on a person's autonomy are justifiable if authorised by a general law, but not otherwise.

For now, the point is clear: a 'constitution which conforms most fully to principles of right' will secure *both* the procedural rights necessary for citizens to participate in omnilateral will formation *and* at least also substantive rights protective of their moral agency. Kant did not accept that the civil condition was a purely procedural republic with laws of potentially any content. The fundamental rights protected within the Kantian constitution can be understood as a minimal set of absolute rights protecting the individual person from laws destructive of their agency, *and* a wider set of presumptive rights capable of being overridden by legislative warrant. And that, of course, mirrors rather closely the structure of late 18th century declarations of rights and modern liberal democratic constitutions more generally.

V. Positive law and natural right

The complexity of the relationship between positive law and natural right which we have already observed in relation to the constitution is even more apparent in Kant's discussion of private law. We turn now to consider this topic, and follow with the rather more speculative question of whether his concept of law is limited to the functions of the classic night watchman state. What place, if any, for social welfare law? We close this section with the problem of the right of resistance to unjust laws.

Private law and pure practical reason

At the end of the *Introduction*,¹²⁰ Kant rejects the distinction between natural and social right, because a social condition is possible in a state of nature. The key distinction for him is between natural and civil right, which is the distinction between private and public right. It is important not to confuse this with the modern distinction between private and public law; 'public right' is all law in the civil condition. At 6:259 and then throughout Part I of *The Doctrine of Right* Kant divides 'private right' into three branches: the acquisition of a corporeal thing (property right), the acquisition of another's performance (contract right) and the acquisition of another's person, that is, his status insofar as one gets to make arrangements about him. This is the law of domestic relations: husband/wife, parent/child and master/servant (domestic right). It is easy to see the influence of the Roman law tradition on Kant's assumptions about the subject-matter of private law.

The point about the civil condition is that it secures 'what is mine or yours' (i.e. private right) by way of public laws. Much later on¹²¹ he repeats this point, stating that the natural and social states are conditions of private right, and the civil condition is one of public right. He continues: 'The

¹²⁰ 6:242.

¹²¹ 6:306.

latter contains no further or other duties of human beings among themselves than can be conceived in the former state; the matter of private right is the same in both.’ So here is Kant’s first thesis about the relationship between the state of nature and the civil condition. In respect of private law, the civil condition (1) merely renders public and conclusive (i.e. omnilaterally agreed) what could only ever be provisional in the state of nature.

However, this is not Kant’s only thesis. In the ‘Episodic section’¹²² Kant considers three rights which are only ‘ideal’ in the natural state. They are neither creatures of pure positive law but nor can they be rendered ‘real’ in the sense of empirically possible in any imaginable state of nature. They are in accordance with natural right, but not natural rights strictly speaking. These rights are: acquisition by prolonged possession, inheritance and the protection of one’s reputation after death. Inheritance is perhaps the easiest of these to understand. The problem is that it is hard to see how a person can have a (natural) right to an object owned by a testator during the testator’s lifetime – the person may be totally ignorant of their expectation, and of course the property remains fully the testator’s. There is neither a common will nor a transfer of physical possession. Yet at the point of death, the heir immediately acquires an exclusive right to decide whether to accept or reject the estate. That right of choice can be taken to be ‘accepted tacitly’ since one cannot possibly lose from having it. Yet pending the heir’s decision as to how they will exercise that right the property in the estate is only vacant, not truly ownerless; such a ‘hovering’ status is only possible under a civil condition. The arguments for prescriptive right and postmortem reputation run along similar lines and likewise show the dependence of some features of private law on the existence of a civil condition. In short, the civil condition (2) also renders real what could only ever be imagined in a state of nature. Some private rights are imaginable but not actualisable, even provisionally, in a state of nature.

¹²² 6:291-6.

This is not the end of it. In the final chapter of ‘Private Right’ Kant considers ‘acquisition that is dependent subjectively upon the decision of a public court of justice’. Here, he has moved from what is right in itself to what is laid down as right.¹²³ The four examples he discusses are: contract to make a gift, contract to lend a thing, action to recover possession, and taking an oath. Private and public right offer ‘different and opposing’ perspectives on these problems.

