

Kant

The Metaphysics of Morals

Introduction to the Doctrine of Right

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Introduction to the doctrine of right

A.

WHAT THE DOCTRINE OF RIGHT IS.

The sum of those laws for which an external lawgiving is possible is called the *Doctrine of Right* (*Ius*). If there has actually been such lawgiving, it is the doctrine of *positive right*, and one versed in this, a jurist (*iurisconsultus*), is said to be *experienced in the law* (*Iurisperitus*) when he not only knows external laws but also knows them externally, that is, in their application to cases that come up in experience. Such knowledge can also be called *legal expertise* (*Iurisprudentia*), but without both together it remains mere *juridical science* (*Jurisscientia*). The last title belongs to *systematic* knowledge of the doctrine of natural right (*Jus naturae*), although one versed in this must supply the immutable principles for any giving of positive law.

B.

WHAT IS RIGHT?

Like the much-cited query “what is truth?” put to the logician, the question “what is right?” might well embarrass the *jurist* if he does not want to lapse into a tautology or, instead of giving a universal solution, refer to what the laws in some country at some time prescribe. He can indeed state what is laid down as right¹ (*quid sit iuris*), that is, what the laws in a certain place and at a certain time say or have said. But whether what these laws prescribed is also right, and what the universal criterion is by which one could recognize right as well as wrong (*iustum et iniustum*),² this would remain hidden from him unless he leaves those empirical principles behind for a while and seeks the sources of such judgments in reason

¹ was *Rechtens sei*. According to 23:262, what is laid down as right (*Rechtens, iuris est*) is what is right or wrong in accordance with positive laws.

² In 6:223–4 Kant used *gerecht* and *ungerecht*, *iustum* and *iniuatum*, for what is right or wrong in accordance with external laws, and *recht* and *unrecht* for what is right or wrong generally. Within *The Doctrine of Right* he uses simply *recht* and *unrecht*, although the context makes it clear that only external laws are under consideration. In the present passage the Academy edition capitalizes the words, as *Recht* and *Unrecht*.

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alone, so as to establish the basis for any possible giving of positive laws (although positive laws can serve as excellent guides to this). Like the wooden head in Phaedrus's fable, a merely empirical doctrine of right is a head that may be beautiful but unfortunately it has no brain.

The concept of right, insofar as it is related to an obligation corresponding to it (i.e., the moral concept of right), has to do, *first*, only with the external and indeed practical relation of one person to another, insofar as their actions, as deeds,^k can have (direct or indirect) influence on each other. But, *second*, it does not signify the relation of one's choice to the mere wish (hence also to the mere need) of the other, as in actions of beneficence of callousness, but only a relation to the other's *choice*. *Third*, in this reciprocal relation of choice no account at all is taken of the *matter* of choice, that is, of the end each has in mind with the object he wants; it is not asked, for example, whether someone who buys goods from me for his own commercial use will gain by the transaction or not. All that is in question is the *form* in the relation of choice on the part of both, insofar as choice is regarded merely as *free*, and whether the action of one can be united with the freedom of the other in accordance with a universal law.

Right is therefore the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom.

C.

THE UNIVERSAL PRINCIPLE OF RIGHT.^l

"Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law."

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

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^k als *Facta*, perhaps "as facts." In 6:227 *factum* was given as the parenthetical equivalent of *Tat* or "deed." In some passages it is unclear whether *Tat* is to be taken as "fact" or as "deed" or as both.

^l *Allgemeines Prinzip des Rechts*

^m *Zustand*. Throughout the *Doctrine of Right*, *Zustand* is translated as "condition" except (1) where the familiar term "state of nature" is called for and (2) where it seems to require the translation "status," in Kant's discussion of rights to persons akin to rights to things. In the *Doctrine of Virtue*, where there is no occasion for mistaking "state" for *Staat*, "state" and "condition" are used interchangeably. In the few texts in which "condition" in the sense of *Zustand* and in the sense of *Bedingung* might be confused, the German word is provided in a note.

ⁿ *tut der mir Unrecht*

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It also follows from this that it cannot be required that this principle of all maxims be itself in turn my maxim, that is, it cannot be required that *I make it the maxim* of my action; for anyone can be free so long as I do not impair his freedom by my *external action*, even though I am quite indifferent to his freedom or would like in my heart to infringe upon it. That I make it my maxim to act rightly is a demand that ethics makes on me.

Thus the universal law of right,^o so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law, is indeed a law that lays an obligation on me, but it does not at all expect, far less demand, that *I myself should* limit my freedom to those conditions^p just for the sake of this obligation; instead, reason says only that freedom *is* limited to those conditions in conformity with the idea of it and that it may also be actively^q limited by others; and it says this as a postulate that is incapable of further proof. – When one's aim is not to teach virtue but only to set forth what is *right*, one need not and should not represent that law of right as itself the incentive to action.

D.

RIGHT IS CONNECTED WITH AN AUTHORIZATION TO USE COERCION.

Resistance that counteracts the hindering of an effect promotes this effect and is consistent with it. Now whatever is wrong is a hindrance to freedom in accordance with universal laws. But coercion is a hindrance or resistance to freedom. Therefore, if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a *hindering of a hindrance to freedom*) is consistent with freedom in accordance with universal laws, that is, it is right. Hence there is connected with right by the principle of contradiction an authorization to coerce someone who infringes upon it.

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E.

A STRICT RIGHT CAN ALSO BE REPRESENTED AS THE POSSIBILITY OF A FULLY RECIPROCAL USE OF COERCION THAT IS CONSISTENT WITH EVERYONE'S FREEDOM IN ACCORDANCE WITH UNIVERSAL LAWS.

This proposition says, in effect, that right need not be conceived as made up of two elements, namely an obligation in accordance with a law and an

^o *das allgemeine Rechtsgesetz*

^p *Bedingungen*

^q *täglich*, perhaps "in fact"

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authorization of him who by his choice puts another under obligation to coerce him to fulfill it. Instead, one can locate the concept of right directly in the possibility of connecting universal reciprocal coercion with the freedom of everyone. That is to say, just as right generally has as its object only what is external in actions, so strict right, namely that which is not mingled with anything ethical, requires only external grounds for determining choice; for only then is it pure and not mixed with any precepts of virtue. Only a completely external right can therefore be called *strict* (right in the narrow sense). This is indeed based on everyone's consciousness of obligation in accordance with a law; but if it is to remain pure, this consciousness may not and cannot be appealed to as an incentive to determine his choice in accordance with this law. Strict right rests instead on the principle of its being possible to use external constraint that can coexist with the freedom of everyone in accordance with universal laws. — Thus when it is said that a creditor has a right to require his debtor to pay his debt, this does not mean that he can remind the debtor that his reason itself puts him under obligation to perform this; it means, instead, that coercion which constrains everyone to pay his debts can coexist with the freedom of everyone, including that of debtors, in accordance with a universal external law. Right and authorization to use coercion therefore mean one and the same thing.

The law of a reciprocal coercion necessarily in accord with the freedom of everyone under the principle of universal freedom is, as it were, the *construction* of that concept, that is, the presentation of it in pure intuition a priori, by analogy with presenting the possibility of bodies moving freely under the law of the *equality of action and reaction*.

In pure mathematics we cannot derive the properties of its objects immediately from concepts but can discover them only by constructing concepts. Similarly, it is not so much the *concept* of right as rather a fully reciprocal and equal coercion brought under a universal law and consistent with it, that makes the presentation of that concept possible. Moreover, just as a purely formal concept of pure mathematics (e.g., of geometry) underlies this dynamical concept, reason has taken care to furnish the understanding as far as possible with a priori intuitions for constructing the concept of right. — A right line (*rectum*), one that is straight, is opposed to one that is *curved* on the one hand and to one that is *oblique* on the other hand. As opposed to one that is curved, straightness is that *inner property* of a line such that there is only *one* line between two given points. As opposed to one that is oblique, straightness is that *position* of a line toward another intersecting or touching it such that there can be only *one* line (the perpendicular) which does not incline more to one side than to the other and which divides the space on both sides equally. Analogously to this, the doctrine of right wants to

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be sure that *what belongs* to each' has been determined (with mathematical exactitude). Such exactitude cannot be expected in the doctrine of virtue, which cannot refuse some room for exceptions (*latitudinem*). – But without making incursions into the province of ethics, one finds two cases that lay claim to a decision about rights although no one can be found to decide them, and that belong as it were within the *intermundia* of Epicurus. – We must first separate these two cases from the doctrine of right proper, to which we are about to proceed, so that their wavering principles will not affect the firm basic principles of the doctrine of right.

APPENDIX TO THE INTRODUCTION TO THE DOCTRINE OF RIGHT.

On ambiguous^s right. (*Ius aequivocum*.)

