2 • Private Property and the Possibility of Consent: Kant and Social Contract Theory

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1. Introduction

In the private right section of the '*Doctrine of Right*',[1] Kant argues that we must assume a permissive law of practical reason (*Erlaubnisgesetz*) authorizing us to become owners of external objects in order to avoid a contradiction of freedom with itself. However, soon after making the case for a permissive law, Kant also introduces the natural law theory notion of common possession of the earth (*Gemeinbesitz der Erde*) as the 'legal title' (*Rechtsgrund*) enabling the division of the earth's land and resources. The question is thus: Why does Kant need to introduce the notion of common possession of the earth in addition to the permissive law authorizing the possibility of becoming owners of objects? Is the permissive law not sufficient for this purpose?

The notion of common possession of the earth has not received enough attention in the Kant literature. In fact, some scholars feel irritated by Kant's introduction of this notion. Kenneth Westphal argued that common possession of the earth is used to link Kant's views to the natural law tradition, but that he does not need it for his justification of property.[2]

> Kant's theory of ownership does not need that myth. All that is required to acquire a right to use something originally – that is, to claim something not previously claimed or detained by anyone else – is to recognize that things per se cannot obligate us (since they are not free rational agents), and that one's claim to something that is not claimed or detained by another is legitimate only if one's claim to it does not otherwise infringe their like freedom.[3]

In this chapter, I show why this view is not correct: common possession is not merely a 'myth' that Kant uses to show continuity with the natural law tradition, but is indeed required to account for the asymmetry between private rights to external objects (*Sachenrecht*) and other forms of private right which do not involve external objects. I will argue that understanding this asymmetry will help us understand how Immanuel Kant can be said to be a social contract theorist and the role of consent in his legal and political theory.

The chapter is structured as follows: in the next section, I will elucidate why rights to external objects are different from other forms of private right involving merely the will of the contracting parties, and require a distinctive treatment in Kant's legal theory. In section 3, I explain the role of the notion of common possession of the earth and of a 'united will of all' in solving the problem of the asymmetry between rights to external things and rights derived merely from the will of the parties. I argue that the problem of acquisition of external objects requires Kant to introduce *a genuinely contractualist element* in his legal theory. In section 4, I spell out the implications of my analysis for the role of social contract in Kant's theory.

2. What is a right to a thing? *Sachenrecht* and the problem of original acquisition

> The usual exposition of a right to a thing (*ius reale, ius in re*), that 'it is a right against every possessor of it,' is a correct nominal definition. But what is it that enables me to recover an external object from anyone who is holding it and to constrain him (*per vindicationem*) to put me in possession of it again? Could this external rightful relation of my choice be a *direct* relation to a corporeal thing? (*RL* §10, 6:260)

In §11 of the Private Right Section of the *Doctrine of Right*, Kant asks what it is to have a right to a thing. According to a nominal definition,[4] a right to a thing is a right against every possessor of that thing. This means that I have a claim against anyone currently holding an object that is *mine*. The problem with this definition is that it does not explain the idea that the rightful possessor would be *entitled* to claim her object back from a person who is currently holding it – that is, someone empirically possessing an object that

is rightfully hers. What distinguishes the rightful possessor from a mere empirical possessor of that same thing? What is the source of this mysterious link between the rightful possessor and the object, which persists even when it is in the hands of another? For answering this question, Kant goes on to examine the 'real definition' of a right to a thing:

> So the real definition would have to go like this: *a right to a thing* is a right to the private use of a thing of which I am in (original or instituted) possession in common with all others. For this possession in common is the only condition under which it is possible for me to exclude every other possessor from the private use of a thing (*ius contra quemlibet huius rei possessorem*) since, unless such a possession in common is assumed, it is inconceivable how I, who am not in possession of the thing, could still be wronged by others who are in possession of it and are using it. By my unilateral choice I cannot bind another to refrain from using a thing, an obligation he would not otherwise have; hence I can do this only through the united choice of all (*vereinigte Willkür Aller*) who possess it in common. (*RL* §11, 6:261)

While the nominal definition determines the meaning of a word as it is conventionally understood and applied, a real definition is supposed to reveal some essential feature about the designated thing. This is why the nominal definition is not helpful in understanding *what it is* to have a right to a thing, although it is not a wrong definition. The real definition, however, is puzzling at first sight: 'a right to a thing is a right to the private use of a thing of which I am in (original or instituted) possession in common with all others.' Kant then adds that possession in common is the condition for the possibility of excluding every other possessor from the private use of my object. Why is 'possession in common' required in order to enable the rightful owner to impose an obligation on everyone else to refrain from her possession? This idea may sound strange if not contradictory to the contemporary reader.

To understand this point, let us reflect about the idea of *having a right to a thing*. Conceptually, a right to an external object must involve two aspects: (1) the possibility of being *wronged* by others when they interfere with your private use of a thing and (2) the possibility of imposing an *obligation* on all others to refrain from using that thing. The two aspects are in fact different sides of the

same coin: unless my act of acquisition can impose an obligation on all others to respect my possession, I cannot be wronged by anyone who interferes with my object. The problem is that acquisition of objects is a unilateral, empirical act, and yet the empirical deed of a person is supposed to generate *necessity* – that is, to impose an obligation on everyone else to refrain from the acquired object. This is a problem for Kant because necessity can only come from universality: experience can at most give rise to generality, but not to necessity. This is why Kant very consistently notes that only an *omnilateral* act – that is, 'the united choice (*Willkür*) of all who possess it in common' – has the authority to impose an obligation on everyone. As opposed to Locke's theory of acquisition, there is no *direct right to a thing*: 'what is called a right to a thing is only that right someone has against a person who is in possession of it in common (*im gemeinsamen Besitz*) with all others (in the civil condition)' (*RL* §11 6:261). Since all acquisition is based on a unilateral act of appropriation, unless the will of all other juridical persons can be conceived as somehow involved in *willing* an act of acquisition, it is not possible to derive an obligation to refrain from anyone's acquisition. *Omnis obligatio est contracta*: all obligation must be self-imposed.[5] This is the condition Kant's theory of rights to external things must account for.

According to the fundamental axiom of Kant's legal theory, innate right, we are as persons already born with something that belongs to us. This is the *original sum*: that is, that which is ours innately and is not acquired or derived from what belongs to another. From our interactions with others, however, we can *acquire* further rights. These rights cannot be original; they are derived from our deeds and interactions with others, i.e. from what is *theirs*. Acquisition is original when it is not derived from what belongs to others (*welche nicht von den Seinen eines anderen abgeleitet ist*) (*RL* §10, 6:258). One can acquire the choice (*Willkür*) of another person or her condition (*Zustand*), but this acquisition is always derived from the *suum* of that other person, that is, from her *will*. Only previously unowned external things (*Sachen*) can be originally acquired.[6] More precisely, *all original acquisition will be acquisition of land*. Kant assumes that there is a metaphysical priority of acquisition of land over acquisition of objects. In this sense, control over land is the condition for the possibility of possession of movable objects on the land.

However, there is no innate right to external objects just by virtue of our juridical status as persons. External objects must be *acquired*: they need to be incorporated into our sphere of freedom. But this, in order to be compatible with the fundamental axiom of Kant's legal theory, must happen without violating the innate rights of others. How is that supposed to happen?

Consider what is going on when you marry someone: the other person must consent to the proposal in order for the agreement to be valid, that is, for it to be a *voluntary* transaction, and not some form of coercion which would violate that person's innate right. The legal title of this 'mutual acquisition' of one another, is derived from the *will* of the contracting parties to commit themselves to each other in marriage. However, this normative structure cannot be applied to external things. External objects must be acquired for the first time at some point in order to enter the sphere of the external *Mein und Dein*. But external things are not persons, they have no will. The legal relation is thus not between myself and the object but between myself and *all other persons* in regard to that thing. The problem is that, unlike bilateral legal agreements, the 'contracting parties' are not present during my act of first acquisition (all humanity, including future generations would have to be present and give their consent to my first acquisition!). The idea of an original community of land thus accounts for the possibility of original acquisition by making it possible to think of a *united will of all possible possessors* of that thing as *willing* acts of first acquisition. The reader may be asking herself: but wait, which kind of consent is that supposed to be? In the next section, I will explain how the idea of common possession of the earth is related to the idea of a united will of all possessors, and elucidate Kant's main arguments in his theory of acquisition.

3. Original community of the earth (*Gemeinbesitz der Erde*) in Kant's legal theory

Kant conceived common possession in a radically different way from his natural law predecessors. Grotius conceived common possession as a historical time preceding private property arrangements. It is overcome and loses its significance (re-emerging only in situations of emergency). For Kant, however, common possession

becomes an idea of reason. It accounts for the fact that if interference with one's possessions is to count as a wrong, I must stand in a relevant legal relation with all others. There is no direct legal relation to objects, only between all persons in regard to that object. The postulate of practical reason establishes only the legal *possibility* of persons becoming owners of objects. However, it does not account for the further implications of *acquisition* of objects on the freedom of other persons who are excluded from it. The postulate only establishes that our use of objects is possible, that it should be made a matter of right. Common possession of earth is the heart of Kant's theory of acquisition, and is meant to account for the compatibility of the empirical side of Kant's property theory (acquisition of objects) with the axiom of external freedom. It follows that the postulate of practical reason of §2, together with its permissive law, are by no means the whole story of Kant's property theory. Common possession of land constitutes the legal title (*Rechtsgrund, titulus possessionis*) (*RL* §6, 6:251) of three domains of Kant's legal theory: (1) of original acquisition of land (and consequently of external objects on the land),[7] (2) of the territorial rights of states and peoples, and (3) of cosmopolitan right (including the 'right to visit' and the right to safe haven). Interestingly, the idea of a *Gemeinbesitz der Erde* is not only the reason why states are allowed to acquire their territory, but also the source of cosmopolitan right in Kant's theory (*Weltbürgerrecht*).[8]

In order to understand the novelty of Kant's use of the natural law idea of common possession, let us briefly compare Kant to his predecessors. For instance, first acquisition was not a problem for Achenwall, as it was for Kant. Achenwall thought that simply taking possession of a thing that had not been possessed by anyone was enough to account for original acquisition (you may have thought this too). This cannot be the case for Kant, for whom unilateral, empirical acts of appropriation are not enough to impose an obligation upon all others to respect this acquisition.[9] The problem is thus grounding the *obligation* required for having a right to a thing. Who has the authority to bind all others? Kant somehow needs to find a way to the united will of the 'contracting parties', in this case, humanity as a whole.

> § 13. Any piece of land *can be acquired originally,* and the *possibility of such acquisition* is based on the original community of land in general.

> The first proposition rests on the *postulate of practical reason* (§ 2). *The proof* of the second proposition is as follows. All human beings are originally (i.e., prior to any act of choice that establishes a right) in a possession of land that is in conformity with right, that is, they have a right to be wherever nature or chance (*apart from their will*) has placed them. This kind of possession (*possessio*) – which is to be distinguished from residence (*sedes*), a chosen and therefore an acquired lasting possession – is a possession *in common* because the spherical surface of the earth unites all the places on its surface. (*RL* §13, 6:262, emphasis added)

While the postulate of practical reason in regard to external objects extends the scope of rights beyond the internal *meum* to include external things, original community of land accounts for the possibility of first acquisition. Since in Kant's legal theory an empirical act of *prima occupatio* cannot by itself constitute a legal deed, Kant's strategy is to establish an original community of land which *ex ante* invests us with a right to occupy space. This right to occupy a place on the earth, which is mere possession (*Besitz*), not ownership (*Eigentum*), is what provides the legal title which renders the empirical act of taking hold of a piece of land a *legal deed*, which ought to be respected as such, despite the fact that possessors are in the state of nature. Therefore, the reason why we need original community of land in addition to the postulate of practical reason of §2 is that simply expanding the scope of the original *meum* to external objects is not enough to explain how taking possession of these things for the first time can be legally binding on everyone else. The binding character of acts of acquisition is thus derived from the *will* of those who form the community of land.

> All human beings are originally in *common possession* of the land of the entire earth (*communio fundi originaria*) *and each has by nature the will* (*Wille*) *to use it* (*lex iusti*) which, because the choice (*Willkür*) of one is unavoidably opposed by nature to that of another, would do away with any use of it *if this will did not also contain the principle for choice by which a particular possession for each on the common land could be determined* (*lex iuridica*). But the law which is to determine for each what land is mine or yours will be in accordance with the axiom of outer freedom *only if it proceeds from a will that is united originally and a priori* (that presupposes no rightful act for its union). *Hence it proceeds only from a will in the civil condition* (*lex iustitiae*

> *distributivae*), which alone determines what is *right* (*recht*), what is *rightful* (*rechtlich*), and what is *laid down as right (Rechtens)*. (*RL* §16, 6:267, emphasis added)

As Joachim Hruschka observes, in this passage Kant uses the famous distinction between *Wille* and *Willkür*, which is introduced in the *Einleitung* of the *Metaphysics of Morals*.[10] While *Wille* is practical reason itself and the source of laws, *Willkür* is what carries out concrete actions. Only *Willkür* is free in the sense of the capacity to perform or refrain from performing an action. *Wille* thus 'gives laws' to *Willkür*. The relation between *Wille* and *Willkür* in the above passage is thus the following: each of us has 'by nature' the will (*Wille*) to use the land. 'By nature' (*von Natur*) should be understood as a form of *rational necessity*, not as natural necessity. This is confirmed by Kant's identification of this will with *lex iusti*, or the purely rational axioms of right.[11] Since practical reason would contradict itself if we were to deprive ourselves of objects by choice, we must assume that it is our will as rational beings to use and consequently divide the land. However, our *Willkür* as concrete individuals creates havoc: our individual choices are by nature (*natürlich*, this time in the sense of *natural* necessity) *antagonistic*. To avoid this problem, *Wille* gives the law to individual *Willkür*, namely, a distributive principle for the division of land that will avoid the conflict of wills, at least when it comes to acquisition and the determination of the extent of one's possession (*lex iuridica*). This is the principle that 'whoever is earlier in time is stronger in right' (*qui prior tempore potior iure*) (*RL* §10, 6:259). However, this principle of distribution can only be seen as compatible with the innate right of each individual if it proceeds (*hervorgehen*) from a will that is united originally and *a priori*. Kant thus moves from the distinction between *Wille,* as giving us the will to use the land and the principle of distribution, and individual *Willkür*, to the united will of all. This united will, Kant adds, is only realized in a civil condition.

Since first acquisition must be thought of as prior to the civil condition, that is, in the state of nature, one may ask oneself how one can regard the principle of division of land as proceeding from a united will *a priori*. This is because this united will is only possible in a condition that lies in the future, that is, that is unrealized at the time of acquisition. However, this is the very gist of Kant's

legal theory: it is *future-oriented*. This explains the obligation to leave the state of nature and enter the civil condition: by making use of land and acquiring, we are also acquiring the duty to enter lawful relations with others, since this is the condition for the compatibility of unilateral, empirical acts of first acquisition with the axiom of external freedom, the innate freedom of all. By entering a civil condition with others we are bringing about a will that is united originally and *a priori*. Until then, all original acquisition remains provisional (*provisorisch*), that is, in *expectation* (*Erwartung*) of a future civil condition, which must encompass not only some peoples, but the whole of humanity.[12] The role of the so called *lex permissiva* is to allow agents to impose an obligation on others (thereby excluding them from the use of their possessions) *before* the united will of all has been realized in a global condition of distributive justice. The permissive law can be compared to drinking a bottle of water inside the supermarket before we have reached the till and paid for it; we are too thirsty to wait and the queue is very long. We are committed to pay for the drink anyway. We drink it *before* we have satisfied the conditions necessary for being fully entitled to that bottle (so that our acquisition can be regarded as 'rightful'). The civil condition is however much further away than the queue in the supermarket; the possessions we have now will only be fully justified after several generations, in a civil condition encompassing all nations on the globe (which perhaps will never be fully achieved).

> The indeterminacy, with respect to quantity as well as quality, of the external object that can be acquired makes this problem (of the sole, original external acquisition) the hardest of all to solve. Still, there must be some original acquisition or other of what is external, since not all acquisition can be derived. So this problem cannot be abandoned as insoluble and intrinsically impossible. But even *if it is solved through the original contract*, such acquisition will always remain only provisional unless this contract extends to the entire human race. (*RL* §15, 6:266, emphasis added)

Determining the 'quantity and quality' of one's acquisition in case of disputes requires not only appropriate knowledge and capacity of judgement, but also the required *authority* to determine the solution and to bind others to one's verdict. This is why this

problem is 'the hardest of all to solve'. However, it can be solved through the *original contract*. The idea of an *original contract* (*urspruenglicher Vertrag*), just as the idea of a united will of all, is a *rational* idea. Once we have realized the conditions enabling the compatibility of individual acquisition with the innate right of all, i.e. once we have entered a civil condition with all persons on the earth, acquisition can finally *be regarded as proceeding* from a *multilateral* contract between all persons. The rational idea of an original contract thus stands for the conditions for reconciling the *reality of acquired rights* with the pure axioms of right. The verdict of a court of justice in this case is unequivocally binding: it has the required authority to impart obligations and to coerce.

The way Kant conceives the role of consent in his legal theory is unique in the natural law and social contract tradition: while the theory seems to aim at some form of actual consent (a *realized* civil condition under which the united will of all is possible), because this condition is still outstanding we must use the idea of a united will of all as a regulative ideal for political decision-making (as an 'as if'). Paradoxically, Kant sometimes says that the idea of a united will of all is *original*, even though the united will is only possible in a civil condition (that is, once it has been realized!).

4. Kant and social contract theory

This leads us to the question of Kant's place in the social contract tradition.[13] Kant certainly uses the terminology of the social contract. However, how far can he be said to be a social contract theorist? A closer look at his theory reveals that he has reinterpreted the main tenets of social contract theory in order to make them compatible with his own theory.

For Kant, the original contract is the idea of the act by which a people forms itself into a state (*RL* § 46, 6:315).[14] This idea can help us test the permissibility of political principles, policies and constitutions themselves, for it is only in accordance with the idea of the original contract (the *rationale* of the unification of individuals into a political society) that one can establish the lawfulness (*Rechtmäßigkeit*) of a state (*RL* §47, 6:316). As the basic law that can only be derived from the general (united) will of the people, the original contract arises from 'the pure source of the concept of

right' (*PP* 8:351). The only constitution that issues from the idea of the original contract is what Kant calls a republican constitution (*RL* §52, 6:340). Existing constitutions must be guided by the idea of the original contract, i.e. they should attempt to come closer to a republican constitution, through gradual constitutional reforms (*RL* §52, 6:340). Further, by virtue of the original contract at domestic level, states can be seen as *moral persons* in the international domain and not merely as a belonging (*patrimonium*) that can be acquired by other states (*PP* 8:344). The original contract at internal level thus imposes constraints on how states can be treated by each other.

> If a public law is so constituted that a whole people *could not possibly* give its consent to it (as e.g. that a certain class of *subjects* should have the hereditary privilege of *ruling rank*), it is unjust; but if it is *only possible* (*nur möglich*) that a people could agree to it, it is a duty to consider the law just (*für gerecht zu halten*), even if the people is at present in such a situation or frame of mind (*Denkungsart*) that, if consulted about it, it would probably refuse its consent (*seine Beistimmung verweigern würde*). (*TP* 8:287)[15]

Kant has traditionally been understood as defending some version of hypothetical consent as the source of political justification. Onora O'Neill has recently argued that this is a mistaken interpretation of Kant. She notes that the kind of consent Kant is appealing to in the passage quoted above is in fact *possible* consent and that it differs both from hypothetical consent theories (based on idealized conceptions of rational beings) and from actual consent theories. Possible universal consent is a *modal* criterion as opposed to hypothetical consent.[16] Further, she argues that only a republican constitution that guarantees freedom within the law can be the object of possible consent, but no constitutions which lack that structure. A republican constitution is one that is based on the principles of freedom of the members of society, dependence of all under common legislation and equality of all before the law.

If the idea of a social contract is that of a constitution that *could* secure universal consent, then any constitution that exemplifies it must require the freedom of individuals, without which the possibility of genuine consent or dissent is undermined, at least for some, and universal consent becomes impossible. Second, it

requires their *common dependence on or subordination to law*: if anyone were above or outside the law, freedom could be systematically or gratuitously undercut, and once again the possibility of genuine consent becomes impossible. Third it must endorse the *legal equality* of citizens, since the subordination of some individuals to others (rather than to the law) would once again undercut freedom, and with it the possibility of genuine consent or dissent, at least for some, and universal consent becomes impossible.[17]

The difference between possible consent and hypothetical consent is, if any, a subtle one. Unfortunately, O'Neill does not explain much how consent as 'modal requirement' differs from hypothetical consent. Her assumption seems to be that hypothetical consent relies on a strongly idealized conception of rational agency while the type of consent Kant actually defends does not. The argument goes like this: under certain types of constitutions subjects are not constrained in ways which would preclude the possibility of genuinely giving or withholding their consent. Because these types of constitutions enable *all* subjects to freely consent or dissent, *universal* consent is possible. In contrast, when some individuals are subordinated to others, the possibility of giving or withholding their consent is undermined. Therefore no universal consent is possible under such a constitution.

O'Neill interprets the three principles of a republican constitution as being necessary *conditions* for securing universal consent. In her reading, one would be able to consent to a republican constitution because it is the only constitution that *secures* the possibility of genuine universal consent; I am free to form my own judgement about the policies or laws of my society and therefore to accept or reject them without being constrained or coerced by state interference. O'Neill's view is thus that the *object* of possible consent is whatever arrangements *secure* universal consent, that is, enable every member of society to form their own opinions and to give or withhold their consent to public laws. As it happens, these are the principles of civil freedom, dependence of all under common legislation and equality before the law.

O'Neill makes the possibility of *realizing* the conditions of universal consent the source of political justification and treats the principles of a republican constitution as mere instruments to it. Guaranteeing freedom is a fundamental concern in O'Neill's account insofar as it is a necessary condition for enabling genuine

consent; dependence and equality before the law are only important insofar as their lack would infringe upon an individual's capacity to freely consent to a policy or legislation. In sum, the basic principles of the ideal *res publica* are reduced to the *enabling conditions* of a universal consent that is not yet but *could* become actual. The main problem with O'Neill's interpretation is that she confuses what one could in *principle* consent to with the *conditions* for enabling actual free consent. The reason for this seems to lie in her assumption that the function of the idea of social contract in Kant is to spell out what the principle of right requires 'in actual human conditions'.[18]

I will argue that it is in fact the other way around: because freedom, dependence on the law and equality are required by the principle of right, and consequently by pure practical reason, consent must be thought as inevitably *following* from it, as a matter of necessity. The rational idea of the *pactum unionis civilis* expresses the rationale of political association. Therefore, the idea of consent is indissolubly linked to the *end* of political association. While all contracts presuppose a common end (an end that the involved parties *share*), the contract establishing a civil constitution is distinctive in that the union in case is an *end in itself*, i.e. an end that all individuals *ought to have*. The *pactum unionis civilis* reflects a duty imposed on all persons by virtue of their external relations, since the possibility of interaction is inevitable (*TP* 8:289). Consent is therefore *secondary* to the rational requirement to enter a lawful condition with others which approaches as much as possible the ideal of how our external relations with each other ought to be. This ideal is expressed in the idea of the *social contract*. The postulate of public law, which requires us to leave the state of nature and form a civil union, already *includes* the idea of an original contract (*RL* §46, 6:315).[19]

Despite Kant's use of social contract terminology, there is a suspicion that his legal theory and theory of the state is in fact devoid of any genuine *contractualist* element. This is because looking closer it is possible to reach the same conclusions about the lawfulness of public policies and laws without any appeal to the idea of an original contract simply by focusing on the civil principles of freedom, dependence and equality. Further, although every sovereign is bound *a priori* to make laws *as if* they could arise from the united will of the whole people (*TP* 8:297), the original contract

seems to work only as a *negative* standard for the evaluation of statutory laws. It does not tell us which laws should be adopted in an existing political society with a specific political regimen, but only which laws are not incompatible with right. The content of the law must be formulated prior to the test, just as maxims of action are material principles formulated independently of the categorical imperative test (they are in fact the 'matter' on which the formal test is applied). Therefore, the original contract seems to offer no information that could not be obtained without it.[20] The idea thus seems to be a purely *heuristic principle* behind which the real requirement is in fact a requirement of *reciprocity*. The idea of a social contract therefore seems to be superfluous in Kant's theory.

It is Kant's practice to show that he can incorporate the theories he refutes. For instance, although he criticizes moral theories which do not presuppose the autonomy of the will as heteronomous, he is very keen to show, with the several formulations of the categorical imperative, that his moral theory is able to accommodate the main intuitions behind these theoretical models, even though they ultimately fail as adequate moral theories.[21] It is possible that Kant would be adopting the terminology of social contract theory in a similar manner, after having left it behind. But I will argue that this is not the case.

The *pactum unionis civilis* is not a historical event. It is an ideal of reason and a regulative standard for existing states. But beyond the idea of an original contract as a regulative idea, Kant's theory of acquisition makes it necessary to introduce a consent-based element in his theory of property. Even though it is legitimate, acquisition in the state of nature is normatively incomplete until we leave the state of nature and enter a civil condition with each other.[22] Kant's theory of property, and more precisely, his account of original acquisition, *genuinely requires the idea of consent* because empirical, unilateral acts of acquisition cannot by themselves generate an obligation on all others to respect these acts of acquisition. We must thus distinguish between Kant's use of the idea of an original contract and possible consent as mere heuristic tools from the *genuine* contractualist aspects in Kant's legal theory: while the idea of a united will of all and of an original contract can be used as a regulative ideal, they are not only an 'as if', as in Rawls's original position. This is because the civil condition in Kant's theory is in fact a condition that *ought to be realized*. It is

the aim of the duty to leave the state of nature (*exeundum esse e statu naturali*). The peculiarity of Kant's position is that while the civil condition is still in the future, its idea provides the guiding thread for its own implementation. Kant's notion of an original contract as realized in a civil condition is *both* regulative ideal and highest aim of political association. This is because it is only via the consent of all possible possessors of external things that necessity to respect an empirically contingent distribution can arise. Here the idea of a contract is no longer a mere heuristic device, but plays a substantive role for Kant"s theory of external acquisition.[23]

Notes

1 Parenthetical references are all to Kant; page numbers refer to the edition of the Prussian Academy. Unless otherwise stated, all translations have been taken from the Cambridge Edition of the Works of Immanuel Kant, edited by Paul Guyer and Allen W. Wood (Cambridge University Press, 1992–). Abbreviations used are

MS RL *Die Metaphysik der Sitten I. Teil: Metaphysische Anfangsgründe der Rechtslehre* (The Metaphysics of Morals Part I, Metaphysical Foundations of the Doctrine of Right) (AA 06)

TP *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis* (On the common saying: That may be correct in theory, but it is of no use in practice) (AA 08)

VAMS *Vorarbeit zur Metaphysik der Sitten* (AA 23)

PP *Zum ewigen Frieden* (Toward perpetual peace) (AA 08)

2 K. R. Westphal, 'Do Kant's Principles Justify Property or Usufruct?' *Jahrbuch für Recht und Ethik*, 5 (1997), n. 2.

3 Westphal, 'Do Kant's Principles Justify Property or Usufruct?', 40.

4 Scholastic philosophy distinguished between two types of definitions: nominal and real. A nominal definition explains simply the meaning of a word, how it is used; in contrast, a real definition explains the 'essence' or the real nature of a thing, in other words, the concept in question.

5 *VAMS* 23:219: 'Es kan aber niemandem eine Verbindlichkeit entspringen als die er sich selbst zuzieht (*omnis obligatio est contracta*).' See also Wolfgang Kersting, *Wohlgeordnete Freiheit. Immanuel Kants Rechts- und Staatsphilosophie* (Berlin: De Gruyter, 1984), p. 146.

6 While innate right is original, being innate, it is not acquired. This is why the only kind of objects that are fit to be originally acquired are

previously unowned things (objects deprived of a will, as opposed to *persons*). They are neither derived from what belongs to another person, nor have been previously acquired by anyone. Acquisition of land must be prior to acquisition of objects, since when acquiring a piece of land for the first time, we automatically acquire the objects on that land.