Working through the first example: the person who promises to make a future gift cannot be presumed to intend to be coerced in the future and thus give up their freedom for nothing. Yet this is exactly the effect of the law in the civil condition. How can that be justified? The court must either presume consent to future coercion (which Kant rejects as absurd) or simply ignore that aspect of the problem and base its judgment on what is ‘certain’ (evident, known) – the promise and its acceptance. On this basis, any reservation of a right to retract must be made expressly. ‘The court adopts this principle because otherwise its verdict on rights would be made infinitely more difficult or even impossible’.¹²⁴

The gap between what is rational and what is practically necessary for a functioning system of justice is exposed most clearly by the case of oath-swearing. It is not simply that some of the foundations of oath-swearing are purely superstitious (e.g. swearing by the bones of your dead ancestors); it cannot be rational to require one person to believe another simply because that other has sworn an oath to tell the truth. Even *requiring* another to swear an oath is weird. Kant goes so far as to say that it is fundamentally unjust – yet it is also indispensable for court process, which is to say for law. So, the civil condition (3) requires the adoption of practical measures to render right workable which may even depart from the *a priori* requirements of right.

¹²³ A distinction which is drawn first at 6:267.

¹²⁴ 6:298.

And, finally, there is a discussion of ‘equivocal right’ in the *Appendix* to the *Introduction*. Here, Kant discusses two potential counter-examples to his dictum that ‘right and the authorization to use coercion ... mean one and the same thing’.¹²⁵ Equity seems to present an example of unenforceable right; the right of necessity by contrast provides an example of force without right. The two elements of his definition of law seem to have come apart. By equity, Kant means the adjustment of strict law in the interests of justice, as for example when a servant argues for greater wages than those originally agreed on account of intervening inflation.¹²⁶ The servant cannot insist on this as a matter of strict right, but can still request it, and might well have a legal remedy. His example of a right of necessity is the legal impunity of the shipwrecked sailor who pushes another off a plank to save himself.¹²⁷ These are, for Kant, the two branches of ambiguous or equivocal right.

Kant’s solution is to posit a gap between what is objectively right (as a matter of reason) and what is subjectively right (in the sense of establishable before a court of justice). In the case of the shipwrecked sailor it is objectively wrong to kill another innocent person to save oneself, but any human law rendering such action punishable would be ineffective, as the mere risk of future hanging cannot outweigh the near certainty of drowning. The situation is wrongful but unpunishable. In the case of equity, he is clear that this cannot simply be a matter of virtue (i.e. imperfect duty). Equity is still a requirement of justice or Right, but it is a result of the absence of a definite condition for the assertion of the right in question. The servant is arguably entitled to more, but how much? Kant seems to think that a judge acts wrongfully in deciding a case on the basis of such indefinite conditions, unless the case concerns a departure from the judge’s own strict rights as a representative of the Sovereign. His example is of a restitutionary claim against

¹²⁵ 6:234-6.

¹²⁶ German courts actually did this in the 1920s in light of very rapid inflation. See J Herget and S. Wallace, ‘The German Free Law Movement as the Source of American Legal Realism’ (1987) 73 *Virginia Law Review* 399-455 at 418.

¹²⁷ 6:235.

the crown by someone who has suffered loss in voluntarily undertaking service for the crown.¹²⁸

The judge can decide whether or not to compensate the claimant. By contrast, refraining from the inequitable enforcement of private rights has to be left to the individual's conscience. This refinement excepted, the civil condition (4) renders some elements of private right unenforceable.

In all this, we can see here how seriously Kant takes the *juridicality* of law. The fact that law concerns only external compliance with duty and must act by way of attaching external incentives to action is not only a matter of perspective. It affects what is legally possible. We will return to this point in the final section.

Beyond private law: imperfect duties and the content of law

Imperfect duties are 'duties of virtue'. One cannot be required to perform them, and performance of them is meritorious. In this sense, they are 'wide' obligations that '...do admit of ...exceptions...' ¹²⁹ and do allow for the exercise of moral discretion (or, as Kant puts it, 'playroom...for free choice').¹³⁰ As we have seen, performance of imperfect duties cannot be demanded as of Right, which concerns 'narrow'¹³¹ or perfect 'outer' duties,¹³² or 'duties to others'.¹³³ Kant is clear that *some* duties can be the subject of coercive laws: '[t]o every duty there corresponds a right in the sense of an *authorisation* to do something...; but it is not the case that to every duty there corresponds *rights* of another to coerce someone.'¹³⁴ For Kant, and as has been argued

¹²⁸ 6:235.