6:234 An authorization to use coercion is connected with any right in the *narrow* sense (*ius strictum*). But people also think of a right in a *wider* sense (*ius latum*), in which there is no law by which an authorization to use coercion can be determined. – There are two such true or alleged rights, *equity* and the *right of necessity*. The first admits a right without coercion, the second, coercion without a right. It can easily be seen that this ambiguity really arises from the fact that there are cases in which a right is in question but for which no judge can be appointed to render a decision.

I.
Equity.
(*Aequitas*.)

Equity (considered objectively) is in no way a basis for merely calling upon another to fulfill an ethical duty (to be benevolent and kind). One who demands something on this basis stands instead upon his *right*, except that he does not have the conditions that a judge needs in order to determine by how much or in what way his claim could be satisfied.¹³ Suppose that the terms on which a trading company was formed were that the partners should share equally in the profits, but that one partner nevertheless *did* more than the others and so *lost* more when the company met with reverses. By *equity* he can demand more from the company than merely an equal share with the others. In accordance with proper (strict) right, however, his demand would be refused; for if one thinks of a judge

¹ *das Seine*. This term, which subsequently comes to the foreground, is often translated as "what is his," "an object that is his," "one's belongings," "what belongs to him." Similar expressions are used for *das Meine* and *das Deine*.

^s or "equivocal," *zweideutigen*

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in this case, he would have no definite particulars (*data*) to enable him to decide how much is due by the contract. Or suppose that a domestic servant is paid his wages at the end of a year in money that has depreciated in the interval, so that he cannot buy with it what he could have bought with it when he concluded the contract. The servant cannot appeal to his right to be compensated when he gets the same amount of money but it is of unequal value. He can appeal only on grounds of equity (a mute divinity who cannot be heard); for nothing was specified about this in the contract, and a judge cannot pronounce in accordance with indefinite conditions.

It also follows from this that a *court of equity* (in a conflict with others about their rights) involves a contradiction. Only where the judge's own rights are concerned, and he can dispose of the case for his own person, may and should he listen to equity, as, for example, when the crown itself bears the damages that others have incurred in its service and for which they petition it to indemnify them, even though it could reject their claim by strict right on the pretext that they undertook this service at their own risk.

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The motto (*dictum*) of equity is "the strictest right is the greatest wrong" (*summum ius summa injuria*). But this ill cannot be remedied by way of what is laid down as right, even though it concerns a claim to a right; for this claim belongs only to the *court of conscience* (*forum poli*) whereas every question of what is laid down as right must be brought before *civil right* (*forum soli*).

II.

The right of necessity.¹⁴ (Ius necessitatis.)

This alleged right is supposed to be an authorization to take the life of another who is doing nothing to harm me, when I am in danger of losing my own life. It is evident that were there such a right the doctrine of right would have to be in contradiction with itself. For the issue here is not that of a *wrongful¹⁵* assailant upon my life whom I forestall by depriving him of his life (*ius inculpatae tutelae*),¹⁶ in which case a recommendation^v to show moderation (*moderamen*) belongs not to right but only to ethics. It is instead a matter of violence being permitted against someone who has used no violence against me.

It is clear that this assertion is not to be understood objectively, in terms of what a law prescribes, but only subjectively, as the verdict^w that

¹⁴ *ungerechten*

¹⁵ right to blameless (self-)defense

¹⁶ *Anempfehlung*

^w *Sentenz*, perhaps "the sentence." Throughout *The Metaphysics of Morals* Kant seems to draw no clear or consistent distinction between a "sentence" and a "verdict" or "decision" of a court.

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would be given by a court. In other words, there can be no *penal law* that would assign the death penalty to someone in a shipwreck who, in order to save his own life, shoves another, whose life is equally in danger, off a plank on which he had saved himself. For the punishment threatened by the law could not be greater than the loss of his own life. A penal law of this sort could not have the effect intended, since a threat of an ill that is still *uncertain* (death by a judicial verdict) cannot outweigh the fear of an ill that is *certain* (drowning). Hence the deed of saving one's life by violence is not to be judged *inculpable* (*inculpabile*) but only *unpunishable* (*impunibile*), and by a strange confusion jurists take this *subjective* impunity to be *objective* impunity (conformity with law).

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The motto of the right of necessity says: "Necessity has no law" (*necessitas non habet legem*). Yet there could be no necessity that would make what is wrong conform with law.

One sees that in both appraisals of what is right (in terms of a right of equity and a right of necessity) the *ambiguity* (*aequivocatio*) arises from confusing the objective with the subjective basis of exercising the right (before reason and before a court). What someone by himself recognizes on good grounds as right will not be confirmed by a court, and what he must judge to be of itself wrong is treated with indulgence by a court; for the concept of right, in these two cases, is not taken in the same sense.

DIVISION OF THE DOCTRINE OF RIGHT.

A.

General division of duties of right.

One can follow Ulpian in making this division if a sense is ascribed to his formulae which he may not have thought distinctly in them but which can be explicated^x from them or put into them. They are the following:

- 1) *Be an honorable human being (honeste vive).*^y *Rightful honor*^z (*honestas iuridica*) consists in asserting one's worth as a human being in relation to others, a duty expressed by the saying, "Do not make yourself a mere means for others but be at the same time an end for them." This duty will be explained later as obligation from the right of humanity in our own person (*Lex iusti*).¹⁵
- 2) *Do not wrong anyone (neminem laede)* even if, to avoid doing so, you should have to stop associating with others and shun all society (*Lex iuridica*).
- 3) (If you cannot help associating with others), *enter into a society with them in which each can keep what is his (suum cuique tribue)*. – If

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^x entwickelt. See *Groundwork of the Metaphysics of Morals* (4:397, note d).

^y Sei ein rechtlicher Mensch . . .

^z Die rechtliche Ehrbarkeit

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this last formula were translated “Give to each what is *his*,” what it says would be absurd, since one cannot give anyone something he already has. In order to make sense it would have to read: “Enter a condition in which what belongs to each can be secured to him against everyone else” (*Lex iustitiae*).

So the above three classical formulae serve also as principles for dividing the system of duties of right into *internal* duties, *external* duties, and duties that involve the derivation of the latter from the principle of the former by subsumption.

B. *General division of rights.*

1. As systematic *doctrines*, rights are divided into *natural right*, which rests only on a priori principles, and *positive* (statutory) right, which proceeds from the will of a legislator.
2. The highest division of rights, as (moral) *capacities^a* for putting others under obligations (i.e., as a lawful basis, *titulum*, for doing so), is the division into *innate* and *acquired* right. An innate right is that which belongs to everyone by nature, independently of any act that would establish a right;^b an acquired right is that for which such an act is required.

What is innately mine or yours can also be called what is *internally* mine or yours (*meum vel tuum internum*); for what is externally mine or yours must always be acquired.

There is only one innate right.

Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity. – This principle of innate freedom already involves the following authorizations, which are not really distinct from it (as if they were members of the division of some higher concept of a right): innate *equality*, that is, independence from being bound by others to more than

^a *Vermögen*¹⁶

^b *rechtliche Akt*. In 23:262, Kant defines a rightful action (*eine rechtliche Handlung, actus iuridicus*) as “someone's action from which a right of his arises.” This involves complications. Strictly speaking an *Akt*, translated as “act,” is not the same as an “action,” *Handlung*, although actions are necessary but not sufficient conditions for acquiring rights; and a rightful act can also be one by which someone gives up a right (6:300). In any case, this translation is too narrow to cover all the contexts in which Kant uses *rechtliche Akt*. In the following paragraph it seems to mean, more generally, an act affecting rights. On the translation of *rechtliche*, see Translator's Introduction.

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- 6:238 one can in turn bind them; hence a human being's quality of being *his own master* (*sui iuris*), as well as being a human being *beyond reproach* (*iusti*), since before he performs any act affecting rights^c he has done no wrong to anyone; and finally, his being authorized to do to others anything that does not in itself diminish what is theirs, so long as they do not want to accept it – such things as merely communicating his thoughts to them, telling or promising them something, whether what he says is true and sincere or untrue and insincere (*veriloquium aut falsiloquium*); for it is entirely up to them whether they want to believe him or not.*

The aim in introducing such a division within the system of natural right (insofar as it is concerned with innate right) is that when a dispute arises about an acquired right and the question comes up, on whom does the burden of proof (*onus probandi*) fall, either about a controversial fact or, if this is settled, about a controversial right, someone who refuses to accept this obligation can appeal methodically to his innate right to freedom (which is now specified in its various relations), as if he were appealing to various bases for rights.

With regard to what is innately, hence internally, mine or yours, there are not several *rights*; there is only *one* right. Since this highest division consists of two members very unequal in content, it can be put in the prolegomena and the division of the doctrine of right can refer only to what is externally mine or yours.

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 AS A WHOLE.

I.