7 That is not to say that territorial rights in Kant's account amount to property rights to land. It is the other way around: private property presupposes possession of land. The rights of states and groups to control territory are treated in an analogous way to property rights only at international level (in the relation between states in the 'international state of nature'), but not in the relation of states in regard to their own subjects at domestic level. In this case, the state is only the symbolic proprietor of land; property rights to land are actually held by individuals (see *RL* 6:323). I explain this relation in Pinheiro Walla, 'Kant's Legal Theory and Territorial Rights' (unpublished manuscript). Cosmopolitan right, on the other hand, imposes under certain conditions a limitation on the rights of states and groups to control territory to the exclusion of others, namely, when outsiders' need for admission into one's territory is involuntary, and declining them would mean their destruction. This right to be admitted in case of need follows from common possession of the earth. See Pinheiro Walla, 'Common Possession of the Earth and Cosmopolitan Right' *Kant-Studien*, 107/1 (2016), 160–78.

8 I develop this idea in Pinheiro Walla, 'Common Possession of the Earth and Cosmopolitan Right'.

9 See Joachim Hruschka, *Kant und der Rechtsstaat und andere Essays zu Kant's Rechtslehre und Ethik* (Freiburg: Verlag Karl Alber, 2015), p. 64.

10 Hruschka, *Kant und der Rechtsstaat*, p. 71.

11 I am following here Byrd and Hruschka's interpretation of the three *leges* in the *Doctrine of Right*. See *Kant's Doctrine of Right: A Commentary* (Cambridge: Cambridge University Press, 2010).

12 The recent literature seems to endorse the view that provisional acquisition means something merely 'temporary' (subject to change) and weaker than a peremptory right (see for instance Lea Ypi, 'A Permissive Theory of Territorial Rights', *European Journal of Philosophy*, 22/2 (2012), 288–312, who says that 'any existing partition of the territory is only provisional and conditional at best'). Although Kant certainly gives this impression in the text and the term 'provisional' also suggests it, his point is rather the *modality* of the claim in question: in the civil condition my property claim moves from being merely *facto* (unilateral, real) to *lege* (omnilateral, necessary), that is, from something that is merely the case to something that has a necessary

legal status. Again, necessity in Kant cannot be derived from empirical deeds, but only from the universality of reason. This is achieved by the united will of all in a civil condition. Cf. Rainer Friedrich, *Eigentum und Staatsbegründung in Kant's Metaphysik der Sitten* (Berlin: De Gruyter, 2004), p. 140. It follows that provisional does not mean a claim that may be removed at a later time and for this reason may be considered less strong or less authoritative. Provisional acquisition ought to be treated as true acquisition (*RL* §15, 6:264). Provisional is acquisition in *expectation* of the conditions of its full justification. The distribution however, would remain the same should this future condition be realized.

13 For a statement of this view, see for instance, John Rawls in *A Theory of Justice* (Cambridge, MA: Belknap Press, 1999), p. 10.

14 As Byrd and Hruschka pointed out, Kant does not distinguish between the original contract and the social contract. This is confirmed by the passage in *TP* 8:297: '*contractus originarius* or *pactum sociale*'. Byrd and Hruschka, *Kant's Doctrine of Right: A Commentary*, p. 170, n. 9.

15 Although public law focuses on the possibility of consent, it does not mean that legislators should attempt to reform the constitution without taking into account the *actual* will of the members of the society in question. While legislators should attempt to approach the ideal constitution, they are permitted to postpone political reforms when dissatisfaction and resistance would be so great as to undermine the very end of political progress. See *PP* 8:347.

16 Onora O'Neill, 'Kant and the Social Contract Tradition', in E. Ellis (ed.), *Kant's Political Theory: Interpretations and Applications* (University Park: Penn State University Press, 2012), p. 32.

17 O'Neill, 'Kant and the Social Contract Tradition', p. 33

18 O'Neill, 'Kant and the Social Contract Tradition', p. 33.

19 See Byrd and Hruschka, *Kant's Doctrine of Right: A Commentary*, p. 170.

20 Wolfgang Kersting, *Wohlgeordnete Freiheit*, p. 276.

21 Interestingly, all rejected heteronomous principles are reintegrated into Kant's system after the purity of the moral principle has been established. External subjective grounds reappear as the duty of decorum and obedience to authority (*Anthr.* §14 7:151–3), there is an indirect duty to cultivate moral feeling (*TL* 6:399–400; *KpV* 5:38, ll. 33–8) and one's own happiness (*GMS* 4:399; *KpV* 5:93, ll. 15–19), as well as a duty to the self to develop one's own perfection (*TL* 6:385). The will of God also reappears as an ideal of the holiness of the will (*KpV* 5:158, ll. 25–6).

22 Wolgand Kersting, *Kant über Recht* (Paderborn: Mentis Verlag, 2004), p. 77.

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Global government or global governance? Realism and idealism in Kant's legal theory

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Global government or global governance? Realism and idealism in Kant's legal theory

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ABSTRACT

Did Kant believe we need a world government? It has been a matter of controversy in Kant scholarship whether Kant endorsed the creation of a world state or merely a voluntary federation of states with no coercive power. I argue that Kant's main concern was with a global juridical condition, which he regarded as a rational requirement given the equal freedom and equality of individuals. However, he recognized that implementing this rational ideal requires sensitivity to contingent aspects of world politics. I will argue that Kant offers an ideal theory not disentangled from realist considerations and that he adopts what I will call *methodological realism*: the attempt to realize the requirements of Right (*Recht*) in a world governed by its own laws and mechanisms. I will illustrate this interpretation with Kant's discussion of the right of nations (*Völkerrecht*). The confusion in regard to Kant's *actual* position on the matter, I will argue, is a direct consequence of Kant's methodological realism. The article concludes by showing how Kant"s ideas and methods can inspire us to rethink global institutions for our current global challenges.

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Why world government?

Kant is famous for being one of the 'intellectual fathers' of the declaration of human rights. Several Kant scholars have tried to show that this identification is incorrect or exaggerated; Kant offers much less than the human rights we would recognize nowadays.[1] However, one significant way in which Kant's conception of rights, more precisely, his account of *subjective rights a priori*,[2] differs from our human rights catalogue and the human rights discourse is that Kant *does not stop* at merely postulating the existence of such rights. Kant's conception of subjective rights goes *beyond* the liberal theory of fundamental rights by additionally requiring the *implementation* of a global civil condition (Kersting 2004, 150). In fact, Kant's theory of rights and his legal theory as a whole cannot be understood independently of the duty to leave the lawless state of nature at a *global* level. Kant's legal theory *culminates* in the idea of world government because the idea of Right cannot be realized without legal institutions.

Subjective rights in Kant's account must be able to impose an obligation on others, that is, they must give rise to a corresponding obligation on all others to respect a person's

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right. The main purpose of Kant's legal theory is in fact accounting for the bindingness (*Verbindlichkeit*) of subjective rights. Kant was therefore ahead of the current rights debate in which he did not merely posit the existence of a subjective right, but also spelled out the conditions under which, say, acquiring an external object, can *bind* others.

Kant started his inquiry with a definition of the concept of right (*Recht,* MS §B at VI: 229–230)[3] and a formulation of the principle of right (MS §C at VI: 230–231).[4] There is only one fundamental, *original* human right, that is, a subjective right all persons have independently of any concrete deeds: what Kant calls innate right (*angeborenes Recht*, MS VI: 237–238). These are the 'axioms' of Right, the fundamental presuppositions of Kant's legal theory (Sharon Byrd and Hruschka 2010, 10). They are followed by private right (*Privatrecht*), which accounts for the possibility of becoming possessors of external objects in general, offers a theory of acquisition and of personal status relations, and by public right, concerning the right of states, the right of nations (*Völkerrecht)* and cosmopolitan right.

If we consider the concept of an external object of choice, Kant argued, one must assume that its possessor has the prerogative to *determine* the use of that object. It would not be an object of choice (*Willkür*) if the agent had no power to decide how the object is to be used. The concept of an object of choice thus entails two assumptions: (1) a metaphysical conception of possession that is independent of mere physical connection with the object (*Inhabung*) and (2) the idea of *exclusive* possession. (1) means that an object must be recognized as mine even if I am not physically connected with it (in fact, even if someone else is actually holding it); (2) means that I must be able to decide how the object is to be used, for instance, if I want to share it with others, destroy it or give it to someone else.

Kant formulated the duty to leave the lawless state of nature and form a civil condition in connection with the need to account for the bindingness of acquired rights. Since external objects must be acquired through unilateral, empirical acts, the question arises how this acquisition can bind others to recognize it and respect it. Kant then spelled out the conditions under which these unilateral acts could possibly bind everyone else: since all obligations must be self-imposed, acquisition must be regarded as *willed* by everyone. In other words, everyone on the face of the earth (including future generations) must be regarded as *willing* that each unilateral act of acquisition be binding.

> […] a unilateral will cannot serve as a coercive law for everyone with regard to possession that is external and therefore contingent, since that would infringe upon freedom in accordance with universal laws. So it is only a will putting everyone under obligation, hence only a collective general (common) and powerful will, that can provide everyone this assurance. – But the condition of being under a general external (i.e. public) lawgiving accompanied with power is the civil condition. So only in a civil condition can something external be mine or yours. (MS VI: 256)

Why is a civil condition necessary for the *obligation* to respect the external mine and thine? Due to Kant's own terminology, it is natural to assume that he is giving a Hobbesian argument for the civil condition: the state is necessary in order to protect rights. A right without enforcement is useless. Further, the civil condition would also solve the *problem of assurance*: if I respect your right (thereby foregoing opportunities to maximize my own benefit), I want to be sure that you will also act in the same way towards me. The idea is that giving up one's unlimited 'right to everything' can only be rational if one has a guarantee that all

others will reciprocate. Otherwise, an agent would be making herself easy prey for the advantage of others. As I have stressed elsewhere, although Kant addressed the Hobbesian problem of assurance, the rationale of the duty to leave the state of nature (*exeundum esse e statu naturali*) does not amount to a prudential consideration. The *exeundum* would not be a *duty* if it was only about mere prudence. Instead, the rationale of the duty is to ensure the compatibility of acquisition with the fundamental axioms of right (i.e. with the fundamental *equal juridical status* of a plurality of agents situated in space and time, who can mutually have an impact on each other's external freedom). Acquisition involves not only external objects, but also *land* and *the territory of states.* Therefore, the territorial rights of states also depend on such a duty in order to be justified (see Ypi 2014). The question is: how can such acquisition impose a duty on all others to respect it, since it arose from unilateral empirical acts of appropriation?

> If no acquisition were cognized as rightful even in a provisional way prior to entering the civil condition, the civil condition itself would be impossible. For in terms of their form, laws concerning what is mine or yours in the state of nature contain the same thing that they prescribe in the civil condition, insofar as the civil condition is thought of by pure rational concepts alone. The difference is only that the civil condition provides the conditions under which these laws are put into effect (in keeping with distributive justice). – So if external objects were not even *provisionally* mine or yours in the state of nature, there would also be no duties of right with regard to them and therefore no command to leave the state of nature. (MS VI: VI: 312–313)

In this passage, Kant argues that without the assumption of an external Mine and Thine there would be no duty to leave the state of nature and enter the civil condition. The link between private law and *exeundum*, which was not present in earlier notes and only appeared in the *Doctrine of Right*, has troubled Kant scholars, who have criticized Kant for refusing to acknowledge that the principle of right must already be enough to commit us to leave the state of nature.[5] I will set aside the question whether the principle of right alone is enough to ground the *exeundum*. I will work with the assumption supported by the quoted passage above that acquisition creates a justification problem that calls for the civil condition as the solution. An obligation that deserves the name must be *self-imposed*. The duty to respect acquisition can only be a duty if it can be regarded as emerging from the omnilateral, united will of all.

In my view, Kant regards the implementation of public institutions as a *surrogate* for the actual consent of all persons. Due to their public, representative character, such institutions have the authority to bind *omnilaterally*. Interestingly, the civil condition must not be restricted to a particular polity; since there is a state of nature outside its borders, this state of nature must also be overcome. In the end, the civil condition must encompass *all areas and inhabitants of the earth*. Because Right requires that *all* possible external relations be regulated, Kant's legal theory is necessarily *global* in scope. This is why a fully juridical condition (some form of global government) comes into question in Kant's legal theory.

It has been widely assumed in the literature that the juridical or civil condition (*rechtlicher Zustand*) amounts to a *state*. It is important to note that Kant did *not* explicitly make this identification (see Byrd and Hruschka 2010, 25–28). Therefore, it is an open question whether the fully juridical condition amounts to a global *state* or if it could be understood as some form of global government or governance.

The relation between Kant's political and legal thought

Kant's legal theory is *Vernunftrecht,* or a *metaphysics of right*. The task of a metaphysics of right is to derive from reason the fundamental principles for regulating external freedom (the object matter of *Recht*) and so provide a foundational normative framework for law. But Kant does not stop there. He is also occupied with the *implementation* of this framework in existing polities.

> Now, in order to progress from a *metaphysics* of right (which abstracts from all conditions of experience) to a principle *of politics* (which applies these concepts to cases of experience) and, by means of this, to the solution of a problem of politics in keeping with the universal principle of right, a philosopher will give i) an *axiom,* that is, an apodictically certain proposition that issues immediately from the definition of external right (consistency *of the freedom* of each with the freedom of everyone in accordance with a universal law); 2) a *postulate* (of external public *law,* as the united will of all in accordance with the principle of *equality,* without which there would be no freedom of everyone); 3) a *problem* of how it is to be arranged that in a society, however large, harmony in accordance with the principles of freedom and equality is maintained (namely, by means of a representative system); **this will then be a principle *of politics,* the arrangement and organization of which will contain decrees, drawn from experiential cognition of human beings, that have in view only the mechanism for administering right and how this can be managed appropriately**. Right must never be accommodated to politics, but politics must always be accommodated to right. (On a supposed right to lie from philanthopy, VIII: 429, emphasis added)

Kant's political philosophy is a theory about the political. If Right is to be instantiated in a social world that has its own mechanism and regularities (which are alien to the laws of reason), it must take into account those mechanisms for its own application. Thus Kant's political philosophy can be understood as a *mediator* between Kant's metaphysics of right and existing social realities. It provides the principles for the application of right to real human beings and their particular, historically determined political societies. This explains why legal theory and political theory are often intertwined in Kant's writings.

Kant has been reviled by political realists for being one of the paradigmatic *moralist philosophers,* that is, an idealist thinker who naively affirms the priority of morality over politics. In their view, Kant's political theory is *apolitical, ahistorical and decontextualized* (Thomas 2017). Kant formulated the principles of politics prior to and independently of politics itself; he justified rights regardless of political contexts, based political legitimacy on normative principles, and applied individual ethics to collective action. In contrast, political realists emphasize the role of politics immanent processes in bringing about political legitimacy and the agonistic nature of politics, which cannot be eliminated (Rossi and Sleat 2014; Gyulai unpublished).

However, some Kant scholars have called attention to what can be considered *realist* elements in Kant's political theory.[6] These aspects are at odds with the 'applied ethics' interpretation of Kant by political realists. For instance, although Kant insisted that states' constitutions must be *republican* (i.e. representative, with a hierarchical division of powers and the rule of law) he nevertheless allows *deferring* political reforms if the circumstances are not favourable, so that the political aim at stake is not undermined. This is the case when a people does not yet have the required mentality (*Denkungsart*) to endorse the changes and imposing it would create social unrest (ZeF VIII: VIII:372–373). He thus advocated *metamorphosis* (gradual reform) as opposed to *palingenesis* (dissolution) as

the preferred mode of political progress (MS VI: 340). Improvements in the constitution should be implemented by means of a gradual reform in the legislature, as opposed to a revolutionary overthrow of the government. When the government is despotic, public opinion may turn against it and endorse bringing down the regime. However, this would mean not only falling back into a lawless state of nature in this transition between former and new government but also a retrocess from a juridical perspective. This is thus a normative constraint on the actual will of the people.

It is therefore not far-fetched to conclude that Kant made more concessions to the *actual consent* of the people and public opinion in political transition processes than his realist critics acknowledge. However, Kant's care in aligning actual consent and the requirements of right is not because he believed that only actual consent can constitute political legitimacy. Ideal and realist aspects should be aligned as a matter of *political prudence*, guided by rational ideals. The moral politician should be neither naive nor politically imprudent; she should not be a Machiavellian or a pure *Realpolitiker* either. The Kantian politician must attempt to reconcile both right and the reality of politics, finding a way to realize the first by means of the latter.

I will defend the view that Kant offered an ideal theory not disentangled from realist considerations[7] and that he defended what I will call a *methodological realism*: the attempt to realize the requirements of Right (*Recht*) in a world governed by its own laws and mechanisms. I will illustrate this view with Kant's discussion of the right of nations. Kant scholars have long debated whether Kant endorsed a global government or merely a voluntary league of states with no coercive powers. This confusion in regard to Kant's *actual* position on the matter, I will argue, is a direct consequence of Kant's methodological realism.

Coercion in the international state of nature

Kant acknowledged that one cannot do away with coercion. For instance, one must rationally assume that individuals in the state of nature have an *authorization* to coerce unwilling individuals to enter a civil condition since there is a duty to leave the state of nature. Kant derived the authorization to coerce analytically from the concept of right (coercion is conceived as the logical negation of a violation of right, a hindrance of a hindrance of external freedom (MS VI §D, 231). Although in the state of nature no individual has the *authority* to coerce, one may nevertheless have a *rightful presumption in her favour* if coercion is used for establishing a civil condition (MS VI: 257).[8]

Creating juridical institutions and frameworks is neither a smooth nor an easy task; in order to 'get started' in the world, reason's requirements must often rely on violent and coercive beginnings (Kersting 1983, 133, fn 134). There are several such examples in human history. Kant argued that the legitimacy of states should not be questioned based on these unjust historical beginnings; if a state's historical beginnings had to be 'clean' for its authority to rule, no state on earth would ever be considered legitimate. Instead, Kant's legal theory is pragmatically *forward looking*: the aim is first of all *to leave the state of nature* and from there, to reform internal constitutions to approach the republican ideal and to expand the civil condition to the relations between states. Kant's position on this point is thus a *hybrid* of realism and idealism: we cannot begin a civil condition without violence; since the state of nature is 'devoid of justice'[9] anyway,

let us get started by coercively implementing some form of public justice and evolve gradually from there towards the rule of law, which is what reason commands.

This is where our difficulty starts. Instead of affirming the duty to enter a civil condition *consistently* across all three levels of the state of nature, Kant introduced an asymmetry between individuals and nations. In contrast to individuals in the state of nature, states must be regarded as 'moral persons' in the international domain (MS VI: 343). Their internal civil condition precludes external interference in their internal affairs, the acquisition or annexation of their territory, but also the rational permission to coerce them into an international civil condition. Although individuals are persons given their capacity to be under obligation, that is, to conceive and understand moral laws[10] (MS VI: 223), states are considered moral persons by virtue of their internal civil condition (the social contract between citizens). Kant did not see states as persons *metaphysically*. The consequence is that states cannot be coerced by other states to leave the state of nature.

> 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; it 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 the nations of the earth. But, in accordance with **their idea** of the right of nations, **they do not at all want this**, thus rejecting *in hypothesi* what is correct *in thesi;* so (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 from right, though with constant danger of its breaking out. (ZeF VIII: 357, emphasis added)

According to reason *there can be no other way* to escape the lawless condition of war at international level than to form a civil condition of states (*Völkerstaat*). However, Kant stressed that states' *own conception* of the right of nations is in fact very different from what reason commands. Kant was talking about *real* states, the nations of his time. These states do not want what is correct *in thesi* and reject it *in hypothesi*. Understanding here the distinction i*n thesi* / *in hypothesi* is crucial for understanding what Kant was saying in this passage. The distinction has a long scholarly tradition going back to Aristotle's discussion of axioms and posits in the *Posterior Analytics* (Aristotle 1941). St. Augustine understood the distinction as the difference between a universal *cognition* (what all persons ought to do) and a situated, particular *judgment* (what person x ought to do, given her knowledge of the particular circumstances). The distinction for Augustine was thus between a general cognition and a judgment informed by knowledge of the circumstances (Augustine 1863, 141; Trimpi 1983, 376). In the Kant literature, Kant's use of the distinction has been understood as corresponding to the difference between theory and empirically guided practice (Williams 1983, 255; Cavallar 1992, 210).[11] This interpretation is based on Kant's use of the distinction in *On the Common Saying*:

> Yet it is easier to put up with an ignorant man who declares that theory is unnecessary and dispensable in his supposed practice than with a would-be expert who concedes it and its value in schools (perhaps only to exercise the mind) but at the same time maintains that matters are quite different in practice; that when one goes from school into the world one becomes aware that one has been pursuing empty ideals and philosophic dreams; in short, that **what sounds good in theory has no validity for practice**. (This is often expressed as,

> this or that proposition does indeed hold *in thesi,* but not *in hypothesi*.). (TP VIII: 276, emphasis added)

Theories that have to do with empirical concepts must be tested by experience; if experience refutes these principles, then the theory was incorrect. However, if something is required by reason as a matter of duty, it *must* be possible in practice (even if not as the perfect realization of the duty). The saying 'ought implies can' attributed to Kant is usually taken to mean that it cannot be my duty to do something impossible. However, Kant understood it the other way around: because something is commanded by reason, it *is* possible. But we need to qualify what Kant meant by 'possibility' in this case. It is only when reason reveals unconditional obligations to us *that our own freedom is revealed*. Had we not the capacity to conceive and be motivated by those rational requirements, we would be merely satisfying our inclinations. The possibility of acting independently of our empirical nature would have remained *hidden to us*. Moral obligation opens up freedom as independence from natural causation *as a possibility* for us. *It is because* reason commands that we *can* do something other than merely satisfying our desires and natural wants.

> But in a theory that is based on the *concept of duty,* concern about the empty ideality of this concept quite disappears. For it would not be a duty to aim at a certain effect of our will if this effect were not also possible in experience (whether it be thought as completed or as always approaching completion); and it is theory of this kind only that is at issue in the present treatise. (TP VIII: 276–277)

But there are different uses of this distinction in Kant's works. In the *Religion,* Kant identified *in thesi* with a command that is *objective in the idea* (*objectiv in der Idee*) and *in hypothesi* with what is *subjective,* that is, when this objective command has to be followed by a particular subject, who also has inclinations. The distinction is embedded in his discussion of the frailty of human nature (*fragilitas*), the first of the three degrees of 'natural propensities to evil' in human nature. Kant uses the phrase of St. Paul to illustrate *akrasia* or weakness of the will: the possibility of recognizing what is *objectively required* and indeed committing oneself to act accordingly, but in the end failing to live up to what reason commands because inclination feels *subjectively stronger* and thus eclipses the motive provided by reason. The distinction in this case is between what is *rationally* required and how the agent is *de facto* motivated to act.

> What I would, that I do not! (*Wollen habe ich wohl, aber das Vollbringen fehlt)* i.e. I incorporate the good (the law) into the maxim of my power of choice; but this good, which is an irresistible incentive objectively or ideally (*in thesi*), is subjectively (*in hypothesi*) the weaker (in comparison with inclination) whenever the maxim is to be followed. (*Religion Within the Boundaries of Mere Reason*, VI: 29)

In the Third Critique, Kant applied the distinction to the problem of achieving *Enlightenment*. Because it is in the very nature of reason to be active and not passive, achieving Enlightenment is *in thesi* easy for human beings. However, in *hypothesi*, achieving *Enlightenment* in one's way of thinking (*Denkungsart*), especially the *public* way of thinking, is very difficult. Here the distinction is used to stress the tension between what is *objectively* the case for human beings as rational beings and what is *de facto* the case for human beings since they are embedded in a particular, historically situated society and political culture. Again, we have the idea of a cognition human beings have access to as rational beings, but

that becomes *overshadowed* by contingent aspects of that human being's empirical nature and particular social and historical embedment.

> One readily sees that while enlightenment is easy *in thesi, in hypothesi* it is a difficult matter that can only be accomplished slowly; for while not being passive with his reason but always being legislative for himself is something that is very easy for the person who would only be adequate to his essential end and does not demand to know that which is beyond his understanding, nevertheless, since striving for the latter is hardly to be forbidden and there will never be lacking many who confidently promise to be able to satisfy this desire for knowledge, it must be very difficult to maintain or establish the merely negative element (which constitutes genuine enlightenment) in the manner of thinking (especially in that of the public). (*Critique of the Power of Judgment*, V: 294, fn.)

How did Kant understand this distinction in regard to the required institutions for global peace in the *Perpetual Peace* passage quoted earlier? To reject a complete civil condition *in hypothesi*, while it is right *in thesi*, means: states *de facto* reject what is correct in theory. It is not that they think the theory does not apply to practice or that they would not be able to take the necessary means to implement it. They simply *refuse* to accept the theory. Kant was thus making a *realist* statement about states: it is a matter of fact that states *want* to remain in a lawless condition and treat each other according to the inner logic of the state of nature: *uti partes de iure sue disponunt, ita ius est* (whichever way the parts dispose of their rights, this is right, MS VI: 307). According to this logic, *might makes right*. States do not want to give up power and geopolitical influence unless they need to protect themselves against other nations. Kant was thus *presupposing* states' unwillingness to accept what reason requires at international level. They reject the duty to leave the state of nature *full stop*.

If states are *de facto* unwilling to do what reason requires, why is it not possible to coerce them to enter an international civil condition, similarly to coercing recalcitrant individuals in the state of nature? What is the reason for the asymmetry between the *exeundum* at individual and inter-state levels? Ingeborg Maus saw in Kant's capitulation in regard to the world republic the affirmation of state sovereignty as a principle of international law. As she puts it, 'state sovereignty is simply the exterior aspect of inner-state popular sovereignty and because of this dimension it requires protection at the level of international law' (Maus 2010, 150).

Regarding state sovereignty as a principle of international law is clearly at odds with Kant's *exeundum* at international level and with the idea of a condition of distributive justice encompassing all states and nations of the globe (Cavallar 2006, 29).[12] My view is that state sovereignty has to be respected in the international domain but for different reasons than usually assumed. It is often taken for granted that state sovereignty is an absolute political value or an end in itself. In fact, the political value of state sovereignty is based on the fact that a state constitutes what I will call a *relative* juridical condition. It is relative in regard to the state of nature outside its borders. For understanding this, it is useful to imagine states as isolated 'islands' of juridical condition floating in a 'sea of lawlessness' that is the inter-state domain.[13] The duty to leave the state of nature aims at a *complete* juridical condition, which means that all inter-state relations, as well as the relations of stateless or displaced individuals on the globe, would be regulated by the rule of law. The state of nature would then be fully overcome at international and cosmopolitan level. We must respect states as 'islands' of juridical condition

because they are the necessary starting points for the international juridification process. The development towards a global rule of law starts at isolated points of the globe. The idea is to continually reform and improve those isolated civil conditions and gradually expand juridification beyond national borders. The *exeundum* thus has normative priority over state sovereignty. Paradoxically, it must not trump the actual consent of the involved nations out of respect for their own internal civil condition. The mistake is to believe that this internal civil condition is the end of Kant's story, that is, that it is an end in itself.

My proposal is that we should understand state sovereignty in Kant's political philosophy in *realist* terms. States are *de facto* unwilling to give up their freedom to act as they please in regard to other nations. Contra Maus, I will argue that what is at stake in Kant's discussion of *Völkerrecht* is the lawless freedom of states to act as they please in regard to other states, *not* internal sovereignty. The idea is thus to rule out internationally aggressive behaviour, not interference in the internal social contract. The internal social contract does not entail the freedom to behave as one pleases in regard to other states; external lawlessness is a consequence of the international state of nature. We should thus *not conflate* external sovereignty with internal sovereignty. However, the problem is that even if we agree that arbitrary, aggressive behaviour between states should be ruled out, we cannot *coerce* unwilling states to commit to an internationally peaceful world order. Paradoxically, this is because of their internal social contract. Whether it is a world state or a non-coercive league of nations: the step towards a peaceful international order must be taken by states *themselves*, and not coerced from outside. I believe this is Kant's main point, and not a glorification of popular sovereignty *per se*.

Although giving up external sovereignty is *compatible* with internal sovereignty, *external coercion is not*. The step towards the juridification of international relations must thus come 'from within' and be compatible with the actual consent of its citizens, satisfying the realist desideratum that political legitimacy must arise from politics immanent processes. However, there is no reason to assume that a people will *never* be able to reach such a stage, lest political realism be made into a dogma and become unable to explain political change.

