KANT AND SOCIAL POLICIES

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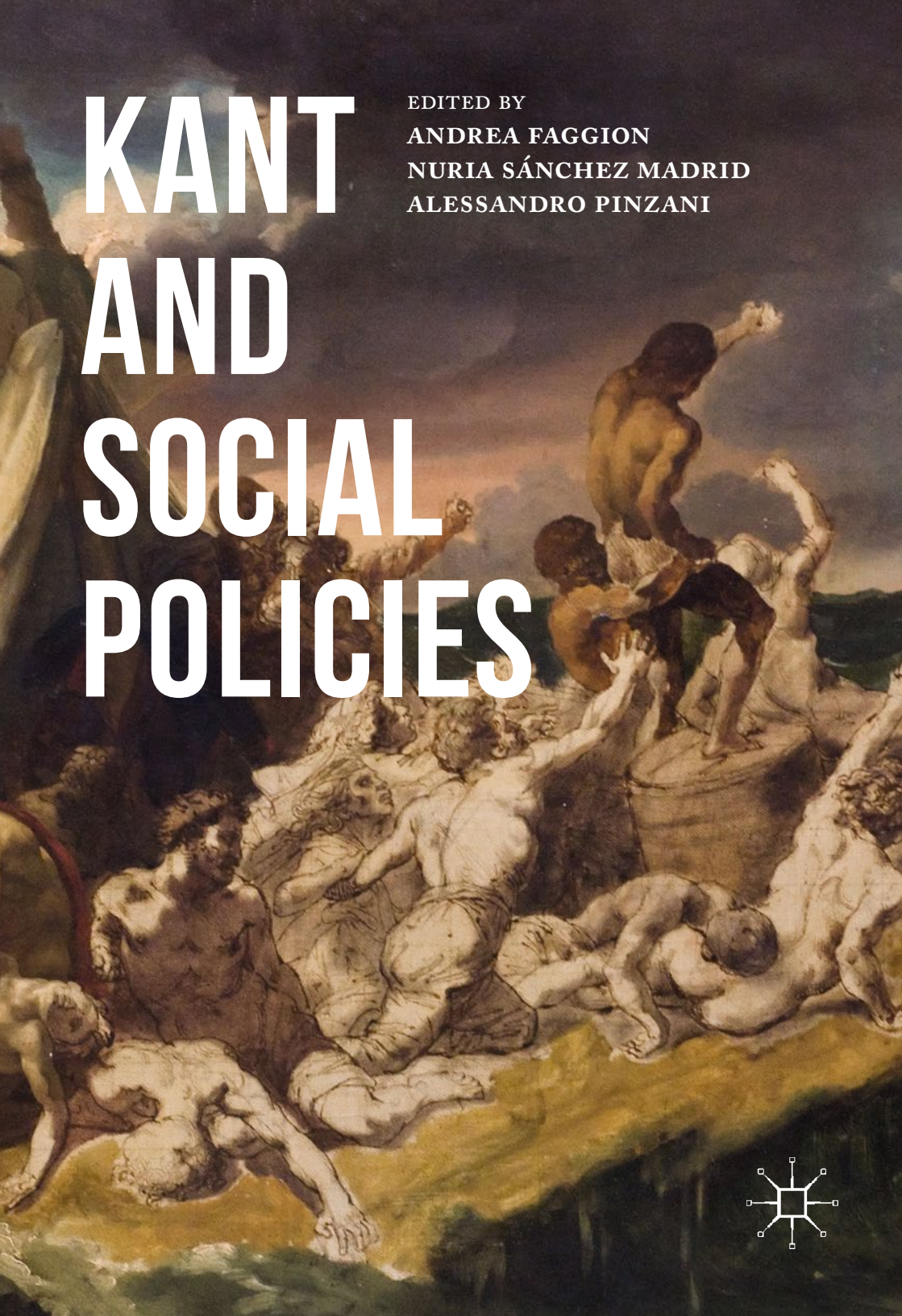

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Editors

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Preface

This volume aims at exploring the potentiality of Kant's political and juridical philosophy to cast light over current social challenges and policy making at a global scale. The contributions focus on key issues of Kant's political theory as the philosophical foundation of human rights, the account of the right to citizenship, social dynamics and the scope of global justice, with the intent to open up new avenues in the field of Kantian studies. The authors of the volume share the impression that Kant's republicanism should not be viewed as a historical feature that should be seen nowadays as irremediably obsolete and unable to helpfully inspire current policies. Nevertheless, they do not will to oversee the inner contradictions and tensions that Kant's political model entails.

The texts gathered in this book tackle from a Kantian point of view issues such as poverty and economic redistribution, the material conditions for citizenship and the nature of human rights. The will to establish an honest dialogue with Kant's key republican tenets has guided the composition of the volume. Most contributions were previously discussed in a workshop held at the Federal University of Santa Catarina (UFSC), in Florianópolis, where authors had the chance to exchange remarks and submit their early drafts to critics. This experience was extremely helpful and proved that the confrontation of Kant's thought with empirical social concerns of our global world is a still neglected path that needs to be taken.

Scholars such as John Rawls, Robert Nozick, Thomas Pogge or Onora O'Neill are often mentioned and considered a clue reference by the authors, insofar as they acted as forerunners of the approach taken by this volume. Taking into account the hermeneutical proposal of these scholars, each author attempts to unfold and better understand some ambiguous remarks by Kant or to focus on misunderstood excerpts from his writings, aiming at broadening the traditional outlook about this thinker. As a result, the prevailing tone in these texts is one of questioning, critically discussing and tentatively interpreting rather than one of closed argumentation, since most chapters contain groundbreaking approaches regarding the basis of a form of republicanism that might be conscious of the troubles, which hunt a complex society.

The title of the volume was inspired by the challenge to consider Kant as our contemporary, leaving aside the efforts to exempt and justify a high esteemed thinker before any responsibility or nonchalance regarding sensitive issues as poverty relief, the right to property, the problems connected with the republican state model or the legitimacy to defend a passive concept of citizenship. The discussion framework that gave birth to the table of contents helps to grasp a main guideline through these pages, that is, the will to gain an appraisal of a classical thinker that does not enclose him into the comfortable walls of history of philosophy. Kant has inspired a large number of theoretical efforts for boosting human autonomy and emancipation from a manifold slavery, but scholars have rarely reviewed the shortcomings that this thinker shows as he deals with the boundaries of citizenship or the rights of worse-off people.

This matter of fact, which represents a source of contradictions, led the gathered authors to dissect the reasons that prevent Kant to support more audacious positions in the social and political field. Most of the positions defended by Kant stem and are understandable from his own social context. Yet others appear more puzzling and difficult to explain. Some contributors maintain the actuality of our thinker, while others prefer to highlight the "dark side" of his republicanism. Yet all authors are con-

scious that they face a sound theory of political freedom and statehood, which raises key questions to hold the burden of our times.

May 2015

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1

Kant on Citizenship, Society, and Redistributive Justice

Susan Meld Shell

Scholars have long been divided on the redistributive implications of Kant's theory of justice. On the one hand, there is a prominent "libertarian" reading (including that of von Humboldt, Hayek and Nozick, among others), according to which the function of the state is mainly to defend and maintain private market outcomes. On the other hand, Kant's work has also inspired, almost from its inception, a more "socially democratic" reading (such as that of Fichte and Hermann Cohen). I will argue that both readings ignore Kant's actual justification of the state's duty to tax the wealthy to relieve the poor: namely, the "end," on the part of the "general will of the people," to "unite into a society that is to maintain itself perpetually" [6: 326]. In what follows, I will attempt to spell

References to Kant's works are given by the volume and page number in the Academy edition of Kant's writings.

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out the meaning of this phrase, with a view to providing an alternative (limited) defense of contemporary liberal-democratic welfare policies. I will also consider the larger question of what, according to Kant, it means to be a full-fledged member of the political community: that is, an "active citizen" as distinguished from a mere, if still vitally necessary, "participant," and what, if anything, governments should do to facilitate such membership.

1.1 Kant on Redistributive Justice: Current Approaches

Current approaches to Kant on distributive justice roughly divide between libertarian "minimalism" (with or without insistence on a safety net) and some version of state-welfarism. Although the former was until recently the dominant view (at least going by the not-too-distant past[1]) state-welfarist approaches have recently become increasingly popular. These approaches divide, roughly, between those that derive a right or duty on the part of the state to make provision for the poor from some version of the duty of beneficence[2] and those, increasingly influential, that derive that right or duty from a citizen's innate right to external freedom understood as independence from the arbitrary will (Willkuer) of others.[3]

Additionally, scholars from both minimalist and welfarist camps have found reasons to contest a distinction on Kant's part, with potential distributive implications, between active and passive citizenship: the former group because that distinction seems inconsistent with the formalistic account of equal liberty they favor, and the latter because allowance for the category of passive citizenship seems inconsistent with the independence to which citizens are innately entitled.[4] As I will argue below, both interpretations miss something essential in Kant's own treatment of the

[1] See, for example, Nozick (1974), Murphy (1994), Hayek (1969) and, with some qualification, Lebar (1999), Kersting (1992), and Byrd and Hruschka (2012).

[2] See, for example, O'Neill (2013) [in Global Ethics: Seminal Essays, 139–154]; and Rosen.

[3] See, for example, Weinrib (2003), Ripstein (2009), cf. Holtman (2004). For a thorough and insightful discussion of the recent literature on issues of redistribution in Kant, see Baiasu (2014).

[4] See, for example, Varden (2006), Walla.

twin issues of redistribution and citizenship. That conclusion is supported both by a careful reading of the few passages in which Kant discusses these themes directly and in consideration of the broader implications of his understanding of public right both in the ideal case and with a view to its empirical actualization.

1.2 Relevant Kantian Texts

Supporters of the minimalist view can find apparent corroboration for their reading in a number of texts, including a series of passages from the essay *Theory and Practice* [1793], which stress the juridical irrelevance of material inequality as such, along with all other considerations pertaining to the actual happiness of citizens.

> The whole concept of an external right [Rechts] is derived entirely from the concept of *freedom* in the mutual external relationships of human beings, and has nothing to do with the end which all men have by nature (i.e. the aim of achieving happiness) or with the recognised means of attaining this end. And thus the latter end must on no account interfere as a determinant with the laws governing external right. *Right* is the restriction of each individual's freedom so that it harmonizes with the freedom of everyone else (in so far as this is possible within the terms of a general law). And *public right* is the distinctive quality of the *external laws* which make this constant harmony possible. Since every restriction of freedom through the arbitrary will of another party is termed *coercion,* it follows that a civil constitution is a relationship among free men who are subject to coercive laws, while they retain their freedom within the general union with their fellows. Such is the requirement of pure reason, which legislates a *priori,* regardless of all empirical ends (which can all be summed up under the general heading of happiness). Men have different views on the empirical end of happiness and what it consists of, so that as far as happiness is concerned, their will cannot be brought under any [74] common principle nor thus under any external law harmonising with the freedom of everyone. [8: 289–290]

It would seem to follow that "freedom," "equality" and "independence" that are constitutive of the concept of citizenship have no necessary relation to distributive issues as such. Juridical equality, as Kant here insists, is quite consistent with the greatest degree and kind of material inequality, be it physical or mental:

> This uniform equality of human beings as subjects of a state is … perfectly consistent with the utmost inequality of the mass in the degree of its possessions, whether these take the form of physical or mental superiority over others, or of fortuitous external property and of particular rights (of which there may be many) with respect to others. Thus the welfare of the one depends very much on the will of the other (the poor depending on the rich), the one must obey the other (as the child its parents or the wife her husband), the one serves (the laborer) while the other pays, etc. Nevertheless, they are all equal as subjects *before the law,* which, as the pronouncement of the general will, can only be single in form, and which concerns the form of right and not the material or object in relation to which I possess rights. [8: 291–292]

The anti-redistributivist tenor of these remarks is echoed in the Introduction to Kant's later, and arguably more definitive, *Doctrine of Right* [1797], which defines right as an "external" relation among wills (Willkueren), a relation that not only entirely abstracts from the matter of the will (or the end each has in view) but also ignores mere "needs" or "wishes" (i.e., desires not accompanied by consciousness of the means (Vermoegen) to bring about their object) [6: 230; 213]. The minimalist reading finds further apparent support in the richly elaborated section on "private right." According to that account, external property, whether acquired originally (i.e., where there is no previous owner) or through voluntary exchange, cannot be rightfully taken away or otherwise made use of without the owner's consent, however great the need of others.[5] Kant's accompanying systematic treatment of private right in all its possible conceptual permutations gives added weight to the presumption that

[5] This is not to say that someone who uses them in the state of nature, in which all acquired property is merely "provisional," necessarily does their owner a "wrong." The contentious question of how to understand the force and limits of "provisional" ownership cannot detain us here.

market outcomes are intrinsically legitimate, and that any argument for redistributive adjustment would bear a very heavy justificatory burden. That impression is seemingly confirmed by Kant's later claim, in introducing the notion of "public right," that the laws regarding "mine and thine" are "formally the same," whether one is speaking of civil society or of the state of nature:

> If one would not want [wollte] to recognize any acquisition as rightful [rechtlich] even provisionally prior to entering into the civil condition, the civil condition itself would be impossible. For according to their form, the laws regarding mine and thine in the state of nature contain the very same thing they prescribe in the civil condition insofar as these are thought according to pure concepts of reason: only that in the latter case the conditions are stated under which these can arrive at execution [Ausuebung] (in conformity with distributive justice).—Thus if external mine and thine were not given even *provisionally* the state of nature, there would also be given no duty of right concerning it, and hence no command to exit from it. [6: 312–313]

At the same time, Kant himself is quite specific about the positive authorization of the state to tax the rich for the relief of the impoverished, suggesting that a minimalist reading that wishes to remain true to Kant's text must, at least, allow for the provision of a "safety net" for those unable to provide for their most immediate needs:

> To the supreme commander there belongs *indirectly*, i.e., as taking over the duty of the people, the right to impose taxes on the people for its (the people's) own preservation, to wit: *institutions for the poor*, *foundling homes* and *church organizations* usually called charitable or pious institutions. [6: 325–326]

As Kant proceeds to explain:

> The general will of the people [allgemeine Volkswille] has united itself … into a society [Gesellschaft] which should maintain itself perpetually, and has to that end subjected itself to inner state authority in order to maintain those members of this society who are not able to maintain themselves [die

> es selbst nicht vermoegen]. On a state level [Von Staatswegen], therefore, government is justified in necessitating those with means [die Vermoegenden] to provide the means [Mittel] of sustenance to those who are unable to provide for their most necessary natural needs: because the existence [Existenz] of those with means is at the same time, as an act of submission, under the protection and provision of the commonwealth that is necessary to their [own] existence [Dasein], through which they have made themselves obliged to contribute what is theirs to maintaining their fellow citizens, on which obligation the state now grounds its right. [6: 326]

These terse and syntactically complex passage has lent itself to a variety of interpretations; some read what Kant here calls the "duty of the people" as one of benevolence, which the state subsequently adopts;[6] others extract from it a(n unenforceable) right to sustenance grounded in the general will by which the state is originally constituted, and in which individuals renounce their right to make use at libitem to objects external to their own bodies in exchange for state provision for their bare existence;[7] still others take it as an argument for a safety net based on the state's requirements for its own survival.[8]

Taken literally, however—or so I will argue—the passage yields a series of claims that do not strictly conform to any of the now standard interpretations.

1. The "duty of the people" here at issue is not a duty of benevolence but, as Kant immediately goes on to explain, one arising from the juridically constitutive act itself, and hence a duty of right rather than (mere) ethics.
2. This duty does not derive from the supposed right of those in need to state support (as is sometimes urged), but on the collective "end" intended by the people's general will in submitting itself to state authority.

[6] See, for example, O'Neill (2013) and Rosen (1993).

[7] See, for example, Weinrib (2003) and Ripstein (2009).

[8] See Lebar (1999).

3. The end here at issue is not the ongoing existence of the *state* (which was the subject of the preceeding section "B" [6: 323–325]), but (that of) an "ever enduring" *society*, which differs from the state, as Kant earlier makes clear when he takes issue with Achenwall on just this point [6: 242; 306].

As to the precise difference between the civil and the social union (or, alternatively expressed, the merely *social* dimension of that civil union) Kant offers the following clarifying remarks: a social state, which can also be called "artificial," remains "a state of nature" so long as law generally and distributive justice in particular are lacking.[9] The relevant contrast is thus not between the state of nature and that of society (however artificial) but between the state of nature and the civil union or juridical condition. Social unions can be compatible with rights (gesetzmaessig) even in a state of nature (as is the case with spousal, parental and domestic societies in general) [6: 306]. Such rights-compatible societies are, however, specifically distinguished from civil unions in at least the following two ways: (1) unlike the civil union, there is no duty to enter a (private) society (like the family) [6: 306] and (2) unlike the civil union, which involves relations of subordination between superior and inferior, society is a partnership involving relations of coordination among equals. Thus:

> The civil union (unio civilis) cannot well be called a *society* [Gesellschaft]; because between the *commander* (imperans) and the *subject* (subditus) there is no partnership (Mitgenossenschaft). They are not social fellows [Gesellen][10]; rather, one is *subordinated to*, not *coordinated with*, the other, and being co-ordinated with one another must regard themselves as equals inasmuch as they stand under the same common laws. It is thus less the case that this union [Verein] is a society than that makes one. [6: 306–307]

[9] In distinguishing between the civil and the social in this way, Kant *may* have had in mind a similar distinction drawn by Abbe Sieyes, with whose work Kant seems to have been generally familiar. On the relation between Kant and Sieyes, see below.

[10] *Geselle* generally means "companion" or "comrade"; "Handwerkgeselle" is a technical term for "journeyman." (Kant himself uses *Geselle* to mean "journeyman" at [6: 314].)

It seems reasonable to conclude that unlike private societies (such as the family), the public society here at issue is a creature of the state, not merely in the sense of depending upon the state for its maintenance and defense, but also in owing its existence to the self-constitutive juridical act by which the state itself is formed [6: 314; 315–316; cf. 320n].

Political society in the sense at issue in section "C" (on the "police power") is, then, that dimension of the civil union whose constituents participate not as co-legislative citizens or "members" (Glied) of the "commonwealth" (gemeinen Wesen) but as "subjects" who are equal to one another in their common submission to civic law (or to the head of state as their "commander") [6: 314]. It is on this plane that those citizens he earlier described as "passive" (a topic which will be taken up again below) participate as equal "members" of "society"—the natural or quasi-natural matrix, one might say, absent which the state as form would lack the matter necessary to its own ongoing this-worldly existence. Such a society, as one might surmise, is a necessary concession to our status as embodied rational beings who must both produce and reproduce the natural conditions of their own ongoing existence, both individual and collective, if they are to carry out the end intended by the people's general will: namely the people's own existence as an ever-enduring society.

Read in this light, the duty of the people is two-fold: at once individual and collective, arising from a shared "intention" to form a society, along with the accompanying "Akt" by which each is reborn, so to speak, as a citizen [6: 343], owing his/her existence to the protection and provision of the commonwealth. As member of the general will, in other words, each wills his *own* existence as citizen only insofar as he also, and equally, wills the civic existence of every other member of the people.

In sum: the duty of the people that is taken over by the state and that authorizes the state to impose coercive taxes on those with means is *not* a duty of beneficence (an *ethical* duty, i.e., as such, unenforceable) but one of right. And the immediate *end* of the state action thus authorized is neither the welfare of the people (which would be paternalism) nor the state's *own* preservation (as in Kant's earlier discussion of the state in its capacity as "supreme proprietor" [6: 323–325]), but the preservation of "society." Society, in this sense, is both a creature of the state (unlike

wholly private societies such as families) and its necessary complement, for reasons that will be further explored below.

That the state's authorization to tax the wealthy to provide for the needy is explicitly associated—in the only passage that directly addresses the issue of redistribution—with the ongoing preservation of society as such calls into question some recent efforts to ground Kant's justification for such policies in the individual's innate right to independence from the individual wills of others, an independence essentially threatened, according to proponents of that argument, by a state of material want.[11] Their argument is rendered still more doubtful by Kant's urging, in the passage that immediately follows, that redistributive policies be framed so as to discourage those relieved from becoming "lazy" or otherwise unjustly imposing on the people generally:

> It may be asked whether provision for the poor ought to be administered out of *current contributions*—and this by direct assessment rather than by begging, which is closely akin to robbery—so that every age should maintain its own, or whether this were better done gradually by means of *permanent funds* and charitable institutions, such as widows' homes, hospitals, etc.—The former arrangement must be held as the only one that is conformable to the right of the state, from which no one who has to live can withdraw: for (unlike pious institutions) it does not, even if the number of the poor grows, become a means of acquisition [Erwerbmittel] for lazy human beings, and thus become through the government an unjust burden on the people. [6: 326]

Kant's stated concern in the above passage is not with assuring the independence of the poor (as might be anticipated on the basis of the

[11] A good deal more would have to be said to meet Weinrib/Ripstein argument, which has many powerful features. On the face of things, however, their approach comes perilously close to the argument Kant explicitly rejects with respect to capital punishment; namely that individuals could not rationally consent to join a juridical community if it meant consenting to the loss of one's own life [6: 335]. Kant does speak elsewhere of the claim of the desperately needy arising from their status as human beings (Ref. 8000) or, alternatively, as "citizens of the world," that is, ship wreck survivors or others who unwillingly arrive on foreign shores. That the rights of such survivors include only temporary food and shelter, rather than a right to settle, further suggest that the duty to relieve that is at issue at [6: 326], a duty specifically attached to ongoing existence of a particular people, rests on grounds other than the innate right of humanity as such.

Weinrib/Ripstein reading) but in preventing lazy individuals for taking unjust advantage of the people as a whole.[12]

Still, if neither the argument from the duty of beneficence nor the argument from the innate right to independence seems to do full justice to Kant's actual claims, Kant's own argument is not stated with all the clarity that one might wish: the precise relation between the specified end, namely an ever-enduring society (or, alternatively, people), and the means, namely provision through taxation of the wealthy for support of those unable to satisfy their most basic natural needs, remains obscure. If the end is merely the preservation of society in general, does the duty of the people apply to *each* and *every* needy person or is it merely enough to ensure the perpetuation of society?[13] And how is this end to be weighted against other juridical goals, such as maintaining the state?

At one level, what Kant means by the "preservation of the people" [6: 325–326] might seem obvious enough: without a strong and healthy population, the state cannot perform its essential functions of assuring to each what is his/hers.[14] The state's legitimate interest in a maintaining a large and healthy population is, indeed, mentioned elsewhere in the *Rechtslehre*, for example, in Kant's treatment of punishment and clemency, where the need to preserve the population (Volksmenge) is enough to modify a demand for capital punishment that would otherwise be categorical [6: 334].

Still, that more is intended by the term "society" than the population in a merely natural sense is suggested even there: Kant's stated concern is less with the depletion of able bodies than with the morally dulling

[12] Kant's only other published treatment of redistributive relief of the needy among a people occurs in the appendix, in a section entitled "On the right of the state regarding *perpetual* foundations for its subjects." Kant there defends the right of the state to honor the spirit, rather than the letter, of the testator's will where better means have been discovered for carrying out the testator's intentions than those originally specified. Kant's example—giving the poor cash and thereby caring for them "better and more cheaply" than by housing them in expensive institutions—values their independence, at least for Kant's immediate purposes, less as desirable in itself than as a more efficient means of "preserving" for the people what is theirs. [6: 367] The intrinsic value of giving the poor as much personal independence as possible is taken up below.

[13] Sanchez also makes this point.

[14] I here take issue with Ripstein's treatment of this argument as an improperly instrumentalist one: all state functions that are necessary to the execution of right, given our human condition as embodied rational beings, is "instrumentalist" in this sense.

effect that would be produced the spectacle of massive slaughter, however fitting from a strictly punitive perspective.[15] And the example is itself presented as one of those rare "cases of necessity" [6: 334] in which immediate, seemingly empirical requirements momentarily override the strict demands of justice.

To better appreciate what Kant means by the preservation of society in the sense that is here juridically most pertinent—the sort of society, in other words, that derives, directly and necessarily, from the people's general will and gives rise, in turn, to their duty to preserve the needy [6: 326]—it proves helpful to examine his discussion of citizenship. For, as I will argue, it is in Kant's treatment of the contrast between civil persons in their capacity as co-legislative citizens and (civil) persons in their capacity as subjects that the contours of society, and with it, the function and limits of economic redistribution, emerge most clearly.

1.3 Kant's Dual Account of Citizenship

One of Kant's most disturbing juridical claims, for modern readers, lies in his distinction between active and passive citizens, only the former of whom may vote or otherwise actively participate in the management of state affairs. Kant's derivation of the state's law-giving authority (Gewalt) from the united will of all the people [6: 313], and related identification of the "essence" of citizenship with law-giving [6: 314], makes that distinction all the more puzzling.

That puzzlement is partly allayed by taking into account the political/historical context, and—in particular—the fact that Kant's categories of "active" and "passive" citizen are lifted almost verbatim from the French Constitution of 1791, following the recommendations of Abbe Sieyes. In adopting these categories—as Kant's contemporary audience would surely have recognized—Kant was also laying down a political marker, in favor of the French constitutional moderates and against radicals like

[15] Hence the appropriateness of the alternative proposed by Kant: exile to the provinces (within the state's territorial jurisdiction), a solution that would hardly suit was the main point of avoiding mass, albeit deserved, executions, that of sustaining a large and healthy home population.

Robespierre who was closely identified with the cause of universal suffrage. To call for universal suffrage, in such a context, would be close to endorsement of the terror that had quickly followed Robespierre's rise.

Sieyes's recommendations, originally penned in 1789, and subsequently adopted by the National Assembly, had called for a graduated civic status, ascending from that of "passive" citizens, who were to enjoy protection of life, liberty, and property to that of "active" citizens who were also to be granted increasing "political rights" corresponding to their wealth and other productive contributions to "society."[16] The effectual threshold of active citizenship adopted by the National Assembly was payment of a tax equivalent to three days' labor.

To be sure, Kant's own treatment of active and passive citizenship diverges from French practice and/or the recommendations of Sieyes, in a number of important ways. First: whereas the National Assembly, following Sieyes, had made the right to vote conditional upon possession of a degree of taxable (productively derived) wealth, Kant rests that right, more formally and abstractly, on what he calls "self-subsistence" (Selbststaendigkeit).[17] Second: whereas Sieyes had defined the "nation"

[16] According to Abbe Siéyès, "All inhabitants could enjoy in it the rights of *passive* citizens; all have the right to the protection of their person, of their property, of their liberty, etc. But all do not have the right to play an active role in the formation of public authorities; all are not *active* citizens. Women (at least at the present time), children, foreigners, and those others who contribute nothing to sustaining the public establishment should not be allowed to influence public life actively. Everyone is entitled to enjoy the advantages of society, but only those who contribute to the public establishment are true stockholders (*actionnaires*) of the great social enterprise. They alone are truly active citizens, true members of the association" (Siéyès 1789, 193–194).

[17] When Kant's speaks of the innate right to "independence" from the elective wills of others, he uses "Unabhaengigkeit," rather than "Selbstaendigkeit," a term he here exclusively reserves for citizenship in the "active" sense. (Cf., however, *Vorarbeiten* [19: 351]; and *Theory and Practice* [8: 295], where Kant equates Selbstandigkeit with being sui iuris.) To my knowledge, none of the standard interpretations take note of the distinction between these two terms; indeed, most if not all treat them as equivalent—as reflected in the standard translation of both as "independence." I have here chosen to translate Selbstaendigkeit, more literally, as "self-subsistence," and Kant, indeed, here explicitly links the term with "substance" as distinguished from "inherence" (as the manner of existence of merely passive citizens) [6: 314]. In *Theory and Practice*, Kant presents *sibisufficientia* as the Latin equivalent of "Selbstaendigkeit" [8: 294]. (In his 1891 translation of the *Doctrine of Right*, W. Hastie suggests "self-dependence.") Curiously, in *Perpetual Peace*, Kant replaces the formula "liberty, equality, self-subsistence," which figures both in *Theory and Practice* and in the *Rechtslehre*, with "freedom, dependence, and equality" [8: 349–350]. On the meaning of "Selbstaendigkeit," see the helpful treatment by C. Dierksmeier, "Kant on 'Selbstaendigkeit.'" Cf. the related "Staendigkeit," meaning "constancy," "steadfastness" or "resolution." (The term Selbstaendigkeit

as a "society" or "body of associates living under common laws and represented by the same legislative assembly," Kant, as we earlier saw, specifically distinguishes the people qua "society" from the commonwealth (gemeinen Wesen), or state, by which that society is, as Kant puts it, "made" [6: 306–307]. Finally: whereas Sieyes includes within the "nation" only members of the productive class, or "third estate" (as distinguished from the non-productive first and second estates—that is, the clergy and nobility—or anyone laying claim to exceptional political privilege), Kant includes all willing to join in constituting a people.

The essential attributes of a citizen, according to Kant, are (1) "freedom" in the sense of obeying no law other than one to which one has consented; (2) "equality" in the sense of regarding no one among the people as superior to oneself in moral capacity to bind others; and (3) "self-reliance" or "self-subsistence" in the sense of owing one's preservation to one's own "rights" and "forces" as member of the commonwealth.[18]

> The members of such a society (societas civilis), i.e., a state, united for giving law, are called *citizens* (cives), and the rightful attributes of a citizen, inseparable from his essence [Wesen] (as such) are lawful *freedom*, obeying no other law than one to which he has given his consent [Beistimmung];

later plays a major role in both Hegel's dialectic of master and slave and in Heidegger's *Being and Time*.)

[18] Cf. *Theory and Practice* [8: 290], which links the "civil condition" to the three principles of: (1) the freedom of every member of a society as a human being; (2) his equality with every other as a subject; and (3) the independence of each member of the commonwealth as a citizen; in *Toward Eternal Peace*, the civil condition is described, instead, in terms of: (1) principles (Prinzipien) of the freedom of the members of a society as individuals; (2) principles (Grundsaetzen) of the dependence (Abhaengigkeit) of all on a common legislation as subjects; and (3) the law of their equality as citizens [8: 349–350]. In the *Metaphysics of Morals*, Kant includes all three principles as attributes of citizenship (rather than merely independence (as in *Theory and Practice*) or lawful equality (as in *Toward Eternal Peace*); he also replaces "dependence," returning to the term for self-sufficiency or independence (Selbstsaendigkeit) that he had used in *Theory and Practice* to describe the citizen tout court. That the more common German word for "independence" is *Unabhaengigkeit* suggests that "self-sufficiency" or "self-subsistence" may be the more accurate translation, a suggestion further supported by the argument below. As to the significance of these changes, it must suffice here to note that Kant's restoration, in the *Rechtslehre*, of "self-sufficiency" to its former state of juridical importance is accompanied by an expansion of the concept of a citizen to include qualities previously reserved to members of civil society as human beings and subjects. This newly integrative understanding of the juridical personhood goes together with a new verbal link between the "essence" (Wesen) of the citizen and full-fledged participation in the common wealth (or, literally, the common essence) (gemeinen Wesen).

> civil *equality*, recognizing no one superior among the *people* as having the moral power [Vermoegen] to juridically bind him in a way that he could not in turn bind the other; and third, the attribute of civil *self-subsistence* [Selbstaendigkeit], of being able to thank for his existence and maintenance not the Willkuer of another among the people, but his own rights and forces as member of the commonwealth [gemeinen Wesen], it following from this his civil personality, not needing to be represented by another in matters concerning rights. [6: 314]

Kant's verbal linkage between the "essence" (Wesen) of the citizen and the commonwealth as, literally, the "common essence" (gemeinen Wesen) drives home the integrative character of civic Selbstaendigkeit. The citizen is self-subsistent not in an autarkical sense but only in relation to and as integral member of the whole.

That all members of the people are not "self-subsistent" in this sense "makes necessary" a distinction, however, between active and passive citizens, only the former of whom may vote or otherwise actively participate in managing affairs of state.

The qualification to be a citizen is constituted only by the capacity (Faehigkeit) for voting (Stimmgebung); this, however, presupposes the self-sufficiency of one among the people who would be not only a part (Theil) of the commonwealth but also a member (Glied) of it, that is to say, an acting (handelnder) part in community with others from his own Willkuer. The latter quality, however, makes necessary the distinction of *active* (activen) from *passive* citizens, even though the concept of the latter seems to stand in contradiction with that of a citizen in general. [6: 314][19]

Kant is sensitive to the difficulty, bordering on contradiction, that this "necessity" poses, given his essential definition of a citizen as a "law-giving" member of the "state" understood as a *societas civilis* [6: 313–314]. Kant responds with a series of clarifying examples of those who are only fit to be passive citizens:

[19] That Kant only treats active and passive citizenship in this and the following *indented* paragraphs suggests that the entire discussion may be a concession to the empirical human condition rather than being necessary in a strictly a priori sense [6: 205–206]. Kant's stated intention at [6: 205–206] to use indentation in such contexts does not seem to have been carried consistently enough to allow one to reach a firm conclusion on this point.

> The journeyman [Geselle] of a merchant or a craftsman; the domestic servant [Dienstbote] (not one who stands in service [Dienste] to the state); the minor (natural or civil); all women, and generally anyone who is compelled [genoetigigt] to maintain his existence (nurture and protection) not through his own operation [Betrieb] but according to the arrangements [Befuegung] of another (other than the state) lacks civil personality, and his existence is so to speak only inherence.—The woodcutter whom I employ in my yard, the blacksmith in India who goes house to house with iron with his hammer, anvil and bellows to work with iron, in comparison with the European carpenter or blacksmith who can place the products of his labor publicly up for sale as wares; the house tutor in comparison with the schoolteacher; the tenant farmer in comparison with the lease-hold farmer, and so forth, are mere handy-men [Handlanger] of the commonwealth, because they must be under the direction or protection of other individuals and thus possess no civil self-subsistence. [6:314]

What each of these figures has in common is a shared need to be "under the direction or protection" of another. Whereas Sieyes had considered such a condition akin to slavery,[20] Kant himself *distinguishes* slavery, which is a fundamental violation of the innate right of each to be his own master (*sui iuris*) [6: 237–238], from dependence in the sense here intended, a dependence entirely consistent with that innate right, according to Kant, so long as it is based either on one's natural status as a minor (as with children), or arrangements arising from one's own choice, and limited by the rights of humanity in one's own person [6: 276–284; 285].[21] (An additional, final proviso, namely that nothing stand in the

[20] Sieyès, *Arch Parl.*, 27 August 1789, tome VIII, p. 503. Ripstein's view, in this regard, is closer to Sieyes, according to the argument I am presenting here, than to Kant. Cf. Ripstein, *Force and Freedom*, 221. "Poverty, as Kant conceives it, is systematic: a person cannot use his or her own body, or even so much as occupy space, without the permission of another. The problem is not that some particular purpose depends on the choices of others, but that the pursuit of any purpose does. If all purposiveness depends on the grace of others, the dependent person is in the juridical position of a slave or serf." On my reading, by way of contrast, no one, even in the direst poverty, is entirely without the capacity to act purposively, that is, to use his or her faculties (Vermoegen) as he or she deems "right and good" without "depending in this" on the Willkuer of another [6: 312]. If one cannot move in space without the permission of another, one can at least think as one chooses. This may seem a very limited sort of action, and indeed it is, but the conceptual point remains valid.

[21] Kant equates being one's own master with being an active citizen in *Theory and Practice*, but not in the *Doctrine of Right*, which I am treating as the more definitive argument.

way of passive citizens "working their way up" to active status, will be taken up below [6: 315]). Indeed, it is only through due recognition of this innate right to freedom and equality—a right that those who enter into such relations of dependence are incapable of forfeiting—that the state is possible at all. Thus:

> This dependence on the will of another and inequality [implicit in passive citizenship] is… in no way opposed to the freedom and equality [of such citizens] as human beings who together constitute a people; on the contrary, it is only on conformity to the conditions of [this freedom and equality] that this people can constitute a state and enter into a civil constitution. In this constitution, however, to have the right to vote [Stimmgebung], i.e., to be a citizen of the state and not merely an associate [Staatsgenosse], for this all do not qualify with equal right. For from their right to demand of all others that they be treated/handled [behandelt] according to natural laws of freedom and equality as passive parts [Theil] of the state there does not follow the right to handle themselves [behandeln] as active members [Glieder] of the state itself, to organize [organisiren] or cooperate [mitzuwirken] in the introduction of specific laws; it only follows that whatever positive laws the state citizens might vote for not be opposed to [zuwider sein] the natural laws of freedom and the corresponding equality of all among the people: namely, being able to work one's way up [empor arbeiten] from this passive condition to the active one. [6: 315]

Kant's own distinction between active and passive citizenship might thus be put as follows: on the one hand, the passive citizen, like all citizens, participates in that general will by which all are united to give a law in which "each wills for all and all for each," a law that is necessarily just in accordance with the principle that "no one can do himself an injustice." On the other hand, the "organized" authority (Gewalt) thereby authorized, on through which subsequent positive laws are to be introduced, is to be conceived, on Kant's view, as a separate community in its own right.[22] The members of community, unlike the general members of society at large, have what he here calls "civil personality" (buergerli-

[22] So conceived, this subsidiary law-giving authority represents one of the three Gewalten (along with the executive commander and the courts) included in the "concept" of the state. The people play another active role: namely serving on juries—a demand, on Kant's part, wholly at odds with

che Personalitaet) [6: 314], as distinguished from the "moral personality," both internal and external, that no human being is capable of giving up [6: 223].[23]

In sum: qua *citizen*, the passive citizen is a full-fledged member of the people and with it the general will by which the people both constitute the state and subject themselves to the latter's three-fold authority (Gewalt): legislative, executive and judicial [6: 315–316]. Qua *passive* citizen, however, he is subject to the legislative authority to which he has ideally given his consent as member of the general will, without, unlike the active citizen, playing an ongoing role in organizing or otherwise "cooperating" in "the introduction of specific laws" [6: 314–315].