All duties are either *duties of right* (*officia iuris*), that is, duties for which external lawgiving is possible, or *duties of virtue* (*officia virtutis s. ethica*),^f for

* Telling an untruth intentionally, even though merely frivolously, is usually called a *lie* (*mendacium*) because it can also harm someone, at least to the extent that if he ingenuously repeats it others ridicule him as gullible. The only kind of untruth we want to call a lie, in the sense bearing upon rights,^d is one that directly infringes upon another's right, e.g., the false allegation that a contract has been concluded with someone, made in order to deprive him of what is his (*falsiloquium dolosum*).^e And this distinction between closely related concepts is not without basis; for when someone merely says what he thinks, another always remains free to take it as he pleases. But a rumor, having some basis, that this is a human being whose talk cannot be believed comes so close to the reproach of calling him a liar that the borderline separating what belongs to *Ius* from what must be assigned to ethics can only be drawn in just this way.

^c *rechtlichen Akt*

^d *im rechtlichen Sinne*

^e deceitful falsehood

^f duties of virtue or ethics

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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.

But why is the doctrine of morals usually called (especially by Cicero) a doctrine of *duties* and not also a doctrine of *rights*, even though rights have reference to duties? – The reason is that we know our own freedom (from which all moral laws, and so all rights as well as duties proceed) only through the *moral imperative*, which is a proposition commanding duty, from which the capacity for putting others under obligation,^g that is, the concept of a right, can afterwards be explicated.^h

II.

In the doctrine of duties a human being can and should be represented in terms of his capacity for freedom, which is wholly supersensible, and so too merely in terms of his *humanity*, his personality independent of physical attributes (*homo noumenon*), as distinguished from the same subject represented as affected by physical attributes, a *human being* (*homo phaenomenon*). Accordingly right and end, related in turn to duty in this twofold property, yield the following divisions:

*Division
in Accordance with the Objective Relation of Law to Duty*

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Perfect Duty

Duty to Oneself	1. The right of humanity in our own person	(of right) Duty (of virtue)	2. The right of human beings	Duty to Others
	3. The end of humanity in our own person		4. The end of human beings	

Imperfect Duty

^g *Vermögen andere zu verpflichten*

^h *entwickelt*

The subjects between whom a relation of right to duty can be thought of (whether admissibly or not) can stand related to each other in different ways, and so a division can also be made from this point of view.

Division

in Accordance with the Relation of the Subject Imposing Obligation to the Subject Put under Obligation.

I.

The relation in terms of rights of human beings toward beings that have neither rights nor duties.

*Vacat*ⁱ

For these are beings lacking reason, which can neither bind us nor by which we can be bound.

3.

The relation in terms of rights of human beings toward beings that have only duties but no rights.

Vacat

For these would be human beings without personality (serfs, slaves).

2.

The relation in terms of rights of human beings toward beings that have rights as well as duties.

Adest

For this is a relation of human beings to human beings.

4.

The relation in terms of rights of human beings toward a being that has only rights but no duties (God).

Vacat

At least in philosophy, since such a being is not an object of possible experience.

So only in Number 2 is there found a *real* relation between right and duty. The reason that it is not to be found in Number 4 is that this would be a *transcendent* duty, that is, a duty for which no corresponding external subject imposing the obligation can be given, so that the relation here is only *ideal* from a theoretical point of view, that is, a relation to a thought-entity.^j We ourselves make the concept of this being, but this concept is not altogether *empty*; instead it is fruitful in reference to ourselves and to maxims of internal morality, and so for an internal practical purpose,

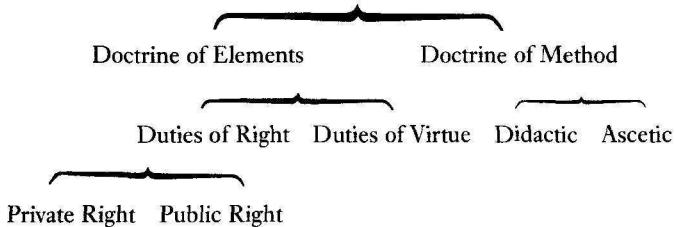
ⁱ *Vacat* might be rendered "has no members," *Adest* "has members."

^j *Gedankkending*

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inasmuch as our entire *immanent duty* (that which can be fulfilled) lies only 6:242 in this relation that can merely be thought of.

On the Division of Morals as a System of Duties in General.



that involves not only the contents of a scientific doctrine of morals but also its architectonic form, once its metaphysical first principles have traced out completely the universal principles for it.

The highest division of natural right cannot be the division (sometimes made) into *natural* and *social* right; it must instead be the division into natural and *civil* right, the former of which is called *private right* and the latter *public right*. For a *state of nature* is not opposed to a social but to a civil condition, since there can certainly be society in a state of nature, but no *civil* society (which secures what is mine or yours by public laws). This is why right in a state of nature is called private right.

Ripstein
Force and Freedom

Chapter 2

The Innate Right of Humanity

THE UNIVERSAL PRINCIPLE OF RIGHT states that “an action is right if it can coexist with everyone’s freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with universal law.”¹ An action is wrong if it hinders an action or “condition” that is itself rightful, that is, one that can coexist with everyone’s freedom.

Kant also identifies a right as a “title to coerce.” He goes on to argue that it follows from this, by “the principle of contradiction,” that any act that hinders another person’s use of freedom may in turn be hindered by others. This idea of hindrance, and the analogy with general dynamics through which Kant explicates it, have been the source of some confusion. I will examine Kant’s direct arguments for the Universal Principle of Right, as well as the analogies he draws with dynamics, in the appendix. My task in this chapter will be to lay out his conception of equal freedom in normative terms.

My focus in outlining the broad idea of equal freedom will be on what Kant characterizes as the “innate right of humanity in your own person,” which he also identifies as the right to be your own master—that is, the

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right that no other person be your master. I will explain the social and interpersonal dimension of this conception of self-mastery, its relation to a system of equal freedom in accordance with universal law, and Kant's characterization of that system in terms of coercion.

By making the innate right to freedom the basis for any further rights, Kant imposes an extreme demand for unity on his account of political justice. The rights that each person has against others must be derived from it, as must the fundamental constitutional rights that protect political freedoms and freedom of religion. The same right to independence also limits state action to genuinely public purposes and the means that the state may use in achieving them. In particular, state power may not be used to subject one private person to the choice of another. All of this is to come. The basic case of a system of equal freedom under law must first be established.

Both the idea of right as a system of equal freedom and the related idea that a right is a title to coerce incorporate ideas that have fallen from favor in recent political philosophy, because they are widely thought to be subject to fatal objections. The idea of equal freedom is said to be unable to balance competing exercises of freedom against each other except by attending to the underlying interests that are at stake, and so to those interests, rather than freedom as such. The claim that a distinctive set of standards governs the use of force is said to overlook the fact that the concept of a norm is prior to the concept of a sanction for its violation.

I will introduce Kant's conception of innate right as a system of equal freedom by engaging these two objections. I will first introduce the idea of a system of equal freedom, and then show how it allows coercion to be understood as a hindrance to freedom.

I. Purposiveness and Its Restriction

The idea of a system of equal freedom for all has come in for a rough ride in recent times, to the point where it strikes many people as hopeless, because subject to a devastating objection. I will introduce the core ideas through a dialogue with this objection. In *A Theory of Justice*, John Rawls advocated a principle of "maximum equal liberty," but, in response to criticisms by H. L. A. Hart, conceded that his approach to justice lacked

the theoretical resources to develop that idea.² Other attempts to formulate liberty-based principles have fallen victim to other, equally familiar criticisms. Remarking that libertarianism is a poorly named doctrine, G. A. Cohen has argued that any set of rules protects some liberties at the expense of others. Cohen gives the example of the way in which property rights restrict the freedom of nonowners to use land.³ From another perspective, Ronald Dworkin has used the example of driving the wrong way on a one-way street to illustrate the difficulty with liberty-based accounts of justice.⁴ Writing from yet another tradition, Charles Taylor has emphasized the differences between freedom of religion and the freedom to cross intersections unimpeded.⁵ These critics of the principle of equal freedom differ in many ways, but are united in supposing that in a world in which one person's actions affect another, liberty is not a self-limiting principle, so societies and theories of justice that aspire to guide them must decide which liberties to favor, or how to weigh liberty against other values.

This objection was first put forward close to two centuries ago, by Samuel Taylor Coleridge. Like Cohen, he argues that property constitutes an external limit on freedom, which is imposed for purposes that have no relation to freedom as such and depend entirely on advantage. Coleridge's argument was repeated without a reference to him by Henry Sidgwick, and explicitly endorsed by Frederick Maitland, both of whom Hart referred to in introducing his own version of it.⁶

All of the standard objections to the idea of equal freedom conceive of

2. Hart, "Rawls on Liberty and Its Priority," in Norman Daniels, ed., *Reading Rawls* (New York: Basic Books, 1975).

3. Cohen, "Freedom, Justice, and Capitalism," *New Left Review* 1, 126 (1981): 9.

4. Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), 271.