In the international *anarchy* of eighteenth-century global order, when natural law theory was used to justify colonialist invasion and declarations of war,[14] it was clear that states were only willing to 'abide' by right if it could be used to justify their belligerent politics. They had no interest in taking any step towards enduring international peace treaties. Kant by no means denied the picture of states as self-interested political agents seeking the promotion of national interest at the expense of international peace. This is why despite his juridical rhetoric, Kant often speaks like a Hobbesian in his texts.[15] These 'Hobbesian' passages led many a Kant scholar to believe Kant was indeed defending a Hobbesian position in some matters such as the duty to leave the state of nature and the role of the state. In my interpretation, one must clearly separate Kant's 'Hobbesian talk' from the way he conceives his legal philosophy. The Hobbesian sounding passages are the result of Kant's attempt to *transpose* his metaphysics of right into a political scenario conceived in realist terms. He thus constantly shifts from idealism (Kant) to realism (Hobbes) and back, sometimes offering a *revised* proposal that might be easier to implement. This is precisely why *Völkerrecht* is so confusing and has generated so much debate about Kant's actual stance on the matter. This 'ambiguity', however, does not mean that he is more committed to the revised proposal (league of states) than to his ideal position (world republic). He is shifting from the *intellectual*, *ideal* perspective to the *empirical, realist* perspective, which his theory attempts to

ultimately *reconcile*. This method can be seen, for instance, in Kant's compatibilism (his attempt to reconcile transcendental freedom with a world causally determined by natural laws) and in his theory of moral motivation (his attempt to reconcile autonomy with our finite, empirical nature and inclinations).

As Georg Geismann pointed out, Kant's argument is not that there should be *no world state*, but that given the lawlessness in the relations between states, there should be *at least* a free federation of states, as a *minimum* towards the avoidance of war (Geissmann 1997). Kant's discussion of *Völkerrecht* or international law operates on two levels: at the level of reason, involving strictly rational requirements, and in the 'real world' scenario, which is constrained by empirical factors such as the present internal development of given polities and the willingness of political actors to implement what reason requires.

While the world republic is the *ideal* solution to the problem of the international state of nature, it is nevertheless the less likely way towards an international rule of law. *Völkerrecht* takes this reality into account, and operates with the presupposition that states are externally independent of each other as legal subjects. State sovereignty is thus a *realist* assumption. As 'moral persons', states must be regarded as equal members of a collective international will. If our starting assumption is the existence of sovereign, externally independent states at the international level, that is, if we start with the *reality* of *Völkerrecht* and ask ourselves how to implement the rule of law in the relation between states, then any international agreements will need to be *voluntary*. The best transnational arrangement in this case would be a voluntary federation of free states with no coercive powers.

The UN is the best example of such a global institution, the possibility of which in Kant's time would have been met with scepticism if not outright mockery. The forerunner of Kant's peace treatise was the abbé de Saint-Pierre's Project of Perpetual Peace (Castel and de Saint-Pierre 1792; see also Archibugi 1992). Starting in 1713 he produced first 3, then 23 volumes in which he developed the peace project in great detail. Among other things, Saint-Pierre devised a perpetual peace league including the 24 Christian states of Europe and a court of justice to decide international disputes. The project sparked great debate (of which Kant was aware) and drew criticism for putting national security at risk. Rousseau feared that the unwillingness of states to join such a plan would lead to coercion and tyranny; Leibniz observed in a letter to St. Pierre that only a minister who was on his deathbed could possibly dare such a plan, and only if he left no family behind (Eberl 2004, 215).

Although public opinion often stresses the shortcomings of the United Nations as a political actor, it is important to stress that its limitations are directly tied to the political will and funding of member states, who remain the main political actors in the transnational arena. This is precisely the problem with a voluntary league of states with no coercive powers, in which nation states, especially the geopolitically powerful ones, have the last say in global decision making. Nevertheless, it is undeniable that as a global institution the UN has brought about an unprecedented revolution in the way global challenges are addressed. The UN is not restricted to the security council; it also involves agencies such as UNICEF, the World Food Program, and the World Health Organisation. It played a crucial role in addressing, for instance, the ebola crisis, cholera, malaria, AIDS and child malnutrition worldwide. Without the UN, many more lives would have been lost and local conflicts could easily have expanded beyond national borders. It has also created a forum in which 193 member states can come together for discussion.

It's important to note Kant's caveat in the quoted passage: *if all is not to be lost* (*wenn nicht alles verloren werden soll*), we must forego the positive idea of a world state and adopt only its *negative surrogate:* a league that merely averts war and continuously expands to include more nations. That we should have a league of states for ensuring peace instead of a world state is not a conclusion arrived at by states themselves or their 'compromise' to achieve world peace without a world state. The league of states is *Kant's* suggestion, after taking into account the unwillingness of states to give up their nationalist power politics which need an anarchic transnational order to thrive. It took a major humanitarian disaster to move states to draft and commit themselves to the precursor of the declaration of human rights in 1942. Kant's point is to show that despite the way politics is conducted in real life, it does not completely rule out the institutional developments required for global peace. There is hope after all.

Conclusion: a Kantian solution

In her short essay *We Refugees*, Hannah Arendt provides one of the most incisive accounts of the phenomenology of forced displacement and deprivation of political membership: the experience of being a *refugee* (Arendt 2016). She calls our attention to the loss of jobs, language, social status and personal relations refugees have to bear, as well as the loss of citizenship and protection that comes from being a member of a particular state. A refugee is no more than a human being. Paradoxically, there is something deeply shameful and inhumane about being reduced to one's bare humanity. In the *Origins of Authoritarianism*, Arendt thus coined the famous phrase *the right to have rights* (Arendt 1948).

One would expect a republican argument in favour of state membership to follow from Arendt's reflections. In fact, she attacks the reliance on national states. A few years later, Arendt criticized the Zionist project of creating a Jewish state, a position which earned her strong criticism and disapproval (Meyer 2016). Arendt realized that states could arbitrarily deprive citizens of their legal status. States had thus forfeited their *raison d'être*. The solution of the refugee problem could no longer be sought in the national state. For Arendt, the creation of the state of Israel meant slipping back into the old political category that created the refugees in the first place. The state was *itself* the problem. The *phenomenon* 'refugee' therefore called for a new political theory and political categories. Arendt formulates the problem. I believe Kant can offer the solution.

Arendt's criticism of states suggests that some of the main global challenges humanity was facing then (and is facing again now) are of a *global* nature. They can only be properly addressed by global institutions, not by nation states. The current refugee crisis illustrates this well. Although the European Union attempted to treat the distribution of incoming refugees within the member states as a matter of EU policy, at the end the decision ended up in the hands of member states, with countries such as Hungary and Poland refusing to take any refugees, and Britain's referendum vote to leave the EU in order to 'gain back' control over its borders. Once more, states were giving priority to their alleged national interest and security over global 'solidarity'. Who should be *responsible* for displaced persons when the political institutions we have must give priority to their 'own interests' and close their territory to non-members? Do refugees have to create their own state if they have nowhere else to go? We are now faced with the imminence of large displacements of *climate* refugees. Antigua and Barbuda, Caribbean islands

rendered uninhabitable by hurricane Irma, might lose their territory to rising water levels in the next three decades. Which nation state is likely to care about large numbers of climate refugees when accepting foreigners can foment populism and negatively impact on elections at home?

In Kant's terms, the refugee crisis is a matter of *cosmopolitan right,* not of beneficence (ZeF VIII: 357, MS VI: 352). Since we share the planet with each other, we are all citizens of the world, that is, we have an original *right* to be *somewhere* on the surface of the earth. As a matter of fact, the world is now divided into states. Despite conventions on refugee rights, displaced persons must *hope* states will be willing to open their borders to them, despite evidence that for some (the 'super rich') there is already a world without borders (Muir 2017). The unwillingness to share social benefits with 'undeserving' incomers in welfare states, and fears about terrorism are factors unlikely to promote sympathy towards the plight of millions of persons who have lost everything and are ignobly reduced to the beneficence of others.

Our current global challenges call for an exercise of *political imagination*. How would our political institutions have to be so that no one would be deprived of one's 'right to have rights' when one's state has turned against oneself? What would such a world order require? How would it be to live in a world where displaced people have a legally recognized *cosmopolitan* citizenship and can freely move across borders? How would the world look if we had a *global* welfare institution that extends basic welfare provision to everyone on the planet, so that no groups would need to protect their benefits jealously against those who seek better prospects in their territory? How would it be to grant everyone equal access to education, opportunities and resources no matter where they live and come from?

We must dream about the global institutions we need. We must imagine those global institutions even if, like Kant, we need to come up first with a 'revised proposal' that will enable us to get started.[16]

Notes

1. See for instance, Horn (2014, Chap. II).
2. Subjective right are the *concrete* rights individual persons can derive from a given general norm (an objective right), thereby binding another person or others *directly*.
3. Lacking a better alternative, I translate the German 'Recht' as 'right', a usage also adopted by Mary Gregor in her translation of the *Doctrine of Right*.
4. Kant's works are cited according to the Academy edition of Kant's works. Unless otherwise stated, all translations are from the Cambridge Edition of the Works of Immanuel Kant, Practical Philosophy, translated by Mary Gregor, Cambridge University Press, 1996. I use the following abbreviations: MS: The Metaphysics of Morals; ZeF: Towards Perpetual Peace.
5. See for instance, Kersting (2004, 79).
6. Eberl (2004, 213) and Geissmann (2012, 233–238) argue that Kant was by no means naïve in political matters, although they would not identify Kant as a *Realpolitiker*. This last reading, which is unusual in the literature, has indeed been proposed by Kenneth N. Waltz, who argues that 'while Kant may be seen as a backsliding liberal, he may also be considered a theorist of power politics who hid his Machiavellian ideas by hanging 'round them the fashionable garments of liberalism' (Waltz 1962, 331). The interpretation I will defend in this article is indebted to scholars who have pointed out the realist aspects of Kant's political theory but goes beyond them in proposing a middle ground between the acknowledgment of realist elements in Kant's theory and Waltz's realist interpretation of Kant. I would like to

thank an anonymous reviewer of the *Journal of Global Ethics* for urging me to differentiate my position in relation to these other realist readings of Kant.

7. It is important to differentiate between non-ideal theory and realism. While non-ideal theories take into account context sensitive considerations for the implementation of ideals, political realism relies on a politics immanent conception of political legitimacy and on the concept of legitimate rule as opposed to mere violence or coercion. In political realism, the actual consent of the people plays an important role.
8. Despite the analytic relation between the concept of a right and coercion, it does not follow that whoever has a right also has the *authority* to enforce that right (like Locke's idea of rights enforcement in the state of nature). The enforcement must have a binding character (equally valid for everyone). Only a public institution can have such an authority.
9. By 'devoid of justice' Kant meant 'with no public *authority* to decide and enforce disputes of rights'. Justice is thus a matter of the formal *authority* to rule and not some substantive criterion of legitimacy.
10. 'Moral' means laws of practical reason as opposed to laws of nature. Following Kant in his late works, I will not conflate morality (*Sittlichkeit*) with ethics or virtue (*Tugend*) and will use the first as the broader category which encompasses both virtue and right. See Introduction to the *Metaphysics of Morals*, VI: 218-221.
11. See also Ingeborg Maus' (2010, 155) discussion. Maus understands 'in hypothesis' as concerning a hypothetical judgment about the means for attaining global peace. I will offer an alternative interpretation in the course of this section (156).
12. Democratic peace theory is one such interpretation that ascribes the dogma of state sovereignty to Kant at the cost of the duty to develop international law. This interpretation, based on the third definitive article for perpetual peace, assumes that the democratization of states at internal level is what promotes perpetual peace. Because democracies do not tend to attack each other, peace comes from within these republican democratic states, and not from international law. *Völkerrecht* is only required because there are non-democratic states against which democracies must unite in the international arena; the relations between democratic states themselves, however, do not require international regulation. For a criticism of democratic peace theory, see Cavallar (2001).
13. This picture is of course exaggerated in our times, since we already have international institutions such as the UN. There is no longer an absolute state of nature between states as was the case in the eighteenth century and before.
14. Kant explicitly mentions Hugo Grotius, Pufendorf and Vattel, the 'sad comforters' of natural law theory of rights (*lauter leidige Tröster,* ZeF VIII: 355).
15. See for instance his discussion of the duty to leave the state of nature in §§42 and 44, MS VI: 307–308 and 312–313. The Hobbesian colour of his arguments has led several Kant scholars to assume Kant's exeundum was motivated by Hobbesian considerations such as the problem of assurance. There is enough textual evidence to refute this interpretation (see my 'Human Nature and the Right to Coerce in Kant's Doctrine of Right'. Archiv für Geschichte der Philosophie, Vol. 96, Issue 1, April 2014). Nevertheless, the shift between idealism and realism is confusing enough. I hope that the present article will help solve this confusion.
16. I would like to thank audiences at the workshop *World Government or Else*? at Collegium Helveticum, Zurich, Switzerland, and Zukunftskolleg, University of Konstanz, June 2017, and at the panel *Realism and Idealism in Kant's Political Thought*, Kantian Standing Group, ECPR annual conference, University of Oslo, August 2017, for their comments on earlier versions of this paper, especially Raffaele Marchetti, Torbjörn Tännsjö, Henning Hahn, Marco Cellini, Attila Tanyi, Howard Williams, Helga Varden and Ewa Wyrębska-Đermanović. I would also like to thank an anonymous referee for their very helpful comments.

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CHAPTER 10

Kant on Freedom of Thought

Alice Pinheiro Walla

Kant and Censorship

Kant is a famous proponent of academic freedom of expression, freedom of communication, and freedom of thought.[1] He differentiated himself from Hobbes by affirming that subjects should be granted freedom of

[1] Kant's works are cited according to the volume and page numbers of the Prussian Academy edition of Kant's works (*Akademie-Ausgabe*): *Kants Gesammelte Schriften*, abb. AA, 29 vols., ed. Königliche Preussische Akademie der Wissenschaften, Reimer, Berlin 1900–1922, De Gruyter, Berlin 1922–2009. Unless stated otherwise, quotations are from I. Kant, *Practical Philosophy*, trans. and ed. M.J. Gregor, Cambridge University Press, Cambridge 1996. The titles of Kant's works in AA are abbreviated as follows: KpV, *Kritik der praktischen Vernunft*, AA, Vol. 5, 1788/1913 ("Critique of Practical Reason" in the English edition); ANT, *Anthropologie in pragmatischer Hinsicht*, AA, Vol. 7, 1798/1917; MS, *Die Metaphysik der Sitten*, AA, Vol. 6, 1797/1914 ("The Metaphysics of Morals"); TP, *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis*, AA, Vol. 8, 1793/1927 ("On the Common Saying: This May Be True in Theory But It Does Not Apply in Practice"); SF, *Der Streit der Fakultäten*, AA, Vol. 7. 1798/1917. English translation in I. Kant, *The Conflict of the Faculties*, trans. M.J. Gregor, Abaris Books, New York 1979; ZeF, *Zum ewigen Frieden*, AA, Vol. 8, 1795/1927 ("Towards Perpetual Peace"); WA, *Beantwortung der Frage: Was ist Aufklärung?*, AA, Vol. 8 1784/1927 ("An Answer to the Question: What is Enlightenment?"); WDO, *Was heisst: sich im Denken orientieren?*, AA, Vol. 8, 1786/1927.

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speech as the "sole palladium of people's rights"[2]; he stressed the necessary connection between the freedom to *communicate* one's thoughts to others and freedom of thought, arguing that prohibiting the exchange of thoughts and ideas amounts to undermining individuals' freedom to think.[3] With the famous injunction *sapere aude!* Kant defended not only responsibility for one's own beliefs and judgments but also the central importance of public discourse, in which independence in thought (*Mündigkeit*) could be developed and exercised.[4] He distinguished between a private and a public use of reason and argued that the state should not punish the latter.[5] Finally, Kant also grounded the right to communicate one's thoughts to others in the fundamental innate right in the *Metaphysics of Morals*, suggesting that expressing one's thoughts to others is a fundamental human right.[6]

As these examples illustrate, Kant offers a number of arguments for freedom of expression. Although these are independent arguments, which cannot be reduced to a single argument,[7] they seem not only to form a consistent whole, but also to mutually support each other.[8] Peter Niesen sees a strength in the diversity of Kant's arguments for freedom of expression and speech and argues that this makes his approach more *versatile* than other theories on offer. For instance, Kant's account of freedom of the pen can be seen as anticipating the republican literature on freedom of expression,[9] which justifies the right to free speech by reference to the role it plays for political association and the common good. The connection between freedom of expression and innate right is also promising, providing a fundamental human right to free speech along the lines of the liberal individualistic tradition. To protect the right of expression is to protect the autonomy of individuals, not only a necessary means to a common political aim, as the former argument may suggest.[10]

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[2] TP, AA 8:304.

[3] WDO, AA 8:144.

[4] WA, AA 8:35.

[5] WA, AA 8:38.

[6] MS, AA 6:238.

[7] M. Davis, "Kant's Fourth Defense of Freedom of Expression," *The Southern Journal of Philosophy* 21 (1), 1983, p. 13.

[8] This interpretation is defended by P. Niesen, *Kants Theorie der Redefreiheit*, Nomos, Baden-Baden 2014.

[9] Ibid., Ch. 2.

[10] SF, AA 8:6–7.

However, Kant *himself* became a victim of censorship in his late years as a result of the edict—issued in 1788 by the king's minister, Johann Christoph von Wöllner—that initiated censorship of religious texts in Prussia. The problems that Kant had with the authorities began in 1792 upon the publication of the second essay that was to make up *Religion within the Boundaries of Mere Reason*. The essay was rejected by the "Immediate Examination Commission," led by G.F. Hilmer and J.T. Hermes. The commission was directly responsible to Frederick William II, and was established in 1791 to counteract the supposed "laxness" of the Berlin Superior Consistory of the official Lutheran Church in limiting the impact of rationalist religious publications.[11]

Frederick II the Great, King of Prussia for most of Kant's life (1740–1786), was an enlightened yet absolutist monarch, known for the motto: "*Argue* as much as you will and about whatever you will, *but obey!*"[12] He was said to have no interest in religious orthodoxy, as long as subjects did their duty as subjects. However, his successor Frederick William II (1786–1797) introduced the above-mentioned censorship practices, which compromised the autonomy of the universities and considerably limited the freedom of academic thinkers.

While it is widely accepted in Kant scholarship that the religious edict of 1788 constituted an unjust limitation on academic freedom and an attempt to stop the enlightenment movement (Kant being the very personification of the idea of enlightenment),[13] Ian Hunter has rejected this traditional view by arguing that the purpose of the religious edict was in fact not to impose a religious creed on individuals, but to achieve religious toleration through a system of regulated public confessions. For this, it was necessary to "prevent particular forms of theological innovation and proselytising, to the extent that these threatened the confessional balance."[14] Due to its transcendental and a priori character, many scholars thought that Kant's philosophical theology had no implications for positive confessional theology. In his revisionist approach, however, Hunter argues that Kant's theology could be rightly

[11] I. Hunter, "Kant's *Religion* and Prussian Religious Policy," *Modern Intellectual History* 2 (1), 2005, p. 2, footnote 2.

[12] WA, AA 8:37.

[13] I. Hunter, in "Kant's *Religion*...," op. cit. p. 2, attributes the first such interpretation to W. Dilthey back in 1890.

[14] Ibid.

regarded as a "way of life" and therefore as an "unsettling public intervention in a concrete religious and political culture."[15] Instead of being anti-enlightenment, the religious edict was an instrument for maintaining religious peace. The censoring of Kant's works would thus be "the unintended and peripheral by-product of a broad and long-standing Prussian *Religionspolitik*," according to Hunter.[16] Kant was well aware of the atrocities of the seventeenth-century wars of religion. As Anna Tomaszewska has argued, Kant thought that religious differences were deeply divisive. His strategy to overcome this divisiveness was to "dilute" the shared moral content of diverse confessions into a "rational religion" that all could endorse.[17] In this way, Kant's position would be inconsistent with the sort of political secularism that would allow religious pluralism in the public sphere.

In this article, I will not attempt to settle whether the Prussian authorities were correct to regard Kant's philosophical theology as a threat to public peace. I will concentrate instead on the ambiguous way in which Kant dealt with the prohibition to publish on religious matters and the way he seemed to openly acknowledge a *reservatio mentalis* in the Preface to the *Conflict of the Faculties*. Although this attitude seems compatible with what Kant has to say about academic freedom, the public use of reason, and state interference, it seems to stand at odds with fundamental aspects of his moral theory.

While the censors approved the first essay of Kant's *Religion within the Boundaries of Mere Reason*, published in Biester's *Berlinische Monatsschrift*, they censored the second essay for being incompatible with Biblical doctrines. Kant was able to sidestep the prohibition by publishing the work in Jena. The first edition of the *Religion* appeared in Königsberg in 1793. In October 1794, the king himself intervened:

> First, our gracious greetings, worthy, most learned, dear and loyal subject! Our most high person has long observed with great displeasure how you misuse your philosophy to distort and disparage many of the cardinal and

[15] Ibid., p. 5.

[16] Ibid., p. 4.

[17] A. Tomaszewska, "Kant's Reconception of Religion and Contemporary Secularism," *Roczniki Filozoficzne* 64 (4), 2016, pp. 125–126.

> basic teachings of the Holy Scriptures and of Christianity; how you have done this particularly in your book *Religion within the Boundaries of Mere Reason*, as well as in other shorter treatises. We expected better things of you, as you yourself must realise how irresponsibly you have acted against your duty as a teacher of youth and against our paternal purpose, which you know very well. We demand that you give at once a most conscientious account of yourself, and expect that in the future, to avoid our highest disfavour, you will be guilty of no such fault, but rather, in keeping with your duty, apply your authority and your talents to the progressive realisation of our paternal purpose. Failing this, you must expect unpleasant measures for your continuing obstinacy.
>
> With our favourable regards.
>
> Berlin, 1st. October 1794
>
> By special, most gracious order of His Majesty
>
> Woellner

Kant's answer to this letter, which he published together with the letter four years later in the Preface of the *Conflict of the Faculties* is surprising in many ways.[18] As a "teacher of the youth," he stresses that he always strictly separated religion from scientific matters. The textbook he used in his lectures was Baumgarten, not the Bible. Further, his *Religion* was neither aimed at nor is accessible to the general public, but only to academic circles. One must thus distinguish between the academic discourse, within academic circles, and the discourse aimed to instruct the uneducated masses. The latter is the task of public teachers and has as its object the religion of the country. It is only the instruction of the masses, *not academic discourse* that should be subject to the control and sanctions of the government. This point reflects Kant's distinction between a private and a public use of reason, made earlier in *What is Enlightenment?*

While Kant famously defended the freedom of the pen in *Theory and Practice* as "the sole palladium of people's rights" (*das einzige Palladium der Volksrechte*) to argue for academic freedom of expression

[18] I. Kant, *The Conflict of the Faculties*, trans. M.J. Gregor, op. cit., pp. 11–19.

and publication,[19] it is important to note that in his reply to the king he does not appeal to a similar rights argumentation. Instead, his argument stresses the fact that his writings are *inaccessible to the masses*. The absence of rights rhetoric in Kant's letter is noteworthy. One could consider Kant's move a careful, prudential attempt to avoid the king's disapproval. Elsewhere, such conduct from a head of state had been expressly identified with despotism.[20] However, Kant's silence in regard to freedom of the pen could also suggest that he did not conceive it as a basic civil right, but merely as a means by which loyal subjects can inform the ruler of mistakes she is not aware of. In other words, freedom of the pen would not be a fully fledged right of free speech but a mere right of petition.[21] This means that it ought to be subordinated to loyalty to the constitution and obedience to authority. This interpretation seems to be supported by the very meaning of the word "palladium" ("*palladion*" in Greek). A *palladion* was the name used for the devotional picture of the goddess Pallas Athena, meaning a holy object which offers *protection*. By analogy, freedom of the pen is also supposed to be "holy," offering protection to the people, presumably because they would be informing the head of state of the impact of her policies on the rights and well-being of the people, and thus playing a beneficial role for the "paternal purpose" of the state, to use Woellner's expression. Attempts to instill fear in the monarch, by arguing that freedom of the pen would cause unrest, were heavily criticised by Kant as instilling in the head of state "mistrust of his own power" or "even hatred of his own people."[22] This suggests that

[19] "Thus freedom of the pen – kept within the limits of esteem and love for the constitution within which one lives by the subjects' liberal way of thinking, which the constitution itself instills in them (*and pens themselves also keep one another within these limits, so that they do not lose their freedom*)—is the sole palladium of the people's rights. For to want to deny them this freedom is not only tantamount to taking from them any claim to a right with respect to the supreme commander (according to Hobbes), but is also to withhold from the latter whose will gives order to the subjects as citizens only by representing the general will of the people—all knowledge of matters that he himself would change if he knew about them *and to put him in contradiction with himself*" (TP, AA 8:304, italics A.P.W.).

[20] See e.g. WA, AA 8:38–40.

[21] See T. Mertens, "How to Read Kant's Metaphysics of Morals? A Conversation with My Student," *Studi Kantiani* 29, 2016, pp. 11–29.

[22] "But to instill in a head of state concern that unrest in the state might be aroused by [the subjects'] thinking independently and aloud is tantamount to awakening in him mistrust of his own power or even hatred of his people" (TP, AA 8:304).

the problem with disregarding freedom of the pen is not that it violates a civil right, but that it reveals an attitude incompatible with the "dignity" (*Würde*) of a head of state. Having addressed the king's concerns about his teaching, Kant continues:

> Regarding the second point – not to be guilty in the future of (as I am charged) distorting and disparaging Christianity – I believe the surest way, which will obviate the least suspicion, is for me to declare solemnly, *as Your Majesty's most loyal subject*, that I will hereafter refrain altogether from discoursing publicly, in lectures or writings, on religion, whether natural or revealed.[23]

Taking into account Ian Hunter's revisionist account of the religious edict, it is also possible that Kant was expressly addressing the rationale of the edict in promoting public peace. Kant's theory would thus be one of those religious sects which would undermine the publicly recognised three main confessions of Prussia by proposing a rationalist religion. By emphasising the academic character of his writings, Kant is clearly attempting to deny its influence on public religious practice.

However, as Karl Vorländer has remarked, many readers of Kant were struck by what seemed to be a *reservatio mentalis* on Kant's part: the calculated ambiguous way in which Kant expressed his commitment not to publish on religious matters as valid only as long as the monarch lived.[24] Kant himself openly acknowledges this subterfuge. In a footnote added to this passage of his reply to the king, Kant adds: "This expression, too, I chose carefully, so that I would not renounce my freedom to judge in this religious suit forever, but only during His Majesty's lifetime." Kant thus consciously phrased his oath in such a way that it was valid only as long as the king was alive.

One may think that although Kant observed "the letter" of the oath, he nevertheless seemed to have violated "the spirit" of the commitment by "bending" his own words. This conduct seems incompatible with Kant's categorical prohibition of lying in his ethical writings. He also condemns the practice of mental reservation, adopted by Jesuits,

[23] SF, AA 7:10, italics A.P.W.

[24] K. Vorländer, *Immanuel Kants Leben*, ed. R. Malter, Felix Meiner, Hamburg 1974, p. 189.

in *Perpetual Peace*, which leads to peace treaties being formulated in an ambiguous way, in order to allow later distortion of the content of the agreement.[25] Further, and perhaps more worryingly, Kant's tone gives the impression that he was *proud* of his cunning strategy. This stands at odds with his notorious defence of obedience to authority, which committed him to dismissing a right to revolution, and making freedom of academic expression conditional on loyalty to the constitution, as suggested in the previously discussed "palladium passage" of *On the Common Saying*.

In the next section, I will argue that we can make good sense of Kant's attitude: there are aspects of Kant's theory which not only excuse such behaviour, but positively entitle Kant, or indeed any author, to such conduct when facing censorship of their works. These aspects, I will show in the next section, are his conception of the duty of truthfulness as involving some latitude in the degree of disclosure and his views on freedom of thought and communication, and on justified state interference in academic speech, to which the section "Freedom of Thought as Freedom to Think with Others" is dedicated. I will conclude with the formulation of Kant's conception of freedom of thought.

Reservatio Mentalis and the Latitude of the Maxim of Truthfulness

Kant is famous for his *unconditional* condemnation of lying, that is, telling an untruth with the intent to deceive. While in the *Groundwork* Kant follows tradition in regarding a lie as a violation of a duty in regard to *another person*, in the Doctrine of Virtue he introduces the idea of lying as a violation of a duty *against one's own person for the first time in a published work*.[26] The idea is that lying causes *dishonour* to the agent.[27]

[25] ZeF, AA 8:385.

