

Kant on Law and Justice*

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Political philosophy is sometimes thought of as a branch of applied moral philosophy. For John Stuart Mill, for example, questions about the legitimate use of state power are answered by reference to the same utilitarian considerations that govern ordinary moral life. A reader whose familiarity with Kant's practical philosophy was limited to the *Groundwork* could be forgiven for expecting Kant to adopt a parallel strategy, seeking to apply the categorical imperative to questions of political legitimacy, state power, punishment, or taxation, or perhaps viewing the state as a coordinating device that would enable people to carry out their moral obligations more effectively. Alternatively, such a reader might expect Kant to stand back from such questions, and recommend a stoic indifference to matters of politics. Kant is often taken to understand morality in terms of the principles upon which a person acts. As such, it would seem to depend contingently or not at all on the kind of society in which the agent found herself.

The reader who approaches the *Doctrine of Right* armed with either set of expectations is in for a surprise. Not only does Kant offer detailed analyses of things that seem irrelevant from the point of view of individual virtue – property, contract, taxation and punishment – but he does so without reference to the principles upon which people are supposed to act. He barely mentions the categorical imperative. More puzzling still for any "applied ethics" reading, he appears to argue that might makes right outside of a state, when he contends that persons are under no obligation to refrain from interfering with the goods of others unless they have an assurance that others will do the same.¹

The *Doctrine of Right* is also likely to surprise readers familiar with the modes of argument prominent in contemporary political philosophy. Kant insists on a sharp divide between the *metaphysics* of morals he will provide and an *anthropology* of morals that focuses on human nature.² He argues that law and justice are morally required "no matter how well-disposed and law abiding men might be,"³ explicitly denying that either is a response to unfortunate features of the human

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¹ All references are to Immanuel Kant, *The Doctrine of Right*, Part I of the *Metaphysics of Morals*. Because the work exists in so many different editions, all references are to the Prussian Academy pagination appearing in the margins. 6:256.

² 6:217

³ 6:312

situation. He denies that needs generate any direct obligations of mutual aid, dismissively treating it as no different from "mere wish."⁴ Yet he formulates many of his arguments in terms of coercion, which most recent philosophers assign a secondary role in law and politics. Most striking of all from the perspective of contemporary readers, he denies that justice is concerned with the fair distribution of benefits and burdens.

Instead of pursuing any of these familiar paths, Kant seeks to explain justice and law in terms of a distinctive conception of freedom as independence. In what follows, I will first explain the central idea of independence. I will then trace the three stages of his development of this idea, explaining how it leads first to private right, which governs the interactions of free persons, and then to public right, which requires the creation of a constitutional state. The idea of independence carries the justificatory burden of the entire argument, from the prohibition of personal injury, through the minutiae of property and contract law, on to the details of the constitutional division of powers. Kant argues that these norms and institutions do more than enhance the prospects for independence: they provide the only possible way in which a plurality of persons can interact on ground of equal freedom. Kant's concern is not with how people should interact, as a matter of ethics, but with how they can be forced to interact, as a matter of right.⁵

The core idea of independence is an articulation of the distinction between persons and things. A person is a being capable of setting his or her own purposes, while a thing is something that can be used in pursuit of purposes. Kant follows Aristotle in distinguishing choice from mere wish on the grounds that to choose something a person must take himself to have means available to achieve it.⁶ You can wish that you could fly, but you cannot choose to fly unless you have or acquire means that enable you to. In this sense, having means with which to pursue purposes is conceptually prior to setting those purposes. In the first instance, the means that you have, just as a matter of what Kant calls "the innate right of humanity" in your own person, are your own bodily abilities. You are independent if you are the one who decides the purposes your means will

⁴ 6:230

⁵ The German word "recht" and its cognates have no exact English equivalent. It covers both law and the more general idea of a legitimate power. Recent translators have used the word "right" which has the merit of preserving some of this ambiguity in a way that neither "law" nor "justice" usually does. In Kant's usage, right refers to the domain of enforceable obligations.

⁶ 6:213

be used to pursue. You are dependent on someone else's choice if that person gets to decide what purposes your means will be used to pursue.

This recasting of the familiar Kantian distinction between means and ends provides a distinctive understanding of the ways in which one person can interfere with the independence of another, either by drawing that person into purposes that she has not chosen, or by depriving her of her means. Fraud is a familiar example of the first type of interference, bodily injury a familiar example of the second. In doing either, the wrongdoer fails to respect the other person's capacity to set her own purposes, treating her instead either as a means to be used in pursuit of another person's purposes, or as a mere obstacle to be gotten around.

Interference with another person's freedom creates a form of dependence; *independence* requires that that one person not be subject to another person's choice. Kant's account of independence contrasts with the more robust conceptions of autonomy prominent in contemporary political philosophy, which usually focus on some mix of the ability to identify with your own choices, and having an adequate range of choices so as to make that identification meaningful. Autonomy is usually represented as a feature of a particular agent. On this conception, if there were only one person in the world, it would make sense to ask whether and to what extent that person was autonomous.⁷ Kantian independence is not a feature of the individual person considered in isolation, but of relations between persons. Personal autonomy contrasts with dependence on circumstance. Independence contrasts with dependence on another person, being subject to that person's choice. Independence is relational, and so cannot be predicated of a particular person considered in isolation. The difference is important: in principle a slave with a benevolent master and favourable circumstances could be autonomous in the contemporary technical sense. A slave could never be independent, because what he is permitted to do is always dependent on his master's choice or grace. Independence is an entitlement that provides the normative measure of legitimate institutions.