5. Taylor, "What's Wrong with Negative Liberty?" in *Philosophy and the Human Sciences*, Philosophical Papers, vol. 2 (Cambridge: Cambridge University Press, 1985).

6. See F. W. Maitland, "Mr. Herbert Spencer's Theory of Society III," *Mind* 8 (1883): 506–524. Maitland in turn attributes its general thrust to Samuel Taylor Coleridge. See Coleridge, "Section the First on the Principles of Political Knowledge" (1818), in Kathleen Coburn, ed., *The Collected Works of Samuel Taylor Coleridge*, vol. 4/1 (Princeton: Princeton University Press, 1969). Both Maitland and Coleridge argue that property requires a compromise of freedom in conditions of scarcity in which "not every man can get what he wants."

freedom as a person's ability to *achieve* his or her purposes unhindered by others. This understanding of freedom, described as "negative liberty" in Isaiah Berlin's essay "Two Concepts of Liberty," characterizes any intentional actions or regulations that prevent a person from achieving his or her purposes as hindrances to freedom.⁷ Some critics have questioned the special significance of the actions of others in limiting freedom on this account—lack of resources or internal obstacles may frustrate your purposes at least as much as other people's deliberate actions. Other critics have wondered how different freedoms could be measured to determine whether people had equal amounts.⁸ These difficulties aside, the deeper problem is that how different exercises of negative liberty interact with each other depends on the particular purposes the people are pursuing, or what Kant would call the "matter" of their choice. If our purposes come into conflict, so too must our negative freedom. Any purpose, whether my private purpose of crossing your yard or the state's public purpose of coordinating traffic flow, can come into conflict with some person's ability to get what he or she wants.

Kant conceives of equal freedom differently. It is not a matter of people having equal amounts of some benefit, however it is to be measured, but of the respective independence of persons from each other. Such independence cannot be defined, let alone secured, if it depends on the particular purposes that different people happen to have. One person cannot be independent of the *effects* of choices made by other people, except by limiting the freedom of those people. Instead, a system of equal freedom is one in which each person is free to use his or her own powers, individually or cooperatively, to set his or her own purposes, and no one is allowed to compel others to use their powers in a way designed to advance or accommodate any other person's purposes.

You are independent if you are the one who decides what ends you will use your means to pursue, as opposed to having someone else decide for you. At the level of innate right, your right to freedom protects your

7. Berlin, "Two Concepts of Liberty," in his *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), 118–134.

8. Onora O'Neill, *Towards Justice and Virtue* (Cambridge: Cambridge University Press, 1996), 161–162.

purposiveness—your capacity to choose the ends you will use your means to pursue—against the choices of others, but not against either your own poor choices or the inadequacy of your means to your aspirations. You remain independent if nobody else gets to tell you what purposes to pursue with your means; each of us is independent if neither of us gets to tell the other what purposes to pursue.

This right to independence is not a special case of a more general interest in being able to set and pursue your purposes. Instead, it is a distinctive aspect of your status as a person in relation to other persons, entitled to set your own purposes, and not required to act as an instrument for the pursuit of anyone else's purposes. You are sovereign as against others not because you get to decide about the things that matter to you most, but because *nobody else* gets to tell you what purposes to pursue; you would be their subject if they did. Thus Kant's conception of the right to independence rests on neither of what is referred to in recent literature as “interest theory” or “will theory” of rights.⁹ Underlying the other differences between these accounts is a shared conception of rights as institutional instruments that constrain the conduct of others in order to protect things that matter apart from them. Kant's account identifies a right with the restriction on the conduct of others “under universal law,” that is, consistent with everyone having the same restrictions. Each person's entitlement to be independent of the choice of others constrains the conduct of others because of the importance of that independence, rather than in the service of something else, such as an interest in leading a successful, worthwhile, or fully autonomous life. Those things can be specified without reference to the conduct of others, and constraining the conduct of others is, at most, a useful way of securing them. If rights are understood in this instrumental way, they are always at least potentially *conditional* on their ability to secure the underlying values that they are supposed to protect. The Kantian right to independence, by contrast, is always an entitlement within a system of reciprocal limits on freedom, and so can only be violated by the conduct of others, and its only point is to prohibit that conduct. The protection of independence and the prohibi-

9. Joseph Raz, “On the Nature of Rights,” *Mind* 93 (1984): 215–229; H. L. A. Hart, “Are There Any Natural Rights?” *Philosophical Review* 64 (1955): 175–191.

tion of one person deciding what purposes another will pursue stand in a relation of equivalence, rather than one of means to an end. As a result, the constraint a system of equal freedom places on conduct is *unconditional*. An unconditional constraint does not preclude the possibility of hindering the action of a person, or even of using lethal force to do so, because the unconditional right is not a right to a certain state of affairs, such as the agent staying alive. Instead, it is a right to act independently of the choice of others, consistent with the entitlement of others to do the same. The principle of mutual restriction under law applies unconditionally, because it is not a way of achieving some other end.

Your sovereignty, which Kant also characterizes as your quality of being your “own master (*sui juris*),” has as its starting point your right to your own person, which Kant characterizes as innate. As innate, this right contrasts with any further acquired rights you might have, because innate right does not require any affirmative act to establish it; as a right, it is a constraint on the conduct of others, rather than a way of protecting some nonrelational aspect of you. It is a precondition of any acquired rights because those capable of acquiring them through their actions already have the moral capacity to act in ways that have consequences for rights, that is, for the conduct of others. That any system of rights presupposes some basic moral capacities that do not depend on antecedent acts on the part of the person exercising them does not yet say what the rights in question are, or how many such rights there might be.

Kant writes that there is “only one innate right.”

Freedom (independence from being constrained by another’s choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every human being by virtue of his humanity.¹⁰

The innate right is the individualization of the Universal Principle of Right, applied to the case in which only persons are considered. The Universal Principle of Right demands that each person exercise his or her choice in ways that are consistent with the freedom of all others to exer-

10. 6:237.

cise their choice; the innate right to freedom is then each person's entitlement to exercise his or her freedom, restricted only by the rights of all others to do the same under universal law. No issues of right would arise for someone who succeeded in "shunning all society,"¹¹ and if there were only one person in the world, no issues of independence or rightful obligation would arise.¹²

Kant offers different formulations of innate right, each of which elaborates an aspect of the idea that one person must not be subject to the choice¹³ of another, which Kant glosses in terms of one person being a mere means for another. This familiar Kantian theme is explained in terms of the classic distinction, from Roman law, between persons and things. A person is a being capable of setting its own purposes. A thing is something that can be used in the pursuit of whatever purposes the person who has it might have. The classic example of a person being treated as a mere thing is the slave, for a slave is entirely at the disposal of his or her master. The slave's problem is that he is subject to the master's choice: the master gets to decide what to do with the slave and what the slave will do. The slave does not set his own ends, but is merely a means for ends set by someone else. To call it "the" problem is not too strong: if the other problems a slave has—low welfare, limited options, and so on—were addressed by a benevolent master, the *relationship* of slavery would perhaps be less bad, but it would not thereby be any less wrong. The right to be your own master is neither a right to have things go well for you nor a right to have a wide range of options. Instead, it is explicitly contrastive and interpersonal: to be your own master is to have no *other* master. It is not a claim about your relation to yourself, only about your relation to others. The right to equal freedom, then, is just the right that no person be the master of another. The idea of being your own master is also equivalent to an idea of equality, since none has, simply by birth, either the right

11. 6:236.

12. Ibid.

13. Kant distinguishes between will (*Wille*) and choice (*Willkür*). Choice is the ability to decide what purpose to pursue; will is pure practical reason, the capacity for self-determination in accordance with the representation of a rule (6:214). The classic discussion of this distinction is Lewis White Beck, "Kant's Two Conceptions of Will," *Annales de Philosophie Politique* 4 (1962): 119–137.

to command others or the duty to obey them. So the right to equality does not, on its own, require that people be treated in the same way in some respect, such as welfare or resources, but only that no person is the master of another. Another person is not entitled to decide for you even if he knows better than you what would make your life go well, or has a pressing need that only you can satisfy.

The same right to be your own master within a system of equal freedom also generates what Kant calls an “internal duty” of rightful honor, which “consists in asserting one’s worth as a human being in relation to others, a duty expressed by the saying do not make yourself into a mere means for others but be at the same time an end for them.”¹⁴ Kant says that this duty can be “explained . . . as obligation from the right of humanity in our own person.”