[26] There are suggestions in his lectures that lying should be reinterpreted as a violation of a self-regarding duty. See S. Bacin, "The Perfect Duty to Oneself Merely as a Moral Being," in A. Trampota, O. Sensen and J. Timmermann (eds.), *Kant's Tugendlehre, A Comprehensive Commentary*, De Gruyter, Berlin 2013, pp. 245–268.

[27] MS, AA 6:429.

Lying makes the liar dishonourable in her own eyes due to her deliberate choice to adopt a maxim she cannot possibly declare to herself and her conscience.[28] Every external lie must thus be reduced to an inner lie. In both cases, lying is wrong regardless of whether it causes harm.[29]

The ethical perspective, however, must be distinguished from the juridical perspective. The juridical domain focuses on external freedom and more specifically on *wrongs*, i.e. violations of rights. Kant has two juridical arguments against lying. From the juridical perspective, a lie will either harm a *specific* person (for instance, by violating her rights) or, if no one in particular is harmed, wrong humanity in general (*Unrecht überhaupt*). Unlike ethics, the juridical domain does not take into account the quality of the agent's maxim.

> The greatest violation of a human being's duty to himself regarded merely as a moral being (the humanity in his own person) is the contrary of truthfulness, lying (*aliud lingua promptum, aliudpectore inclusum gerere/To have one thing shut up in the heart and another ready on the tongue*).[30] In the doctrine of right an intentional untruth is called a lie only if it violates another's right; but in ethics, where no authorisation is derived from harmlessness, it is clear of itself that no intentional untruth in the expression of one's thoughts can refuse this harsh name.[31]

The opposite of lying in the ethical domain is the commitment to a *maxim of truthfulness* (*Wahrhaftigkeit*). Dangerously close to lying is the practice of *mental reservation* (*reservatio mentalis/Vorbehalt*). A mental reservation is an utterance expressed in an ambiguous way in order to allow the speaker to "reinterpret" her commitment later on to suit her own purposes. In *Perpetual Peace*, Kant identifies *reservatio mentalis* with the casuistry of "spurious politics." This amounts to the political practice of "formulating public pacts in expressions that, as occasions arise,

[28] S. Bacin, "The Perfect Duty to Oneself Merely as a Moral Being," op. cit., p. 252.

[29] MS, AA 6:429.

[30] Sallust, *The War with Catiline*, 10.5., trans. M.J. Gregor, in I. Kant, *Practical Philosophy*, op. cit., p. 552.

[31] MS, AA 6:429.

can be interpreted to one's advantage as one wants"[32] in a way that "can match the best Jesuit school." *Reservatio mentalis* in this case is clearly a mark of *dishonesty*.

Nevertheless, Kant did not believe that we are morally required to say the *whole* truth when this can be done without lying. The commitment to a maxim of truthfulness allows a certain *latitude*: as long as the agent remains sincerely committed to uttering only what she knows to her best knowledge to be true, she does not have to disclose everything she knows. In this case, the *reservatio mentalis* would be a form of *reticence*: a permissible means of avoiding a duty that becomes too demanding for the agent. When silence is not possible, say, because one is being coerced into an answer, latitude allows agents to reconcile their commitment to truthfulness to other duties such as the avoidance of harm to others and oneself, and even to protect her permissible prudential interests if complete disclosure would render the agent vulnerable to the malice or violence of other agents. The agent would be allowed to use her practical wisdom (*Klugheit*) to decide how much to disclose in such a way that she can avoid lying while preserving her other ethical commitments and personal integrity. She would not be deceiving her interlocutor, but relying instead on her lack of attention or perception in order to protect herself and/or others. A famous example was the advice given by Kant to the young Maria von Herbert. The Austrian noblewoman wrote a letter to Kant, despairing after being abandoned by her lover after she disclosed to him sensitive details of her past. She believed morality required her not to keep any such secrets.[33] Kant argued that one has a duty *not to lie*, but not necessarily to tell anything that would be *imprudent* for her

[32] "Such a spurious politics has its casuistry to match the best Jesuit school—the *reservatio mentalis*, formulating public pacts in expressions that, as occasions arise, can be interpreted to one's advantage as one wants (e.g., the distinction of the *status quo de fait* and *de droit*); the probabilismus, subtly detecting evil intentions in others, or even making the likelihood of their possible superior power a rightful ground for undermining other, peaceful states; finally the *peccatum philosophicum* (peccatillum, bagatelle), taking the devouring of a small state to be an easily pardonable trifle if a much larger state gains by it, to the supposedly greater good of the world" (ZeF, AA 8:385).

[33] I. Kant, *Briefwechsel*, Brief 614, von Fräulein Maria von Herbert, 1793. Retrieved from https://korpora.zim.uni-duisburg-essen.de/kant/briefe/614.html on Jun 20, 2017. See also A. Pinheiro Walla "Virtue and Prudence in a Footnote of the Doctrine of Virtue (VI: 433n.)," *Jahrbuch für Recht und Ethik* 21, 2013.

to disclose. Kant develops this view in his distinction between *reticence* and *candour* in the Doctrine of Virtue of the *Metaphysics of Morals*:

> Between truthfulness and lying (which are *contradictorie oppositis*) there is no mean; but there is indeed a mean between candour and reticence (which are *contrarie oppositis*), since one who declares his thoughts can say only what is true without telling the whole truth. Now it is quite natural to ask the teacher of virtue to point out this mean to me. But this he cannot do; for both duties of virtue have a latitude in their application (*latitudinem*), and judgment can decide what is to be done only in accordance with rules of prudence (pragmatic rules), not in accordance with rules of morality (moral rules). In other words, what is to be done cannot be decided after the manner of narrow duty (*officium strictum*), but after the manner of wide duty (*officium latum*). Hence one who complies with the basic principles of virtue can, it is true, commit a fault (*peccatum*) in putting these principles into practice, by doing more or less than prudence prescribes. But insofar as he adheres strictly to these basic principles he cannot practice a vice (*vitium*), and Horace's verse, *insani sapiens nomen habeat aequus iniqui, ultra quam satis est virtutem si petat ipsam*, is utterly false, if taken literally. In fact, sapiens here means only a judicious man (*prudens*), who does not think fantastically of virtue in its perfection. This is an ideal which requires one to approximate to this end but not to attain it completely, since the latter requirement surpasses man's powers and introduces a lack of sense (fantasy) into the principle of virtue.[34]

The upshot of this argument is that while one can never be *too virtuous*, that is, there is never an *upper limit* to how much one can do in moral matters (Kant has in mind *imperfect duties*, which command the realisation of certain moral ends which can never be fully achieved in our finite lives), one can nevertheless be *imprudent while being virtuous*. Imprudence is not necessarily morally required; in fact, morality *allows* agents to reconcile their *permissible* prudential interests with moral requirements by providing a *latitude* within the compliance of certain duties. Latitude "appears" when strict compliance would turn human virtue into "fantastic" virtue, that is, an ideal of virtue that is wholly unrealistic given our human condition and limitations. In the case of truthfulness, latitude creates a "leeway" within which the agent can choose how much to disclose, as long as she remains committed to the maxim of truthfulness.

[34] MS, AA 6:434.

Although moral requirements can become quite demanding depending on external circumstances, there is in principle no inherent conflict between moral requirements and our *permissible* non-moral interests. Such conflicts are usually contingent ones. Practical judgment enables us to reconcile imperfect duties and our permissible non-moral interests in our lives. There is no duty to pursue a fantastic ideal of virtue.

It is clear that Kant recognised a *perfect* obligation to obey authority. It is also clear, given Kant's views on freedom of thought and academic freedom, that he regarded what was asked of him as an *unjust* imposition (I will reconstruct Kant's views on freedom of thought and of the pen in the next section). However, Kant's legal theory does not identify the substantive justice or injustice of a particular law or policy with the legitimacy of political authority itself. Historical governments are more or less imperfect instances of an ideal we are gradually attempting to approximate over many generations: the ideal republic (*respublica noumenon*). If substantive justice were a requirement of state legitimacy in Kant's account, no existing state would be legitimate. Kant's requirement of legitimacy is thus a minimal one, compatible with different historical instantiations and levels of progress: a government must have a representative *public* character. It is omnilaterally binding by virtue of the idea of a *united will of all* which is brought about by public representation.

As I will elaborate in the next section, enlightenment is an end every human being must seek. It can be understood as an *imperfect duty*, since it is an *end* we must adopt and can only promote to a limited extent in the course of our lives (some individuals more than others and in different ways). In contrast, obedience to authority is a *perfect duty*. I will argue that a *just* government (1) will never demand immoral actions from its citizens and (2) will not impose unjustified constraints on external freedom (for instance, on academic freedom). However, an imperfectly just state may *de facto* impose (1) and (2) on its subjects. In Kant's legal theory, there is a duty to obey such a government unless, I will argue, it demands an *immoral* action. The agent would thus be justified in engaging in civil disobedience but must be prepared to take punishment for resisting this unjust demand. The scenario I have in mind is the famous Anne Boleyn example of the Doctrine of Method of the Second Critique. An upright person is required by the prince (Henry VIII) to give false testimony against an innocent person, who will then

be condemned to death (Anne Boleyn). In Kant's example, the agent refuses to comply despite threats of loss of life and even high costs to her family.[35]

Since promoting and seeking enlightenment would be an imperfect duty, it is permissible to *postpone it* so that it does not collide with other perfect obligations. Therefore, if the king required Kant not to publish on religious matters, Kant, as a loyal subject of his majesty, *must* obey. However, it is important to note that Kant was seventy years old when he received the king's letter in 1794, and that the king was twenty years younger than Kant. Kant was thus prepared never to write on philosophical theology again. Nevertheless, Kant's *reservatio mentalis* shows that he had the *hope* things would end up otherwise. In fact, Frederick William II would die in 1797 at age fifty-three.

Unlike Baumgarten, who recognised the idea of a lie of necessity (*Notlüge*) to save one's own life, Kant ruled out a permission to lie regardless of the nature of the circumstances.[36] He also rejected the notion of right of necessity accepted by his natural law predecessors such as Grotius and Pufendorf. Necessity thus gives rise neither to permissions, nor to rights. Nevertheless, I will argue that latitude may play an *analogous* role to the lie of necessity, with the advantage that, with luck, one would be able to protect oneself without violating moral commitments.

In the next section, I will argue that although Kant did not think he had a right to disobey legal authority, the king was nevertheless denying him and all others a fundamental right: the *freedom to think*. Because this right was being unjustly denied by political authority, Kant saw himself justified in restricting himself to the *letter* and not to the *spirit* of the oath.

Freedom of Thought as Freedom to Think with Others

> Thinking for oneself means seeking the supreme touchstone of truth in oneself (i.e., in one's own reason); and the maxim of always thinking for oneself is ENLIGHTENMENT …. To make use of one's own

[35] KpV, AA 5:277–278.

[36] S. Bacin, "The Perfect Duty to Oneself Merely as a Moral Being," op. cit., p. 248, footnote 21.

> reason means no more than to ask oneself, whenever one is supposed to assume something, whether one could find it feasible to make the ground or the rule on which one assumes it into a universal principle for the use of reason. This test is one that everyone can apply to himself; and with this examination he will see superstition and enthusiasm disappear, even if he falls far short of having the information to refute them on objective grounds.[37]

Thinking for oneself is an *ideal* for Kant. It is something we must strive towards and seek to approach as much as possible, as it may never be fully realised. But what exactly is thinking for oneself? Philosophers before Kant have identified the ideal of enlightenment with the acquisition of knowledge in a theoretical sense. It means acquiring genuine knowledge, free from superstition and the imposition of religion and following correct methods. Originally, enlightenment was thus an epistemic project.[38] In contrast, enlightenment for Kant is not merely theoretical; it presupposes a specific attitude and has an essentially *practical* character.[39] Thinking for oneself requires the courage and strength to liberate oneself from the domination of others in matters of thought, and daring to make use of one's own understanding. Above all, thinking for oneself presupposes the willingness to take *responsibility* for one's beliefs and ideas. As Kant notes, it is much easier and more comfortable just to let others tell us what to think and do, since thinking for oneself requires intellectual effort and being fully responsible for one's opinions and behaviour. This is why thinking for oneself is compared to achieving *majority* (*Mündigkeit*), while the person who is unwilling to think for herself can be considered a *minor* when it comes to her own beliefs and conduct. Enlightenment for Kant is a form of progress, based on what he takes to be the vocation of human beings: freedom, i.e. autonomy (you cannot separate the two concepts in Kant's conception; they go hand in hand). Enlightenment is thus the way human beings can evolve from dependent children into fully responsible, autonomous adults, in the strict sense, not merely biologically. This growth is not only intellectual;

[37] WDO, AA 8:146–147, footnote.

[38] See J. Locke, *An Essay Concerning Human Understanding*, ed. P.H. Nidditch, Oxford University Press, Oxford 1975, Bk. 1, Ch. 2, which introduces the idea that knowledge must be an achievement of the subject herself and should not be taken over from others.

[39] See R. Brandt, *Immanuel Kant—Was bleibt?*, Felix Meiner, Leipzig 2010, p. 178.

it requires the willingness to live up fully to one's vocation as a human being.

Although thinking for oneself is central, enlightenment in Kant's conception is not an individual task. It is ultimately a collective enterprise. One swallow does not make a summer and a few isolated enlightened individuals do not bring about an enlightened society. As Reinhard Brandt observed, an enlightened individual would be an isolated manifestation, which may not make any particular impact on others and on society. If enlightenment is to become a *driving social force*, it must be socially embedded, and this presupposes legal institutions which can if not positively promote, then at least *not forbid* the collective process and culture of enlightenment. In this way, enlightened individuals can gradually become the rule rather than an exception.[40]

In Kant's view, enlightenment requires three stages: to think for oneself; to think while adopting the perspective of others; to think at all times in unity with oneself.[41] Thinking for oneself is thus merely the *initial* moment of enlightenment. It corresponds to the category of substance in Kant's table of categories, and to the Ulpian formula *honeste vive* (which is rendered by Kant as *be a rightful human being!*). Thinking for oneself is to lay the foundations for the autonomous subject of thought and action, as opposed to being uncritically led by the opinions and guidance of others. Thinking for oneself is thus the first step towards autonomy in thought, as opposed to the heteronomy implicated in the (non-)use of one's own understanding. The second stage requires the ability to enter a relationship with another, in which the subject takes up another's perspective to understand her thinking. This corresponds to the category of causality and to the second Ulpian formula *neminem laede* (*harm no one!*). The third and final stage presupposes the former two. It means thinking in unity with oneself while at the same time being able to think with others. It corresponds to the category of interaction or community (*Wechselwirkung*), and to the third Ulpian formula *suum cuique tribue* (*give each what is theirs!*). The sequence of those stages is relevant, they are not interchangeable. The last stage is a synthesis of the former two, and thus requires the first two steps in their respective order.

[40] Ibid., pp. 185–190.

[41] KpV, AA 5:294, and ANT, AA 7:200.

Enlightenment as a collective enterprise is only possible through a public culture of reflection and judgment. This is necessary for thought to be free of ideology and fabricated myths, and for public discussion and exchange of ideas to be possible. Neither the church nor the government must hinder this public culture. During the reign of the enlightened monarch Frederick the Great, Kant noted that although they did not yet live in an enlightened age, they lived in an age of enlightenment (i.e., a time in which the conditions of enlightenment were made possible).[42] Because he respected freedom of expression, Frederick the Great enabled the development of a lively academic scene. As Kant notes, although private individuals ought to obey the law (in their public roles and social functions), they nevertheless must be allowed the freedom to express their thoughts and exchange ideas as academics. The government can benefit from their advice, and thus should not regard freedom of thought and of the pen as a threat to political order. In *A Letter Concerning Toleration*, Locke argued for freedom of thought on the basis of the pluralism resulting from thinking. No one really knows whether she has true beliefs; this is why tolerance is necessary.[43] In contrast, in *What is Enlightenment?* Kant argues that an enlightened prince (*Fürst*) would decline the arrogant name of tolerance (*den hochmüthigen Namen der Toleranz*), and see it as his or her *duty* to accord individuals true freedom in religious matters.[44]

Kant thinks that the purpose of thought is the search for truth. We cannot think correctly unless we bring the process of thinking closer to truth as a regulative ideal. This will involve respecting the rules of thought, which are none other than the rules of reason itself. This

[42] WA, AA 8:40.

[43] "But let us grant unto these zealots, who condemn all things that are not of their mode, that from these circumstances arise different ends. What shall we conclude from thence? There is only one of these which is the true way to eternal happiness. But, in this great variety of ways that men follow, it is still doubted which is this right one. Now, neither the care of the common-wealth, nor the right of enacting laws, does discover this way that leads to heaven more certainly to the magistrate, than every private man's search and study discovers it unto himself" (J. Locke, "A Letter Concerning Toleration," in I. Shapiro (ed.), *Two Treatises of Government and A Letter Concerning Toleration*, Yale University Press, New Haven and London 2003, p. 229).

[44] WA, AA 8:40.

process of self-correction and improvement in the thought process is only possible in community with others. The exchange of ideas with an academic purpose is the way of achieving correctness in thinking and ultimately—the ideal of thinking for oneself. Freedom of communication (*Mitteilungsfreiheit*) is the condition for freedom of thought. Because freedom of thought requires the community with others, denying the possibility of an exchange with others is the same as denying the freedom *to think*.

Enlightenment is thus only possible in a society which treats individuals in a way that is consistent with their *rational vocation* as human beings. Ideally, this will be a society with a representative system, with division of powers and equal legal status for each citizen. The process of enlightenment will thus inevitably lead to a specific form of political constitution: a *republican constitution*. Enlightenment thus makes political progress possible through gradual reforms which may require the work and insights of several generations.

Anyone trying to hinder the progress towards greater autonomy in the ethical and legal domains can be regarded as violating the vocation of humanity. Kant thus attempts to reconcile respect for political authority and the preservation of fragile existing political organisations with the idea that humanity must be allowed to make progress in their insights, and towards better political institutions.

Conclusion: *Caesar Non Est Supra Grammaticos*

One can now make better sense of Kant's apparently immoral *reservatio mentalis* when promising to Frederick William II never to write on philosophical theology again. It must be emphasised that Kant could not be certain if he would outlive the king; in fact, the opposite was probable, given Kant's advanced age at the time. Obedience to authority thus came at a high price, and Kant was prepared never to publish on religion again during his own lifetime. However, although the king had the legitimate authority to restrict Kant's freedom of the pen according to Kant's own theoretical standards, such a demand was nevertheless incompatible with the higher vocation of humanity. Kant's *reservatio mentalis* was thus an attempt to reconcile both duties.

Efforts to shield religious beliefs and practices from scrutiny and criticism for all times make the progress of humanity impossible in matters of truth, and this is something no rational being can willingly deprive

herself of. The monarch should not place herself above the experts by attempting to control and hinder the achievement of better knowledge. What a people cannot impose on itself should not be imposed on a people.[45] A people could not rationally choose to be deprived of making progress in matters of thought and truth. Since the monarch imposed an unjust demand, it was not only permissible, but indeed *required* to regard such an unjust imposition as expiring with its author. One may need to postpone enlightenment, but no one has a duty to renounce it for oneself and for posterity.[46]

I have argued that Kant's use of the latitude of disclosure compatible with the commitment to a maxim of truthfulness can be seen as a way to follow the perfect duty to obey a comparatively unjust, historically contingent authority while maintaining the commitment to the moral end of enlightenment. This is a non-ideal scenario; in an ideal republic, there would be no need for state interference in academic freedom. But until we have arrived at something close to the ideal *respublica noumenon*, moral agents must help themselves with all permissible means available.

[45] TP, AA 8:304.

[46] WA, AA 8:39.

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Kant's Moral Theory and Demandingness

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Abstract In this paper, I sketch a Kantian account of duties of rescue, which I take to be compatible with Kant's theory. I argue that there is in fact no "trumping relation" between imperfect and perfect duties but merely that "latitude shrinks away" in certain circumstances. Against possible demandingness objections, I explain why Kant thought that imperfect duty must allow latitude for choice and argue that we must understand the necessary space for pursuing one's own happiness as *entailed* by Kant's justification of one's duty to promote other's happiness. Nevertheless, becoming *worthy of happiness* has always priority over one's own happiness, even when circumstances are such that we cannot secure our own happiness without seriously neglecting more pressing needs of other persons. I conclude that Kant's moral theory calls for complementation by the political and juridical domain. Implementing just political institutions and creating satisfactorily well-ordered societies create an external world which is friendlier to our attempts to reconcile moral integrity and a happy human life.

Keywords Immanuel kant · Imperfect duties · Beneficence · Perfect duties · Demandingness

I. Do we need the distinction between perfect and imperfect duties?[1]

[1]Kant's writings are cited according to the volume: page number of the Prussian Academy Edition of Kant's Complete Works (1900-, Gesammelte Schriften, Ausgabe der Preußischen Akademie der Wissenschaften, Berlin: Walter de Gruyter). Unless otherwise stated, all translations have been taken from the Cambridge Edition of the Works of Immanuel Kant, edited by Paul Guyer and Allen W. Wood (Cambridge University Press, 1992-).

I use the following abbreviations for the individual works cited:

-GMS Grundlegung zur Metaphysik der Sitten (The Groundwork to the Metaphysics of Morals)
-KpV Kritik der praktischen Vernunft (Critique of Practical Reason).
-MS Die Metaphysik der Sitten (The Metaphysics of Morals)

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Perfect duties are injunctions to refrain from or to perform certain acts. They are strict requirements concerning more or less clearly specified actions. All act tokens falling under the description of the duty are *binding* duties: they should either be performed or refrained from. If one has a perfect duty not to wrong others, one must refrain from performing all the act tokens matching the description "wronging others" or perform all those act tokens whose non-performance would imply harming others. Thus, it is not up to the agent to choose whether to perform or refrain from performing a strictly required act token: refusing to do what is strictly required amounts to a violation of duty. This is made explicit by Kant's *contradiction in conception test* of the *Groundwork* (GMS IV: 421–423).

Imperfect duty, in contrast, may leave some latitude for choice. This means that an unlimited amount of act tokens A1, A2, A3… may fall, for instance, under the duty of beneficence, but doing a specific act instead of others does not imply a violation of duty, only, to use Kant's own expression, "lack of merit" (*demeritum*, MS VI: 390) in regard to the act tokens which were not performed.

Kant's paradigmatic imperfect duty is the duty of beneficence. Even though it is possible to think of a world in which a maxim of indifference would be a universal law, Kant argues that as rational agents we cannot consistently *will* that such a maxim become a universal law (GMS IV: 423). Recognizing imperfect duties seems necessary for two reasons. Firstly, not recognizing them would imply making morality excessively demanding, perhaps even unbearable for human beings. No matter how much we do in matters of beneficence, we are never "done" with it. It is therefore not possible to release oneself forever (or even temporarily) from the duty by doing a "sufficient" amount of beneficent acts. Secondly, Kant scholars such as Marcia Baron have shown that imperfect duties can help us not only demystify the idea of *supererogation* but ultimately *replace* that notion by that of imperfect duties (Baron 1987; Hale 1991). Supererogation has been regarded with suspicion by moral theorists, who believe that accepting that some morally worthy actions are "beyond duty" can be used as an excuse for ignoring moral requirements (Wilson 1993).

According to Kant, perfect duties must always be given priority over imperfect duties. Since we are not obliged to act on every possible act token falling under an imperfect duty, foregoing one opportunity to comply with an imperfect duty for the sake of satisfying a strict requirement does not amount to a conflict of duties. In contrast, choosing to comply with an imperfect duty when this presupposes violating a strict requirement would amount to a positive violation of duty and undermine the moral worth of one's conduct. If helping you would require stealing something or murdering an innocent, then I must not help you.

The normative priority of perfect over imperfect duties seems to contradict some common moral intuitions. For instance, it seems absurd to think that one should not save persons from a burning house if doing so would require using the neighbor's garden hose without her permission, or that I should not save a drowning child because that will entail breaking a promise. Many instances of beneficence intuitively seem more pressing than certain instances of respect for private property or other perfect duties (Statman 1996). These are cases when we would have a *duty of rescue*. Kant however does not seem able to derive duties of rescue from his contradiction in the will test. Our duty to help is an imperfect one: it comes with a latitude for choice which seems out of place in emergency situations, when another person's life is at stake. Kant seems either to have ignored duties of rescue or to have conflated them with duty of beneficence in general.

If we take these intuitions seriously, it seems that it is not the specific structure of the duty which determines our judgment of what to do in a certain circumstance. This raises the suspicion that practical deliberation can do without the distinction between perfect and imperfect duties. A second, more serious worry follows from the first one: if imperfect duties do not always allow us latitude for choice, it could be that we are wrong when we think it is

permissible to forego an opportunity to help. If the pressing needs of others can make the duty to help stronger than some perfect duties and we are living in a world of urgent need, then it is possible that we are being more lax about the duty of beneficence than we are aware of.

Kant himself did not seem to think his conception of beneficence could be overdemanding precisely because he believed in the distinction between perfect and imperfect duties. However, he believed that *perfect duties* could be very demanding, depending on external circumstances. I will discuss the demandingness of perfect duties in the last section of this article and argue that it can be reduced with the implementation of just political institutions, although not altogether eliminated. In the following, I will concentrate on Kant's understanding of the duty of beneficence and make the case for the following claims: (1) the distinction between perfect and imperfect duties is not superfluous; (2) it is possible to give a Kantian account of duties of rescue without undermining this distinction; (3) the latitude of imperfect duties can deflect demandingness objections against a Kantian duty of beneficence.

Most cases which rule out latitude for compliance with imperfect duties are instances of the duties of aid or rescue, which Kant does not explicitly distinguish from beneficence in general. Kant argues in the *Doctrine of Right* that the concept of right "does not signify the relation of one's choice to the mere wish (hence also to the mere need) of the other, as in actions of beneficence or callousness" (RL VI: 230, my emphasis). As stressed before, Kant seems unable to account for the stringent requirement to help in emergency situations; he treats emergency situations in the same way as instances of the duty of beneficence. If there is a *juridical* duty of rescue, that is, if the duty of rescue is institutionalized by one's state, the case would be settled for Kant. The duty of rescue would be a *perfect* duty whose "ground of obligation" could be considered more stringent than the duty to respect private property, for instance. However, I will explore the possibility of a *moral* argument for duties of rescue and will put this possibility aside.

Daniel Statman has argued that when a perfect duty is "overridden" by an imperfect duty in accordance to our common intuitions, the imperfect duty in question must actually be a perfect one. If saving persons from a fire requires us to use the neighbor's garden hose without her permission, saving them not only has priority over respecting private property, but is a perfect duty. While this view at first seems to leave Kant's understanding of perfect duties as more fundamental than imperfect ones intact, Statman goes on to argue that the characterization of a duty as perfect or imperfect is done ad hoc, "on the basis of the weight of the conflicting duty, instead of independent considerations concerning the nature of the duties at stake" (Statman 1996). In other words, it is not the specific "logical structure" of a duty which determines which action should be given priority in a certain situation.

Although under certain circumstances it may *seem* that imperfect duty overrides perfect duty, I will argue that it is only the *stringency* of these duties which may vary under exceptional circumstances. The subordination of imperfect to perfect obligation, however, is maintained and still plays an important regulative function for practical judgment. This is the subject of the next section.

1 Why Latitude Matters and When It Shrinks Away

While in the first formulation of the categorical imperative in the *Groundwork* Kant used the termini perfect and imperfect duties, at the transition from the first to the second formula, Kant changes his terminology. He now speaks of *necessary* or *owed* duty (*nothwendige Pflicht gegen sich selbst*, IV: 429, l. 15, *nothwendige oder schuldige Pflicht gegen andere*, Ibid, l. 29) and of *contingent* or *meritorious* duty (*zufällige/verdienstliche Pflicht gegen sich selbst*, IV: 430, l.10). It might seem

puzzling that Kant associates the distinction strict/wide duty with the predicates *necessary*/*contingent*. Given Kant's standard definition of duty as the necessity of an action from respect for the law (GMS IV: 400 l.18), one might wonder how a duty can ever be contingent. According to Timmermann, wide duties are contingent not because they depend on an existing inclination of the agent (in which case they would no longer be duties, but a hypothetical commands), but because token duties depend on particular occasions to apply (for instance, from the fact that someone else is in need). They are not "less obligatory" than perfect duties (Timmermann 2010)

Contingent duties are dependent on the specific circumstances in a way necessary or strict duties are not. The necessity of acting on a certain act token identified by the agent as a beneficent action will depend on the specific circumstances, for instance, the degree of need involved, her position to give help, whether there are other persons responsible or more able to help, etc. Depending on how pressing the conjunction of all these factors is, one has either an opportunity to act beneficently or no latitude at all. As I will stress later, latitude refers to the *stringency* of the duty and not to the choice of means available to the agent.