¹²⁹ H.J. Paton, note X, above, at p. 147.

¹³⁰ 6:390. Furthermore, in the *Critique of Practical Reason*, Kant writes: 'the law of what the need of human beings requires of me as contrasted with what their right requires, the latter of which prescribes essential duties whereas the former prescribes only nonessential [*außerwesentliche*] duties' (5:159).

¹³¹ 6:390.

¹³² '...doctrine of right dealt only with the formal condition of outer freedom (the consistency of outer freedom with itself if its maxim were made universal law), that is, with right.' (6:380).

¹³³ 4:421.

¹³⁴ 6:383.

throughout this article, perfect duties to others can be enforced. As we have also seen, Kant regarded imperfect duties (and also duties to self) as unsuitable for enforcement.¹³⁵

If imperfect duties cannot be the subject of enforcement, significant limits are placed on possible law-making. Choice of ends in pursuance of, for example, self-perfection or the happiness or well-being of others should not be legislated for omnilaterally through, for example, the establishment of a system of universal education within a community, or the creation of a welfare state. Performance of such duties can only be a matter of personal choice. The division would appear to make Kant something of a libertarian, which runs against some influential ideas within the Pietist movement in Prussia during his lifetime, and to which he was connected.¹³⁶ It would seem to limit his theory of law to constitutional law, criminal law, and a rather conventional account of (Roman-influenced) private law.

This libertarian reading of Kant may be too simplistic. The point can be made by turning to Allen Wood's analysis of the division between Right and Virtue.¹³⁷ Wood focuses on Kant's point that a person cannot be required to adopt an end internally, which leads Wood to the conclusion that moral duty (of any kind) cannot be enforced. He cites the following from the *Doctrine of Right* as evidence for his position:

¹³⁵ See above, **XX-XX**.

¹³⁶ In his biography of Kant, Kuehne writes that Kant's education was greatly influenced by the Pietism of Francke. This promoted 'social activism' so that 'Acts of charity were not just the private affair of every individual Christian, but also a common task of the Prussian Pietist community.' Charity was to be institutionalised through housing and education through Pietist institutions. While this form of Pietism heavily influenced Kant's mother, it is unlikely that Kant thought much of Pietist doctrine. However, it was the case that the idea of institutionalising virtues was an important theological idea, which was being made reality through the work of important figures in the Pietist movement in Königsberg and elsewhere in Prussia, at the time Kant was writing. (See M. Kuehn, *Kant. A Biography* (Cambridge: Cambridge University Press, 2001), p. 34)

¹³⁷ A. Wood, 'Right and Ethics: Arthur Ripstein's *Force and Freedom*', S. Kisilevsky and M. Stone, note 63, above, chapter 8 and also see A. Wood, 'The Final Form of Kant's Practical Philosophy', M. Timmons (ed.), *Kant's Metaphysics of Morals. Interpretative Essays* (Oxford: Oxford University Press, 2002) chapter 1.

Duties of virtue cannot be subject to external legislation simply because they have to do with an end which (or the having of which) is also a duty. No external legislation can bring about one's setting an end for himself...¹³⁸

Held against the argument advanced in this article, Wood's claim seems problematic, insofar as it disregards the division of duties (perfect, imperfect, to self, to others) which Kant introduces in the *Groundwork* and develops in *The Doctrine of Virtue*. *The Doctrine of Right*, as we have repeatedly argued, is specifically concerned with how perfect moral duties to others are to be enforced. But even more worrying for Wood's position is what follows the sentence from Kant which he relies on. Kant writes: '...although it may prescribe actions that lead to an end without making the subject making it his end.'¹³⁹ He says the same thing in *The Doctrine of Virtue*: 'I can indeed be constrained by others to perform actions that are directed as means to an end, but I can never be constrained by others to have an end.'¹⁴⁰ Kant's position is that legislation can require action *towards* an end, but not require the holding *of* an end. That is, there are logical limits to coercion: we cannot be forced to be internally motivated towards the achievement of particular ends, which law can still require us to act towards. We cannot be coerced into benevolence, but we can be coerced into behaving as if we were benevolent. We will return to this point in the final section. But turning back to the claim made about Kant's political persuasion, it does seem possible that (actions consonant with) imperfect duties could be legislated for, and Kant may be less of a libertarian than might be thought.