Independence is the basic principle of right. It guarantees equal freedom, and so requires that no person be subject to the choice of another. The idea is again similar to one that has been the target of many

⁷ Here as elsewhere, the work of John Rawls is more Kantian. For Rawls, "full autonomy" is a distinctively political value that is "realized in public life by affirming the political principles of justice and enjoying the protections of basic rights and liberties." Full autonomy is distinct from "the ethical values of autonomy and individuality, which may be applied to the whole of life." (PL 78)

objections. The basic form of almost all of these focuses on the fact that *any* set of rules stops people from doing what they would otherwise do, so that, for example, laws prohibiting personal injury and property damage put limits on the ability of people to do as they wish. Not everyone can be allowed to do as they please, because different people have incompatible wants, and to let one person do what he wants will typically require preventing others from doing what they want. Thus, it has been contended, freedom cannot even be articulated as a political value, because freedoms must always be traded off against other goods.⁸ This objection has some force against freedom understood as the ability to do whatever you wish, but fails to engage Kant's conception of independence. Limits on independence generate a set of restrictions that are by their nature equally applicable to all. Their generality reflects the extent to which they abstract from what Kant calls the "matter" of choice and focus instead on the capacity to set purposes without having them set by others. What you can accomplish depends on what others are doing – someone else can frustrate your plans by getting the last quart of milk in the store. If they do so, they don't interfere with your independence, because they impose no limits on your ability to use your powers to set and pursue your own purposes. They just change the world in ways that make your means useless for the particular purpose you would have set.

Kant aims to show that independence, understood in this way, comprises a self-contained domain of reciprocal limits on freedom. Setting the problem in this way both poses the problem and gives him the resources to provide a principled account of the most puzzling features of political life. Those who imagine that political powers can be used whenever doing so will bring about beneficial consequences see no need to draw a principled line around them. The Kantian commitment to freedom requires a principled account, because both the power to displace individual judgment, by having institutions and officials empowered to make decisions binding on everyone, and the power to enforce those decisions, appear to be in tension with the idea that individuals are free to set their own purposes according to their own judgment. Kant aims to do no less than show that the existence of such powers are not only consistent with, but in fact required by individual freedom.

Kant develops the idea of independence in three stages. He first articulates the relation of independence in its simplest form as a constraint

⁸ The earliest formulation of this objection comes from Samuel Taylor Coleridge in his (get reference). Frederick Maitland reiterated the objection a century later; H.L.A. Hart, G. A. Cohen, Charles Taylor and Ronald Dworkin have been recent advocates of the objection.

on interactions between persons. He calls this “the innate right of humanity” in one’s own person, because it does not require any act to establish it. Instead, people have it simply because they are persons capable of setting their own purposes. This form of independence is incomplete, and needs to be extended to take account of the possibility that people could have entitlements to things other than their own bodily powers. Those entitlements fall under private right, and cover the traditional categories of Roman private law, relations of property, contract, and status, which govern rights to things, to performances by other persons, and, in special cases, rights *to* other persons. These categories provide a complete specification of independence between interacting persons, but need to be further extended to take account of the possibility of disputes about them. The possibility of dispute about rights gives rise to public right, which requires the creation of a state with legislature, executive, and judicial branches.

Innate Right

Kant formulates the innate right of humanity from two directions. First, each person has the right to independence from others, and so also a right to equality with all others, innately, prior to any affirmative act to establish it.⁹ My right to my own person guarantees that I am free to use my own powers as I see fit, consistent with the freedom of others to do the same. Innate right also includes the right to be “beyond reproach”¹⁰, the right to have only your own deeds imputed to you, and to be assumed innocent unless you have committed a wrong. From the other direction, innate right carries with it the imperative of rightful honor. Kant interprets the Roman jurist Ulpian’s precept *honestas vive* (“live honourably”) as the requirement not to allow yourself to be a mere means for others.¹¹ Where other philosophers, including Hobbes, Locke, and Hume, have drawn attention to the *tendency* of people to be unwilling to benefit others because of observed features of human behaviour, Kant focuses on the *entitlement* to be unwilling to benefit others as a consequence of the entitlement to be the one who decides what purposes you will pursue. His claim is not that people should be selfish, but only that in dealing with a person, no *other* private person could ever be entitled to assume that you are acting for anyone’s purposes but your own. I can accept the gift that you offer me, but I cannot use force against you to extract it from you if you dispute my claim to it.

⁹ 6:237

¹⁰ 6:238

¹¹ 6:236

Innate right governs interactions between free persons, but does so in a way that is incomplete. Each extension of the idea of a right of humanity in one's own person is required because of the human capacity for choice. Although rights to external things and the possibility of disputes both seem particularly pressing in what David Hume called the "circumstances of justice," they do not enter Kant's account as responses to empirical circumstances. Instead, they enter because the only way that independence can be systematically consistent is if it is subject to all and only those limits required by freedom. Rights to external things are required by independence; both the possibility of disputes about rights and the need for public right to resolve them follow from rightful honour's entitlement to refuse to be a mere means for other people's purposes. The extensions also show how the two striking inequalities of political life are consistent with the equal freedom required by innate right. *Private right* – the areas of law governing property, contract and other legal relationships between private parties – explains how inequalities in material wealth, including holdings of property, contractual obligations and employment and familial relationships can be consistent with the equality of innate right. *Public right* – the areas of law governing the lawmaking powers of the state, including constitutional law, criminal law and – explains how differentiated offices are both consistent with and required by innate right.