Kant often equates the distinction pairs *strict/wide* with *juridical/ethical*, perhaps giving the impression that they are synonymous. Although juridical duties are all strict,[2] ethical duties can be both strict and wide (although wide duties are the paradigmatic ethical duties). There are also variations in the wideness of different imperfect duties. The duty to work towards greater moral perfection is presumably stricter than the duty to develop one's talents, (MS VI: 446) just as the ethical duty of respect for others is more strict than the ethical duty of love (MS VI: 449–450). The distinction strict/wide thus seems to refer to the *type of necessity* or the *stringency* of the obligation in question, whereas the juridical/ethical distinction addresses the aspect of *necessitation* (*Nötigung*), i.e. whether only *internal* or also *external* necessitation (i.e. coercion) is possible.[3] The stringency of wide duties can thus vary depending on the context, a feature belonging to the *latitude* of these duties. Therefore, Kant's distinction between perfect and imperfect duties is less rigid than Kant's critics assume and could accommodate variations in stringency without undermining itself.

When is there is no latitude for choice? My view is that latitude shrinks away when refusing to help would amount to *giving up* one's commitment to beneficence *altogether*. While bypassing opportunities to help is mostly compatible with a maxim of beneficence ("sorry, I don't have time to help you with your garden right now, but next time!"), there are circumstances when acting otherwise would necessarily imply that the agent has altogether given up a maxim of beneficence. Making use of the latitude of wide duties is permissible in Kant's account as long as one remains sincerely committed to the moral end. Certain circumstances, however, put the sincerity of one's commitment to the moral end *under proof*. Under these circumstances the duty to help acquires a *stringency* that is identical to that of perfect duties. This is because even though beneficence is an imperfect duty, the requirement to adopt a moral end is itself a strict one: what is "in the manner of imperfect duty" is *discharging* the duty, that is, the promotion of the end of beneficence. As rational finite beings we are strictly required to adopt the happiness of others as our end, but since this involves the furtherance of an end[4] (and

[2] The exception is wide duties of right, which cannot be externally enforced. See MS VI: 233.
[3] See Mary Gregor 1963 p. 97.
[4] Another way of talking about the adoption of a morally required end is to talk about the adoption of a *maxim* of promoting obligatory ends (as opposed to a maxim of indifference or of neglect of one's natural talents). This is the way Kant formulates the first principle of ethics: act according to a maxim of ends (*Maxime der Zwecke*) which it can be a universal law for everyone to have (MS VI: 395). The maxim of ends of ethics is contrasted to the maxim of actions characteristic of the domain of right (*Recht*, cf. VI: 230 ll. 29–30).

not simply the omission or commission of certain acts), we need latitude for choice, so that we can comply with other duties and have the necessary space for the satisfaction of permissible needs and non-moral interests.

As Kant notes, "if the law can prescribe only the maxim of actions, not actions themselves, this is a sign that it leaves a latitude (*latitudo*) for free choice (*freie Willkür*) in following (complying with) the law, that is, that 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 VI: 390). The ways in which I can comply with my maxim of beneficence seem open to me. Because I can choose when, how and how much to comply, foregoing act tokens which would fall under the description "beneficence" are not violations of duty; they just reflect the fact that I have chosen to comply with my duty of beneficence in a different way; insofar as I remain sincerely committed to the moral end, it poses no greater difficulties.

Now, I do not claim that the way one should help becomes determinate in emergency cases, while it is otherwise indeterminate. What is clear in the circumstances is only that help we must, here and now. The requirement to help is stringent in the sense that under the circumstances we cannot chose whether to help or not (although we could still decide between one act token or another, say, ringing up the ambulance, screaming for passers-by to assist you with the injured person or applying your first aid knowledge by yourself). It is important not to confuse the latitude / stringency of the duty with the possibility of choosing the means to help. Even perfect duties allow for choice in the means of compliance (for instance, I can pay my debt by cheque, debit or with any combination of paper money and / or coins, even though using only coins is likely to drive the creditor mad). If that is the case, what makes a duty stringent or gives rise to latitude is not simply the availability of different means to discharge the duty.

My duty not to lie is stringent and not complying with this duty here and now amounts to a violation of duty. It is not permissible to lie to you now because I shall be discharging my duty of truthfulness to someone else tomorrow after breakfast. Stringency has to do with the question *when* to discharge the duty. We cannot put off compliance, with the thought that we are going to discharge it later in this or that way.

In contrast, beneficence does not *always* impose a stringent obligation to act in a particular circumstance. But it *can* become stringent. While perfect duties are *always* stringent across different scenarios, imperfect duties can vary in stringency depending on the circumstances. If so, when does beneficence become stringent, to the point of leaving us no latitude for choice? I will argue that stringency in the case of beneficence signalizes that not to act here and now would be incompatible with the description of an agent who is committed to the end of beneficence.

It is important to remember that the commitment to any end excludes certain actions and attitudes as incompatible with one's commitment to that end. If I have decided to further my musical talent and become a professional pianist, any activities compromising my ability to play are off the list. For instance, becoming a hobby boxer or chopping wood in my free time would show that I no longer take serious my end to become a professional pianist. Since not helping someone in great need at very little cost to ourselves when possible is incompatible with having adopted the end of beneficence, not helping would amount to giving up the moral end of beneficence. Stringent occasions for help are therefore situations in which voluntary, conscious non-compliance would undermine our commitment to a moral end. Just as the pianist who irresponsibly hurt his fingers, you can no longer say you are sincerely committed to beneficence. This of course excludes cases of ignorance or inability to offer help.

But what if some perfect duty prohibits or imposes constraints on one's conduct in an emergency situation? For instance, if helping the victims of a car crash nearby makes it necessary that I break into your house and take whatever I need to help the victims? Intuitively, one might think that I would be morally permitted to violate private property (whether this is legally the case is another matter), but not to murder you if you are in the house and refuse me entry. Strictly speaking, we are not *permitted* to violate perfect duty; we might be merely *excused* to do so, given the circumstances. I would be violating a perfect duty if I broke into your house and used your phone to save the victims of the car crash, but the point is that from a moral perspective I may be retrospectively *excused* for doing so.[5]

Perfect duties are not "trumped" by the imperfect ones in emergency situations. They are *violated*, but with an *excuse*, namely that the circumstances were such that although our duty to help is very stringent, perfect duties did not allow us to comply with imperfect duty. However, there is a point when violating perfect duties is no longer excusable and this is not only when violating perfect duties would be strictly necessary for complying with the stringent imperfect duty. Although the violation of a perfect duty must be strictly needed for saving the victims, saving the victims is not the only duty we have. Our conception of the perfect duties there are still imposes constraints on the means "morally available" to us for saving the victims. This shows that the subordination of imperfect to perfect obligation is still maintained at a broader level and plays a regulative function for practical judgment. It accounts for the intuition that although we may be excused for violating some perfect duty to comply with a duty of rescue, there is a point *we may be excused not to comply with the duty of rescue*.

We can summarize the points made so far about stringent imperfect duties as follows:

1. Willfully not acting would be incompatible with the description of an agent who is committed to the end of beneficence. There is no latitude for choice;
2. However, the duty to help is still an imperfect duty because it may be limited by perfect duties;
3. One may need to violate some perfect duties in order to discharge one's stringent duty to help; given the circumstances, we may be morally excused for doing so.
4. But there is a limit to how far we can violate perfect duties and be excused. Other perfect duties still limit one's conduct and there is no trumping relation.

One might object to the idea of *excusing* a violation of a perfect duty in order to save a person's life. Why not acknowledge that agents are *permitted* and not merely *excused* to violate these duties? Granting an agent a permission to do X entails an express recognition that the agent is justified in violating the norm. In contrast, excusing the agent may suggest that it would be better if the agent had not violated the duty, although her violation can be condoned, given her circumstances (perhaps she was too distressed and not fully accountable for her conduct at the time). Intuitively, there is a great difference between someone who breaks into a house to save someone's life and a person who does the same action to avoid some inconvenience, although her action is excusable. It seems that *excusing* someone is incompatible with the idea that she has done nothing *wrong* in the first place.[6] I will argue that the agent has done something wrong, even though not helping the victim is not an option either.

[5] Depending on the existing laws of a society I may be legally sanctioned for violating private property or contracts, even if addressing emergency situations.

[6] I thank an anonymous referee for the BSET for this point.

Positive laws are needed for maintaining a condition of public justice. Once they are laid down in an equally binding manner for all agents, it is not up to individuals to decide for themselves when they should uphold or make an exception to these laws. This would undermine the possibility of public justice. Kant himself acknowledges that strictly adhering to positive laws will sometimes generate unfair outcomes and yet we must abide by what is publicly laid down as right (MS VI: 234–235).[7] Kant's point is that we need an omnilateral system of laws which would collapse if everyone took the liberty to reinterpret the law subjectively. Therefore, there is a very important reason for insisting upon the unconditional character of perfect duties. However, courts of justice can decide to excuse agents for violations in emergency cases or to formulate clauses permitting the violation under certain conditions.

There is a clear difference between taking your coat by mistake and taking your coat because I want it for myself. None of these intentions can make your property right in that coat disappear, although they will be relevant for accessing my action retrospectively. Now, if I take your coat to save the life of someone dying of cold, it is still the case that I have violated your property right in that coat. Your right does not disappear nor is it "trumped". We might however agree that in this case I should be *excused* for taking your coat.

2 Why Latitude Matters

While some Kant scholars interpret latitude as allowing the agent to decide when, how and how far to comply with imperfect duty,[8] other scholars have adopted a more rigoristic interpretation of imperfect duties, in which the notion of latitude for choice is restricted. One of the problems which more rigoristic approaches to latitude seek to address is the worry that acknowledging latitude for choice in the case of imperfect duties would lead not only to a minimalistic, self-indulgent conception of morality, but also to the dangerous belief that compliance with imperfect duty may be considered *supererogatory*. Doing anything that goes beyond what is strictly owed to others would be considered "good but not required". As Marcia Baron notes, "one can puff up with self-satisfaction at having done something extra for someone; it is not as easy to feel smug and superior about doing what, one believes, anyone in those circumstances is morally required to do."[9] This view is a good expression of Kant's critical attitude in regard to the romantic ideals recommending extraordinary heroic acts (cf. KpV V: 155).

Since in Kant's moral theory moral worth depends on whether an action is morally required and has been done from the motive of duty, the idea of something being morally good but not required seems a conceptual impossibility, at least in Kant's theoretical framework. Although not ill founded, Kantian concerns about admitting the category of supererogation should not lead us to adopt an excessively restrictive understanding of the latitude of imperfect duties, against Kant's own intention. Once we understand the role the notion of latitude is intended to play in Kant's account of duty, these worries will be dispelled.

[7] For a discussion of the tension between positive laws and equity judgments in Kant's legal theory see my "When the strictest Right is the greatest Wrong: Kant on Fairness". Forthcoming in *Estudos Kantianos*, 1/2015.
[8] H. J. Paton, *The Categorical Imperative. A study in Kant's Moral Philosophy*, Mary Gregor, *Laws of Freedom*, Blackwell, 1963, and more recently Thomas E. Hill, "Meeting Needs and Doing Favours" In: *Human Welfare and Moral Worth*, *Kantian Perspectives*. Oxford University Press, 2002
[9] Marcia Baron, *Kantian Ethics almost without Apology*, p. 37

Jens Timmermann interprets latitude of choice as restricted to the possibility of choosing the *means* to satisfy duty in a certain situation, since the choice of means falls outside the scope of moral deliberation. Latitude thus only applies to rules of skill (technical imperatives) related to one's duty.[10] According to Timmermann, we have a *strict* duty to help when there is only one permissible course of action open to the agent in a given situation. In this case, it is not possible to choose the means to beneficence "according to one's preferences," that is, there is no latitude for choice.

Timmermann's interpretation is problematic. Imagine someone going out to work in the morning who finds a severely injured person lying on the pavement (a pedestrian who was hit by a car on the nearby road). It is clear to the agent that she has no option other than to help. Nevertheless, she might still be unsure what means to take, although help she must: what should she do first, call the ambulance straight away or perhaps first see that the person is not choking on her own blood? Should she perhaps first cover the injured person's body with a warm blanket, since this is a cold January morning, and then call for help? Or should she perhaps just start screaming for help as loud as she can, so that the neighbors will come and perhaps make a better decision? Latitude in Kant's account refers to the *stringency of the duty* relative to the circumstances and not to the range of possible means for complying with the duty. What is "not an option" in this case is *indifference* to the injured person's condition rather than any specific way of helping. When the duty is especially pressing, latitude for doing *anything else which is not helping* shrinks away, even though we are still dealing with an imperfect duty. On the other hand, it is possible that helping in a certain case is only *effective* through a particular action. If I am dying of thirst, the only useful thing you could possibly do is to give me some water. If you *know this* and choose instead to make a generous bank transfer on my behalf, it seems that you were not really committed to helping me. Your duty is to try to help me effectively. But this is a "technical" aspect of my action and not what latitude is all about.

Timmermann's interpretation might suggest that we may pursue our happiness only when there is no other duty to be discharged. As soon as one perceives an opportunity to help, one has a *stringent* duty to help, unless other moral principles speak against it. Latitude is only about which means to take in order to help: but if no perfect duty speaks against it, help we must. But my question is: since one has a duty to actively *promote* a moral end (in this case, the happiness of others), should we not *look* for opportunities to help when no opportunity presents itself? The world is full of persons in need, many of them in urgent need and I know this. How can we know *when* we are finally permitted to devote ourselves to our own happiness? Further, when the pursuit of non-moral ends precludes satisfying the more pressing needs of others we also have what I will call the *lexical asymmetry problem*. As Timmermann puts it, moral goodness is "infinitely precious."[11] The question is thus: how can my happiness, which is merely *permitted*, ever compete with what is *morally necessary*? In other words, how can we ever find space for the "merely permitted", when we could be realizing moral goodness?

Here we can enumerate all those aspects of Kant's moral theory which permit us to limit compliance with beneficence and perhaps clear Kant's moral theory of the charge of being overly demanding: firstly, we must take into account the indirect duty to promote one's happiness, since a certain degree of satisfaction with one's condition keeps us from temptations to violate duty. Secondly, we should only adopt the permissible ends of others (although it seems implausible to

[10] Jens Timmermann, "Good but Not Required? Assessing the Demands of Kantian Ethics". *Journal of Moral Philosophy* 2.1, 2005.
[11] Timmermann, op. cit., p.23.

assume that not having to help sloths, bank robbers, murderers, and exploitative people to achieve their immoral ends would considerably reduce opportunities to help). Thirdly, we should avoid making others dependent; we should only help until agents can restore their ability to provide for themselves. There is also the duty to cultivate one's talents, which would permit (if not *require*) us to invest some resources in our person. Additionally, Timmermann argues that one should not let the morally lax free ride on our good works (even though he acknowledges that in Kant's account no one would be exempt from duty if others happen not to do their share). Despite these limiting conditions, it seems that we have still not justified *why* we are not giving up our commitment to the happiness of others when we *recognize* an opportunity to help and deliberately forego it, despite the fact that we are *always under the obligation to help*.

In order to solve this problem, we must recall why we have a duty to help others in the first place. The condition for the permissibility of the pursuit of one's own happiness is that we also adopt the happiness of all others as our end. This means that a person who sincerely adopts the happiness of others as her end is *permitted* to be beneficent to herself (MS TL § 27 at VI: 451). Marcia Baron argued that these considerations do not rule out a "sterner" view of the latitude of imperfect duties. The quotation at VI: 451 means only that "we are all equals and there is no ground for regarding as morally irrelevant one's own happiness."[12] In her view, what will lead us to adopt a more restrictive view of the latitude of imperfect duty is the duty of *self-perfection*. According to Baron, the duty to improve oneself morally will influence the way we carry out the duty to promote each other's happiness. As she puts it, "the full spirit of the [imperfect duty of making the ends of others my own] is not brought out until that duty is seen as shaped and "stiffened" by the duty to improve oneself morally."[13] By self-scrutiny, the agent will become alert to the fact "that she has a tendency to avoid friends when they are ill or depressed or in mourning" and has the opportunity either to improve herself or to be beneficent in different ways. Baron's interpretation may suggest that agents who make use of the latitude of imperfect duties are not perfecting themselves when they could do so, and are failing to live up to certain moral standards. No significant role seems to be assigned to the notion of latitude in the moral life (apart from the view that it ought to be restricted by self-perfection). It is also important to note that self-perfection in Kant's account is "narrow and perfect in terms of its quality but it is wide and imperfect in terms of its degree, because of the frailty *(fragilitas)* of human nature." In regard to its object, the moral ideal one ought to realize, it is narrow, but in regard to the subject, whose duty it is, it can only be considered an imperfect duty to the self (MS VI: 446). Although more strict than other wide duties, self perfection focuses on the *purity* of our motives and does not necessarily imply that we should maximize opportunities of making ourselves more perfect and thereby reduce latitude for compliance with beneficence.[14]

Since beneficence to oneself is not a duty, but merely a *permission* entailed by the adoption of the happiness of others as one's end (MS TL VI: 451), it is necessary that the principle commanding beneficence to others involves *latitude* for compliance. We have the duty to adopt the happiness of others as our end because we naturally want our own happiness. If commitment to the principle would exclude the possibility of pursuing our

[12] Marcia Baron, op. cit. p. 93.
[13] Marcia Baron, op. cit. p. 100.
[14] Cf. Thomas E. Hill, "Meeting Needs and Doing Favours" In: *Human Welfare and Moral Worth*, Oxford University Press, 2002, pp. 209–210.

own happiness,[15] a maxim of benevolence would be *self-contradictory*. We *must* acknowledge latitude because while there is no upper limit to the demands of wide duty, the promotion of our own happiness is *not morally required*. We are required to promote the moral end of beneficence and self-perfection ad infinitum, not because we must *maximize* virtue, but because we are *always* under obligation and can never "be done" with the duty by doing a certain amount of obligatory acts (not even by doing the best we can our whole life long).[16] Latitude creates the required space for the satisfaction of the agent's most important needs compatible with a genuine commitment to the promotion of the happiness of others, what Kant calls one's true needs. A permissible pursuit of happiness must thus *necessarily* be embedded in the context of our moral commitment to the happiness of others, in the form of latitude for choice *granted* to the agent by the principle of beneficence. To deny genuine latitude for choice in the case of the duty of beneficence is thus to undermine its very *raison d'être*.

When we deliberately forego an opportunity to comply with the duty of beneficence to pursue our own happiness, this is not necessarily morally objectionable; this is not because we are making "exceptions" to the duty of beneficence in the name of inclination. We are invoking a permission, which is implicitly built into the principle of beneficence, qua wide duty. This permission is expressed in the way we *integrate* obligation in and *structure* our lives and not on an ad hoc basis: our different maxims of imperfect duty, personal projects and preferences all shape the way we lay out (or interpret) the duty of beneficence in advance. It is therefore possible to have more than one correct answer to the same moral problem. Moreover, *different agents* may have *different (correct) answers*. As Barbara Herman argues, "having made certain decisions about how to live one's life, say, ones that require the focused development of special talents, one may have closed off, morally speaking, certain ways of living with others. That is, such decisions affect not just obligations but permissions as well. We can now understand why it is that how often and how much I might offer help could in a sense be up to me and it still be the case that "I don't feel like it" is not a reason for not helping."[17]

3 A Few Remarks on the Tragic Side of Kant's Moral Theory

Learn now the wisdom of Oedipus: if a man with a
sharp blade

[15] It can be argued that one's happiness could coincide with the happiness of others. I would be pursuing my happiness in that I adopt the happiness of others as my end. Although this is possible, it is certainly not the case that one can completely reduce one's own happiness to the happiness of others. This would mean either that the happiness of others would coincide with my conception of happiness or that my happiness could be reduced to mere moral self-approval. Kant seems to rule out the first option as a conceptual impossibility: if I pursue the happiness of others as my own conception of happiness, I am not adopting the moral end of beneficence, but merely taking the means to my own happiness. As for the second, Kant explicitly rules out the plausibility of reducing *human* happiness to mere moral self-approval (KpV V: 88).

[16] Contra Hill, who assumed that by doing a certain amount of beneficent acts, the agent would accumulate a kind of moral "bonus" after which certain acts falling under the duty of beneficence would be considered supererogatory (although in a weak sense). The problem I see with this view is the assumption that one can reach the point of "having done enough", even if temporarily. Thomas E. Hill, "Kant on imperfect duty and supererogation." *Kant Studien*, 62 Vo. 1, 1971.

[17] Barbara Herman, "The Scope of Moral Requirement." In: *Moral Literacy*, Harvard University Press, Cambridge Massachusetts, 2007, p.221.

Lops off a shoot from a glorious oak and disfigures its
glorious form,
even if it can no longer bear leaves it casts a vote in its
own favour,
whether it comes at the end to a fire in winter
or, sustained by upright pillars in a master's house,
it performs a cheerless labour in an alien building,
having abandoned its native place.
(Pindar, Pithyan Ode 4, 2008)

In this paper, I have focused on the demandingness of Kant's account of the duty of beneficence. I have not yet discussed the demandingness of perfect duties in his account. That perfect duties can also be demanding is exemplified by several examples in Kant's works. For instance, Kant stresses that one must not give false testimony even if one's own life may be endangered by complying with the duty (whether one will act as duty commands is another story, KpV V: 30, 155–6). As Kant often stresses, we must do what duty commands regardless of the impact on our non-moral interests (however, when one can avoid bad consequences without being immoral, there is no reason why one should be imprudent).[18]

Kant seems to have thought that the latitude characteristic of beneficence would preclude demandingness. But if conditions are as dire as to make the need around agents more pressing than furthering their less urgent non-moral interests, then similarly to emergency situations, latitude may shrink away. I will argue that possible sources of demandingness are the same for perfect and imperfect duties in Kant's account. Even if one's conception of happiness includes only permissible ends, moral demands and the agent's happiness may still be *contingently* incompatible. The fact that morality can become very demanding is therefore not intrinsic to moral demands, but depends on how friendly or unfriendly external circumstances are in regard to moral agency.

Kant regards morality as the condition for the permissibility of happiness (in Kant's words, for the "worthiness to be happy"). Although for Kant there is a necessary conceptual link between morality as worthiness to be happy and happiness proper, "morality meets happiness" only in a contingent way in the world (KpV V: 124). The best moral agent may end up being a very unhappy person, while an immoral agent may enjoy a much more pleasant life. Kant's moral theory does not exclude the possibility of moral agents having to sacrifice their happiness completely when circumstances are very dire. This is because *worthiness to be happy* must always be given normative priority over happiness, when being moral *and* securing one's happiness is contingently impossible. All that Kant seems to offer in those circumstances are reasons to hope that God exists and will compensate us for our morally motivated sacrifices in an afterlife. Since this hope cannot be confirmed theoretically, the Kantian agent's only consolation must remain an unwarranted object of faith (KpV V: 125).

Telling the truth, keeping one's promises and being kind and helpful to others are all aspects of everyday life in well ordered societies. Instead of being a moral burden, these 'basic' obligations are more or less integrated into the lives of most agents and play a crucial role in structuring social life. However, under circumstances of political turmoil or instability (civil wars or in extremely unjust or malfunctioning polities) it can become exceptionally hard if not

[18] Kant is by no means saying that we should not care about our prudential interests when these do not collide with morality. Often, morality allows us to reconcile duty and prudential interests. For a discussion of the relationship between morality and prudence, see Pinheiro Walla (2013).

altogether impossible to comply with the simplest of these everyday duties without sacrificing one's happiness completely. Under less well ordered conditions, compliance with the most trivial moral requirements can make moral agents vulnerable to violence or manipulation by others. Although moral requirements remain the same in both ordered and badly ordered societies, it is clear that the particular social and political context makes a difference to whether morality will be too demanding or not.

Just political institutions are not meant to distribute rewards "proportional to one's moral worth," as God would presumably do in the afterlife in Kant's account of "moral faith". Nevertheless, just societies can create conditions of greater or lesser security and stability under which moral agency does not exclude human happiness and flourishing.[19] Although just institutions would not completely rule out eventual clashes between moral requirements and the possibility of a happy life, the point is that morality is not *intrinsically* incompatible with human happiness. Since overdemandingness is mostly due to contingent factors (for instance, whether there are princes who try to force subjects to give a false testimony by threatening death, cf. KpV V: 30, 155–6), reducing these factors is a political task which may not be achieved within the span of one's life but needs not to be relegated to the afterlife.

Kant suggests a similar idea in the *Conflict of the Faculties* when he identifies moral progress not with the increase in the human capacity for morality or moral intentions, but with the development and expansion of political institutions. Political institutions would "increase the *effects* of morality", that is, actions in external accordance with duty (*legality,* SF VI: 91). Although Kant does not say explicitly that just political institutions create favourable conditions for moral agency, this is clearly presupposed by his view of moral progress.

> Gradually violence on the part of the powers will diminish and obedience to the laws will increase. There will arise in the body politic perhaps more charity and less strife in lawsuits, more reliability in keeping one's word, etc., part out of love of honour, partly of well-understood self-interest. And eventually this will also extend to nations in their external relations toward one another up to the realization of the cosmopolitan society, without the moral foundation in mankind having to be enlarged in the least; for that, a kind of new creation (supernatural influence) would be necessary. (SF VII: 91–2)

The charge of demandingness has been regarded by moral philosophers as a serious objection against a moral theory. While a Kantian account of morality does not need to deny the possibility of demandingness, it can nevertheless withstand demandingness objections by pointing out that it is not its conception of morality that needs revision, but the political conditions under which agents must act. Although unfortunate circumstances do not free us from the call of duty, we are confronted to the political task of creating a world which is friendlier to rational ideals: a world in which moral agents can finally be at home.

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[19] See Barbara Herman, 'Morality and Everyday Life'. *Proceedings and Addresses of The American Philosophical Association* 74:2 (2000), pp.29–45.

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Common Possession of the Earth and Cosmopolitan Right

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Abstract: *Common possession of the earth* was a prominent idea in seventeenth-century modern philosophy. In this paper I will argue that Kant not only provides a secularized version of common possession of the earth but also radically departs from the conception of his natural law theory predecessors. I argue that Kant's account of cosmopolitan right seeks to address the same problem as Grotius' right of necessity, namely the implausibility of assuming inflexible acquired rights when this would go against the rationale for introducing these rights. However, while Grotius intended to excuse violations of private property in cases of necessity, Kant restricts his discussion to the right of host peoples to reject entrants in their territory. I show that in Kant's account, to deny life-saving occupation of space to another being who is in principle just as entitled as anyone else to any place of the earth is to *contradict* the very justification for the territorial rights of states. This is because the permission to control territory and the right of the involuntary visitor to be admitted are based on the same legal foundation or *Rechtsgrund*, namely, the original community of the earth.

Keywords: Kant, Common Possession of the Earth, Cosmopolitan Right, Right of Necessity, Territorial Rights.

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I Common Possession of the Earth in Modern Political Philosophy

To all the way was open;
The *use* of all things was a *common* right...[1]

Common possession of the earth was a prominent idea in seventeenth-century modern philosophy. It has its origins in the Christian idea of God's common gift of the earth to Humanity and accounted for the idea that although private property was a development devised by human reason, it was not contrary to natural law.[2] The notion appears in the works of philosophers such as Hugo Grotius, Pufendorf, Locke, Achenwall and Immanuel Kant. In this paper I will argue that Kant not only provides a secularized version of common possession of the earth but also radically departs from the conception of his natural law theory predecessors. While Kant preserves some important affinities with the use of the notion by natural law theorists, such as its central role in imposing limitations on acquired rights, he had to redefine the concept in order to make it compatible with his legal theory, as it is based on external freedom and not on a conception of human nature.