Kant’s characterization of this as an “internal duty” may seem out of place, given his earlier characterization of the Universal Principle of Right in terms of restrictions on each person’s conduct in light of the freedom of *others*. But the duty of rightful honor is also relational: it is a duty because it is a limit on the exercise of a person’s freedom that is imposed by the Universal Principle of Right. Just as the rights of others restrict your freedom, so that you cannot acquire a right to anything by acting in ways inconsistent with the innate right of another person, so, too, the humanity in your own person restricts the ways in which you can exercise your freedom by entering into arrangements with others. Your innate right prevents you from being bound by others more than you can in turn bind them; your duty of rightful honor prevents you from making yourself bound by others in those ways. Rightful honor does not warn you away from some juridical possibility that would somehow be demeaning or unworthy. You do not wrong yourself if you enter into a

14. Kant introduces the idea of rightful honor as a gloss on Roman jurist Ulpian’s precept “*honeste vive*” (6:237). See Ulpian, *Rules*, Book 1, recorded in Justinian, *Digest*, Book I, 1.10. A more literal translation would be “living honorably.” The Ulpian precepts appear to have been a standard reference point in discussion; they appear in Baumgarten’s textbook from which Kant taught moral philosophy. Kant concedes that his reading of them involves putting content into them. Kant uses the Latin phrase *Lex iusti* (“What is right”), as well as the phrases “the law of outer freedom” and “the axiom of outer freedom,” to mark this idea elsewhere in the *Doctrine of Right*.

binding arrangement inconsistent with the humanity in your own person. Instead, your duty of rightful honor says that no such arrangement can be binding, so no other person could be entitled to enforce a claim of right against you that presupposes that you have acted contrary to rightful honor.

Rightful honor does not demand that you behave selfishly, or refrain from helping another person with some particular project, or make another person's ends your own. To do any of these things is just to adopt some particular purpose, and so is an exercise of your freedom. In later chapters, we will see that rightful honor prevents you from giving up your capacity to set your own purposes, and so prevents others from asserting claims of right that assume that you did. In private right your rightful honor prevents you from entering into an enforceable contract of slavery, even if you were to believe the arrangement to be to your advantage. In public right, it prevents officials from making arrangements on your behalf that are inconsistent with your innate right. Rightful honor also provides the link from private right to public right by imposing a duty on each to leave the state of nature, which Kant characterizes as a condition in which everyone is subject to the choice of others.

Understood in this interpersonal way, the idea of independence contrasts with the idea of freedom as independence from empirical determination that some interpreters take to be central to Kant's *Groundwork*, insofar as the latter is often taken to depend only contingently on the existence or deeds of others.¹⁵ It also contrasts with prominent contemporary views according to which natural and social obstacles pose equally serious impediments to freedom.¹⁶ Finally, Kant's account of independence

15. If this reading of the *Groundwork* is the canonical statement of Kant's position—an issue on which I take no stand here—the existence of a *Doctrine of Right* is surprising and its content even more so. For one such expression of surprise, consider Robert Pippin's comment, "It would not be unreasonable to expect Kant at this point to suggest a certain sort of stoic indifference to the practical affairs of politics." See Pippin's "Dividing and Deriving in Kant's Rechtslehre," in Otfried Höffe, ed., *Immanuel Kant, Metaphysische Anfangsgründe der Rechtslehre* (Berlin: Akademie Verlag, 1999), 63–85.

16. For example, in *A Theory of Justice* Rawls speaks of freedom in terms of independence from natural contingencies and natural fortune. See Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), 73.

does not aspire to isolate people from the effects of other people's choices. Instead, my independence of your choice must be understood in terms of my right that you not choose for me. I remain independent if your choices have effects on me, as when you decline to cooperate with me on some project, or you pursue purposes of your own, and in so doing render things I had hoped to use unavailable. Any such idea of independence from all effects of the actions of others violates Kant's basic idea of equal freedom. To insulate one person from all effects of the choices of others would subordinate everyone else to that person's choice. This last contrast between independence of the choice of others and independence of the effects of their choices underlies Kant's conception of a number of familiar legal doctrines: you do me no wrong by offering a product similar to mine but at a better price, even though I lose customers. Nor do you wrong me by damaging something that I am accustomed to using but do not own; nor do you violate any right of mine by breaching a contract with someone other than me, or by taking down your fence so that my land is now exposed to wind. In each of these cases, I remain independent, that is, entitled to use my means as I see fit. These differences are central to Kant's argument.

Once freedom is understood in terms of people's respective independence, one person's freedom need not conflict with another's. Each person is free to use his or her own abilities to set and pursue his or her own purposes, consistent with the freedom of others to use their abilities to set their purposes. A system of equal freedom demands that nobody use his own person in a way that will deprive another of hers, or use another person's without her permission.

Each of these ideas requires filling out: the idea that your freedom is to be identified with your purposiveness; the idea that your right to your own person is tied up with your right to decide what to do with your body; and the idea that the separate or cooperative exercise of those powers can form a system of equal independence. Once the account of independence is in place, it also provides an account of wrongdoing as the violation of independence. It also generates the other "authorizations" that Kant says are included in innate right, both the right to speak your mind and the right to be "beyond reproach."

II. Freedom and Choice

The idea that you exercise your freedom by setting and pursuing purposes is familiar, common to Rawls's emphasis on the moral power to "set and pursue a conception of the good," and the distinction, common to Aristotle and Kant, between choice and wish. The ability to choose in this sense doesn't depend on the ability to stand outside the causal world, or even to abstract from your own purposes in making choices. Instead, it rests on the familiar observation that if you choose to do something, you must set about doing it, which requires that you take it to be within your power to pursue.

A different conception of choice sometimes appears in philosophy, according to which people simply have certain purposes and then select means to achieve them.¹⁷ This conception is exactly backward. Even if your wishes are fixed by your biology and upbringing, you can only *do* something if you set out to do it, and you can only set out to do what you take yourself to have the power to do. You might be mistaken about what your powers can achieve, but your freedom to choose your own purposes just is your freedom to decide how to use the powers you have. Hobbes could set out to square the circle, even though he was mathematically doomed to fail, because he took himself to have the requisite means—a compass, a straightedge, and one of the best minds of the seventeenth century. Without the powers, you can wish for anything—to walk on the moon and be home in time for dinner—but it is not a choice you can make. Your wishes may all come true, but you only *do* things by exercising your powers.

You do not, and could not, have a right against others to purposiveness as such. Instead your right is that you, rather than any other person, be the one who determines which purposes you will pursue. In the first instance, your right to your person is your right to your body. Your body is the sum of your capacities to set and pursue your purposes; your right to

17. As economics textbooks frequently put it, preferences are "given." As a matter of the best empirical theory of human motivation, this may be true. If so, the distinction between choice and wish applies *within* a person's preference profile.

it is your right that no other person determine what purposes you will pursue, not that you exercise that capacity successfully.

This formulation of your right to your person as your right to your body neither presupposes nor conflicts with any more general metaphysical claims about the relation between your person and your body. At the level of theoretical metaphysics, your person might be kept track of in other ways— the narrative of your actions, the fluctuations of your bank account, or your own conscious thoughts. As far as your claim against others, and the claims of others against you, however, the starting point must be your person as your body. You are the one to whom various things happened, the one who engaged in various transactions, and every time you did something or something happened to you, your body did it, or it happened to your body. If somebody wrongs you, he typically interferes with one or more aspects of your person; all are wrongs against your person by being wrongs against its aspects. Your person is not just a set of means that are at your disposal, but if another person interferes with your body, he thereby interferes with your ability to set and pursue your own purposes by interfering with the means that you have with which to set them, namely your bodily powers or abilities. Some philosophers have thought that you can keep track of your conscious thoughts without keeping track of your body. Any such possibility is irrelevant to the ways in which you may treat others, or others may treat you, consistent with your respective purposiveness. Your thoughts make no difference to the capacity of others to set and pursue their own purposes unless you act on them. You exercise your purposiveness by choosing, rather than merely wishing.

There is thus a fundamental distinction between interfering with the *purposiveness* of another person and interfering with that person's *purposes*. I can interfere with your purposes in a variety of ways—I might occupy the space that you had hoped to stand in, make arrangements with the person you had hoped to spend time with, and so on. Actions that affect you in these ways leave your purposiveness intact, because you still have the ability to determine how to use what you already have, and you are still the one who gets to determine how it will be used. All I have done is change the world in which you act.

Innate right entitles each person to use his or her bodily powers as he or she sees fit, consistent with the ability of others to do the same with theirs. The consistency is achieved through the idea of noninterference and the correlative requirement that cooperative activity be voluntary. Each person is only entitled to use his or her means in ways that are consistent with the entitlement of others to use theirs under universal law. This consistency requirement precludes anyone from using another person's means without that person's permission. The qualification "under universal law" entails that you could not have a right to a certain state of affairs so that, for example, others were required to organize their activities in such a way as to guarantee that it continued to obtain. Any means that you have may be subject to generation and decay, and others are not required to use their means in ways that protect you from such possibilities. Instead, they are only required to use them in ways that do not themselves damage or destroy what is already yours.

