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# Kant's Natural Law

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**Kant's natural law**

by

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requirements for the degree of

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## CHAPTER 1: INTERPRETATIONS OF KANT

Immanuel Kant's writings on politics continue to be debated centuries after they were written.<sup>1</sup> His most attractive contributions to political philosophy include his rejection of utilitarianism, his arguments for individual rights to freedom, and his argument for a republican form of government. Kant's philosophy is often used to ground various contemporary theories of justice, which range from socialism to libertarianism. Two of the most prominent political philosophers of the 20<sup>th</sup> century were John Rawls and Robert Nozick. Both authors appealed to Kant's ethics and political philosophy to justify very different conceptions of a just state. One interpretation of Kant involves an emphasis on rights and a limited conception of justice that results in a libertarian "minimalist" state. According to the minimalist account of Kant, welfare policies are restricted to only the very limited purposes that include maintaining the security of the state, and to provide defense and dispute resolution services for citizens. The second, the "welfarist" interpretation, understands Kant in a way that allows for significant social welfare programs and a pursuit of justice that requires substantial state activity to secure. The welfarist reading of Kant is one that believes Kant's political philosophy allows for increased welfare policies for purposes beyond those that are explicitly discussed by Kant.

There are two separate but related goals for this project. The first and main objective is to discover whether Rawls or Nozick is more accurate in his use of

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<sup>1</sup> When citing Kant's writings, I abbreviate *Groundwork of the Metaphysics of Morals* as G, *The Metaphysics of Morals* as MM, *Lectures on Ethics* as LE, and *Perpetual Peace* as PP. Other citations to Kant are not abbreviated. I abbreviate *Anarchy, State, and Utopia* (Nozick 1977) as ASU, and *A Theory of Justice* (Rawls 1999) as TOJ.

Kant's philosophy. The second objective is to analyze what is known as the "welfarist" vs. "minimalist" debate regarding Kant's true political philosophy. These two goals can be connected with Nozick representing a minimalist interpretation of Kant, and Rawls a welfarist interpretation. Further, there is a better opportunity for Kant to be interpreted as a welfarist by appealing to social contract themes in his writing, rather than natural law themes. The reason is because natural law approaches often provides boundaries and limits on the kinds of social contracts that can be agreed to. If natural law does not play an important role in Kant's political philosophy, then other contract theories, such as the one presented by Rawls, may be compatible with Kant. In contrast, if natural law does play an important role in Kant's philosophy, minimalists like Nozick may be more compatible with Kant. This is particularly true if Kant's natural law imposes stringent restrictions on the extent to which the social contract can be used to justify redistributive welfare policies.

For these reasons, if interpretations based on natural law succeed where interpretations based on consent and the social contract fail, this is strong evidence that the minimalist interpretation is accurate; at least given the way that Kant presents his natural law theory. The first section begins by outlining the major arguments for each of the two interpretations. I intentionally postpone the more detailed Rawls and Nozick comparison until later, though it does fit into both the minimalist-welfarist and natural law-contract debates. In the second section, I argue for an interpretation of Kant that connects his political philosophy to this moral philosophy. Here, I will argue that Kant is best understood as a natural law

theorist, and not a social contract theorist. In the third section, I use these conclusions to analyze the different ways Kant is used by both Rawls and Nozick. Ultimately, I will argue that Nozick employs Kant in a way that is more consistent with his actual moral and political philosophy.

### **I. Minimalist Interpretation**

I begin by articulating the minimalist position because it is the most straightforward and is essentially the position that accepts what Kant says very literally. The literature on this topic is often presented as if the “burden of proof” is on those wishing to include a more expansive reading of the state’s powers in Kant’s philosophy. Interpretations of Kant’s political theory as promoting a minimalist conception of justice typically refer to three important themes in his writing. The first regards his comments on the state’s use of coercion, and more specifically that coercion is only legitimate when its purpose is to protect the lawful freedom of individuals. Second, Kant does not base justice on the political end of fulfilling the desires or needs of citizens. Rather, any welfare that is acceptable to Kant is only instrumental to the ultimate purpose of the state – its own preservation and securing the external freedom for all. Third, the comments that Kant does make regarding welfare legislation in general indicate a skeptical attitude toward paternalistic state policies. The last two points, taken together, provide evidence that welfare is not a central feature of justice, and that welfarist policies can actually conflict with justice.

*Coercion*

Near the beginning of the *Doctrine of Right*, Kant claims that “any action is right if it can coexist with everyone’s freedom in accordance with a universal law.”<sup>2</sup> He goes on to explain that any action that can coexist with a compatible freedom for all other individuals is right, and whoever hinders that action has done wrong. Coercion is only legitimate when it is in response to action that would violate the external freedom of others and it is intended to prevent that violation.<sup>3</sup> This leads to the conclusion that state coercion is legitimate only when it protects that original natural right to freedom that we all share. Because coercion is fundamentally a restraint on freedom, it follows that freedom can only be sacrificed for the sake of freedom itself. For this reason, a just Kantian state could not allow tradeoffs between freedom and some other value such as material prosperity or happiness.<sup>4</sup> This resembles the foundation of most arguments for classical liberal conception of rights. It is thought that individuals possess a certain right to liberty that is natural and innate which cannot be sacrificed for some greater good. In fact, egalitarian

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<sup>2</sup> MM, 24.

<sup>3</sup> MM, 25.

<sup>4</sup> Louis-Philippe Hodgson, “Kant on the Right to Freedom: A Defense.” *Ethics*. no. 4 (2010): 794.

liberals often accept a similar principle, although its justification is much different from the one given by Kant.<sup>5</sup>

*Justice does not involve welfare*

Kant is clear that welfare policies are not (at least not directly) a concern of justice. In one essay he states:

“The whole concept of an external right is derived entirely from the concept of freedom in the mutual external relationships of human beings, and has nothing to do with the end which all men have by nature (i.e. the aim of achieving happiness) or with the recognized means of attaining this end.”<sup>6</sup>

This is a theme that is repeated throughout many of Kant’s writings on justice. The reason that Kant bases justice on right and freedom rather than on welfare is because preference satisfaction cannot be pursued according to a universal principle. In contrast to right and freedom, welfare and happiness are contingent on individual circumstances, and using “variable illusions” as a benchmark for happiness is impossible.<sup>7</sup> Everyone has different needs and different

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<sup>5</sup> Rawls’ priority of the basic liberties principle over the difference principle is based on the assumed “hierarchy of interests,” that imply liberties are fundamental only because of their usefulness. In fact, toward the end of *A Theory of Justice*, Rawls briefly mentions the possibility of restricting liberties if that is necessary to bring about the “required social conditions.” TOJ, 476

<sup>6</sup> Immanuel Kant. “On the Relationship of Theory to Practice in Political Right” in *Kant: Political Writings*. Edited by H.S. Reiss. (Cambridge: Cambridge University Press, 1991), 73.

<sup>7</sup> Kant, “On the Relationship of Theory to Practice,” 80.



preferences, and pursuing justice based on welfare lacks the objective quality Kant believes is so important.

In anticipation of possible objections to this argument, Kant immediately proceeds to explain when it is acceptable to enact welfare legislation. The sovereign is authorized to put into place any legislation that is needed for the commonwealth's prosperity.<sup>8</sup> Kant warns that any laws that appear to be directed toward happiness (he gives the example of affluence of the citizens) must be understood as being only a means to secure the *rightful* state. The rightful state is, as mentioned, primarily concerned with the preservation of equal reciprocal freedom of its citizens and to preserve itself against external enemies. A *prosperous* state, then, is one that successfully achieves and maintains the rightful condition.<sup>9</sup> It may be conceivable that a basic education, or even basic health care, may be part of a just Kantian state. However, these are not necessary conditions for justice and such social programs would only need to exist as long as they are necessary to preserve the security of the state and to maintain the external freedom of its citizens. In this sense, references Kant makes to various social welfare programs should be considered empirical suggestions for instrumental ways to achieve a rightful condition.<sup>10</sup> It may be suggested that this authority given to the sovereign to maintain a stable state that can keep peace and resist foreign enemies could in fact lead to a very extensive

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<sup>8</sup> Paul Guy, *Kant*. (London: Routledge, 2006), 80.

<sup>9</sup> The term "prosperous" in Kant is not intended to refer to wealth or any other material benchmark. Rather, a prosperous state should be thought of as one that flourishes according to its proper end, which in this case is securing the rightful condition.

<sup>10</sup> Wolfgang Kersting, "Kant's Concept of the State" in *Essays on Kant's political philosophy*. Edited by Howard Lloyd Williams. (Chicago: University of Chicago Press, 1992), 153.

state. However, Kant is clear that the well being of the state should not be confused with the welfare of the citizens.<sup>11</sup> The well being of the state is judged according to its ability to maintain a rightful condition. This distinction, along with the fact that Kant never explicitly argues for public welfare on the basis of necessity or benevolence leads to the conclusion that Kant did not intend for it to be a fundamental purpose of the state.<sup>12</sup>

### *Skepticism of social welfare legislation*

Kant is adamant that concerns of welfare are not necessary to achieve justice, and he is also skeptical of whether a free state can pursue social welfare consistent with justice. In *Theory and Practice*, he condemns paternalistic governments as the “greatest conceivable despotism” for treating its subjects “as immature children who cannot distinguish what is truly useful or harmful to themselves.”<sup>13</sup> A similar passage is found in *The Doctrine of Right* contrasting paternal despotic governments with a more favorable patriotic government that respects the independence of each citizen.<sup>14</sup> Even if policy goals aimed at increasing welfare were consistent with justice, he still expresses concern about the effects that these programs have on personal responsibility. In one interesting passage, Kant even goes so far as to remark about the possibility that generous religious institutions

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<sup>11</sup> MM, 6:318

<sup>12</sup> Mark Lebar, "Kant on Welfare." *Canadian Journal of Philosophy*. no. 2 (1999): 234.

<sup>13</sup> Kant, "On the Relationship of Theory to Practice," 74.

<sup>14</sup> MM, 6:317.

“make poverty a means of acquisition for the lazy.”<sup>15</sup> The context of the passage in which he makes this remark is in a discussion of various means to raise revenue for important social programs. While there is room for poverty relief in Kant’s theory, it is important to keep in mind such programs are only instrumental to secure the rightful condition. If Kant has even slight concerns about how a private religious institution’s charitable behavior can affect the character of citizens, then certainly public institutions would receive similar skepticism.