There has been a surge of interest in the notion of common possession of the earth in the recent debate on global distributive justice and territorial rights. For instance, left libertarians such as Hillel Steiner and Mathias Risse have found a renewed interest in the idea as a means to argue for equally shared natural resources.[3] Common possession of the earth, or the idea that all human beings have at least some minimal equal claim to the earth and its natural resources, seems promising since it can provide a non-relational argument for global redistribution or for questioning states' control of borders. However, it is important to note that although the current debate often refers to common *ownership* of the earth,

1 Seneca, quoted by Grotius, Hugo: *De Jure Belli ac Pacis / On the Law of War and Peace* (1625). Kitchner 2001, 288.
I use the following abbreviations:
DJPC Grotius, Hugo: *De Jure Belli ac Pacis / On the Law of War and Peace* (1625). Kitchner 2001.
DJNG Pufendorf, Samuel: *De Jure Naturae et Gentium libri octo / Of the Law of Nature and Nations* (1672). London 1729.
2 See Aquinas, Thomas: *Summa Theologica*. 2.2 quaest. 66 art. 2 ad 1.
3 See Vallentyne, Peter & Steiner, Hillel: *Left-Libertarianism and Its Critics: The Contemporary Debate*. New York 2000.

the notion did imply joint ownership.[4] "Possession" is thus a more appropriate term than "ownership".[5] Common possession of the earth was used to explain the normative development from individual first appropriation into a system of private property. It meant neither fully fledged property rights nor claim rights to objects. A claim right is a right to exclude others from the use of an object. In contrast, common possession of the earth gave rise merely to *use rights* in the sense of a *liberty* or *privilege*.[6] This idea has traditionally been illustrated by the theatre seat example.[7] Assuming that there are no seat reservations and that the row of seats is reserved to the class of knights, no knight has any claim to any specific seat in the theater. The seats must be occupied on a first-come basis. Once you are occupying a seat you shall not be removed from it by another knight who would prefer to sit exactly where you are. Removing you would not only violate your physical integrity (the original *suum*), but would also presuppose that some other knight has more than a mere use right and can therefore *claim* the seat you are occupying. A mere use right does not allow this. Common possession of the earth therefore explained why individuals are permitted to use objects or occupy a certain place on the earth without wronging others but have no claim to objects or places as a *right to exclude*. According to the Grotius-Pufendorf tradition, the institution of private property eventually developed from the original community of goods and its corresponding original use right because it was a more *convenient* arrangement. This is probably why Kant, following Achenwall, criticizes Grotius and Pufendorf for understanding original community as a fictitious "historical" fact (*uranfänglicher Gesammtbesitz, communio primaeva*).[8] Kant, as we will see, understands the notion as an idea of reason, having objective, that is, legally practical, reality (*rechtlich praktische Realität*).[9] Understanding the role of common possession of the earth in modern political philosophy is thus important

4 See for instance, Risse, Mathias: "Common Ownership of the Earth as a Non-Parochial Standpoint: A Contingent Derivation of Human Rights". In: *The European Journal of Philosophy* 17, 2009, 277–304. And Risse, Mathis: *On Global Justice*. Princeton 2012.

5 See Westphal, Ken: "Do Kant's Principles Justify Property or Usufruct?". In: *Jahrbuch für Recht und Ethik / Annual Review of Law and Ethics* 5, 1997, 141–194.

6 Salter, John: "Grotius and Pufendorf on the Right of Necessity". In: *History of Political Thought* 26 (2), 2005, 28.

7 This is Seneca's version of the example, used in ch. 5 of *Mare Liberum*. Seneca, *De Beneficiis* / On Benefits, M. Griffin and B. Inwood (trans.), University of Chicago Press, 2011, VII. 12.3, p. 176. Grotius also uses Cicero's version in DJPC, II.II.2, 71. Cicero, *De Finibus* / On Moral Ends, Julia Annas (ed.), R. Woolf (trans.), Cambridge 2001, III. 67, 86.

8 MS, RL, AA 06: 262.31.

9 MS, RL, AA 06: 251.02.

not only for grasping how this idea can be rehabilitated in contemporary debates, but also for understanding (1) how Kant departs from the Grotius-Pufendorf tradition, (2) his specific contribution as an alternative to this tradition and (3) its potential for current debates such as climate change and ecological migration.

A common assumption of Christian natural law theory is that *God* gave the world to everyone in common. The world can be seen as the common bounty of humanity, whose resources can be used by each to satisfy their needs. This leads us to another fundamental assumption of natural law theory: that the basic needs of living beings (their "fundamental desires") provide the *content* of natural law. Natural law includes whatever is necessary for self-preservation.[10] However, as I will show, this is Kant's major rupture with his natural law predecessors, although he still preserves several elements of the natural law tradition (which he redefines). Kant not only *secularizes* the idea of common possession of the earth; he also does away with the notion of *needs* as the source of natural law (which is the law of *reason*), since in his account empirical facts about human nature are insufficient to *generate obligations* and unable to *justify coercion* in a way compatible with the freedom of all.

Hugo Grotius used the idea of common possession of the earth to explain why every individual had an *original* use right to the resources of the earth. The use right is "original" because no deeds were required in order to give rise to the right: we are born with it as God's creatures. Because the goods of the earth were given to us in common, individuals have a right to use whatever they need for their self preservation, that is, to maintain what is originally theirs: the *suum* (life, limbs and liberty). Since use rights often coincide with *using up* a resource (i.e., eating an apple means "using up" the apple), use rights naturally excluded others from using a resource. One can thus see how the satisfaction of needs in a sense "calls" for the institution of private property.[11] However, it still seems problematic to take away and use up a resource without the *consent* of others. How do I know that others agree to my eating this specific apple? What if they also want that same apple for themselves? Grotius assumed a general *tacit consent* on the matter. Individual appropriation is thus not properly unilateral in Grotius' account. Acts of acquisition are permitted by the community of original possessors, which is constituted by the notion of common possession of the earth.[12] This presupposes a

10 See for instance Aquinas, Thomas: *Summa Theologica*. I-II, Q. 94, A.2.

11 Buckle, Stephen: *Natural Law and the Theory of Property. Grotius to Hume*. Oxford 1991, 30.

12 As Gierke observes, community is not the source of natural law, but the other way around: natural law is what gives rise to community. Gierke, Otto: *Natural Law and the Theory of Society Vol. I.*,Cambridge 1934, 100.

power to use things to the exclusion of others, without which one would be doing injustice to those who are necessarily excluded from that resource.[13]

The original power to use things requires that rights relations between persons already be in place before any agreements or deeds. This is precisely what the notion of original community means to accomplish. However, it is important to understand the *nature* of that original community. Pufendorf considered Grotius' understanding of the original community of the earth and the assumption of tacit consent to be problematic. As Pufendorf makes clear, we do not need to conceive the earth and its resources as belonging to humanity *ab initio*, that is, as a *positive* community. His strategy is to start with the assumption of a *rights vacuum* in regard to the earth's resources, what he called a *negative* community of the earth.[14] In a negative community, all things are open to everyone, not because they were given to us in common, but because they belong to no one. Appropriation thus requires neither the assumption of use rights nor the consent of the community of users.[15] Nevertheless, Pufendorf argues, nature "does not want us" to stay in that situation forever: unless things are appropriated, they can be of no use to us. Therefore, appropriate we must (and God is fine with that). Individuals then began acquiring things for themselves. However, since everyone was equally entitled to whatever single individuals separated for themselves, conflict became inevitable. The establishment of separate dominions over things was needed to avoid conflict and this in turn required *pacts*. Pacts, however, are not valid for all times and all generations: at different stages of development, new agreements must be put in place. Therefore, the introduction of use rights and ultimately of private property is a means of avoiding conflict and creating security in Pufendorf's account.

The original community, as conceived by Grotius and Pufendorf, also imposed *restrictions* on property rights in cases of extreme necessity. Although the privatization of the common stock of humanity was a departure from common possession, appropriation and ultimately private property still has to be compatible with the *rationale* of common possession. Since private property was intro-

13 Buckle, Stephen: *Natural Law and the Theory of Property. Grotius to Hume*. Oxford 1991, 30.

14 Pufendorf, DJNG IV.4.

15 According to Buckle, Pufendorf's claim that the original community should be understood as a negative instead of a positive community does not mean that he disagreed with Grotius. Pufendorf thought that Grotius' view *implied* a negative community although Grotius himself was not clear about it and tended to confuse positive and negative community. Positive community is always adventitious, that is, it must be a later development and thus a departure from the original negative community. Buckle, Stephen: *Natural Law and the Theory of Property. Grotius to Hume*. Oxford 1991, 104.

duced as a way to optimize human self-preservation, it would be absurd to make it so inflexible as to hinder persons to secure their self-preservation in cases of extreme need. Both Grotius and Pufendorf recognized that a person in extreme necessity should not be considered guilty of theft.[16] Grotius argues for a *right of necessity*, which meant a "revival" of the original use right in case of extreme necessity, although some restrictions applied.[17] In contrast, Pufendorf thought that reviving the original use right as in the state of nature would be inconsistent with property rights. He therefore sought to give an alternative account of the intuition that necessity can excuse violations of property rights. Similarly to Aristotle, Pufendorf considered an important aim of the institution of private property the creation of an opportunity to property owners to exercise generosity towards the needy, thereby winning their gratitude.[18] His strategy thus was to appeal to the distinction between *imperfect rights and duties* instead of assuming a perfect right to violate the law of property.[19] The needy do not have a *right* to the surplus of the wealthier. They can be *worthy* of their help. In contrast, the wealthy have an imperfect duty to attend to the needs of others and to share their property. This obligation can be made perfect as a matter of state provision (for instance, by taxing the wealthy to support the needy).

Kant's conception of an original community of land (*communio fundi originaria*) follows the Grotius-Pufendorf tradition.[20] However, Kant gives the notion a radically different interpretation, compatible with his legal theory as based on external freedom. Although this notion lies at the heart of Kant's account of cosmopolitan right and is central to his theory of acquisition in the Private Right section of the *Doctrine of Right*, it has not been given enough attention in Kant scholarship. I will argue that Kant's account of cosmopolitan right seeks to address the same problem as Grotius' right of necessity and Pufendorf's imperfect rights and duties, namely the implausibility of assuming inflexible acquired rights when this would go against the rationale for introducing these rights. However, Kant's account of original community constitutes a radical departure from Grotius and Pufendorf. While Grotius and Pufendorf had in mind violations of

16 Grotius, DJBP II.II.VI.4, 78. Pufendorf, DJNG, II.VI ("Of The Right and Privilege of Necessity").

17 A needy person should not take from an equally needy person, but from the surpluses of a wealthier person. There must be restitution after the emergency is over. Need must also be genuine and not attributable to the agent's own fault. DJBP II.II. 7–9, 78 f.

18 Pufendorf, DJNG, II. VI. V.

19 For a discussion of Pufendorf's criticism of Grotius' right of necessity, see Salter, John: Grotius and Pufendorf on the Right of Necessity. In: *History of Political Thought* 26 (2), 2005.

20 Byrd, B. Sharon & Hruschka, Joachim: *Kant's Doctrine of Right. A Commentary*. Cambridge 2010, 123.

private property, Kant restricts his discussion to the right of states to decline involuntary entrants.

II Common possession of the Earth and Acquisition of Land

Similarly to Grotius and Pufendorf, Kant tells us how external objects of choice can become the property of persons, that is, how the original *suum* can be extended to include external objects. For Kant, this is far from being obvious. He assumes that we are born with a *right* to be free from unjustified interference in the exercise of our agency. This innate *right* also entails our physical integrity but does not originally extend to objects outside us. The fundamental assumption which Kant shares with Grotius and Pufendorf is that rights can only be derived from something the person *already has,* that is, from *the suum*. Kant's argument for the inclusion of external objects under the notion of right is that we must assume a legal capacity to become owners of objects, in order to avoid a contradiction. External freedom (and with it pure practical reason) would be depriving itself of the possibility of using objects of choice and thus contradicting itself (*ein Widerspruch der äußeren Freiheit mit sich selbst*). We must thus introduce a *postulate of practical reason*, assuming the possibility of becoming legal owners of objects.[21]

Once it has been established that external objects can become the matter of rights (i.e., that the *suum* can be extended to external objects), the next question Kant's theory must address is the problem of *acquisition* of external objects. Acquisition is the empirical deed through which an external object is incorporated into a person's *suum*. *First* or *original acquisition* is when an object becomes someone's possession for the first time. Explaining the possibility of original acquisition is extremely important since all further acts of acquisition are derived from it.[22] Interestingly, Kant argues that acquisition of land must be conceived as *prior* to the acquisition of objects. Possession of anything on a territory presupposes

21 MS, RL, AA 06: 246.04–247.08.

22 Byrd, B. Sharon & Hruschka, Joachim: *Kant's Doctrine of Right. A Commentary*, op.cit, 135. One must thus distinguish two distinct steps in Kant's argumentation for the right to possess objects: firstly, he argues for the formal *possibility* of becoming owners of objects. Secondly, he accounts for the possibility of *acquiring* objects of choice. Why is the first step not enough to justify acquisition of objects? Acquisition as an *empirical deed* has more implications than the mere possibility of extending the *suum* to external things. It requires "separating" a resource from the global community of goods and thus doing something that seems incompatible with that

the possession of the territory itself, since objects are regarded as mere accidents of the substance on which they "inhere", i.e. the land on which are located.[23] Kant's claim relies on the ontological dependence of accidents on the substance: just as the accidents cannot exist independently of the substance, movable objects cannot be acquired without the prior acquisition of land on which they are located.[24] However, one may wonder if this ontological dependence can be extended to the relation between land and movable objects. Is it not possible to possess movable objects without possessing the land on which they are located? Katrin Flikschuh argued that unless one has some control over the land on which one's possessions are situated, one's right to those possessions would be easily compromised. One would be at the mercy of others while pursuing one's ends. While possession of external objects does not require that I *myself* possess the land on which these objects are placed, I must at least be able to enter some form of agreement with someone who owns or has control over the land, lest I be in the situation of a *squatter*: someone who can be permanently pushed away, along with one's possessions, from one place to the other. If so, some kind of ownership of land or at least a right to control the land is necessary to secure one's right to things. Because I can in principle occupy the space on which your object is situated by displacing your object from its location, displacing your object without your consent would be in principle no infringement upon your possession. We could think of a scenario where you would have to look for your car every time you leave work because it keeps being moved around from where you parked it in the morning. The car would still be yours, but you have no control over its location. However, secure possession of objects must entail the possibility of determining the location of one's possessions.[25]

Although this is certainly correct, it seems to miss Kant's fundamental point, which is not merely about the *empirical* conditions necessary for securing possession of objects, but about the normative *priority* of acquisition of land over acquisition of objects. Acquisition of land must be understood as normatively prior to acquisition of objects due to the *spatial* character of Kant's theory of property and of his legal theory in general. Right has to do with *external* freedom, an aspect of freedom which would be irrelevant if we were not embodied rational beings, not

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very community. The possibility of singling out a resource from the shared bounty of humanity without injustice to others who are equally entitled to it thus requires additional justification.

23 MS, RL, AA 06: 261.29–35.

24 See Kersting, Wolfgang: *Wohlgeordnete Freiheit. Immanuel Kants Rechts- und Staatsphilosophie*. Paderborn 2007, 205.

25 Flikschuh, Katrin: *Kant and Modern Political Philosophy*. Cambridge 2000, 156.

only *in space*, but also confined with each other to the *limited surface of the earth*. The limited dimension of the planet (which also defines the limits of human expansion) renders the interaction and the possibility of impact on the mutual exercise of external freedom *inevitable*. Our agency can have, and will most likely have, an impact on the agency and rights of others. Nowadays we do not even need to travel to distant lands to do this: climate change proves that my external deeds can have a considerable impact on your agency and way of living wherever you are. In other words, we are *globally interconnected*, whether we want it or not. Therefore, there would be no *problem of Right* without the possibility of interaction which arises from our embodiment and the limited space to which we are confined. The problem of Right in Kant's theory is thus essentially a *spatial* problem: we must bring the external exercise of freedom of a plurality of persons under a *system* of external freedom, that is, in accordance with universal laws which can regulate these interactions. Without universal laws, that is, *a priori* principles, there can be no necessity and consequently no rights and obligations that deserve the name. Therefore, although the problem of Right has an empirical component, namely the facts about the human condition mentioned above, the solution to the problem of right must nevertheless be provided by rational principles. The project of Kant's legal philosophy in the *Doctrine of Right* is to provide the a priori principles capable of addressing the problem of right, taking into account the different levels of possible interaction and institutionalization of right: within individuals in a common polity (state right), between polities (international right) and as citizens of the world (cosmopolitan right).

Although we can conceive possession of objects as separate from possession of land, this independence is only normatively possible through the idea that the first proprietor of land can *dispose* of the objects acquired via his acquisition of land. The idea is that persons were able to enter contractual relations with whoever first possessed the land and thus acquire movable objects independently of possessing the land themselves. Kant's point is to explain where acquired rights to movable objects come from, normatively speaking. Once acquisition of objects becomes independent from possession of land, we need contracts regulating the location of objects, that is, agreements between possessors of land or those with jurisdictional rights over land and proprietors of movable objects.[26] I can park my car in the street, even though the street does not belong to me, provided I satisfy certain requirements (I might need to pay a parking ticket or refrain from parking at certain areas at certain times and so on).

26 According to Kant the sovereign is the "supreme proprietor" of land, which means that it has jurisdictional rights over the national territory (MS, RL, AA 06: 323.27–28).

Acquiring land for the first time must be regarded as a realization or "particularization" of innate right.[27] But this is the beginning of another problem. First acquisition of a piece of land involves both singling out a specific part of land as my "dominion" and excluding others from access to it. However, Kant's legal theory does not assign a right-conferring function to empirical acts. If acquisition is to have a legal quality, its lawfulness cannot be grounded on an empirical act.[28] Further, if empirical acquisition justified possession, we would have to regard possession as a legal relationship between a thing and a person. This is not an option in Kant's theory, according to which legal relations pertain only between *persons* as beings capable of obligation and consequently as subjects of rights. Therefore, the legal foundation or title (*Rechtsgrund*, *titulus possessionis*)[29] enabling the acquisition of land must be understood as follows: it must *precede* the empirical act of acquisition and is not created by it; is a relation between persons in regard to external objects, and finally it is able to impose an *obligation* on all others to respect one's acquisition. The idea of the original community of the earth is what constitutes this *Rechtsgrund*:

> All human beings are originally in *common possession* of the land of the entire earth (*communio fundi originaria*) **and each has by nature the will to use it** (*lex iusti*) which, because the choice of one is unavoidably opposed by nature to that of another, would do away with any use of it **if this will did not also contain the principle for choice by which a particular possession for each on the common land could be determined** (*lex iuridica*) But the law which is to determine for each what land is mine or yours will be in accordance with the axiom of outer freedom **only if it proceeds from a will that is united *originally* and a priori** (that presupposes no rightful act for its union). **Hence it proceeds only from a will in the civil condition** (*lex iustitiae distributivae*), which alone determines what is *right* (*recht*), what is *rightful* (*rechtlich*), and what is *laid down as right (Rechtens)*. But in the former condition, that is before the establishment of the civil condition, but with a view to it, that is *provisionally*, it is a *duty* to proceed in accordance with the principle of external acquisition. Accordingly, there is also a rightful *capacity* of the will to bind everyone to recognize the act of taking possession and of appropriation as valid, even though it is only unilateral.[30]

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27 Byrd, B. Sharon & Hruschka, Joachim: *Kant's Doctrine of Right. A Commentary*, op.cit., 134 f.

28 As Kersting notes, the realization that empirical acts have no right conferring function is the very heart of Kant's legal theory. Kersting, Wolfgang: *Wohlgeordnete Freiheit. Immanuel Kants Rechts- und Staatsphilosophie*, op.cit., 214.

29 MS, RL, AA 06: 251.31. *Rechtsgrund* is the legal justification of a juridical claim or deed. *Deutsches Rechtswörterbuch* (DRW) http://drw-www.adw.uni-heidelberg.de/drw/, accessed 06/12/2014.

30 MS, RL, AA 06: 267.04–23. "Alle Menschen sind ursprünglich in einem *Gesammt-Besitz* des Bodens der ganzen Erde (*communio fundi originaria*) mit dem ihnen von Natur zustehenden Willen (eines jeden) denselben zu gebrauchen (*lex iusti*), der wegen der natürlich unvermeidlichen

A unilateral will cannot impose an obligation on others. It is a contingent exercise of freedom and has no *authority* to impose an obligation. For this, we would need the *consent* of all others whose exercise of freedom is restricted by that unilateral act. *Omnis obligatio est contracta*: all obligation must be *self-imposed*.[31] The idea of a united will of all therefore *extends the scope* of Kant's reason based legal philosophy, introducing what seems to be a voluntaristic element in his theory. A unilateral will can only impose an obligation on others if it is the *will of everyone* that it be so. However, for Kant it is not enough that this be the will of all (as a contingent matter of fact); it must be the will of all *a priori*. In Kant's reason-based legal theory, only reason can impart necessity. The necessity of respecting unilateral acts of acquisition is thus derived not from the unilateral acts themselves (which are *empirical and therefore contingent*), but from the united will of all, which is *a priori* and therefore *necessary*.

But how can he assume that we all want *a priori* that objects be appropriated to the exclusion of others? How could I possibly *want* to be excluded from using an object I might be interested in? The notion of a united will *a priori* follows from the fact that intelligible possession is *a priori* necessary, and for this, acquisition of objects to the exclusion of others must be permitted from the perspective of pure practical reason. Since on pain of contradiction practical reason must allow appropriation of objects, it must be the case that it is *our will* to be able to use objects of choice.[32] This is why the general will is said to be united *a priori*, independently of actual consent.

Entgegensetzung der Willkür des Einen gegen die des Anderen allen Gebrauch desselben aufheben würde, wenn nicht jener zugleich das Gesetz für diese enthielte, nach welchem einem jeden ein besonderer Besitz auf dem gemeinsamen Boden bestimmt werden kann (*lex iuridica*). Aber das austheilende Gesetz des Mein und Dein eines jeden am Boden kann nach dem Axiom der äußeren Freiheit nicht anders als aus einem ursprünglich und a priori vereinigten Willen (der zu dieser Vereinigung keinen rechtlichen Act voraussetzt), mithin nur im bürgerlichen Zustande hervorgehen (*lex iustitiae distributivae*), der allein was recht, was rechtlich und was Rechtens ist, bestimmt.- In diesem Zustand aber, d.i. vor Gründung und doch in Absicht auf derselben, d.i. provisorisch, nach dem Gesetz der äußeren Erwerbung zu verfahren, ist Pflicht, folglich auch rechtliches Vermögen des Willens jedermann zu verbinden, den Act der Besitznehmung und Zueignung, ob er gleich nur einseitig ist, als gültig anzuerkennen; mithin ist eine provisorische Erwerbung des Bodens mit allen ihren rechtlichen Folgen möglich."

31 Kersting, Wolfgang: *Wohlgeordnete Freiheit. Immanuel Kants Rechts- und Staatsphilosophie*, op.cit., 146.

32 Kant is referring to our will as *pure practical reason*, not as the contingent will of particular individuals with preferences which can diverge from one another. Kant is presupposing a substantive conception of rational willing from which it is possible to establish "what we can and cannot want" as rational beings with a will. This idea is present for instance in Kant's argument

It is important to note that the same rational principle that allows the use of external objects as an extension of innate freedom is the one that makes it necessary to assume an *a priori* united will. This idea ensures the compatibility of Kant's theory of acquisition with the principle of right. Because acquisition of objects to the exclusion of others would mean an unjustified impediment on their freedom, only the assumption of an *a priori* united will can make acquisition rightful. However, Kant also stresses that a united will is only realized in a condition of public justice, that is, in the civil condition. Possession of objects thus commits us to the implementation of a system of distributive justice under which the a priori united will can be realized.

The transition from common ownership of the earth to a concrete individual possession of land requires a principle of distribution, according to which the earth can be *divided*. Distribution in this case can only be done by an empirical act: occupation (*Bemächtigung*, *occupatio*)[33] through a unilateral act of choice (*Act der Willkür*).[34] In taking physical possession of a piece of land, an individual is *particularizing* her original right to be somewhere.[35] However, the only principle available for determining who has originally acquired something is *prior in time, strong in right* (*qui prior tempore portior iure*).[36]. Unless the right is given to the person who arrived first, no person would ever be able to exercise the right to acquire land, for anyone else would have a claim to the land that person acquired. Being the first to take control over a piece of land must entitle the agent to keep it despite the possible interest of others, as a condition for the possibility of making use of land at all. It therefore follows from *prima occupatio* that native peoples must be seen as the rightful possessors of their land. All later acquisition of land can only be *derived* from first possession, that is, it must be transferred to another by means of a *contract* with the native peoples, which presupposes their free and true *consent* in order to be valid. Further, this principle of distribution must be understood as contained in the united will of all (who have the will, individually, to use the land).

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for a contradiction in the will in the *Groundwork*. According to this conception of the will of rational beings, one cannot want one's talents to be neglected or to give up one's claim to the help of others when committed to a maxim of indifference (GMS, AA 04: 422.37–423.01–35).

33 MS, RL, AA 06: 259.13, 263.02–03, 15.

34 MS, RL, AA 06: 263.09.

35 See Byrd, Sharon B. and Hruschka, Joachim: *Kant's Dictrine of Right. A Commentary*. Op. cit., 134.

36 MS, RL, AA 06: 259.16–17.

III Community of the Earth as the basis of Cosmopolitan Right

The idea of *communio fundi originaria* has implications that extend beyond what is required for the justification of a right to external things. This is because the realization of one's right to occupy space starts not with the occupation of land for the first time, but already with *birth*. When we are born, our mere "entrance in the world" is already a legally relevant fact.[37] Not only have we *come* to occupy space in the world, we also have an original *right* to do so: this is "the right to be wherever nature or chance (apart from their will) has placed [one]".[38] The existence of a *person*[39] in the world entails both her equal legal status among a plurality of subjects of right and her original right to occupy space. Persons are also automatically members of the global community of the earth, which is constituted by the unity of all possible places individuals can occupy within the limited surface of the earth.

Common possession of the earth plays a central role in Kant's argument for cosmopolitan right. Although the role of cosmopolitan right, I will argue, has an analogous function to Grotius' right of necessity and Pufendorf's imperfect rights and duties, Kant's "revival" of the original community in cosmopolitan right is nevertheless a radical redefinition of the Grotius-Pufendorf tradition.

> [It] is not the right to be a guest (*Gastrecht*) [...] but the right to visit (*Besuchsrecht*); this right to present oneself for society, belongs to all human beings by virtue of the right to possession in common of the earth's surface on which, as a sphere, they cannot disperse infinitely but must finally put up with being near one another; **but originally no one had more right than another to be on a place on the earth**.[40]

37 Kersting, Wolfgang: *Wohlgeordnete Freiheit. Immanuel Kants Rechts- und Staatsphilosophie*, op.cit., 211.

38 MS, RL, AA 06: 262.19–20.

39 Kant defines a person as a subject whose actions can be imputed to her because she is able to be under obligation (MS, RL AA 06: 223.24–25). Kant's definition presupposes his conception of transcendental freedom: moral personality is freedom under moral laws. Right is thus a relation between persons, that is, finite rational beings who are not only capable of conceiving and understanding obligations but also of experiencing themselves as under obligation.

40 ZeF, AA 08: 358.05–13, (my emphasis) „Es ist kein Gastrecht [...], sondern ein Besuchsrecht, welches allen Menschen zusteht, sich zur Gesellschaft anzubieten vermöge des Rechts des gemeinschaftlichen Besitzes der Oberfläche der Erde, auf der als Kugelfläche sie sich nicht ins unendliche zerstreuen können, sondern endlich sich doch neben einander dulden müssen, ursprünglich aber niemand an einem Orte der Erde zu sein mehr Recht hat, als der Andere."