Private Right

Innate right is an incomplete account of independence, because it regulates only a person's entitlement to his or her own person and reputation. This opens the possibility that there could be other means available that a person might use in setting and pursuing purposes. This possibility requires a further "postulate," an extension consistent with, but not contained in innate right.¹² Kant argues that it would be inconsistent with innate right if usable things could not be rightfully used. The ability to use things for your purposes could be satisfied through a system of *usufruct*, in which things are borrowed from a common pool for particular uses. However, because of the way that Kant conceives of the relation between having means and setting ends, using things is not enough to extend your freedom; it would merely enable you to succeed at some particular purpose or other. To enhance your freedom, you must be able to have usable things at your disposal, to use as you see fit, and so to decide which purposes to use them for. Any other arrangement would

¹² 6:246. (Because of the recent discovery a printing error in earlier German editions, the Postulate appears *after* 6:250 in recent editions, but still has its academy pagination.)

subject your ability to set your own ends to the choice of others, since they would be entitled to veto any particular use you wished to make of anything. The innate equality of all persons entails that nobody could have standing to limit the freedom of another person, except to protect his or her own independence. To allow others have a veto on your use of things would be inconsistent with independence, because your ability to set your own purposes would depend on their choice, but not in a way that was required to protect their freedom. Nobody else is deprived of *their* means simply because you have external things as *yours*. At most, it deprives them of things that they might wish for, but frustrating the wishes of others is not inconsistent with their freedom, because nobody is entitled to have others organize their pursuits around his or her wishes. So it must be possible to have them as your own. All persons are symmetrically situated with respect to innate right; private right introduces the space for an asymmetry, because it allows different people to have different claims. You and I can own different things, and we can stand in different contractual and status relations.

Kant presents private right through an analysis of the categories of Property, Contract, and Status, which form the backbone of all Western legal systems. He introduces them as corresponding to the Categories of Substance, Causality, and Mutual Determination from the *Critique of Pure Reason*. They provide an exhaustive specification of the possible types of interaction consistent with freedom. Property concerns rights to things; contract rights against persons, and status contains rights to persons "akin to" rights to things.¹³ Kant remarks that the person/thing dichotomy makes room for only these possibilities. The intuitive idea is that free persons can only interact in three basic ways. They can interact independently, each pursuing his or her separate purposes. This is the structure of innate right. Property has a corresponding structure, because as a proprietor, what is mine is subject to my purposes and nobody else's. I can be wronged with respect to property in the same two ways that I can be wronged with respect to my person: by having my property used on behalf of another, or by being prevented from using my property on my own behalf. I have both possession and use of my property. If you use my house without my permission, you use it on your behalf, not mine; if you damage it, you prevent me from using it on my own behalf. Contract covers the case in which parties interact interdependently and

¹³ Kant explicitly excludes the fourth possibility, rights to things akin to rights to persons – on the grounds that a thing could not owe a contract-like obligation. 6:338 The same point could be made by saying that category must be empty because such rights would involve neither possession nor use.

consensually. If I invite you into my home, you do not wrong me; if I agree to do something for you, my powers to do so are now at your disposal, and you are entitled to use them as specified in our agreement. If I fail to do what I have agreed to do, I wrong you, by depriving you of means that you were entitled to.

For Kant, a contract is not understood as a narrow special case of the more general moral obligation of promise keeping¹⁴, but as a specifically legal institution governing the transfer of rights.¹⁵ I transfer my powers to you, for my powers include both my ability to do certain tasks, such as cutting your lawn, or paying you a sum of money, and my legal powers to do things, such as transferring piece of property to you. If I fail to perform as required, I wrong you in pretty much the same way as I would have wronged you had I given you something, either as a gift or in exchange for something else, and then taken it back. In a contract, I have given you that thing, as a matter of right, and so if I fail to deliver, I wrong you in the way I would if I took it back. In cases of contract, one person has the use of the other's powers, as specified by their agreement, without having possession of the other person.

Relations of status are the mirror image of contractual relations, because in relations of status one person has possession of another but *not* the use of a person. Such relationships are possible when people interact interdependently, but non-consensually. The structure of this relationship parallels the situation when one person is in possession of another's property: if I am repairing your car, I am allowed to take it for a drive to see if it is working properly, but not to take it to visit friends. To do so would be to use what is yours in pursuit of my purposes, rather than your own. Kant recognizes that there is a limited class of cases in which a person can be in possession of another person, in a way that the latter is not in a position to consent to the ways in which his or her affairs are managed. Of the examples that Kant considers, the most familiar is the relationship between parents and children. Kant notes that parents bring children into the world "without the consent of the children and on {our] own initiative,"¹⁶ and takes this to entail that parents have both a duty to act on behalf of their children, and a right to "manage and develop"¹⁷ the

¹⁴ Most enforceable contracts involve promises because they concern future arrangements. On Kant's analysis, the transfer of rights is fundamental to a contract, whether it is a present transfer or a future one expressed through a promise.