## II. Welfarist Interpretation

An alternative interpretation works a conception of social welfare into a Kantian state by appealing to the duty of beneficence. This is a duty of virtue requiring that we promote the happiness of others in need.<sup>16</sup> As mentioned above, Kant never explicitly argues for public provisions of welfare based on beneficence, but rather as possibly necessary to secure the rightful condition. However, this particular welfarist argument is grounded in the fact that self-interest, or at least a maxim of deliberate non-beneficence, cannot be willed universally without contradiction because it would be our wish that others come to our aid when we fall on hard times. Since beneficent acts have an external characteristic – we must physically “act” in some way – it may be claimed that this duty could be enforced

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<sup>15</sup> MM, 6:327-8.

<sup>16</sup> MM, 6:453.

through government coercion.<sup>17</sup> Some of Kant's duties of virtue, such as the duty to develop your own personal talents and moral faculties, lack a distinct external component that can be subject to compulsion. In contrast, the act of beneficence exhibited through altruistic transfers of resources to those who need them can be coerced, and so it is suggested this is a duty of virtue that can be enforced. David Cummiskey bases this conclusion on the following passage from Kant:

"All duties are either *duties of right*, that is, duties for which external lawgiving is possible, or *duties of virtue*, for which external lawgiving is not possible. Duties of virtue cannot be subject to external lawgiving simply because they have to do with an end which (or the having of which) is also a duty. No external lawgiving can bring about someone's setting an end for himself (because this is an internal act of the mind), although it may prescribe external actions that lead to an end without the subject making it his end."<sup>18</sup>

This passage is simply meant to explain that duties of virtue are such that, even if they have an external component, they cannot be subject to external lawgiving due to the internal disposition that is also required to fulfill that duty. Taking the example of beneficence, the act of charitable giving is the external component and could conceivably be coerced. The internal component requiring the individual to adopt another's happiness as one's own end cannot be coerced.<sup>19</sup> Cummiskey's confusion is in regards to the very last sentence of the quoted passage.

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<sup>17</sup> David Cummiskey, *Kantian Consequentialism*. (New York: Oxford University Press, 1996), 149.

<sup>18</sup> MM, 6:239.

<sup>19</sup> MM, 6:452.

He mistakenly interprets the phrase “it may prescribe external actions that lead to an end” as meaning something equivalent to “it is permissible to prescribe external actions that lead to an end.” This is a misreading of Kant. With that phrase, Kant is only making the simple observation that the external components of duties of virtue *could* be coerced in a way that brings about the anticipated effect of adopting that end. However, it should not be interpreted as somehow granting permission for this coercion to take place.

If we replace beneficence with another one of Kant’s virtues (the duty of gratitude), the point is clearer. Certainly no external lawgiving can coerce someone to adopt the duty of gratitude because there is an important internal component that consists in the “heartfelt” feeling that accompanies gratefulness.<sup>20</sup> However, we *may* prescribe external actions that lead to a particular end of gratitude, such as mandating written letters of appreciation. When read in this way, it becomes clear that Kant was only giving a warning that even if prescribing external actions leads to a particular end, that alone would not guarantee the end was truly internally adopted by the individual, and thus in compliance with the duty of virtue.

Why is this so important? It is important because interpreting Kant in a way that would allow the duties of virtue to become legitimate grounds for state policy could potentially turn the state into a tyrannical nightmare. The externally realized ends of fulfilling most of the other virtues that Kant lists could be anticipated. For example, it is typically easy to spot actions that appear to be beneficent, loving, or sympathetic. It would be a mistake to believe that Kant would sanction state power

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<sup>20</sup> MM, 6:455.

simply because acting in accord with duty has predictable external results that it would be *possible* to bring about coercively. This approach would also ignore the important feature of an act that gives it moral worth – acting for the sake of duty.<sup>21</sup> If we justify redistributive welfare policies by appealing to the individual duty to be charitable, coercing the action in accord with that duty immediately undermines any possibility that the duty can be done in a way that gives it moral worth.

A more plausible attempt to invoke beneficence to justify social welfare programs can be done by attributing a special duty to the sovereign. While it may not be permissible to coerce individuals to comply with such a duty, it may be possible that the state itself has its own duty to be charitable and aid the poor.<sup>22</sup> Support for this understanding of the state's powers is found in a passage where Kant describes the a redistributive function of the state:

“To the supreme commander there belongs *indirectly*, that is, insofar as he has taken over the duty of the people, the right to impose taxes on the people for its own preservation, such as taxes to support organizations providing for the *poor, founding homes, and church organizations* (...).”<sup>23</sup>

This seems to be strong textual evidence that Kant could accept certain social welfare programs, and it seems he has given two good avenues for enacting welfarist policies. In the previous section, it was acknowledged that welfare programs might be instrumentally necessary for the preservation of the state. In this section, he is suggesting that there is even a justice-related duty to aid not only

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<sup>21</sup> MM, 6:442

<sup>22</sup> Allen Rosen, *Kant's Theory of Justice*. (Ithaca, NY: Cornell University Press, 1996), 191.

<sup>23</sup> MM, 6:326.

the poor, but also church organizations. The inclusion of religious organizations on a list of possible recipients of charity indicates that the goal of this duty is for more than merely preserving the state. However, O'Neill points out that beneficence is an imperfect duty, which means the end to be attained is defined without specifying exactly how or to what extent that end is to be realized.<sup>24</sup> In other words, it is a duty on par with the duty to cultivate one's talents or to show gratitude. This means that even if the sovereign does acquire an imperfect duty of beneficence, it could not be a necessary condition for achieving a rightful condition. To what extent would the sovereign need to exercise an imperfect duty such as beneficence to fulfill the requirements of justice?

Rather than attempting to use the duty of beneficence to justify state welfare goals, a more promising attempt can be made by connecting the level of citizens' welfare to the actual requirements of justice. The most basic requirement of justice for Kant is that the state achieves a "rightful condition," which is defined as "that relation of men among one another that contains the conditions under which everyone is able to enjoy his rights."<sup>25</sup> Alexander Kaufman argues that the ability of individuals to enjoy their rights can only exist in a civil condition where freedom and equality are protected.<sup>26</sup> These are indeed the preconditions to a rightful condition that Kant specifies. Further, the precise definition of equality that Kant gives is "independence from being bound by others to more than one can in turn

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<sup>24</sup> Onora O'Neill. *Constructions of Reason: Explorations of Kant's Practical Philosophy*. (Cambridge: Cambridge University Press, 1990), 232.

<sup>25</sup> MM, 6:305.

<sup>26</sup> Alexander Kaufman, *Welfare in the Kantian State*. (Oxford: Oxford University Press, 1999), 29.

bind them.”<sup>27</sup> If economic conditions are such that individuals experience asymmetric relations between those with more resources and those with less, it can be argued that the necessary equality between individuals in order to achieve a rightful condition is not fulfilled. This equality can lead to a loss of freedom in the form of economic dependency, thus further undermining a rightful condition.<sup>28</sup> Kant’s comments on passive citizens (women, children, etc.) in the state indicate that the dependence of these individuals on active citizens (primarily men and property-owners) is only compatible with freedom when the laws do not prevent the former from “working up from this passive condition.”<sup>29</sup> Based on this, Kaufman argues that the only way to ensure that individuals have equality and freedom in order to secure a rightful condition is to enact public welfare policies preventing exploitive conditions.

This is quite a stretch of what Kant means. The kind of freedom that Kant intends is achieved only through general laws that are free from material conceptions of a good life.<sup>30</sup> Preventing exploitive dependency relations between individuals is not directly a material goal, but it would require the state to constantly judge the degree to which inequalities in wealth or social circumstances were truly affecting the freedom of citizens. Further, the equality that Kant is concerned with is only legal equality in the form of legally unrestricted access to all social positions.<sup>31</sup> As a result, Kant cannot be read as proponent of redistributive or

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<sup>27</sup> MM, 6:237.

<sup>28</sup> Kaufman, 31.

<sup>29</sup> MM, 6:315.

<sup>30</sup> Kersting, 151.

<sup>31</sup> *Ibid.*, 152.



welfarist policies for the sake of equality unless economic inequalities are affecting the actual legal symmetries between citizens. This could perhaps occur if corporations or other wealthy organizations are attempting to influence the political sphere, and could be legitimately regulated in the Kantian state. This is especially true if economic power is being converted into political power in a way that results in legal inequalities.<sup>32</sup>

Some modern Marxist philosophers claim that Kant's failure to include more substantive comments about the relationship between economic conditions and justice is a result of the relative infancy of capitalism at the time.<sup>33</sup> They claim that he did not fully appreciate the extent to which capitalism would come to form dependent relationships between classes, and that if he had, it certainly would have been addressed given his concern for freedom and equality. Again, for Kant, these developments would only affect justice when they affect actual legal relationships between citizens. Also, it is not the purpose of this project to predict how Kant's views on freedom and equality would have changed if he fully understood the implications of modern capitalism.

At this point it is unconvincing that either the minimalist or the welfarist interpretations are more accurate. Both have strong textual evidence, and Kant must share some of the blame for the confusion for his inconsistent comments

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<sup>32</sup> Interestingly, Kersting is not a minimalist and goes on to argue that a justification for welfare policies in a Kantian state can only be achieved by appealing to the requirement that the state do whatever is necessary to preserve itself. He is adamant that actual principles of distributive justice cannot be deduced any other way. His emphasis is on only legal tests of justice, and never tests based on distributions.

<sup>33</sup> Harry Van Der Linden, *Kantian Ethics and Socialism*. (Indianapolis: Hackett Publishing, 1988), 158.

regarding paternalistic and social welfare policies. However, it is clear that Kantian justice cannot have welfare or redistributive policies as a *necessary* condition for achieving justice. It is not clear that equal external freedom for all individuals absolutely requires redistribution of some kind. Also, beneficence is a duty that becomes void of moral worth when coerced, and moral duties, such as the duty to be charitable, cannot give rise to corresponding rights.<sup>34</sup> The current debate seems highly unsatisfying in that it consists primarily of picking out quotes that support whichever interpretation is most favored. In the next section, I present an interpretation of Kant that focuses on his reliance on natural law to justify political obligation. The implication of this interpretation is that welfare policies are not easily included in Kant's civil society, and instead must appeal to themes of consent and the original contract.