> This rational idea of a *peaceful*, even if not friendly, thoroughgoing community of all **nations** on the earth that can come into relations affecting one another is not a philanthropic (ethical) principle but a principle having to do with rights. (...) And since possession of the land, on which an inhabitant of the earth can live, can be thought only as possession of a part of a determinate whole, and so as possession of that to which each of them originally has a right, it follows **that all nations (*Völker*) stand *originally* in a community of land**, though not of rightful community of possession (*communio*) and so of use of it [...].[41]

In the *Doctrine of Right*, Kant derives *nations*' original community of the land from the fact that the possession of individuals (to which they have an original right) *can be thought* as a part of a *determinate whole*. National borders in connection with an internal civil condition make the *extent* of individual possessions relatively *determinate*. Borders delineate the scope of individual acquisition in a way which, although not peremptory until the institution of a cosmopolitan condition of distributive justice, is *closer* to the idea of right than leaving individuals to determine the limits of their acquisition in a wholly unilateral way (as in the state of nature).[42] Unlike Locke, Kant has no theoretical resources for establishing the content (*Inhalt*) of occupation; the *prior occupans* must decide according to her own judgment if her possession is being infringed upon and consequently have a conception of the extent of her possession. Only the civil condition is able to provide relatively legitimate conditions for determining the scope of acquisition.[43] This necessity makes Kant's theory far more dependent on the institution-

41 MS, RL, AA 06: 352.06–17, (my emphasis) „Dieser Vernunftidee einer friedlichen, wenn gleich noch nicht freundschaftlichen, durchgängigen Gemeinschaft aller Völker auf Erden, die untereinander in wirksame Verhältnisse kommen können, ist nicht etwa philanthropisch (ethisch), sondern ein rechtliches Princip. [...] und da der Besitz des Bodens worauf der Erdbewohner leben kann, immer nur als Besitz von einem Theil eines bestimmten Ganzen, folglich als ein solcher, auf den jeder derselben ursprünglich ein Recht hat, gedacht werden kann: so stehen alle Völker ursprünglich in einer Gemeinschaft des Bodens, nicht aber der rechtlichen Gemeinschaft des Besitzes (*communio*) und hiemit des Gebrauchs oder Eigenthums an demselben [...]".

42 Oliviero Angeli sees the role of territorial borders as providing a more reliable spatial reference for identifying degrees of different *legal* relations between individuals (Angeli, Oliviero: From Proximity to Territoriality: A Kantian Genealogy of the State, unpublished manuscript, forthcoming in: *Reading Kant's Doctrine of Right*. Ed. by Jean-Christophe Merle. Wales 2016). Although I believe this certainly follows from implementing territorial borders, the primary point of extending original possession of the earth to nations is that they provide a better (*relatively* omnilateral) standard for quantifying acquisition, which is one of the main functions of a condition of distributive justice.

43 I say "relatively legitimate conditions" because a fully fledged condition of distributive justice can only be completely achieved in a *cosmopolitan* civil condition. There are three different levels of civil condition (domestic, international and cosmopolitan). Inner state justice is just a step towards a greater scale institutionalization of right, as commanded by reason.

alization of right than Locke's theory.[44] The territorial rights of states can thus be understood as a necessary step towards a cosmopolitan condition of distributive justice.

As Kant formulates in *Perpetual Peace*, "cosmopolitan rights shall be limited to the conditions of universal hospitality".[45] This is a right to offer oneself for commerce (*Verkehr*) with one another, be the subjects of these rights individuals or nations.[46] As cosmopolitan right makes clear, the idea of common ownership of the earth presents itself under two different *modes*: (1) as basis of the *acquired* right of host peoples to their territory, enabling them to decline voluntary interaction, and (2) as the basis for the *original* right of individual citizens of the world or nations to offer themselves for interaction with foreign nations. In *Perpetual Peace* Kant called this right "right to visit",[47] which is neither a right to settle (*ius incolatus*[48]) nor a right to be a *guest* in the foreign land (*kein Gastrecht*[49]). As Kant stresses, host nations retain a right to reject the visitor on the condition that this can be done "without causing his destruction".[50] Although visitors have no *claim* to enter the foreign territory, they should not be treated with hostility by the inhabitants, so long as they behave peacefully.

However, the original community of the earth also imposes constraints on the acquired right of host nations to control their borders. Kant makes clear that host nations have the right to *reject* visitors whenever their reason for interaction is *voluntary*.[51] Similarly to the original right to a place on the surface of the earth,

44 Kersting, Wolfgang: *Wohlgeordnete Freiheit. Immanuel Kants Rechts- und Staatsphilosophie*, op.cit., 216.

45 ZeF, AA 08: 357.20–21.

46 Byrd and Hruschka argue that in Kant's later account in the *Doctrine of Right* the right to visit of *Perpetual Peace* no longer falls under cosmopolitan law, that is, between individuals and foreign states, but under international law (*Völkerrecht*), that is, between nations (Byrd, B. Sharon & Hruschka, Joachim: *Kant's Doctrine of Right. A Commentary*, op.cit., 208). Despite the difference from the account of 1795, individuals are not excluded from the *Doctrine of Right* as addressees of cosmopolitan right. As Kant mentions further in the *Rechtslehre* text, abuses of cosmopolitan right "cannot annul the right of *citizens of the world* (*Erdbürger*) to try to establish community with all and, to this end, to visit all regions of the earth" (MS, RL, AA 06: 353.04–06, my emphasis). Here we have individuals instead of nations, although these individuals could be seen as directly or indirectly promoting the community of all nations.

47 *Besuchsrecht*, 08: 358.07.

48 MS, RL, AA 06: 353.08.

49 ZeF, AA 08: 358.05.

50 ZeF, AA 08: 358.03.

51 See VAZeF, AA 23: 173.11–17. As Kant's endorsement of the selective practices of China and Japan in the 18th century illustrate, restricting or completely suspending contact with outsiders is justified, given the previous inhospitable behaviour of Europeans (ZeF, AA 08: 359.05–08).

the right to admission in a foreign territory obtains only under the condition of *involuntary* occupation of space. Just as the occupation of space by virtue of one's entry in the world is independent of one's will, rejecting an involuntary visitor when this would harm or destroy her is *incompatible with the original community of the earth*. As Kant stresses, in principle no one has more claim to a specific area of the earth than another person. The global distribution of land is thus wholly *contingent*. Today's nations can be seen as "permitted" to control a certain territory to the exclusion of others because borders are helpful for determining the extent of individual acquisition, at least within that territory. However, to deny life-saving occupation of space to another being, who is in principle just as entitled as anyone else to any place of the earth, would be to *contradict* the very justification for the territorial rights of states. This is because the permission to control territory and the right of the involuntary visitor to be admitted are based on the same legal foundation or *Rechtsgrund*, namely, the original community of the earth. Kant could easily have insisted that the acquired right of nations to their territory not only has priority but *trumps* the original right of persons to occupy space. It is worthy of attention that he did not accept this in the case of involuntary occupation of space.

My view is that cosmopolitan right signalizes a contradiction of the right to occupy space with itself under different *modalities*: on the one hand as the *original* right of individuals or nations to "be somewhere" (as belonging to the *lex iusti*) and on the other, the *acquired* right of peoples to their land (belonging to the *lex iuridica*). Kant distinguishes between three *leges* or conditions of justice: *lex iusti, lex iuridica* and *lex iustitiae*[52]. The distinction is essential for understanding the relationship between Right as a system of external laws *a priori* and the subsequent developments of right. As Byrd and Hruschka stressed, the three *leges* correspond to three categories of modality in the *Critique of Pure Reason*: possibility (*Möglichkeit*), reality (*Dasein*) and necessity (*Notwendigkeit*[53]). They can be seen as different "modes" of the same idea of right: original right as the pure rational concept of right (*possibility*), acquired right as arising from concrete deeds or relations between agents (*reality*) and peremptory right as legitimized

However, Kant does not specify which would be reasonable criteria for rejecting a voluntary visitor with peaceful purposes. Therefore it remains an open question whether accepting or rejecting voluntary visitors is wholly at the discretion of the host nation, in which case one must ask if there is indeed any *right* to visit. Cosmopolitan right thus secures the right to a *safe haven* and the right to *offer* oneself for interaction (without guarantee of acceptance), which is certainly less than the expression *Besuchsrecht* may suggest.

52 MS, RL, AA 06: 236.24–237.08, 306.08–16.

53 KrV, AA 03: 93.16–20. KrV, A / B

and enforced by a public court of justice (*necessity*).[54] Although there is a positive development in the transition from the *lex iusti*, through the *lex iuridica*, to the *lex iustitae distributivae* in the civil condition, the *lex iusti* is not made superfluous in the civil condition, but is still the source of the normativity, and consequently, of the *legitimacy*, of all further developments of right. The need for maintaining the compatibility of the development of right with its a priori normative source is what gives rise to cosmopolitan right. In this sense, cosmopolitan right in Kant's theory has a similar function to the right of necessity in Grotius and imperfect rights and duties in Pufendorf's theory. They are needed to avoid scenarios which would contradict the rationale for introducing certain rights.

While Grotius, following the natural law tradition, appeals to the *need* of individuals as a basis for the original use right to land and natural resources, Kant does not make the need of individuals the basis of cosmopolitan right. Kant replaces the natural law idea that fundamental needs of human beings provide the content of natural law with the idea of the external exercise of freedom and the impact that unregulated interaction can have for the external freedom of individuals, assuming they have equal juridical status and thus an equal right to non-interference. While Grotius' right of necessity excuses what would otherwise constitute violations of private property, Kant leaves private property untouched. He restricts himself to limitations to the rights of states to refuse entrants in their territory in case of involuntary occupation of space. Kant does not recognise a right of necessity. As he puts it in the *Common Saying*, to preserve one's life is a conditional duty, that is, to be observed if this can be done without injustice (*Verbrechen*).[55] Although it may seem too inflexible to insist upon the inviolability of private property, property rights are too central in Kant's legal theory to be compromised.[56] Therefore, the closest Kant comes to imposing limitations on acquired rights is cosmopolitan right.

It is important to note how Kant replaces the natural law idea of human fundamental needs with occupation of space. The notion of original community is used to justify a right to occupy a particular place in the earth. The mere existence of our bodies entails the occupation of a separate area in the world (*Separatbesitz*),

54 I adopt here Byrd and Hruschka's interpretation of the three *leges*. See Byrd, B. Sharon & Hruschka, Joachim: *Kant's Doctrine of Right. A Commentary*, op. cit.

55 TP, AA 08: 300n. However, Grotius did not recognize an unqualified right of necessity either; there were several restrictions to be observed for violation of private property to be justified.

56 Kant insisted on the lexical priority of perfect over imperfect and consequently juridical over ethical duties. He did not recognize a duty of rescue either. For a Kantian account of a duty of rescue when this would require the violation of private property, see Pinheiro Walla, Alice: "Kant's Moral Theory and Demandingness". In: *Ethical Theory and Moral Practice* 18, 2015, 731–743.

which Kant considers an original right.[57] Original acquisition of space (land) entails acquisition of natural resources, without the appeal to human needs. Further, the kind of community generated by the original right to occupy space is a radically different one from Grotius and Pufendorf. It is constituted by the *unity of all potential places individuals can come to occupy on the earth*.[58] These potential places are considered *disjunctively*.[59] Concretely, this means that no one is entitled to any specific area but only to *a place* on the surface of the earth. Everyone can, in principle, possess *this or that* place on the earth.[60] The right to occupy a place on the earth is thus a *disjunctively universal right* (*disjunctiv-allgemein*). It is therefore only a contingent fact that persons (and consequently nations) have come to occupy a particular place on the earth, for instance, the present territory of France. This contingency plays an important role for Kant's argument that there is a right to be admitted in case of involuntary interaction. Further, the community of the earth must also be understood as *collectively universal* (*collectiv-allgemein*) insofar as it is constituted by the idea of the *union* of all possible places on the earth.[61] It is therefore not a community in the sense of a *joint use* of the earth, but a community constituted *malgré soi*, in virtue of the interconnectedness of all points within the closed spherical surface of the planet. The spatial relations between individuals are what constitute the global community, not God's gift of the earth to humanity. However, one should not think, as Flikschuh argued, that Kant moved from "the fact of individual acquisition to the idea of original common possession" and thereby "inverted" the natural law sequence from common possession to individual acquisition.[62] This would mean taking the original community to be constituted by empirically given facts. Kant is clear enough that the original community is an *idea of reason* and not a community that was "instituted" (*gestiftete Gemeinschaft*[63]). This failure to realize the rational (i.e., *original*) character of the idea of community of the earth is precisely what Kant takes to be the failure of Grotius' and Pufendorf's "primitive community" (*uranfängliche Gemeinschaft, communio primaeva*[64]). Kant's departure from natural law theory

57 VARL, AA 23: 311.33 „Alle Menschen stehen von Natur aus ein Recht zum Separatbesitz zu".
58 MS, RL, AA 06: 262.21–23.
59 VARL AA 23: 320.22.
60 See VARL AA 23: 320.22–23 and 323.29 and Byrd, B. Sharon & Hruschka, Joachim: *Kant's Doctrine of Right. A Commentary*, op.cit, 128.
61 VARL AA 23: 323.30.
62 Flikschuh, Katrin: *Kant and Modern Political Philosophy*, op. cit., 152.
63 MS, RL, AA 06: 251.05–06.
64 MS, RL, AA 06: 251.04, 258.17.

lies not in an "inversion" of the sequence of ideas but in his *redefinition* of central concepts of the natural law in terms of external freedom.

Kant not only *secularizes* the natural law conception of a community of the earth but also replaces fundamental human needs (the traditional content of the laws of nature) by the spatial relations between subjects of right. Although Kant renders the natural law idea of an original community of the earth compatible with the fundamental tenet of Kant's Doctrine of Right, he by no means does away with the notion: common possession of the earth plays a central role in his legal theory.

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A Kantian Foundation for Welfare Rights

(article currently under peer review)

Abstract

In this article, I offer a foundation for the prima facie idea of a *right* to welfare based on a neglected aspect of Kant's legal theory: his account of equity rights (*aequitas, Billigkeit*). I argue that these rights are not the same as the "moral rights" of current literature, and that they arise as a consequence of systemic injustice. The contribution of this article is twofold: firstly, it provides an analysis and application of Kant's underanalysed and little understood discussion of equity; secondly, it offers an alternative to contemporary accounts of welfare rights as moral rights which can better account for their juridical nature as rights.

Keywords: Kant, Welfare Rights, General Injustice, Systemic Injustice, Equity

I. A Hohfeldian Right to Welfare

Is there a *right* to some form of welfare provision? Let me first explain this question. Clearly, if a right to welfare has been institutionalized in a given society one is entitled to some welfare upon satisfying some specified conditions. This is an uncontroversial understanding of 'having a right' and not the sense I will explore here. Instead, my question is whether there can be a *claim-right* to some form of welfare provision, independently of whether it is available in institutionalised form.

The reader may wonder if my question is whether there is a *moral right* to welfare provision. However, I consider the moral rights discourse problematic. There is no canonic understanding of what moral rights are. Above all, the contemporary moral rights discourse often conflates rights and other moral notions, making it difficult to identify matters of rights proper as opposed to ethical considerations, such as our moral duty to help others. While I do not dispute that there are good moral reasons for providing welfare, my view is that these moral considerations *per se* do not give rise to a right, only to obligations to ensure that certain human needs be met. The talk of a right would be a mere *façon de parler*, refering to a consideration we deem morally stringent or compelling to provide welfare provision to someone in need. A right, in contrast, is an *entitlement* to some performance or resource. My aim in this article is to provide an alternative to the moral rights discourse as a foundation for a pre-legal claim to welfare provision. I will therefore also set aside the question whether there is a human right to welfare, understood as a universal right based on the fact that we are human beings.

I will use 'right' in a narrow sense as corresponding to what Hohfeld called a *claim*. A claim correlates to a duty. I will assume with Hohfeld that only a claim is a right proper. My question is thus whether there can be a Hohfeldian claim to welfare provision valid independently of whether welfare provision has been institutionalised in a given legal order. If that is the case, my argument would imply a strong case for institutionalising such rights, since failing to do so would amount to *wronging* the right-holder in a juridical sense, as opposed to merely failing to discharge a moral duty towards her, by failing to help or benefit her.

I will offer an account of welfare rights as *equity rights as* Kant understands them in his legal philosophy. According to Kant, equity (*Billigkeit*, *aequitas*) gives rise to *genuine* albeit non-enforceable claim-rights. Equity rights arise from contractual relations and can be recognized by reason independently of legal systems. The problem with equity rights is that in a condition of public justice a court of justice is bound to observe the explicit terms of contracts and may therefore issue verdicts which diverge from our judgments about what would be equitable. This is the case when a contract lacks explicit information about the intentions and legitimate expectations of the contracting parties. Although Kant argues that equity should not influence the verdicts of a court of justice on a *ad hoc* basis, I argue that equity can and should *inform* improvements and reforms of codified legal systems. Precisely because equity involves extra-positive juridical judgments, it can help us understand the shortcomings and limitations of existing formal legal systems and see violations of rights we would otherwise remain blind to.

By connecting Kant's account of equity rights with what he calls "general injustice", I argue that welfare rights provision can function as a proxy for the compensation of rights violations resulting from past legal discrimination and ongoing systemic injustice. While this is not the only possible way to justify welfare rights, it can account for the prima facie idea that there is a *claim-right* to welfare. I conclude that equity based welfare rights would require providing a sufficient amount of resources for securing substantive economic freedom. This involves not only securing basic subsistence and access to education, but also public policy ensuring *effective* equality of opportunity, social and income mobility, and gender and racial non-discrimination.

I start with an analysis of Kant's account of equity (*aequitas*, *Billigkeit*), which has been neglected in Kant scholarship. I argue that welfare rights are genuine claim-rights and should not be confused with "moral rights" as understood in the literature. After situating the notion of equity rights within Kant's legal theory and elucidating Kant's views on "general injustice," I show the parallels between general injustice and structural injustice, as well as between the the difficulties in arguing for the prima facie idea of a claim-right to welfare and equity rights.

Before we proceed, it will be useful to clarify the concept of a right as I will be using it. A right is an *entitlement to x*: where x can be an external object, an action or performance by another, or freedom from interference. Most importantly, the right has the ability to impose an *obligation* on others to respect the right. This is what Hohfeld means when he says that a claim correlates to a duty. A right has the capacity to bind when it involves something that *already belongs* to that agent. The correlating duty can be understood as applying to a specific person (a paucital right) or to a wide range of persons (a multital right).

For example, if I legally buy a horse at the market, even though this horse is not yet in my possession, it is already mine; if you fail to deliver the horse as voluntarily agreed in the transaction, you are violating my right. Similarly, if agents are at liberty to exercise their own free agency as long as it is compatible with the free agency of others, each agent is entitled to something she already has, namely, the *authority to decide* how her agency is to be exercised, within certain constraints. Unjustifiably interfering with her agency would be to violate her right. The *suum,* or what belongs to an agent, was a central notion in modern political philosophy, and crucial for the definition of a claim-right.[1] I will adopt the concept of the *suum*, together with the idea that claim-rights are necessary for coordinating a plurality of agents with equal spheres of freedom into a unified system of external freedom.

Claim-rights allow each person to pursue his or her own freedom in a way that avoids clashes with other individuals and groups. They enable the co-possibility of a plurality of equal spheres of freedom.[2] Unfortunately, the literature on rights is full of unclarities about the nature of rights, and what counts as a right. Rights can be something desirable, in our self-interest, or a good idea to have. However, the idea of a right implies something stronger than all this. Rights need not always be in our interest or even benefit us, although there tends to be a strong connection be-

[1] Pufendorf and Hugo Grotius are examples of modern political thinkers for whom the concept of the suum played a central role. See Alejandra Mancilla, "What we own before property: Hugo Grotius and the suum" *Grotiana*, Volume 36, Issue 1, pp. 65-77, 2015.

[2] This view is at the core of Kant's legal theory. See also Hillel Steiner, *An Essay on Rights*, Blackwell, 1994. Steiner rightly observes that identifying rights with interests does not rule out clashes of rights, since the interests of different individuals can very well be incompatible at times. In principle, rights should not clash: they make sure that spheres of freedom are protected in which they coordinated with each other and made co-possible.

tween rights and interests. Most importantly, rights must be able to impose *obligations* on others. Rights are *entitlements*, which means that failure to respect them is to *wrong* the right-holder. Because they have to do with the distribution of external freedom, rights should not be confused with other moral notions.[3]

This definition of a right as corresponding to something that belongs to the right-holder does not presuppose a juridical order in which rights arise as a matter of positive convention. It is also possible to think of rights in a pre-civil condition. Locke conceived the body and physical integrity of the agent as a form of pre-state self-ownership; in contrast, Kant did not conceive our relation to our own body as a relation of private property akin to possessing an external object. We have instead the authority to be our own masters (*sui iuris*). If this is the way in which we "own" ourselves, it follows that we must have a claim-right to freedom from arbitrary interference.[4] Kant also extends the *suum* to acquired external objects in the private law section of the Doctrine of Right, a move which requires a special justification, since external things are not originally entailed by innate right.[5] Further, one can also acquire rights by engaging in voluntary contractual relations with others.

II. Respecting Rights and Doing Good

Kant identifies neither a *right* of the poor to welfare provision nor a *direct* duty of the state to maintain them. However, in a famous passage of the *Doctrine of Right*, he makes two peculiar claims. Firstly, he affirms that the state has "indirectly" taken over the duty of the people to maintain the members of society who cannot provide for themselves, and secondly, that the state has the right to tax the wealthy in order to discharge this duty (*General Remark C*, MS RL VI:

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[3] H. L. A. Hart, Are there any natural rights?

[4] Note that this is not merely a liberty to move one's body as one pleases; arbitrary interference could amount to violating one's physical integrity.

[5] For an excellent account of Kant's justification of the right to become owners of external objects and his extension of the original suum see Byrd and Hruschka, Kant's Doctrine of Right. A Commentary. Cambridge University Press, 2010.

325-26).[6] The reasons for this "taking over" of the duty of the people by the state are not made clear in the text. This passage has been the object of much discussion in the recent debate about redistribution in the Kantian state.[7] In my present analysis, I have chosen not to focus on this passage, since I am concentrating not on the justification of the *right of the state* to redistribute in order to maintain its poor (which in fact is the subject matter of this famous passage and often overlooked in the literature), but on accounting for the prima facie idea that there could be a *claim-right* to some minimal form of welfare provision. The focus of my paper is thus how one could regard some minimal form of welfare provision as a *right of the destitute*. I have offered an interpretation of the passage and of the right of the state to redistribute elsewhere.[8] For the purposes of this paper, I will argue that focusing on Kant's account of wide, non-enforceable rights is more promising. This approach will also throw light on why Kant believed it a duty of the people, and only indirectly a duty of the state, to maintain those who cannot provide for themselves, which is a claim Kant makes in the passage but does not explain.

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[6] Kant's works are cited by volume and page number of the Academy edition of Kant's works (Berlin, 1900ff.). Unless stated otherwise, all translations are from the Cambridge Edition of Kant's Works. I use the following abbreviations:

GMS: Groundwork of the Metaphysics of Morals / Grundlegung zur Metaphysik der Sitten (AA IV)

Moral Collins: Moralphilosophie Collins /student notes from Kant's lectures on Ethics, transcribed for or by Collins, (AA XXVII)

Moral Mrongovius: Moralphilosophie Mrongovius /Mrongovius notes on Kant's moral philosophy (AA XXVII and XXIX)

Moral Brauer Me: Moralphilosophie Brauer, In: Eine *Vorlesung über Ethik*. Paul Menzer (ed.). Berlin 1924.

MS: Metaphysics of Morals/ Die Metaphysik der Sitten (AA VI)

TP: On the common saying: that may be correct in theory but it is of no use in practice / Über den Gemeinspruch (AA VIII)

ZEF: Towards Perpetual Peace / Zum ewigen Frieden (AA VIII)

[7] See for instance Sorin Baiasu, "Kant's Justification of Welfare". *Diametros* (39), March 2014, pp. 1-28, Alexander Kaufmann, *Welfare in the Kantian State*, Oxford University Press, 1999, M. LeBar, "Kant on Welfare," Canadian Journal of Philosophy (29) 1999, pp. 225–250, Sarah Holtmann, "Kantian Justice and Poverty Relief", *Kant-Studien* (95), No 1, March 2004, pp. 86-106, Allen Rosen, *Kant's Theory of Justice*, Cornell University Press, Ithaca and London, 1993, H. Varden, "Kant and Dependency Relations: Kant on the State's Right to Redistribute Resources to Protect the Rights of Dependents," *Dialogue* (45) 2006, pp. 257–284, Jacob Weinrib, "Kant on Citizenship and Universal Independence". *Australian Journal of Legal Philosophy* (33), 2008.

[8] Reference to author's published work.

Before we start, it is necessary to understand the place of equity within Kant's legal theory. In his *Metaphysics of Morals* (1798), Kant distinguishes two separate domains of Morals (*Sitten*): the domain of Right (*Recht, Jus*) and the domain of ethics or virtue (*Tugend*). Kant calls the set of juridical duties whose compliance can be externally coerced "strict right" (*striktes Recht*). If a duty can be externally coerced without losing its meaningfulness as a duty, this implies that the motive from which the agent acts is *secondary* and that mere *external* compliance is enough to satisfy the requirement.[9]In contrast, Ethics commands the free, i.e. *voluntary* adoption of certain ends. Therefore, as a matter of definition, ethical duties cannot be externally coerced (MS VI: 383). Because ethics has to do with duties to adopt certain ends, ethics is strictly speaking the domain of *wide* obligation and of *imperfect duties*. Right, in contrast, has to do with *narrow* obligations (requirements to do or refrain from doing specific actions, i.e., *perfect duties*, MS VI: 390). This is why right is said to give laws to *actions*, while ethics gives laws to *maxims of actions* (MS VI: 388-89). However, the dividing line between right and ethics is not always clearly cut. Kant also subsumes perfect duties to oneself and others under ethics in the *Doctrine of Virtue* and acknowledges that there are non-coercive juridical duties in the *Doctrine of Right* (the domain of *equity* or *Billigkeit*).[10] There is a remarkable omission in Kant scholarship in regard to equity.[11] I will argue that Kant's conception of equity can offer a foundation for welfare rights as genuine claim-rights.

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[9] Bernd Ludwig, "Die Einteilung der Metaphysik der Sitten im Allgemeinen und die der Metaphysischen Anfangsgründen der Tugendlehre im Besonderen." in: Andreas Trampota, Oliver Sensen and Jens Timmermann (eds.), *Kant's Tugendlehre. A Comprehensive Commentary*, De Gruyter. Although the prudential interest in avoiding coercion and sanctions is permitted and sufficient as an incentive for compliance with right, the possibility of *ethical motivation* in our compliance with juridical duty is not excluded. If one complies with right out of respect for the fact that it is a duty to do so, one's conduct is not only legal (compatible with right), but also has moral worth.

[10] The distinction between Right and Ethics is thus based not on the fact that they involve perfect or imperfect duties, but on the specific principle underlying them: the principle of ethics (concerning internal freedom) or the principle of right (which has to do with the external freedom of a plurality of persons unified in a system of external freedom). I will argue that external freedom presupposes the idea of a suum (what belongs to a person). This suum can be original and internal (what Kant calls innate right) or acquired and external (external objects, contractual rights).

[11] A few exceptions can be found in German Kant scholarship: Daniel O. Dahlstrom, "Ethik, Recht und Billigkeit," *Jahrbuch für Recht und Ethik/Annual Review of Law and Ethics* Vol. 5, Themenschwerpunkt: 200 Jahre Kants "Metaphysik der Sitten" / 200th Anniversary of Kant's "Metaphysics of Morals" (1997), pp. 55-72, and Jean-Christophe Merle, „Die Billigkeit bei Kant" (unpublished manuscript), published in French as "L'équité dans la pensée du droit de Kant et des kantiens et son influence sur la philosophie du droit contemporaine", *Annuaire de l'Institut Michel Villey* , Volume 2 , 2010.

In order to understand Kant's view on general injustice, it is necessary to bear in mind how he conceived the lexical priority between different types of duties or grounds of obligation.[12] Perfect duties have priority over imperfect ones: they impose constraints on the way one can discharge one's imperfect duties and have precedence in case of conflict. In the *Groundwork,* the priority of perfect over imperfect duties is established on the basis of the universalization requirement imposed on maxims by the categorical imperative, more precisely, on the kind of universalization a maxim *fails* to satisfy. While perfect duties correspond to maxims which would generate a contradiction in conception, imperfect duties arise from maxims which could be conceived as laws of nature without contradiction, but nevertheless could not be *willed* by rational agents.