This point may receive some support from an otherwise difficult section. Kant states that the supreme commander has a duty derived from that of the people as a whole to impose taxes to support organizations providing for the poor and orphans and for other ecclesiastical, charitable

¹³⁸ 6:239.

¹³⁹ 6:239.

¹⁴⁰ 6:381.

or pious purposes.¹⁴¹ Ernest Weinrib has argued that this minimal duty to alleviate poverty is best understood as a necessary condition of entry into the civil condition under which people give up their freedom to take possession of the means of existence not currently possessed by any other person.¹⁴² Such a reading would preserve a clear distinction between perfect duties which may (and, indeed, should) be made the subject of legislation and imperfect duties which may not. However, it already breaks the otherwise clear distinction between duties to self and duties to others. Kant justifies taxation for the relief of poverty by reference to self-preservation. This is presumably a duty to self. The implausibility of this construction becomes apparent as he turns to the support of abandoned children.¹⁴³ This mirrors the problem identified in Kant's discussion of active and passive citizenship.¹⁴⁴ Legislative enforcement of imperfect duties may fit well with his political convictions but sits uncomfortably within his strict definition of Right. However, there is no logical reason why consent could not be given unilaterally to the fulfilment of imperfect duties by the state on behalf of citizens.

The right to revolution

In the standard reading of Kant, the account we have offered of his concept of law is fatally undermined by his reflections on the right to revolution. Kant claims that

...the constitution cannot contain any article that would make it possible for there to be some authority in a state to resist the supreme commander in case he should violate a law of the constitution, and so limit him. For someone who is to limit the authority in a state must have even more power than he whom he limits, or at least as much power as he has....¹⁴⁵

¹⁴¹ 6:325-328.

¹⁴² E. J. Weinrib, 'Poverty and Property in Kant's System of Rights' (2003) 78(3) *Notre Dame Law Review* 795-828.

¹⁴³ 6:326-327.

¹⁴⁴ See above at **XX-XX**.

¹⁴⁵ 6:319.

If there can be no remedy against an unjust sovereign, what practical purpose is served by the enumeration of *any* constitutional limits?

Three possible ways of dealing with this passage present themselves. The first is to adopt the route of Kant's instrumentalist interpreters and reconstruct his entire philosophy of law along Hobbesian lines. Perhaps, after all, Kant thought the consequences of civil disorder so terrible that it must be avoided at any cost. As we have suggested, this requires us to ignore the main trajectory of his argument. The second is to treat it as a pragmatic concession to the political circumstances of late 18th century Prussia, and not ultimately coherent with the rest of the theory or a reflection of his real views. The third is to read it as ultimate confirmation of the substantive openness of law in the civil condition. If law can – morally – have any content, as Kant's proceduralist interpreters suggest, then there can be no moral right to resist. None of these escape routes is necessary.

It is important to note that Kant's argument against revolution is similar to his argument against colonisation. He expressly draws a parallel between the two when discussing cosmopolitan Right at the very end of *The Doctrine of Right*.¹⁴⁶ After working through various inadequate instrumental justifications for subordinating original inhabitants of colonised territories he closes with what must be, for him, the best argument of all: without force, how could anyone ever have been brought into a civil condition? Yet he thinks that even such a cataclysmic, one-off use of force violates a precondition of Right (*Rechtsbedingung*). In fact, in a strategically astute move, he presupposes that a right to revolution is unacceptable and then shows that the same logic rules out colonisation as well. The sensibilities of his modern readers have simply been reversed.

¹⁴⁶ 6:353.

Both revolution and colonisation suffer from the same moral defect as benign dictatorship. To engage in civil disobedience, or to establish colonial rule, implies that other wills are to be considered subordinate to one person's unilateral will. As we have seen, this violates the categorical imperative.¹⁴⁷

This said, Kant does argue that while 'active resistance' against the sovereign – that is, the executive – is impermissible, 'negative resistance' is permissible.¹⁴⁸ By negative resistance he means 'a refusal of the people (in parliament) to accede to every demand the government puts forth as necessary for administering the state'.¹⁴⁹ That is, the legislative authority, which 'can only belong to the united will of the people',¹⁵⁰ provides the means by which that community can challenge the demands of the executive power. Disagreement about the content of the omnilateral will is *absorbed* within the institutional structure – that is the constitutional arrangements in relation to the separation of powers – of the state and is resolved by the legislature that embodies the equal choice of members of a political community. Elsewhere, Kant issues the imperative to 'Obey the authority who has power over you (in whatever does not conflict with inner morality)'.¹⁵¹ This 'inner morality' seems to concern violations of duties to self, warranting a different form of negative resistance in conscientious refusal. As we have already noted,¹⁵² such negative resistance is by definition not coercive and not in need of further justification.