¹⁵ 6:271

¹⁶ 6:280

¹⁷ 6:281

children.¹⁸ In such circumstances, the only way their interaction can be rendered rightful is if the parents act on behalf of their children. Once again, the intuitive idea is familiar in a wide variety of contexts. Teachers are not allowed to take advantage of their students, because their asymmetrical relationship undermines the ability of the students to give genuine consent. Because teachers are precluded from acting for their own purposes, the relationship can only be rightful if they act on behalf of their students.

This analysis of the basic types of rightful interaction makes no use of any conception of harm. It is possible for one person to harm another without wronging her – as when I open a competing business that lures away your customers, or use my property so that you no longer have the pleasant view you once did. It is also possible to wrong someone in each of the three ways without doing that person any harm. If I touch you without your consent while you sleep, or use your property without your consent while you are absent, I draw you into my purposes, and wrong you even if, as it turns out, you never learn of my action, and your body or property suffers no identifiable harm. If I breach a contract with you, I wrong you even if, as it turns out, you had not done anything in reliance on the contract, and the expectation I deprived you of was purely prospective. The person in possession of another in a status relation who takes advantage of the relationship does wrong even if the ward of the relationship suffers no loss. This is not to say that the Kant's analysis has no explanation of why harm is significant – it is significant when it diminishes a person's powers, and so her freedom. But it is not significant merely because it diminishes either welfare or wealth.

The relations of right that Kant focuses on are initially introduced as ways in which free persons can interact consistent with each being independent of all the others. Kant devotes a separate discussion to the question of how a person can come to have a right to a particular thing, whether a piece of property, another person's performance, or to have another person acting on his or her behalf. Where recent political philosophers have considered property at all, they have tended to follow John Locke in assuming that the starting point for understanding property is an explanation of how acquisition of property differentiates the owner from all others in relation to a thing. Kant sees that this strategy cannot work. He mocks it as the "guardian spirit" theory of property, noting that property is a relation between persons, not a relation between a person and

¹⁸ The sense of "possession" here is formal: parents are in a position to decide things about what their children will do, and so to determine which ends the children will pursue in a way that the children did not (and until they reach maturity could not) consent to.

a thing.¹⁹ Kant's theory of property explains the nature of that relationship, before explaining how persons can come to stand in that relationship with respect to a specific previously unowned thing. Instead of focusing on the expenditure of toil in appropriating the thing, Kant focuses instead on the result of acquisition, the sense in which the owner has the right to use it for his or her own purposes, to the exclusion of all others. Toil or effort as such is neither necessary nor sufficient for acquisition. It is not sufficient because you can fritter away your efforts without acquiring a thing, as you do if you chase a wild animal that escapes. It is not necessary because you can take possession of a piece of land without working on it or using it for any specific purpose. What is acquired is the right to decide how the thing will be used. Using something, even using it legitimately, is not sufficient to generate a right to decide future uses of a thing, or limit other people's access to it. No can that right cannot depend on having somehow acquired it for rightful use already, on pain of regress. Instead, taking possession of a thing subjects it to the owner's choice, so that anyone who subsequently uses the thing deprives the owner of means that are for his choice.

Coercion

These forms of rightful interaction are at the same time the outer limits of rightful interaction. Anything done in violation of them will be wrongful, and so, for Kant, coercive. If I interfere with your property, either by using it for my purposes, or damaging it so that you cannot use it for your purposes, I coerce you, in that I deprive you of your capacity to use what is yours to set your own purposes. If I breach a contract with you, I deprive you of particular means you were entitled to – in this case, the use of my powers in the specified way. And if I take advantage of a relationship the terms of which you cannot consent to, either because you are ill or a child, or because you are not in a position to supervise the particulars of my use of it – I coerce you in the sense that I draw you into my purposes. In each of these disparate ways, I interfere with your freedom, either by compromising the means against which you choose your own purposes, or, alternatively, by using you or your means to pursue purposes you have not made your own. In each case, I wrong you if I make you subject to my choice, because I violate the reciprocal limits on freedom that protect each of us from the choice of others.

Because any such coercion is inconsistent with reciprocal limits on freedom, Kant argues that *hindering* such coercion is consistent with reciprocal limits on freedom.²⁰ Kant characterizes rightful coercion as the

¹⁹ 6:260

²⁰ 6:230

"hindrance of a hindrance," and surprises his readers by claiming further that relation between limits on freedom and the use of coercion to protect them is "analytic." The claim is surprising if the justification of coercion is understood in terms of its efficacy, in the way that punishment is often rationalized in terms of its effects in reducing future crime. No such effects could follow analytically from any principle. Kant means something quite different: he says that "external constraint... can "coexist with ends as such."²¹ The prospect of redress for the violation of universal laws of external freedom does not interfere with the capacity of persons to set their own purposes in conformity with such laws. Instead, the limits on the ways in which one person can use force against another are equivalent to the limits on the ways that people can forcibly prevent others from wronging them. It does not set up the one who has been wronged as master over the wrongdoer, but simply stops one person from being subject to the choice of another.