III. Domination

The right to freedom as independence provides a model of interaction that reconciles the ability of separate persons to use their powers to pursue their own purposes. In so doing, it also provides a distinctive conception of the wrongs that interfere with this independence. Wrongdoing takes the form of domination. Both your right to independence and the violations of it can only be explicated by reference to the actions of others. Wrongs against your person are not outcomes that are bad for you which other people happen to cause. Unlike the familiar "harm principle" put forward by Mill, which focuses exclusively on outcomes that can be characterized without reference to the acts that bring them about, the right to freedom focuses exclusively on the acts of others. It is not that somebody does something that causes something bad to happen to you; it is that somebody does something to you.

The idea of freedom as nondomination has a distinguished history in political philosophy. Recent scholars have pointed out that Berlin's dichotomy between negative and positive liberty leaves out a prominent idea of liberty, sometimes referred to as the "republican" or neo-Roman conception of liberty, according to which liberty consists in indepen-

dence from others. These scholars argue that this conception was central to the political thought of the civic republicans of the Renaissance, who were centrally concerned with the dangers of despotism. On this reading, the early modern republicans did not object to despotism because it interfered with their negative or positive liberty (to use anachronistic terms they would not have recognized). A despot who was benevolent, or even prudent, might allow people, especially potentially powerful ones, opportunity to do what they wanted or be true to themselves. The objection was to the fact that it was up to the despot to decide, to his having the power, quite apart from the possibility that he would use it badly. Unless someone has a power, there is no danger of it being used badly, but the core concern of the civic republicans was the despot's entitlement to use it, and the subjugation of his subjects that followed regardless of how it was used.¹⁸ Berlin is aware of this difference when he writes, "It is perfectly conceivable that a liberal-minded despot would allow his subjects a large measure of personal freedom."¹⁹

Freedom as independence carries this same idea of independence further, to relations among citizens. It insists that everything that is wrong with being subject to the choice of a powerful ruler is also wrong with being subject to the choice of another private person. As a result, it can explain the nature of wrongdoing even when no harm ensues. One person is subject to another person's choice; I use your means to advance purposes you have not set for yourself. Most familiar crimes are examples of one person interfering with the freedom of another by interfering with either her exercise of her powers or her ability to exercise them. They are small-scale versions of despotism or abuse of office.

Your powers can be interfered with in two basic ways, by usurping them or by destroying them. I *usurp* your powers if I exercise them for my own purposes, or get you to exercise them for my purposes. If I use force or fraud to get you to do something for me that you would not otherwise

18. See generally Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997), and Quentin Skinner, *Liberty Before Liberalism* (Cambridge: Cambridge University Press, 1998). In "A Third Concept of Liberty," *Proceedings of the British Academy* 117 (2002): 239, Skinner points out that Berlin's idea of positive liberty is not an idea of self-mastery but of mastering yourself.

19. Berlin, "Two Concepts of Liberty," 129.

do, I wrong you, even if the cost I impose on you is small. I have used you, and in so doing made your choice subject to mine, and deprived you of the ability to decide what to do. If you chose to do the same thing and I got the same benefit from it, but I had no role in making you do it, I haven't wronged you; I just took advantage of the effects of something you were doing anyway.

I can use you in other ways as well. Suppose that you are opposed to the fluoridation of teeth on what you believe to be health-related grounds. You are mistaken about this, but committed to campaigning against fluoridation. As your dentist, I use the opportunity created by filling one of your (many) cavities to surreptitiously fluoridate your teeth, pleased to have advanced the cause of dental health, and privately taking delight in doing so on you, the vocal opponent of fluoridation. In this example, I don't harm you, and there is even a sense in which I benefit you. I still wrong you because I draw you into a purpose that you did not choose. You remain free to use your other powers to pursue other purposes. But part of being free to use your powers to set and pursue your *own* purposes is having a veto on the purposes you will pursue. You need more than the ability to pursue purposes you have set; you also need to be able to *decline* to pursue purposes unless you have set them.²⁰ When I usurp your powers, I violate your independence precisely because I deprive you of that veto. I am like the despot who uses his office for a private purpose.

The other way in which I can subject you to my choice is by injuring you or, in the limiting case, killing you, ending your purposiveness. If I break your arm, I wrong you because I interfere with your person. The wrong interferes with a specific aspect of your purposiveness: in this case, I destroy your ability to use your arm (for some period of time) and in so doing limit the ends that you are able to set and pursue for yourself. The wrong does not consist in the fact that you no longer *have* those powers; you are not wronged if a disease or a wild animal produces the same result. I subject you to my choice because I deprive you of them. I dominate you because I treat your powers as subject to my choice: I take it upon

20. This idea receives its classic legal articulation in Judge Benjamin N. Cardozo's remark that "every human being of adult years and sound mind has a right to determine what shall be done with his own body" (*Schloendorff v. Society of New York Hospital*, 211 NY 125 (1914)).

myself to decide whether you can keep them. If I usurp your powers, I decide what purposes you will pursue, and make you dependent on me in one way; if I destroy them, I may not set any particular purposes for you, but treat your means as though they were mine to dispose of.

This second category of wrongdoing enables the right to freedom to account for all of the core examples that make Mill's harm principle seem plausible. Bodily injury reduces your powers no matter how it comes about, but it only violates your independence if another person injures you. Any injury potentially reduces your ability to set and pursue your own purposes, but intentional injury does something more: if I set out to deprive you of powers you have, I subordinate your ability to use your powers to set and pursue your own purposes as you see fit to my pursuit of my purposes. I set myself up as your master by deciding that you will no longer have them. Intentional injury is despotism by another name. Harm merits prohibition when it is a manifestation of despotism, but not otherwise.

Use and injury exhaust the space of possible violations of independence. Other possible losses are excluded. Your entitlement to be your own master is only violated if another person makes you pursue an end you have not chosen, by using your powers without your authorization, or restricts your ability to use your powers, either by physically constraining you or by depriving you of the ability to use them. Your self-mastery is not compromised if others decline to accommodate you, because the idea of self-mastery is explicitly contrastive. The person who declines to exercise his own self-mastery in aid of your wishes or needs does not thereby become your master. Indeed, any other restrictions on the freedom of others would require them to use their powers for another person's purposes.

Many wrongs against persons combine use and injury. Touching a person without her consent uses her for a purpose she didn't authorize; if she is also injured in the process, it may limit her ability to use her powers, at least temporarily. But intentional touching is objectionable even if harmless or undetected, or the injury is small. Your person—your body—is yours to use for your own purposes, and if I take it upon myself to touch you without your permission, I use it for a purpose you haven't authorized. The problem is not that I interfere with your use of your person or

powers, but that I violate your independence by using your powers for my purposes. The trespass against your person is primary, and any consequent injury secondary to it. If I cause you minor harm, such as the distraction of the few seconds of pain you experience when slapped, the small injury is serious because it aggravates an unauthorized touching. That is why an unauthorized caress or kiss can be a serious wrong, even if the victim is asleep or anesthetized.

Other people might do various things that annoy you in various ways. You might be happier if other people dressed in ways that you found tasteful or modest, or refrained from public displays of affection. However troubling you might subjectively find such conduct, your right to your own person does not entitle you to constrain it, because it does not stop you from using your body as you see fit. Again, you could not enjoy a right against others looking at you under a universal law, because embodied and motile persons can only avoid bumping into each other by looking where they are going, and so sometimes at each other.²¹

Defenders of Mill's harm principle have sought to explain the wrong in harmless trespasses against persons by pointing to their effects on third parties, arguing, for example, that people are particularly likely to be upset by or afraid of such forms of conduct²² or, alternatively, that most trespasses against persons are harmful, and so it is better to have a general rule proscribing them.²³ The Kantian idea of an innate right of humanity

21. It does not follow from this that your right to your person does not include rights against assault, that is, rights against what the law calls "an apprehension of a battery." Nor does it preclude the possibility that your right against assault could be engaged by others stalking you or even leering at you without touching you, even though you could not have a right against their looking at you as they go about their own business. Another person may wrong you without actually touching you in those cases in which he induces the expectation of a battery in you. That person is not entitled to put you in a position of using your powers defensively, because in so doing, he is dictating how you will use your powers. The standard by which an assault is judged must be objective, so that neither the assailant nor the person complaining determines whether a particular case is in fact an assault.

22. Colin Bird, "Harm Versus Sovereignty: A Reply to Ripstein," *Philosophy & Public Affairs* 35 (2007): 182–185; John Gardner and Stephen Shute, "The Wrongness of Rape," in Jeremy Horder, ed., *Oxford Essays in Jurisprudence: Fourth Series* (Oxford: Oxford University Press, 1999), 193–218.

23. See, for example, Joel Feinberg, *Harmless Wrongdoing* (Oxford: Oxford University Press, 1990).

in your own person provides a simpler explanation: the person who touches you without your authorization uses you for a purpose that is his but not yours. The ground for prohibiting such conduct does not depend on any hypothesis about the likelihood that some third person will harm yet a fourth.