¹⁴⁷ This argument, as it happens, is made by Christiano against the right of civil disobedience, in an argument for political authority which bears a strong resemblance to the argument made here. (See T. Christiano, 'The Authority of Democracy' (2004) 12 *Journal of Political Philosophy* 266-290 at 281).

¹⁴⁸ 6:322. Admittedly, in Kant's earlier work, he does not go as far as a right to negative resistance, instead limiting citizen to a 'freedom of the pen' against the sovereign (e.g. 8:304).

¹⁴⁹ 6:322.

¹⁵⁰ 6:314.

¹⁵¹ 6:371 and see also 6:315.

¹⁵² See above at **XX-XX**.

But what if such ‘negative resistance’ is inadequate? Presumably, even in the absence of any representative body it is possible for subjects to start acting as engaged citizens. We might speculate – although Kant nowhere makes this connection – that just as in the state of nature the necessarily coercive acts of claiming possession must simultaneously be expressions of willingness to enter a civil condition, so also the acts of dissatisfied subjects in response to an unjust regime must themselves be examples of engaged citizenship under a civil condition. Quite what that looks like will depend on the circumstances, but in modern times one might instance the subversive use of church meetings in East Germany to provide a context for political speech prior to the collapse of the iron curtain.¹⁵³

In short, for Kant, the only way of getting to the civil condition is by gradual amelioration. As Bernd Ludwig recognises, Kant is exceptional within the tradition of natural law theorists in stating an optimistic case for reforming existing states from pre-republican ones to republics.¹⁵⁴ The civil condition is not simply a polity in which certain substantive rights are secured. Well-intentioned revolutionaries, colonisers and benign despots might all aim at such a condition. But in their very choice of means they undermine the end desired – a condition in which all coercive acts are directed towards securing perpetual procedural and substantive Right. In the real world, such a condition can – and can only – be achieved step by step.

¹⁵³ M.Fulbrook, *Anatomy of a dictatorship: inside the GDR, 1949-1989* (Oxford: Oxford University Press, 1995).

¹⁵⁴ See B. Ludwig, “‘The Right of a State’ in Immanuel Kant’s Doctrine of Right” (1990) 28 *Journal of the History of Philosophy* 403-415, at 415. We would also suggest that Kant’s views in *Perpetual Peace* concerning ‘permissive laws’ (as a licence to temporarily not implement Right for reasons of political prudence (8:437)) are best read as being part of this argument, rather than being concerned with permissive laws that establish legal liberties and powers (See **XX-XX**, above, and J. Weinrib, note 75).

VI. Kant's other concepts of law

We have seen that in the main part of the *Doctrine of Right* Kant develops a moral concept of law. It is a requirement of pure practical reason that we enter and remain within a civil condition. Only in this way can the coercive consequences of our existence and actions be reconciled with the universal principle of equal freedom. Right is the set of duties – including the duty to obey the laws created by the sovereign legislature – which necessarily flow from this requirement.

At the start of this article we noted that this is not how Kant is commonly read. Although we think such a view mistaken, there is undoubtedly complexity in Kant's full understanding of law. In particular, his moral concept of law is accompanied by two others: a juridical and an ethical concept. In this final section, we show how Kant develops other concepts of law which make it possible to understand the complex relationships between positive law and natural right.

All lawgiving, Kant tells us in the *Introduction to The Doctrine of Right*, whether related to internal or external actions, and whether prescribed *a priori* by pure reason or by the choice of another, consists of two components: a law (i.e. a *Gesetz*; something set down) which presents an action as objectively necessary, that is, as required by duty, and an incentive, or motivation, which subjectively connects the determining ground of choice (*Willkür*)¹⁵⁵ to the representation of the law.¹⁵⁶ The action-component of any law is an object of merely theoretical knowledge of the possible determination of choice; any moral law holds out to us the possibility of a specific action. The motivation-component is what then connects the possibility of acting in such a way with an actually determining ground of will in the subject. Put simply, we can carry out the same act for a variety of reasons.