A proper coercive response to a private wrong gives the wronged party what he was entitled to all along. Your goods are to be used only for your purposes. Any use I make of them for my purposes does not change your entitlement to have them be used for yours alone, so any benefits I gain by using them properly belong to you. If I deprive you of means by injuring your or damaging your goods, making me restore your means guarantees that you have what you were entitled to all along. Again, my failure to perform a contract with you deprives you of my performance, but not of your right to my performance, so that forcing me to perform, or to give you the equivalent of what you would have received had I performed, is consistent with our interacting on terms of equal freedom. In each case, the use of force does not serve to restore everyone to the situation he or she was in prior to the wrong, but to restore the independence of the one who was wronged, by making it as though he had never been subject to the choice of the other.²²

From Private Right to Public Right

Kant's focus on the right to exclude generates a puzzle for his theory of property. Any *act* of acquisition will be merely unilateral: as I

²¹ 6:396. Strikingly, he contrasts it with the basic principle of virtue, which is synthetic.

²² In each of these examples, one of us ends up with more or less than we would have had the wrong never occurred: I may end up with a "windfall" because you use my goods in a profitable way that I could not have done on my own, or I may end up with a loss because I must use my means to make up the loss I wrongfully inflicted on you. Such changes are irrelevant from the standpoint of right; a régime of equal freedom must treat them no differently than it treats other fluctuations in the size of people's holdings.

wrap my hand around a previously unowned apple, you are not party to my deed. If I am to come to own the apple in a way that entitles me to coercively exclude all others, there must be a sense in which *everyone* is party to my act of acquisition, despite the fact that almost none of them will even be aware of it. The problem here is not that my appropriation of an unowned thing narrows their range of opportunities, since others are no longer free to use or acquire it. That may be true, but that relates to their wishes, not their rights, because it does not make them subject to my choice, or deprive them of means to which they already had a right. At most, it deprives them of an opportunity to which they had no right, in something like the way that you deprive me of an opportunity to which I have no right by buying the last carton of eggs in the store before I have a chance to, or by declining my invitation to go into business with you.

The real difficulty is that my unilateral act carries with it the right to exclude. Prior to my act, you did no wrong by happening to be wherever you were. Once I have appropriated a piece of land, you are no longer allowed to be there, and I am allowed to use force to keep you out. If I have appropriated an apple, the problem is not that you are not allowed to appropriate it, but that you now need to take care not to damage it, and must seek my consent before using it. My right to exclude makes it legitimate for me to use force to prevent you from doing things that you could have done rightfully before. So equal freedom requires that it be possible for people to have external things as their own, and so to acquire them, but any act of acquisition appears to be a case in which one person unilaterally changes his relations with others, in a way that seems inconsistent with the idea of equal freedom.

How can your rights change through the acts of others to which you are not a party? Kant's answer is that, because equal freedom requires that such acts do bind you, there must be a sense in which you are a party to them, so that my unilateral act binds you because it takes place against the background of everyone authorizing acts of appropriation by others. Nobody could object to such acts on grounds of freedom, because they don't deprive anyone of any powers, they merely change the context in which each person is free to exercise his or her powers.

Kant's point isn't that you just need to think of others as authorizing your deed in order of it to bind them. The idea of a united choice that is presupposed by acquisition doesn't determine the respects in which others are bound by your (implicitly omnilateral) deed. That is a matter that is by its nature open to dispute. Your claim is only provisional, because your judgment about the significance of your unilateral act for the freedom of others is from their standpoint nothing more than in your

unilateral judgment, even if we both think of ourselves as upholding a system of equal freedom. We can, and should, strive to do what is right in a state of nature; every duty of right is also, indirectly a duty of virtue, which “commands us to hold the right of human beings sacred.”²³ But the most anyone can do is “what seems good and right to him,” that is, to enforce his own unilateral will. The unilateral aspects of your deed are reproduced in your judgment about its significance.

Kant’s point about disputes is not just a reiteration of Locke’s familiar claim that people often disagree about the application of principles to particular situations, especially when their interests are at stake. Unilateral judgment is a problem because of the two dimensions of the innate right of humanity. The innate right to freedom demands that people be able to acquire things as their means without the explicit leave of others. Rightful honor requires people to stand up for their rights, and so that no person defer to any other private person’s judgment in cases of dispute about what either is permitted to do. If you think that you have performed an act establishing a right, you are entitled to stand by your claim in the face of all who contest it, but those who contest it are no less entitled to stand by their claims. Rightful honor requires that each party accept no standard other than “what seems right and good” to him.”²⁴ The only reason to defer is because you can’t win. Might makes right, regardless of how “good and law-abiding” you or the person who disputes your claim might be.

The solution to disputes about rights is to make the omnilateral will institutional. Disputes can be resolved in a way that is consistent with rightful honor if the parties to it are subject to the authority of an impartial judge, and an enforcer who can carry out the decision. The state is a generalized version of this structure. It is a common authority, charged with making, applying, and enforcing law. It is legitimate because it makes it possible for people to resolve disputes about rights in a way that is consistent with the rightful honour of all. Legitimacy flows from what the state does, and so does not require an explicit act of instituting it.

Kant’s argument for the moral need for a state does not depend upon factual assumptions about scarcity, selfishness, or the likelihood of bias if someone is judge in his or her own case. It is not that we are likely to disagree about whether my act binds you because of different desires or perspectives, but that we must already be in the right kind of relationship for my act have any significance for you. That requirement reflects the normative requirements of right. People must be able to acquire means

²³ 6:395

²⁴ 6:312

through their deeds, and stand up for their rights. The two requirements are only compatible in a rightful condition.