More generally, innate right's indifference to harm, considered as such, enables it to explain the familiar exceptions to the harm principle.²⁴ Self-inflicted injury involves no despotism—it is not something that one person has done to another. Ordinarily, injury that results from consensual undertakings will not involve despotism either. If consent is genuine, the person injured as a result of a voluntarily undertaken danger is not subject to another person's despotism. By consenting, you can turn an act that would otherwise be another person's despotism over you into an exercise of your own freedom. The right to engage in consensual interactions and the rights you acquire through consensual interactions are, strictly speaking, not parts of the innate right of humanity as such. Instead, they are acquired rights, which require affirmative acts to establish them. We will return to them in detail in Chapter 4.

The idea of independence also explains why other harms do not matter to right. Voluntary cooperation enables people to use their powers together to pursue purposes they share. It can be made to look as though potential cooperators are always subject to each other's choice: unless you agree to cooperate with me, I can't use my powers in the way I want to. But this is an example of our respective independence. Cooperation only contrasts with domination when it is voluntary on both sides. You get to decide whether to cooperate with me because you get to decide how your powers will be used. I can no more demand that you make your powers available to accommodate my preferred use of mine than you can make that demand of me. Each of us is sovereign over our powers, and the power to decide who to cooperate with is a basic expression of that sovereignty. That is why I wrong you when I use your powers for my purposes,

24. The ways in which these exceptions follow directly from innate right might lead some to suspect that the harm principle is just a façade for arguments that appeal to independence rather than harm.

even if it doesn't cost you anything: in appropriating your powers as my own, I force you to cooperate with me.

Each person's entitlement to decide how his or her powers will be used precludes prohibiting many of the setbacks people suffer as effects of other people's nondominating conduct. People always exercise their powers in a particular context, but that context is normally the result of other people's exercises of their own freedom. To protect me against the harms that I suffer as you go about your legitimate business, perhaps because you set a bad example for others, or deprive me of their custom, would be inconsistent with your freedom, because it would require you to use your powers in the way that most suited my wishes or vulnerabilities. You do not dominate me by failing to provide me with a suitable context in which to pursue my favored purposes. To the contrary, I would dominate you if I could call upon the law to force you to provide me with my preferred context for those purposes. That would just be requiring you to act on my behalf, to advance purposes I had set. That is, it would empower me to use force to turn you into my means. Refusing to provide me with a favorable context to exercise my powers is an exercise of your freedom, not a violation of mine, no matter how badly the refusal reflects on your character.²⁵

Indifference to harm that is suffered as a result of one person's failure to provide another with a favorable context is just the generalization of the protections the right to freedom provides. That is the precise sense in which it articulates reciprocal limits on freedom: you would be wronged if I could prohibit you from doing something that doesn't wrong me. You can be prohibited from dominating me, but the basis for that prohibition is also the basis for prohibiting me from calling on the state to make you provide me with favorable background conditions to use my own powers.²⁶

In the same way, if you defeat me in a fair contest, you do not deprive

25. If you can be required to perform acts for others, such as easy rescues, the rationale must have another source, since failing to rescue doesn't usurp or destroy a person's powers, it just fails to rescue her. I examine this issue in more detail in "Three Duties to Rescue," *Law and Philosophy* 19 (2000): 751–779.

26. Interests can be set back in ways that are more closely connected to freedom when, for example, parents or guardians fail to see to the development of the powers of their children. I examine these issues in the next chapter.

me of any of my powers. I merely failed at something that I was trying to do. That failure may disappoint me, but it doesn't deprive me of means that I already had, it only prevents me from acquiring further ones. My defeat may change the context in which I use those powers in the future: if you win the championship, others may no longer hire me to endorse their products. But I had no entitlement against you to a favorable context or to have those other people enter into cooperative arrangements with me.

This remains the case even if I use up my means, and so have less after the contest than before: I haven't been deprived of them, I have just used them in trying to acquire something I didn't get. The fact that this happened in the context of a contest with other people doesn't make this expenditure any different from any other case in which I might expend my means while trying unsuccessfully to get more. They are mine to use, and as long as nobody forces me to use them one way or another, I am free to use them as I see fit. Conversely, if I squander them, I can't say that anyone else deprived me of them. Reasonable people may disagree about what counts as a fair contest, or about the familiar example of economic competition for which the idea of fair contest is so often invoked. Nobody can coherently dispute the claim that a fair contest is one that nobody is entitled to win in advance. No matter how significant the impact on those who lose at fair contests, the loss does not amount to the despotism of the winner over the loser.

Cases of economic competition presuppose a further context not yet contained in the idea of innate right: rights to property, obligations under contracts, and institutions charged with enforcing acquired rights. Nonetheless, they illustrate an important structural feature of the difference between wronging a person and changing the context in which that person acts. If you lure my customers away by providing a better combination of product and price, I may be much worse off. You do not wrong me, because I still have my means at my disposal: my (unsold) stock, my premises, and my abilities as a salesman. I had no right that my customers continue to patronize me. I only had a right to offer them incentives to enter into commerce with me. You have the same formal right, and so you, too, may offer them incentives. They are free to respond to our respective incentives as they see fit. I cannot have a right to my customers, because if I did, such a right would limit their ability to use their means as they see fit,

that is, by entering into transactions with whomever they please, on the terms they find most attractive.²⁷

Independence can only be violated by the deeds of other persons, because it is an interest in independence of those deeds. Thus it cannot be treated as just another vulnerability, to be added to the harm principle's catalogue of protected interests. All of those interests can be set back by a variety of things other than the actions of others.

The sense in which I use you is particularly vivid if I willfully *decide* to use you, but the same point applies quite apart from my state of mind. My use of you is objectionable even if you are merely incidental to my purpose: I grab you and push you out of the way, or vent my frustration by hitting you. In either of these cases, you are an unwilling party to the transaction: I force you to participate in my pursuit of my petty purposes, either by forcing you to stand where I want you to, rather than where you were, or by volunteering you as my punching bag. Either way, subjecting your choice to mine is the means I use to get what I want; my act is objectionable because the means I use are properly subject to your choice, not mine. In so doing, I exercise despotism over you, and so treat you as subject to me. I can do the same carelessly or inadvertently. Not looking where I am going, I may injure you, or, absentmindedly, I sit on a chair, failing to notice that it is already occupied. In all of these cases, I act in ways inconsistent with our respective freedom under universal law, because I restrict your ability to use your person to set and pursue your own purposes.

IV. The Other “Authorizations”

The right to independence entitles each person to use his or her means to set and pursue his or her own purposes, consistent with the entitlement of others to do the same. Innate right also entitles you to tell others what you think or plan to do, without being held to account for saying so, and

27. It is conceivable that there might be grounds of public right to restrict economic competition in certain settings, since, as we shall see, the state has the right to “manage the economy,” which entitles it to act on its best judgment about how to do so. If there are grounds for restricting competition, however, their basis cannot be traced to an individual right on the part of the person disadvantaged by the fact that people did not respond to the incentives he offered, because no person could ever have a right that others respond to his incentives or offers.

the right to be “beyond reproach,” the right to have only your own deeds imputed to you. These authorizations are fundamental to public right, because they constrain the possible activities of the state in making law. The former provides the basis for rights of freedom of expression, limited only by the rights of others; the latter is the basis of both the right to sue in defamation for damage to your reputation and the right to place the burden of proof on a person who accuses you of having done wrong. These are both “already” included in innate right and “not really distinct from it” because each is an aspect of independence of the choice of others. The right to communicate your thoughts to others is just a special case of the right to use your powers as you see fit. Kant remarks that this extends even to deliberate falsehoods, because it is up to others to decide whether to believe what they are told. The only untruth “that we want to call a lie in a sense bearing on rights” is one that deprives another of some acquired right, such as a fraudulent claim that a contract has been concluded. The right to say what you think does not preclude liability for fraud, or injuring another person’s reputation, or falsely shouting “fire” in a crowded theater when you know people will be trampled, because each of these deprives others of things to which they already had a right. To deprive you of property or get you to do something by lying to induce you to enter into an arrangement with me is not parallel to depriving you of property or getting you to do something with force.²⁸ Such cases contrast with those in which one person suggests that another do something, and the other follows the suggestion. In that case, the second person must be taken to act on his or her own initiative, because no person has a right that others use what is theirs in ways that most favor them. Using your power of speech is a special case of using your powers; saying things to others is ordinarily a matter of changing the context in which they act, rather than depriving them of what they already have.²⁹

28. These cases are analyzed in detail in Chapter 5.

29. Kant’s well-known essay “On the Supposed Right to Lie from Philanthropy” actually incorporates this analysis. Confronted with Constant’s example of someone who comes to your door looking for a friend “just now bent on murder” (8:427), Kant contends that it is not permissible to lie, on the grounds that “truthfulness in statements that one cannot avoid is a human being’s duty to everyone” (8:426), and then, surprisingly, remarks that the murderer “has no right to the truth.” This latter claim follows from his claim that each person has a right to communicate thoughts to others, except where doing so directly infringes another person’s

The right to be beyond reproach is another instance of the right to independence. No person can place you under a new obligation or restriction simply by alleging that you have done wrong. If he could, and thereby place the burden on you of clearing your name, he would be entitled to restrict your freedom entirely on his own initiative. Thus you would be subject to his choice. Your right to be “beyond reproach” just is the right that you never have to clear your own name; you are entitled to your own good name simply by virtue of your innate right of humanity.