1.4 Citizenship and Redistributive Justice

If this is indeed the right way to understand Kant's distinction between active and passive citizenship, how might it bear on issues of redistributive justice and, in particular, the duty/authorization to compel those with means to provide for those in need? And in what way, if at all, might the requirement that that passive citizens "be able to work their way up" to active citizenship (if the category of passive citizenship is to remain consistent with citizen's innate right to freedom and equality) translate into the duty or authorization of the state to actively enable those in a position of dependence to thus work their way up?

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current Prussian practice. Trial by jury, long customary in England, was also adopted the French Constitution of 1793.

[23] A "person" is a subject "whose actions may be imputed to him." "Moral personality" is the freedom of a rational being under moral laws," from which it follows, Kant says, that "a person is subject to no laws other than those he gives himself (either alone or at least along with others)" [6: 223]. By the former sort of law-giving, Kant would seem to have in mind internal legislation, by the latter (i.e., lawgiving along with others), he would seem to have in mind law-giving through a general will, which binds externally even if internal (moral) self-legislation is lacking. Somewhat puzzlingly, Kant also treats condemned criminals as lacking in "civil" personality (cf. Merle). There is, however, this crucial difference: unlike passive citizens, in whom civil personality lies, as it were, dormant and ready to actualized as will and opportunity permit, condemned criminals have themselves actively "forfeited" their civil personality by their own deed; in keeping with this decisive loss, they may be used by the state in any way, including being put to death, that does not make humanity itself into "something abominable" (e.g., no torture) [6: 331–333].

One answer that does not seem satisfactory, at least if one wishes to remain true to Kant's own text, is the recent and increasingly influential view that dependence *as such* represents a violation of the innate right to independence from the will of others, a violation that the state is accordingly obliged to set right by vigorous redistributive intervention. For, as we have seen, by Kant's own lights there is nothing intrinsically wrong (contrary to right) with a condition of economic or personal dependence, so long as it arises from one's own choice and/or (temporary) natural incapacity, such as youth or imbecility.[24]

I would suggest, instead, the following two-tiered approach. The **first** stems from the duty of the people to provide for the most basic natural needs of those who, through no fault of their own,[25] cannot provide for themselves, either "self-sufficiently" (in the manner of active citizens) or through other voluntary arrangements (e.g., by temporarily "hiring out" to another the "use of [their own] one's forces" [6: 285; 330]). Such provision might be likened to other policies with redistributive implications, policies that Kant might endorse on similar grounds. Given flexible and rising standards of what it means to have one's basic natural needs unmet, such provision might, indeed, prove quite expansive, including access to adequate health care services, decent housing, nutritional support, and so on, so long as care were taken that such provision not become a "means of acquisition" for the lazy and thereby unjustly burden the people as a whole.

The **second** basis for redistributive policies stems from the requirement that nothing prevent passive citizens from "working their way up" to active status. On a "minimalist" reading, to be sure, this would demand no more than that there be no legal bars to such advancement (of a sort that still existed in contemporary Prussia, where serfdom had not yet been completely abolished, and noble status remained necessary for placement in the upper military ranks, as would remain the case until the end of World War I). But that Kant himself had more in mind

[24] The peculiar case of women, about whose status Kant appears to vacillate, cannot be here addressed, for reasons of space. For a fuller treatment, see Shell (2009).

[25] That is, who have not willfully made poverty a "means of acquisition." Kant's own striking example of such no-fault neediness is that of abandoned children, whom the state is to charge the people "with not allowing to perish knowingly" [6: 326–327].

is suggested by his frequent flirtations with the idea of universal state-supported education—a policy that had, in principle if not in practice, been in place in Prussia since the early eighteenth century. His objection to state, as opposed to privately supported education, was based not on the worry that it might unjustly burden taxpayers, but on the likelihood of it resulting, under current political conditions, in popular moral and religious indoctrination inimical to the cause of freedom. That children had a *right* to education—a right directed, in the first instance, against their parents—Kant had no doubt; and it seems reasonable to assume that he would have urged, in cases in which parents could not fulfill this obligation, that the state make it available, either indirectly or directly.

At the same time, the *content* of the education that Kant favored (as described in his *Lectures on Pedagogy*) suggests the limits he would probably have placed on positive state efforts to help citizens advance from passive to active status: namely that such policies not unwittingly subvert a citizen's *own* efforts to become able to maintain himself through his own forces. It here becomes especially important to distinguish Selbstaendigkeit in the sense of being self-supporting from "independence" as understood by contemporary scholars (following the work of Philip Pettit, Quentin Skinner and others). Whereas "independence" (the term commonly used to translate "Selbstaendigkeit") places the emphasis, especially if understood in Pettit's sense, on freedom *from* domination by another's will, Kant himself places the emphasis on the positive ability to be "self-supporting" [9: 486; 491–492], that is, to rationally manage one's own affairs on the basis of one's own resources (Vermoegen), whether material or mental, as a member of the commonwealth.

But "to be one's own master" in a juridical sense is *not* the same, in Kant's understanding, as self-subsistence. Savages, for example, may enjoy independence in the sense of freedom from domination by another will (and are properly sui iuis) and yet manifestly lack the qualities necessary for Selbstaedigkeit as Kant himself defines it. To be self-subsistent in this sense is, in Kant's own words, to be "an acting [handelnder] part in community with others from [one's] own Willkuer." One who is thus qualified "can thank for his existence and maintenance" his "own rights and forces as member of the commonwealth," rather than depending

another Willkuer, or capacity for choice, in the acquisition and deployment of the means needed for his own support [6: 314; cf. 213].

Such qualities include not only skills and discipline that for which culture and civilization are necessary, but also a certain strength of character that can only be acquired through personal effort, be it (to cite the ideal case) during a properly guided childhood and youth, in the manner sketched in Kant's own *Lectures on Pedagogy*.[26]

Understood in this light, Kant's distinction between active and passive citizenship not only suggests certain necessary limits of any positive policies in support of citizens' ascent from passive to active status; it also sheds light on Kant's argument for the duty of the people, and related authorization of the state, to compel the wealthy to provide for those who are truly needy (i.e., who, through no fault of their own, cannot meet their most basic natural needs). What is juridically pertinent about such a state, on the reading I am urging, is not the immediate threat to life as such, the right to which, as some have claimed, cannot be given up on entering civil society; nor is it the inaccessibility of external means that would have been available in a state of nature in which all acquired property is merely provisional. As Lebar has noted, the means available to individuals for their individual existence and maintenance are likely far greater in a juridical condition than in a state of nature. Nor is it dependence on the Willkuer of others (e.g., to offer one employment), once all the accessible land is taken, contrary to innate right as such; for dependence in this sense is the fate of *any* member of society who does not elect to be a hermit. (The head of General Motors is dependent on the Willkuer of his customers, etc.) If the (alleged) threat to individual independence was indeed the ground of the people's duty to support the needy, one might expect Kant to mention it here, but no such argument appears either here or elsewhere in the text.

The pertinence of that condition of need lies, rather, in its relation to the end and act of the juridically constitutive general will, which unanimously intended the ongoing existence of the people. It is not his own

[26] An additional, heretofore largely unexplored source for Kant's economic model here might be the exchange economy of self-subsistent artisans as outlined in Book Three of Rousseau's *Emile* (albeit with suitable changes in the direction of permitting an ever-growing expansion in the total quantity of "means").

individual existence that each member of the general will must be presumed to have had in view, but his own existence only insofar as it counted neither more nor less than that of others. The duty of the wealthy to those in need is thus one of reciprocity: the wealthy have already enjoyed no less benefit from the protection of the commonwealth than they are now obliged to give. This reciprocal dependence is precisely in keeping with the equality of rich and poor as subject members of "society" in general, as distinguished from "civil society" or the "commonwealth," in whose necessitating authority only those capable of rationally managing their own affairs are fit to actively participate.[27]

A final suggestion: Kant may well have conceived of passive citizenship as a useful form of civil and moral education, at least potentially, particularly for those without access to the sort of ideal youthful education that he favored. This may, indeed, have been true for Kant himself, who served as house tutor until the age of 31, remaining on excellent terms with one of families for the rest of his life. It is arguably by serving in such posts that Kant, himself from a modest artisanal background, acquired the urbanity and other social skills that won him the title "elegant master" when he last began to lecture at the university in 1755. (He would not assume a regular university post for another 15 years.)

Indeed, if, as Kant elsewhere insists, true maturity, both civil and moral, rarely occurs before the age 40, then a prolonged state of civil "journeymanship"[28] may be unavoidable, whatever one's actual material means.

If this suggestion has merit, passive citizenship (in an extended sense) might have its own necessary uses, especially given the imperfect state of education.[29] Abraham Lincoln may have had something similar in mind when he hoped that employees who made up the ranks of what was then called "free labor" might at some point in their lives have the opportunity to work for themselves—at some point, but not immediately.[30]

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[27] That wealth and active citizenship are not identical categories can be illustrated by the example of wealthy minors, whose funds are administered by others.

[28] See note 10 above.

[29] In the *Anthropology* and *Lectures on Pedagogy*, Kant suggests that the "idea of education" has not yet been fully worked out and, indeed, may never be.

[30] See Abraham Lincoln, "Address to the Wisconsin State Agricultural Society: September 30, 1859.

And that aspiration lives on in the dream, not only American, of "being one's own boss," a status not generally thought inconsistent with starting out as an employee under the direction and management of others. I am far from urging that we revert to the sort of limited suffrage embraced by Kant, French moderates like Sieyes, and the Framers of the US Constitution. Still, the remarkably low voting rate among those who lack self-subsistence in a roughly Kantian sense might give one pause. Perhaps this is less deplorable, from a civil and moral point of view, than most liberal democrats today are wont to think. What is crucial, from a Kantian point of view (suitably updated) is that any such state of apprenticeship be genuinely conducive to the acquisition of Selbstaendigkeit, or what might be called civic character, within the limits of the human condition—a condition that necessarily includes relations of dependency (on the part of the young, the very old, and those who, for whatever reason, do not will or want to be an active member of the commonwealth).

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2

The State Looks Down: Some Reassessments of Kant's Appraisal of Citizenship

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We shall start with some general remarks on Kant's vision of citizenship, based mostly on *Common Saying*, and then we shall discuss some passages from Kant's more systematic political work, namely the *Doctrine of Law*. We shall aim to make sense of his distinction between active and passive citizens, and we shall also try to understand what kind of protection passive citizens enjoy and on what normative grounds. In doing so, we shall discuss many topics, including property, life, dignity and, of course, freedom.

In this paper, we would like to discuss some features of Kant's political thinking which seem to be at odds both with our understanding of modern society and with the widespread view of Kant as a philosopher

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defending a liberal vision of inviolable individual rights. We claim that Kant is not at all a liberal thinker, at least in the contemporary meaning of the word, even if he shares some elements that are characteristic of classical liberalism. At the same time, he is not a classical republican, even if he also shares elements from this tradition. His position seems to hold a somehow intermediate position between liberalism and republicanism. This essay claims that, far from being positive, such evidence makes it difficult to accept some liberal conclusions stemming from his metaphysical republican premises.

In order to defend this conclusion, this interpretative essay focuses on what we consider to be inconsistencies in Kant's theory of law, especially with regard to his concept of citizenship and the public power of the state, since some of his key theses on these topics strongly contradict his claim that political agency should be a right open to all people without restriction. In pursuit of this goal, we shall tackle three main issues, corresponding to the three sections of this paper. Firstly, we will consider Kant's appraisal of Sieyès's distinction between active and passive citizens, reviewing the means—public or private—necessary to attaining the status of civil agency according to Kant. Secondly, we shall analyze the role played by law in guaranteeing the livelihood of the *civitas* as a whole and in protecting individual property, drawing some initial conclusions about Kant's alleged liberalism. Finally, we will size up whether cosmopolitanism deeply changes the landscape built up by Kant's notion of legal society or whether republican nation-states remain the epitome of political legitimacy, so that the hoped for international juridical order would not be able to resolve the flaws discovered concerning public right. Our purpose in this last section and more generally in this paper is not to criticize Kant from the point of view of our time, but to highlight some points of his juridical and political system that do not fit with his notion of Enlightenment and with the commitment to the cosmopolitan destiny of the human species.

We shall start with some general remarks on Kant's vision of citizenship, based mostly on *Common Saying*, and then we shall discuss some passages from Kant's more systematic political work, namely the *Doctrine of Law*. We shall aim to make sense of his distinction between active and passive citizens, and we shall also try to understand what kind of

protection passive citizens enjoy and on what normative grounds. In doing so, we shall discuss many topics, including property, life, dignity and, of course, freedom.

2.1 Active and Passive Citizens

As is well known, Kant grounds the civil state on the a priori principles of freedom, equality and independence of each member of the civil community (TP, 8: 290). [1] However, both equality before the law and the freedom to make decisions about one's life are strongly limited by economic dependence, since Kant claims that individuals who are not economically self-sufficient do not have the right to vote and to participate actively in the process of legal decision-making. They are merely passive citizens, who enjoy the protection of the law but do not participate in creating said law; this is reserved for economically self-sufficient individuals, the only ones who can become active citizens. In other words, economic autonomy translates directly into political autonomy.[2] *Nota bene*: we are not referring to the empirical circumstance by which greater economic power normally translates into greater political power. This is, of course, a relevant fact for political theory, but Kant tends to construct his arguments on a metaphysical foundation, even if not always with ultimate coherence and not without occasionally slipping into empirical considerations. So, it is reason itself that necessarily connects economic independence and active citizenship.

[1] All writings of Immanuel Kant are cited by the volume and page number of the Academy Edition. Except when indicated, all translations of Kant's writings are from the Cambridge Edition of the Works of Immanuel Kant. The following abbreviations for Kant's writings are used throughout the chapter: IaG = Idee einer allgemeinen Geschichte in weltbürgerlicher Absicht (Idee for a Universal History with a Cosmopolitan Aim) R = Reflexion (Reflection); Rel = Die Religion innerhalb der Grenzen der blossen Vernunft (Religion within the Bounds of Bare Reason); RL = Rechtslehre (Doctrine of Law); TL = Tugendlehre (Doctrine of Virtue); TP = Über den Gemeinspruch (On the Common Saying); VASF = Vorarbeiten zu Der Streit der Fakultäten (Preliminary Notes for The Constest of Faculties); VAZeF = Vorarbeiten zu Zum ewigen Frieden (Preliminary Notes for On Perpetual Peace); PP = Zum ewigen Frieden (On Perpetual Peace).

[2] One could object that in *Perpetual Peace* (1795) Kant does not defend this position, first exposed in *Common Saying* (1793). However in the *Doctrine of Law* (1797), which represents Kant's major and final political work, the idea reappears, so that we may claim that it mirrors Kant's final position on the topic.

Kant's position on this point deserves to be analyzed more accurately since it will provide us with valuable elements for explaining his reluctance to encourage, for example, legislative intervention in economic issues. Despite the universal scope of the postulate of public right presented in § 42, which declares the constitution of the State to be a duty of reason (therefore a duty for everyone, not just for some individuals), Kant has no problem in distinguishing between "active" and "passive citizens",[3] as in the following excerpt from the *Doctrine of Law*:

> The only qualification for being a citizen is being fit to vote. But being fit to vote presupposes the independence of someone who, as one of the people, wants to be not just a part of the commonwealth but also a member of it, that is, a part of the commonwealth acting from his own choice in community with others. This quality of being independent, however, requires a distinction between *active and passive* citizens, though the concept of a passive citizen seems to contradict the concept of a citizen as such.—The following examples can serve to remove this difficulty: an apprentice in the service of a merchant or artisan; a domestic servant (as distinguished from a civil servant); a minor *(naturaliter vel civiliter);* all women and, in general, anyone whose preservation in existence (his being fed and protected) depends not on his management of his own business but on arrangements made by another (except the state). All these people lack civil personality and their existence is, as it were, only inherence. (RL, § 46, 6: 314)

Let us attempt to draw some conclusions from this excerpt. It states that some human beings are viewed as co-legislators, while others are prevented by their wretched living conditions or by their gender from being considered true members of the commonwealth, and hence from being fit to vote. In *Common Saying*, Kant states that an active citizen should be his own master,[4] because he has to serve none other than the commonwealth. He adds that this condition will be fulfilled only when one has "some property (and any art, craft, fine art, or science can be counted as property) that supports him" (TP, 8: 295). Some Kant scholars try to

[3] See the useful account of this distinction in R. Beiner (2011: 211–214).

[4] Herein we shall use the male pronouns and adjectives when referring to Kant's active citizen, since he thinks of such an individual exclusively as a male adult.

interpret these passages as proof of Kant's opposition to the possible abuse of the voting right of the poorer citizens,[5] who cannot serve two masters, restricted as they are by social and economic forces. Kant would argue that human beings must wait until they are better-off, meanwhile undergoing preparation for the exercise of their freedom, even if this would go against a famous note of the *Religionsschrift* in which he condemns the assumption that it takes time till human beings are ready to use freedom (R, 6: 188).[6] While admitting that Kant is genuinely worried about the possible buying of votes and not about the political ascent of the poor, would not this interpretation be overly charitable? We would like to offer three remarks regarding this question.

First of all, the argument according to which the poor should be excluded from voting out of fear that they would sell their vote is a double-edged argument, since one could just as well use it to exclude the *rich* from voting, on the grounds that they could buy other people's votes. Why should potential sellers be punished instead of potential buyers? Is it because the poor are more numerous? But the real risk is the abuse of power that the *rich* might commit if backed by enough popular support—so, it is the rich who actually represent the real threat to the republican character of the state. Ancient Athens introduced ostracism precisely in order to avoid such a risk and to prevent individual citizens from gaining too much political power, thanks to their fortunes or their popularity.

Secondly, Kant focuses only on formal obstacles to attaining full, active citizenship such as hereditary prerogatives common in aristocratic societies. He claims that such privileges ought to be removed in order to

[5] See as an example of this appraisal Luigi Caranti's excellent chapter, "Politica" in S. Besoli/C. La Rocca/R. Martinelli (2010: 366–367). Caranti argues against Kersting's critique of what the latter considers Kant's bourgeois fear of the broadening of active citizenship (Kersting, 1992: 153). In contrast to this critique, we claim that the point is Kant's lack of consciousness regarding some consequences stemming from the social neutrality of the state more than the challenges for a bourgeois-minded thinker to grasp the very essence of political agency.

[6] The note refers to the case of the bondsmen of a landed proprietor and to the fellowship of a church, but its scope can be extended to the political realm. If Kant had considered a social relation as unfair, he would have denounced it, but his work does not offer hints in this direction.

allow for free competition among social agents[7] and thinks, obviously, that once *aristocratic* hereditary privileges are cut out, human beings, or more accurately *men* as heads of family, will be able to undertake progress toward self-made citizenship. He does not consider that *economic* hereditary privileges also represent a distortion in the competition for social positions, since the scion of the wealthy will have greater access to the better ones, while the children of the poor will probably remain illiterate and obscure (and this is also true of contemporary democracies, as shown by many empirical studies). Kant maintains, rather, that every individual has to struggle for his own life conditions and is responsible for the position he obtains in society. Thus, he replaces blood-based aristocracy with an economic privileged class, nobility with a bourgeois frame of citizenship. Thus, he fails to take into consideration hindrances other than the aristocratic tradition, such as economic inequality. In this sense, one can safely claim that Kant's conception of social advancement falls far short of offering an adequate framework for understanding complex society.[8]

Susan Mendus has brought up a third concern, that the situation of servants and women is not similar, since women cannot escape from their essential dependence and inherence: "Kant tells us that by entering into marriage the woman, unlike the man, renounces her civil independence".[9] Men have to be industrious and to improve their family's social status, but this possibility is not taken into account when it comes to women, even if they refuse to marry.[10] Women are doomed to perform always passive roles according to Kant's model of society and the theory of law shall not hinder this wise will of nature. One could object that this is a contingent

[7] "There can be no innate prerogative of one member of a commonwealth over another as fellow subjects, and no one can bequeath to his descendants the prerogative of the rank which he has within a commonwealth. [The better-off] may not prevent [those worse-off] to raise themselves to like circumstances if their talent, their industry, and their luck make this possible for them" (TP, 8: 293).

[8] Howard Williams has pointed out: "Had capitalist development been more advanced in Germany Kant might have seen that the economic subordination of the wage-worker does not arise from the fact that he performs a service for another person but simply from the fact that he works for a wage and does not sell what he produces. Similarly, he might have seen that what gives the commodity producer the stamp of independence is not just that he works for himself but also that he possesses his own capital" (Williams 1983:149).

[9] See Mendus (1992: 176).

[10] See Beiner (2011: 215).

aspect of Kant's thinking, but we would like to observe, firstly, that not all thinkers of his time shared his extremely negative view of women and, secondly (and more importantly), that the exclusion of women from the circle of the active legal subjects has additional consequences for the resulting legal theory that go well beyond the fact that every time Kant uses the word *Mensch* he means actually *Mann*. What is more, he tends to neglect the wife and mother's rights against her husband, as one can observe in marriage law or in the casuistic questions to paragraph 7 of the *Doctrine of Virtue*, in which the wife has to yield to her husband's lust even when she feels no desire for intercourse (TL, 6: 426).[11] It is surprising that commentators tend to downplay this question when they claim that Kant is a liberal thinker.

For these reasons, it is difficult to assume Kant's concept of civil independence as a meaningful thesis fitting in with our present social context, for Kant has a quite blurred idea about the causes that keep a social agent far from political agency. For instance, he does not attach due importance to the fact that their lack of capital condemns some human beings to enter into unfair relations with other human beings, landowners or stockholders, as Marx will later observe.[12] The State's neutrality in economic matters (including the labor market) is a direct consequence of Kant's system of law but, in an entangled world, where the limits between economy and politics have become faint (if ever they were neat), it is not so clear why the highest legislative power should witness unmoved its own waning. Helga Varden clearly defines the state's neutral role in Kant's political theory in the following passage:

The state is simply the means (the public person) through which private persons act in order to secure and enable rightful interactions, including the enabling of conclusively rightful, domestic private property relations. This also means, however, that in an important sense states are neither rich nor poor. States can have internally unjust economic policies, small tax bases, badly organized economies, be adversely affected by the world

[11] On Kant's views on sex, see Mertens (2014: 330–343).

[12] According to Marx and marxism, it is not that individuals as such are forced to accept unfair contracts; the victim of this imposition is rather the whole group of individuals who own nothing more than their labor force, as opposed to the group of individuals who own the means of production.

economy, and so on, but they cannot be rich or poor in the sense that private persons are rich or poor, since states do not have private property.[13]

Of course, no State did ever represent just a tool through which private persons realize their private ends. Kant recognizes at least that the state might pursue a specific end that might be at odds with certain particular goals but in a classical republican manner he still considers this end to consist of the state's own integrity and safety, as we shall see. In Kant's time, however, states were *economic* actors along with individuals, and even the most rigid economic-liberal theories recognize that the state pursues economic interests of its own (for instance, fostering the growth of Gross National Product (GNP), reducing inflation, etc.). The reduction of the state to a mere tool for individual interests has *always* been either an ideological operation or the result of a naïve view of social reality. On the one hand, it is correct to observe that Kant's declared criticism of colonialist practices[14] clearly mirrors his reluctance to acknowledge that the state has its own economic interests that determine its international political agenda. Actually, he denounces in a rather modern fashion the colonialist practices of major European powers, which he regards as just the counterexample of cosmopolitan hospitality. In this sense, he might have been worried that recognizing the state's economic interests as legitimate might have opened the way to justify colonialism and other forms of state domination of other states or individuals. On the other hand, in Kant's time, all major economic theories (from physiocracy to mercantilism) considered the state in and of itself as a perfectly legitimate economic actor from a domestic perspective, that is, without taking into account an international perspective that could have led to the possible justification of colonialism. Only political thinkers defending a specific political agenda neglected or even denied the fact that the economic and the political spheres are so closely intertwined that it is impossible to say precisely when one gives way to another. The fact that this (voluntary or involuntary) blindness characterizes so many political theories (even in our time) speaks against their capacity to grasp the real world and therefore to be valid theories at all.

[13] Varden (2014: 261).

[14] See Flikschuh and Ypi (2014).

In other words, Kant is worried about individual freedom and about the formal equality of all citizens before the law, but he takes into account that some citizens have more political power than others because of their social and economic status and thinks that any direct attempt by the state to change this situation would represent a violation of the freedom of precisely those individuals who are actually privileged by it, while the freedom and equality of the passive citizens are not so relevant for him. Is that a liberal position? Of course, it has been defended by many liberal thinkers over centuries, as pointed out by Domenico Losurdo among others.[15] However, we are not interested in the petty question of the discrepancy between the ideals professed by some individuals and the way they lived concretely. We are, rather, interested in the potential arguments that could be introduced to support this weird defense of abstract equality and concrete social and legal inequality at the same time. Therefore, we would pose the following question: is Kant a liberal thinker? If not, which kind of freedom does he claim to be the only innate right of man?

2.2 Is Kant a Liberal Thinker?

Since active citizenship and political autonomy depend on economic independence, one would expect that Kant's politics would imply a strong commitment to the improvement of social conditions and material arrangements, so that a larger number of people could progressively become an active part of the civil union as they set a *pactum unionis civilis* (TP, 8: 289). Some commentators[16] have even expressed the idea that Kant's distinction between active and passive citizens is incompatible with his own definition of freedom as the only innate right, since it violates the idea of original equality before the law entailed by this right (RL, 6: 237). Therefore, it should be argued that this distinction is temporary and reflects a social arrangement that is also temporary, even if the state has neither the authority nor the authorization to change it actively by modifying the existing property relations or by redistributing

[15] Losurdo (2011).

[16] For example Maus (1994).

wealth. Instead, Kant demonstrates a clear aversion to state intervention to relieve poverty or the material scarcity of a large part of society. In this sense, he defends a classical liberal position, according to which the state should not intervene in the economic status quo, since this results from private transactions among free individuals. The state's task should be only to create the legal conditions that allow individuals to rise by their own effort above their initial situation of economic and political dependence.

Scholars[17] usually tackle this feature of Kant's state theory as a genuine liberal feature and as a positive one, since the republican state should not represent an *imperium paternale* but an *imperium patrioticum* (TP, 8: 291), which would give citizens complete freedom to seek their happiness via freely chosen paths. Yet, even if we acknowledge that there might be a connection between paternalism and despotism, it is debatable on what grounds Kant bases his rejection of effective state control of economic dynamics. His political theory seems to be generally at odds with the hypothesis that the legislator often has to take measures that contravene, for example, the unfettered freedom of the market. Even if Kant himself hints at the fact that the state has to amend situations of extreme poverty when it seriously endangers the unity of the civil body,[18] he holds the hope that inequality of possession would not damage the equality of human beings before the law—be they rich or poor, man or woman, servant or master (TP, 8: 291). Since only the law can legitimately coerce, Kant seems to neglect the existence of a likewise violent *social coercion* that keeps a large number of people far from political activity:

> [A human being] can be considered happy […] provided he is aware that, if he does not reach the same level as others, the fault lies only in himself ([his lack of] ability or earnest will) or circumstances for which he cannot blame any other, but not in the irresistible will of others who, as his fellow subjects in this condition, have no advantage over him as far as right is concerned. (TP, 8: 293–294)

[17] See among others Hrushka and Byrd (2010) and Maliks (2014).

[18] See Sánchez Madrid (2014).

Passages like this confirm Kant's acceptance of the fact that social intercourse provokes inequalities resulting in material dependence and the submission of individuals to others. Moreover, according to our philosopher, the ultimate causes of this fact should be seen in the lack of ability to improve one's own social status or, more enigmatically, in what Kant specifically calls "circumstances for which [a human being] cannot blame any other" (ibid.). Put differently, society is supposed to bring about an arrangement of relations that politics is not intended to change, as the social realm draws on a sort of "veil of ignorance" beyond which the legislator lacks the legitimacy to investigate. Thus, the invisibility of social forces protects them before the parliament, the government and the courts, which are not charged with controlling the existence of injustice in that field. Does such a claim entail that every covenant proceeding from private economic intercourse has to be regarded as a good deal? Kant clearly points out that a contract could never condemn a human being to having merely duties and no rights, "for he would thereby deprive himself of the right to make a contract and thus the contract would nullify itself" (TP, 8: 292). Yet, as Rousseau argued in his *Second Discourse*, the economy could discourage the legal protection of citizens, bringing about huge imbalances, whereas Kant's political philosophy provides only a feeble rhetorical shelter against this unconstrained power. Read in the present as well as in the socioeconomical context of his times, Kant is devoid of any hermeneutical means of grasping the complexity of the overlapping interaction between politics and economics. As the *Doctrine of Law* underscores, Kant is hopeful "that anyone can work his way up from [the] passive condition to an active one" (RL, § 46, 6: 315) but the concrete means to attaining this goal remain not merely unspecified but unattainable to a vast number of individuals within society.

Let us consider the hypothetical case that social inequalities prevent people from taking part in political activity, not due to their lack of capacity or effort, but because of disadvantageous circumstances. In such a case, according to Kant's politics, victims of this social injustice could only hope that someone—sometime and somehow—will free them from this state of serfdom, in which human beings, deprived of public autonomy, cannot develop and lead to perfection their faculties and moral vocation. Such uncanny patience and passivity is quite at odds with the

idea of active participation in the effort to enhance one's use of public freedom, as Enlightenment demands, according to Kant himself.

There is, however, at least one occasion in which Kant explicitly foresees an active intervention of the state in economic matters. This is the case of the extreme poor, who are unable to provide for their subsistence by their own means. But the reason Kant gives for justifying this intervention is not connected to some general idea of basic social rights or of human dignity or of civic equality, rather to a preoccupation with social stability. Here is the passage from General Remark C:

> The general will of the people has united itself into a society which is to maintain itself perpetually; and for this end it has submitted itself to the internal authority of the state in order to maintain those members of the society who are unable to maintain themselves. For reasons of state the government is therefore authorized to constrain the wealthy to provide the means of sustenance to those who are unable to provide for even their most necessary natural needs. (RL, 6: 326)

We shall see later why the wealthy have a duty to accept state intervention in this case. For now, we should concentrate on Kant's arguments along these lines.

Interestingly, according to this passage, it is not individuals who unite into society, but "the general will of the people" (*der allgemeine Volkswille*) It is not clear what Kant really means with this concept.[19] Of course, he is echoing Rousseau and maybe even Diderot, since his idea of a general will sometimes seems to refer to mankind, not just to a specific political community. Nevertheless, the concept is unclear—at least as much so as Rousseau's *volonté générale*—and we should analyze it closely, because it will help us answer our question about Kant's liberalism.

[19] In the *Doctrine of Law*, he uses expressions such as "the united will of the people" (*vereinigter Wille des Volkes*) (RL, 6: 313 and 328), "a collective general (common) and powerful will" (*ein kollektiv-allgemeiner (gemeinsamer) und machthabender Wille*) (RL, 6: 256), "a will that is united originally and a priori (that presupposes no rightful act for its union)" (*ein ursprünglich und a priori vereinigte Wille (der zu dieser Vereinigung keinen rechtlichen Akt voraussetzt)*) (RL, 6: 267) and "a synthetic general will" (*ein synthetisch-allgemeiner Wille*) (RL, 06: 269). He speaks further of "the idea of a possible united will" (*Idee eines möglichen vereinigten Willens*) (RL, 6: 258) and of "a general will (in the idea) giving an external law" (*ein äusserlich allgemein gesetzgebender Wille*) (RL, 6: 259 and 306).

We should note that in the *Doctrine of Law* Kant uses both the expressions "general will" and "united will" to refer to two different aspects of the idea of the will of the people. The word "general" refers to the activity of law-giving that characterizes this will. It implements external general laws; therefore, it neither puts forth internal, ethical laws, nor originates particular decrees like the ones issued by the executive power. This aspect is relatively unproblematic. The word "united" indicates that this will is the result of a union of individual wills. This part is quite problematic, however, since Kant speaks of an "originally and a priori united will", and this seems to minimize or even nullify the social contract through which individuals are supposed to unite into a state or a *civitas* (RL, 6: 313). If the will is united originally and a priori and if it presupposes no rightful or legal act for its union, then the idea of a social contract among individuals becomes devoid of meaning.

On the other hand, one should distinguish here between two levels at which the united will of the people comes into existence. From the point of view of the metaphysics of morals, that is, on the level of a priori principles of law, it is not necessary for individuals to actually unite in order to give rise to a general will that guarantees the legal character of possession and the external mine and yours (which is precisely what the collective general will does in paragraphs 8, 10 and 14). This idea is conveyed by an expression used by Kant when discussing the external acquisition of land. He claims that this act requires "a will that is omnilateral, that is united not contingently but a priori and therefore necessarily, and because of this is the only will that is lawgiving" (RL, 6: 263).[20] This will is united necessarily and a priori because no private ownership of land and more generally no private law; therefore, no juridical relation among individuals is possible at all without it. On the other hand, every political community or state (*civitas*) results from the "union of a multitude of human beings" (RL, 6: 313)—a union that is contingent and not a priori or necessary in its particular make up.

This contrast between the necessity of the idea of an a priori united will, on the one hand, and the contingency of a specific group of individuals

[20] In the original German: "ein allseitiger, nicht zufällig, sondern a priori, mithin notwendig vereinigter und darum allein gesetzgebender Wille".

united into a *civitas*, on the other, appears in the passage we are discussing. The general will has united itself into a society whose end is to maintain itself perpetually;[21] since the idea of a united will that is necessarily and a priori a general and law-giving, one cannot allow for the possibility of its own ending—quite in contrast to an empirical state, which may very well come to an end, particularly if its citizens opt for this solution. Kant himself alludes to this possibility when discussing penal law ("Even if a civil society were to be dissolved by the consent of all its members…", RL, 6: 333). According to Kant in General Remark C, however, the perpetual maintenance of the state implies the physical survival of all its citizens. This is not an obvious thing, since a state could survive even if a large number of citizens should perish, as may happen during war or a natural catastrophe. The General Remark C passage could perhaps be read as a plea for the survival of citizenship as a whole (for example in warfare or during other critical events) that deems the individual subjects mainly as *material* support, which embodies and manifests the *formal* united civil will. Furthermore, in a remark on Achenwall's *Ius Naturale*, Kant observes that "the safety [*Heil*] of the state is something completely different from that of the people. The former refers to the whole with regard to their [scil. The citizens'] subordination under the Law and to the administration of justice; the latter refers to everyone's private happiness" (19:372, R7430). Therefore, the state should care only for the safety of the *civitas* as a whole, not of individual citizens. But in the passage from General Remark C, Kant does not introduce the empirical argument, according to which the survival of a state actually depends on the survival of its citizens (whether as a whole, or as individuals); rather, he defends the idea that the state has a *duty* to guarantee its own maintenance and *therefore* the survival of the citizens *as individuals*. He uses the German verb *soll*, meaning that the state *ought to* provide for its own perpetual maintenance. Furthermore, he claims that it is in order to achieve this goal that individuals have submitted to its authority, so that it may provide for those who cannot secure their survival by themselves. In other

[21] In his remarks on philosophy of law Kant observes: "consociatio est coniunctio plurium ad perseqvendum *finem communem et perdurabilem*. Unio inde profecta est societas" (Refl 7525, 19: 446—our italics).

words, he claims that the state exists in order to guarantee that all individuals be able to meet their own natural needs; this is what authorizes the state to levy taxes to this specific end.

This is a puzzling statement somehow, when compared to other passages like the ones mentioned above. For instance, while discussing the necessity of entering civil society and of transforming provisory private law into peremptory private law thanks to state intervention, Kant does not mention the needs of individuals. Generally speaking, Kant seems to claim throughout the *Doctrine of Law* that the state exists in order to allow individuals to realize their external freedom, not to help them achieve well-being. On the other hand, meeting one's most basic natural needs can be seen as an element of realizing one's freedom. Kant himself seems to admit this, even if in a negative way, since individuals who have lost their freedom (like criminals) or who are not completely free in the Kantian sense (like women or wage laborers) depend on others for the satisfaction of their basic needs. There is, therefore, a direct connection between individual freedom and the ability to meet one's basic needs. The state, however, has a direct duty of assistance only toward those individuals who are not able to guarantee their own survival by their efforts—not even as wage laborers.