Because these problems are formal features of the contrast between unilateral acts and reciprocal limits, they are not limited to the special case of property. They apply also to relations of contract and status. There must be a way of making them give rise to enforceable obligations consistent with the freedom of all.

Kant's solution to these problems takes a form superficially similar to the familiar modern idea of a social contract. There must be a way of understanding an act of acquisition as implicitly authorized by the "united will of all."²⁵ Kant explains how wills can be united in his discussion of contract, noting that agreement must be something the two people do together, not a pair of separate acts by the two of them, or even the pairing of interlocking acts. If I promise to do something for you, and you promise to do something in return, two *other* people who made a parallel pair of promises would not, without more (much more) be entitled to discharge their obligations to each other by giving each of *us* what we were respectively entitled to through *our* contract. A contract does not confer an entitlement to have something happen; it confers an entitlement on someone in particular to have somebody else in particular make that thing happen. That relation can only be understood if their separate acts are taken to be expressions of what Kant calls a "united will." Kant models the possibility of a united will in the law of contract through the idea of *lex continua*, familiar from his discussion of causation in the *Critique of Pure Reason*. Just as an idea of continuity must be imposed in order to distinguish between a succession of appearances and an appearance of succession, the same idea of continuity is presupposed by the distinction between unrelated acts of separate persons and the transfer of powers inherent in a contract.

More generally, one person's unilateral act can only be relevant to the rights of others if all share a more general united will. The right to exclude presupposes the background of a united will, competent to adjudicate disputes, and in whose name the results of those adjudications can be enforced. Otherwise, appropriation and enforcement are merely unilateral, and so inconsistent with the rightful honor of others.

The problem of appropriation is introduced through the category of property (*factum*); the idea of people doing things together is introduced through the category of contract (*pactum*); the idea that people can be bound through their deeds without intending to enter into an arrangement

²⁵ 6:314

is introduced through the category of status (*lege*). Both property and contract are acquired through affirmative acts. Relationships *lege* are deemed to apply in order to make forms of interaction rightful. If actual consent is impossible, rightful relations must be deemed to hold anyway, as in the case of parents and their children. In the case of the state, someone sympathetic to Locke's political philosophy might contend that it is possible to have actual consent, suitably construed. Kant's point is that the actual consent of all, understood as a particular affirmative act, is the wrong standard for a rightful condition. In order for actual consent to bind everyone, it would need to be unanimous: a contract requires the actual choice of the parties to it. The problem is not that unanimity is unlikely to be secured, but that as a matter of contract doctrine, private parties are entitled to refuse a contract if they do not *take* it to be to their advantage, even if it really *is* to their advantage. Nobody can be forced to enter into a private transaction, even one that benefits him. As it is sometimes put, freedom *of* contract requires freedom *from* contract. To carry the right to refuse over into the context of public right would subject each person's ability to live in a rightful condition to the choice of indefinitely many other actual persons. Thus everyone would be subject to the choice of everyone else, because each person would hold a veto on the ability of others to be in a rightful condition. As a result, the postulate of public right requires that everyone enter into a rightful condition, and so licences others to use force to bring the unwilling into such condition. To allow an outsider to exercise such a veto would leave everyone in the condition in which everyone is subject to the choice of whomever they are immediately interacting with would be inconsistent with rightful honor.

To sum up, independence requires both enforceable reciprocal limits on freedom and the ability to acquire things without the consent of all. The two requirements can only be reconciled in a rightful condition. That there are differences in the powers of officials and private citizens is consistent with the equality of all, because some official powers are required to preserve equal freedom. The arguments of Public Right go on to show the types of power, and the limits on them, that are required. Kant's claim is not that citizens are more likely to be independent if officials make, apply, and enforce laws: they cannot be independent without them.

Public Right

The innate right of humanity in your own person explains both the structure of right as a system of reciprocal limits on coercion and the basis for rightful relations with respect to external things. The other aspect of

innate right, rightful honor, generates the need for a united will: the refusal to submit to a united will leaves you vulnerable to the choice of others, in a way that is inconsistent with rightful honor. Rightful honor plays a further role in Public Right, by providing the rationale for the various powers that Kant supposes a state must have, as well as the relation between the various powers in the state.

Kant defends the modern view of the division of powers between executive, legislative, and judicial branches of government. The legislative branch is charged with making law, the executive with carrying out and enforcing law, and the judiciary with applying it to particulars in cases of dispute. The functions are distinct because only the legislature has the power to make law. It does so as the voice of the people, so that they rule themselves. The executive branch does not make general rules, but takes up means to give effect to them. The judiciary resolves particular disputes and calls upon the executive to “render to each what is his.”²⁶ Together the divided powers preserve independence by putting people under common rules governing their interactions, and common procedures enforcing them so that no person is subject to the power or judgement of others.