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<sup>34</sup> George Fletcher, "Law and Morality: A Kantian Perspective." *Columbia Law Review*. no. 3 (1987): 545. For example, the moral duty to respect other people does not entitle someone with an enforceable right against ridicule. In contrast, the right against assault or theft *does* impose a corresponding duty on others to not commit those acts.

## CHAPTER 2: KANT'S NATURAL LAW

The relationship between politics and morality can take roughly three forms – realist, negotiating, and idealist.<sup>35</sup> The realist conceives of politics and morality as two distinct spheres with no overlapping between the two. This approach can either elevate politics above concerns of morality, or claim that there exists a separate set of virtues specifically for the political sphere.<sup>36</sup> The negotiator tradition requires politics to balance between principled ethical convictions and the responsibility that the individual accrues by participating in politics.<sup>37</sup> The nature of politics is such that the decisions made in this sphere have consequences that affect the whole state. If actions motivated by principled ethical convictions require the goodness and perfection of other individuals to avoid disastrous foreseeable consequences, it is the responsibility of politicians to adjust their actions accordingly.

Immanuel Kant falls into the third category as an idealist<sup>38</sup> whose political philosophy cannot be interpreted separately from his moral theory. Unlike the previously discussed approaches where politics is sometimes, if not always, subject to pragmatic concerns, Kant regards “true politics” as being unable to proceed at all

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<sup>35</sup> Paul Formosa, "All Politics Must Bend Its Knee Before Right: Kant on the Relation of Morals to Politics." *Social Theory and Practice*. no. 2 (2008): 158.

<sup>36</sup> Machiavelli, for example, can be interpreted as arguing for each of these related realist approaches.

<sup>37</sup> Max Weber, “The profession and vocation of politics” in *Identity: A Reader*. Edited by Gay, Evans, & Redman. (New York: Sage Publications, 2001), 353.

<sup>38</sup> This and other references to idealism in this paper do not refer to what Kant calls “transcendental idealism”. I am using the term as used by Formosa, Weber, and others to generally to describe political doctrines are based on what is actually morally permissible. See Alasdair MacIntyre (2006) p. 134 for similar language.

without first “paying homage to morality”.<sup>39</sup> The dictates of morality cannot be adapted to politics, but rather politics conform to the dictates of morality.<sup>40</sup> Kant’s idealism is taken to the extreme in an example given in *On the Supposed Right to Lie*. Here it is claimed that a well-intentioned lie to a murderer regarding the whereabouts of a friend can leave a potential deceiver accountable for all the consequences resulting from the lie.<sup>41</sup> Because there is an unconditional duty to tell the truth, acting contrary to that ethical duty can justifiably lead to reprimand. Kant seems to also understand the legal difficulty such an interpretation of right would cause, and elsewhere explains that lies can only be subject to civil punishment if it directly infringes on another’s rights. The claim given is that only when lies affect another’s right, such as perjury in instances of procedural justice, does the act become subject to punishment for reasons of right.<sup>42</sup>

In any case, we see Kant’s idealism in these examples. His moral theory plays an important role in forming his conception of politics, the role of the state, and his theory of right. The limits of political authority and the duties of the state are always subject to the moral law. To the extent that the state can use coercive power to achieve its legitimate goals, it must do so in a way that is morally permissible.<sup>43</sup> The most obvious formula of the categorical imperative that is relevant to questions of justice is the formula of humanity (FOH). This principle sets limitations on the

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<sup>39</sup> Kant, Immanuel. *To Perpetual Peace: A Philosophical Sketch*. Translated by Ted Humphrey. (Indianapolis: Hackett Publishing, 2003), 26.

<sup>40</sup> Kant, Immanuel. *Grounding for the Metaphysics of Morals: With on a Supposed Right to Lie Because of Philanthropic Concerns*. Translated by James Ellington. (Indianapolis: Hackett Publishing, 1993), 64.

<sup>41</sup> Ibid.

<sup>42</sup> MM, 6:239.

<sup>43</sup> MM, 6:383.

ways that individuals can be treated, and these limits must necessarily apply to both individuals acting outside of the state as well as individuals acting through the state.<sup>44</sup>

It seems, then, that understanding Kant's ethical theory would be a crucial starting point to understand his conception of justice. This section discusses how Kant uses his moral theory (the formula of humanity, in particular) to ground his principles of justice. I will first start by explaining common interpretations of FOH and analyze how they assist in understanding the proper role of the state. In general, I will conclude that interpreting the FOH cannot be successful without understanding Kant's political philosophy, which relies heavily on our capacity for freedom. In particular, interpreting Kant's moral or political philosophy by appealing to the concept of consent encounters difficulties. It is only when the FOH is interpreted in light of the emphasis Kant places on our innate right to freedom that the proper scope of coercive state power can be determined. Finally, I will show that Kant is best understood as a natural rights theorist for whom consent plays a limited role in determining legitimate state authority.

### **I. Consent in Kant**

Kant's second formulation of the categorical imperative is stated as: "Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means but always at the same time as an

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<sup>44</sup> Mary Gregor, "Kant's Theory of Property." *The Review of Metaphysics*. no. 4 (1988): 770.

end.”<sup>45</sup> There are two important parts of this formulation – the first is the meaning of the word “humanity”, and the second being what it means to treat someone merely as a means. For Kant, the characteristic that sets humans apart from non-humans is our ability to autonomously set and strive for particular ends.<sup>46</sup> This capability to set our own ends is a result of our unique capacity for rationality and is the source of our dignity. Our dignity obliges others with similar capacities for rationality to respect that dignity.<sup>47</sup> The second part of the FOH is a command prohibiting the treatment humanity as mere means. Since Kant’s principle of justice is derived from the FOH, understanding the implications of this formulation is important. As an example, Kant explains how a false promise violates the 2<sup>nd</sup> formulation:

“For he whom I want to use for my own purposes by means of such a promise cannot possibly assent to my mode of acting against him and cannot contain the end of this action in himself ... he who transgresses the rights of men intends to make use of the persons of others merely as means, without considering that as rational beings, they must always be esteemed at the same time as ends, i.e., only as beings who be able to contain in themselves the end of the very same action.”<sup>48</sup>

What exactly does it mean to treat someone as merely a means? Many interpretations of this passage use the concept of consent to judge whether or not an action respects individuals as ends in themselves. Two major efforts to

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<sup>45</sup> G, 4:429.

<sup>46</sup> Allen Wood, *Kantian Ethics*. (Cambridge: Cambridge University Press, 2007), 167.

<sup>47</sup> Thomas Hill, "Humanity as an End in Itself." *Ethics*. no. 1 (1980): 85.

<sup>48</sup> G, 4:429-30.

understand this passage include the possible consent interpretation and the rational consent interpretation introduced below. Ultimately, both of these interpretations fall short of being able to fully explain and unify Kant's ethical theory with his political theory.

### *Possible Consent*

According to the possible consent interpretation, the key phrases for understanding the quoted passage consist in the reference to other individuals being unable to assent to the ultimate purposes of a false promise, and that they are also unable to contain the action in themselves.<sup>49</sup> It is irrelevant to consider whether or not an individual would accept the intended goal of a false promise, or if the end result would benefit the deceived party. Rather, the deceived individual simply having no opportunity to make the intended end of the false promise as her own end is sufficient to disrespect the dignity of that person. Disrespecting a person in this way is to treat them merely as a means.

This is an interpretation of the formula of humanity that suggests the possibility to consent is the morally significant aspect to consider in determining whether an individual is treated as a mere means. It not only rules out deception, as mentioned above, but also must rule out coercion and force as methods to achieve particular ends. Both coercion and deception deprive an individual of being able to autonomously choose among alternative courses of action. The force used in

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<sup>49</sup> Christine Korsgaard, "The Right to Lie: Kant on Dealing with Evil." *Philosophy & Public Affairs*. no. 4 (1986): 331.

committing a robbery, for example, overpowers an individual's will giving the victim no adequate alternative but to forfeit property to the robber. The victim cannot consent to the transaction because the choice is essentially made of them. While a victim may be *compliant* when faced with aggression, forced compliance rules out possibility of consent. In the case of a false promise to repay a loan, for example, the lender believes both parties are consenting to an arrangement that the borrower has no intention of fulfilling. The lender cannot assent to something she has no knowledge of, and thus she has been treated as a mere means.

From this, we can conclude that one necessary condition for fulfilling the formula of humanity would be that individuals are at least capable of consenting to any proposed action or transaction. A similar interpretation can be taken of Kant's formula of universal law, which requires us to "act according to that maxim whereby you can at the same time will that it should become universal law."<sup>50</sup> Kant does not mean that the maxim on which you act is a maxim that you must simply wish to become universal law. It is not meant to be an imperative based on subjective inclinations or desires. Rather, it is meant to test actions as far as they can be willed universally without contradiction.<sup>51</sup> If it is not possible to will the potential maxim without leading to contradictory results, it should be ruled out on this account. For example, an individual in desperate need of money could certainly subjectively will that she receive a loan through deception. However, if the maxim on which she acts were universalized, nobody would take seriously any promise to repay loans

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<sup>50</sup> G, 4:422.

<sup>51</sup> Marcia Baron, Philip Pettit, and Michael Slote, *Three Methods of Ethics: A Debate*. (Hoboken, NJ: Wiley-Blackwell, 1997), 69-70.



knowing that it would not be paid back. In this case, the end she seeks using deception (securing a loan) would not be possible in a world in which her maxim is universalized. This is a case where a contemplated action would lead to a contradiction, could not be willed as universal law, and thus impermissible according to the formula of universal law.<sup>52</sup> The connection of these two formulations is through the *possibility* to consent (FOH) to a proposed end, or the *possibility* to consent that others act on the same maxim (Formula of Universal Law).