The reference to the satisfaction of needs as an end which leads individuals to enter the state is quite odd in the context of Kant's political theory. Moreover, the passage has other surprises for us. In the following lines, it becomes clear that not even independent citizens are economically completely autonomous with regard to their own survival:

> The wealthy have acquired an obligation to the commonwealth, since they owe their existence to an act of submitting to its protection and care, which they need in order to live; on this obligation the state now bases its right to contribute what is theirs to maintaining their fellow citizens. (RL, 6: 326)

Kant obviously opposes the libertarian Robinsonade according to which individuals are able to exist and thrive relying solely and completely on their own powers with no help from society, much less from the state. Rather, Kant is aware of the social character of our existence and of our dependence on society in order to guarantee our bare survival. This bodes

well both for the wealthy and for the poor, with the difference being that the former hold the means for their survival and prosperity, while the latter do not. But the wealthy owe their favorable economic situation to the protection of their possessions by the state, namely through its laws regarding private property, contracts, marriage, and inheritance, but also by way of its army (against external enemies) and its police (against internal enemies). It would be impossible for the wealthy to protect themselves, their families and their property from external and domestic threats just by way of their own forces. Even if they were rich enough to hire a private army, they would only gain a perilous, unstable security. To this extent, it is true that they have more to lose if the state should perish. This concurs with the classical argument traditionally posited by liberals (but not by Kant) to justify the exclusion of the poor from voting or to give a greater weight to the votes of the rich (as e.g. in John Stuart Mill's proposal).[22]

According to this interpretation, Kant's view of the state is not the classical liberal one of a minimal state entrusted merely with securing the smooth functioning of the market. Participants in the market owe the state far more than the freedom of realizing their economic transactions; they owe it their survival and the safety of their lives and property. The state is able to guarantee this by being a collective body and the expression of a united will. Therefore, individuals have a duty to participate in the state's efforts to survive both as a whole (in this case, they have to pay for the maintenance of an army or to fight as soldiers) and as a group of individuals (in this case, wealthy citizens pay taxes to help poor citizens). This seems to represent a mixture of republican and liberal features: the state worries about the safety of individuals, not merely as a tool but as an expression of a united will, whose scope is greater than that of any individuals' will; it has legitimate ends and interests of its own.

There are other elements that speak against seeing Kant as a liberal. One of the most striking refers to the fact that the protection accorded to citizens by the law is not unconditioned at all. First of all, when individuals commit a crime, they forfeit their freedom and their dignity as citizens, becoming a mere tool in the hands of the state, which can use

[22] Mill (1991: 205–467).

them as instruments or transfer them to other citizens as bondsmen (6: 329 f.). Secondly, not every human being deserves to be protected by the law. The very idea of a *human* right to life or of an innate sanctity of life is never defended by Kant, who rather connects the idea of a right to the capacity of an individual to demonstrate that he is really worthy of it.[23] The only innate right, namely freedom, consists in qualities the individual can lose if he acts wrongly (6: 237 f.): he can stop being his own master if he commits a crime; he can lose his legal equality if he loses his economic independence therein becoming a merely passive citizen; and he can lose his original good name if he stops living beyond reproach and commits acts that might stain his reputation.

Things are not much better with regard to the right to property. It is worth pointing out that Kant introduces the word *Eigentum* (ownership) only late in the *Doctrine of Law*, namely in the note to paragraph 17 (6: 268 ff.), well after discussing the idea of possessing something external as one's own, the concept of rightful mine and yours and the principles governing external acquisition. Kant prefers generally the term *Besitz* (possession). This is not simply a semantic question, rather a conceptual one. Ownership refers to the right of the owner to a thing he can dispose of as he pleases, as Kant remarks (6: 270). Possession refers to "the private use of a thing of which I am in (original or instituted) possession in common with all others" (RL, 6: 261). Kant's theory of private property is beyond the scope of this paper. However, he is adamant in claiming that "all human beings are originally (i.e. prior to any judicial act of choice)[24] in possession of the land in conformity with the Law". He is also adamant in claiming that this possession:

> is an original possession in common […], the concept of which is not empirical and dependent upon temporal conditions, like that of a supposed primitive possession in common […], which can never be proved. Original possession in common is, rather, a practical rational concept which contains a priori the principle in accordance with which alone

[23] Cf. Sensen (2011).

[24] Mary Gregor's English version is quite misleading here, since the German text says simply: "vor allem rechtlichen Akt der Willkür", while she translates: "prior to any act of choice that establishes a right", which is more an interpretation (and an incorrect one, in our view) than a translation.

> people [*die Menschen*] can use a place on the earth in accordance with principles of Law. (RL, 6: 262)

When individuals start taking into their empirical and arbitrary possession pieces of the originally common land, they need an act of the a priori, omnilateral will in order to claim that that piece of land is their rightful possession. It is an act of the originally and a priori united will that gives legitimacy to their property, neither their labor (as in Locke), nor the simple act of appropriation or of declaration (as in Rousseau's account in the second *Discourse*).[25] Once again: the social dimension prevails over the individual. Kant does not start with disparate individuals who decide to unite in order to protect their private property, rather—from a metaphysical point of view—a general, law-giving united will that is original and a priori, without which any legal act would have no legitimacy at all. From an empirical, temporal point of view—a society whose institutions arise through violence, as Kant recognizes often in his writings (e.g. IaG, 8: 23, PP 8: 365, VAZeF, 23:169 and VASF, 23: 426), therefore needs to gain legitimacy through rational ideas such as the social contract, the *lex permissiva*, and the rational postulates mentioned in the *Doctrine of Law*.

2.3 Kant's Cosmopolitanism and the Alleged Universal Right to Citizenship

Kant's account of citizenship is often tackled within the context of his cosmopolitan commitment, from which other difficulties arise. Firstly, cosmopolitan law implies the previous existence of a civil union, so that it is debatable whether the free circulation of human beings on earth would be sufficient to provide them with the status of citizenship. Secondly, Kant's cosmopolitanism clearly highlights the right to hospitality, that is, the right not to be treated with hostility by anyone, which should not be mistaken for the right to inhabit a particular location. Finally, the federation of states would not solve the problem that public law, in Kant's view, leaves some groups deprived of the right to citizenship for

[25] See Pinzani (2013: 11–24).

there is no institutional agency able to offer them civil protection. All in all, a Kant-inspired global order carries the same inconsistencies of the nation-state, without displaying any instrument that might overcome them. Nevertheless, Kant's cosmopolitan law is traditionally regarded as offering a sheltering space for all human beings, since it could correct the missing role of some failed states and thus protect individual bearers of rights. But let us consider more accurately this appraisal. Pauline Kleingeld has pointed out that global justice will be enhanced as a consequence of the civil development of single states—a point Katrin Flikschuh has also supported in several papers. According to this account, Kant would share with Rawls's "law of peoples" the focus on state development as an enabler of improved justice on a global scale:

> Rawls and Kant […] emphasize the importance of the political self-determination of individuals as citizens of republican or liberal states. They argue, each in his own distinctive way, that the internal improvement of political structures and processes within states will have positive effects for global justice. Because they view the ideal state as the embodiment of the political autonomy of citizens, they can claim that their political theory, rather than prioritizing groups over individuals, actually represents a way of making individual political autonomy compatible with world citizenship.[26]

Yet, taking into account the above analyzed flaws of Kant's idea of citizenship, there is no objective support in his writings for the belief that such a narrow right of citizenship would improve the situation of refugees, worse-off people nor any of those subjects that meet Arendt's definition of the *pariah*. We suggest that Kant simply does not consider the inclusion of these groups of human beings in the civil union[27] since his theory of state also entails a wide range of elements, for example, the traditional right to honor which belongs to "effects that follow from the nature of the civil union" (RL, 6: 318ss.), displaying a certain entangle-

[26] Kleingeld (2012: 197).

[27] Although several Kant inspired scholars such as Seyla Benhabib claim that the duty to hospitality will trigger a new cosmopolitan and transnational order on earth, which will provide every human being with the right to universal political membership, we deem such an appraisal to be far from the original spirit of Kant's political theory. See Benhabib et al. (2006).

ment of principles at the foundation of his theory of right. This confirms that the progress of law is destined to always encounter an unyielding social remainder that cannot be erased. Kant does not see these cases as a contradiction to his own theory, but rather as empirical exceptions that political philosophy is not entitled to solve. This point leads us to claim that Kant's idea of progress is more conservative than many commentators may think[28] and that our philosopher does not see the political evolution of the human species as a path to *social* transformation. Moreover, according to Kant, this political evolution stems from undisputed forces such as individuals' *unsocial sociability*, not from the unequal and unfair struggle between different social groups that require the regulatory intervention of the state. Actually, the state acts as a spectator regarding most social changes and developments of propriety, since public authority is not supposed to shape the social features of human community. Thus, cosmopolitan interactions inherit the flaws shown by public law in individual states. He considers cosmopolitan law to be a systematic consequence of republicanism at the domestic level, not a corrective part of the injustices identified precisely at that level.[29] Therefore, Kant's cosmopolitanism casts relevant doubts upon the effectiveness of this universal right to hospitality from the point of view of the right to citizenship. Moreover, when a member of a community—a servant or a woman or even a criminal—does not achieve the minimal conditions to be considered a real citizen, no international institution would be entitled to modify this situation. It is foreseeable that such a conclusion will be seen by contemporary readers as deeply unsatisfactory.

[28] See, for example, Pauline Kleingeld's following commentary (1998: 84): "International law has in some respects broadened the scope of individual rights beyond the 'limits' Kant set for cosmopolitan law in the third definitive article in *Perpetual Peace*. But many of these newer developments are compatible with his views. For example […] one can derive a strong notion of refugee rights from Kant's writings. Moreover, the 'limits' he set were meant to limit the rights of colonial powers rather than the further development of individual rights".

[29] Kant does not even consider, of course, that his "right to visit" would someday become the mirage of multitudes of people deprived of any political right and moving from one country to another, but he cannot be blamed for this.

2.4 Conclusions

If we are to draw some conclusions, we could affirm that Kant does not defend a liberal view of citizenship, as claimed by many interpreters:[30] in order to lend legitimacy to the existence of law and the state, he resorts to the rational idea of a united will that is original and a priori, instead of appealing to the—hypothetical or actual—consent of individuals united by a social contract.[31] Moreover, he rejects the fact that not every individual is externally free and that therefore not everyone is fully a citizen. For the same reason, there are no innate, inviolable individual rights for everyone, including the right to life, personal freedom and property, since all these rights depend on either the behavior of the individual, or on his social status, which can be rather contingent and independent of the individual's will (no one chooses to be born a man or a woman, to belong to a rich or a poor family, etc.).

In this sense, it is not only questionable whether Kant's theory of law and politics really does represent a timely or topical guide to thinking about our contemporary liberal democracies but also whether it respects the universal scope of the innate right to freedom, that is, an essential tenet of his theory of right. On the other hand, this theory might be reappraised in order to criticize certain dogmas that dominate our society and even our way of conceiving of it, starting with the allegedly sacred character of private property. Its rational normative approach is especially valuable, even if this feature does not at all enforce its ability to justify social transformation, as contemporary readers would have expected. Moreover, the rule of reason proves not to be strong enough to correct the social inequalities deriving from the economic order. In our view, this rational and metaphysical basis of Kant's theory of law, which gives shape to concepts such as the omnilateral united will, should precisely orient the scholar toward unfolding the unexpressed potentialities that the theory tends to conceal. The contemporary Kant scholar often has the impression that some powerful temporal biases considerably hinder the ability of this systematic political thought to cast light on the challenges

[30] An interesting discussion on Kant's liberalism can be found in Pogge (2004).

[31] About this issue see Williams (2014).

of our times and the chances to overcome the difficulties that they entail. A critical appraisal of some inconsistencies of Kant's account of citizenship should accurately separate the living rational "wheat" of this theory from its social "chaff".

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3

Kant For and Against Human Rights

Aguinaldo Pavão and Andrea Faggion

3.1 Introduction

Kant's practical philosophy is considered one of the major theoretical grounds of human rights. Although the contemporary conception of autonomy as a person's capacity to pursue his/her own conception of the good is not identical to Kant's conception of autonomy as the property of the will of being a law to itself,[1] it is safe to say that Kant initiated a tradition that grounds human rights in the capacity of autonomy. After all, it is the capacity of autonomy that distinguishes human beings as ends in themselves:

> a human being and generally every rational being exists as an end in itself, not merely as a means for the discretionary use for this or that will, but

[1] Flikschuh. "Personal Autonomy and Public Authority", 2013, p. 169, n. 1.

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> must in all its actions, whether directed towards itself or also to other rational beings, always be considered at the same time as an end. (GMS, 4: 428)[2]

In other words, our moral existence as ends in ourselves is the ground for our entitlement to moral rights corresponding to obligations to each other. Indeed, Kant claims that the principle of humanity as an end in itself is "the supreme limiting condition of the freedom of actions of every human being" (GMS, 4: 430–431).[3] Moreover, the connection between human rights and the inviolability of human dignity is confirmed in *The Doctrine of Right*, where it is asserted that "There is Only One Innate Right" (MS, 6: 237).

According to Kant, this innate right is a right belonging to every man (MS, 6: 237). It is a natural right in the sense that (1) human beings have it *qua* human beings, not because they are members of some society or stand in some relation to others, and (2) it is not created or conferred by voluntary action.[4] In fact, Kant says that such a right belongs to every human being by virtue of his/her *humanity* (MS, 6: 237).[5] Thus, a human right for Kant is an innate or natural right grounded in the moral nature of a human being.

But what is our only human right? In short, it is "[f]reedom (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" (MS, 6: 237). With this conception in hand, this paper aims to examine whether ideas such as brotherhood and positive/social rights[6]—as species of human rights—might be grounded in our only human right.

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[2] References to Kant's works embedded in the text are formed by the standard abbreviations of the German titles, followed by the volume number in Academy edition (the Akademie Ausgabe) of Kant's writings in which the work is included, and by the page number in that volume.

[3] Thus, Bielefeldt is therefore right to claim that Kant's philosophy of human rights rests on the inviolability of human dignity (Bielefeldt. "A filosofia dos direitos humanos", 2000, p. 62).

[4] Hart. "Are There Any Natural Rights?", 1955, pp. 175–176.

[5] We believe that the term "humanity" in this passage refers to the moral property of being an end in itself because of the passage in GMS, 4: 430–431, quoted above. In other words, we see an interconnection between GMS, 4: 430–431 and MS, 6: 237. A similar point is made by Höffe (see "Kant's Innate Right as a Rational Criterion for Human Rights", 2010, pp. 84–85).

[6] Jonathan Wolff defines positive rights in the sense relevant to us here: "If I have a *positive* right to something this entails that a particular person, or in other cases everyone, has a corresponding duty

Since we assume that human rights are to be realized through external legislation, this question more fundamentally concerns whether brotherhood and social rights can be legitimately enforced. Our hypothesis is that Kant could not support the enforcement of brotherhood and social rights because of his own conception of human rights, or rather human *right*.

3.2 Our Only Human Right

Why should one accept that human rights must include, for instance, the right to assured survival, such as the right to be fed? Certainly, human beings need food in order to survive. According to Kant, however, and unlike benevolence, the moral concept of right does not concern our wishes and needs (MS, 6: 230). Nevertheless, as we have seen, human dignity is the foundation of our only human right. Thus, one might appeal to the notion of human dignity in order to claim that the requirement that one receive food when one is starving amounts to the requirement that one's dignity be respected. But is one's dignity related to one's animal condition?

We have seen that Kant rests human dignity on the capacity of autonomy. We can say that a starving agent lacks the capacity of autonomy, and therefore that he/she lacks dignity. But is the right to have one's dignity respected equivalent to the right to have one's dignity preserved? In the moral sense, a right "is related to an obligation corresponding to it" (MS, 6: 230). If a person has a moral right to have his/her dignity preserved, others are obliged to preserve his/her dignity, for instance by providing his/her with food.

Nonetheless, if we pay attention to Kant's formulation of our only human right, we see that it is not directly a right *to* autonomy.[7] Rather,

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to provide me with that thing, or whatever is necessary to secure it" (Wolff. *Robert Nozick*, 1991, p. 19). Instances of what we mean by positive or social rights are to be found at least in Articles 22, 23, 24, 25, 26 and 27 of the Universal Declaration of Human Rights.

[7] "[B]y 'freedom' [in a 'law of freedom'] he does not here mean freedom of the will, that is, morality or the disposition towards right" (Höffe. "Kant's Innate Right as a Rational Criterion for Human Rights", 2010, p. 77).

it is a right *based on* autonomy. The right that we have by virtue of autonomy is a right to mere "independence from being constrained by another's choice" (MS, 6: 237). It therefore makes sense to point out, with Nozick, that: "someone else's not providing you with things you need greatly, including things essential to the protection of your rights, does not itself violate your rights, even though it avoids making it more difficult for someone else to violate them".[8]

It is true that the concept of freedom to which we can claim a right involves what Höffe calls "a multiplicity within the one human right, but not in addition to it".[9] To be more precise, four rights are constitutive of our only human right. Nonetheless, none of them seems to be a positive right. The first right, for instance, is (merely formal) equality, that is, "independence from being bound by others to more than one can in turn bind them" (MS, 6: 237).

The second and third rights follow from the right to formal equality. They are "a human being's quality of being *his own master* (*sui iuris*), as well as being a human being *beyond reproach* (*iusti*), since before he performs any act affecting rights he has done no wrong to anyone" (MS, 6: 237). Kant does not accept the libertarian idea of self-ownership. The quality of being one's own master and being beyond reproach is the closest he comes to that libertarian principle.[10] What is at issue here that a free agent, that is, a person, is "subject to no other laws than those he gives to himself (either alone or at least along with others)" (MS, 6: 223). In other words, Kant adheres to a modern tradition according to which no human being has natural political authority over any other, and no human being is morally permitted to subject others to his/her discretionary choice.

The fourth right included in the right to freedom is a person's "being authorized to do to others anything that does not in itself diminish what is theirs, so long as they do not want to accept it" (MS, 6: 237). Kant seems to advocate the radical view that a rightful action can even do harm

[8] Nozick. *Anarchy, State and Utopia*, 1974, p. 30.

[9] Höffe. "Kant's Innate Right as a Rational Criterion for Human Rights", 2010, p. 87.

[10] "[S]omeone can be his own master (*sui iuris*) but cannot be the owner of *himself* (*sui dominus*) (cannot dispose of himself as he pleases)" (MS, 6: 270).

to another as long as it does not infringe on his/her freedom of choice. In other words, the harm is rightful if and only if its existence depends on the voluntary consent of the one who is harmed. On this point, Kant even claims that one can rightfully make an insincere promise to others since "it is entirely up to them whether they want to believe him or not" (MS, 6: 237).

With this point in mind, let us consider the Universal Declaration of Human Rights, adopted by the United Nations General Assembly on December 10, 1948. On the one hand, articles such as the second (regarding formal equalities) and the nineteenth (regarding freedom of opinion and expression) seem undoubtedly to be implied by the right to freedom in the Kantian sense. On the other hand, the first article establishes that human beings "should act towards one another in a spirit of brotherhood", which suggests a duty of mutual aid. Is this duty a juridical duty? We can perhaps throw more light on the question by considering a cluster of Kantian theses on the distinction between ethics and strict right. Let us start with the conditions of application of the concept of right.

3.3 Juridical Obligations

The main characteristics of the obligation corresponding to right in the moral sense are to be explained in terms of its conditions of application. The first condition is that a juridical obligation concerns only the external aspects of intersubjective relations, that is, actions as deeds that affect others. Because of this condition, internal motivation is excluded from the juridical field. The rationale for this exclusion is our innate right to freedom, which is not affected by others' motivations: "for anyone can be free so long as I do not impair his freedom by my external action, even though I am quite indifferent to his freedom or would like in my heart to infringe upon it. That I make it my maxim to act rightly is a demand that ethics makes on me" (MS, 6: 231).

In any case, the first condition makes duties to oneself special duties of ethics (MS, 6: 220), since a juridical duty is always a duty to another.

Again, we can understand this consequence in light of our only innate right. After all, it is a right not to be constrained by *another*'s choice.

The second condition, already mentioned above, goes straight to the point at issue. The crux of this condition is that the relationship between choices and wishes or needs is of no concern to right. Again, one needs to keep in mind our innate right to freedom. Regarding this right, it is my choice that should not be constrained by another. It is not a matter of the fulfillment of my wishes or needs by others. When one sticks to the definition of freedom contained in Kant's definition of our only innate right, it becomes clear that freedom is not impaired by scarcity.

Let us supposed that agent *A* has 300 alternative ways to reach his/her goal, while another agent, *B*, has none (or maybe only one, and an insufficient one at that). Moreover, *B*'s lack of means was caused by objective circumstances (illness, a natural catastrophe, etc.), as was *A*'s abundance of means (she is lucky). Now suppose that agent *C* hinders *A* in making the choice between one of his/her 300 alternatives. According to Kant's definition of freedom, regarding our right to freedom, it is safe to say that *B* is free while *A* is not. In other words, *A*'s choice is constrained by another's, while *B*'s is not.[11]

At this point, we need to remember that Kant inserts a condition that must be satisfied if an agent is to claim his/her right to be free: her freedom must be able to "coexist with the freedom of every other in accordance with a universal law" (MS, 6: 237). This means that *C* can rightfully constrain *A*'s choice if and only if *A*'s freedom cannot coexist with the freedom of every other in accordance with a universal law. But what is the meaning of this condition? It seems safe to say that an action cannot coexist with the freedom of every other in accordance with a universal law when it itself is a hindrance to freedom. In this case, such an action

[11] Due to these considerations, we disagree with Höffe regarding the possibility of a broader scope for the term "coercion" in Kant's text: "The term 'coercion' is often taken to refer to physical violence. There are however plenty of other types of coercion, and not only direct coercion, but also indirect coercion, such as that which results from social dependence or economic poverty. Since Kant does not describe the broad spectrum of possible kinds of coercion, one often assumes he is employing a restricted concept that is reduced to physical violence. In fact it remains open in Kant's text whether the coercion is physical or economic, whether it can be easily perceived or instead is hidden, and whether it applies directly or indirectly" (Höffe. "Kant's Innate Right as a Rational Criterion for Human Rights", 2010, pp. 82–83).

may be constrained by another's choice. This would be a "*hindering of a hindrance to freedom*" (MS, 6: 231) that in fact promotes freedom and is consistent with it. Kant makes clear that only hindrances to freedom may be the object of rightful constraint when he says:

> If then my action or my condition generally can coexist with the freedom of everyone in accordance with a universal law, whoever hinders me in it does me *wrong*; for this hindrance (resistance) cannot coexist with freedom in accordance with a universal law. (MS, 6: 230)

The conception of freedom to which one can claim a right seems too "mechanical" in our reading. This does not mean that our reading is not consistent with Kant's text, however. Indeed, Kant himself suggests that we understand the law of reciprocal coercion in accord with freedom by analogy with the "possibility of bodies moving freely under the law of the *equality of action and reaction*" (MS, 6: 232). The fruitfulness of this analogy is confirmed by the third and last condition of application of the moral concept of right: in the reciprocal external relation of choices, no account at all is taken of the *end* each has in mind (MS, 6: 230). In other words, regarding your right to be free, you cannot claim a right to realize your ends, which could imply some juridical duty of brotherhood in the sense of cooperation. Your innate right is a right to pursue your ends without external interference by others' choices. Kant could not be clearer about the issue: "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" (MS, 6: 230).[12]

[12] This is why Höffe and Kersting, for instance, consider a juridical community to be a community grounded in the freedom of responsible agents, and not in solidarity with the needy (See Höffe. *Introduction à la philosophie pratique de Kant. La morale, le droit e la religion,* 1993, p. 182; Höffe. *Immanuel Kant*, 1986, p. 199; Höffe. "O imperativo categórico do direito", 1998, p. 217; Kersting, "Politics, freedom, and order: Kant's political philosophy", 1992, p. 345). More recently, Höffe explicitly says: "The 'spirit of brotherhood,' which the first article of the UN 'Universal Declaration of Human Rights' requires that human beings show toward to one another, […] does not have the rank of an innate human right for Kant" (Höffe. "Kant's Innate Right as a Rational Criterion for Human Rights", 2010, p. 89).

3.4 Strict Right and Ethics

At this point, it is safe to say that the lack of requirement regarding internal motivation is not enough to account for the distinctiveness of strict right in relation to ethics (the subject of the doctrine of virtue). The very fact that strict right does not require us to act from duty follows from the universal principle of right, which, in turn, seems to be analytically implied by the innate right to freedom. The principle is as follows: "Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law" (MS, 6: 230).

As we have seen, acting in accordance with right does not depend on acting from duty, because "anyone can be free so long as I do not impair his freedom by my external action, even though I am quite indifferent to his freedom or would like in my heart to infringe upon it" (MS, 6: 231). This expresses an important difference between the requirements of the universal principle of right and the requirements of ethics. It shows that virtue will ask more than is asked by the principle of right, since it will demand a specific motivation. But this is not the whole story. The universal principle of right also covers a narrower sphere of duties, since duties to oneself and duties of benevolence are not covered by it.

There are good grounds for the distinction between the demands of the principle of right and those of ethics. An ethical principle is not suitable as a principle of external legislation since external legislation can be an object of enforcement. Ethical duties cannot be enforced for two reasons.[13] Firstly, ethics requires the adoption of ends. However, it is impossible to externally coerce someone to have an end: "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*: only I myself can *make* something my end" (MS, 6: 381).

Interpreters tend to only pay attention to this first reason. Secondly, however, if a person is coerced to direct his/her external actions as means

[13] This means that the categorical imperative can command the fulfillment of the principle of right, but not the other way around.

to an end that is not his/her own, he/she is treated as a mere means to someone else's (moral or immoral) end, which violates the dictates of virtue. This is why Kant says that right contains only "a formal determining ground of choice" (MS, 6: 381), but not "the concept of *an end that is in itself a duty*" (MS, 6: 381). The latter belongs to ethics (MS, 6: 381).

A "formal determining ground of choice" is a limiting or negative condition for the pursuit of ends. It is not itself an end. In order to harmonize the autonomy of ethics with an enforceable principle of external legislation, Kant had to exclude from right duties to adopt ends. In other words, the universal principle of right is grounded in "the supreme limiting condition of the freedom of actions of every human being" (GMS, 4: 430–431), which we have mentioned above. Since I should not treat anyone else as a mere means to my ends, I should recognize everyone's right to freedom by obeying the universal principle of right, enforcing only side constraints[14] but never the pursuit of an end.[15]

A key point that helps to clarify the issue is that an end that is also a duty is always a duty of wide obligation, or an imperfect duty. In turn, a duty of wide obligation is always an ethical duty, never a juridical duty, because "the law can prescribe only the maxim of actions, not actions themselves" (MS, 6: 390). Why is this point so relevant to our overall argument?

If the law can prescribe only the maxim but not the action itself, "it leaves a playroom (*latitudo*) for free choice in following (complying with) the law, that is, […] the law cannot specify precisely in what way one is to act and how much one is to do by the action for an end that is also a duty" (MS, 6: 390). According to Kant, this playroom for free choice entails "a permission to limit one maxim of duty by another" (MS, 6: 390).

[14] The notion of side constraints can be better understood here: "In contrast to incorporating rights into the end state to be achieved, one might place them as side constraints upon the actions to be done: don't violate constraints C. The rights of others determine the constraints upon your actions" (Nozick. *Anarchy, State, and Utopia*, 1974, p. 29).

[15] As Höffe says: "First, the idea of negative rights to freedom is at the source of human rights. Second, they are definitely defensive rights" ("Kant's Innate Right as a Rational Criterion for Human Rights", 2010, p. 78).

With this idea in hand, it is easier to understand our claim that the conversion of duties of benevolence into juridical duties amounts to treating others as mere means or resources. The enforcement of benevolence abrogates the playroom for free choice in complying with the law. I am forced to contribute to your cause, whereas the moral law permits me to choose the causes to which I will contribute. As Nozick points out while arguing that people cannot be forced to contribute to the majority's cause, it is perfectly possible, for instance, that you might not "wish to cooperate, as part of your plan to focus their attention on your alternative proposal which they have ignored or not given, in your view at least, its proper due".[16]

A last (and connected) issue is that it is up to the free agent to decide how much he/she is to sacrifice in pursuing an end that is also a duty, since every finite agent also has a duty to secure his/her own happiness (at least indirectly) (GMS, 4: 399). In other words, to secure one's own happiness is a duty to limit other imperfect duties. But since happiness is a subjective matter, how is it possible for someone else to decide for me how much I am to help others when so acting competes with the pursuit of my own happiness? In the end, it is I who must strike the balance between the imperfect duty of benevolence and the imperfect duty of securing my own happiness.[17]

We can now better understand what Kant means when he says: "I can indeed be constrained by others to perform *actions* that are directed as means to an end" (MS 6: 381).[18] In this context, "can" refers to the *feasibility* of such coercion, not to its conformity to right, since it is clear from our analysis of imperfect duties that I cannot *rightfully* be constrained by others to perform actions that are directed as means to ends that are also duties. The impossibility of rightfully enforcing the pursuit of an end clearly shapes Kant's conception of the state.

[16] Nozick. *Anarchy, State, and Utopia*, 1974, p. 95.

[17] Apparently, Nozick is again in tune with Kant about this issue (see *Anarchy, State, and Utopia*, 1974, p. 170).

[18] The whole sentence in German reads: "Nun kann ich zwar zu Handlungen, die als Mittel auf einen Zweck gerichtet sind, nie aber einen Zweck zu haben von anderen gezwungen werden, sondern ich kann nur selbst mir etwas zum Zweck machen".

3.5 Against the Eudaemonist and the Ethical State

At this point, we can articulate a Kantian critique of the eudaemonist state and the state directed to ethical ends. After all, according to Kant, a state is "a union of a multitude of human beings under laws of right" (MS, 6: 313). Since right only concerns the formal limiting conditions of our actions, the state does not aim to make human beings happy or virtuous.[19] We have already seen why this is the case regarding virtue. But it is good to keep Kant's own words in mind:

> [W]oe to the legislator who would want to bring about through coercion a polity directed to ethical ends! For he would thereby not only achieve the very opposite of ethical ends, but also undermine his political ends and render them insecure.—The citizen of the political community therefore remains, so far as the latter's lawgiving authority is concerned, totally free: he may wish to enter with his fellow citizens into an ethical union over and above the political one, or rather remain in a natural state of this sort. (RGV, 6: 96)[20]

In light of our previous considerations, it is also clear that happiness (the natural end of our choices) cannot be a principle of law. Indeed, Kant says explicitly that, with respect to happiness, "no universally valid principle for laws can be given" (TP, 8: 298). According to Kant, the public well-being that concerns the state is only a

> lawful constitution which secures everyone his freedom by laws, whereby each remains at liberty to seek his happiness in whatever way seems best to him, provided he does not infringe upon that universal freedom in conformity with law and hence upon the right of other fellow subjects. (TP, 8: 298)

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[19] "[T]he moral capacity to constrain oneself can be called virtue, action springing from such a disposition (respect for law) can be called virtuous (ethical) action" (MS, 6: 394).

[20] See also the distinction between an "honorable man" and a "good citizen" corresponding to the distinction between "*rectitudo juridica*" and "*rectitudo ethica*" in Kant's *Lectures on Ethics* (V -Mo/Mron, AA 27: 299).

However, this does not mean that a state cannot have laws that are actually directed at the happiness of its citizens. The core issue here is that such laws are to be grounded not in the social or positive rights of the citizen but in the necessity of the state's self-preservation as a commonwealth: "this [a law aiming at happiness] is not done as the end for which a civil constitution is established but merely as means for *securing a rightful condition*, especially against a people's external enemies" (TP, 8: 299). Therefore, it seems impossible to claim that, by issuing laws directed at people's material well-being, the state is enforcing human rights. Instead, it is enforcing a state right.

Similarly, in his *Doctrine of Right*, Kant deals with matters regarding poverty relief in the sections where he examines "rights that follow from the nature of the civil union" (MS, 6: 318) in Part II, which corresponds to Public Right. The location of these comments could be enough to show that it is not Kant's view that public policies directed to poverty relief can be derived from an innate right belonging to us by virtue of our humanity, that is, a human right. Moreover, just after referring to a kind of right that "belongs to the state for its preservation" (MS, 6: 325) in section B, Kant explains in section C that: "*For reasons of state* the government is therefore authorized to constrain the wealthy to provide the means of sustenance to those who are unable to provide for even their most necessary natural needs" (MS, 6: 326, our italics).

The rationale here is that the wealthy have submitted themselves to state protection since the state's primary function is to guarantee ownership, turning temporary possession into peremptory (conclusive) possession.[21] Such an act of submission implies an obligation acquired by the wealthy. Thus, "on this obligation the state now bases its right to contribute what is theirs to maintaining their fellow citizens" (MS, 6: 326). It is therefore clear that, in Kant's view, the poor do not have a right to be provided for by the wealthy, and the wealthy in turn are not obliged by the poor to provide for them. The obligation at issue is an obligation on

[21] Kant is explicit regarding the extension of the state's role in his theory of possession: "a civil constitution is just the rightful condition, by which what belongs to each is only secured, but not actually settled and determined.—Any guarantee, then, already presupposes what belongs to someone (to whom it secures it)" (MS, 6: 257). Our reading of the topic is very similar to Byrd's (See Byrd. "Intelligible Possession of Objects of Choice", 2010).

the part of the wealthy toward the state, and the right at issue is a right of the state to preserve itself.

3.6 The Universal Declaration of Individual Rights

All things considered, it is fair to claim that from a Kantian point of view the Universal Declaration of Human Rights, insofar as it is not a declaration of the rights of a state, should be called the Universal Declaration of Individual Rights.[22] Moreover, there is, on this view, only one supreme individual right: freedom. The ideal of brotherhood—central to the Universal Declaration of Human Rights and established during the French Revolution—was even rejected by Kant in his formulation of the three principles of "the civil condition, regarded merely as a rightful condition" (TP, 8: 290). These are: "1) The *freedom* of every member of the society as a human being. 2) His [formal] *equality* with every other as a *subject*. 3) The *independence* of every member of a commonwealth as a *citizen*" (TP, 8: 290).

It is easy to predict the content of the first principle in light of the above discussion. It holds that:

> each may seek his happiness in the way that seems good to him, provided he does not infringe upon that freedom of others to strive for a like end which can coexist with the freedom of everyone in accordance with a possible universal law (i.e., does not infringe upon this right of another). (TP, 8: 291)

Upon establishing such a principle, Kant condemns paternalistic governments—those that act on a principle of benevolence, like a father toward his children—as "the greatest *despotism* thinkable" (TP, 8: 291).

[22] Höffe considers two rights as "quasi-human rights". They are: (1) the "right to live in a legal order that permits every object of human choice to become mine or yours", and (2) "the right of a human being to live in a public legal order" ("Kant's Innate Right as a Rational Criterion for Human Rights", 2010, p. 91).

As for the second principle, we should understand formal or juridical equality (a slight modification of the innate right to equality outlined above and here a political principle) as consisting in every subject's being "subjected to coercive right equally with all the other members of the commonwealth" (TP, 8: 291). Indeed, Kant emphasizes the formal character of equality because he holds that "this thoroughgoing equality of individuals within a state, as its subjects, […] is quite consistent with the greatest inequality in terms of the quantity and degree of their possessions" (TP, 8: 292).

The third principle seems, in fact, to be morally indefensible—a pure and simple mistake—since it restricts political rights based on citizens' economic situations: "it is not the case that all who are free and equal under already existing public laws are to be held equal with regard to the right to give these laws" (TP, 8: 295). Such a principle is a (non-excusable) violation of Article 21 of the Universal Declaration of Human Rights: "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives".

3.7 Final Remarks

In spite of his immoral defense of the restriction of political rights, Kant's conception of human rights seems to be essential to clarifying what we consider basic conceptual mistakes in the Universal Declaration of Human Rights. The Universal Declaration of Human Rights confuses ethical with juridical claims. Moreover, it confuses the right to freedom as independence from being constrained by another's choice with an alleged right to freedom as independence from objective circumstances and internal needs. If a right to freedom is understood as a right to material conditions for the pursuit of ends, we should acknowledge that this is far from Kant's horizon of thought.

This being so, it is plausible to think of Kant not only as an advocate of human rights but also as an opponent to them. He would object to human rights precisely to the extent that ethical precepts have been transformed into statutory laws. Hence, a Kantian review of the Universal Declaration of Human Rights would recommend a deflation of alleged

rights in order to preserve genuine rights. Such a deflation would be consistent with a possible Kantian libertarianism. This is an issue, however, for another paper.