Rightful honor also sets out the powers that the state must have. To the modern reader, Kant’s list of the consequences that follow from the social contract looks like a sort of grab-bag of eighteenth century powers: the role of “supreme proprietor of the land,” including the power to tax and overturn perpetuities in land ownership;²⁷ a separate duty to impose taxes in support of the poor; the right to distribute offices; the right to punish and grant clemency. Underlying this apparent miscellany is the requirement that the state not allow one person to be subject to the choice of another. Prohibiting and punishing crime is a clear example of this: the state cannot allow one person to make the wronging of another the means through which he pursues his purposes. The duty to support the poor protects independence in a different way. As a matter of private right, nobody has a right to means that are not already his or her own, and, as Kant coldly puts it, “need or wish” are irrelevant. The duty to support the poor is not a way of coordinating efforts to discharge prior obligations to support those in need. There are no enforceable private obligations to do so. The only private obligation to support the needy is an obligation of charity, which does not dictate specific actions, but requires only that each person make the needs of (some) others one of her ends.²⁸ The state’s

²⁶ 6:317

²⁷ 6:233

²⁸ 6:390

duty to support the poor sustains independence in the face of the possibility that through a series of otherwise rightful private transactions, some people might come to have no assets, personal or external, with which to support themselves, and so be dependent on the charity of others. To be dependent on the generosity or grace of others is to be subject their choice, which is inconsistent with rightful honor.²⁹ In a parallel way, perpetual estates in land subject future generations to the choice of past ones, by requiring them to use and bequeath it in a particular way. As a result, it would not be subject to their choice, but would amount to a sort of serfdom.³⁰ Each of these restrictions can be cast in terms of the idea of a social contract, because each serves to preempt or repair a type of dependence that is made possible by the existence of enforceable obligations. Free persons concerned to preserve their independence could only enter a rightful condition provided that it was secure against these further types of dependence. Of course, there was no point at which they all agreed to enter the condition. That actually strengthens Kant's point. The appropriation of unowned things, or the transfer of rights, can only be rightful against the background of a régime of equal freedom, and such a régime must contain more than the apparatus of property and contract through which individual transactions are conducted.

Kant also argues that the Idea of a social contract precludes a right of revolution.³¹ Reaction to this claim has been less puzzlement than outrage. Kant offers a number of arguments for a number of distinct but related claims. One argument is about the ability of institutions to deal with a right of revolution. Kant argues that no one can sit in judgment of the sovereign, on the grounds that the person who could do so would be the sovereign, and so, either the real sovereign, or subject to having still *others* sit in judgment, generating a regress. This argument strikes many readers as too legalistic to be of much interest, but it is worth noting that it is a generalization from Kant's earlier discussion of the traditional legal problem of recovery of a stolen object. Suppose somebody steals my horse, and you, in good faith and in a public market "regulated by police ordinances," purchase it from the thief.³² I then see you with the horse, and accuse you of theft. You show me all the paperwork. We have both been cheated by a single rogue, who has dropped out of sight. Who gets

²⁹ 6:326

³⁰ 6:324, 6:368

³¹ 6:320

³² Had I branded the horse, I would have made it much harder for the thief to sell it in a regulated market. Procedures for regulating transfers make the brand relevant; the marking, simply as such, does not.

to keep the horse? Kant notes that as a matter of natural right, it seems clear that I do, because a right in property is not extinguished just because the owner is no longer in physical possession of the thing. Nonetheless, he argues that a court can make no such decision and must instead allow the purchaser to keep it. His reasoning is instructive: the original owner's title is only as good as the rightful condition that initially secured it. It is impossible to trace the history back to ensure no wrong had occurred in all of the transactions relevant to my title in the horse (including the transaction through various people acquired things they used in those transactions.) Going back to my earlier acquisition faces exactly the same problem as your more recent one: the most I could ever show is that I acquired it in a legitimate and publicly rightful way. My claim to the horse is on all fours with yours, but you have a more recent, and so superior, ratification of your title.³³

Kant's point about the impossibility of judging the sovereign has exactly the same structure: the only thing that *qualifies* the sovereign to rule is the Constitution that *empowers* the sovereign to rule. There is no rightful claim to property outside of a rightful condition, only a series of potentially competing provisional claims, none of which generate a coercive right in relation to any other. There is also no rightful claim to rule outside of a rightful condition, only potentially competing provisional claims. Those provisional claims may be better or worse on the basis of moral argument, but nobody has standing to adjudicate between them or enforce any of them, because they are merely unilateral.

The problem of revolution illustrates the sense in which a rightful Constitution is what Kant calls an "Idea of Reason."³⁴ It provides the normative basis against which constitutions can be judged, and so provides the standard to which they should aspire. If that idea is to apply to particulars, however, there must be procedures for applying it, including procedures that determine who will apply it. Those procedures must take priority over any abstract formulations of the idea of a rightful Constitution, because the most basic tenet of a rightful Constitution is the idea of procedures to make it binding on all, and so consistent with the innate right of humanity of each person.

On this understanding, Kant's argument is anything but banal. It is also much less reactionary than Kant's critics have usually taken it to be. Kant is often saddled with the view that it would have been wrong to rebel against Nazis or for blacks in South Africa to take up arms against the apartheid régime. It does not commit Kant to the claim that every

³³ 6:299

³⁴ 6:371

organization that holds a near monopoly of force in the geographic area is entitled to allegiance from the residents of that area, or that they do wrong if they rise up against it. The analogy with reclaiming stolen goods makes this clear. The purchaser only gets to keep the horse if the purchase takes place in a public market with police ordinances, but the purchaser gets to keep it even if those ordinances are imperfect in any number of ways. It does not follow from this that every transfer of stolen property, or even every transfer under the supervision of the local warlord, gives the new possessor good title. Your title to your property is only as good as the procedures that affirm it. If such procedures are in place, your title is also superior to that of the person who receives stolen goods in secret. Nor does it mean that you have no coercive right against the person. In the same way, a constitutional system of government takes priority over the claims of natural right, even if the Constitution and the positive law passed under it are flawed in any number of ways. It does not follow from this that every organized use of power and violence is a legitimately constituted state. Nor does it follow that those who find themselves oppressed by a powerful oppressor have no right to use force, either to protect themselves, or, if possible, to bring that person into a rightful condition with them. A state of nature is an Idea of Reason just as a rightful condition is, and Kant's argument leaves open the possibility that the rogue régimes of the world are in a state of nature, so that those to whom they do violence are not only *entitled* but *required* to use force to bring them in to a rightful condition.