The consent interpretation runs into some serious problems as a possible understanding of Kant's ethics and, at best, can only provide a necessary condition for fulfilling the categorical imperative. First, it seems to reduce morally significant consent to a simple matter of procedurally gaining actual consent to avoid using someone as a mere means. This is often difficult from a practical standpoint. Onora O'Neill, considers situations where a simple nod of the head (to an auctioneer, for example) can indicate consent in some contexts that would never be considered actual consent in others.<sup>53</sup> We can also imagine situations in which someone is consenting to actions that have consequences which the consenter does not fully understand. Does the wage laborer consent to the continued exploitation of both himself and his fellow workers when he signs a labor-for-paycheck contract? It is likely that her intended consent is only to the immediate paycheck in exchange for

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<sup>52</sup> Christine Korsgaard. *Creating the Kingdom of Ends*. (Cambridge: Cambridge University Press, 1996), 92-93.

<sup>53</sup> Onora O'Neill. "Between Consenting Adults." *Philosophy & Public Affairs*. no. 3 (1985): 255.

her labor, and not (from a Marxist perspective) to the exploitative relationships that follow. Does a patient who is about to undergo operation consent to the details of the operation? Certainly not, since the average patient could not even begin to understand to the particulars of a complex medical procedure. The patient is somewhat impaired with respect to what she is actually consenting to. How much must a physician explain the details of a procedure to a patient before her consent becomes significant? Is consent in this case only a matter of acquiring the patient's signatures on a few forms?<sup>54</sup> In both of these cases, there is something questionable about relying on procedural consent alone to avoid using someone as a mere means. If possible consent is all that matters to avoid treating someone as a means, then we must conclude that it is unimportant whether the consenting individual fully understands what she is truly consenting to.

Another problem with possible consent is that it rules out some of the conclusions of Kant's very own political philosophy. The possible consent interpretation rules out force and coercion on grounds that these actions do not allow an individual the *possibility* to consent to or dissent from a proposed action. However, Kant places no prohibitions on acts of self-defense when protecting yourself against hindrances to your own freedom.<sup>55</sup> It may be objected that this is a special case in that a victim does not initiate the aggression and so coercion can be used when it is a response to someone already violating categorical imperative at your expense. However, Kant's views on the state of nature seem to further rule out

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<sup>54</sup> It may be suggested that consenting to undergo a medical procedure is not consent to the procedure itself, but to the nature of the risks involved. If this were the case, it certainly would be possible to consent to the risk.

<sup>55</sup> MM, 6:231.

the possible consent interpretation. He held that there is a duty to leave the state of nature and enter a civil condition, and that anyone holding out from forming such a condition could be compelled to enter.<sup>56</sup> Coercion to enter a civil condition in this way would certainly prevent the possibility that any holdouts might have of consenting. Since coercion of this kind is permissible (and encouraged) in Kant's political philosophy, the possible consent interpretations only leads to inconsistencies between Kant's ethics and Kant's politics.

### *Rational Consent*

We can rule out the possible consent interpretation as being an adequate way of interpreting the formula of humanity. Another attempt at interpreting the categorical imperative involves our rational nature, and respect for that nature, as being the morally relevant aspect in determining whether we respect people as ends in themselves. Even if possible consent were a *necessary* condition to avoid violating the categorical imperative (the above section showed that it is not), it would not be *sufficient* in all cases. This is plain in Kant's assertion regarding immorality sex outside of marriage, whether it is committed adulterously or pre-marriage. Regardless of whether the act is consensual, even formally so, he still regards it as being immoral. Consent alone cannot override the fact that such acts are based on our inclinations in a way that disrespects our humanity.<sup>57</sup> Another example would be Kant's prohibition on suicide. Here, he specifically refers to the

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<sup>56</sup> For example, see MM, 6:264.

<sup>57</sup> LE, 161.

formula of humanity in arguing that ending one's own life is not consistent with treating humanity as an end in itself.<sup>58</sup> Assuming both adulterous relations and the act of suicide would be acts committed with the full consent of participating individuals (we can even imagine formal, written consent for each case) it appears neither would still pass the formula of humanity because the consent is not *rational*.

This leads to another approach to interpreting the categorical imperative. It is difficult to determine exactly what makes consent rational. One possibility is that we respect individuals as ends in themselves when we treat them in ways they would rationally consent to, meaning what they would choose when given various alternatives and knowledge of those alternatives.<sup>59</sup> On this account, individuals must be sufficiently knowledgeable regarding a proposed action to make an informed decision about whether or not to give their consent. This approach argues that every individual has particular aims and desires, and given facts about these aims and desires, we can judge whether an individual would consent to being treated in a certain way. If individuals would consent with these facts considered, the consent is rational.

However, this is not what Kant means when he refers to our rationality. Our rationality is not merely our ability to calculate the most efficient way to achieve goals based on our natural inclinations. This would amount to heteronomy of the will. Rather, our rationality for Kant is our capacity to act contrary to those

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<sup>58</sup> LE, 124.

<sup>59</sup> Samuel Kersting, *How to Treat Persons*. (Oxford: Oxford University Press, 2013), 69.

inclinations based on *a priori* moral laws.<sup>60</sup> From a purely empirical perspective it may seem rational for a distraught individual to commit suicide, but this is an act grounded entirely in inclinations arising from that individual's circumstances. This interpretation would lead us to conclude that we avoid treating people as mere means if we treat them in ways that are compatible with (or at least do not hinder) their rational pursuit of whatever ends they have chosen. While this seems more plausible than the possible consent interpretation, it fails to use the concept of rationality in a way Kant would accept.

Problems still exist even when we use rationality as Kant intended, which is the human ability to will and act contrary to our natural instincts and inclinations. To act from duty in accordance with the categorical imperative is what makes us autonomous, rational beings separate from animals. But, according to the rational consent interpretation, we need to know what we would rationally consent to in order to act in ways consistent with the categorical imperative.<sup>61</sup> So, when we apply Kant's original definition of rationality in this way, we end up in a circular problem – we act rationally when our actions conform to the categorical imperative, and our actions conform to the categorical imperative when we respect another person's rationality. To respect another person's rationality, we must know what they would

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<sup>60</sup> G, 4:419. This is not to say that acting according to inclinations is immoral. Being driven by our inclinations, or even allowing certain choices to be influenced by those inclinations, is compatible with rationality. It is just that these actions have no moral worth. It is important to emphasize that Kant's notion of rationality only involves the *capacity* to act contrary to inclinations, and the capacity to ensure that those inclinations do not command our will.

<sup>61</sup> Japa Pallikkathayil, "Deriving Morality from Politics: Rethinking the Formula of Humanity." *Ethics*. no. 1 (2010): 124.

rationally consent to, which can only be determined by going back to the categorical imperative for guidance.

## II. Uniting Ethics and Right

Interpretations of the categorical imperative based in consent – either possible or rational – run into problems particularly when these interpretations are at odds with the conclusions of Kant’s political philosophy. Instead, Kant’s ethics must be understood as connected to the results of his political philosophy. Japa Pallikkathayil offers an interpretation of Kant that uses three steps to unify his ethics and political theory.<sup>62</sup> I will briefly summarize her lengthy argument below, and then show how this understanding of Kant can overcome the challenges facing consent interpretations.

### *Pallikkathayil’s Approach*

In stage one, the focus is connecting the conclusions of Kant’s political philosophy with the formula of humanity. By humanity, Kant means our capacity to set our own ends, and act in pursuit of those ends.<sup>63</sup> Our actions can be free when they are self-directed in two distinct ways. We obtain internal freedom when actions are directed by our will autonomously rather than by the force of our natural inclinations. External freedom refers specifically to our physical freedom to

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<sup>62</sup> Pallikkathayil, 129.

<sup>63</sup> Pallikkathayil, 132.

act in the absence of coercion or restraint, and is the subject of Kant's political philosophy. Kant claims that cases in which the human rights are violated are the clearest cases in which individuals attempt to use others merely as means.<sup>64</sup>

Pallikkathayil takes this as a starting point, rather than a consent-based approach. If the formula of humanity can ground restraints on our actions based on how they affect another's external freedom, Pallikkathayil concludes that violations of these restraints would be a case of treating someone as a mere means.<sup>65</sup>

All individuals face some limits to their external freedom simply because others exist. Because space on earth is limited, an individual's existence in space limits another individual's external freedom to simultaneously occupy the same space. Kant gives multiple references to the significance of this fact – that coexistence is an unavoidable feature of human life.<sup>66</sup> Conceiving of infringements to external freedom in such a stringent way would be absurd, and to remedy this we need the concept of rights. Rights define a sphere of autonomy in which individuals control certain features of the world, and their choices regarding that control is insulated from the choices of others.<sup>67</sup> The appeal to rights defines the limits of our freedom and helps clarify what Kant means when he refers to an equal and rightful distribution of external freedom.

The second stage of Pallikkathayil's argument attempts to discern the content of the rights that individuals possess. First, we can only engage in self-directed physical acts through our bodies, and so control over one's own body is a

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<sup>64</sup> G, 4:430.

<sup>65</sup> Pallikkathayil, 133.

<sup>66</sup> MM, 6:311.

<sup>67</sup> Pallikkathayil, 133.

pre-condition for external freedom.<sup>68</sup> Secondly, from this we can conclude that we have a right to anything that cannot be moved without our physical bodies also being moved.<sup>69</sup> Finally, she points out that Kant accepted that property rights existed (rights to things not in our immediate possession) and that the only reason for individual property rights to be restricted would be to preserve equal external freedom among individuals.<sup>70</sup>

However, determining exactly how our rights to property can be compatible with a similar right for others requires some sort of procedure for adjudicating disputes. For example, I may not pick flowers off of land belonging to someone else, but can I turn on a giant fan sitting on my own property that blows some of the petals off? Or, if I play music so loudly that my neighbor develops a severe migraine, has my use of the stereo infringed some right my neighbor has to her body?<sup>71</sup> The indeterminacy of specific scenarios involving how far our rights extend ultimately will require political decision making procedures to adjudicate.<sup>72</sup> This is a reference to the defects in the state of nature that play an important role in Kant's ultimate conclusion that it is a duty to form civil society.

Finally, in stage three Pallikkathayil returns to Kant's moral philosophy to answer the questions of interpretation that were unanswerable apart from his

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<sup>68</sup> Pallikkathayil, 136.

<sup>69</sup> I believe this is a reference to things in our immediately physical possession, in which case she does not consider the significance of whether or not we are in rightful possession of the object in the first place.

<sup>70</sup> Pallikkathayil, 136.

<sup>71</sup> Pallikkathayil, 137.