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4

The Place of Sociality: Models of Intersubjectivity According to Kant

Alberto Pirni

4.1 Social Rights: "rights in a precarious balance"

The intellectual history of "social rights" is undoubtedly a subject of great interest and complexity. The roots of the idea are typically traced back to the end of the eighteenth century, to the so-called "age of revolutions" (America and France) which impressed such a fundamental change on the political, legal and cultural history of the West. Of course, it would not be possible to reconstruct its origins or the theoretical path it has taken at any length in the present context.[1] A brief conceptual clarifica-

[1] As it is known, the topic is intensively investigated as point of intersection amongst philosophers, theorists of law and of politics. By referring to the present debate, let me recall at least the following studies: G. De Búrca, B. de Witte, L. Ogertschnig (eds), *Social rights in Europe*, Oxford, Oxford University Press 2005; J. Jimenez, *Social Policy and Social Change: Toward the Creation of Social and*

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tion, however, is in order so as to facilitate our discussion of how the idea is echoed and confronted in the writings of Kant.

The first explicit articulation of the concept of social right—namely the first demand that each member of a society be granted the legitimate "right" to ask their authorities for help—was enunciated in Article 21 of the Declaration of Rights, the preamble to the "Jacobin" Constitution of 24 June 1793. It goes as follows:

> Society owes maintenance to unfortunate citizens, either by procuring work or by assuring the means of existence to those who are not able to labour.

These succinct lines enshrined a fundamental principle that would henceforward lie at the heart of every democratic political and legal theory on social rights: society—or the legitimately instituted power that is the state—must be able to guarantee sustenance to all members who cannot (or who can no longer) maintain themselves through their own means and abilities. Here, we can glimpse the first fundamental link being drawn between a sort of "right to subsistence" and the even more embryonic "right to work". In any case, both of these rights should be treated as mere supplements to the more fundamental right to liberty.

Moreover, only a full member of society, a citizen who lives (at least) decently and who enjoys a minimum of sustenance, can call himself and try to be free: that is maintain his personal dignity and, at the same time, the ability to develop his own personality according to his own capabilities, inclinations and will as long as they are compatible with a social existence. Despite its evidence, this argument cannot be given entirely for granted; there are scholars who place in tension, up to explicitly counterpoise "freedom rights" to "social rights", as these latter would limit the freedom of the individual initiative.[2]

Economic Justice, Los Angeles, Sage, 2010 (2015[2]); Th. Casadei, *I diritti sociali. Un percorsofilosoficogiuridico*, Firenze, Firenze University Press, 2012; H.A. García, K. Klare, L.A. Williams (eds), *Social and Economic Rights in Theory and Practice. Critical Inquiries*, Abingdon, Routledge, 2015.

[2] For what concerns the history and developments of such contraposition, the paradigmatic research developed by G. Oestreich (*Geschichte der Menschenrechte und GrundfreiheitenimUmriß*, Berlin, Duncker & Humblot, 1968, 1978[2]) remains one of the most relevant points of reference.

Legal historians typically locate the earliest debates about and subsequent theoretical consolidation of social rights in the works and lives of Edmund Burke, J.A.C. de Condorcet and Thomas Paine. Of the three, Thomas Paine was to make the most significant contribution to the development of the idea. Of particular relevance is his treatise on the *Rights of Man* (1791–1792), where he undertakes a vast and authoritative defence of the *Declaration of the Rights of Man and of the Citizen*, treating it as a progressive extension of the American *Bills of Rights*.

Crucially, Paine's work—like that of Kant—constitutes a sort of theoretical crossover point between two distinct intellectual periods: that of natural law and that of legal constitutionalism. Paine argues with some vigour that before man acquires civil rights, he is already in possession of natural rights, which are in fact the foundation for the former. In other words, there is a *continuity* of content of different types of rights, between the state of nature and the civil state. The difference lies only in their relationship to power.

Since men lack the power to safeguard their natural rights, they renounce to the direct control over them and entrust their rights to a "common power", which is constituted exactly for the guarantee of such entrusting.

> An enquiry into the origin of Rights will demonstrate to us that rights are not gifts from one man to another, nor from one class of men to another […]. A declaration of rights is not a creation of them, nor a donation of them. It is a manifest of the principle by which they exist, followed by a detail of what the rights are; for every civil right has a natural right for its foundation, and it includes the principle of a reciprocal guarantee of those rights from man to man.[3]

The continuity of juridical content and the implicit osmosis of natural and civil states are both themes that Kant himself would develop, as will soon become apparent. In keeping with the *Zeitgeist* of revolutionary France, Paine would also help legitimise the deep link that binds *liberty* and *equality*. Interestingly, he also showed a more American awareness of

[3] Th. Paine, *On the First Principles of Government*, in M. Foot, I. Kramnick (eds), *Thomas Paine Reader*, Harmondsworth, Penguin, 1987, p. 464.

the need for the state to guarantee the exercise of rights to all its citizens, through its ability to make *positive* interventions into social life. In other words, liberty cannot be defined solely in negative terms—that is, *against the state*—for it is also exercised thanks to and *through the state*, thus constitutively generating a sort of patriotic solidarity of all of society's members.

It was in this intellectual context that the earliest debates on *welfare rights* were conducted in the press of the time, contrary to the widespread belief that the welfare question arose well after and not concurrently to the birth of constitutionalism. Paine's writings, in fact, testify to the shared origins, namely the co-original birth of the "three generations" of civil, political and social rights, thus undermining the stadial view of their development as ideas.

Even so, the status of social rights is not quite so clear and uncontroversial. Social rights are a complex assemblage that intersects at various points with some of the most important concepts in modern philosophy and jurisprudence, most notably *liberty*, *equality* and *solidarity*, as well as the (*welfare*) *state* and the idea of *citizenship*.

The complexity of these conceptual intersections has placed the category of social rights in a "precarious balance"—to borrow an expression of Thomas Casadei[4]—on account of the uncertainty of what these concepts should cover and where their boundaries should lie. I am referring not only to the right to subsistence, but also to the right to work, to social security, to compulsory education, to health and so on, that is to rights that deal with important aspects of life, but whose boundaries are difficult to define univocally.

Furthermore, these are "rights in a precarious balance", meaning that they are difficult to uphold conceptually for at least three distinct, albeit connected reasons. *Firstly*, one can cast doubt on the relationship between rights to freedom and social rights. Some thinkers have perceived a struc-

[4] T. Casadei, *I diritti sociali*, cit., p. 27–32. On this specific point see also: G. Razzano, *Lo "Statuto" costituzionale dei diritti sociali*, in E. Cavasino—G. Scala, G. Verde (a cura di), *I diritti sociali dal riconoscimento alla garanzia*, Napoli, Editoriale Scientifica 2013; E. Catelani, *Profili costituzionali della limitazione dei diritti sociali garantiti dallo stato e dalle regioni di fronte alla crisi economica*, in E. Catelani, M. Tarchi (a cura di), *I diritti sociali nella pluralità degli ordinamenti*, Napoli, Editoriale Scientifica 2015, pp. 17–56.

tural or even "ontological" difference between these two typologies, arguing that the latter infringes heavily upon the exercise of the former. *Secondly*, the "cost of rights" is no trifling matter: the implementation and defence of any possible combination of social rights entails important decisions on how and where to allocate public resources, inevitably limiting other possible allocations and interfering with potential political choices.

Thirdly, the "justiciability" of social rights, or the extent to which they can be realised in practice and actualised at a *constitutional* level, is not entirely clear. This uncertainty derives from the existence of extremely varied approaches to social, education and sanitary assistance, and from the diversity of bodies and institutions within the state (and the *diversity o*f their respective responsibilities and powers) that are supposed to deal with social policy.

To conclude, the birth of social rights undoubtedly constitutes a great achievement of post-1789 modernity, but at the same time it can be seen as a kind of "uncomfortable inheritance", impossible to liquidate on the one hand, perennially difficult to manage on the other.

4.2 Kant, the Social Sphere and Social Rights: Yet Another "precarious balance"

How does Kant relate to the question of social rights and how did he contribute to its theorisation? To explore the possible answers to these questions, we must shift our attention to the work that Kant explicitly intended as a systematic treatment of the subject of law. In particular, in the First Part of the work, the *Doctrine of Law*, after a long introduction to the concept of law, Kant divides the law into two types: *Private Law* and *Public Law*.

It is worth pausing to consider one specific part of the work, namely the passage from private to public law, or as Kant calls it: "*Transition* from What is Mine or Yours in a State of Nature to What Is Mine or Yours in a Rightful Condition Generally".

Here (§ 41) Kant summarises a fundamental distinction between the juridical and non-juridical condition.[5] What interests us at present, however, is what Kant has to say about the *non-juridical state*.

> The condition that is not rightful [*Der nicht-rechtlicheZustand*], that is, a condition in which there is no distributive justice is called a state of nature [*natürlicheZustand*] (*status naturalis*). What is opposed to a state of nature is not (as Achenwall thinks) a condition that is *social* [*gesellschaftliche Zustand*] and that could be called an artificial condition (*status artificialis*), but rather the *civil* condition (*status civilis*), that of a society subject to distributive Justice. For in the state of nature, too, there can be societies compatible with rights (e.g. conjugal, paternal, domestic societies in general, as well as many others); but no law, "You ought to enter into this condition", holds *a priori* for these societies, whereas it can be said of a *rightful* condition that all human beings who could (even involuntarily [*unwillkürlich*]) come into relations of rights with one another *ought* to enter this condition.[6]

Kant rejects the juxtaposition between *nature* and *society* delineated by Gottfried Achenwall in his vast manual *Jus Naturae* (1755/56), which Kant himself had made use of in his courses on natural law. In its stead, Kant perceives a dialectic between *nature* and *civility* and backs up this new juxtaposition with what is admittedly a rather weak argument.

Kant's reasoning would prove more lucid in another passage, prominently placed at the beginning of the Doctrine of Right (and more specifically in the *Methodical Division of the Science of Right*) and conceptually akin to the passage we have just looked at.

> The highest division of the natural right cannot be the division (sometimes made) into *natural social* right. It must instead be the division, into natural and *civil* right, the former of which is called *private right* and the latter

[5] MdS, 6: 305–306 [*The Metaphysics of Morals*, translated and edited by M. Gregor, Introduction by R.J. Sullivan, Cambridge, Cambridge University Press 2012[17], p. 85]. References to Kant's works embedded in the text are formed by the standard abbreviations of the German titles, followed by the volume number in Academy edition (theAkademieAusgabe) of Kant's writings in which the work is included, and by the page number in that volume.

[6] MdS, 6: 306 [85].

> *public right*. For a *state of nature* is not opposed to a social but to a civil condition, since there can certainly be society in a state of nature, but not *civil* society (which secures what is mine or yours by public laws). This is why right in a state of nature is called private right.[7]

Even if the philological correctness of this passage is not universally accepted (it was in fact excised from Bernd Ludwig's edition of the *Metaphysics of Morals*), I thought useful to recall it due the fact that it simply exposes more clearly what Kant affirms—perhaps in a too cryptic way—summarising the same point in § 41 above.

Kant's subsequent remarks in § 41 are also of clear importance:

> The first and second state may be viewed as the *states of Private Right*, and the Civil state may be specially regarded as the *one of Public Right*. *The latter state contains no more and no other Duties of men towards each other than what may be conceived in connection with the former state*; the Matter of Private Right is the very same in both. The Laws of the Civil state, therefore, only turn upon the juridical Form of the co-existence of men under a common Constitution; and in this respect these Laws must necessarily be regarded and conceived as Public Laws.

Two points need to be made here.

Firstly, it is important to observe the shift that Kant's earlier juxtaposition has undergone. The civil state is no longer contrasted exclusively with the state of nature, but rather with both non-juridical dimensions: the state of nature and the social state understood as a whole.

Secondly, Kant confirms the continuity of the content of *duties*, namely of the demands that each rational being can legitimately issue in both a *natural* and *social* state, but which acquire a new form in the *civil* state. Here duties become *laws* and exchange their "private status", that is, their lack of formal codification, for a "public" one, that is universally recognised, applicable and demandable, in the form of a legally established right.

[7] MdS, 6: 242 [33–34].

Kant, however, makes a point of separating his theoretical content from any possible intrusions of the social dimension. Indeed, he proceeds in the following terms:

> The same *Civil Union* (*Uniocivilis*) cannot, in the strict sense, be properly called a *Society* [Gesellshaft]; for there is no partnership [*Mitgenossenshaft*] in common between the Ruler (*imperans*) and the Subject (*subditus*) under a Civil Constitution. They are not *co-ordinated* as Associates in a Society with each other, but the one is *subordinated* to the other. Those who may be co-ordinated with one another must consider themselves as mutually equal, in so far as they stand under common Laws. The Civil Union may therefore be regarded not so much as *being*, but rather as *making a Society*.

The *civil union* is not a *society* in that it envisages hierarchical relationships that are not founded on mere equality which, by contrast, is the basis for relationships in a society (even if Kant appears to skim over those hierarchical relationships that existed within domestic, familial and conjugal structures during his lifetime, and which he would justify and defend). Members of a society conduct relations according to a principle of reciprocal coordination and submission to common laws. In this sense a civil union *is not* a society, but rather *forms* a society of a higher kind, in which coordination and subordination are legally established according to the limits and possibilities of the law.

It is in these distinctive terms that Kant characterises the social sphere, which yet again appears to be held in "a precarious balance". Above all, it is precariously balanced between a state of nature and a social state, in that the social state appears to add new modes of relationship that complement the original "mine and yours" relationship typical of private law, that is of the natural state of relations between individual rational beings.

The social sphere is also in a precarious position because of its proximity to and possibility of overlapping with the civil state. It cannot merge with the civil state, for it is only the civil state that formalises the content of duties into laws, but nor can it separate from it completely, for besides dealing with relationships between *imperans* and *subditi*, the civil state must *also* consider relationships between subjects (or citizens).

However, there is a third meaning that allows us to appreciate the precarious character not only of the social sphere, but also of those specific social rights which we last saw in the context of the 1793 Declaration of Rights and the reflections of Thomas Paine. To gain this viewpoint, we must move our gaze to the discussion of State law at the end of the First Section of Public Law, another transitional passage wedged between Public and Private Law in the Doctrine of Rights.

Here Kant develops a "General Remark on the effect with regard to rights that follow the nature of the civil union."[8] In Section C of this note Kant lingers on what we would call a draft of social rights that would need to be instituted within the civil state, all the way from the sovereign downwards.

> The Supreme Commander [*Der Oberbefehlershaber*], as undertaker of the duty of the People, has the Right to tax them for purposes essentially connected with their own preservation. Such are, in particular, the Relief of the Poor, Foundling Asylums, and Ecclesiastical Establishments (MdS, 6: 325–326).

The Supreme Commander's right to taxation is affirmed on the grounds that he has taken upon himself the task of satisfying the duties of the people, that is, the aspects of private law which the natural/social state contains but does not protect. Such a "Commander", however, exercises this right with a specific purpose (indeed, it could be deemed a sort of forerunner to the "purpose-tax" which exists in modern states): the maintenance of the poor, orphans and sites of worships (albeit within clear limits, which I shall not discuss).

Kant offers a contractualist, but nevertheless innovative justification (which surprisingly makes no mention of rights to freedom) for this core of social rights:

> The general will of the people have in fact united themselves by their common Will into a *Society* [Gesellschaft], which has to be perpetually maintained; and for this purpose they have subjected themselves to the internal

[8] B. Ludwig, *Einleitung*, in I. Kant, *Metaphysische Anfangsgründe der Rechtslehre*, Meiner, Hamburg, 1998[2] (1986), spec. pp. xiii-xxvi.

> Power of the State, in order to preserve the members of this Society even when they are not able to support themselves. By the fundamental principle of the State, the Government is justified and entitled to compel those who are able, to furnish the means necessary to preserve those who are not themselves capable of providing for the most necessary wants of Nature. For the existence of persons with property in the State, implies their submission under it for protection and the provision by the State of what is necessary for their existence; and accordingly the State founds a Right upon an obligation on their part to contribute of their means for the preservation of their fellow-citizens.

The preservation of society (it is worth noting Kant's confident use of this term in this particular context) is the ultimate end for which single individuals have united. To preserve and maintain society means to preserve and maintain each of its members. It is from this principle that the state derives its right to demand of its wealthy members to help those who cannot secure the means for their own maintenance. The legitimacy of this demand is based on the fact that even the wealthy have entrusted themselves to the protection and care of the state, which guarantees them an important series of rights, but also expects to be compensated economically. Kant goes so far as to suggest that the poor be protected with state funds whose interest could be used to this end, with voluntary contributions or indeed with legal taxes, "the only ones that are conformable to the Right of the State, which cannot withdraw its connection from any one who has to live".

The proposal for the maintenance of children left in orphanages is equally interesting. The state has the right to impose responsibility for this rise in population upon the people and, to this end, to demand "contributions from the unmarried persons of both sexes who are possessed of means" on account of their "being in part responsible for the evil" (!). All the same, Kant admits that "this is a problem of which no solution has yet been offered that does not in some measure offend against Right or Morality".

Thus, Kant appears adamant to introduce a reference to social rights within state law—that would be a sort of practical experiment to try out the principle of *public* or *redistributive justice*. He remains reluctant,

however, to use the term "social rights" and at any rate discusses them in a part of the work that is of lesser importance – but that is still revealing of the double "citizenship" that they possess in the public sphere and the private one, as well as of the not already systematically consolidated place. In this sense, Kant's treatment of the subject appears to be in a decidedly "precarious balance" in relation to the rest of *the Metaphysics of Morals*.

Though I do not intend to consider this reference in the depth it deserves, the ambiguous status of the social sphere and of social rights in Kant is borne out further if we consider one of the work's opening paragraphs.

At the end of his *Introduction to the Doctrine of Right*, Kant proposes a *Division of the Science of Right*, in which the first section presents a *General Division of the Duties of Right*. It is here that Kant offers his own reading of Ulpiano's three famous juridical principles: *honeste vive*, *nemimemlaede*, *suumciuquetribue*. As we know, this paragraph has already been the subject of an illuminating critical interpretation by Alessandro Pinzani.[9]

Let me just make one important point. The comment which Kant tacks on to the third principle reads as follows: "*Enter*, […] into a *Society* [Gesellschaft] with them in which each can keep what is his own". Kant reformulates thus the same point immediately later in these terms: "*Enter* a state [Zustand] in which what belongs to each can be secured to him against everyone else (Lex justitiæ)".

Firstly, we should note the shift from *Gesellschaft*to (Ziviles) *Zustand* that Kant's thinking continues to undergo, despite the clarifications made in the aforementioned § 41. The most important thing to observe, however, is the implication that Kant manages to draw from this division. Whilst the first principle ("live rightly") concerns "internal duties", the second principle ("Do Wrong to no one") concerns external ones and the third principle relates to "duties which contain the latter as deduced from the Principle of the former by subsumption".

Thus, we are given a definitive affirmation of the link that connects all duties, be they individual or public, and proof of both the difficulty that Kant had in merging the social sphere and the civil sphere and the need

[9] A. Pinzani, *Der systematische Stellenwert der pseudo-ulpianischen Regeln in Kants* Rechtslehre, "Zeitschrift für philosophische Forschung", 59, 1 (2005), pp. 71–94.

he felt to establish a relationship between the two, however, restricted and self-restricting this may have been.

4.3 A Particular "groundwork" for the Social Sphere

On the basis of the above discussion, it could thus be said that Kant places the social sphere and its associated rights in a "precarious balance". In what follows, however, I would like to argue that a certain foundation for the social sphere and for the legitimacy of social rights can in fact be found in Kant. Though it is located outside the *Metaphysics of Morals*, it is nevertheless closely connected to the same theoretical project.

Thus, the main thesis of the second half of this chapter posits that—although in a neither very explicit nor very considered manner by the interpreters—Kant does in fact offer an early discourse on social rights and that this discourse can be found within the *Groundwork for the Metaphysics of Morals*, a text whose very purpose was to provide the foundations for the later work.

4.3.1 The Shared Root of Ethics and Law and the Importance of the *Groundwork of the Metaphysics of Morals*

As is well known, Kant's 1785 text was intended as the first part of the *Metaphysics of Morals* and as an exposition of the general underlying principles of that work as a whole. To hark back to the definition provided in the *Architecture of Pure Reason*, the "metaphysics of morals" contains "the principles that predetermine and necessitate *deeds and omissions* [*Tun und Lassen*]". It is therefore "a purely isolated metaphysics of morals, mixed with no anthropology [i.e. an empirical condition]" (*KrV*, B 869–870).[10]

[10] For what concerns the Kant's use of the expression "*Tun und Lassen*": implicit referring to Christian Wolff, *Vernünfftige Gedancken von der Menschen Thun und Lassen, zu Beförderungihrer Glückseligkeit* [1720]—now in Ch. Wolff, *Gesammelte Werke*, hrsg. von J. École, J.E. Hoffmann, M. Thomann, H.V. Arndt, Olms, Hildesheim-New York, 1976, Vol. IV, I.

Kant reasserts this definition in the Preface to the *Grundlegung*, deeming now the full development of a "pure moral philosophy" (*einereineMoralphilosophie*) a matter of "extreme necessity". According to the author's intentions, therefore, the *Grundlegung* should be regarded as a meta-ethical work, namely as a "foundation" for the philosophical domain which he considers the science of the "laws of liberty" (*GMS*, 4: 387). Thus, the *Groundwork* constitutes a preliminary theoretical stage to the *Metaphysics of Morals*, a project which Kant would manage to complete only in 1797 though the idea itself had originated in the mid-1760s and is evidenced in many of Kant's correspondences.[11]

Putting aside the various reasons for this delay,[12] we shall focus on the theoretical links between the *Groundwork of the Metaphysics of Morals* and the *Metaphysics of Morals* itself.

The *Metaphysics of Morals* is composed of two parts dealing respectively with the *Metaphysical principles of the doctrine of right* and the *Metaphysical principles of the doctrine of virtue*. Whilst the first part discusses the application/fulfilment of ethical principles in those institutions that govern the co-existence of rational beings, the latter part deals with the realisation of the same principles in the subject agent through the establishment of fundamental behaviours and attitudes such as virtues.

Concerned as it is to determine the structures in which reason manifests itself in practice, the *Groundwork* moves beyond the distinction between *right* and *ethics* that is so explicitly drawn up in the *Metaphysics of Morals*, concentrating instead on the definition and elaboration of those principles that would apply in both spheres of pure practical reason.

By highlighting the peculiarity of the 1785 work, I am not arguing that Kant had not yet conceived of the distinction between *morality* and *legality*, between "internal legislation" and "external legislation", and

[11] See the following letters by Kant: to Johann Heinrich Lambert (31 December 1765; Ak. X, 56); to Johann GottfriedHerder (9 May 1768; *Briefe*, Ak. X, 74); again to Lambert (2 September 1770; Ak. X 97); to Marcus Herz (7 June 1771; Ak. X, 123 and another one datable around end 1773 (Ak, X 145); to Moses Mendelssohn (16 August 1783; Ak. X, 346–347); to Heinrich Jung-Stilling (datable after 1 March 1789; Ak. XXIII 495).

[12] On this point see first L.W. Beck, *A Commentary on Kant's Critique of Practical Reason*, University of Chicago Press, Chicago—London, 1960, spec. pp. 5–18; B. Ludwig, *Einleitung*, in I. Kant, *Metaphysische Anfangsgründe der Rechtslehre*, Meiner, Hamburg, 1998[2] (1986), spec. pp. xiii–xxvi.

ultimately between ethics and right, which would lie at the heart of the *Metaphysics of Morals*.

This distinction is, in fact, already apparent in the notebook relating to the *Course on natural law (NaturrechtFeyerabend)*, which was held by Kant in the summer term of 1784, that is at exactly the time when he was completing the *Groundwork* (whose production lasted from the autumn of 1783 to the summer of 1784). The same distinction is also made in the 1775–1780 *Course on ethics* where Kant differentiates *obligations internae* and *obligations externae* whilst commenting on the idea of the *obligatio* in relation to the Baumgarten manual (*VE*, 41; *Collins*, 27: 272).[13]

Indeed, it is even present in the *Groundwork*, where moral actions intentionally undertaken for the sake of duty (*ausPflicht*) are distinguished from actions that conform to duty, that is actions undertaken only for the sake of external conformity to the law and based either on a subject's natural inclination or fear of punishment (*GMS*, 4: 390, 397–398).

But besides outlining the distinction between ethics and the law, the 1775–1780 *Course on ethics* also explicitly underscores their affinity:

> The difference between the law and ethics does not lie in the nature of the obligation, but in the motives adopted for its accomplishment […] Ethics takes into consideration all obligations as long as their motive is internal; it considers them, in other words, on the basis of duty, […] paying no attention to their coercive aspect. The law, on the other hand, considers the fulfilment of an obligation not in terms of its dutiful motivation, but insofar as it depends on coercion.[14]

Ethics and the law differ in terms of the motivation that underlies the same actions, be it pure intention or coercion. Nevertheless, the "nature of the obligation" remains identical in the case of both juridical and virtuous duties.

By viewing things in these terms, we can identify *a first indirect confirmation* of a key theoretical problem in Kantian thought: the unchanging nature of the obligation approximates the "matter of the law" which, as

[13] See also Kant's courses on Moral Philosophy: *Mrongovius II*, 29: 611–619; *Powalski*, 27: 131–133, *passim*. Furthermore: *Feyerabend*, 27: 1326.

[14] *VE*, 40; *Collins*, 27: 271–272.

we saw in § 41 of the *Metaphysics of Morals*, shifts unaltered in the passage from a *state of nature/social state* into a *civil state*.

Moreover, the idea of the obligation (*Verpflichtung*) makes an important reappearance in the *Introduction to the Metaphysics of Morals*. Here Kant resumes and also develops the meta-ethical line of reasoning inaugurated in the *Groundwork*. In Section IV of the Introduction, whilst discussing those "concepts 'that are' common to both parts of the metaphysics of morals", Kant defines an obligation as "the necessity of a free action under the categorical imperative of reason" (*MdS*, 6: 222).

It is worth highlighting three considerations in this regard.

(i) Above all, in his *Introduction* Kant reiterates the point that the idea of the obligation is common to both ethical and juridical spheres, to which the *Metaphysics of Morals* devotes ample space.

(ii) It must also be pointed out that Kant discusses obligations in terms of the categorical imperative, which renders an otherwise free action—namely an action that is the product of subjective choice—necessary and therefore obligatory.

(iii) Thus, the categorical imperative, which is extensively treated in the *Groundwork* and subsequently in the *Critique of Practical Reason*, justifies its application on both an ethical and juridical level.

In a general sense the categorical imperative is an unconditional obligation which transcends any distinction between internal and external legislation. Just like ethics then, the law "commands categorically" and does so in a way that is not "technical" or "pragmatic", although it differs from ethics insofar as it holds up the threat of coercion. The duties that the law imposes on me as a man and citizen of the state do not allow me to evaluate the usefulness of obedience and to weigh up the advantages I could gain from it. Rather, they command in an absolute manner, for they are *laws* in the more common sense of the word. In the context of the law one does not reason and act according to a hypothetical imperative, but rather in accordance with the categorical imperative of the law.[15]

[15] This last expression is by Otfried Höffe. See: O. Höffe, *Kant's Principle of JusticeasCategorical Imperative of Law*, in Y. Yovel (ed.), *Kant's practica lPhilosophy reconsidered*, Kluwer Academic Publishers, London, 1989, pp. 149–167; Id.,*KategorischeRechtsprinzipien. Ein Kontrapunkt der Moderne*, Suhrkamp, Frankfurt a.M., 1994, spec. pp. 11–29 e 126–149; Id., *Kategorische*

It is worth drawing attention to Kant's remarks concerning the syntactic formulation of the imperative in the *Introduction to the doctrine of right* (that forms part of *the Metaphysics of Morals)*, and in particular to his definition of the "universal law of right": "Act externally in such a way that the free exercise of thy will may be able to coexist with the liberty of all others according to a universal law" (*MdS*, 6: 231).[16] Equally, one can find at least three explicit references to the juridical role of the categorical imperative in the 1797 work.[17]

By focussing on the categorical imperative, the *Groundwork for a Metaphysics of Morals* furnishes Kantian thought with a key idea, which the author himself would implement in both an ethical and juridical context. This characterisation of the *Groundwork* and its important position within Kant's moral system should always be remembered, even if the work deals almost exclusively with the moral dimension and even if it appears to lose sight of its original preliminary intention when read alongside the second *Critique*, which was written a mere three years later.

4.3.2 The Categorical Imperative and its Communitarian Outcome: The *Kingdom of Ends*

The Groundwork is divided into three parts, three "passages" that seek to guide the reader from a "shared rational knowledge of morality" via a "metaphysics of morals" onto a "critique of pure practical reason". In what follows, I will concentrate on the second section, where the categorical imperative is expounded.

Contemporary debate on the subject continues to use Paton's famous work[18] as its main point of departure. Instead of engaging in a detailed

Rechtsimperativ. "Einleitung in die Rechtslehre", in O. Höffe (Hrsg.), *Immanuel Kant. Metaphysische Anfangsgründe der Rechtslehre*, Akademie Verlag, Berlin, 1999, pp. 41–62.

[16] On this topic see: S. Goyard-Fabre, *La philosophie du droit de Kant*, Vrin, Paris, 1996, spec. pp. 17–60; Id., *Philosophie critique et raison juridique*, PUF, Paris, 2004, spec. pp. 64–70 e 120–149.

[17] See *MdS*, VI, 318, 336–337, 371.

[18] H.J. Paton, *The Categorical Imperative. A Study in Kant's Moral Philosophy*, Hutchinson, London, 1965[5] (1947). Amongst the most recent studies: C. Horn—D. Schönecker (Hrsg.), *Groundwork of the Metaphysics of Morals*, de Gruyter, Berlin/New York, 2006; J. Timmermann, *Immanuel Kant, Grundlegungzur Metaphysik der Sitten*, Vandenhoeck & Ruprecht, Göttingen, 2004 (ed. ingl.: *Kant's "Groundwork of the Metaphysics of Morals". A Commentary*, Cambridge University Press, Cambridge, 2007).

analysis of the various formulations presented by Kant, however, I have chosen to focus on the theoretical culmination of Kant's entire discussion of the categorical imperative: the *kingdom of ends* (*Reich der Zwecke*).

Over the course of the Second Section, Kant elucidates the *principle of universalisation* and the idea of *man as an end in himself*, considering them in the light of the first two formulations of the imperative. Subsequently, he condenses the first two formulations into a single one by articulating the principle of *autonomy*, which emphasises the self-legislating capacity of subjects considered from a universal point of view. The *kingdom of ends* "derives" from and encompasses the principle of autonomy,[19] thus reifying in itself all of the other formulations that make up the categorical imperative.[20] It is a sort of additional and therefore more comprehensive synthesis that, as will become clear, completes the individual dimension of the imperative, raising it to a supra-individual, communitarian and social plateau.

But, in what sense can the *kingdom of ends* be understood as a communitarian structure? An analysis of its exact meaning allows us to answer this question more accurately:

> By a *kingdom* I understand a systematic union of various rational beings through common laws. Now, since laws determine ends in terms of their universal validity, if we abstract from the differences of rational beings as well as from all the content of their private ends, we shall be able to think of a whole of all ends in systematic connection (a whole both of rational beings as end in themselves and of the ends of his own that each may set himself), that is, a kingdom of ends, which is possible in accordance with the above principles.

As I have argued elsewhere,[21] the *kingdom* represents a community of rational beings placed in a systematic connection (*systematischeVerbindung*) that is mediated through shared laws (*gemeinschaftlicheGesetze*), a totality (*Ganzes*) in which all freely obey the law that is given to them

[19] On this point: A. Pirni, *Kant filosofodellacomunità*, Edizioni ETS, Pisa 2006, spec. pp. 28–36.

[20] See also Ch. Schnoor, *Kants kategorischer Imperativ als Kriterium der Richtigkeit des Handelns*, Mohr, Tübingen, 1989, spec. pp. 47–48.

[21] A. Pirni, *Il "regnodeifini" in Kant. Morale, religione e politica in collegamento sistematico*, Genova, ilMelangolo 2000.

(and which they simultaneously share with all others) and abdicate their own particularity, thus recognising the autonomy of all other subjects.

It is interesting to note that the adjective "systematic" (*systematisch*) is used twice in the space of a short sentence and is accompanied by two terms that are almost synonymous with it: *Verbindung* and *Verknüpfung*. The *kingdom of ends* presents itself primarily as a connection, a systematic union, that is an organised and internally coherent "totality". This totality encompasses and systematically unites "various [*verschiedener*] rational beings", whose "variety" reflects not only their large number, but also each being's possession of unique individual qualities.

Besides, if the totality of all ends can be considered separately from "the personal differences between rational beings and the content of their private ends", this does not immediately negate these ends. Rather, this way of thinking allows us to place the ends in a systematic and teleological perspective. Thus, we avoid the error of treating ends as absolutes or alternatively reducing the totality to a disorganised, inchoate "rhapsody" (*KrV*, III 538–539, B 860–861). No rational being can hope to pursue his own ends in an absolute manner, without limitations, and to remain in spite of this in a systematic connection with all other rational beings. On the contrary, his rationality dictates that he does not abandon this connection, since participation in it is commanded by reason.

The problem here is merely a matter of subordination. First, one has to recognise the *kingdom of ends* as a teleological and moral whole in which each rational being has to find his place. The totality of ends that is formed in this way will include all rational beings insofar as they are ends in themselves and grant to each of them the permission to pursue their own ends as long as they are compatible with the moral law.

The need to coordinate the various members of the *kingdom of ends* should be apparent by now. This coordination is simultaneously internal and external to the individual rational being. On an internal level, it refers to the subject's ability to prioritise the end that is rational (i.e. the rational being as an end in himself and not merely as a means) and, subsequently, to pursue all "private ends" (i.e. ends that benefit the individual and that are not explicitly required by pure practical reason) that he is able to find for himself.

At an external level it refers more to the need to respect all other rational beings as ends in themselves and to recognise their capacity to find their own path for their own self-fulfilment within a shared legislative framework, or in Kant's words "through common laws" (*durchgemeinschaftlicheGesetze*).

Here we can find *another indirect reference* to § 41 of the *Metaphysics of Morals* and more specifically to the definition of "society" that Kant offers to contrast the concept of "civil union". Whilst the latter includes the person in charge who inaugurates hierarchical relationships between himself and his subordinates, the idea of "society" envisages people who are bound by relationships only of a certain type: "those who are coordinated with one another must for this very reason consider themselves equals since they are subject to common laws"(MdS, § 41, 6: 133).

4.3.3 The *Kingdom of Ends* as a Juridical and Political Community

But in what sense and to what extent can the *kingdom of ends* be understood as the complete foundation not only for a communitarian structure, but also more specifically a political and juridical community?

To help answer this question it is worth recalling that the categorical imperative is applied in two different spheres in the *Groundwork*. In fact, the kingdom of ends gives rise to another formulation of the imperative: "Act according to the maxims of a universal legislating member of a merely potential realm of ends" (*GMS*, 4: 439). Thus, in keeping with the entire theoretical configuration of the *Groundwork*, the kingdom of ends must be understood as referring to both the ethical and juridical sphere, as the origin of both ethical and juridical norms and, therefore, as their source of legitimacy within Kantian thought.[22]

[22] Other scholars could agree with the thesis of the Kingdom of Ends' double sphere of application. I'm referring here to: D. Pasini, *Dirittosocietà e stato in Kant*, Giuffrè, Milano, 1957, spec. pp. 49–56; D. Pasini, *Das* Reich der Zwecke*und der politisch-rechtliche Kantianische Gedanke*, in Funke G. (Hrsg.), *Akten des 4. Internationalen Kant-Kongresses*, de Gruyter, Berlin-New York, 1974a, pp. 675–691; Id., *Il 'mondo dei fini' ed il pensiero giuridico-politico kantiano*, in A. Rigobello (a cura di), *Ricerche sul 'regno dei fini' kantiano*, Bulzoni, Roma, 1974b (ma 1975), pp. 87130; G. Fassò, *Storia della filosofia del diritto*, il Mulino, Bologna, 1968, spec. pp. 387–410;

This thesis, however, needs to be bolstered with a closer reading of the *Groundwork*. In the *kingdom of ends* each member has to treat all other members with respect and, at the same time, should demand the same degree of respect for himself. All members of the *kingdom of ends*, as rational beings, possess the dual quality of being both ends in themselves and agents capable of generating their own ends. Respect for another rational being *qua* end in himself implies respect for his freedom of action, and a tendency to consider and promote all attempts to develop and perfect his intellectual freedom, those predispositions and moral qualities that nature has granted him—especially when they can translate into concrete actions.

This moral obligation to treat all rational beings as ends gives rise to a political and juridical problem, namely how to determine the extent to which respect for one person's liberty of action does not infringe on another person's exercise of liberty. This is the problem of right.