¹⁵⁵ We noted the place of this idea in relation to the will at **XX-XX**.

¹⁵⁶ 6:218.

This distinction between the action and its motivation makes it possible to distinguish between two ways of complying with duty. Conformity of action regardless of motivation is called the ‘legality’ of the action;¹⁵⁷ conformity of motivation for the sake of the duty itself, i.e. acting *from* duty, not merely in accordance with duty, is called the ‘morality’ of the action. Kant repeats this point several times in the *Introduction*.¹⁵⁸ It is important not to be confused by the fact that ‘morality’ serves both as the designation of all laws of wilful human action (as opposed to the laws of physics),¹⁵⁹ and as the characteristic of a particular, and ethically virtuous, mode of compliance with those laws.

The Doctrine of Right lays a particular emphasis on the action-component of compliance with duty, because Right is the set of laws for which ‘external’ lawgiving is *possible*. Remember that the problem which gives rise to law as an expression of omnilateral willing is the coercion inherent in our external interaction as beings in time and space. Kant calls ‘binding laws, for which an external lawgiving is possible, external laws (*leges externae*).’¹⁶⁰ As we have already seen, this category can be sub-divided into natural laws, which can be known *a priori* by reason without there being any external lawgiving, and positive laws, which cannot bind unless there has been an actual legislative act in accordance with the procedural constraints inherent in the omnilateral will. In the case of natural law, external lawgiving is possible but not necessary; in the case of positive law, external lawgiving is both possible and necessary.

Kant then tells us that ‘rightful lawgiving’¹⁶¹ can only deal in external duties, because it cannot require that the idea of this duty, which is internal, should be the determining ground of the choice

¹⁵⁷ Unusually, but consistently, Kant also refers to the internal act of adopting a virtuous end as the ‘legality’ of compliance with the duties of virtue. Presumably one could set out to be benevolent to look good. Only when benevolence is pursued *from duty* is the virtue truly moral. See 6: 239 and the scheme at 6:398.

¹⁵⁸ 6:214, 6:225, 6:219.

¹⁵⁹ 6:214.

¹⁶⁰ 6:224.

¹⁶¹ 6:219. The term is ‘*rechtliche Gesetzgebung*’, a term which seems to refer to the laws of Right as opposed to the moral laws of freedom more generally.

of the actor. External law still requires a suitable motivation, but it can only connect an external motivation with law. As we have seen, Allen Wood misreads this point to argue that acts expressive of virtue cannot be made the subject-matter of law. Kant's point is purely subjective: one simply cannot make people act for ethical reasons. Not even a divine legislator could do that. To act ethically you have to do so *freely*. The idea of an external motivation, which is strictly self-contradictory, must be shorthand for the internal effect of external acts such as threats of punishment.¹⁶² He includes the possibility of using rewards as incentives as well, but much of his discussion presupposes official adverse coercion as the basic incentive behind law. A little later, Kant reverses the emphasis. Just as 'rightful lawgiving' cannot be internal, so he insists that ethical lawgiving cannot be external.¹⁶³ The command to fulfil a duty for that reason alone, to act *from* duty, regardless of any other motivation, can only come from the internal law one gives oneself.

Kant uses the term 'juridical' several times in the *Introduction* to refer both to the merely external dimension of compliance with duty and to the fact that it is a distinctive feature of Right that it connects 'external motivations' with its duties. In the former sense, the 'juridicality' of an action has the same meaning as its 'legality'. It offers a partial perspective on compliance based on conformity of action with rule alone regardless of motivation. But in the latter sense, juridical law and juridical lawgiving is law within the domain of Right, i.e. law which only concerns itself with external actions and which is warranted in imposing coercive constraints on the hindrances to freedom. In the one instance outside the *Introduction* in which he uses the term 'juridical', it seems to refer straightforwardly to the existence of unconditional criminal sanctions for questioning the sovereign's title to rule.¹⁶⁴ As Marcus Willaschek has correctly noted, Kant thinks that law is

¹⁶² Kant talks of 'pathological determining grounds of choice' (See 6:219).

¹⁶³ 6:220.

¹⁶⁴ 6:371. The term is 'juridically-unconditional' not 'rightfully-unconditional' (Gregor).

fundamentally connected with authorising ‘hindrances to the hindrances to freedom’,¹⁶⁵ or in other words creating external incentives to avoid unjust external actions in relation to others.