Kant also claims that the existence of a rightful condition makes it wrong to look to the history of that condition "with practical intent." His claim is not only that we will never discover the appropriate founding moment, but the more striking claim that history must ultimately be irrelevant. No doubt every existing political régime exists as a result of wrongdoing in the past. But just as the unwillingness of some "independent" to enter into a rightful condition cannot deprive others of their entitlement to live on grounds of equal freedom, so the existence of past wrongs by others cannot forever preclude entry into a rightful condition.³⁵

Crime and the right to punish

Public right also contains Kant's discussion of the criminal law and the right of the sovereign to punish and grant clemency. That discussion has received a disproportionate amount of attention from commentators,

³⁵ 6:318

despite the fact that Kant makes it clear that punishment is the prerogative of the sovereign, and not the case of coercion that is central to right. Nonetheless, his discussion of punishment is striking, because he introduces, seemingly out of nowhere, the retributive principle that a wrong should be visited back upon a wrongdoer. This is not the place to develop Kant's account of punishment in the detail it deserves. I will remark only that it, too, is said to "follow" from the idea of a social contract. Crimes must have a different remedy than civil wrongs do, in order to preclude the possibility that someone could claim an entitlement to wrong another person and simply pay damages. The criminal law does not make such behavior empirically impossible, but it does make it impossible for someone to do so as a matter of right. Punishment takes the form of retribution because the state must preclude such wrongs, and the only means at its disposal are coercive ones, since it can shape only external conduct. The insufficiency of civil damages is part of the problem, so the further coercive response takes the form of making and carrying out threats. The state must be prepared to punish any crime if it occurs, and the quantum of punishment for any particular crime must not be out of proportion to the punishments for other crimes. Kant concludes that the wrong itself provides the appropriate measure of punishment: the state must threaten to use the same type of force against the criminal that the criminal has used for his own purposes. Crime is not prohibited because of the ends the criminal sets, but because of the means he uses to get them. Kant argues that the illicit means that the criminal uses in pursuit of his purposes provide the measure of his penalty. A greater or lesser punishment would treat the criminal as a mere means in pursuit of social purposes, whether protective or philanthropic. Threatening to visit the crime back on the criminal is consistent with his independence. He is treated as he chooses to treat others.³⁶

Kant appears to back away from his commitment to retribution when he insists that paradigmatic crimes of honor cannot be given the punishment they deserve. He focuses on the 18th-century examples of the mother who kills her illegitimate child, and the soldier who kills another when challenged to a duel.³⁷ After parenthetically noting the standard contemporary analyses of these as examples in which the murder victim lacks or forfeits rights against murder (an analysis which Kant must reject on the same grounds that he rejects slave contracts: the innate right of humanity cannot be alienated through a deed or act of consent), Kant explains the cases in terms of the idea of honor. Kant elsewhere remarks

³⁶ 6:332

³⁷ 6:336

that the sense of honor and shame provides the basis for morality, because it creates the possibility of acting on the basis of a conception. His concern here, however, is internal to the idea of right, and does not depend on the relation between honor and virtue. Instead, what is at stake in each of these examples is rightful honor. On Kant's understanding of sexuality, the mother of an illegitimate child has allowed herself to be treated as a mere thing,³⁸ and the child exists as proof that she has done so; the soldier challenged to a duel has had his right to be beyond reproach³⁹ called into question. The problem with punishing in either case is that to do so would be to "declare by law that the concept of honor counts for nothing." The difficulty here is that honor is the model for right. Throughout private right, Kant introduces concepts of right through a development of empirical examples that serve as models. Physical possession is the model for rightful possession; a present transfer is the model for contract; two people taking sexual possession of each other is the model for relations *lege*. In the same way, empirical honor is the model for rightful honor, and where "legislation itself... remains barbarous and undeveloped" the subjective and objective incentives of honor come apart. But the law cannot deny its own model. So it must adopt the barbarous and undeveloped conception of honor as its own.

Conclusion

Kant's legal and political philosophy starts with a simple but powerful conception of freedom as independence from another person's choice. The idea of freedom provides him with a systematic answer to the most basic questions of political philosophy. It explains how inequalities in wealth and power are consistent with the innate equality of all persons. It also shows that giving special powers to officials is consistent with equal freedom for all. It shows why some people must be given the power to tell everyone (including themselves) what to do, and why others must be empowered to force people to do as they are told. The answer is distinctively Kantian: political power is legitimate and enforceable because freedom requires it.

³⁸ 6:278. As Barbara Herman has pointed out, Kant shares this view of sexuality with Jean-Paul Sartre, Simone de Beauvoir, and Andrea Dworkin. See "Could it be Worth Thinking About Kant on Sex and Marriage" in *A Min of One's Own*, edited by Louise Antony and Charlotte Witt (Boulder, Westview 1994).

³⁹ 6:238