Kant confronts this theoretical dilemma head-on in his *Idea for a Universal History from a Cosmopolitan Point of View*, a text that dates back to the same year as the *Groundwork*. Indeed, the title of the *Fifth Thesis* avers that: *The greatest problem for the human race, to the solution of which nature drives man, is the achievement of a universal civic society which administers law among men.*[23] Such a civil society will need to be characterised by *the greatest liberty and therefore (by) a general antagonism between its members*, combined with *the most exact definition of freedom and fixing of its limits so that it may be consistent with the freedom of others.* Only in this society, which Kant terms a "perfectly just civil constitution", can nature's supreme objective (*Absicht*)—the development of all human faculties—be achieved. Its pursuit will become the "supreme task" (*höchsteAufgabe*), that is "the greatest aim" (*größten Zweck*)[24] ever entrusted by nature to mankind.

P. Quattrocchi, *Comunità religiosa e società civile nel pensiero di Kant*, Le Monnier, Firenze, 1975, spec. pp. 146–157; Id., *L'ideale della comunità umana come determinazione costitutiva del regno dei fini*, in A. Rigobello (a cura di), *Ricerche sul 'regno dei fini' kantiano*, cit., pp. 191–213; Ch. Taylor, *Kant's Theory of Freedom*, in Id., *Philosophy and the Human Sciences* (*Philosophical Papers*, Vol. II), Cambridge University Press, Cambridge, 1985, pp. 318–337.

[23] *Idee*, 8: 22.

[24] *Anfang*, 8: 110.

It is difficult not to notice the substantial theoretical continuity between the idea of the civil society and that of the Platonic republic, which is presented in the *Transcendental Dialectic* of the first Critique and defined as "a constitution characterised by the greatest human freedom according to laws that enable the freedom of all to coexist with that of all others" (*KrV*, III 247, B 373).

I should emphasise that the freedom Kant speaks of is none other than external freedom, which concerns interpersonal relationships between rational beings in their capacity as legal persons. As has been said, the purpose of the law or right is to determine the limits of this freedom. In order to discover the fullest definition of the concept of right, the Kantian scholar typically turns to the *Metaphysics of Morals*, and in particular to the Introduction to the *Rechtslehre*. In effect, this is where its most rigorous definition can be found.[25] Kant, however, had already come up with a perfectly satisfying definition for it in the *Course on natural law* which he held in the summer term of 1784, precisely at the time that he was completing the *Groundwork*: "Right is the limitation of liberty, through which liberty can exist alongside all other liberty according to a universal rule"(*Feyerabend*, 27: 1320).[26]

But what is Kant referring to when he speaks of the "universal rule" or the "universal law of liberty"(*MdS*, 6: 230) in relation to right? He is referring to the practical principle that underpins its legitimacy. Why does the limitation of my liberty have to be legitimate? Because this limitation is dictated by practical reason in the form of a categorical imperative. I must limit my liberty so that it can co-exist with that of all other rational beings, for reason commands all to submit themselves to the law according to which "nobody should ever treat himself or others simply as means, but always and contemporaneously as ends in themselves" (*GMS*, 4: 433), as Kant affirms in his definition of the *kingdom of ends*. Thus, a reciprocal agreement is born, a systematic union of rational beings that share the same concept of right.

Thus, the very same categorical imperative that is presented in the *kingdom of ends* also constitutes the foundation of the law and legitimises its limitation of freedom: a necessary means of guaranteeing the respect

[25] "Right, therefore, comprehends the whole of the conditions under which the voluntary actions of any one Person can be harmonised in reality with the voluntary actions of every other Person, according to a universal Law of Freedom" (MdS, 6: 45). See also Gemeinspruch, 8: 289–290.

[26] Cfr: Feyerabend, Tit. I (*De norma action umliberalium et in genere*), 27: 1334 and 1335.

that is owed to all rational beings in their capacity as persons. Having linked morality to the question of the law, Kant offers his own ideal solution—it is only where people treat all other people as ends in themselves that legally feasible freedom can be established.

Kant's speculation occurs in a space where interiority and exteriority are bound together and fuse "systematically", once again precipitating a continuity between spheres that could easily be considered distinct. The moral respect that one owes to the internal freedom of others is the same as the respect that is owed to the exercise of this freedom, to the actions of others, which in turn occur in a world of social relations, a sphere of shared exteriority, a political community (or public sphere), in which individual action is not framed in self-referential terms, but rather includes and respects all possible others.

Returning to our discussion of the *Groundwork*, one can affirm that every member of a state—like every member of the *kingdom of ends*—is contained within a "[…] a whole of all ends in systematic connection (a whole both of rational beings as end in themselves and of the ends of his own that each may set himself)".[27]

Every individual who submits himself to the fundamental laws of the *kingdom of ends*, namely: (i) to become an autonomous legislator and (ii) to respect the other always as an end, acts not only for his own wellbeing, but also for that of all others and that of the whole. The joint subordination to the categorical imperative of all members of the *kingdom of ends* justifies the existence of the law and therefore of a just state. It also brings into life a public space where everyone is called upon to recognise the validity of the law as the mechanism that co-ordinates and informs the daily relations of all rational beings.

4.4 Beyond Formal Intersubjectivity: The Latent Foundation of Sociality

The *kingdom of ends* presents itself as the necessary context for the actualisation of the law and, at the same time, as a framework offering concrete guidelines for the conduct of a moral life. It, therefore, justifies

[27] *GMS*, 4: 433.

itself as the proper scenario for the full realisation of the human condition. Moreover, recalling again the theoretical context of § 41 of the *Metaphysics of Morals*, it offers a sort of *tertium*, namely a point of interconnection between the two "realms" of morality and law.

In these terms articulated, the Kantian community should be thought of in terms of an unbridgeable gap between the universality of *form* and the particularity of *content*. In my view, this gap can be narrowed through reference to the *kingdom of ends*, which constitutes itself not only as a formal moral community, but also as one offering concrete instructions for the moral life.

In what terms does the existence of concrete "content" within the *kingdom of ends* make this concept in some way "intermediary" in relation to both the moral and the juridical community? The justification of this intermediary character corroborates the ground-breaking nature of Kant's 1785 work and also helps us understand the social sphere, even if this remains a latent aspect of Kantian thought at best. What then are the *moral contents or values* that one can spot in the *kingdom of ends* and that can be defined as social, insofar as they relate to the pursuit of those social rights that were mentioned at the outset?

The treatment of man as *an end in himself* and a *person* constitutes the primary and most patent value enshrined in the kingdom. Only within the *kingdom of ends* does man have to consider every other man "always as an end in himself" and can therefore expect to be considered as such by everyone else. This first fundamental value entails two additional (and interconnected) ones: *self-determination*, namely the free pursuit of individual ends, which is justified within this communitarian structure only insofar as it is combined with mutual *respect* and recognition of the other's *dignity*.

The recognition of the *dignity* of each rational being, that is, "the recognition of humanity as capable of morality",[28] furthermore implies an element of solidarity, mutual assistance in the pursuit of individual happiness which, as Kant suggests, consists in the promotion of humanity in each man and the development of his rational nature. The promotion of humanity, which occurs in the context of a forever-changing relationship

[28] *GMS*, 4: 435.

between men, also implies the value of *responsibility*, acknowledgement of the fact that my actions affect not only me but also all other rational beings with whom I engage in "systematic connection".

The awareness of the need to maintain a responsible and consistent relationship above all with myself and therefore with all others merges with the awareness that I am an *autonomous* and therefore *moral* subject. It is the value of freedom that emerges from this speculative line of reasoning, even though Kant himself would only expand on this idea in the second *Critique.*[29]

It is this set of values that the *kingdom of ends* succinctly expresses and that Kant implicitly refers to when he invokes "communitarian laws" (*gemeinschaftlicheGesetze*) in his definition of the kingdom. In this sense the "laws" are no more than a bond shared by a social group and intended to preserve and promote a specific set of values.

At the same time this reference to the laws inevitably brings to mind the *law* of the imperative. Corresponding to a state of obedience towards the law of morality, these values are imposed by practical reason upon all rational beings and, as such, are constitutively shared by all rational beings. The *kingdom of ends* turns out to be a *community of moral content* insofar as it implies a commonality of fundamental values.

Nevertheless, this communitarian dimension of Kantian thought is subject to a constant intellectual tension. We should not forget that the *kingdom of ends* is "in truth only an ideal" (*GMS*, 4: 433). But it is in the duplicity of the *kingdom of ends*, its status as both a "constitutive structure" and "regulative ideal" that its conceptual fecundity resides.[30]

This duplicity allows us to perceive the *kingdom of ends*' dual nature as both an *ideal* and a *practical idea* (*GMS*, 4:433, 436). It takes us back to the passage in the *Critique of Pure Reason* where Kant asserts: "as the

[29] About this specific point, first see: H.J. Paton. 1946. *The Categorical imperative*, cit., spec. pp. 207–222, 266–278; G. Prauss, *Kant über Freiheit als Autonomie*, Frankfurt am Main, Klostermann 1983; H.E. Allison, *Kant's Preparatory Argument in* Grundlegung III, in O. Höffe (Hrsg.), *Grundlegungzur Metaphysik der Sitten. Ein Kooperativer Kommentar*, Klostermann, Frankfurt am Main, 1989, pp. 314–324; F. Chiereghin, *Il problema della libertà in Kant*, Trento, Verifiche 1991, spec. pp. 76–101.

[30] On this specific point see: A. Rigobello, "Il 'Regnodeifini' come Ideale Regolativo e come Struttura Trascendentale", in G. Funke (Hrsg.), *Aktendes 4. Internationalen Kant-Kongresses*, cit., pp. 597–604, spec. pp. 599–600.

idea gives the rule, so the ideal serves as the archetype for the complete determination of the copy" (*KrV*, B 597). The *kingdom of ends* as an *idea* "gives the rule", that is it proposes the final and most comprehensive formulation of the imperative ("act according to the maxims of a member of a merely possible *kingdom of ends* legislating in it universally" [*GMS*, 4: 439]). In this regard, it presents itself as a "constitutive structure" which ought to guide and determine the conduct of the rational being on account of its moral authority and the continual invocation of shared values. On the other hand, as an ideal image of the community, the *kingdom of ends* represents the archetype of perfection and becomes a *regulative* model for all concrete relations between rational beings.

These two dimensions, which could be conceived of as separate, are thus integrated and fused in the *kingdom of ends*. This mutual implication seems to be more explicitly upheld by Kant in his third *Critique*—and to be specific in the Appendix to the *Methodology of Teleological Judgement*—where he writes: "from a practical point of view a regulative principle […] is simultaneously constitutive, or practically determinative" (*KU*, 5:457).[31]

Community is our "destiny", the inescapable horizon against which our actions are played out. At the same time, we can never quite reach this horizon. The *systematic connection* between men is accomplished through common laws that nevertheless cannot be captured in their entirety. Rather, they are laws that in an apparently paradoxical manner encourage our disobedience, not so much to save the *noumenon* of freedom from ourselves as to save ourselves from it. "The community is protected by a diaphragm that we cannot cross lest it consume us, to prevent ourselves from being entirely sucked in by an Object that would destroy us as subjects, an Abyss where all particularities and determination would be obscured."[32]

This diaphragm exists in the *kingdom of ends*, and consists precisely in its dual status as a "constitutive structure" and "regulative ideal" of a community of rational beings that is motivated by a shared purpose: the

[31] On this point see G. Cunico, *Moralische Teleologie und höchstes Gut bei Kant*, "Wiener Jahrbuch für Philosophie", 1998 (XXX), pp. 111–124. See also B. Williams, *Ethics and the Limits of Philosophy*, Cambridge (Mass.), Harward University Press 1985, spec. p. 231.

[32] R. Esposito, *Communitas. Origine e destino della comunità*, Torino, Einaudi 1998, pp. 86–87.

pursuit of the moral good for themselves and for all others. Differently understood by all subjects and yet experienced and accepted by all as a co-ordinated and co-operative endeavour, this shared purpose encapsulates the ultimate meaning of the *kingdom of ends* and the particular grounding of the social sphere it implies.

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5

Rawls Vs. Nozick Vs. Kant on Domestic Economic Justice

Helga Varden

5.1 Introduction

Robert Nozick initiated one of the most inspired and inspiring discussions in Anglo-Saxon political philosophy of the late twentieth century when his 1974 *Anarchy, State, and Utopia*[1](hereafter ASU) responded to John Rawls's 1971 account of distributive justice in *A Theory of Justice* (TJ)[2]. Nozick argues that Rawls's main principle of economic justice in his theory of "justice as fairness"—the so-called "difference principle"—

Thanks to Andrea Faggion and the audience at the Department of Philosophy at the State University of Londrina for useful feedback on an earlier version of this chapter. Thanks also to Kirstin Wilcox for invaluable help with the presentation of the ideas below.

[1] Robert Nozick: *Anarchy, State, and Utopia*, Basic Books Inc., 1974.

[2] All references to this work in this chapter will be to the 1999, revised edition of *A Theory of Justice*, The Belknap Press of Harvard University Press.

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is irreconcilable with liberal theory's basic commitment to protect each person's right to freedom, that is, to set and pursue ends of their own with their means.[3] Nozick considers it impossible for this principle of economic justice to apply to the distribution of income and wealth in the way Rawls envisions without conflicting with Rawls's second core idea: the right to private (or what Rawls calls "personal") property.[4] One can defend *either* a person's right to private property *or* principles of distributive justice along the lines of the difference principle. But one cannot do both. And if one wants a theory of freedom, one has to uphold the right to private property and so give up the idea of (leftwing) distributive principles of justice à la Rawls's difference principle. Any liberal attempt (whether by private individuals or the state's legal-political institutional structure) at enforcing some sort of ahistorical baseline, such as every person's right to a specific, even minimum amount of certain goods at all times, will, Nozick argues, necessarily fail.

In contrast, Rawls's 1971 account of justice as fairness solves a problem internal to Kant's moral theory. According to the prominent Kant interpretation at the time, it was impossible to envision any defensible account of economic justice within Kant's framework. The formal nature of Kant's moral account in combination with how it conceives of beneficence or charity as an imperfect duty makes it incompatible with the

[3] Rawls's difference principle states that "social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all" (TJ: 53). The relevant social and economic inequalities, in turn, are identified by utilizing a standard consisting of a set of "primary social goods," that is, "rights, liberties, and opportunities, and income and wealth" that are useful "whatever a person's rational plan of life" (TJ: 54, cf. 79–81). The difference principle is the second principle of justice as fairness; the first one states that "each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others" (TJ: 53.). Rawls clarifies that the first principle concerns traditional liberties like "political liberty (the right to vote and to hold public office) and freedom of speech and assembly; liberty of conscience and freedom of thought; freedom of the person… the right to hold personal property and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law" and that all citizens are to be equal in regard to this principle (ibid.). Nozick takes no issue with this principle, but only with the second principle, and especially how Rawls thinks that it can apply "… to the distribution of income and wealth and to the design of organizations that make use of differences in authority and responsibility" (TJ: 53).

[4] If this is true, then Rawls is also mistaken in his basic claim that the two principles of justice as fairness should, and so can "be arranged in a serial order with the first principle prior to the second… [so that] infringements of the basic equal liberties protected by the first principle cannot be justified, or compensated for, by greater social and economic advantages" (TJ: 54).

basic liberal ideal of securing everyone basic rights, liberties *and* actual opportunities. Rawls's 1971 account with its difference principle is supposed to overcome this alleged problem in Kant's theory. The difference principle secures opportunities for all by means of redistributing certain basic goods in response to inequalities. And Rawls argues that because the difference principle is ranked as the second principle of justice, which cannot override the first principle of justice as fairness (the principle that secures classical rights and liberties), the potential incompatibility of rights, liberties and opportunities is solved as a matter of Kantian liberal theory. Nozick disagrees, and so aims to show that Rawls' attempt to reconcile the two concerns—rights/liberties *and* actual opportunities—in a liberal way within the framework of justice as fairness, fails.

Despite Nozick's resistance to principles of so-called *re*distributive justice, he surprisingly realizes that an aspect of his theory entails that the just state must engage in "apparent redistributive" measures to justify its monopoly on coercion in relation to so-called independents (non-citizens living within its territory) (ASU: 115). This redistributive element is not a part of his account of private property acquisition, but a necessary consequence of establishing a state with a monopoly on coercion. Both arguments—Nozick's account of private property and of the establishment of the state—remain fundamentally Lockean, but they conform to Kant's liberal intuition that our moral basis is a respect for each other's freedom (rather than Locke's fundamental principle of self-preservation). More specifically, Nozick's argument regarding private property goes like this: in times of scarcity, Locke's "enough-and-as-good" proviso no longer gives everyone a right to own land. Instead, this basic principle now grants everyone a right to access goods equivalent to 1/nth of the world's natural (undeveloped) resources (where "n" refers to the total number of people in the world), and such access can be accomplished by how private individuals employ each other in labor markets.[5]

[5] For my purposes here, all that's needed is this extremely brief outline of Nozick's account. His argument is found in Ch. 7 "Distributive Justice," Section 1 of ASU, pp. 149–182. I discuss this and other prominent, contemporary libertarian revisions of this principle of private property acquisition in my "The Lockean'Enough-and-as-Good' Proviso—an Internal Critique."*Journal of Moral Philosophy* 9 (2012b), pp. 410–422.

The other Lockean argument, regarding the need for the state (a question that Rawls sets aside in his writings), is given the following twist[6]: if we imagine individuals living together in a pre-state condition (the state of nature), then we can imagine that they will start to specialize in providing goods and services—and some people will specialize in providing security services for others. Moreover, once there are several private security companies ("protection agencies") competing in a geographical area, it is likely that one of them will be able to gain some advantage over the others (become a "dominant protection agency"). At that point, it will be irrational for anyone to buy their services from anyone but this most competitive security company since it will be the strongest and, so, the safest. Hence, in all likelihood one security company will enjoy a de facto monopoly on coercion or become what Nozick calls an "ultra-minimal state." Of course, such an ultra-minimal state does not have all the people living in the geographical area as its customers; there will still be some independents living there who do not want to buy its protective services and instead (irrationally) want to rely on their own powers to defend their rights. However, due to its immense power, the ultra-minimal state will enjoy de facto control over the exercise of coercion in the area: no one will (de facto) be able to use coercion against its customers without the ultra-minimal state's approval. But once this happens, a new moral problem arises: the ultra-minimal state must ensure that its monopoly on coercion is reconcilable with the rights of those independents living in the area who, as a matter of empirical fact, can no longer enforce their natural rights against the ultra-minimal state's customers.

Nozick's solution to this problem of the rights of independents is that the ultra-minimal state must transform itself into a "minimal state": it must secure access to its legal-political institutions for anyone (independents or non-citizens) interacting with its customers (citizens) within its geographical area. Consequently, if there is a conflict between an independent and one of its customers, the protective agency must ensure that

[6] Again, given the aims in this chapter, I'm providing an abbreviated version of Nozick's account of the establishment of the state, which can be found in Chapters 2 through 6 in ASU, pp. 10–146. I discuss Nozick's account of the establishment of the state (including much relevant secondary literature) in "Nozick's Reply to the Anarchist: What He Said and What He Should Have Said about Procedural Rights," *Law and Philosophy*, Volume 28, Issue 6 (2009), pp. 585–616.

the independent in question can afford to buy the legal services it needs to secure her rights in relation to this customer. Here the surprising, redistributive element arises: Nozick argues that the minimal state can and must justly charge its customers (citizens) the amount of money necessary to secure such legal access for the independents. Yet, he continues, this is not strictly speaking a *re*distributive element, even though it is a cost or tax that does not occur in the state of nature and involves transferring some money from those who have to those who have not. It is not redistributive in nature because the monopoly on coercion is a new kind of fact that those who partake in upholding it (as a fact) must respond to normatively, exactly by securing everyone access to its legal-political institutions when interacting with them. Hence, Nozick argues, this apparently redistributive element of the minimal state does not justify a welfare state. State-enforced, basic protection of the poor regardless of circumstances or redistribution aimed at ensuring real opportunities for social climbing through, for example public educational and health care measures remain unjustifiable, according to Nozick. Such measures are out of reach for a state committed to freedom, since they involve enslaving some to others, making some (the richer) into mere means for others (the poorer). Caring for others and their needs as such remains, Nozick concludes, a non-enforceable duty of virtue (charity or beneficence) and not an enforceable duty of justice.

The most common responses to Nozick's theory are as follows: Most liberals and libertarians pay little attention to his monopoly on coercion argument. Rightwing liberals and libertarians follow his minimal state direction (even if they sometimes revise his account or supplement it with other arguments). Leftwing liberals (including libertarians) challenge either his idea that everyone only gets a right to an equivalent of $1/n^{th}$ of the world's natural resources through labor, his idea that charity is not enforceable under any circumstances, and/or his idea that freedom is incompatible with any ahistorical redistributive principle. Kant's theory is attractive, I argue below, because its argument is consistent with Nozick's basic idea that all liberal theories must be reconcilable with each citizen's right to freedom. Kant's main argument for the state's right and duty to provide unconditional poverty relief is similar in structure to Nozick's monopoly on coercion argument. In addition, however, Kant's

theory avoids the problems haunting Nozick's account from the point of view not only of most liberal and libertarian thinkers, but also liberal legal-political practices as they mature: Nozick struggles to make any good sense of secure vision of systematic justice that includes proper concern for social climbing and real engagement in what Rawls calls "public reason." Kant's theory engages with these concerns without having to appeal to what may or may not be advantageous or virtuous for citizens to do; instead a mature vision of systematic justice is seen as following from their own commitment to the basic principle of each person having a right to freedom. To make my case, I first present a brief overview of the approaches to Kant's theory of economic justice that were prominent at the time Nozick and Rawls developed their theories. I then present what I take to be the better kind approach to Kant's theory of justice, one that has become a serious interpretive alternative by now. I then return to the theories of Nozick and Rawls in order to show why, if conceived in this alternative way, Kant's position has some of the arguments needed to realize the best of both their views.

5.2 Kantian Accounts of Economic Justice[7]

For the longest time, most Kantians considered Kant's take on economic justice as something of an inherited Achilles heel.[8] On these readings—the kind prominent in the heyday of Nozick and Rawls—Kant was seen

[7] I'm including this section for reasons of context for the Rawls–Nozick discussion, and so for readability of the chapter only. There's significant overlap between my presentation here and my first publication on these themes in "Kant and Dependency Relations: Kant on the State's Right to Redistribute Resources to Protect the Rights of Dependents." *Dialogue—Canadian Philosophical Review*, XLV (2006): 257–284. For two overviews over Kant's legal-political and related secondary literature, see Kyla Ebels-Duggan, "Kant's Political Philosophy," *Philosophy Compass*, 2012, 7:12, pp. 896–909, and my "Immanuel Kant—Justice as Freedom," in *Philosophie de la justice/Philosophy of Justice*, in the series Contemporary Philosophy, ed. GuttormFløistad, Springer: Germany, 2014, Vol. 12, pp. 213–237.

[8] See, for example, Mary Gregor: *Laws of Freedom*, Basil Blackwell: Oxford, 1963, pp. 36f; Otfried Höffe: *Immanuel Kant*, transl. by M. Farrier, SUNY Press: Albany, pp. 184ff); Jeffrie G. Murphy: *Kant. The Philosophy of Right*, Mercer University Press: Macon, pp. 144ff; Onora O'Neill: *Bounds of Justice*, Cambridge University Press: Cambridge, England, p. 65; John Rawls: "Themes in Kant's Moral Philosophy", in *Kant's Transcendental Deductions*, ed. E. Förster, Stanford University Press: Stanford, 1989, pp. 81–95, Ch. 40 "The Kantian Interpretation of Justice as Fairness," in *A Theory*

as not only as unmoved (in his theory of justice) by the material misery surrounding him, but as diametrically opposed to any redistribution of material resources to alleviate society's poverty. Any notion that the burdens of the poor, including what we often call "systemic injustices," should give rise to redistributive efforts was thought foreign to Kant and the Kantian project. To make their case, these interpreters often appealed to passages where Kant explicitly rejects the idea that justice can require the redistribution of resources in response to need (27: 517, 526),[9] as well as where he emphasizes that charity or benevolence is an imperfect duty and consequently not enforceable (MM 6:220f). In such passages Kant seems to affirm the view so forcefully expressed, as we saw above, by Nozick, that if one person were given a right to another people's property due to need or to facilitate the development of his capacities, he would be given the right to enslave her.[10] It is therefore not without reason that many have concluded that any "egalitarian" material redistribution aimed at strengthening the poor's or less able persons' abilities to set and pursue ends, is far beyond Kant's and the Kantian reach.

In response to this seemingly callous aspect of Kant, most contemporary Kantians either gave up on the idea that the Kantian position can

of Justice, rev. ed., Harvard University Press: Cambridge, Massachusetts, 1999, pp. 221–227, and *Lectures in the History of Moral Philosophy*, ed. B. Herman, 2000, pp. 217–234; Allen D. Rosen: *Kant's Theory of Justice*, Cornell University Press: New York, p. 197, Howard L. Williams: *Kant's Political Philosophy*, St. Martin's Press: New York, 1983, pp. 196 ff. For a recent defense of this interpretation of Kant on economic justice, see Pauline Kleingeld's *Kant and Cosmopolitanism: The Philosophical Ideal of World Citizenship*, Oxford University Press: Cambridge, 2013.

[9] All references to Kant's works in this article are given by means of the Prussian Academy Pagination (PAP) as well as an abbreviation. This particular reference is to "Notes on the Lectures of Mr. Kant on the *Metaphysics of Morals*," PAP 27: 479–732, in *Lectures on Ethics*, ed. P. Heath and J. B. Schneewind, Cambridge University Press: New York, 2001, pp. 249–452. In addition, I have used Mary Gregor's translations of *The Metaphysics of Morals*, Cambridge University Press: Cambridge, 1996, and of his other texts in moral philosophy printed in *Practical Philosophy*, Cambridge University Press: New York, 2006.The other abbreviations are: MM for *The Metaphysics of Morals*, CPrR for *Critique of Practical Reason*, TP for "On the common saying: That may be correct in theory, but it is of no use in practice."

[10] See especially Ch. 7 "Distributive Justice" in ASU, pp. 149–232. Similar arguments are found in Locke's writings as well as in contemporary, so-called rightwing libertarian economic writings such as those of F. A. Hayek, Jan Narveson, Erick Mack, and Fernando R. Tesón—entailing that this argument, if successful, should be of interest also to them since there is nothing in the argument that their basic commitment to understanding justice in terms of freedom rules out.

justify any redistribution of material resources,[11] or they sought to overcome the perceived problem by reformulating core elements of Kant's own position. Most of these reformulations focused on his account of domestic justice. For example, Onora O'Neill, Allan D. Rosen and, as we saw above, Rawls agreed that Kant's position is unresponsive to the material aspects of the human condition (the fact that we are embodied beings with material needs). To overcome this source of the problem, O'Neill and Rosen maintained that the state can enforce charity (beneficence),[12] and Rawls incorporated these empirical aspects of the human condition in his theory of justice as fairness (by means of the difference principle in combination with the list of primary goods).[13] Later, Paul Guyer[14] argued that by reformulating aspects of Kant's "Doctrine of Right," we can actually make room for considerations of economic justice of a Rawlsian kind. Hannah Arendt[15] and Alexander Kaufman[16] searched *The Critique of Judgment* for arguments that could render Kant's theory sensitive to the human condition and our embodied, material needs.

These attempts at reformulating Kant's position have significant problems. For example, it remains unclear how a coherent conception of justice understood in terms of freedom can appeal to anything but freedom when specifying what constitutes justice, including just coercion. That is, Nozick seems right to maintain that such a position cannot consistently set its boundaries according to nature, material needs, capacities or continuous access to basic goods, as suggested by Arendt, Guyer, Kaufman, O'Neill, Rawls (à la 1971), and Rosen. Such philosophical result is not in positions of freedom, but in positions ultimately subjecting freedom to some other end or concern. And, as Nozick also loves pointing out, the problem with such positions is that they make everyone's right to pur-

[11] See, for example, pp. 153 and 164n7 in Wolfgang Kersting's "Kant's Concept of the State," in *Essays on Kant's Political Philosophy*, ed. H. L. Williams, University of Chicago Press: Chicago, 1992, pp. 143–166.

[12] See, for example, Rosen 1996: 173–208 and O'Neill: 1989, ch. 10 and 12; 1998: ch. 5–7; and 2000.

[13] See, again, Rawls 1989: 81–95; 1999: 221–227, and 2000: 217–234.

[14] Paul Guyer: *Kant on Freedom, Law, and Happiness*, Cambridge University Press: New York, 2000.

[15] Hannah Arendt: *Lectures on Kant's Political Philosophy*, ed. by R. Beiner, University of Chicago Press: Chicago, 1992.

[16] Alexander Kaufman: *Welfare in the Kantian State*, Oxford University Press: New York, 1999.

sue their own ends is made conditional on certain ends being obtained (an ahistorical "end-result" occurring); they are not positions according to which everyone gets to set and pursue their own ends.[17] Kant seems to have had very good reasons for resisting the moves these reformulation attempts make, and these Kantian accounts do not overcome the problems involved in making them. For example, if we attempt to make charity or beneficence enforceable, as O'Neill and Rosen do, we try to do something that is in principle impossible. Kant argues forcefully that charity or beneficence requires us not only to act on specific maxims, namely those that involve making another person's happiness our own end, but also to act in these ways *because* it is the right thing to do—or from duty. An action of beneficence requires us not only to want to give money to the poor, but to do so *because* it is the right thing to do. Incorporating the moral motivation (duty) into the maxim of the action transforms the action of simply giving money to the poor into an action of beneficence (GW 4: 397ff, 440f, 449; CPrR 5: 20f; MM 6: 220f, 225f, 379f). More generally, since maxims (subjective ends of which we take ourselves to be pursuing) and moral motivation (duty) cannot be coerced, virtue is beyond the reach of justice (MM 6: 219ff, 239). Of course, the state can force its citizens to act in ways that are consistent with an end of charity—they can force richer citizens to hand their money over to poorer citizens—but doing so neither respects the richer citizens' right to freedom nor forces them to be charitable or beneficent. According to Kant, therefore, whatever the state does when it coercively redistributes material resources, it is not enforcing charity or beneficence. In fact, the ultimate upshot of this conception of right is that morality as such is beyond its proper grasp. Right (justice) only concerns what can be hindered in space and time, or what can be coerced, which is why Kant argues that only freedom with regard to interacting persons' external use of choice (right) can be enforced. Virtue (or ethics understood as first-personal morality) also requires what he calls freedom with regard to "internal use of choice"; internal freedom requires a person both to act on universalizable maxims and to do so from the motivation of duty (MM 6: 220f) and so cannot be enforced. Freedom with regard to both inter-

[17] See, again, especially ch. 7: "Distributive Justice," in ASU.

nal and external use of choice (morality) can therefore not be enforced (ibid.). In sum, Kant's philosophical resistance to the idea that states can enforce charity runs deep in his thinking, and these attempts to reformulate his views do not overcome the philosophical problems involved in trying to argue otherwise. And, of course, many of us do not want to give up on the idea of freedom without extraordinarily good reasons to do so—which these alternative and philosophically muddled positions do not give us.

5.3 Kant's Theory of Justice as Freedom

In this section, I outline an alternative interpretation of Kant's conception of domestic economic justice, which has become more prominent in recent years.[18] Rather than seeing Kant's position on economic justice as one of his weaker moments, I defend it as a particularly appealing aspect of his position. To make my case clear, I draw attention to how those other interpretations and reformulations (from Arendt and Kaufman to O'Neill and Rosen and on to Guyer and Rawls) rest on an assumption that Kant himself explicitly rejects: that his position can or should be read through (weak) voluntarist lenses. According to the voluntarist perspective, the just state will do what individuals do if they abide by private right (their individual rights against each other), in which case what Kant calls "public right" (the delineation of state rights) is understood ideally as merely an institutionalization of private right. Or to put this point in

[18] The earliest interpretation of Kant's poverty arguments that is closer to the one I defend here is probably the one proposed by Sarah Williams Holtman in "Kantian Justice and Poverty Relief," in *Kant-Studien*, 95: 86–106. The interpretation of Kant on economic justice that is the closest to the one I'm sketching here is the one defended by Arthur Ripstein in his *Freedom and Force—Kant's Legal and Political Philosophy*, Cambridge, Massachusetts: Harvard University Press, 2009. I defend this type of position in more detail (including against alternative readings) in my papers "Kant and Dependency Relations: Kant on the State's Right to Redistribute Resources to Protect the Rights of Dependents" (*Dialogue*, XLV, 2006: 257–284) and "Kant's Non-Absolutist Conception of Political Legitimacy: How Public Right 'Concludes' Private Right in 'The Doctrine of Right'" (*Kant-Studien,* Heft 3/2010, pp. 331–351) and I defend it against recent objections raised by Pauline Kleingeld in her *Kant and Cosmopolitanism* in "Patriotism, Poverty, and Global Justice—A Kantian Engagement with Pauline Kleingeld's *Kant and Cosmopolitanism*," *Kantian Review*, Vol. 10: 2, pp. 251–266, 2014.

Nozick's words, on this view, state's rights are "decomposable without residue" into individuals' rights against one another (pp. 89, cf. 6, 118, 133). But this relationship between individual and state rights is precisely what Kant denies. Kant denies that economic justice is a concern to be analyzed simply in terms of private right (individuals' rights against each other), and instead defends it as constitutive of public right (the rights of the state, including the claims citizens have on their public institutions). More specifically, Kant defends three kinds of systemic arguments concerning economic justice: (a) poverty arguments issuing from the state's need to reconcile its monopoly on coercion with the rights of each citizen; (b) system-dependence arguments about citizens' exercise of freedom; and (c) reform arguments concerning the need for continuous improvement of public institutions so as to make them the means through we enable rightful interactions by governing ourselves through public reason. On the last point, because the state is the means through which we govern ourselves by reasoning about legal-political issues in distinctly public ways, its aim is necessarily to improve the overall institutional framework to make more public reasoning about these issues possible. Improving these institutional conditions includes ensuring a reality where all citizens can take informed part in the public discussion of legal-political issues *and* reason in public, representational ways, for example as public officials and as publicly licensed and entrusted professionals (judges, lawyers, police officers and physicians). When we explore these arguments, we realize that economic justice is not something diametrically opposed to Kant's conception of the just state, but rather, it lies at the very heart of it and it has the kinds of arguments needed to overcome the Nozick vs. Rawls-type dispute in liberal theory.

5.3.1 Kant on Private Right and the Need for the State

Right, Kant argues, is solely concerned with people's interactions in space and time, or what he in the "Doctrine of Right" calls our "external use of choice" or "external freedom" (MM 6:213f, 224ff). When we deem each other and ourselves capable of deeds—when we see each other and our-

selves as the authors of, and so responsible for our actions—we impute the actions to each other and/or ourselves. Such imputation, Kant argues, shows that we judge ourselves and others as capable of freedom under laws with regard to external use of choice (external freedom), or as legally responsible for our actions (MM 6: 227). When we interact, we need to enable reciprocal freedom, or a way of interacting that is consistent with everybody's external freedom. And this is where justice, or what Kant calls "right" comes in. Right is the relation between interacting persons' external use of choice such that reciprocal freedom is realized (MM 6: 230). A rightful interaction is reconcilable with each person's innate right to "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" (MM 6: 237). For Kant, justice requires that universal law (rather than anyone's arbitrary choices) regulate individuals' external use of choice when they interact.[19]

The first, main part of the "Doctrine of Right" is an account of private right. Private right, Kant explains, is "right in the state of nature," that is, right as described only with concepts referring to private individuals and not any public or civil authority with its legal-political, institutional framework (MM 6: 242). Private right concerns what is externally "Mine or Yours" (MM 6: 245). To be externally free is to set my own ends in space and time, which requires the possibility of acquiring things external to me (things distinct from my body) as my own. Kant proposes that there are three kinds of things external to me that can be my own: private property, other people's services through contracts and other people (MM 6: 247).[20] With regard to these spheres, Kant points out, we make normative claims such as "that is *my* car," "you owe me $20 for the soccer ball I gave you," and "this is *my* child." In his private right account, Kant proposes three corresponding abstract principles of private right

[19] Hence, public reason so understood refers, as Rawls suggests, both to how "government officials and candidates for public office" must reason in order to specify the "political relation" between citizens properly as well as to how citizens engage each other in public debates of legal-political issues. See John Rawls: "The Idea of Public Reason Revisited," in *The Law of Peoples*, Harvard University Press: Cambridge (2003), pp. 132f.

[20] For Kant, the reason why there are only three such categories of things is that they are made possible by the three relational categories of the understanding, namely substance (private property), causality (contract) and community (status relations) (6: 247).