Although Right itself does not require that we comply with its duties *from* duty, that is, simply because obedience is a requirement of pure practical reason, it does not follow that Right properly understood is not a requirement of reason. Indeed, virtue requires us to adopt just this perspective.

As he puts it in the *Introduction* to *The Doctrine of Virtue*,

A human being has a duty to carry the cultivation of his will up to the purest virtuous disposition, in which the law becomes also the incentive to his actions that conform with duty and he obeys the law from duty.¹⁶⁶

The personal maxim of every action should be,

...to strive with all one’s might that the thought of duty for its own sake is the sufficient incentive of every action conforming to duty.¹⁶⁷

There is no doubt that this virtuous attitude extends in Kant’s mind also to the duties of Right (both natural and positive law).¹⁶⁸ As Kant remarks already in the *Introduction*, while ethical lawgiving cannot be external, yet ethical lawgiving ‘does take up duties which rest on external lawgiving, by making them, as duties, incentives in its lawgiving’.¹⁶⁹ In other words, while Right

¹⁶⁵ Willaschek, note 9, above.

¹⁶⁶ 6:387.

¹⁶⁷ 6:393.

¹⁶⁸ See 6:390. ‘Although there is nothing meritorious in the conformity of one’s actions with right (in being an honest human being), the conformity with right of one’s maxims of such actions, as duties, that is, respect for right, is meritorious. For one thereby makes the right of humanity, or also the right of human beings, one’s end and in so doing widens one’s concept of duty beyond the concept of what is due..., since another can indeed by his right require of me actions in accordance with the law, but not that the law be also my incentive to such actions.’

¹⁶⁹ 6:219.

sets out certain actions as duties, it cannot require that we comply with those duties for any given reason. All that Right does is authorise the use of coercion to ensure that (typically) human beings comply externally with the duties they have. But this does not divorce Right from the rest of morality. Virtue comes along and insists that we act Rightfully for the right reasons, that is, out of a pure sense of duty.¹⁷⁰ Kant recognises the possibility of some confusion here between the substance and form of virtue.¹⁷¹ One really needs a word such as ‘ethicality’ for the idea of conformity with duty for duty’s sake, or what Kant calls a single ‘virtuous disposition’ applicable to all actions. In short, we have a moral duty to obey the law.

So, there is a threefold distinction in Kant between (1) juridical (i.e. enforceable) law – or more strictly, Right in juridical, external, perspective, (2) the duties of Right as requirements of pure practical reason, and (3) the (imperfect) moral duty to regard Right ethically. Kant provides a clear example of this distinction towards the end of the *Introduction* when he discusses an unenforceable contract.¹⁷² On one hand, ‘juridical lawgiving’ normally connects with a contract the incentive of external constraint or coercion. Contracts can normally be enforced. If this incentive is lacking, say, on account of lapse of time, from a juridical perspective there is no duty to fulfil the contract. However, Kant goes on to say, from an ethical perspective, the contract should still be fulfilled, since ethics teaches that duty itself is a sufficient incentive. Fulfilling a promise is a straightforward example of a perfect duty to others,¹⁷³ and this duty has survived any failure of enforceability. Nevertheless, this does not make faithful performance of contracts substantively a matter of virtue like benevolence. The duty to keep one’s promises is still clearly a duty of Right, not a duty of virtue. It is a duty the performance of which *could* be coerced. It does not cease to be a duty of

¹⁷⁰ There is therefore a distinction in Kant’s mind between a virtuous attitude and the duties of virtue as a subset of the laws of freedom. See 6:393-4.

¹⁷¹ 6:383.

¹⁷² 6:219-220.

¹⁷³ 4:421-422.

Right simply because on this particular occasion coercion is not actually applicable. And nor does the duty lapse as a moral duty of Right.

The juridical perspective is peculiarly appropriate to law because law is itself external and deals in externalities. We suspect that it is Kant's idea of juridical law which lends partial credence to instrumental readings of his work, for if it is taken as his main structuring idea, then one naturally seeks, and indeed finds, passing references to what may incorrectly be read as a non-moral justification of legal obligation within the *Doctrine of Right*. Complying with law for external reasons looks thoroughly instrumental!