<sup>72</sup> Here she is almost echoing Kant's exact thoughts on property rights. Kant believed property rights exist in the state of nature, but that were provisional and did not become concrete until civil society is established. See MM, 6:264.



political philosophy. The argument presented leads to the conclusion that treating someone merely as a means occurs when that individual's rights are violated, or when individuals are denied their due equal moral value inherent in their humanity.<sup>73</sup> Infringing on an individual's rights in the way that they were conceived in the above argument, or to deny them an equal amount of external freedom, is to disregard the value of their humanity. Denying someone the value of their humanity in this way is to treat them merely as an object (something that does not possess humanity).<sup>74</sup>

### *Assessing Pallikkathayil*

Before evaluating Pallikkathayil's approach to interpreting Kant's FOH, it may be useful to briefly describe what I take to be the most important components of her argument:

- 1) Treating someone merely as a means entails disrespecting her humanity.
- 2) The value of humanity consists in our ability for self-directed action.
- 3) Self-directed *physical* action requires the concept of rights to have meaning.

Therefore,

- 4) Treating someone merely as a means consists in violating her rights, conceived as spheres in which she ought to be able to freely engage in self-directed action.

And also,

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<sup>73</sup> Pallikkathayil, 141.

<sup>74</sup> Pallikkathayil, 142.

- 5) Some boundaries of rights require political institutions to clarify.
- 6) Accurately interpreting the formula of humanity is not possible apart from the results of Kant's political philosophy.

If this connection of Kant's ethics to political philosophy is to be an improvement upon consent-based interpretations, it will have to account for the prohibition on false promising. Kant does argue that a false promise is a violation of the formula of humanity, but it should not be understood as treating a person merely as a means for reasons based on consent. Rather, the promise represents the formation of a contract. One passage in particular is helpful:

"In a contract by which a thing is acquired, it is not acquired by acceptance of the promise, but only by delivery of what was promised. For any promise has to do with a performance, and if what is promised is a thing, the performance can be discharged only by an act in which the promisor puts the promisee in possession of the thing..."<sup>75</sup>

Here Kant associates contracts with promising. What is acquired by an individual who has been promised something is the deed itself being fulfilled as expected – that it be carried out as promised.<sup>76</sup> So a promise involves acquiring a right to have that promise carried out, and breaking that contract is to treat someone as a mere means. However, it is clear that no state could possibly enforce every promise as a binding contract, and to conceive of contract rights in such a stringent this way would burden the enforcement controls of a state to unsustainable levels. Are the promises that the state chooses not to enforce no

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<sup>75</sup> MM, 6:275.

<sup>76</sup> MM, 6:274.

longer violations of rights, and therefore not actions that treat someone merely as a means? For example, if I promise to meet someone at a certain time and arrive five minutes late, have I violated her rights? Should this case be treated as a contract to be enforced? The answer, resides in Kant's comments on lying. Consider the following passage:

“Lying (in the ethical sense of the word), intentional untruth as such, need not be harmful to others in order to be repudiated; for it would then be a violation of the rights of others. [...] The speaker may even intend to achieve a really good end by it. But his way of pursuing this end is, by its mere form, a crime of human being against his own person and a worthlessness that must make him contemptible in his own eyes.”<sup>77</sup>

Here we can contrast treating someone else as a mere means by violating her rights, and treating yourself as a mere means. A false promise that harms another person is an action impermissible by the categorical imperative not because it fails to acquire the consent of the other party, but because it violates her acquired contract rights. Preventing violations of such rights and securing equal external freedom for all is a legitimate function of the state. However, lies that do not harm others are something other than rights violations, and the harm is done to the liar herself.<sup>78</sup> Pallikkathayil's interpretation utilizing Kant's political philosophy is strengthened by this distinction. Since political philosophy is concerned only with the external relations between individuals, ethical duties to oneself cannot be enforced. The consent interpretation was inadequate in its ability to account for the

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<sup>77</sup> MM, 6:430.

<sup>78</sup> MM, 6:429.

ways people treat other people as mere means – in explaining relations between individuals with equal external freedom. When we attribute the wrongness of some lies to failing in a duty to oneself, and other lies to violating another’s rights, we can maintain consistency regarding the wording of the formula of humanity. With this understanding of FOH, it is possible to apply Kant’s ethics in order to derive a more complete understanding of his political philosophy and rightful external relations between individuals.

### **III. Kantian Rights**

At this point it might be necessary to point out an important distinction between consent-based interpretations of the FOH, and the preferred rights-based interpretation. The example of forming a contract does involve consent between individuals, and violating that contract seems to indicate that the actual consent of the other party is disrespected. However, for Kant consent only becomes morally relevant in the context of rights. Consent has little moral significance prior to the mutual recognition of rights between individuals made conclusive through the establishment of a state that protects those rights.<sup>79</sup> Interpreting Kant as a social contract theorist is a popular strategy for those that believe his theory can be cast in welfarist terms. The reason is that if the justification of the Kantian state can be moved away from natural law, and toward themes of consent and contract, it is easier to impose broader duties upon the state to protect material interests and

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<sup>79</sup> Ibid.

positive rights.<sup>80</sup> If Kant's is best understood as a natural law theorist, it will be difficult for justify a Kantian state enacts extensive welfare policies while without violating natural law.

In this section I briefly describe the rights that we have according to Kant, and the defects in the state of nature that pose a threat to these rights. Overcoming these defects legitimizes the state. It is difficult to develop an account of welfare in Kant's theory considering his starting point – the innate right to freedom – and the other natural acquired rights.

### *Innate Right*

Kant defines external freedom as independence from being constrained by another's choice.<sup>81</sup> This freedom, insofar as it can coexist with the freedom of every other in accordance with universal law, is the only original right belonging to humanity.<sup>82</sup> No action is needed to establish this right. It exists independently of any state or civil society, and is due to our capacity for self-directed action. This innate right to freedom is necessary because of the social nature of humans, because we come into contact with one another, and because the potential exists that other wills can come into conflict with our will in the pursuit of our chosen ends. It is a right that is only concerned with the practical relations between individuals to the

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<sup>80</sup> Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy*. (Cambridge: Harvard University Press, 2009), 284.

<sup>81</sup> MM, 6:237-8.

<sup>82</sup> Ibid.

extent that their external (physical) actions affect others' freedom.<sup>83</sup> Insofar as the innate right to freedom restricts our actions, it does so in a negative way as a sort of injunction against various possible actions. For this reason, its content gives no guidance on our duties to aid someone's material condition. For example, failing to act charitably could not be considered a violation of right.<sup>84</sup> Kant also grounds all further acquisition of rights in the innate right to independence.

Based on this innate right to freedom, Kant's general conception of justice consists of three important characteristics.<sup>85</sup> The first, as already mentioned, is that it is concerned only with the external relations between individuals, or how actions directly affect another person. Secondly, it is not concerned with internal "wishes or desires" of individuals. By this he means that rightful relations are not judged solely according to the wants or needs of one person. Thirdly, justice is only concerned with the formal relations between individuals, and not the results or consequences of any freely chosen actions. The example given is that justice is not concerned with whether or not both parties benefit from a commercial transaction, but only that the transaction was completed freely and in accordance with universal law.

This right is also the justification for coercion. If there were no violations of the innate right to freedom, there would be no need for any force or coercion.

However, any free action that is not consistent with the freedom of all according to

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<sup>83</sup> MM, 6:235.

<sup>84</sup> Benevolent and charitable actions may be required ethically, but failing to fulfill our ethical obligations is in no way incompatible with the innate right to freedom as Kant presents it.

<sup>85</sup> MM, 6:229-30.

universal law, is a wrong that can be resisted.<sup>86</sup> Therefore, the innate right simultaneously obliges individuals to respect a similar freedom for others and also authorizes the use of coercion whenever this freedom is violated.

### *Private Right*

The innate right to freedom is an incomplete right because it only describes the right that individuals have about what physical actions are permissible. This right only grants us sovereignty over our bodies, but not objects of potential choice. This right is the only right belonging to individuals by birth alone, and all other rights must be acquired or established through particular acts. As an extension to the innate right, Kant describes other rights that are derived from the right to freedom but not inherent to our humanity in the same way.<sup>87</sup> For example, one of these is the right to obtain and use external objects of choice. His reason is that it would be inconsistent with the right to freedom if usable things could not be used.<sup>88</sup> In addition, it is not enough that these objects can be permissibly used, but they also must be able to be used independently from the will of others. If it is permissible for individuals to make use of objects, they must be able to come to own in a way that preserves their independence from the will of others. He concludes that usable things must be able to be owned, used, and disposed of however the owner

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<sup>86</sup> MM, 6:231.

<sup>87</sup> MM, 6:238.

<sup>88</sup> MM, 6:246.

chooses.<sup>89</sup> Any other arrangement to use usable things would limit the ability of the individual to pursue their own ends autonomously, free from being subjected to the will of another.<sup>90</sup> All legitimate acquired rights that can be derived from the innate right to freedom fall into one of three categories – rights to a physical object, rights to the performance of a deed by another person resulting from a promise, or rights resulting from the status of another person.<sup>91</sup> The last category is most commonly meant as the rightful claim by dependent children to aid and care from their parents.<sup>92</sup>

### *Public Right*

The actual ability of individuals to exercise and enjoy their acquired rights runs into problems outside of a civil setting. These problems include indeterminate boundaries of those rights, the ability to impartially judge when infringements of those boundaries have occurred, and the assurance that such infringements will be prevented.<sup>93</sup> The solution to these problems is to form a civil condition that protects the innate and acquired rights of individuals. The particular constitution that Kant recommends resembles many other liberal thinkers of his time and

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<sup>89</sup> Ibid.

<sup>90</sup> Kant's explanation of *how* property comes to be owned provisionally (in the state of nature) or conclusively (in civil society) is discussed in another section in the Doctrine of Right. At this point it is only necessary to briefly describe his argument that external objects of choice *can* become privately owned and used.

<sup>91</sup> MM, 6:260.

<sup>92</sup> Leslie Mulholland, *Kant's System of Rights*. (New York: Columbia University Press, 1990), 235.