(regarding private property, contract and so-called status right) that we ideally employ to govern these spheres of private right. The challenge Kant then takes on is explaining how we can make and enforce such claims to things external to us—specify and apply the principles of private right when we interact—while respecting everyone's freedom. Kant claims throughout the private right sections that such rightful enforcement of these claims to things external to us is impossible in the state of nature. The abstract principles governing private right cannot function as rightfully enforceable restrictions in this condition; they can only enable what Kant calls "provisional" justice; "conclusive" justice is therefore considered impossible in this condition (6: 267). This is not the place to go into any detail regarding these arguments—including the interpretive controversies surrounding them. Instead we may simply note that there are two main types of problems that lead Kant to this conclusion, namely a problem of assurance as well as a problem of indeterminacy in specifying and applying the principles of private right to actual interactions. Because these problems are in principle insoluble in the state of nature, Kant deems them not rightfully enforceable in this condition, and he concludes the entire doctrine of private right by claiming that we have an enforceable duty to enter civil society, meaning to establish a public authority (a legal-political framework) through which we can make the principles governing property, contract and domestic (status) relations rightfully enforceable (MM 6: 307f, cf. 6: 230, 232, 312f, 345f, 8:344, 351f, 371).[21] Kant's account of public right, in turn, aims to explain how

[21] I provide my interpretation of Kant's account of private right in "Kant's Non-Voluntarist Conception of Political Obligations: Why Justice is Impossible in the State of Nature," in *Kantian Review,* vol. 13–2, 2008, pp.1–45. Other interpretations that are similar (in that they also defend ideal reasons for the establishment of the state), though not identical (since various steps in the arguments are described in different ways) in their way of approaching Kant's Doctrine or Right include Julius Ebbinghaus: "The Law of Humanity and the Limits of State Power." *The Philosophical Quarterly*, Vol. 3, No. 10: 14–22, 1953; Katrin Flikshuh: "Reason, Right, and Revolution: Kant and Locke," *Philosophy and Public Affairs*, Vol. 36:1, s. 375–404, 2008; Wolfgang Kersting: *WohlgeordneteFreiheit. Immanuel KantsRechts- und Staatsphilosophie*, Berlin: de Gruyter, 1984 / Frankfurt: Suhrkamp 2nd ed. 1993; Arthur Ripstein: *Force and Freedom*; Thomas Pogge: "Kant's Theory of Justice." *Kant-Studien* 79, 1988, s. 407–433; Jeremy Waldron: "Kant's Theory of the State," in Kleingeld, P. *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*, New York: Yale University Press, 2006, pp. 179–200; Ernest Weinrib: *The Idea of Private Law*, Cambridge, Massachusetts: Harvard University Press, 1995.

the liberal state enables rightful relations through its public, legal-political institutional framework.

5.3.2 Public Right: Systemic Justice

Public right, Kant argues at the beginning of this second part of the "Doctrine of Right," is "the sum of the laws which need to be promulgated generally in order to bring about a rightful condition" (6: 311). Two core challenges when interpreting Kant here are establishing how his public right account is informed by the private right account and figuring out exactly how public right ("the sum of the laws" that constitute the rightful condition) complements private right. Both considerations are central to Kant's account of domestic economic justice.

A major difference between Kant and much contemporary liberal thought concerns Kant's claim that it's impossible, even for individuals with only the best of intentions, to realize justice in the state of nature. According to Kant, only a public authority can solve the problems of indeterminacy and assurance in a way reconcilable with each person's right to freedom. We therefore find Kant starting his discussion of public right of the state with the following:

> however well disposed and [right-loving][22] 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… can never be secure against violence from one another, since each has its [her] own right to do *what seems right and good to [her]* and not be dependent upon another's opinion about this. (6: 312)

There are no rightful relations in the state of nature, since might ("violence," or arbitrary judgments and "opinion" about "what seems right and good") rather than right ("universal laws'") ultimately governs interac-

[22] The German word used here is "rechtliebend" and Mary Gregor has translated this as "law abiding," which I find misleading since Kant does not think that it's possible to be law abiding in the state of nature (it's only possible to love, or be committed to right in this condition). Hence, I use the word "right-loving" instead of "law-abiding" here.

tions here.[23] According to Kant, only a public authority for legal-political reasoning can ensure interaction in ways reconcilable with each person's innate right to freedom and acquired rights to private property, contract and status relations. Kant argues, in a Rousseauan fashion, that the public authority represents the will of each and yet the will of no one in particular—it represents an "omnilateral," general or common will. Only through such an authority can we solve the problems of assurance and indeterminacy that our commitment to right involves. The state (civil society) is the only means through which individuals can subject their interactions to universal law.[24]

A second, related difference between Kant and much contemporary thought, including Kantian liberal thought, is his challenge to the common implicit assumption that the reasoning and actions of the public authority should be thought of as analogous to those between virtuous, private individuals. According to many contemporary liberal accounts, the public authority ideally argues and acts in a way that all persons respectful of one another's individual (private) rights would do, and so these ways of reasoning and acting are those to which all persons could hypothetically consent.[25] Yet, as we saw above, Kant does not think that there is *one*, ideal way to *specify* the general principles of right, nor is there

[23] Although Kant considers justice impossible in the state of nature, this does not mean that there is always injustice in this condition. After all, if no coercion is used—if everyone discusses everything peacefully and no one is enforcing their rights against others as they happen never to disagree about anything)—then there is no injustice (no wrongful use of coercion). Yet this is still a condition *devoid* of justice, since rightful interaction remains impossible in it (6: 312). I engage this issue in "Kant's Non-Voluntarist Conception of Political Obligations."

[24] This is why Kant argues that only a will "that is united *a priori* (i.e., only through the union of the choice of all who can come into practical relations with one another) and that commands absolutely" can justify external acquisitions because "a unilateral will (and a bilateral but still *particular* will is also unilateral) cannot put everyone under an obligation that is in itself contingent; this requires a will that is *omnilateral*, that is united not contingently but *a priori* and therefore necessarily, and because of this is the only will that is lawgiving. For only in accordance with this principle of the will is it possible for the free choice of each to accord with the freedom of all, and therefore possible for there to be any right, and so too possible for any external object to be mine or yours." (MM 6: 263)

[25] Some liberal accounts also seem to assume that what the state enforces is individuals' moral rights against one another, such as Kant's perfect, ethical duties (duties of virtue). As we have seen above, this is not Kant's position. For reasons of space, I cannot elaborate further on this issue here. For an overview of some of these issues, see my "Immanuel Kant–Justice as Freedom."

one, correct way to *apply* the principles to particular cases of dispute. In addition, however, and as will become clearer below, Kant also rejects the premise that the state cannot rightfully do anything beyond merely specifying, applying and enforcing individuals' individual (or private) rights against one another. This does not mean that the state can do whatever it wants to do—that citizens can do anything they want with impunity when they hold public office (absolutism)—but rather that Kant's analysis of the legitimate, liberal state is more complex these other liberal, non-Kantian theories.

Kant's general proposal, then, is that the reasoning and actions of the public authority should be, exactly, *public*. First, those citizens entrusted with this authority must act within the legal parameters of their public office and understand it as not their private domain. When vested with public authority, state officials should not understand themselves as acting as private persons (even ideally virtuous versions of themselves so considered). After all, overcoming subjection to private choice is the problem of the state of nature, the problem the public authority is supposed to solve by enabling interaction subjected only to universal law. For the public authority to be the means through which citizens enable rightful interactions among themselves, those citizens entrusted with this authority must reason in distinctly *public* ways; only in this way can they enable subjection of interaction to universal law rather than to private choice. And this is why they must reason within the legal parameters of the office when they act as public officer. Second, acting as a public official means reasoning in such a way that *all citizens* can recognize any decision's legitimacy even if they, in fact, reasonably disagree with its exact content. As we have already noted, there is no one, general way to specify the principles of private and public right or how they apply in particular cases since many specifications and applications fall within the scope of the reasonable. Right-loving, law-abiding citizens recognize exactly this.

These, then, are among the core considerations Kant appeals to when he says that the reasoning of public officials is such that all citizens' can consent to it *as citizens*: in order to represent the citizens in the right way, the public authority must consider them as "members of… a soci-

ety who are united for giving law… [or as] *citizens of a state*" (6: 314).[26] Moreover, since *everyone* must be seen as born with a right to *freedom* and since freedom is understood in terms interactions that are subject to the law rather than one others' arbitrary choices, Kant suggests that we may think of the "essence" of the citizen as her right to freedom, equality and independence.[27] The perspective of the public authority is therefore not an idealized perspective of private right or of virtue, but rather a common public perspective constitutive of a rightful condition. By assuming this perspective, the public authority can (as it should) seek to secure a legal-political institutional framework within which each citizen's innate right to freedom (his right to freedom, equality and independence) is enabled and secured. Again, on this approach, the liberal state is the means through which a group of interacting people can interact rightfully.

To fill out this picture, let's look at some of the relevant details of Kant's account. Kant starts his discussion of public right by arguing that in order for the public authority to not reproduce the problems associated with private right in the state of nature, it must have a monopoly on coercion and be impartial in the right way. An in-principle impartial authority—a *public* authority—must have two features. First, it can only *re*present the citizens, and so cannot have any private interests: it cannot own land or private property (6: 323f). After all, if it did, it would simply

[26] Rawls also seems to share this basic assumption with Kant; this especially prominent in Rawls' later writings (*Political Liberalism* onwards) where he increasingly emphasizes how the theory is based on the *citizens'* two moral capacities and the *public* character of the state.

[27] Kant argues: "In terms of rights, the attributes of a citizen, inseparable from his essence (as a citizen), are: lawful *freedom*, the attribute of obeying no other law than that to which he has given his consent; civil *equality*, that of not recognizing 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; and third, 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" (6: 314). Naturally, given his emphasis on consent, it might be tempting to believe that here Kant is defending democracy or strong voluntarism (actual consent viewed as a precondition for political obligations). This, however, is not the case. As we saw above, Kant defends an enforceable duty to enter civil society (and so not a strong voluntarist conception of political obligations), and later in the "Doctrine of Right," Kant explicitly denies that democracy is a necessary condition for state legitimacy (6: 338–341). In fact, Kant maintains that there are three legitimate forms of actual states, namely autocracy, aristocracy and democracy (6: 338). I deal with some of the related interpretive issues in "Kant's Non-Absolutist Conception of Political Legitimacy: How Public Right 'Concludes' Private Right in "The Doctrine of Right" as well as in "Self-Governance in Kant's Republicanism" (work-in-progress).

be yet another, albeit very powerful, private person. The state's "interests," in other words, are interests that always are analyzable in terms of the citizens' interests, namely those institutional features that enable citizens to interact rightfully (with each other and with citizens and people outside the state's boundaries[28]). Second, the state must rule through posited law: it must be an authority whose powers are delineated by the social contract (typically a constitution), and it must be tripartite in that it distinguishes institutionally between its legislative (specification of the law), its judiciary (application of the law) and its executive (enforcement of the law) powers. In this way public offices are governed by impartial public reason rather than by private persons. In addition, of course, in order for the public authority to overcome the problems associated with private right, the posited laws must be reconcilable with each citizen's innate right to freedom and her corresponding acquired rights to private property, contract and status relations (private law) (6: 313, cf. 6: 315).

We have now seen important ways in which Kant distinguishes public right from private right, even if these ways primarily concerns how to rightfully enforce the principles of private right, including by having them specified and applied in the right ways. Kant does not, however, argue that these resulting institutional features comprise the full conception of the legitimate state; the rights of the state are not reducible to the rights of individuals in further ways.[29] The public authority must also, Kant maintains, ensure that its institutional framework as a whole is consistent with each citizen's innate right to freedom, which may be spelled out in terms of citizens' rights to freedom, equality and independence. So, it is not enough that the state institutionalizes private right so as to make it rightfully enforceable (in the ways outlined above), but it must also ensure that these institutions secure each person's the innate right to freedom by affirming those rights to be free, equal and indepen-

[28] I'm naturally not engaging this issue of what Kant calls international and cosmopolitan spheres of justice here.

[29] Most of these arguments are found in the section called "General Remark. On the Effects with Regard to Rights That Follow from the Nature of the Civil Union," or the sections marked A through E in the "Doctrine of Right." (MM 6: 319–338). In addition, I expand on Kant's comments about how passive citizens must be facing a set of coercive restrictions that permit them to work themselves into active citizenship (MM 6: 314f).

dent through institutional frameworks—"the sum of the laws." Only in this way does state reconcile its monopoly on coercion with the innate right to freedom of each of its citizens, and thereby make sure that they are dependent only on (subjected only to) the state's own rightful coercive power (universal law) and not each other's arbitrary choices. Given the emphasis on economic justice in this chapter, let me focus on how this argument plays out with regard to the state's provision of unconditional poverty relief; special control over institutions governing land, the economy and finances; and provisions to secure the possibility of passive citizens working themselves into active citizenship (become active participants in the public reason through which civil society is governed). These are further, important ways in which Kant rejects the idea that the rights of the state are co-extensive with ("decomposable without residue into") the rights of individuals and denies that public right is merely the institutionalization of private right.

5.3.2.1 Unconditional Poverty Relief

Kant explains that providing poverty relief is an "indirect" right that belongs to the sovereign "insofar as he has taken over the duty of the people" (6: 325f). The reason is that "The general will of the people has united itself into a society which is to maintain itself perpetually; and for this reason it has submitted itself to the internal authority of the state." He further clarifies that this must be understood as entailing that the state cannot rely on "*voluntary* contributions" to fulfill its obligation; instead the state must invoke public taxation or dedicate interest from public funds to "the needs of the people" (6: 326). Moreover, it can fulfill these obligations, Kant argues, by using tax money to support organizations that provide "for the *poor*, [such as] *foundling homes*, and *church organizations*, usually called charitable or pious institutions." (6: 326). Now, one might conclude from reading these statements that Kant here mistakenly appeals to the need for poverty relief to ensure the survival of the state (mistakenly since the state clearly does not need everyone to survive). Alternatively, one might be tempted to believe that Kant here inconsistently appeals to the needs of the people to justify poverty relief

(inconsistent because the resulting position would no longer be a position of freedom and would also conflict with his account of beneficence). Finally, one might think that Kant here wrongly maintains that the state *must* establish a coercive public taxation program to secure the future survival of the state (wrong because the survival of the state does not require everyone to survive and because since the argument presumes Hume's so-called "circumstances of justice," namely a general lack of resources and virtue amongst the people). In fact, all of these (and more) objections are common in the secondary literature on Kant, especially in the older readings mentioned above.

As is often the case with Kant, however, to understand what he is saying, we must look at his particular arguments in light of his overall account. The particular statements and arguments considered in isolation from Kant's project as a whole, typically lead us astray. And Kant's main aim in this section of public right is to envision public right as the set (sum) of laws that enables rightful interaction under universal laws of freedom. The problem with poverty from this point of view is not need, future survival of the state, lack of resources or citizens' limited generosity, but rather that unless unconditional poverty relief is guaranteed by the state, the sum of laws does not establish rightful relations between citizens. After all, rightful relations require that the institutional coercive framework as a whole be reconcilable with each citizen's right to freedom, understood, again, as independence from other person's arbitrary choices and instead as subjection only to universal law. As we see in the quotes above, it lies within the state's rightful prerogative whether it chooses to reconcile its coercive framework with the individual right to freedom by financially supporting private charitable institutions or by setting up its own institutions; the requirement is only that it legally guarantee unconditional poverty relief. What the state cannot permit, therefore, is a situation (a total set of laws) in which the possibility of any one citizen's exercise of external freedom is subjected to, or made dependent upon another citizen's arbitrary choice to be charitable, generous, or caring, or to hire her. Such subjection of one person's freedom to another's arbitrary choice is a private dependency relation that is irreconcilable with each citizen's innate right to freedom. Instead each citizen must be in a condition where the possibility of her (external) freedom is subject only to

universal law, which is public law. By legally guaranteeing unconditional poverty relief, the state secures for each citizen legal access to means that is not subject to any other citizen's private choice. The possibility of each citizen freedom is thus made dependent only on public law.

On this theory, then, poverty is a systemic problem arising with the state's (necessary) establishment of a monopoly on coercion. Notice that in the state of nature, the fact that I have taken control over something cannot create an obligation on you to respect my exercise of choice. On a Lockean theory, there is a way to explain such an obligation: in the ideal case, you are obliged to respect my possessions insofar as my acquisition of this something is a correct application of the laws of nature (Locke's "enough-and-as-good" proviso). Kant's indeterminacy argument can be applied to Locke's account of the proviso by challenging its assumption that there is one objectively correct way to determine the value of natural resources, and so Kant's account reveals a problem with Lockean accounts of private property acquisition.[30] And, indeed, I believe that such concerns were among those that led Kant to reject the proviso as a possible principle of private property appropriation. Another reason was probably that although the proviso is likely in scenarios where we all start to acquire private property at the same time, it is much less plausible in other scenarios and does not capture the way relatively peaceful and stable historical societies have evolved. In any case, the Lockean argument is not available to Kant. On Kant's position, there is no way to explain why my unilateral choice to take something under my control can obligate you to abstain from it (and vice versa), including, of course, when there's nothing else for me to take possession of. The only reasonable solution involves entering the state where the representation of a public "us" affirms what each of us unilaterally holds onto as belonging to either one (our provisional private property). In turn, as we see here, Kant maintains that the state's guarantee of unconditional poverty relief is a minimal institutional condition for this public us being able to justifiably affirm the provisional possessions as belonging "conclusively" to particular citizens. The state's guarantee of unconditional poverty relief

[30] I illustrate one way of doing this in "The Lockean 'Enough-and-as-Good' Proviso—an Internal Critique."

for all citizens secures that even those who enter the civil condition with nothing obtain legal access to something and thereby have a safe and secure starting point for working themselves into a better situation.

5.3.2.2 The State's Regulation of Land, the Economy and the Financial System

What about the other two kinds of systemic argument regarding economic justice, those explaining ways in which system-dependence becomes important for understanding how liberal states secure conditions of economic justice for its citizens? To appreciate Kant's reasoning here, it is important to remember that the state consists of the basic legal-political institutions (the totality or "sum" of laws) that make possible rightful interaction between citizens considered as free, equal and independent. Therefore, the state must ensure that each of its citizens can legally interact with any other citizen; this possibility of legal interaction cannot be subject to anyone's choices but those choosing so to interact. To ensure these conditions, however, the state must institutionally enable freedom, equality and independence with respect to land, the economy and finances by regulating these spheres of interaction by means of various kinds of public law.

One way in which the state ensures freedom, equality and independence with regard to land is by taxing (a public law measure) landowners to provide public roads (as regulated by public law) so that everyone can interact legally (reach each other by legal means wherever they might reside on the territory) without the possibility of such access to each other being dependent on other people's choices.[31] Similarly, the fact of system-dependence is why, if the state allows a situation in which access to goods and services are facilitated through an economy, it will regulate the economy such that no one private person can control the supply of these goods and services (such as by establishing monopolies). The state will also require all business owners to treat everyone (and their money) as having equal value, and it will require business owners to ensure that their

[31] Ripstein's chapter "Roads to Freedom" in *Force and Freedom* explicates this point particularly well.

shops are accessible to all (for example, by ensuring that all citizens, both disabled and able-bodied, can access them). And finally this is why, if the state permits the use of money for trade, it must assume control over the supply of legal tender, again such that the value of people's means (their money) is not subject to any private citizens' arbitrary choices (by issuing illegal tender). Permitting any private person to be in charge of any of these economic and financial structures would make it impossible for everyone's freedom to be equally subject to universal law, since someone would then be given the "right" to restrict others by his or her arbitrary choice. This is what Kant means, in short, when he argues that once the state establishes its monopoly on coercion, it must assume institutional control over the land, economy and finances by means of public right. Again, only then is everyone's freedom subjected to universal (public) law rather than to one another's arbitrary choices and rightful interaction made possible (6: 325).

5.3.2.3 Active Citizenship and Participation in Public Reason

What about the last type of argument we find in Kant, the one concerning how the state must reform itself such that everyone faces a condition (a total sum of laws) within which they can work themselves into what Kant calls active citizenship? I suggested above that active citizenship can be understood as involving ability to partake in public reason (hold public office, professional positions vested with public authority, and participate in informed ways in public discussions). I can here only outline Kant's main arguments for this more complicated point of interpretation.[32] As we see below, there appear to be two main steps to this

[32] One interpretive complication concerns the fact that what I call public reason here is by Kant divided into "private" and "public" reason in his essay "What is Enlightenment?" Here Kant emphasizes that an enlightened public, namely one that governs itself through public reason, is a precondition for right in its full realization. Yet being an enlightened public includes two aspects: One the one hand, it involves everyone being capable of what Kant here calls "private" reasoning, which is the kind of reasoning ability necessary for one to execute the duties of a functioning public office as governed by public rules (8: 37f). On the other hand, it requires the people to govern themselves through public reason as "scholars," meaning as people capable of engaging in public critique of the actual operations of the fundamental public institutional structure. See Jonathan

argument. On the one hand, the state can never make it illegal for any one group to work itself into active citizenship. On the other hand, the state must reform itself so that: (a) only effort and merit (rather than inherited privileges) determine which particular citizens end up holding public office or professional positions entrusted with public authority, and (b) everyone can partake in public discussions in informed ways. I deal with each issue in turn.[33]

To see how Kant makes these arguments, first note that already early on in the public right section, Kant draws certain implications from the argument that the innate right to freedom is a right to independence from other persons' arbitrary choice coupled with subjection to universal law.[34] Naturally, since any coercive restriction on citizens is ultimately governed by public law and since everyone is guaranteed poverty relief, everyone is independent of other persons' arbitrary choices in fundamental ways. But, Kant argues, it would be wrong to conclude from this that all citizens are capable of full "civil *independence*" meaning "the attribute… of owing his [one's] existence and preservation to his [one's] own rights and powers as a member of the commonwealth, not to the choice of another among the people." (6: 314) In particular, Kant argues that some citizens are not capable of such active citizenship, but only of passive citizenship. Controversially, Kant argues that all children, domestic servants, "all women and, in general, anyone whose preservation in existence (his [or her] being fed and protected) depends not on his [or her] management of his [or her] own business but on arrangements made by another (except the state)" (6: 314) belong to the category of passive citizens. Because these citizens' management of their private lives, including their ability to feed and protect themselves is under another private person's authority—their parents, their husbands, or the family that they serve[35]—Kant

Peterson's interpretation of Kant's "private" and "public" reason distinction in his "Enlightenment and Freedom" by Jonathan Peterson (*The Journal of the History of Philosophy*, 2008, 46: 223–244)

[33] I develop this argument in more detail in my "Self-Governance in Kant's Republicanism," (work-in-progress).

[34] This concern is mentioned prior to the "General Remarks," on (6: 314f), in the "Doctrine of Right."

[35] The category of passive citizens therefore corresponds to Kant's the weaker party in his discussion of "status relations" in private right (6: 276–284).

deems them incapable of active citizenship. Active citizenship, in turn, means that one has the ability to take active part in the actual operations of the public authority, such as by voting on political issues. "The only qualification for being a[n active] citizen" Kant argues, "is being fit to vote. But being fit to vote presupposes… [civil] independence" (6: 314). Some of Kant's worries here might have been that if one has none or very little education, it is difficult to make informed decisions about complex political matters; servants' lack of material independence may reasonably lead them to obey their employers' pressure to vote in certain ways (so that those with large estates in effect get more votes than those with smaller estates); and women may yield to their husband's views (giving married men in effect two votes). Regardless of what we think of these arguments and judgments, the main challenge for Kant is how the state, even though it must distinguish between passive and active citizenship, can reconcile this distinction with each person's innate right to freedom.

Kant's general claim here is that the active citizens (here: adult, independent men) can only vote for laws that are "not contrary to the natural laws of freedom and of the equality of everyone in the people corresponding to this freedom, namely that anyone can work his [one's][36] way up from this passive condition to an active one." (6: 315) So, no one can be legally denied the right to work themselves into active citizenship, including by proving wrong those thinking that some groups of human beings (such as women) cannot work themselves into active citizenship. And indeed, one would expect this view given how Kant in the introduction to the *Metaphysics of Morals* argues that anthropological claims about what people can and cannot do must not frame an analysis of freedom, since then we "run the risk of bringing forth false or at least indulgent moral laws, which would misrepresent as unattainable what has only not been attained" (MM 6: 217).[37] Hence, Kant's considered view, in the least, must be that posited law must be compatible with children, domestic servants and women working themselves into an active independent

[36] The original German is gender neutral here.

[37] I go into more detail in my "Kant and Women" (work-in-progress).

condition.[38] Hence, the just state cannot deny certain groups of citizens, regardless of the "passivity" of their current socio-economic condition, the opportunity to advance to full participation in public reason. The state must make sure that the totality of the rules does not force passive citizens to remain forever in their passive condition, but rather provides everyone with institutional conditions from which active citizenship can be achieved through effort.

It is also significant that the argument requiring the public authority to posit laws consistent with the possibility of each person working toward active citizenship is complemented by another argument, according to which the state can posit laws that strengthen citizens' opportunities to work themselves into active citizenship.[39] When the state comes into being, "[t]he general will of the people," Kant argues, "has united itself into a society which is to maintain itself perpetually." (6: 326) The state must ensure that the institutional structure as a whole enables its people and future generations remain in rightful relations on the land in perpetuity. Moreover, although the actual starting point for many liberal states is much less than ideal, the aim for any liberal state, Kant argues, is to reform itself into a truly representative republic, in which the people governs itself through public reason. For better or for worse, Kant does not identify democracy as a minimal condition on a state's legitimacy.[40] Instead, what he sees as crucial is for public reason to govern the institutions constitutive of the public authority—that it is a representative, law-ruled society where those in power view themselves as exactly *representatives* of ("delegates" for) its citizens. Kant says that in the just state "*law* itself rules and depends on no particular person… Any true republic is and can only be a *system representing* the people, in order to protect its

[38] It is common to maintain that Kant's statements about women reveal that he considers women incapable of civil independence in perpetuity. I discuss these issues in my papers "Kant and Dependency Relations" as well as in "Kant and Women" (work-in-progress).

[39] A major difference between these two arguments is, I believe, that only the former (that the state does not make it impossible for passive citizens to work themselves into active citizenship) can plausibly be presented as a minimal requirement on the legitimacy of the state. I discuss this issue in "Self-Governance in Kant's Republicanism."

[40] Kant considers there to be three forms of state, namely autocracy (rule by one), aristocracy (rule by nobility) and democracy (rule by the many) (6: 340). I address this issue in Kant interpretation in much more detail in my "Self-Governance in Kant's Republicanism" (work-in-progress).

rights in its name, by all the citizens united and acting through their delegates (deputies)." (6: 341) In order to bring about such a condition, Kant argues that the state must, over time, eradicate inherited right to political power, and it must instead let the people fill all the public offices and dignitary positions based on merit alone (6: 328). By "merit," Kant means the ability to assume responsibility for public offices, whether, obviously as a legislator, an informed citizen about political affairs or as a judge, lawyer, or other professional vested with public authority to handle a legal dispute. It may differ from state to state which offices are left to common (democratic) choice and to what extent, without those differences rendering the state illegitimate. The main point is that the notion of inherited privilege must be replaced with merit over time, and Kant's position considers it within the state's legitimate use of coercion actively to strengthen the institutional framework so that it becomes increasingly possible for everyone to work themselves from passive to active citizenship.

So, how do various liberal states try to accomplish this goal internal to themselves? I take it that a core component here is to provide opportunities for education for all as soon as feasible—just as liberal states have sought to do over the last few centuries. Their first developmental aim has been naturally a guarantee of basic, public education for all, including (as necessary) free education for children of poor families. Then, as many of the more established liberal states have done by now, states seek to guarantee at least student loans for all, such that higher education is available to all citizens without regard to others' (typically parents') choices about this.[41] In these ways, the state reforms itself such that it truly is the means through which the people governs itself through public reason.

5.4 Concluding Remarks

The last sections above outlines ways in which Kant views public right as "concluding" private right not only by how the distinctly *public* authority (liberal legal-political institutions) enable rightful relations in the three

[41] I deal with this point in more detail in "A Kantian Critique of the Care Tradition: Family Law and Systemic Justice." *Kantian Review* (2012a), Vol. 17:2, pp. 327–356.

spheres of private right, but also by ensuring that the totality of laws make it possible to interact in ways reconcilable with everyone's innate right to freedom. Since the focus has been on economic justice, I paid attention only to issues concerning land, the economy and finances, unconditional poverty relief, securing transitions from passive to active citizenship, and the reform of states into what Kant calls "true republics." Notice, however, that if we read Kant's position through what I called "voluntarist lenses" earlier in the chapter, none of these features of his account are visible. Only when we understand that, for Kant, public right is *not* reducible to private right, can we begin to see why and how his position is actually able to capture these important concerns of economic justice. Therefore, Kant needs no reformulation (as so many have thought) in order to have something quite significant to say about economic (including systemic) injustice. Moreover, we see that the account is thoroughly an account of freedom. At no point does it appeal to contingent aspects of the human condition or to ethics and virtue to make its case. One advantage of this focus on freedom is, I believe, that it can provide a liberal critique of—rather than assume away—some of the most pressing systemic problems concerning the core institutions within which we live and upon which our exercise of freedom is dependent in modern states. The account can therefore make sense of major developments in modern, liberal states, such as public, systemic efforts to combat poverty and provide conditions of education for all.

In making sense of those kinds of development, Kant can both capture the intuitions in Nozick that have such liberal appeal and show why an account of economic justice that stays consistent with them captures the merits of Rawls's focus on the just operations of the basic, coercive legal-political institutions of a liberal state. To state this point from a different direction: an advantage of Kant's account is that it can overcome a split in liberal freedom theories of justice like the one between Nozick and Rawls. If we read this dispute through Kant's eyes, a major problem with Nozick's theory is that it does not appreciate the nature and full implications of the state's monopoly on coercion. That monopoly does not only introduce a new moral fact important to understand why states must secure access to legal protection for all (as Nozick argues), but it is also a new, morally important fact with regard to the guarantee of legal access to

means for all (unconditional poverty relief). Two further problems with Nozick's position are that he fails to appreciate that justice is impossible in the state of nature and (relatedly) that the public authority is not yet another private person, but a *public* person, that is, a legal-political institutional framework through which we act to enable rightful interactions between us. The effect of these mistakes is that Nozick fails to see, and so fails to make sense of, how public and private law complement each other in just, liberal states and how these institutions are reformed over time (when things go well).

Rawls, on the other hand, ducks the question of whether or not justice is possible in the state of nature, and, indeed, in his 1971 account of the theory he seems to assume (like Nozick) that the reason why we have established states is mere prudence in response to the Humean circumstances of justice. Unfortunately, however, this also means that his theory of justice as fairness (in all its versions) has a non-existent account of private right, and Rawls also does not quite appreciate how his theory of the basic structure is best understood as an account of public right (in Kant's sense of the term). If we do view Rawls's theory as an account of public right—indeed an account that can be supplemented by Kant's account of private right or, for that matter, a Nozickian or any other libertarian freedom-based account of private right—libertarian objections of Nozick's kind no longer hold against it. Finally, if Nozick's and Rawls's theories are reformed along these Kantian lines, both become capable of giving better, fuller critiques of modern, liberal societies and their sustained reform efforts. Consequently, reformed versions of these theories may also provide a way of overcoming some of the related, unproductive political discussions between so-called leftwing and rightwing liberal politicians in modern states.

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6

Rawls and Kant on Compliance with International Laws of Justice

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What should be the basis for compliance with international laws of justice: peoples' sense of justice, as John Rawls claims, or non-moral mechanisms such as establishing a condition of reciprocal independence and of rough equality of power among all states, as Kant maintains?[1]

In this paper, I argue that Rawls's position entails a break from contractarianism both in his diagnosis of the causes of war and conflict at the international level and in his proposed solution to the problem. On his account, such causes are to be found in the internal institutional structure of some societies that incapacitates them for complying with the laws of international justice and, in the extreme, for relating to other societies in a peaceful way. He maintains that while liberal and decent societies are willing to be peaceful and are capable of voluntary compliance, other soci-

[1] Rawls (1999b). Hereafter referred to in the main text as *LP*. Kant, *Towards Perpetual Peace*. I refer to this work in the parenthetical references in the main text as "*PP*" followed by the volume and page number of *Kants gesammelte Schriften* (published by the *Preussische Akademie der Wissenschaften*, Berlin).

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eties are not. In agreement with this diagnosis, his solution requires first and foremost the internal institutional transformation of those societies that are not capable of voluntary compliance. A society can be included in a "reasonably just" society of peoples that comply with international laws from a sense of justice only after it has transformed itself internally so as to become liberal or decent. As societies transform themselves in either of these directions, conflicts among them tend to disappear.

By contrast, a typical contractarian diagnosis of the causes of war among states holds that such causes are to be found in the *relation* that states find themselves in, namely, a state of nature characterized by the absence of a common authority. This view parallels the contractarian diagnosis of the causes of violent confrontation among individuals in a state of nature: confrontations are inevitable given the relation in which individuals stand toward each other regardless of their moral goodness or the lack of it. Similarly, states in a condition of nature are led to war regardless of their internal institutional structure since in the absence of a common authority they lack a lawful way of adjudicating conflicts among them. In Kant's view in particular, which Rawls claims to follow, the spatial proximity in which states find themselves on the finite surface of the earth is the source of conflicts among them no matter how willing they may be to relate to each other peacefully (*PP* 8:354). In the absence of common laws, such conflicts are bound to lead either to violent confrontations to settle them or to the constant preparation for war, which is as much against the possibility of a lasting peace, according to Kant. Since the relation of spatial proximity is impossible to change, conflict is ineradicable.

A contractarian diagnosis has two important implications. First, the possibility of a peaceful resolution of conflicts, either among individuals or states, primarily requires a change in the terms of the *relation* among all of them. Second, if the problem of war or the preparation for it in the state of nature is due to the lack of a common authority with the power to ensure compliance with its mandates, the solution must be the establishment of such an authority with coercive powers. As is well known, Kant appears to reject this solution at the international level and maintains that a free league of states should lack coercive powers.[2] This does

[2] The point is strongly contested among scholars. See Kleingeld (2006b). Kant, *Metaphysical First Principles of the Doctrine of Right* (6:350–351). I refer to this work in the parenthetical references in

not imply, however, that compliance has to depend on the willingness of the participants to observe international laws from a sense of justice, as Rawls maintains since, from a contractarian view, the solution consists of changing the terms of the relation among them. I argue that Kant's contractarian diagnosis leads to the requirement that states should stand in a relation of reciprocal independence and of rough equality of power as a necessary condition for the possibility of compliance with coercive laws or the resolutions of a voluntary league. This condition holds for republics as much as it does for non-republics. If peace is to be possible, states must assure each other reciprocally that they will not resort to war or prepare for it in order to settle conflicting claims. A condition of rough equality of power is a necessary condition for such an assurance regardless of what we take Kant's most coherent position to be (the establishment of either a state of states endowed with coercive powers or a free league without such powers).

Compliance from a sense of justice and through non-moral mechanisms need not be mutually exclusive since they can both be possible at the same time and support each other. However, these two alternatives come apart in Rawls's and Kant's respective accounts. On the basis of his diagnosis of the causes of war and conflict at the international level, Rawls envisions a society of peoples in which conflict among peoples tends to disappear as they gradually become either liberal or decent. Thus, in his view, compliance from a sense of justice need not be supported, in the ideal, by non-moral mechanisms. By contrast, after placing the source of conflict in the relation of spatial proximity among states regardless of their internal institutional structure, Kant's account can never rule out the possibility of conflict. For this reason, compliance cannot be left to the goodwill of states but must necessarily be ensured through non-moral mechanisms.

My main interest here is to show how Rawls's position entails a departure from contractarianism both in his diagnosis of the causes of war and conflict among societies and in his proposed solution despite the fact that he presents his Law of Peoples as an extension of "a general social contract

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the main text as "*DR*" followed by the volume and page number of *Kants gesammelte Schriften* (published by the *Preussische Akademie der Wissenschaften*, Berlin).

idea to a Society of Peoples" (*LP* 4). The paper is organized as follows. I first present Rawls's position on compliance from a sense of justice with the laws of international justice. In the second section, I argue that his confidence in the possibility of this kind of compliance is rooted in his non-contractarian diagnosis of the causes of war and conflict among societies. In the third section, I consider Kant's own diagnosis of the causes of war and conflict. In the fourth one, I examine his solution to the problem. I argue that his contractarian diagnosis motivates the need for a non-moral mechanism through which states provide each other reciprocal assurance of their disposition to peace.

6.1 Compliance from a Sense of Justice

Rawls conceives of the ideal of a "reasonably just society of peoples" in analogy with the ideal of a "well-ordered society" that he develops in his writings on domestic justice. At both levels, stability rests on either peoples' or citizens' development of a sense of justice. A sense of justice is "the capacity to understand, to apply and to act from the public conception of justice."[3] In his view of the ideal case, it is not sufficient that citizens recognize the principles as being correct or justified; it is also necessary that they act on such principles *because* they regard them as justified (*PL* 35). He writes: "Stability for the right reasons describes a situation in which, over the course of time, citizens acquire a sense of justice that inclines them not only to accept but *to act upon* the principles of justice" (*PL* 45, my emphasis). The ideal of a well-ordered society is of a society governed by publicly known principles of justice, which citizens regard as right and with which they comply because they so regard them.