It is important to note that Kant is not asserting a moral duty to regard all juridical law ethically; that would be to raise all juridical law to the status of a moral absolute. The juridical perspective on law is a legitimate perspective, because of law's distinctive externality. It makes possible a distinctively legal way of viewing our obligations.¹⁷⁴ At the same time, Kant is clear that identifying this legitimately juridical perspective on law does not make Right collapse into the 'wooden head' of a purely empirical doctrine.¹⁷⁵ He thinks that such an impoverished view of law 'has no brain'.¹⁷⁶ We might say that focusing only on the external dimension of law (both in terms of the performance of legal duties and the incentives law offers for performance) destroys the possibility of an account both of its proper content, the way in which it justly constrains our freedom of choice, and how we should act in the light of it. The distinctive externality of law should not lead us to ignore either its grounding in morals (i.e. pure practical reason) or the requirement of an ethical attitude. More than that, as we have seen in the previous section, the very juridicality of law

¹⁷⁴ As Robert Alexy notes ('The Dual Nature of Law' (2010) 23(2) *Ratio Juris* 167-182 at 174 n10), Kant's distinction between moral and juridical perspectives on law is thus not the distinction between an internal and an external perspective. Both the moral and juridical are internal perspectives, and how they are brought into relation with each other is complex.

¹⁷⁵ 6:230.

¹⁷⁶ Ibid.

has the consequence of modifying, and even occasionally reversing, the *a priori* requirements of Right. The fact that there is no right of revolution (that is, no right unilaterally to impose one's own understanding of Right on others) means that the juridical perspective on law offers a secure pre-interpretative starting-point. But law in juridical perspective is to be understood *in relation to* Right, even where it has to depart from the pure requirements of Right. And so the moral concept of law retains interpretative priority, even while there is space for juridical and ethical concepts alongside it.

VI. Conclusion

‘By the well-being of a state is understood ... that condition in which its constitution conforms most fully to principles of right; that is that condition which reason, *by a categorical imperative*, makes it obligatory for us to strive after.’¹⁷⁷

Kant develops a moral concept of law, establishing Right as the condition under which positive law reflects and refracts moral obligation. Right determines how free choice is possible for a community of persons, in a way that is consistent with the strict or perfect duties each owes to others. Right is established where those institutions that coerce in accordance with positive law express the omnilateral will of persons subjected to that coercion. The omnilateral will is formed when legal institutions play their part in the enactment and enforcement of law. In doing so, they must adhere to various procedural and substantive constitutional rights which inhere in persons qua citizens. Political authority derives from such law. This is the explanatory core of *The Doctrine of Right*, and it is what makes other ways of thinking about legality intelligible. It shows us why a state of nature, a benign dictatorship and by the end, revolution and colonialism are all inherently not-rightful.

Kant’s legal theory is therefore part of a comprehensive and reasonably consistent practical philosophy. It should not be seen as a pragmatic response to co-ordination problems, detached from the rest of his thought. This pragmatic reading, which can even brand Kant a legal positivist, gives juridical law, rather than Right, interpretative priority. Once the relationship between juridical law and Right is reversed in this way, it becomes plausible to seek a non-moral theory of

¹⁷⁷ 6:318.

obligation, and the passing references to the instrumental benefits of living under law are brought to the interpretative fore. Law becomes instead a useful tool for the protection of important general interests, resulting in a thoroughly unKantian distinction between freedom in a moral sense and freedom in a juridical sense.¹⁷⁸

All of these moves are wrong-headed. Perhaps obviously, the *Doctrine of Right* gives interpretative priority to Right. Freedom in a Kantian sense is only possible under Right. Right is what renders the obligation to obey juridical laws intelligible. The omnilateral will, authentically institutionalised and expressed through law, is nothing less than our own will as persons exercising freedom of choice qua citizens. In the legal orders with which we are familiar, getting the institutional structure within which authority is claimed, right, is an on-going task. Kant's aim, as Ludwig notes, is not '...the upholding or destruction of states', rather it is to establish the 'principles of reforming existing states toward the ideal of a "condition of greatest agreement of the constitution with principles of Right"'.¹⁷⁹ This is how Kant's moral concept of law gives juridical law its brain.

¹⁷⁸ This is why Kant distinguishes in his *Anthropology* between despotism ('Law and force without freedom') and the republic ('Force with freedom and Law') (7:331 and see also 8:352). Legal orders that do not conform to Right are not ones in which citizens are free.

¹⁷⁹ Ludwig, note 154, above, at 415.