> Now, certainly, if such a way of thinking [a maxim of indifference] were to become a universal law of nature, the human race could very well subsist, and no doubt still better than when everyone chatters about compassion and benevolence, even develops the zeal to perform such actions occasionally, but also cheats wherever he can, sells out the right of human beings, or infringes it in some other way. (GMS IV: 423, ll.23-28)

As Kant stresses in this passage, humanity would be better served even if agents were indifferent about beneficence but strict about respecting each other's rights. In fact, this priority is constantly violated: beneficence is often used as a means to camouflage or compensate violations of rights, even though "one cannot wipe out injustice by doing beneficent acts" (Moral Collins, XXVII: 433). Kant sharply criticizes the self-complacent attitude of those agents who view their duties towards others as meritorious and consequently want to believe that nothing is owed to others as a matter of right. Central to my argument in this paper is Kant's acknowledgment that the idea of meritorious duties is problematic in a world in which dependence on the beneficence of others is often a result of injustice in the first place:

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[12] On different types of obligations (grounds of obligation) and why in principle they cannot collide, see Timmermann, "Kantian Dilemmas? Moral Conflict in Kant's Ethical Theory," *Archiv für Geschichte der Philosophie*, 95(1), 2013, pp. 36–64.

> One may take a share in the general injustice, even though one does nobody any wrong by civil laws and practices. So if we now do a kindness to an unfortunate, we have not made a free gift to him, but repaid him what we were helping to take away through a general injustice. For if none might appropriate more of this world's goods than his neighbour, there would be no rich folk, but also no poor. Thus even acts of kindness are acts of duty and indebtedness, arising from the rights of others." (Moral Collins, XXVII: 416)[13]

[13] Later on in the same lecture, Kant stresses this point again: "If we have taken something away from a person and do him a kindness when in need, that is not generosity but a poor recompense for what has been taken from him. Even the civil order is so arranged that we participate in public and general oppressions, and thus we have to regard an act we perform for another, not as an act of kindness and generosity, but as a small return of what we have taken from him in virtue of the general arrangement. All acts and duties, moreover, arising from the right of others, are the greatest of our duties to others." (Moral Collins, XXVII: 432).

One may object that the Collins lecture notes (mid 1770s) are too early to use as a source for a claim that is not explicitly formulated in Kant's later writings. However, references to the idea of general injustice can also be found in later writings, such as in a footnote of the *Critique of Practical Reason*, where Kant notes that "one will always find a debt that he has somehow incurred with respect to the human race (even if it were only that, by the inequality of human beings in the civil constitution, one enjoys advantages on account of which others must all the more do without), which will prevent the self-complacent image of merit from supplanting the thought of duty." KpV V: 155n. As Kate Moran shows, the idea of general injustice underlies Kant's criticism of "unwarranted self-congratulation" in matters of beneficence. See Moran, "Neither Justice nor Charity", p. 4-5. The idea of humility in the exercise of charity is in my view a pervasive aspect of Kant's views on beneficence and there is reason to assume that his attitude is at least partially motivated by his awareness of the social injustice of his time. Further, explicit criticism of social injustice in the published writings would probably be considered too subversive in Kant's time. Kant's sparing use of such remarks is thus understandable.

It must be noted that the connection between general injustice and equity is not one drawn by Kant himself, it is my own. Kant's references to equity in his lectures, for instance, in Vigilantius XXVII: 573, focus solely on contractual relations and are unrelated to any claims about general injustice. I do not think this detracts from the Kantian argument for welfare rights I am defending here, which is my own construct. I thank an anonymous reviewer of the *Canadian Journal of Philosophy* for raising these objections and pressing me for clarification.

In this passage, Kant denies the status of meritorious duties to some instances of beneficence, namely aiding the poor. Kant allows social inequality on the basis of differences of talent and merit, but social inequality, as Kant recognizes in the passage, is also the result of "the injustice of governments". Further, Kant claims that one can take part in general injustice, in a way that does not presuppose the violation of any specific laws of the state. In other words, it is possible to do wrong without doing any form of injustice identifiable by the system of laws. Kant's claim presupposes two different concepts of justice and injustice: one that can be recognized with reference to the positive laws of the state and one which is independent of that positive system.

> Having the resources to practice such beneficence as depends on the goods of fortune is, for the most part, a result of certain human beings being favoured through the injustice of the government, which introduces an inequality of wealth that makes others need their beneficence. Under such circumstances, does a rich man's help to the needy, on which he so readily prides himself as something meritorious, really deserve to be called beneficence at all? (MS VI: 454)

Kant formulates his view as a *casuistical question* and presses the reader to reflect about the causes of social inequality and need. A problem with addressing systemic injustice is that given Kant's formal conception of justice, anything that happens within a rightful or lawful framework, is *per* definition *not* unjust. Social inequality, as *material* inequality, is formally compatible with the basic principles of right.

But what does Kant mean by the "injustice of governments"? The system of right protects private property. This means that individuals are constrained in the range of permissible means for providing for themselves and their families. They must respect the private property of others. Ernst Weinrib has argued that a property rights system imposes a systemic difficulty on innate right, that is, the fundamental right to be one's own master (MS VI: 238), which is also connect-

ed with the duty of rightul honor (MS VI: 236).[14] In Weinrib's interpretation, the people have a collective duty to provide for the poor jn order to make private property consistent with innate right.. I disagree with this interpretation for two reasons: firstly, private property *per se* does not make it impossible for other persons to acquire private property, even when the whole land has been divided, and first acquisition is no longer possible; derived acquisition through contracts should remain possible. Secondly, Kant regards an omnilateral global system of distributive justice as the necessary condition for the compatibility of private property with innate right. Kant sees the problem as resting on *unilaterally* imposing an obligation on everyone to respect acquisition, and not on the fact that the poor would not be able to consent to a system which keeps their hands empty. Kant regards the implementation of an omnilateral system of justice encompassing all individuals on the globe as a proxy for actual consent to the institution of private property.[15]

If a legal system is such that it allows violations of rights, one may wonder if such a system is *just* after all. But it is important to stress which normative standards are being used for such a judgment about the justice of a legal system. From the perspective of the juridical system itself, it is possible that no *formal* violations of rights are taking place. I take Kant's point in the passages just quoted to be a distinction between two kinds of judgments about justice (or injustice, as the case may be): justice as defined with reference to the positive laws of a given juridical system and justice defined with reference to some substantive, extra-juridical standard. The idea is that formally just governments can nevertheless preserve structural injustice and informal forms of violence. As I will show later, this idea is also reflected in Kant's conception of equity, as a form of juridical judgment that may differ from the judgment of a court of justice. We end up with two conceptions of justice that may be at odds with each other. Their tension may indeed be an indissoluble feature of legal practice, but one that plays an important epistemic function towards improving positive legal systems.

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[14] Ernst Weinrib, "Poverty and Property in Kant's System of Rights". Notre Dame Law Review, Vol. 78, Issue 3, 2003. The duty of rightful honour, which is Kant's own interpretation of the Ulpian formula *honeste vive*, which he renders as "*sei ein rechtlicher Mensch!"* (*Be a honorable human being!* MS VI: 236) requires that we live in accordance with the right of humanity in our persons, that is, that we do not let our rights be trodden on by others.

[15] Reference to author's work.

By structural injustice I mean socially caused asymmetric constraints on the exercise of external freedom that make the fulfillment of basic human needs extremely difficult, if not altogether impossible. This asymmetry gives rise to vulnerability and economic dependency of some individuals on others and can therefore be regarded as an unjustified restraint on the *economic freedom* of individuals. For instance, Prussia in Kant's time was a heavily agricultural economy with extremely unequal distribution of land. Serfdom was widespread until agricultural reforms abolished it in the early nineteenth Century. This meant not only radical social inequalities, lacking civil and political rights but also structural constraints on the ability of a great number of individuals and their families to satisfy their basic needs and improve their condition through hard work. As Kant observed in a note, "my powder takes away the flour of someone else (…) and I am always unjust when I take away from many a considerable amount of their welfare to add only an insignificant amount to my own.[16]

To apply this line of thought to our time, it is useful to consider how poverty is "expensive".[17] A system of finance that excludes the poor imposes considerable financial burdens on them, to which better off people are not exposed. Given their disadvantage, these costs have a great impact on the range of options available to them, constraining them to make "bad choices" from financial and prudential perspectives. For instance, not having access to banking services, such as a bank account, due to fees they cannot afford, means having to pay more later when having to transfer money or withdraw cheque payments. Being denied credit because of one's low income means that those who need it most are not able to make upfront lump sum payments such as a deposit when renting a home, and will be forced to spend more to live in a motel and on meals they cannot prepare at home; not having a car in places with underdeveloped public transport and in which shopping facilities are concentrated in specific areas, will lead them to pay more for groceries. Eating badly will be a result and this will in turn have an impact on their health and ability to work. The poor then get "stuck" in a system that disadvantages them, while others may

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[16] (…) was ich habe: müßen andre entbehren: – mein Puder entzieht andern das Meel: (...) Nach der Proportion des Erwerbs steigert sich nicht die Summe der Wohlfahrt: und ich bin stets ungerecht, wenn ich vielen einen beträchtlichen Zusatz zu ihrer Wohlfahrt wegnehme: da ich nur einen unbeträchtlichen meiner eignen zusezze. Praktische Philosophie Herder, XXVII: 51, my translation

[17] See "Tackling poverty: It's expensive to be poor. Why low-income Americans often have to pay more." *The Economist,* Sep 5th 2015, and Joseph Heath, *Economics without Illusion. Debunking the Myths of Modern Capitalism,* p. 257.

greatly benefit from the low wages and bad working conditions they are forced to accept. This is an example of injustice that does not result from the violation of any specific positive laws. Kant's notion of general injustice, in which no one "does nobody any wrong by civil laws and practices" could thus be applied to this kind of situation.

For Kant, in grandiloquently exalting charity and beneficence we are doing no more than trying to address the effects of structural injustice with beneficent means. The poor must rely on the good will of others, to which they have no right. And we congratulate ourselves for being so generous. Kant thus recommends that we regard meritorious duty as much as possible as a matter of justice rather than kindness (Moral Collins XXVII: 417). The implication is that we should not dismiss beneficence as a less important duty, but attempt to regard it as a *strict* rather than a wide duty (which, however, is not always possible without rendering beneficence far too demanding). Nevertheless, if poverty is systemic it cannot be addressed effectively as the object of individual virtue. 18In the next section I will show how Kant's legal theory can account for rights which fall short of strict right (rights which can be recognized and enforced by legal systems of justice), and how these so called "wide" rights are exactly what we need when arguing for a right to welfare.

18 The duty of beneficence is not restricted to remedying injustice. We also need the help of others due to our shared human condition which makes us vulnerable to injuries, sickness and natural disasters. The above criticism of the duty of beneficence is thus restricted to the context of "general injustice" and does not apply to all instances of beneficence.

III. Kant on Equity (*Billigkeit*)

Kant introduces the concept of a wide right in his discussion of *ius aequivocum* (ambiguous right). In the Introduction of the *Doctrine of Right*, he distinguishes for methodological reasons between ambiguous right and the "firm basic principles" of strict right, which are fit to be made into laws by legal institutions. Ambiguous right lies in the tendency to confuse or conflate what is right *in itself* (in accordance with "the court of conscience") with the verdict of a court of justice, which is *subjectively right*. This confusion is a *vitium subreptionis,* or error of subreptition.

As Kant stresses, "without making incursions into the domain of ethics, there are two cases which lay claim upon a decision about rights" (MS VI: 233). These are equity (*aequitas, Billigkeit*) and the right of necessity (*Nothrecht*, *ius necessitatis*). Both equity and necessity are instances of *ambiguous right*, although only equity turns out to involve genuine rights. While equity is *right without coercion*, necessity is merely *coercion without right* and consequently no true right at all.

The right of necessity (*Nothrecht*) is the alleged right to kill an innocent in order to save one's own life. Kant uses the classic example of the plank of Carneades: someone sees herself "necessitated" to push an innocent person from a plank in order to save herself from drowning. In contrast to other theorists who recognize a right to self-preservation, Kant argues that such an action can never be in accordance with right. The agent would be *wronging* an innocent person by pushing her off the plank. However, actions from "necessity" cannot be punished by law, since *deterring* agents with threats of punishment would be useless (MS VI: 236). This is because a "threat of an ill that is still *uncertain* (e.g., death by a judicial verdict) cannot outweigh the fear of an ill that is imminent and *certain* (drowning)" (MS VI: 235-6). The impossibility of deterring anyone in such a situation of necessity creates the illusion that one has a *right* or is at least *permitted* to kill an innocent to preserve one's life. This is why the right of necessity must be included under *ius aequivocum*: because a court of justice cannot punish such actions, there is a tendency to assume that a genuine right is at stake.

Although equity[19] also belongs to *ius aequivocum*, equity claims are *genuine* although not *coercive* rights. They are juridical in nature because they are derived from the principle of right (what belongs to someone), but non-coercive because no judge is a position to render a publicly binding verdict concerning this right (MS VI: 234). This is why equity belongs to *ius latum*, or wide right ("right in general", as opposed to "strict right"). The authority to coerce must be determined by a law. The difference between *ius strictum* and *ius latum* is that in the latter a law authorizing coercion cannot be determined. It is interesting to note the way in which Kant reinterprets the traditional understanding of equity as a form of lenience or forbearance meant to correct the strictness of justice under specific circumstances. In Kant's reinterpretation, equity *by definition* is outside the scope of strict right, as a distinctive form of juridical reasoning.

Kant gives the example of a trading firm (*Maskopei*) whose agreement is that partners are to share profits equally. However, one partner has worked more and therefore loses more than the others when the company meets hardship. By equity, the harder working partner is entitled to more compensation than the other partners. Another example is the domestic servant whose initially agreed wage loses value due to inflation (*verschlechterte Münzsorte*, MS VI: 234). Equity would require that the servant be compensated for the financial loss. However, unless such possibilities are specified in the employment contracts, the judge has no *determinate* conditions for addressing these claims, since she must base her decision on what is *publicly declared* in the contract (*Declaration*, MS VI: 296).[20] Although it can only be heard by the "court of conscience", Kant stresses that equity is nevertheless not a matter of beneficence or kindness to others, but of *right,* since it is based on the principle of right (concerning external freedom and the *suum*) and not on the principle of ethics (concerning internal freedom).

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[19] The term "billig" means "preiswert" or "günstig" (cheap) in modern German. Originally, Billigkeit comes from the old German „biliden" or „bilethen" which means to make equal (*gleichmachen*). In Middle High German (*Mittelhochdeutsch)*, "billig" meant "appropriate" or "adequate" (as in "angemessen"). This reflects the meaning of the term *Epieikeia* in Aristotle. While Justice (*Dikaiosyne*) means a general application of the law, equity is meant to compensate the strictness of justice. *Epieikeia* is justice that takes into account the details and nuances of the particular situation, as opposed to laws that are strictly applied in the same way accross different scenarios (Aristotle, Nichomachean Ethics,). Kant is thus following Aristotle in the idea that equity plays a corrective, complimentary function to strict Right when he adopts Cicero's maxim *summum ius, summa iniuria*, the highest law, the highest injustice (De officiis, I, 10, 33).

[20] See Moral Mrongovius, XXVII: 1552-3, Moral Collins, XXVII: 433u, Moral Brauer Me 269.

> Equity (considered objectively) is in no way merely a basis for calling upon another to fulfill an ethical duty (to be benevolent and kind). One who demands something on this basis stands instead on his right, except that he does not have the conditions that a judge needs in order to determine by how much and in what way his claim could be satisfied. (MS VI: 234)

A condition of public right requires that rights conflicts be settled by a public court of justice and not by the private agents themselves, as in the state of nature. Although judgments of rights in the state of nature have a "private" character (each individual must judge for herself but does not have authority to bind others), insofar as a verdict is derived from reason in the "court of conscience", right is *objective*, that is, "right in itself". In contrast, despite its public character and capacity to bind omnilaterally, the verdicts of a public court of justice are *subjectively* valid. They follow from the *empirical principles* a judge is constrained to apply, that is, in accordance with statutory laws. Although a judge in her own personal judgement is able to recognize the equity claims of a certain person (what is "right in itself"), in her public role as a judge her verdict is constrained by subjective principles, which may depart from what she would judge as a private person. As a judge she must follow the laws, not her private judgement.[21] There are two reasons for this. Firstly, allowing too much flexibility would ultimately make the system of public justice superfluous.[22] Secondly, private judgements do not have the authority to bind others. For this reason, equity must "remain unheard" by a court of justice.

However, this does not mean that equity considerations cannot be accommodated in legislation *ex-ante* (for instance, as special clauses in contracts). This means that the conditions for compensation in case of a change in the circumstances (e.g. inflation) can be specified in advance in order to pre-empt a potential clash between the verdict of the court of justice and our private judgements about equity. There is thus a sense in which the *content* of equity judgments can be codified. However, Kant's point is that the appeal to equity cannot be *ad hoc*, since this would

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[21] An exception is when the government volontarily decides to reverse a past inequitable action concerning the rights of the judge herself. In this case, the judge would be acting as a government agent and would be permitted to follow equity. See MS VI: 234-5.

[22] Similarly, Byrd and Hruschka argue that the rationale of the rules of distributive justice is to protect the proper functioning of the public judiciary itself. Unless contracts are enforced, distributive justice would lose its meaning. *Kant's Doctrine of Right. A Commentary*, Cambridge University Press, 2010, pp. 225-6.

create instability and ultimately endanger a condition of public justice. By definition, considerations of equity that are codified cease to be equity: they have become positive law and are no longer *extrinsic* to the legal system. This suggests that equity is primarily defined not by reference to the specific *content* of a juridical judment, but by its *modality*. When codified, equity judments are no longer private judgments without authority to bind but have acquired *public* character. Equity *qua* equity is thus always extra-positive and as such a permanent feature of contractual law: "Equity looks to the disposition and aims of the contracting parties; strict right, however, to the content of the contract. It is thus a contradiction to decide according to equity and yet to be a judge" (Vigilantius lecture notes XXVII: 573).

Summum ius summa iniuria: the more strictly we apply the statutory right, the more we can *wrong* someone for not taking into account her equity claim. Although the duty bearer can freely choose to waive her right to enforce the precise terms of the contract, for procedural reasons this cannot be coerced. The ambiguity of equity lies in a tendency to conflate *commutative* with *distributive* justice, that is, confusing the way one would judge rights as a private person and the way a public court of justice must judge. In the state of nature, what belongs to each is determined by commutative justice (justice in private exchange or contractual relations). In a condition of distributive justice, however, what belongs to each person must be determined in accordance with public principles, which enable public justice to function *most readily* and *surely*. Although distributive justice is about "giving each what belongs to them", this may be done differently from the way one would reason in the state of nature. For the sake of maintaining a functioning system of public justice, we must abide by what is laid down as right without bending the laws in accordance with our private judgment (even when there is good reason to do so). There is thus a "price" to pay for upholding a condition of distributive justice. The reason we must be willing to pay this price is that we have a *duty* to establish a civil condition with others, and gradually improve existing constitutions and forms of government until the lawless state of na-

ture has been fully overcome.[23]

Nevertheless, equity can and should *inform* improvements and reforms of codified legal systems. This is why I will argue that equity based rights can be used to create codified welfare programs. Precisely because they are extra-positive judgments about rights, they can help us understand the shortcomings and limitations of existing formal legal systems we would not be able to identify from within them.

[23] Why do we have a duty to enter the civil condition? The common answer in Kant scholarship is that a civil condition is a condition in which rights can be effectively protected. Although this is certainly true, the main reason is that it is the condition for the permissibility of private property (this presupposes Kant's freedom based argument justifying why we must assume exclusive possession of objects in the first place). It is only possible to impose an obligation on everyone else to respect each other's acquisition if we have a global, omnilateral binding system of distributive justice. Only omnilaterality can make exclusive possession of external objects compatible with the equal innate right of all persons. (Reference to author's work)

IV. An Equity argument for Welfare Rights

In this final section, I will provide an equity based argument for welfare rights. I will argue that equity rights help us identify a distinctive sort of rights violations or wrongs, namely those that are *extrinsic* to formal legal systems. Further, what is *actually* owed to equity right-holders is compensation in proportion to their specific loss. But since it is often impossible to determine the extent of wrongs suffered as a result of systemic disadvantage and quantify what is owed to each individual as matter of compensation, universal welfare provision can function as a *proxy* for compensation for violations of rights.

Which rights are being violated in the case of equity based welfare rights? Equity rights arise from contractual relations. The content of these rights refers to what we can assume were the original intentions and aims of a party when making a contract. Equity is therefore a feature of contractual law. Equity tells us what a court of justice cannot take into account, namely what is not explicitly stated in the terms of the contract. Therefore, it seems that in order to speak of equity based welfare rights we would need some kind of contract to be in place. Which contract would this be? A possible candidate would be the idea of the *original contract* in Kant's legal theory, i.e., the rational idea of the union of a plurality of individuals into a civil condition under a public constitution. However, I will not base my argument on this idea, since the original contract in Kant's legal theory is a *heuristic* device for understanding the nature of the civil condition and spelling out its normative implications, and not a contract proper. Instead, I will follow the idea of *commutative justice*, that is, *justice in contractual relations,* in order to identify the specific wrongs underlying equity based claims to welfare provision.

While equity tells us that victims of systemic injustice have a right to some form of compensation, strict right does not see their disadvantage as a violation of rights. No one is harming or taking away what is theirs from a formal perspective; no one is hindering them from working their way up as a matter of legislation. We thus have an *ambiguous right scenario* in which our private judgments about what would be just necessarily *differ* from the institutional conception of justice. These are problematic rights, which cannot be accounted for in a straightforward way simply by reference to the existing laws of the state.

I will argue that the wrongs underlying equity based welfare rights follow from unjustified (that is, asymmetrical and non-reciprocal) restraints on the economic freedom of certain individuals insofar as they belong to specific social groups. Each individual should in principle be free to engage in voluntary contractual relations with others in a free market. By bringing their assets into the market, individuals can acquire the necessary means to maintain themselves and their families and possibily improve their own social and economic situation through competition in society. Kant voices this idea as following from the *equality* of each member of a state:

Every member of a commonwealth must be allowed to attain any level of rank within it (that can belong to a subject) to which his talent, his industry and his luck can take him; and his fellow subjects may not stand in his way by means of a *hereditary* prerogative (privileges reserved for a certain rank), so as to keep him and his descendants forever beneath the rank. (TP VIII: 292)

A fundamental requirement of right is that external coercion be applied *equally* to all members of society. This means that no subject has the authority to coerce another; legitimate external coercion can only ensue from *public* law. It is therefore a right not to be bound in ways one could not bind all others in return. This right is also the basis for one's capacity to make contracts with others; without this right one would have only duties and no rights against others. It is therefore a right that cannot be given up by a voluntarily act and can only be forfeited through crime (TP VIII: 202).

The requirement that external coercion be reciprocal is incompatible with the systemic exclusion of certain groups from economic competition as a means to preserve social and economic privilege of powerful groups. For instance, certain groups were formally prevented from access to education, from acquiring land or real property, from inheriting or even from marrying whom they wanted. These hindrances may have followed from past formal inequality, that is, from the fact that women, people of colour and certain ethnic, religious and social groups were historically barred from enjoying equal status before the law by their societies. This created a material disadvantage, since unequal formal status before the law also entailed formal exclusion from economic opportunities. Even when the asymmetry in legal status has been corrected at a later histo-

rical stage, members of formerly disadvantaged groups often continued to be disadvantaged by stigmatisation, implicit bias and informal mechanisms of discrimination. Racism, misogyny and class hatred, while often regarded and evaluated from a moral lens, may be traced back to attempts to exclude potential competitors from economic opportunities. Structural injustice is the term I will be using for the set of informal discrimination mechanisms which perpetuate the privilege of powerful groups by excluding "potential competitors" from economic and social opportunities.

One could argue that the recognition of disadvantage caused by the outcomes of collective actions would be enough to justify a duty to compensate them for those disadvantages. This is because other individuals and groups in society benefit from this imbalance (for instance, by the abundance of low wage, unskilled workers, who are in no bargaining position to improve their lot). The argument for compensation would thus be a fairness argument in the Rawlsian sense. We ought to redistribute the burdens and benefits of social cooperation in a better way. When some are benefiting from greater burdens imposed on others, we no longer have *cooperation*, but exploitation. Compensation would be a means to correct this asymmetry and provide opportunities to the worse off. However, it is not clear why failing to provide compensation would be a violation of the *rights* of the disadvantaged, understood as Hohfeldian claims. Rawls' idea is that agents would not agree to such possibility in the original position because it would not be *rational* for them to do so. The rejection of a unfair distribution of burdens and benefits is the result of rational bargaining behind a veil of ignorance. The problem with an unfair society is that it cannot be justified from the decision theoretical standpoint of the original position, not because it violates rights.

Systemic injustice is informal and contingent, giving rise to significant asymmetries between individuals in a way that requires extra-judicial judgment to be identified. There may be thus disagreement as to if and when systemic injustice exists. This is partially due to the fact that we are addressing wrongs that have not been formally recognized or addressed by legal systems, and that are caused by pervasive and ubiquitous social mechanisms, of which we may not be aware due to socialisation and habit. It is only by looking "beyond" the fact that no one seems to be violating any rights in an institutional sense that it is possible to recognize that there is something

wrong in the civil condition. Equity judgments play an important epistemic role by revealing asymmetries in external coercion that undermine equality before the law in substantive and informal ways. While it is possible to consider systemic disadvantage from an ethical perspective, meaning our moral duties to others as fellow human beings, equity is a form of reasoning that is *juridical* in nature. It takes into account the idea of the distribution of external freedom among individuals who have equal juridical status and thus what belongs to individuals as a matter of *right*. An equity based right to welfare provision would not be a right to the beneficence of others (for there is no such right), but a right to reparation or at least *compensation* for one's condition of economic dependence and disadvantage, when it resulted from the general arrangement of society. The problem is thus how to determine how much is owed to each individual.

One of the reasons why equity must remain unheard by a court of justice is that it would impose considerable burdens on juridical systems. Equity claims may require extensive investigation in order to determine not only the title of the right-holder, but the extent of the wrongs done to her and the amount of compensation owed to her. This investigation may have to go back several generations. Another difficulty is that considerations of personal responsibility and desert are often difficult to dissociate from the consequences of systemic injustice. This is illustrated by the fact that the poor tends to make poor economic decisions and discount the future as a consequence of the lack of hope in better economic prospects.

If the poor have an *equity claim* to compensation due to systemic disadvantage in society, it follows that granting a right to basic subsistence would be, again, "only a small return of what we have taken from [them] in virtue of the general arrangement".[24] Someone could be entitled to more compensation for suffered wrongs than mere basic provision, for instance a person whose grandparents were slaves and whose descendants continue to be discriminated and disadvantaged in society. My proposal is to regard welfare provision as a second best substitute to actual reparation, given the indeterminacy of equity rights. Institutionalizing welfare rights would thus be a means of addressing these wrongs, although only to a very limited extent (no full justice would be done to each particular case). Equity based welfare rights are thus different in content from

[24] Ernst Weinrib, "Poverty and Property in Kant's System of Rights". Notre Dame Law Review, Vol. 78, Issue 3, 2003.

rights to basic subsistence, although granting universal basic subsistence is used as a means to restore the economic freedom of agents wrongfully disadvantaged by systemic injustice. Further, equity based welfare rights would require more than basic subsistence. They would require effective access to knowledge, skills and material conditions enabling persons to improve their own economic situation, as opposed to remaining marginalised members of the economic system. Public policy aiming at counteracting racism, misogyny and implicit bias, as well as promoting social and income mobility would also be necessary. Mere formal equality of opportunity is not enough.

Although it may be possible at times to indentify individual perpetrators (for instance, when a specific person discriminates against another due to the latter's social class), mechanisms of social disadvantage are systemic. Therefore, the corresponding duty to compensate for systemic violations of rights falls on society as a *collective*. Individuals, either isolatedly or organised in groups may address social disadvantage as a matter of charity, which is not only inappropriate but also humiliating since violations of rights are at the source of the problem. A better way individuals and civil society at large can contribute would be through public discussion, public protests and voting in such a way that brings public awareness and pressures governments to ensure universal welfare provision and equality of opportunity. However, due to their public character, states are alone in the position to discharge this collective social duty in a way compatible with the juridical nature of the violations in question. Firstly, as public agents states are able to act on behalf of society as a collective. Secondly, only public institutions have the legitimate authority to coerce, including the right to tax for redistribution and the enforcement of public policies. While individual actions may bring relief in situations of emergency or dire need, systemic injustice calls for an institutional response.

In this article, I have proposed an argument for welfare provision based on a Kantian understanding of equity rights. My aim was to account for the prima facie idea that there may be a claim-right for some form of welfare provision. While my proposal is limited here to the domestic level, it may be possible to extend this argument beyond national borders to the international domain. But this will be the topic for another article.

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