Similarly, at the international level, Rawls claims that the stability of a "reasonably just society of peoples" depends on the capacity of peoples to develop a sense of justice. In his proposed ideal, he includes two kinds of well-ordered societies, liberal and decent, which I will characterize later. He claims that there must be a process parallel to the domestic case "that leads peoples, including both liberal and decent societies, to

[3] Rawls (1993: 19). Hereafter referred to in the main text as *PL*.

accept willingly and to act upon the legal laws embodied in a just Law of Peoples" (*LP* 44). In the absence of such a "psychological process" of "moral learning," the society of peoples could not be stable for the right reasons. Here again, in Rawls's view, it is not sufficient that the principles of international justice be publicly recognized as right: it is also necessary that individuals develop a sense of justice according to them. Otherwise, he thinks, individuals would not support their respective governments in honoring the Law of Peoples (*LP* 35). When peoples comply from a sense of justice with the Law of Peoples, the society of peoples is likewise "well-ordered."

Rawls insists that the only alternative to this account of political stability is a mere "modus vivendi," in which stability rests on "a balance of forces" (*LP* 44). He thus rules out any intermediate possibility between "stability for the right reasons" and "a balance of forces" in which stability could rest on principles of justice with which societies comply from non-moral considerations. As I will argue later, this is the possibility contained in Kant's account. It is important to notice, though, that in Rawls's account of the domestic case, citizens' compliance from a sense of justice is added to the coercive enforcement of the law.[4] At the international level, however, coercive enforcement drops out along with any other non-moral mechanism that could ensure compliance. Here compliance is entirely voluntary and depends on the capacity of both liberal and decent peoples to develop a sense of justice. As the domestic case shows, however, there is no reason why a moral mechanism should entirely replace a non-moral one in a conception of stability "for the right reasons." The development of a sense of justice could work along with other non-moral mechanisms for ensuring compliance. The reason for this asymmetry, I argue, is Rawls's assumption that, in the ideal, conflict among well-ordered societies disappears.

At both levels, domestic and international, Rawls conceives of the relevant actors as having moral capacities. This is why he departs from Kant's international account, which focuses on states, and replaces them

[4] As Rawls indicates, "political power is always coercive power backed by the government's use of sanctions, for government alone has the authority to use force in upholding its laws" (Rawls 1993: 136).

with "peoples" as the main actors.[5] The reason for this change is that, as Rawls explains, peoples have a "moral nature." He says that the idea of peoples "enables us to attribute moral motives…to peoples (as actors), which we cannot do for states" (*LP* 17). He writes: "what distinguishes peoples from states—and this is crucial—is that just peoples are fully prepared to grant the very same proper respect and recognition to other peoples as equals" (*LP* 35). In contrast to states, just peoples, he claims, "are not moved solely by their prudent or rational pursuit interests": peoples can have a "moral nature," which allows for the possibility of acting reasonably, or at least decently, toward each other (*LP* 27). In contrast to states, peoples can be willing to limit their conduct by what is reasonable. Here again, the reasonableness of peoples is conceived of in analogy to the reasonableness of citizens. Reasonable citizens regard each other as equals and "are ready to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so" (*PL* 49). Similarly, reasonable people are willing to limit the pursuit of its rational interests by considerations that can be accepted by other peoples provided that they will act likewise.[6] Thus, peoples could accept principles of international justice because they regard them as right and could comply with them because they so regard them.

By the "moral nature" of a people, Rawls means an internal structure by analogy to a person's moral character conceived of in Kantian terms. A person's moral character, in this view, depends on the principles on which she acts. Similarly, a people's moral nature is determined by the fundamental political principles contained in its constitution. This is why he affirms that the moral nature of liberal peoples requires "attachment to a political (moral) conception of right and justice" (*LP* 24). In his

[5] Beitz (2000).

[6] Rawls contrasts "reasonableness" with "rationality." "Rationality," he explains, "applies to a single, unified agent (either an individual or corporate person) with the powers of judgment and deliberation in seeking ends and interests peculiarly his own" (Rawls 1993: 50). Specifically, a state is rational when it pursues its own interests on the basis of informed deliberation about what its interests are, how to give them priority, and about the best means to attain them. States, however, in Rawls's view, cannot be reasonable. A state does not limit the rational pursuit of its interests by considerations acceptable to other states. Thus, in his view, while states are purely rational, peoples can be both rational and reasonable.

domestic conception of political justice, the principles of justice of a liberal people, ideally conceived, are those that citizens would accept as fair terms of cooperation when represented in an original position of equality.[7] The moral nature of liberal peoples, Rawls maintains, is expressed in the reasonable conduct of its citizens as, ideally, "they offer to cooperate on fair terms with other citizens" (*LP* 25). Accordingly, he attributes the capacity for reasonableness to liberal peoples only. A crucial assumption is that because, ideally, citizens of a liberal democracy are willing to offer each other fair terms of cooperation, as a people they will also be disposed to offer similar terms to other liberal peoples provided that the latter will do likewise. In other words, the assumption is that because the internal political structure of a liberal people is constituted by "reasonable" principles, liberal peoples will also guide their foreign policy, outwardly as it were, by reasonable principles as well—but only when dealing with other liberal peoples. Rawls presents this connection as a "guiding hypothesis" (*LP* 49) but does not say much about the grounds for it.[8]

As is well known, Rawls departs from Kant in his ideal of a reasonably just society of peoples by including societies that do not meet the ideal of domestic justice ("well-ordered liberal" societies for Rawls, "republics" for Kant). Rawls calls such societies "decent" and characterizes a particular kind of decent society that he calls "hierarchical" as having two main features: first, "the society does not have aggressive aims and it recognizes that it must gain its legitimate ends through diplomacy and trade and other ways of peace", and second, it is governed by a "common good idea of justice" (*LP* 64–65). A common good conception of justice entails that a decent society's basic institutions protect some basic human rights, among which Rawls includes "the right to life (to the means of subsistence and security); to liberty (to freedom from slavery, serfdom, and forced occupation, and to a sufficient measure of freedom of conscience

[7] In addition to the protection of basic rights and liberties, a "reasonably just constitutional democratic society" guarantees "a certain fair equality of opportunity, especially in education and training," "a decent distribution of income and wealth" such that "all citizens must be assured the all-purpose means necessary for them to take intelligent and effective advantage of their basic freedoms," "society as employer of last resort," "basic health care assured for all citizens," and "public financing of elections" (*LP* 50).

[8] For a development of this idea see Pettit 2006.

to endure freedom of religion and of thought); and to formal equality as expressed by the rules of natural justice (that is, that similar cases are to be treated similarly)" (*LP* 65).[9] Rawls insists that these rights should not be seen as being specifically liberal as they are "necessary conditions of any system of social cooperation" (*LP* 68).[10]

Rawls also attributes to decent societies a moral nature or character that enables them to comply with principles of international justice. Given that decent peoples lack a reasonable conception of justice, their moral nature cannot be reasonable, but it can be "decent." "Decency", Rawls tells us, is "a normative idea of the same kind as reasonableness, though weaker" because "it covers less than reasonableness does" (*LP* 67). A decent political arrangement does not meet the high standard of voluntary acceptance by its members when fairly represented, but it does meet a lower requirement of acceptability. His characterization of a hierarchical society suggests that it qualifies as a system of social cooperation that meets the minimal moral requirement of not treating its members as mere means. Though the basic political liberties are not guaranteed, the principles of political right prohibit slavery, serfdom, and forced occupation. The principles of a common good conception of justice do not meet the highest standard of procedural justice—collective self-legislation through individual voluntary acceptance—but they do meet a minimal standard of substantive justice, namely, not to treat any member of society as a mere means. To this extent, the basic institutions of a decent society can be acceptable to its members.

As in the case of liberal societies, Rawls assumes a connection between a decent society's internal political structure and its conduct toward societies that are at least decent. The fact that decent societies are governed by a common good conception of justice and honor, the short list of human rights is supposed to account for the fact that, in their outward conduct, they are peaceful. Since Rawls does not explain the nature of this supposed connection between internal structure and outward conduct, one may speculate that because a society does not treat its members as mere

[9] For a criticism of Rawls's short list of human rights see Beitz (2000).

[10] This is the basis for the claim that the short list of human rights is not dependent "on any particular comprehensive religious doctrine or philosophical doctrine of human nature" (Rawls 1999b: 68).

means, it demands "due respect" and to be treated on a footing of equality with other peoples.

In sum, according to Rawls, there would be well-ordered liberal and decent societies in a "reasonably justice society of peoples" who comply with the Law of Peoples for their own sake and without the need for coercive enforcement by a superior power. In the ideal, well-ordered liberal and decent peoples would join voluntarily from consideration of reasonableness or decency. If this kind of voluntary consent turns out to be impossible in the real world, a reasonably just society of peoples turns out to be likewise impossible. He writes: "any hope we have of reaching a realistic utopia rests on there being reasonable liberal constitutional (and decent) regimes sufficiently established and effective to yield a viable Society of Peoples" (*LP* 29–30). On this conception of the ideal case, the need for non-moral mechanisms for ensuring compliance does not even arise because societies are already willing to comply with such principles. In the following section, I will argue that this view on compliance is motivated by a diagnosis of the causes of war and conflict among societies that departs from contractarianism.

6.2 Rawls's Diagnosis of the Causes of War and Conflict

According to Rawls's diagnosis, the causes of war and conflict among societies are to be found in the internal institutional structure of some societies. As we saw, he holds that there is a correspondence between a society's internal institutional structure and its outward conduct. According to him, it is because of unjust domestic institutions that some societies are aggressive and prone to cause conflicts with other societies. His main piece of evidence for this diagnosis is the "democratic peace" thesis, which is the empirical finding that democracies usually do not go to war against each other.[11] He attributes this happy state of affairs to the absence of conflicts among these societies, which is due, in his view, to their democratic institutions. He writes: "The crucial fact of peace among

[11] Doyle 1997.

democracies rests on the *internal* structure of democratic societies, which are not tempted to go to war except in self-defense or in grave cases of intervention in unjust societies to protect human rights" (*LP* 8). He tells us that democracies are peaceful toward each other because "their basic needs are met, and their fundamental interests are fully compatible with those of other democratic peoples" (*LP* 47). He maintains that "there is true peace among them because all societies are satisfied with the status quo for the right reasons" and "all being satisfied in this way, liberal peoples have nothing to go to war about" (*LP* 47).

The democratic peace thesis does not say that liberal peoples do not ever go to war. They do, but only in self-defense against "unsatisfied societies," which "threaten their security and safety, since they must defend the freedom and independence of their liberal culture and oppose states that strive to subject and dominate them" (*LP* 48). Since, presumably, peace among democratic societies is due to their democratic institutions, the aggressiveness of other societies must be due to their non-democratic institutional arrangements. Thus, the solution to the problem of war and conflict among states must lie, in this view, in the internal moral transformation of each society. As this process takes place, better ordered societies will cease to attack each other and will become willing to comply with laws of international justice voluntarily. Rawls writes: "What makes peace among liberal democratic peoples possible is the internal nature of peoples as constitutional democracies and the resulting change of the motives of citizens" (*LP* 29, fn. 27). The optimistic hypothesis that liberal peoples are capable of complying with the principles of the Law of Peoples from a sense of justice is grounded in Rawls's diagnosis according to which the relations among liberal peoples are already peaceful.

Rawls's claim is not only that, as a matter of fact, democracies do not go to war against each other.[12] He makes a stronger claim that well-ordered liberal societies have "no reason to go to war with one another" to the extent that their fundamental interests are satisfied (*LP* 19). A weaker claim would involve the recognition that well-ordered liberal societies make conflicting claims against each other, but that, in virtue

[12] Catherine Audard (2006) has criticized what she regards as a confusion between "democratic peace" as a historical fact and as a desirable end.

of their institutional structure, they do not settle them in a violent manner. Rawls's strong claim is that conflicts among them do not even arise. As is well known, Rawls has been widely criticized for not carrying this line of thinking to its obvious conclusion, namely, that ideally all societies should be democracies.[13] Instead, as we saw, he includes well-ordered decent societies in the ideal case. It is much less noticed, however, that in offering this diagnosis of the causes of war and conflict among societies, Rawls has departed from contractarianism.

From a contractarian view, the need for an agreement on principles of justice arises from a conflict among the parties involved (either individuals or societies), the causes of which are to be found in the *relation* that the parties stand toward each other regardless of their internal moral dispositions or institutional structure.[14] This is Rawls's own position in *A Theory of Justice* where the need for an agreement on principles of justice arises from the facts of disagreement and conflict among citizens: they disagree on the principles that should govern the basic institutions of society and make conflicting claims about how to distribute the benefits and burdens of social cooperation (*TJ* 4 and section 22). This conflict has nothing to do with individuals being vicious or selfish. Rawls holds that in light of the plurality of conceptions of the good and of comprehensive doctrines, conflict and disagreement among individuals are unavoidable.[15] While he maintains a contractarian diagnosis of the causes of conflict at the domestic level, he rejects it at the level of the relations among societies. He holds that at the international level war and conflict are due to the lack of good institutions in some societies. In his view, the source of conflict should not be placed in the relation among them. Since he also maintains that peoples have a moral nature, which is in turn determined by its basic institutions, it turns out that, in his view, war and conflict among them is caused by the evil or corrupt moral nature of some societies.

In agreement with this non-contractarian diagnosis, he offers a non-contractarian solution according to which those societies that are neither

[13] Tesón (1995), Tan (2006).

[14] This position is common to all contractarian thinkers from Hobbes to Rawls himself (in *A Theory of Justice*), though I will focus here on Kant's account, which Rawls claims to be following.

[15] Rawls (1999a, b: 5& 110).

liberal nor decent should transform themselves morally *before* the possible establishment of a viable society of peoples (*LP* 106). Rawls's account of the ideal case presupposes that societies have undergone some process of moral transformation such that they are either liberal or decent. Thus, what he calls "outlaw states," "burdened societies," and "benevolent absolutisms" should become at least decent in order to be in a position to be included in a "reasonably just society of peoples."[16] Only after societies have become well ordered, can they be peaceful and cease to make conflicting claims against other societies. Only after this internal change has taken place, a society could be willing to comply with the Law of Peoples voluntarily.

In ruling out the use of coercive enforcement by a world government, Rawls claims to be following Kant (*LP* 36).[17] However, as I will argue in the following section, on Kant's contractarian diagnosis, the cause of war and conflict among states is the kind of relation in which they stand toward each other. This diagnosis, in turn, calls for a contractarian solution that consists of changing the terms of the relation among them. Despite Rawls's suggestion, compliance from a sense of justice and through coercive enforcement does not exhaust the alternatives available. Kant's view introduces a non-moral mechanism as a necessary condition for the possibility of compliance, which consists of placing states in a relation of reciprocal independence and of rough equality of power. Though coercive enforcement by a world government may be ruled out, compliance is not left to the goodwill of states, but requires, as a necessary condition for its possibility, a change in the relation in which they stand toward each other.

6.3 Kant's Contractarian Diagnosis

As is well known, Kant's diagnosis of the causes of war and conflict among states parallels his account of the state of nature among individuals.[18] He argues that conflicts are unavoidable at both levels by virtue of the relation in which either individuals or states stand toward each other. As regards

[16] Rawls (1999a, b, Part III).

[17] For a broad view of the context of Rawls's position in relation to Kant's see Boucher (2006).

[18] On Kant's account of Right, see Byrd (1995), Flikschuh (2000), Ludwig (2002), Ripsten (2009).

the relation among individuals, he maintains that they cannot avoid coming into conflict in the exercise of their external freedom of action because they share a limited space. The postulate of public Right says that "when you cannot avoid living side by side with all others, you ought to leave the state of nature and proceed with them into a rightful condition, that is, a condition of distributive justice" (*DR* 6:307). Likewise, states cannot avoid coming into conflict among themselves because of their spatial proximity. Kant writes: "Nations, as states, can be appraised as individuals, who in their natural condition (that is, in their independence from external laws) already wrong one another by being near one another" (*PP* 8:354).

At both levels, Kant maintains that, in the absence of a common authority in charge of settling disputes, individuals and states will settle the conflicts among them through force. The kind of conflict that is relevant for political purposes at both levels concerns right claims. A right, according to him, is an authorization to use coercion (*DR* 6:232). Thus, before the establishment of a common power with the authority to determine rights, whatever claims individuals or states defend through the use of force and coercion must be seen as claims of right. The alternative would be to see the use of force as mere violence, but this is an alternative that Kant rules out. If the use of force is to be considered in principle legitimate, it must be seen as the exercise of a right claim. In using force against others, individuals and states in the state of nature consider themselves authorized to proceed in this way, that is, they see themselves as pursuing their rights. As Kant says, in the state of nature, individuals and states are entitled "to do *what seems right and good to it* and not to be dependent upon another's opinion about this" (*DR* 6:312). In the absence of an independent criterion of who has a right to what and of a common authority in charge of adjudicating conflicting claims, individuals and states will take into their own hands the defense of what they consider to be entitled to. In such a condition, he writes, states pursue their rights through war (*PP* 8:355).

It is central to Kant's account that this way of settling conflicts in the state of nature has nothing to do with either the moral disposition of individuals or the internal political structures of states. It is not the immorality of either individuals or states that pushes them to pursue their alleged rights through force and violence since, in his view, this happens "however well disposed and law-abiding human beings might be" (*DR* 6:312). He maintains that "before a public lawful condition is established

individual human beings, peoples and states can never be secure against violence from each other" (*DR* 6:312). The reason is that each of them claims to have the right to take the necessary means for protecting and defending what is his. The lack of a common authority produces uncertainty in the resolution of conflicting claims, which may in turn escalate to open confrontations. At the interstate level, the problem is not merely the fact of war, but primarily the continuous preparation for it, which runs contrary to the idea of perpetual peace (*PP* 8:343). Preparation for war is as much against the idea of lasting peace as it is war itself.

In Kant's view, the problem with this condition is not merely the fact of violence, but its immorality. According to him, authorizations to use coercion cannot be unilateral, though in the state of nature they cannot but take this form. This is why he maintains that the state of nature is a wrongful condition and that, by remaining in it, both individuals and states commit wrong in the highest degree (*DR* 6:307–308). Kant holds that authorizations to use coercion, i.e., rights, necessarily presuppose a universal law, which in turn presupposes a common will. He writes:

> When I declare (by word or deed), I will that something external is to be mine, I thereby declare that everyone else is under 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. This claim involves, however, acknowledging that I in turn am under obligation to every other to refrain from using what is externally his; for the obligation here arises from a universal rule having to do with external rightful relations (*DR* 6:255).

The central claim here is that any right claim presupposes a universal rule according to which others are under an obligation to refrain from using what I claim to be mine, provided that I am also under the obligation to refrain from using what others claim to be theirs. By making a right claim, I implicitly lay down such a rule. The problem, however, as Kant goes on to say, is that I cannot be under such an obligation unless everyone provides me the assurance that all others will refrain from using what is mine. But who is to provide such an assurance? His answer is that "it is only a will putting everyone under obligation, hence only a collective general (common) and powerful will, that can provide everyone this assurance" (*DR* 6:256).

According to this, the state of nature is inherently defective because the use of force can be considered legitimate only if it is regarded as the exercise of a right. But rights presuppose a universal law binding upon everyone, which in turn presupposes a common and powerful will that provides the necessary assurance that everyone will refrain from taking what belongs to another. Since such a will does not exist in the state of nature, it is a moral imperative to leave it and to establish a condition of Right, i.e., a civil condition. By the same token, rights in the state of nature are also defective. This is why Kant claims that in this condition, they are "provisional" (*DR* 6:257). Strictly speaking, there cannot be rights in the state of nature, but we must see the use of force as provisionally rightful with a view to the establishment of a condition of Right (*DR* 6:257). It is from the perspective of what the interaction among persons or states must be like, namely, subject to enforceable universal laws, that we can construe the violence in the state of nature as provisionally rightful. Otherwise, if we were to see it as mere violence, there would be no basis for the moral imperative of establishing a condition of Right.

There are two implications of Kant's diagnosis that are crucial for the purposes of this paper. The first one is that the need for the establishment of universal laws of Right among either individuals or states arises because in the state of nature conflicts are unavoidable and, in the absence of a common authority, are settled through force. If there were no conflicts, or if they were never settled through force, there would be no need for laws of Right. Kant's contractarian solution necessarily presupposes a diagnosis according to which conflicts and force are unavoidable in the state of nature. The moral imperative of subjecting interaction to coercive laws arises because individuals and states can never be secure against violence by others in the absence of a common authority.

The second implication is that laws of Right govern the *interaction* among a plurality of agents. In contrast with ethical laws, the universal law of Right is not addressed to individuals for the personal guidance of their conduct. Instead, it is a principle addressed to everyone demanding that we subject our interaction to universal laws. This law says: "so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law" (*DR* 6:231). In Kant's view, a law meant to govern the interaction of a plurality of agents necessarily

gives rise to the question of assurance, which in turn leads to the need for a coercive authority. The point here is not that people will not deliver what they owe each other unless others do the same: the point, instead, is that people cannot be *under an obligation* to deliver what they owe each other unless everyone is given the assurance that others can be made to comply. This means that, in Kant's view, laws for governing interaction must be necessarily coercive. The coercion here is not internal (i.e., self-inflicted) as it is in ethical laws. External laws for the governance of interaction call for coercion that is exercised externally on everyone involved. This is a crucial difference with ethical laws, which are binding for each individual and tell him how he ought to relate to himself and to the rest of humanity. By contrast, laws of Right are addressed to a group of agents in conflict as imperatives for acting together.

Kant's diagnosis is radically different from Rawls's, who, as we have seen, takes as his starting point the absence of conflicts among liberal societies. My purpose here is not to call into question Rawls's optimism, but to argue that his starting point cannot motivate a contractarian proposal. From a Kantian perspective, Rawls's international laws of justice look like ethical laws to the extent that they are addressed to liberal societies as guidelines for their foreign policy (*LP* 10): such laws are not addressed to a group of agents in conflict as imperatives for acting together. By contrast, Kant's contractarian solution is addressed to those involved in the state of nature characterized as a condition of unavoidable conflict and violence. In the following section, I will briefly consider Kant's solution and will argue that, independently of whether we take him to favor a coercive authority or a free league of states, his diagnosis motivates the need for correcting the power relation among states with a view to the possibility of peace.

6.4 Kant's Contractarian Solution

Readers of *Towards Perpetual Peace* usually emphasize the first definitive article, which requires states to be republics, in order to claim, as Rawls does, that world peace primarily depends on the internal institutional structure of societies.[19] By proceeding in this way, they tend to downplay

[19] On Kant's republicanism see Jones (1994).

the six preliminary articles, which are mainly concerned with setting limits to the capacity of states to use force against each other regardless of whether they are republics or not. In this section, I argue that, in agreement with his diagnosis of the nature and source of the problem in the state of nature among states, Kant's solution demands that the first step toward a lasting peace must be a change in the power relation among them. If the problem is that states defend through war what they take to be their rights, the solution must be to limit their capacity to do so. I argue that even if we take Kant to reject the establishment of a state of states, this does not mean that his solution relies only—or primarily—on the hope that states can become republics on their own, as it were, which would put them in a position to comply voluntarily with the resolutions of a free association. His proposal begins by establishing measures to limit the power of *all* states to exercise force against each other, regardless of whether they are republics or not. This is what we find in the six preliminary articles, which are concerned with reducing the asymmetries of power in the relation among states. Provided that such asymmetries are importantly reduced, we can begin to hope that they may be willing to join a voluntary association, which may in turn further their transformation into republics.[20]

On Kant's account, as is well known, the parallelism between the two kinds of state of nature—among individuals and among states—breaks down at the point of offering a solution to the problem of a lawless relation: while he holds that, among individuals, the solution is the establishment of a common authority in charge of legislating and enforcing the laws of Right, he appears not to endorse a parallel view in the relation among states. On the one hand, he claims that "in accordance with reason there is only one way that states in relation with one another can leave the lawless condition, which involves nothing but war," which is that "like individual human beings, they give up their savage (lawless) freedom, accommodate themselves to public coercive laws, and so form an (always growing) *state of nations* (*civitas gentium*) that would finally encompass all nations of the earth" (*PP* 8:357). This is not a world state, which would be "the fusion" of states "by one power overgrowing the rest and passing

[20] Kleingeld (2006b).

into a universal monarchy" (*PP* 8:367). It is, instead, a state of states. On the other hand, he maintains that states "do not at all want this" and that "(if all is not to be lost) in place of the positive idea *of a world republic*, only the *negative* surrogate of a *league* that averts war, endures, and always expands can hold back the stream of hostile inclination that shies away form right, though with constant danger of its breaking out" (*PP* 8:367). Such a league would lack coercive powers.

Interpreters have discussed which solution to the problem of war among states best coheres with Kant's argumentation, but I will not enter into this discussion here.[21] Instead, I will argue that, whatever we take his most coherent position to be, his proposal includes setting limits to the power of *all* states to use force against each other regardless of whether they are republics or not. This follows from his characterization of the state of nature, according to which conflicts among states are unavoidable given that they share a limited space. The point of his proposal is to tell us how to prevent such conflicts from turning into violent confrontations. The possibility of using force effectively against others importantly depends on the power that a state has. If weak, a state may hardly represent a threat to peace. But if powerful, a state threatens peace because it has the power to use force in order to solve conflicts with other states. Thus, the first step to peace requires changing the power relation among states such that they cannot threaten each other with the possibility of using force in order to settle conflicts in their own favor. This is what we find in the six preliminary articles.

With the exception of the first and sixth articles, which rule out certain attitudes and actions of states that are contrary to the possibility of peace, the other four articles are concerned with changing the power relation among them such that it becomes less asymmetrical.[22] The second and fifth articles point to the establishment of a relation among states characterized by their reciprocal *independence*: the second one prohibits the acquisition of one state by another "through inheritance,

[21] See the discussion in Kleingeld (2006a and 2004), Wood (1995), and Pogge (1988).

[22] The first article prohibits holding a peace treaty with "a secret reservation of material for a future war" (*PP* 8:343–344); the sixth one prohibits acts of hostility that would make mutual trust impossible during peace time, such as employing assassins, poisoners, breach of surrender, and incitement to treason within the enemy state (*PP* 8:346–347).

exchange, purchase or donation" (*PP* 8:344); the fifth one prohibits the forceful interference of one state "in the constitution and government of another state" (*PP* 8:346). The third and fourth articles directly require that the relation among states be characterized by their *equal power* as regards their material means for using force against each other: the third one requires the abolition of standing armies (*PP* 8:345), and the fourth one prohibits the contract of national debt to be used for "the external affairs of a state" (*PP* 8:345–346). In his comments on the third article, Kant says that standing armies in themselves "incessantly threaten other states with war by readiness to appear always prepared for war" (*PP* 8:345). He indicates that large inequalities of wealth among states are also, by themselves, a threat to war. He writes: "it would turn out the same with the accumulation of a treasure: regarded by other states as a threat of war, it would force them to undertake preventive attacks (for of the three powers, the *power of armies*, the *power of alliances* and *the power of money*, the last might well be the most reliable instrument of war)" (*PP* 8:345).

According to four of these preliminary articles, the possibility of lasting peace crucially depends on changing the power relation among states. These articles require that states be independent from each other and that large inequalities of wealth among them be eliminated. Kant's concern with relations of power among states directly follows from his characterization of the state of nature. As we saw, the problem in this condition is that states use force and violence against each other in order to defend what they take to be their rights. By placing these articles at the beginning of his proposal, he appears to suggest that unless these changes take place, there can be no hope that states may join an association aimed at lasting peace. This is true regardless of whether such an association has or lacks coercive powers. The establishment of a relation of reciprocal independence and of rough equality of power is necessary in either case.[23] Reciprocal independence is necessary if states are not to be fused with

[23] We do not have to think that these two conditions must be fully attained before the establishment of either a state of states or the voluntary association. Kant holds that fulfillment of the second, third, and fourth articles can be postponed (*PP* 8:347). It is plausible to think that part of the task of the union of states is precisely to promote and bring to completion the fulfillment of these requirements.

one another when placed under the coercive authority of a state of states, and it is also necessary if they are to join a voluntary league. Similarly, rough equality of power is necessary if all states are to submit equally to a powerful coercive authority as well as if they are to join a voluntary association as equals. In either case, the condition of rough equality of power makes it less tempting to states to take the solution of conflicts into their own hands using violent means. As we know, powerful states have always had the de facto prerogative to proceed in this way against those who are weaker.

Kant's proposed measures in the preliminary articles indicate that, in his view, the possibility of peace importantly depends on the building of trust among states. If a lasting peace is to be possible, states must have good grounds for trusting that other states will not keep for themselves the option of waging war. Trust requires not only that states sign peace treaties but also that they take the necessary means for blocking the possibility of war, namely, that they abolish standing armies as well as large inequalities of wealth among them. Resistance of states to do this may rightly be taken by other states as a secret reservation for waging war in the future, which, according to Kant, is as much against peace as it is war itself. Only measures such as these, which are intended to place states in a relation of reciprocal independence and of rough equality of power, can provide everyone the assurance that peace treaties will indeed be honored.[24] Thus, the task of non-ideal theory, to use Rawls's language, is to tell us how steps toward disarmament may be taken as well as how to further a symmetrical condition of power among states.

If we see the definitive articles through this light, it turns out that peace, in Kant's account, cannot primarily depend on the internal transformation of states into republics prior to the establishment of the league of states.[25] The first definitive article, which says that the constitution of all states should be republican, rests on two claims: first, that this is the only constitution that incorporates the freedom, equality, and independence of citizens, and second, that it is the only one conducive to

[24] Here I disagree with Ripsten (2009: 227–229) who claims that the problem of assurance does not arise among states.

[25] Kleingeld (2006b).

peace because it requires citizens' consent for waging war, which, Kant supposes, they will not give. While the former claim is grounded on his normative theory of the state, the latter rests on the empirical assumption that citizens will not consent to go to war. This latter claim should be seen as pointing to yet another means through which a state's capacity for waging war may be limited: in addition to the measures established in the preliminary articles, republics can also be contained by their own citizens. It is important to notice, however, that the requirement of citizens' consent, by itself, offers no assurance to other states that war will not be waged. Kant's own grounds for the claim that republics are peace prone leaves open the possibility that citizens may estimate war to be the best option under certain circumstances. The claim is also compatible with the possibility that citizens of a republic may vote in favor of the preparation for war. Whether a republican state will resort to violence depends on the vote of its citizens, which may or may not favor war or the preparation for it. Republicanism by itself cannot be a guarantee of peace, much less of the elimination of conflicts among societies.[26] The assurance that war will not be waged can only be provided by the kind of relation that states establish among them: according to Kant, the relation must be such that no state has sufficient means at its disposal for using force effectively against another state.

If, for the sake of comparison with Rawls's *The Law of Peoples*, we take Kant's final position to favor a voluntary league of states, it is important to notice that such a league makes no requirements whatsoever regarding the internal institutional structure of states as a condition for entry. The preliminary articles contain no requirement of this sort and Kant explicitly says that neighboring states are at liberty to join the association (*DR* 6:350). The possibility of a voluntary association of states depends on their having good grounds for reciprocal trust, which in turn can only be built if states take the necessary steps to give each other the assurance that they will not resort to war. Such an assurance, as I have argued, cannot rest on the expectation by other states that the citizens of a republic will not ever vote in favor of waging war. Instead, this assurance must be grounded in the relation in which states stand toward each other: recipro-

[26] Guyer (2000).

cal independence and rough equality of power. I wish to stress that non-republics as much as republics are subject to the requirements contained in the six preliminary articles. Kant never suggests that a republican constitution may exempt a state from abolishing standing armies and from accumulating treasure indefinitely. These actions are against the possibility of peace regardless of whether they are carried out by republics or non-republics. Kant does say that a republic is to be the focal point for the formation of an association of states because "by its nature must be inclined to perpetual peace" (*PP* 8:356). But he does not at all imply that, in order to join the association, other states should fulfill some requirements regarding their internal institutional structure, though, to be sure, they must have shown a disposition to peace.

6.5 Conclusion

In this chapter, I have argued that Rawls departs from contractarianism in his diagnosis of the causes of war and conflict among societies as well as in his proposed solution to the problem. In Kant's contractarian diagnosis, such causes are due to the relation in which states stand toward each other, which, in his view, unavoidably leads to conflicts among them. In light of this diagnosis, a contractarian solution is called for, namely, a change in the terms of the relation among all states. Regardless of whether we take his most coherent position to be the establishment of a state of states or of a voluntary league without coercive powers, I have argued that Kant's proposal requires placing all states in a relation of reciprocal independence and of rough equality of power. These non-moral measures are necessary conditions for the possibility of compliance with either coercive laws or the resolutions of a voluntary league.

By contrast, Rawls claims that the causes of war and conflict at the international level are to be found in the internal institutional structure of some societies. While liberal societies are so well ordered that conflicts among them do not even arise, other societies are not so well constituted. Accordingly, his proposed solution requires that all societies transform themselves internally so as to become peaceful. As we have seen, Rawls does not require that all societies become liberal, but he does require

that they become at least decent. Only after a society has become well ordered, it can be included in a reasonable society of peoples that comply with international laws from a sense of justice. Rawls departs from contractarianism both in his diagnosis of the causes of war and conflict among societies and in his proposed solution. According to his diagnosis, such causes are not to be found in the relation in which societies stand toward each other. As a consequence of this, his solution to the problem of war and conflict in the world at large is not a call for a change in the relation among societies but a moral plea for the internal institutional transformation of those societies that are neither liberal nor decent.

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7

Kant and Public Education for Enhancing Moral Virtue: The Necessary Conditions for Ensuring Enlightened Patriotism

Joel Thiago Klein

7.1 The Interrelationship Between History, Anthropology, and Politics

Kant's political philosophy, "as doctrine of right put into practice ['*einer ausübender Rechtslehre*' would be better translated as 'a exercised doctrine of law']" (*PP*, 338/8:370),[1] must be understood, in my view, as a theory comprising part of a broader framework that entails a particular conception of anthropology and the philosophy of history, which shapes Kant's theory of law in politics. The aspect of "exercise" is not simply represented by a gradual accumulation of experience gathered randomly into the history of humankind or the individual history of statesmen subordinate to the prin-

[1] References to Kant's works embedded in the text are formed by the standard abbreviations of the German titles, followed by the volume number in Academy edition (the Akademie Ausgabe) of Kant's writings in which the work is included and by the page number in that volume.

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ciples of law. From the perspective of Kantian philosophy, this approach would be seen as a manner of aggregating elements and producing a distorted theory put together without any principle. From a systematic understanding of Kant's philosophy, political theory should be based on a principle so that it might be put into practice according to a model of organic growth rather than merely being "heaped together (*coarcervatio*)" (*CPR*, B861). This model of the organic growth of experimentation always follows upon the *regulative* and *teleological principle of purposiveness*, which is also aligned with both a conception of humankind and the human condition in history. Both aspects are intrinsically interlinked and constitute Kant's anthropology and philosophy of history. This is, obviously, a direct result of the Copernican revolution as applied to political practice. Namely, it is not possible to arrive at a theory without having at hand a set of principles that, in turn, cannot result from a mere abstraction from experience precisely because it is these principles that allow for the possibility of experience, which is understood as an interconnected set of phenomena.