<sup>93</sup> MM, 6:255-256.



includes separation of powers into three distinct branches – legislative, executive, and judicial.<sup>94</sup>

Through public right, the sovereign has more coercive power than individuals would possess would exist with private right. This is necessary for the state to pursue its purposes in protecting the innate rights of its citizens in light of the three defects in the state of nature listed above. Kant repeatedly references these defects along with the innate right to freedom as being the reasons individuals must submit to a civil condition.<sup>95</sup> His acknowledgement of the defects prior to explaining the importance of forming a state is important. If forming a state is necessary because of those defects, which are all problems in enjoying rights prior to a civil condition, then it is not clear what would justify a state's power beyond merely serving to remedy those defects. As mentioned before, Kant alludes to the possibility of redistribution of resources only to maintain the existence of the state. I have also shown that achieving a particular level of social welfare is not a necessary condition of achieving a rightful condition. To answer whether the state can expand its role beyond merely securing the external freedom of its citizens to include welfare policies, it is important to know precisely how Kant justifies legitimate state power. If it is grounded in the idea of a social contract, then it may be possible that the power of consent could lead to a more extensive state than what is minimally necessary to achieve a rightful condition.

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<sup>94</sup> MM, 6:313.

<sup>95</sup> Guyer, 280.

#### IV. The Kantian State

Many attempts have been made to work a theory of consent into Kant's theory of political obligation. In fact, it seems to be the standard interpretation of his political philosophy. These interpretations are often based on references that Kant makes to the idea of a social contract. For example, "The act by which a people forms itself into a state is the original contract. Properly speaking, the original contract is only the idea of this act, in terms of which alone we can think of the legitimacy of a state."<sup>96</sup> Here Kant seems to indicate that some kind of consent, whether actual or tacit, is a sufficient condition in forming a rightful condition. Shortly later, he states that this consent results in men "relinquishing entirely his wild, lawless freedom in order to find his freedom as such undiminished, in a dependence up on laws, that is, in a rightful condition, since this dependence arises from this own lawgiving."<sup>97</sup>

Howard Williams uses this interpretation to argue that, while the state's purpose may be to protect our rights, the content of those rights requires the consent of the people.<sup>98</sup> Thus, property rights in the state of nature are subject to agreement before they become conclusive, which leaves open the possibility that property holdings could be redistributed according to the general will of the people. If consent were necessary to justify the legitimacy of the state, then this would seem like a possible way of including welfare into a Kantian state.

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<sup>96</sup> MM, 6:315.

<sup>97</sup> MM, 6:316.

<sup>98</sup> Howard Williams, *Kant's Political Philosophy*. (New York: Palgrave Macmillan, 1986), 94.

However, it is a mistake to believe that consent plays an important role in justifying the Kantian state. As mentioned earlier, the right to freedom gives license to use coercion to prevent hindrances to freedom. According to Kant, individuals living side by side in the state of nature pose a serious threat to each other because their rights are not conclusive.<sup>99</sup> While these rights exist provisionally, they are still subject to the three defects discussed above. For example, it is necessary for humans as natural beings to need land and property in order to survive. Our freedom is hindered in the state of nature because we do not have the ability to enjoy conclusive property rights to usable things. Though we could certainly use property in the state of nature, we lack the assurance, determinacy, and adjudicative benefits that civil society provides. Thus, the consent of individuals to establish a legitimate coercive state is unnecessary. The justification of forming such a state rests entirely in its ability to remedy the indeterminacy and enforcement problems in the state of nature.<sup>100</sup> Establishing civil society, then, is simply relieving a hindrance to freedom, and no consent is needed to use coercion in this way.

This understanding of political obligation shows that William's views of Kant's theory of property are not accurate. By "provisional", Kant does not mean that property is subject to agreement by virtue of a social contract. Instead, property holdings are provisional only to the extent that this right cannot be fully enjoyed without a state's ability to enforce property rights. The establishment of the state does not open the possibility of redistribution, but instead secures the

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<sup>99</sup> MM, 6:256.

<sup>100</sup> Louis-Philippe Hodgson, "Realizing External Freedom" in *Kant's Political Theory*. Edited by Elisabeth Ellis. (University Park, PA: Penn State Press, 2012), 106.

property holdings that individuals have. The only redistribution that is permissible, according to Kant, is that which is necessary to further support the institutions that protect the rights described in section III.

Kant's treatment of rights and the obligation to enter civil society to secure those rights indicates that his political philosophy is best understood as being one based in natural law. Any use of consent to interpret Kant's political philosophy should be limited to the idea of "rational consent."<sup>101</sup> By this it is only meant that it is morally required that individuals will the freedom that the rightful condition offers, and so they would rationally consent to such an arrangement. Further, freedom requires individuals to use usable things, and so individuals must rationally consent to the protection of private property. This kind of consent certainly does not depend upon what individuals actually consent to, but instead refers to rational consent. The implication of this distinction results in the Kantian state having little room for expansive provisions of welfare. It is not possible to justify redistributive programs based on benevolence as shown in the first section. It is also not possible to justify redistribution according to the happiness of citizens. Without a social contract interpretation of Kant, it is very difficult to find any way to include welfare policies in his theory of justice except for those that are only instrumentally necessary to preserve the state.

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<sup>101</sup> Mary Gregor, *Laws of freedom: a study of Kant's method of applying the categorical imperative in the Metaphysik der Sitten*. (Oxford: Basil Blackwell, 1963), 59.

### CHAPTER 3: A CONTEMPORARY DEBATE

In the previous section, I argued that Kant is best interpreted as being a natural rights theorist rather than a social contract theorist, and that the implications of that interpretation result in support for the minimalists. In this section, I compare how two contemporary philosophers use Kant's writings in their own theory. Although the minimalist-welfarist debate is distinct from the Rawls and Nozick debate, it is possible to consider Nozick as representing the minimalists and Rawls representing the welfarists. Using the argument from Chapter 2, I will analyze the degree to which each author successfully incorporates Kant's philosophy. While there are important incompatibilities between Kant and both Rawls and Nozick, I conclude that Nozick's reliance on natural rights moves him closer to Kant's own philosophy.

#### Nozick & Kant

In *Anarchy, State, and Utopia*, Robert Nozick begins in a way very similar to Kant by acknowledging, "moral philosophy sets the background for, and boundaries of, political philosophy."<sup>102</sup> This echoes Kant's claims from the previous section about politics being unable to proceed without first acknowledging certain moral principles. The moral principles adopted by Nozick, presumably influenced by Kant, lead him to formulate the idea of "side-constraints" which are essentially inviolable

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<sup>102</sup> ASU, 6.

individual rights. These side-constraints are, according to Nozick, meant to “reflect the underlying Kantian principle that individuals are ends and not merely means.”<sup>103</sup> By adopting this Kantian principle, Nozick avoids an alternative principle that aims at *minimizing* rights violations. Acting to merely minimize rights violations may justify severe abuses of one person’s rights so long as the overall number of rights violations is reduced. This is something both Kant and Nozick wish to avoid.

Based on these rights, Nozick details how coercive state powers can arise, and concludes that state powers cannot rightfully expand to include goals beyond the mere protection of those rights. Two features of his theory immediately correspond to Kant’s theory. First, both Nozick and Kant take rights to exist pre-politically, which indicates that they ground their theory in a type of natural law. Neither asserts that the rights on which state power can be based can arise from agreement or convention, in opposition to Rawls discussed below. Second, the legitimacy of the state is based on its protection of rights. As discussed in Chapter 2, Kant argues that the state is legitimate because of the freedom it provides by overcoming the problems that exist in the state of nature. These problems include indeterminacy of rights, impartiality in judging rights violations, and the lack of a central power to assure that rights violations are prevented. For Nozick, the state provides the same protections and is legitimized so long as it protects rights without violating rights.<sup>104</sup>

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<sup>103</sup> ASU, 30.

<sup>104</sup> ASU, 134.

Perhaps the biggest separation between the two philosophers is in regards to their comments on property rights. Nozick does not fully articulate a theory of property acquisition, claiming only that acquisition is possible.<sup>105</sup> He is uncomfortable with the labor-theory of property, but accepts a similar proviso, which requires that acquisition never make individuals worse off than they would have been without any appropriation.<sup>106</sup> Kant is more detailed in his treatment of property rights, and his rejection of Locke's account of property. He argues that property rights only exist when individuals live in close proximity to one another, and that conceiving these rights as existing between a person and an object is meaningless: "Now leaving out or disregarding these sensible conditions of possession which might be considered a relationship of a Person to *objects*, which do not have obligations, is really a relationship of a Person to *Persons*..."<sup>107</sup> The importance of this passage involves what Kant refers to as "intelligible possession". Whereas empirical possession refers to objects in one's immediate physical possession, intelligible possession refers to a relation between individuals where use of an object without the consent of the owner is a violation of her rights.<sup>108</sup> The way that one establishes this kind of ownership is not by labor, or any other kind of physical act, but rather by willing that it be under one's control so long as this is compatible with the external freedom of others.<sup>109</sup> But it is impossible to know what another will's as their own without a physical sign, and the implications of this

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<sup>105</sup> ASU, 179.

<sup>106</sup> ASU, 180.

<sup>107</sup> MM, 6:258-68.

<sup>108</sup> Mulholland, 241.

<sup>109</sup> MM, 6:253. For example, it is not possible to take intelligible possession of something that already belongs to someone else unless they consent to the transfer.

problem leads Kant to emphasize the indeterminacy of property rights in the state of nature. This indeterminacy causes property rights to only be provisional, and not able to be secured and fully enjoyed. Only by forming the state do property rights become conclusive and defined.

Nozick does not explicitly refer to the indeterminacy of property rights to justify the state, and his discussion of the adjudicatory powers of the state seem only to focus the appropriate “success rate” in accurately resolving disputes.<sup>110</sup> Because Nozick does not separate physical and intelligible possession, his theory of property is lacking in a practical explanation for how to settle disputes over non-physical objects. The theory Nozick provides assumes absolute preemptory rights in the state of nature, while Kant relies on the state not only to enforce, but also clarify the boundaries of those rights. Further, the only factor that legitimizes the state (or the protective agency) for Nozick is that such an institution “gets it right” as far as determining and enforcing rights. Kant adds a further condition for a legitimate state, which is that the adjudication of private rights disputes must not be made unilaterally.<sup>111</sup> In Nozick’s theory of justice, enforcement of rights is *all* that matter, and whether that enforcement is done unilaterally or in accordance with a general will is irrelevant.