In this vein, for example, the political philosophy presented in *The Conflict of the Faculties* relates to the dispute between philosophy and law, which is reduced to the question: "*is the human race constantly progressing?*"(*CF*, 297/7:79) This "*old question raised again*" is the central topic of Kant's philosophy of history and is related to the conflict with the defenders of an allegedly practical philosophy and theory of law as abstracted from experience. The concept of "practical men" assumes the premise that "we must take human beings as they are, not as pedants ignorant of the world or good natured visionaries fancy they ought to be"(*CF*, 298/7:80). However, Kant argues directly against that position and points out that

> in place of that as they are it would be better to say what they *have made* them—stubborn and inclined to revolt—through unjust constraint, through perfidious plots placed in the hands of the government; obviously then, if the government allows the reins to relax a little, sad consequences ensue which verify the prophecy of those supposedly sagacious statesmen. (*CF*, 298/7:80)

It is highly pertinent to link this passage with Kant's first political text, namely, *An answer to the question: what is enlightenment?* Already in 1784, Kant points out that the

> *Enlightenment is the human being's emergence from his self-incurred minority. Minority* is inability to make use of one's own understanding without direction from another. This minority is *self-incurred* when its cause lies not in lack of understanding but in lack of resolution and courage to use it without direction from another. (*Enligh*., 17/8:35)

This state of minority can encompass many areas of human life such as religion, morality, and health: "If I have a book that understands for me, a spiritual advisor who has a conscience for me, a doctor who decides upon a regimen for me, and so forth, I need not trouble myself at all" (*Enligh*., 17/8:35). But it is noteworthy that this natural inclination for indolence (cf. IUH, 111/8:21) is reinforced and perpetuated by a propitious historical–cultural context and by a selfish interest of the "guardians" to remain in their condition: "after they have made their domesticated animals dumb and carefully prevented these placid creatures from daring to take a single step without the walking cart in which they have confined them, they then show them the danger that threatens them if they try to walk alone" (*Enligh*., 17 / 8:35). The said guardians want to keep humankind in a condition of minority, taking measures to keep their domesticated animals tied up and unable to achieve emancipation. This limitation endures because becoming enlightened and emancipated is not a simple and easy thing:

> anyone who did throw them off [the ball and chain of an everlasting minority] would still make only an uncertain leap over even the narrowest ditch, since he would not be accustomed to free movement of this kind. Hence there are only a few who have succeeded, by their own cultivation of their spirit, in extricating themselves from minority and yet walking confidently. (*Enligh*., 17/8:36)

There is an important similarity between these 1784 and 1798 passages. Both discuss not only a criticism of individuals, as is often pointed out in the literature, but there is especially, in my view, a historical, social, and institutional critique. Whether there is a human tendency to indolence and a personal responsibility for one's own enlightenment, on the other hand there is also an even greater relevance accorded to the social and political condition. The responsibility for the minority is just that of

humankind, seen as a species, as a society, as a country. We should blame neither nature, an alleged natural inconvenient condition, divine providence, nor even original sin. So the opening sentence of *Enlightenment* should read, namely, that the minority is the fault of humans themselves. Kant's point is that minority is not just about the fault of individuals, but about the responsibility of the human species for the political and social forms which keep individuals as minors, as beasts tied to carts and incapable of self-guidance.

It is in this context that Kant strongly criticizes the relationship established between politics and the philosophy of history, when the latter is considered from the point of view of the *terroristic*, *abderitic*, or *eudaemonistic* concepts of history (see *CF*, 298f./7:81ff.). He sees political activity to be of such a nature that it must be eminently attuned to the future although, in order to learn from experience, one needs to consider the experiences of the past and the present. Politics should focus on the future, on what is possible, and in this sense, it may have a dogmatic view about the future (either pessimistic, allegedly "realistic", or naive), or in turn it may have a critical and legitimate concept of the possibility of the future, which could guide a real political *praxis*. For Kant, all three dogmatic concepts are illegitimate precisely because they stand on an alleged empirical point of view, that is, they are interpretations of an allegedly empirically self-evident reality which, from the Kantian perspective, can be challenged with regard to their coherence, but they also fail to overcome the fundamental difficulty that

> we are dealing with beings that act freely, to whom, it is true, what they *ought* to do may be *dictated* in advance, but of whom it may not be *predicted* what they will do: we are dealing with beings who, from the feeling of self-inflicted evil, when things disintegrate altogether, know how to adopt a strengthened motive for making them even better than they were before that state. (*CF*, 300/7:83)

Unlike these three views, Kant's philosophy of history does not derive its arguments and its principles from allegedly self-evident empirical experience, but holds its position based on rational principles. These enable the construction of an understanding of history that can simultaneously deal

with all the multiplicity of historical phenomena and yet arrange this profusion into a system, which attributes sense to human actions and forms a history (*Geschichte*) rather than merely a historiography (*Historie*) (see IUH, 119/8:30). The sense of *Geschichte* is constructed by the presumed *end or goal*, which, in turn, should be continually strengthened and promoted by a policy that consciously intends to transform it into an *aim* and a *task*. It is precisely in this way that one should read the final passage of *Towards Perpetual Peace*: "(…) the *perpetual peace* that follows upon what have till now been falsely called peace treaties (strictly speaking, truces) is no empty idea but a task [*Aufgabe*] that, gradually solved, comes steadily closer to its goal [*Ziele*]" (*PP*, 351/8:386).

Thus, politics is presented as a practice whose aim or task should be to maintain some aspects of reality and change others, but always in the direction of a specific purpose expressed by the continual improvement of institutions and the living conditions of the people. In my view, both Kant's philosophy of history and his political philosophy are brought together in a particular view of the future. In all writings of history, even those discussing the interpretation of a conjectural beginning of human history or the principles of organization of a universal history, the most important aspect was always the extrapolation to a projected future, i.e., the potential for a continual approach to developing human faculties, in particular, the moral faculty.

So the answer to the question "What do we want to know in this matter?" raised in *The Conflict of Faculties* is: "a fragment of human history and one, indeed, that is drawn not from past but future time, therefore a *predictive* history; if it is not based on known laws (like eclipses of the sun and moon), this history is designated as divinatory, and yet natural" (*CF*, 297/7:79). Such an answer does not have the status of knowledge, whether theoretical or practical, because it is not *immediately* founded on objective principles (such as duty or the knowledge of nature), but only on practical regulative principles, such as hope. We are speaking not of a naive desire for improvement or a confidence in the state of things, but a well-founded hope for theoretical and practical philosophy. Such a hope is distinct from that of a "sanguine hope" for the concept of eudaemonistic history, because it is a theoretically legitimate "*Fürwahrhalten*" (taking something to be

true), which does not contradict the field of possible experience (i.e., *die Erfahrung*) and rests on a concept of history (i.e., *die Geschichte*) that permits an

> expectation as well grounded as is necessary for us not to despair of its progress toward the better, but to promote its approach to this goal with all prudence and moral illumination (each to the best of his ability). This is a prospect that can be expected with moral *certainty* (sufficient certainty for the duty of working toward this end). (*Anthr*. 424/7:329)

In other words, Kant's thesis rests *in an intermediate form* on "*my innate duty*, the duty of every member of the series of generations—to which I (as a human being in general) belong and am yet not so good in the moral character required of me as I ought to be and hence could be—so to influence posterity that it becomes always better" (*TP*, 306/8:309), which transforms into a practical type of hope in which the human species "is represented in the remote distance as finally working itself upward toward the condition in which all germs nature has placed in it can be fully developed and its vocation here on earth can be fulfilled" (*IUH*, 119/8:30; see also *PP*, 351/8:386).

Kant's anthropological concept lies in a similar vein. Human existence is seen as that of "…an animal endowed with the *capacity of reason* (*animal rationabile*), can make out of himself *a rational animal* (*animal rationale*)" (*Anthr*. 417/7:321). Kant's answer to the question "What is man?" comes neither from the observation of what humans have achieved, nor of their deeds, nor of what they have produced or made effective, but from a philosophical reflection on their dispositions and faculties, which may or may not be put into activity in the right way, something that will always depend on how humans themselves make use of their freedom and whether they have reached or not their respective enlightenment. It should also be noted that the establishment of such powers and dispositions is not disconnected from experience. Kant believes that *it is possible to present historical and philosophical evidence that indicates the improvement of three separate dispositions*: technical, pragmatic, and moral. Although this argument is not decisive in a highly theoretical sense, it has a cor-

roborative character which is sufficient for practical purposes. In my view, it is in this sense that one should read the examples of moral progress based on the pronouncement of disinterested judgments, whether they concern Mendelssohn's attitude toward education (see *TP*, 306/8:309) or the public's view of the French Revolution (see *CF*, 301f./7:85f.) The critical anthropology which removes dogmatic concepts of human nature concludes as follows:

> the human being is destined by his reason to live in a society with human beings and in it to *cultivate* himself, to *civilize* himself, and to *moralize* himself by means of the arts and sciences. No matter how great his animal tendency may be to give himself over *passively* to the impulses of ease and good living, which he calls happiness, he is still destined to make himself worthy of humanity by *actively* struggling with the obstacles that cling to him because of the crudity of his nature. The human being must therefore be *educated* to the good. (*Anthr*. 420/7:324)

Whichever anthropological concept is assumed, it will undeniably have a direct impact on the role of politics. A dogmatic anthropological view considers humans simply arising from that which allegedly constitutes the phenomenon of human history and it always tends to emphasize some aspects over others. However, its worst consequence is that "such a pernicious theory itself produces the trouble it predicts, throwing human beings into one class with other living machines, which need only be aware that they are not free in order to become, in their own judgment, the most miserable of all beings in the world" (*PP*, 345/8:378). On the other hand, Kant's critical anthropology brings to politics the consequence that "the good moral education of a people is to be expected from a good state constitution" (*PP*, 336/8:366). In other words, Kant's anthropological concept points out that the proper characteristic of humans as a species is not their historical and empirical moral condition but their ability to produce the said condition for themselves. For politics, this means that one cannot expect that people have already been morally enlightened in order to create a republican state. On the contrary, it is the result of a joint effort of many individuals, politicians, and rulers, even following a

certain historical dialectic that can and must create a set of institutions, which, by their very nature, i.e., by the principles from which they are established, can build good citizens by way of an educational process.

Otherwise, if political institutions are designed with a view to what they at the current historical moment have produced and performed, then politics would be reduced simply to the maintenance of the social–political status quo. This would be politics not only attached to the present but also chained to the continual projection of an unfair beginning. Politics as an *ausübende Rechtslehre* is a theory of a praxis which is articulated with a critical conception of history (*Geschichte*) and anthropology. Therefore, one can summarize Kant's position about the relationship among politics, history, and anthropology as follows: the logic is not to wait until individuals are morally enlightened in order to create fair political institutions; rather political institutions must be built according to the concept of right and must be continually reformed with the goal of achieving a more just form of the state and society. Through them, individuals will become gradually more enlightened, which, in turn, will again lead to further improvements in the institutions.

7.2 The State's Role in Public Education for Enhancing Moral Virtue

The first contribution of the state toward the formation of the character of its citizens is its very existence, since the state, in working to prevent the reciprocal violence of individuals, already provides a "moral veneer" for society (*PP,* 343/8: 375n). The mere fact of living in a society subject to the laws of a republican state does not build moral beings. However, it does gradually instruct individuals in a way of life based not on arbitrary orders but, instead, on laws established in accordance with the principles of freedom, dependence, and equality regarding the law. Thus, a moral veneer emerges that is not, in itself, a moral step but yes a first step *toward* morality.

This moral veneer is, however, still slight and fragile, because the development of culture, arts, and sciences without the simultaneous moral

enlightenment of individuals gives rise to a number of vices and social hardships. In this sense, Kant states that "*Rousseau* was not so wrong when he preferred to [civil society] the condition of savages, as long as one leaves out this last stage to which our species has yet to ascend" (*IUH*, 116/8:26), namely, the moralization or the development of humanity. The increase in misfortune is fostered even under a state with a civil constitution: "with the progress of this culture (…) calamities grow equally great on both sides [by the poor and by the wealthy], on the one side because of violence imposed from without, on the other because of dissatisfaction from within" (*CJ*, 299/5:432). Therefore, the progress of culture must be coupled with moral development understood as an attitude that does not refer merely to external behavior, since "everything good that is not grafted onto a morally good disposition, is nothing but mere semblance and glittering misery" (*IUH*, 116/8:26).

The true and legitimate exercise of politics is not that which leaves the responsibility for moral education to the effort of individuals, that is, as going upward: "to expect that this will eventually happen by means of education of youth in the home, then in schools on both the lowest and highest level, in intellectual and moral culture fortified by religious doctrine—that is desirable, but its success is hardly to be hoped for" (*CF*, 308/7:92). This does not mean that education for virtue should not occur within the family, community, or schools, but that the agency of single individuals in each of these areas is insufficient when it starts from private perspectives that will probably never touch the society as a whole. For this reason,

> the whole mechanism of this education has no coherence if it is not designed in agreement with a well-weighed plan of the sovereign power, put into play according to the purpose of this plan, and steadily maintained therein; to this end it might well behoove the state likewise to reform itself from time to time and, attempting evolution instead of revolution, progress perpetually toward the better. (*CF*, 308/7:93)

It could be countered that this approach to engendering public education for morality might risk becoming a despotic state that would destroy the

freedom of the citizens. Support for this concern seems to be found in this passage of *Religion*:

> it would be a contradiction (*in adjecto*) for the political community to compel [*zwingen*] its citizens to enter into an ethical community, since the latter entails freedom from coercion in its very concept. (…) But woe to the legislator who would want to bring about through coercion [*durch Zwang*] a polity directed to ethical ends! For he would thereby not only achieve the very opposite of ethical ends, but also undermine his political ends and render them insecure. (Rel., 131/6:95f)

However, in my view, the point in this passage is the impossibility and the illegitimacy of obligating (*zwingen*) citizens to promote ethical purposes and enter into an ethical community. Now, in order to ensure the proper function of the rule of law, it is essential that the said laws be *administered* with a view *only* to external freedom and the laws of right. However, Kant is *not saying* that a potential educational policy promoting the moral education of citizens entails a contradiction regarding the end of the state and will foster political and juridical uncertainty. The point is that the institutionalization of ethical ends by way of coercive laws leads to contradiction, but not that the state should refrain from offering an integrated educational plan for freedom nor even a moral education. Thus, on the one hand, if the state should not act juridically, that is, by means of legal coercion, on the other hand, the use of other institutional instruments to promote the moral progress of citizens remains legitimate.

Another possible criticism of the state's performance in relation to a kind of moral education could be formulated from the following passage:

> (…) it is a contradiction for me to make another's perfection my end and consider myself under obligation to promote this. For the perfection of another human being, as a person, consists just in this: that he himself is able to set his end in accordance with his own concepts of duty; and it is self-contradictory to require that I do (make it my duty to do) something that only the other himself can do. (*MM*, 517f/6:386)

According to Louden (2000, 58), this can be resolved based on the distinction between adults and children. Taking into account the fact that

children need to be educated, it follows that this contradiction does not apply to children's education, but only to fully formed adults. Another possible answer is suggested by Wood (1970, 74f) and Kleingeld (1995, 57), namely, although there is no duty to *establish* someone's perfection, it does not mean that there would be no duty to *promote* someone's perfection by creating favorable conditions for the development of virtue. It seems to me that this is what Kant points out in the following passage from *Theory and Practice*: "if it became a principle of private and public instruction always to make use of this [*the virtue*] (a method of inculcating duties that has almost always been neglected), human morality would soon be better off" (*TP*, 289/8: 288).

According to the principles of Kantian philosophy, would it not be merely permissible but also desirable that the state take on the role of educating citizens for morality or should it not also be equally seen to be the duty of the state regarding citizens? Kant states that the *easiest* way to approach the *noumenon republic* is through a monarchical form of government, because the fewer the representatives, the simpler it would be to achieve gradual reform (cf. *PP*, 325/8:353). Perhaps a republican monarchy would be the easiest way, but I do not believe that this is the *most appropriate according to the moral principles* of Kantian philosophy.

In *Enlightenment*, Kant asserts that

> [o]ne can indeed, for his own person and even then only for some time, postpone enlightenment in what it is incumbent upon him to know; but to renounce enlightenment, whether for his own person or even more so for posterity, is to violate the sacred right of humanity and trample it underfoot. But what a people may never decide upon for itself, a monarch may still less decide upon for a people; for his legislative authority rests precisely on this, that he unites in his will the collective will of the people. (Enligh, 20/8:39f. See also: *TP,* 302/8:304)

Thus, whether there is a human right to pursue enlightenment either on my own or on the part of others, there is also a duty to allow it. One of the most important aspects of enlightenment relates to autonomy and political participation. This is a delicate matter that, in my view, Kant merely alluded to between the lines. In *Enlightenment*, Kant uses some

examples to explain what he means by private and public use of reason. He speaks of the officer, the tax official, the citizen, the clergyman, and the teacher. In the case of citizens, Kant solely mentions the obligation to pay levied taxes. He not only denies the freedom of private use of reason regarding levied taxes but also mentions the right of citizens to make free public use of their reason, as long as such exercise respects the scholar's code of behavior. But when speaking of the clergy, Kant adds: if, on the one hand, the "clergyman is bound to deliver his discourse to the pupils in his catechism class and to his congregation in accordance with the creed of the church he serves, for he was employed by it on that condition," on the other hand,

> (…) as a scholar he has complete freedom and is even called upon to [*als Gelehrter hat er volle Freiheit, ja sogar den Beruf dazu*] communicate to the public all his carefully examined and well-intentioned thoughts about what is erroneous in that creed and his suggestions for a better arrangement of the religious and ecclesiastical body. (*Enligh*., 19/8:38)

Kant later states that although there may be divergence between the clergyman's belief as a scholar and what he professes as an official of the Church, there can be no contradiction between them, otherwise "he could not in conscience hold his office; he would have to resign from it" (*Enligh*., 19/8:38). Finally, Kant concludes by mentioning also the attitude of teachers: "that the guardians of the people (in spiritual matters) should themselves be minors is an absurdity that amounts to the perpetuation of absurdities" (*Enligh*., 19/8:38).

What is the difference between the role of teacher and the clergyman and that of citizens? Despite Kant's silence, the way he builds the examples indicates, in my view, what necessarily follows from his moral assumptions. Individuals generally choose to be teachers or clergymen, but they do not choose to be citizens. Being a citizen or a subject of a particular state is a matter of happenstance. The only decision, which is, in truth, feasible only for a few, is to leave the country and seek refuge elsewhere. To the extent that there is *a call* (*ein Beruf dazu*) for teachers and clergymen to make public use of their reason, why should there not also be *a call* to become a citizen in the sense that all natives should at

certain moments make public use of their reason about the issues of the state, precisely in order to become an enlightened citizen? In the case of the clergyman and the teacher, there is a kind of hypothetical imperative: *if* I want to be a clergyman or teacher, *then* should I behave passively in a certain way? But I also have *a call* to behave actively in another. However, in the case of being a citizen and a moral being, there is by principle a categorical imperative: "be a citizen" and "be a moral being." This is clearly indicated when Kant points out the possibility of a contradiction between the hypothetical imperative: "If I want to be a clergyman, then such and such" and the categorical imperative "be a moral being" in relation to the inner religion. In this case, the categorical imperative has always priority.

Let us keep these arguments in mind in conjunction with *Enlightenment's* motto: "have the courage to use your *own* understanding," which has been formed as a result of the natural duty toward human development in both individuals and in the human species. Why, then, would it not be natural to conclude from the categorical imperative "be a citizen" that the best policy would be the one that not only allows greater freedom for the public use of reason but that also allows the full *exercise* of citizenship as a co-legislator and co-ruler? Would not it be more appropriate for the process of enlightenment to adopt a republican democracy rather than a republican monarchy? I believe that *Enlightenment* points between its lines to the need for moral progress that must culminate in a participatory political model, appropriate for human duty: "emancipate oneself."

I believe that it is meaningful here to establish a link between the call (*ein Beruf dazu*) of the moral conscience to become emancipated and Kant's puzzling formulation at the beginning of *Metaphysics of Morals*:

> [i]f, therefore, a system of a priori cognition from concepts alone is called *metaphysics,* a practical philosophy, which has not nature but freedom of choice for its object, will presuppose and require a metaphysics of morals, that is, it is itself a *duty* to *have* such a metaphysics, and every human being also has it within himself, though as a rule only in an obscure way [*dunkle Art*]. (*MM*, 371/6:216)

Now what does it mean that each man has a *duty to have* such a metaphysics of morals if one already has it in an obscure fashion? The existence of

this duty only makes sense if it means that all individuals have the duty to clarify for themselves this metaphysics, in other words, to make clear for themselves the metaphysical principles of both the doctrine of virtue and the doctrine of law. However, why should it be clear to oneself what those principles are if their participation is reduced to mere compliance with laws? In order to explain this point, it is appropriate to use *The Jäsche Logic*. According to *objective origin*, cognition can be *rational* or *empirical*. From their *subjective origin*, i.e., according to the way in which cognition can be acquired by humans, it can be either *rational* or *historical*. Thus:

> [w]ith some rational cognitions it is harmful to know them merely historically, while with others it makes no difference. Thus the sailor knows the rules of navigation historically from his tables, for example, and that is enough for him. But if the jurist knows jurisprudence merely historically, then he is fully ruined as a genuine judge, and still more so as a legislator. (*Log*, 536/9:22)

Is the citizen's situation closer to that of the sailor or the jurist? In other words, must citizens have rational cognition of the principles of law or is a historical cognition of the right of the state sufficient? I believe that what Kant says in relation to the principles of ethics can also be applied to the principles of law, namely, that innocence "cannot protect itself very well and is easily seduced. Because of this, even wisdom—which otherwise consists more in conduct than in knowledge—still needs science." Therefore, "*common human reason* is impelled, not by some need of speculation (…), but on practical grounds themselves, to go out of its sphere and to take a step into the field *of practical philosophy*" (*GMM*, 58f./4:405). In a similar fashion to what happens in the field of ethics, in law as well, the individual, as co-legislator with the state, should not be limited to a historical cognition of the laws. To the extent that there is an obligation for all individuals to clarify the metaphysics of morals, which in an obscure way they already have, there must also be a duty to create a civil constitution in which this enlightenment can reach its full development. After all, why should individuals have this knowledge if they can never assume the role of judge and legislator? This moral enlightenment about the fundamental principles of the law only makes sense if we think

that the individuals will have the opportunity to actively participate as a subject in politics, otherwise the sailor's mere historical cognition of law would be sufficient. The enlightenment of the fundamental moral principles of the state only makes sense if we think that one will have the opportunity to assume part of the role of judge and legislator. Therefore, the moral duty of enlightenment in relation to the principles of the state and citizenship should be translated into the duty to prepare oneself to take on the role of a citizen in a democracy, *where one assumes, in fact, not only the perspective but also the position of co-legislator*. *This means that the project of Enlightenment flows into a representative, deliberative, and participatory democracy*.

However, if it is a right and a duty of everyone to prepare themselves to assume the role of co-legislator in a republican democracy, it is not up to each citizen to initiate and lead this change. The approximation to the *respublica noumenon* is a duty not of the citizens, but of the sovereign (see *CF*, 307/7:92n.). It is the duty of the head of state to gradually introduce the changes, not only regarding the reformulation of political institutions but also with a pedagogical initiative to morally educate the people about the responsibility of a political agency. With the increase in enlightenment about the principles of the metaphysics of morals, citizens should gradually receive more freedom to participate in decisions regarding the state's political life until a republican democracy is formed. Otherwise, without this institutional and educational reform, human beings are just "stubborn and inclined to revolt" and then "sad consequences verify the prophecy of those supposedly sagacious statesmen" (*CF*, 298/7:80).

This right of the people to their own political enlightenment and the duty of the head of the state to promote it need to be understood in the same sense as the right to the public use of reason. It is not a constitutive right and duty of the doctrine of law, but it is rightly grounded in the natural right to freedom, which is the basis of the doctrine of law. It may be overlooked for a while, but it is essential for ensuring the continual progress of the human species and of political institutions undergoing constant reform. A moral duty regulates the sovereign's political practice regarding the exercise of the doctrine of law. If this right to the moral enlightenment of people is not respected, then the people have no right to constrain the sovereign. But if we are speaking no more about right,

then we just push reason to a desperate leap (*salto mortale*): "once the issue is not that of right but only of force, the people may also try out its own force and thus make every lawful constitution insecure"(*TP*, 304/8:306).

This I believe is the appropriate context for interpreting the following passage:

> In a *patriotic* way of thinking everyone in a state (its head not excepted) regards the commonwealth as the maternal womb, or the country as the paternal land, from which and on which he has arisen and which he must also leave behind as a cherished pledge, only so as to consider himself authorized to protect its rights by laws of the common will but not to subject the use of it to his unconditional discretion. This right of freedom belongs to him, a member of a commonwealth, as a human being namely insofar as he is a being that is, as such, capable of rights. (*TP*, 291f./8:291)

This patriotic way of thinking has nothing to do with the nationalist mind-set because it is not an aesthetic or sensible taste regarding customs, habits, or behavior of a particular people. However, it is also not so general that it could be considered a cosmopolitan way of thinking. The patriotic mind-set concerns a political attitude toward one's own country, because that is where one is a citizen, has rights and duties, and where one must engage politically. The cosmopolitan way of thinking and acting is only indirectly performed by individuals, since regarding citizens of other states the primary agent is the state. In this case, the patriotic way of thinking should be such that it does not exclude a cosmopolitan way of thinking, as the two perspectives can be complementary.

The patriotic way of thinking is not bounded to historical and cultural aspects, but mainly linked to how citizens understand the state's political institutions and how they are related to them. This way of thinking can be explained from the agent's actions motivated not only by the "letter" but also by the "spirit" of the law. This attitude, which I call *moral virtue*, is described by Kant in *The Metaphysics of Morals*:

> 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 *merito-*

> *rious.* 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 (officium debiti),* 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. (*MM*, 521f/6: 390f., emphasis added. See also: *MM* 384F/6:220–221)

This passage presents, in my view, some aspects of the patriotic way of thinking, namely, the way one relates to the law, which must be incorporated into the institutions and rights of the state. Thus, in a patriotic way of thinking, citizens must act not only out of fear but also out of respect for the law. This means that they must act in a way that is respectful of the rights of humanity. This can be translated, more specifically, into a moral duty to act politically in order to defend the position that their state will always act in relation to its subjects and to other states so as to respect their moral person and the right of humanity. Therefore, for Kant, there is, in my view, a convergence between the patriotic way of thinking and the republican way of thinking, having moral virtue and acting out of respect for the law.

7.3 Some Principles of Public Education Aimed at Enhancing Moral Virtue

The implementation of such an initiative of public education is extremely delicate. Depending on how it is done, not only will the intention will be frustrated, *but there is the risk of producing exactly the opposite* of the goal of politically and morally enlightening citizens. Kant warns about this in the last footnote of *Anthropology*:

> It also belongs to the character of our species that, in striving toward a civil constitution, it also needs a discipline by religion, so that what cannot be achieved by *external* constraint can be brought about by *internal* constraint (the constraint of conscience). For the moral predisposition of the human being is used politically by legislators, a tendency that belongs to the character of the species. However, if morals do not precede religion in this dis-

> cipline of the people, then religion makes itself lord over morals, and statutory religion becomes an instrument of state authority (politics) under *religious despots*: an evil that inevitably upsets and misguides character by governing it with *deception* (called statecraft). (*Anth*. 428/7:332f.)

In order to avoid potential negative consequences arising from the public education for moral virtue, some important principles should be observed. With no intention of providing a complete list, I suggest that, according to Kant's philosophy, we must abide by three main principles. The education must be based on (a) the concept of duty rather than that of happiness; (b) reflected principles instead of calculations of advantages, habits, or imitation of examples; (c) learning and the continual exercise of the free public use of reason.

First principle: avoid paternalistic education attempting to impose a concept of the good life or happiness. The main purpose of a state shall be to preserve freedom and not to impose happiness. A state that governs and educates its citizens on the principle of happiness is paternalistic and despotic because it treats the subjects "like minor children who cannot distinguish between what is truly useful or harmful to them"; therefore, in such a state there is "the greatest *despotism* thinkable (a constitution that abrogates all the freedom of the subjects, who in that case have no rights at all)" (*TP*, 291/8:291). Children educated according to this principle would be prevented from exercising their right to try and choose amongst several potential sources of happiness and concepts of good life. On the other hand, what must first be taken into account in the constitution of a republican state and in the moral education it provides "is precisely that lawful constitution which secures everyone his freedom by laws, whereby each remains at liberty to seek his happiness in whatever way seems best to him, provided he does not infringe upon that universal freedom in conformity with law and hence upon the right of other fellow subjects" (*TP*, 297/8:298). Therefore, the only aspect that moral education should teach regarding happiness is that whatever one's concept of happiness is it should always respect the principle of not causing harm to general legal freedom.

Second principle: children must learn to act out of the intrinsic value of the principle of law and not by the advantages derived from their action or

simply repeating or imitating the behavior of others. The first aspect of this principle is clearly enunciated by Kant in the following passage:

> That historical experience up to now has still not proved the success of the doctrine of virtue may well be the fault of just the false presupposition that the incentive derived from the idea of duty in itself is much too fine for the common concept whereas the coarser incentive drawn from certain advantages to be expected, in this world or even in a future one, from compliance with the law (without regard for the law itself as the incentive) would work more powerfully on the mind, and that up to now it has been made a principle of education and homiletics to give preference to the aspiration for happiness over that which reason makes the supreme condition of this, namely worthiness to be happy. (*TP*, 289/8:288)

Kant believes that the teaching of moral law in its purity, whether by way of ethics or legal formulation, is sublimely more powerful than the entire set of sensible incentives that one can collect through experience. More than that, binding the moral action to incentives of benefits would "undermine it and destroy all its sublimity, since they put motives to virtue and those to vice in one class and only teach us to calculate better, but quite obliterate the specific difference between virtue and vice"(*GMM*, 90f./4:442). "Thus morality must have more power over the human heart the more purely it is presented" (*CPrR*, 265/5:156). Only then "the pupil's attention is fixed on the consciousness of his *freedom*" (*CPrR*, 268/5:160).

Another important consideration is not neglecting the very principles of law and trying to replace their understanding and recognition simply by suggesting the imitation of examples. Kant warns that

> [i]mitation has no place at all in matters of morality, and examples serve only for encouragement, that is, they put beyond doubt the practicability of what the law commands and make intuitive what the practical rule expresses more generally, but they can never justify setting aside their true original, which lies in reason, and guiding oneself by examples. (*GMM*, 63/4:409; see also *MM*, 592f/6:479)

In other words, "It is altogether contrapurposive to set before children, as a model, actions as noble, magnanimous, meritorious, thinking that

one can captivate them by inspiring enthusiasm for such actions" (*CPrR*, 265/5:157). This is because the authors of such actions are presented as heroes, far removed from the reality and the simple observation of moral laws. Moreover, simply imitating the actions of others can produce a mere habit, but not a *free habit* as equivalent of virtue. The mere habit "is a uniformity in action that has become a *necessity* through frequent repetition, it is not one that proceeds from freedom and therefore not a moral aptitude. Hence, virtue cannot be *defined* as an aptitude for free actions in conformity with the law unless "to determine oneself to act through the thought of the law" is added (*MM*, 353/6:407).

Third principle: the continual practice of the free public use of reason. The importance that self-reflection and continual moral self-inquiry has for the improvement of ethical virtues is equivalent to the importance that the correct exercise of the public use of reason has with regard to politics and moral virtue. The freedom of the public use of reason is a natural right that should not be violated. However, this does not mean that it is a use without rules and limits. The freedom of the public use of reason is not a barbaric and savage liberty, but is equivalent to a republican freedom of expression and therefore can and must be learned and exercised in order to become a good use.

The definition of the public use of reason is quite peculiar. It is "that use which someone makes of it *as a scholar* before the entire public of the *world of readers*" (*Enligh*. 18/8:37). This use tacitly supposes that, in a certain context, there is a community of equals in which dialogue is established through common principles. This is realized primarily because Kant emphasizes that only those individuals who behave as scholars in the subject matter can make public use of reason, and moreover this attitude can only occur before the general public of the world of readers. This restriction does not intend to establish a kind of technocracy and meritocracy based on erudition, but tries to prevent the public use of reason from suffering from exposure to unreflective and meaningless opinions. As the scholar's audience is the general public of the lettered world, it means that the public use of reason needs to consider both the principles of a rational debate, since one would not expect less from a community of scholars, and the accumulated knowledge and perspectives adopted by the community in question.

In order to guarantee the true freedom of the public use of reason, it cannot suffer any external constraint, that is, it should be regulated only by principles that are internally accepted by the community. This means, on the one hand, that the government or the state should not exercise any coercion regarding the public use of reason: "*Caesar non est supra grammaticos*" (*Enligh.*, 20f./8:40). On the other hand, it also means that in the event of differences arising between the participants in a public debate, no interference or foreign aid is allowed because, in that case, there would be what Kant calls an illegal conflict (see *CF,* 256ff/7:29–32). The illegality arises from the appeal either to the prejudices and feelings of the masses or to the feelings of the legislators, who ignore the subject matter or are not willing to follow the rules guiding the correct public use of reason. In this sense, the conflict ceases to be a debate and becomes a mere dispute or discussion. In a dispute, what is important is winning at any cost while a debate is fundamentally intended to arrive at the truth or as near thereto as possible (see *Log*, 531f./9:16f.).

The illegitimacy of the public use of reason results not only when there are external constraints but also in the presence of internal ones. This constraint occurs when there is appeal to arguments from authorities or to some alleged higher ability for understanding. In the first case, Kant offers an example in matters of religion, that is, when "some citizens set themselves up as having the custody of others (…), and instead of arguing they know how to ban every examination of reason by their early influence on people's minds, through prescribed formulas of belief accompanied by the anxious fear of the *dangers of one's own investigation*" (*WOT*, 16/8:145). Regarding the second kind of coercion, Kant brings up the case of the alleged genius and his sentimentalist exaltation, which has the maxim of a lawless use of reason (cf. *WOT*, 16f./8:145; *VT*, 435/8:394).

The freedom of individuals from the authority of the thinking of others does not mean, however, that freedom of thought is a complete refusal of others' opinions or a refusal of the legitimacy of consistency with the thoughts of others. In other words, if, on the one hand, the public use of reason requires the denial of a discussion based on arguments from the authority, on the other hand, it does not lead the individual to a kind of "logical egoism" (cf. *Anth.,* 239f/7:128f), which entails relativism and absolute skepticism.

The true freedom of reason "has no dictatorial authority, but whose is never anything more than the agreement of free citizens, each of whom must be able to express his reservations, indeed even his *veto,* without holding back"(*CPR*, B 766). That is, the public use of reason requires that all natives act like citizens with equal rights and duties. Thus, there is an opposition between the conception of a republican reason and a monarchical reason, in which someone has been imposed or presented as absolute sovereign and whose teachings were taken as a criterion of truth.

If one borrows the criteria presented by Kant to qualify a republican constitution in the political realm, then it can be said, mutatis mutandis, that the republican constitution that must govern the public use of reason needs to be based on three principles: freedom, dependence, and equality (cf. *PP* 322/8:349ff). In summary, the public use of reason presupposes always a two-way street, in which all move according to the same laws, with no privileges and by free choice. Nobody can be forced to make public use of reason, but by having a moral natural duty regarding it and by choosing to do so, one immediately accepts the condition of a citizen of a republic. The two-way street requires that an opinion is always open to dialogue and debate. This extends even to philosophers when they propose some clarification in legislation, that is, they must always do so in accordance with the rules of the public use of reason. *The public use of reason therefore presupposes both a particular agent's attitude and a certain environment to make it happen. If one of these two aspects is missing, the legitimacy of public use is compromised*.

Following Kant's position about learning the duties of virtue, one should notice that, mutatis mutandis, the learning of the principles of public use of reason need at first follow the regular catechetical model, in which the teacher asks and the student responds. However, once the principles of public use of reason are learned, students should exercise their reason through a dialogic teaching (where both sides pose and answer questions (cf. *MM*, 592f./6:479ff). In this sense, for example, after the students have learned in a historical way the rules of the public use of reason and the positive laws of their country, then they can begin to exercise the public use of reason through a constant debate about the legitimacy of positive right with regard to the metaphysical principles of law. In other words, they can begin to exercise their future roles as citizens. In

this practice of the freedom of public use of reason, one should continuously add historical and anthropological considerations in order to guide the process of a exercised doctrine of law, that is, on the one hand, by adding what politics need (*bedürfen*) and, on the other, by seeking what politics should be, thereby finding the best way to combine morality and prudence.

7.4 Conclusion

The teaching of patriotic and republican thinking, which from the view of Kantian philosophy could be related to moral virtue, must not only occur in private education, but it *has its main place within public education*. For Kant, *carrying out a joint plan for the public education of moral virtue is the task of the state.* It is not merely *civic* education because it does not deal merely with teaching the positive laws of the country but also because it involves teaching the principles of the doctrine of law and the duties of virtue. Moreover, the education to virtue should be the education to freedom, that is, it should not occur on the basis of good or bad consequences of action, but on pointing to the principles of action, which must always be grounded in the moral law and in the principle of autonomy (Cf. *MM,* 595f/6:482f). These republican and democratic aspects do not contradict Kant's liberal aspect of thought: firstly, because the duties of virtue are not based on material principle of happiness, but on the universal moral law. Secondly, the state does not oblige individuals to think in a patriotic way or to be a virtuous citizen. Therefore, the state should carry out the education of a moral virtue, leaving however individuals the right to act only in accordance with the laws.

To the extent that the various states fail to commit to a policy of engaging in the public education of moral virtue, humankind and states will remain politically and legally stagnant. The role of social antagonism (unsociable sociability) has narrow limits, that is, the creation of the state and the formation of political institutions. But the improvement of these institutions depends to a certain degree on individuals' virtue. Kant explicitly recognizes this in *IUH*, where he states the need for the goodwill of the ruler (*IUH*, 113f./8:23). In *Toward Perpetual Peace*, he further

claims that only a moral politician can actually produce a true republic: "History provides examples of the opposite [resulting] from all kinds of government (with the single exception of the truly republican one, which, however, can occur only to a moral politician)" (*PP*, 344/8:377). For Kant, therefore, the education of future citizens should be conceived and focused on what they should be, rather than according to their present condition because, in the latter case, the future is fettered by the past "since such a pernicious theory itself produces the trouble it predicts" (*PP*, 345/8:378).

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