### **Rawls & Kant**

In *A Theory of Justice*, John Rawls also connects justice with Kant’s familiar theory. One point on which he believes his theory to have similarities with Kant is

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<sup>110</sup> ASU, 110.

<sup>111</sup> MM, 6:266.



by noting that his reliance on the social contract, which is an approach he also attributes to Kant.<sup>112</sup> For Rawls, agreement about the social contract is achieved by requiring participating individuals to be stripped of any knowledge regarding their various particular interests that could prejudice their judgment.<sup>113</sup> The features that individual's would not know about themselves would include their natural abilities, social ranking, religion, or particular conception of the good, among others. This approach, which he calls the original position, is meant only to serve as a hypothetical arrangement to achieve unanimous consent to the basic principles of justice that would govern the state. Its purpose is to restrict the type of arguments that can legitimately be offered when deliberating about justice.

Once in the original position, Rawls believes individuals will find common agreement in two principles. First, the principle of equal liberty states each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all. Second, social and economic inequalities are to be arranged so that they are to the greatest benefit of the least advantaged (the difference principle), and that offices and positions are open to all under conditions of fair equality of opportunity.<sup>114</sup> This wording strongly resembles the statements that Kant makes regarding the right of all individuals to an equal external freedom that is compatible with a like freedom for all. In addition, the first principle of equal liberty is to be given priority over the others in the sense that it cannot be infringed or sacrificed for the sake of the difference principle. This

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<sup>112</sup> TOJ, 10.

<sup>113</sup> TOJ, 118.

<sup>114</sup> TOJ, 266. Here Rawls gives his final formulation of the principles of justice, which are revised multiple times throughout the book.

is one way that Rawls separates his theory from utilitarianism, where infringements of liberty or rights can be justified (perhaps even encouraged) if doing so leads to increases in some other measure, such as wealth, utility, or happiness.

However, unlike the theories of Nozick and Kant, neither of these principles is grounded in the concept of natural law and natural rights. Rather, these rights only exist in the context of a political setting and are justified only by the fair agreement between parties in the original position. While Rawls did attempt to contrast his approach with utilitarianism, it seems the most basic justification of rights is closer to that of John Stuart Mill than to Kant in this distinct way. In *On Liberty*, Mill writes that justice is primarily grounded in the “interest of man.”<sup>115</sup> In the original position, it is the self-interest of individuals that leads to the desire that rights be created and respected as specified in the liberty principle. In both cases, the interests of individuals are the source of our rights and liberties. The amount of knowledge individuals have about their particular situations differs between Rawls and Mill, but the comparable feature in both theories is that rights are grounded in interest in general. It is true that the veil of ignorance prevents an individual from knowing how her *particular* interests are served by the basic structure of the state she assents to, but the fact remains that justice for Rawls is entirely grounded on negotiations about “fair” material conditions.<sup>116</sup> The two principles that Rawls proposes are the result of individuals “hedging their bets” against the possibility

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<sup>115</sup> J.S. Mill, *On Liberty and other writings*. Edited by Stefan Collini. (Cambridge: Cambridge University Press, 1989), 14.

<sup>116</sup> TOJ, 57. The term “material conditions” refers to both the resources that individuals have access to, and also the liberties that they enjoy.

that they will end up in the least advantaged group.<sup>117</sup> In the theories of Kant and Nozick, rights operate as the pre-political basis for establishing the state and do not owe their existence to their tendency to promote individual interests. For Mill and Rawls, acknowledging and protecting rights is only necessary to the extent that they serve to increase utility, or because are useful or necessary for individuals pursuing their conception of a good life.<sup>118</sup>

One important reference that Rawls makes to natural law is the existence of natural duties, such as the duty to help others in need, the duty to not be cruel, and the duty to support and comply with just institutions.<sup>119</sup> Based on what has been discussed about Kant above, Rawls' comments about these duties seem to resemble a natural law foundation for the original position. According to Rawls, the principles of natural duty are derived from a contractarian point of view, but they do not depend on an act of actual or tacit consent.<sup>120</sup> They do, however, depend on the outcome of a hypothetical agreement. While these duties are referred to as "natural" by Rawls, they should not be considered natural in the same way as rights and duties are in Kant's philosophy. When Rawls discusses the source of these

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<sup>117</sup> TOJ, 133. Here Rawls explains in detail his "maximin rule." He demonstrates how it would work in the original position, and argues that individuals would adopt this rule to maximize the prospects of the worst possible outcome when the veil is lifted.

<sup>118</sup> It may be controversial to connect Rawls to utilitarianism given the fact that he explicitly attempts to provide an alternative to such a theory. However, he is similar to utilitarianism in a very specific way, which is that the rights we would enjoy in the Rawlsian state are only the product of an understanding that every individual has particular ends and conceptions of the good life, and that rights are only instrumentally valuable to achieve those ends. This section is not an attempt to portray Rawls as a utilitarian, but only to point out his justification of rights is closer to Mill than Kant.

<sup>119</sup> TOJ, 99.

<sup>120</sup> TOJ, 100.

natural duties, he claims it is sufficient to show that they would be agreed to in the original position.<sup>121</sup> Later on, when discussing the content of the natural duty of justice, he considers the possibility that individuals in the original position would alter the content of the principle so that their compliance with those duties is conditional upon certain voluntary acts.<sup>122</sup> This is evidence that “natural duties” for Rawls should not be understood as duties that are independent of agreement. But, is this necessarily incompatible with Kant? It may be the case Kant constructs natural duties and rights in a similar way, achieving a certain objective status of those principles but without their existence being independent of some kind of human procedure. The next section discusses whether Rawls use of Kant’s constructivism is accurate, and this will help clarify the distinction between natural duties for both Rawls and Kant.

### **Kantian Constructivism**

Another popular way that Rawls attempts to associate his theory with Kant considers the realist and constructivist interpretations of Kant’s philosophy. In general, constructivists conceive of the moral law as being the result of a process, and that prior to such a process there is no moral reality. In contrast, the realist holds that the moral law is innate or exists independently of any process or natural

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<sup>121</sup> TOJ, 100.

<sup>122</sup> TOJ, 296.

contingencies.<sup>123</sup> For a realist, the way that the moral law is revealed is through rational intuition. Apprehending principles in this way does not create or legitimize the moral law. Instead, it is only a method of encountering those principles that already exist.

It is often the case that natural law theories are considered realist, while many social contract approaches of justice are constructivist.<sup>124</sup> This may undermine my characterization of Kant as a natural law theorist. If Kant's principles of justice were the result of a procedure in which individuals create and legislate the content of the moral law, it would seem that describing Kant as a natural law theorist is questionable. As a general definition, natural laws are considered those that exist prior to the forming of civil society – in the state of nature, perhaps – and so are not justified by a social contract. In contrast, social contract theories do not require the existence of natural laws, and Rawls certainly does not rely on natural laws as all principles of justice derive from the original position.<sup>125</sup>

In the article "Kantian Constructivism in Moral Theory," Rawls argues that individuals must use reason in a way that does not solely *provide* imperatives, but rather constructs them.<sup>126</sup> The procedure provides the content of the imperatives, which are not given prior to their construction. This approach is an important connection to Kant's argument for freedom. If we are subject to laws that we do not

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<sup>123</sup> Oliver Sensen, "Kant's constructivism" in *Constructivism in Ethics*. Edited by Carla Bagnoli. (Cambridge: Cambridge University Press, 2013), 73.

<sup>124</sup> Attracta Ingram, *A Political Theory of Rights*. (Oxford: Oxford University Press, 1995), 17.

<sup>125</sup> Martin, Rex. *Rawls and Rights*. (Lawrence, KS: University of Press Kansas, 1985), 32.

<sup>126</sup> John Rawls, "Kantian Constructivism in Moral Theory." *The Journal of Philosophy* no. 9 (1980): 516.

choose, we cannot act autonomously. For this reason, Kant rejects psychological naturalism as found in Hume, which essentially asserts that individuals are subject only to natural laws that determine the behavior of all material objects.<sup>127</sup> In addition, Rawls argues that Kant would also reject rational intuitionism (associated with realism) since this requires moral concepts being “fixed” and independent of natural objects. In order to clarify the difference between Kant’s constructivism and rational intuitionism, Rawls describes the latter as having two basic features:

“First, the basic moral concepts of the right and the good, and the moral worth of persons, are not analyzable in terms of nonmoral concepts [...] and, second, first principles of morals (whether one or many), when correctly stated, are self-evidence propositions about what kinds of considerations are good grounds for applying one of the three basic moral concepts, that is, for asserting that something is (intrinsically) good, or that a certain action is the right thing to do, or that a certain trait of character has moral worth.”<sup>128</sup>

According to rational intuitionism, all that is required for an individual to discover moral truths is that they are capable of knowing what these principles are, and to act on them. Because the individuals do not choose the principles, but merely discover them, the actual decision of individuals to submit themselves to the moral order is lacking. An important aspect of Kant’s conception of freedom is that the laws we follow are self-imposed.<sup>129</sup> Thus, rational intuitionism, which conceives of moral principles as being fixed and existing independently of any individual act,

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<sup>127</sup> Patrick Riley, *Kant's Political Philosophy*. (Manham, MD: Rowman & Littlefield Pub Inc, 1982), 53.

<sup>128</sup> Rawls (1980), 557.

<sup>129</sup> Wood, 440.

does not allow autonomous action.<sup>130</sup> An important distinction should be addressed in regards to the *way* that we submit to the moral law and its effect on our autonomy. If we understand moral principles as existing fixed and independent of any act of willing (as in rational intuitionism), our submission to those principles is merely causal. While we may choose to abide by those laws, the reasons for that choice do not have moral worth, just as abiding by the law of gravity has no moral worth. For our submission to moral principles to have moral worth, they must pass a certain “test of reason”.<sup>131</sup> For Kant, this test is the categorical imperative. In this sense principles are “made true” if they conform to the categorical imperative. Moral principles in this way are constructed by subjecting them to the process of rational scrutiny.<sup>132</sup>

However, there are doubts regarding the extent to which Kant is a constructivist. Some constructivist views are sympathetic to the way that cultural influences affect what principles are rationally binding for that particular culture.<sup>133</sup> Moral principles, then, are constructed empirically according to what best serves a particular religious group, culture, or nation at a particular time. This would lead to relativistic and non-universal moral conclusions, which is not compatible with Kant. To avoid relativism, other constructivists may attempt to use procedures that

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<sup>130</sup> Rawls (1980), 559-60.

<sup>131</sup> Mark Lebar, “Aristotelian Constructivism” in *Objectivism, Subjectivism, and Relativism in Ethics: Volume 25, Part 1*. Edited by Ellen Frankel Paul, et. al. (Cambridge: Cambridge University Press, 2008), 187.

<sup>132</sup> John Rawls, “Themes in Kant’s Moral Philosophy” in *Kant and Political Philosophy: The Contemporary Legacy*. Edited by Ronald Beiner and William James Booth. (New Haven: Yale University Press, 1996), 305.

<sup>133</sup> Paul Formosa, “Is Kant a Moral Constructivist or a Moral Realist?” *European Journal of Philosophy*. no. 2 (2013): 173.

employ hypothetical, ideal, or rational acts of willing that can lead to universally valid principles. This is a weaker form of constructivism, or a constructivism that is not “all the way down.”<sup>134</sup> If Kant’s theory were constructivist, it would subscribe to this second type. Kant is clear that the moral law holds for all rational beings, and is not something that can be contingently willed.<sup>135</sup> For Kant, culture, religions, or any particular conceptions of the good could not play a role in constructing moral principles. This resembles the way the original position is set up, and so understanding Kant as a weaker constructivist whose philosophy could yield universally binding moral principles may still allow Rawls to plausibly connect his theory to Kant.

### *Legislating vs. Authorship*

Even describing Kant as a “not all the way down” constructivist is not an accurate way to depict what Kant means when he uses describes autonomous action as being acting according to laws that we give to ourselves. The way that Kant uses the terms “legislate” and “author” are important in interpreting the extent to which our moral principles are constructed. While our contemporary understanding of what it means to legislate often refers to the actual creation of positive laws, Kant means something closer to the enforcer of the law. In *The Metaphysics of Morals*, he writes:

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<sup>134</sup> Ibid.

<sup>135</sup> G 4:437-438: “Act on a maxim that at the same time contains in itself its own universal validity for every rational being.”



“A (morally practical) *law* is a proposition that contains a categorical imperative (a command). One who commands through a law is the lawgiver (legislator). He is the author of the obligation in accordance with the law, but not always the author of the law. [...] A law that binds us *a priori* and unconditionally by our own reason can also be expressed as proceeding from the will of a supreme lawgiver, that is, one who has only rights and no duties (hence from the divine will); but this signifies only the idea of a moral being whose will is a law for everyone, without his being thought of as the author of the law.”<sup>136</sup>

As mentioned before, the content of the moral law is the same for all rational beings. So the way that we can “legislate” this law in a way consistent with our autonomy is that we acknowledge and impose the *obligation* upon ourselves without actually authoring the content. For Kant, to author the law is to make a law through one’s will, while legislating a law is only to declare or acknowledge that the law is in accord with one’s will.<sup>137</sup> On this understanding, there is no need to construct or make a law in order to legislate it. What is required is for individuals to be authors of the obligation to – to declare that it is consistent with their own will – to maintain their autonomy. The question would remain, then, who the author of the moral law actually is. The answer is that no one is the author because of its status as necessary based on our practical reason:

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<sup>136</sup> MM, 6:227.

<sup>137</sup> Patrick Kain, "Self-Legislation in Kant’s Moral Philosophy." *Archiv für Geschichte der Philosophie*. no. 3 (2005): 272.

“The lawgiver is not always simultaneously an originator of the law; he is only that if the laws are contingent. But if the laws are practically necessary, and he merely declares that they conform to his will, then he is a lawgiver. So nobody, not even the deity, is an originator, of moral laws, since they have not arisen from choice, but are practically necessary [...] Such a being is then a lawgiver, though not an originator; just as God is no originator of the fact that a triangle has three corners.”<sup>138</sup>

So there is no procedure for constructing the content of moral laws. If there is no human author for the content of moral law, we must conclude they are natural laws.<sup>139</sup> The only construction that takes place is when we author the obligation. I do not intend to fully argue that Kant is a realist (moral principles are not “self-evident” for Kant, which was how Rawls characterized realism). But, the moral laws are also not constructed. Rawls’ principles of justice are objects of rational choice; they are not practically necessary as a result of our reason, as Kant’s moral laws are. Natural laws still allow for autonomous action because the legislation that takes place is recognizing the obligation, and declaring that such laws are in accordance with our will.

### **Rationality in Kant**

Another contrast to Kant is the way he and Rawls understand individuals as moral beings. In a section that explicitly attempts to give his theory a Kantian interpretation, Rawls writes:

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<sup>138</sup> LE, 27:282-83.

<sup>139</sup> Wood, 113.

“[Kant] begins with the idea that moral principles are the object of rational choice. They define the moral law that men can rationally will to govern their conduct in an ethical commonwealth. Moral philosophy becomes the study of the conception and outcome of a suitable defined rational decision.”<sup>140</sup>

This is a misuse of what Kant intends when he speaks of rationality. He acknowledges that there are two kinds of rationality.<sup>141</sup> In the first case, it is possible to describe the calculations we make regarding the best ways to achieve a particular end as an exercise of rationality. This end may be for something particular that makes us happy, or even an end that will bring happiness to someone else. These are instances where we are guided by our inclinations, and rationality is a tool to best satisfy those inclinations. This is also the type of rationality that individuals in the original position use when they attempt to further their interests, whatever they are, despite being limited by the veil of ignorance. This use of rationality has no moral worth. The second kind of rationality that Kant uses refers to our ability to form a good will, which refers to the maxim on which we act.<sup>142</sup> For individuals to act rationally in the original position, they would have to choose principles that are not based on securing the best material condition than they can. This is not to say that the constitution of the state would be *contrary* to individual

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<sup>140</sup> TOJ, 221.

<sup>141</sup> MM, 6:212.

<sup>142</sup> *Ibid.*

material interests, but only that the principles on which the constitution is based are chosen on a maxim other than the satisfaction of our inclinations.<sup>143</sup>

For Kant, exercising our rationality in a way that has moral worth is what makes us capable of autonomy. In general, to act heteronomously is to act based on desires one has or on material principles. Rawls attempts to attribute autonomous action to individuals in the original position because they lack information about themselves that could lead them to act heteronomously:

“Kant held, I believe, that a person is acting autonomously when the principles of his action are chosen by him as the most adequate possible expression of his nature as a free and equal rational being. The principles he acts upon are not adopted because of his social position or natural endowments, or in view of the particular kind of society in which he lives or the specific things that he happens to want.”<sup>144</sup>

The goal of the original position is to reach fair unanimous agreement, which is only possible if factors that would prejudice the parties are removed. However, even when particular facts about individuals are removed, the motivation of the individuals in the original position remains unchanged.<sup>145</sup> They remain self-interested with the only goal being to secure the best possible outcome under whatever constitution is chosen. They are not acting autonomously because this can only be achieved by acting according to a certain motive. No amount of ignorance can affect the motivation behind choices that are made.

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<sup>143</sup> Oliver Johnson, "The Kantian Interpretation." *Ethics*. no. 1 (1974): 64.

<sup>144</sup> TOJ, 222.

<sup>145</sup> Oliver Johnson, "Autonomy in Kant and Rawls: A Reply." *Ethics*. no. 3 (1977): 253.

Lastly, Rawls attempts to argue that acting according to his principles of justice is to act from a categorical imperative:

“By a categorical imperative, Kant understands a principle of conduct that applies to a person in virtue of his nature as a free and equal rational being. The validity of the principle does not presuppose that one has a particular desire or aim. Whereas a hypothetical imperative by contrast does assume this. [...] The argument for the two principles of justice does not assume that the parties have particular ends, but only that they desire certain primary goods [...] The preference for primary goods is derived, then, from only the most general assumptions about rationality and the conditions of human life.”<sup>146</sup>

The mistake that Rawls makes is that he believes that the difference between a categorical imperative and a hypothetical imperative is a matter of how specific our ends are. It is not the case that our ends could be sufficiently broad to be transformed into a categorical imperative.<sup>147</sup> To act in order to achieve or acquire something (such as primary goods) is to act according to a hypothetical imperative. Even if it is not clear how those primary goods will be used for *particular* purposes in that individual’s life, they are still objects that everyone desires (by definition) and acting to secure as many primary goods as possible is not a maxim that can be considered a categorical imperative. It also does not matter how general the assumptions are about the desirability of the object that is sought, or how accurately

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<sup>146</sup> TOJ, 223.

<sup>147</sup> Thomas Nagel, “Rawls on Justice” in *Reading Rawls*.” Edited by Norman Daniels. (Palo Alto, CA: Stanford University Press, 1989), 4.

they are grounded in “the conditions of human life”. For example, acting based on a desire to live may lead one to eat and drink. Even though no particular food or drink is specified (just as no particular good life is considered in the original position), and such a principle is derived from the most basic conditions of human life (just as primary goods are basic necessities to live a good human life), it could not be considered anything but a hypothetical imperative.

### **Concluding Remarks**

To be fair, it may be important to note an important difference in the way each author even attempts to use Kant. In *A Theory of Justice*, Rawls relies very little on actually grounding his theory in Kant. It is only in passing that he gives various references to the ways in which his theory can be connected with Kant, and suggests that they might be explored and debated elsewhere. In contrast, Nozick relies on the claim that individuals have rights from the very beginning of his theory. He makes fewer references to Kant than Rawls does, but there is certainly heavy reliance on the opening premise regarding rights, which has a strong Kantian origin.<sup>148</sup> For this reason, it is no surprise that Nozick uses Kant in a way that is more consistent with Kant’s own writings. While their views on property ownership and the proper enforcement of property rights differ, Nozick and Kant are very similar in that they rely on individual rights to justify the legitimacy of the state. On the other hand, the multiple attempts that Rawls makes to tie his theory to

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<sup>148</sup> Thomas Nagel refers to it as “Libertarianism Without Foundations” since Nozick does not offer his own account of rights, and instead relies on Kant.

Kant – based on rationality, autonomy, and the categorical imperative – fail to accurately interpret Kant’s intended meaning. Perhaps the strongest argument in opposition to a Kantian interpretation to Rawls is his reliance on the social contract to justify the political obligation.

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