V. Freedom and Coercion

We are now in a position to explain Kant’s claim that right can be identified with the authorization to coerce. He writes that “right can also be represented as the possibility of a fully reciprocal use of coercion that is consistent with everyone’s freedom in accordance with universal laws.”³⁰

This focus on coercion puts him at odds with the tradition that dominates political philosophy, at least in the English-speaking world, for which the primary normative question of political philosophy is what people ought to do, and the question of whether they should be forced to do those things is secondary.³¹ A prominent version of this view receives a forceful statement by Mill in his discussion of justice in *Utilitarianism*. Mill there writes, “We do not call anything wrong unless we mean to imply that a person ought to be punished in some way or other for doing it; if not by law by the opinion of his fellow creatures; if not by opinion by the reproaches of his own conscience.” For Mill, we only attach sanctions to a proper subset of the things that people should not do, and he argues that we should only do so based on the seriousness of the harm those acts

rights. No person has a right to be told the truth as such; a system of equal freedom is only possible if everyone has a right to what he or she already has, but not a right, absent some prior arrangement, to receive anything from anyone. Kant’s conclusion is that lying in such cases violates the postulate of public right, and so, although it wrongs no one in particular, nonetheless does wrong in what Kant describes as “the highest degree” (6:307). For a careful discussion of these issues, see Jacob Weinrib, “The Juridical Significance of Kant’s ‘Supposed Right to Lie,’” *Kantian Review* 13 (2008): 141–170.

30. 6:321.

31. John Rawls’s later work, with its emphasis on the coercive structure of society, is a clear exception to this tendency. See *Political Liberalism* (New York: Columbia University Press, 1993).

cause others and the costs and benefits of using threats to discourage them. So moral philosophy is concerned with the appropriate occasions of blame, and political philosophy is concerned with those moral demands a state can make and back with threats; the demands themselves are identified without reference to the concept of a threat. Mill goes on to add that “reasons of prudence, or the interests of other people, may militate against actually expecting it; but the person himself, it is clearly understood, would not be entitled to complain.”³² Mill himself develops this picture in detail in *On Liberty*, where he looks to the likely consequences and interests of other people that militate against threatening people for their own good.

For the tradition from which I have selected Mill as spokesman, coercion has two key features. The first of these is that coercion involves the shaping of behavior through the making and carrying out of threats. The second is that it is extrinsic to the wrong that it is supposed to address.³³ Let me explain these two features more carefully. The basic idea of the first is that coercion is to be identified with the deliberate setting back of a person’s interests in order to shape his or her behavior. The second is perhaps more familiar. The basic idea is that a person’s interests are set back in order to accomplish something, and that setting back those interests is an effective way of accomplishing that thing. The person who steals something gets locked up for a few years, so that he, and others like him, will not be tempted to steal.

If coercion is understood in terms of sanction, it must have a secondary place in political philosophy, and not figure in its basic principle, as Kant suggests. The idea that the making of threats is somehow constitutive of law or the state is vulnerable to a familiar line of objection, made prominent by H. L. A. Hart.³⁴ According to Hart, sanctions do not lie at the heart of any adequate conception of law. A noncoercive law is perfectly conceivable, because the concept of a rule, the violation of which

32. John Stuart Mill, “Utilitarianism,” in J. M. Robson, ed., *Essays on Ethics, Religion and Society: Collected Works of John Stuart Mill*, vol. 10 (Toronto: University of Toronto Press, 1969), 245.

33. For another example, see Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 148–149. Raz offers a detailed definition that focuses exclusively on coercion by threats, “since this is the form of coercion relevant to political theory.”

34. See Hart, *The Concept of Law* (Oxford: Oxford University Press, 1962), 20–25.

invites sanction, is conceptually prior to the concept of a sanction for its violation, and so cannot be reduced to it. Instead, any adequate account of law must begin with the concept of a rule or norm, rather than trying to reduce it to the concept of a threat.

Kant does not conceive of coercion in terms of threats, but instead as the limitation of freedom. As we saw, freedom in turn is understood as independence from being constrained by the choice of another person. His examples of coercively enforceable obligations are drawn from the jurisdictional categories of Roman private law, and he was presumably aware, as are all students of that legal system, that it existed without a centralized enforcement mechanism for private actions.³⁵ His initial, and indeed paradigmatic, example of coercion is the right of a creditor to demand payment from a debtor, a right to compel payment, not a right to punish nonpayment.

This way of setting up the idea of coercion differs from the sanction theory in two key respects: what coercion is, and what can make it legitimate. First, it supposes that although threats are coercive, actions that do not involve threats can also be coercive. An act is coercive if it subjects one person to the choice of another. One person can be subjected to the choice of another either directly, through acts, or indirectly, through threats of such acts. Kidnapping, for example, typically includes a threat addressed to the victim's family or business associates, but the wrong of kidnapping is constraining—coercing—another person, quite apart from the further wrong of extortion, that is, using the kidnapping to shape the conduct of third parties through threats. It is both artificial and misleading to suggest that only the family members or business associates are coerced, and no less so to suggest that kidnapping is only coercive if the victim is threatened directly. A more plausible view is that both victim and those who pay ransom are coerced, though in different ways, and that the direct use of force is the basic case of coercion.

Second, Kant's conception of coercion judges the legitimacy of any particular coercive act not in terms of its effects but against the background idea of a system of equal freedom. That is, unlike Bentham, he begins with the concept of a rule, but the rules in question govern the le-

35. See, for example, Barry Nicholas, *An Introduction to Roman Law* (Oxford: Oxford University Press, 1962), 27.

gitimate use of force in terms of reciprocal limits on freedom. Coercion is objectionable where it is a hindrance to a person's right to freedom, but legitimate when it takes the form of hindering a hindrance to freedom. To stop you from interfering with another person upholds the other's freedom. Using force to get the victim out of the kidnapper's clutches involves coercion against the kidnapper, because it touches or threatens to touch him in order to advance a purpose, the freeing of the victim, to which he has not agreed. The use of force is rightful because an incident of the victim's antecedent right to be free. The kidnapper hinders the victim's freedom; forcibly freeing the victim hinders that hindrance, and in so doing upholds the victim's freedom. In so doing, it *also* makes the kidnapper do what he should have done, that is, let the victim go, but its rationale is that it upholds the victim's right to be free, not that it enforces the kidnapper's obligation to release the victim. The use of force in this instance is an instance of the victim's right to independence, and so is a consistent application of a system of equal freedom.

If coercion is understood as justified if and only if it restricts a restriction on freedom, it does not need to be identified with a sanction. Aggression is coercive; defensive force is also coercive. The latter is not a further wrong that requires a special justification; it is just the protection of the defender's freedom. The person using defensive force is neither sanctioning the aggressor nor carrying out a threat that was supposed to deter aggression.

Kant's claim that it is legitimate to use force to hinder hindrances to freedom thus incorporates his more general idea of a system of equal freedom. He does not start with the idea that it is always wrong to restrict the choice of another person, and then struggle to show that doing so is sometimes outweighed on balance, in the way that Bentham, for example, thinks that causing pain is always bad but legitimate when outweighed by a greater good produced. Instead, the initial hindrance of freedom is wrongful because inconsistent with a system of equal freedom; the act that cancels it is not a second wrong that mysteriously makes a right, because the use of force is only wrongful if inconsistent with reciprocal limits on freedom. So force that restores freedom is just the restoration of the original right.

Examples like kidnapping and self-defense may seem too narrow to generate a full account of legitimate coercion as the protection of freedom,

since both kidnappers and aggressive attackers *set out* to restrict others. But the same point applies to defensive force against accidental wrongdoing: you can protect your person against interferences by others, even if those others are merely careless in injuring you.

At the level of innate right, the entitlement to hinder hindrances of your freedom is always defensive. It may also operate prospectively; the expectation that others will defend themselves might lead someone considering aggression to refrain. The principle of right does not need to be the incentive to conduct; an act is right if consistent with the independence of others, regardless of the person's reasons for acting. In the next chapter, we will see that the introduction of acquired rights adds a further dimension to a system of equal freedom and a corresponding dimension to the possibility of reciprocal coercion.

Bentham and Austin are easy targets for Hart's criticism because they suppose that legal (or moral) rules are instruments created to serve a purpose. From that starting point, it is natural, if not inevitable, that they should also suppose that every creation has a creator, and so conclude that a rule must be an expression of a conditional intention expressed in order to produce a result. Kant rejects both their instrumentalist conception of rules and their concomitant attempt to reduce norms to intentions. He is thus in a position to conceive of coercion differently, simply as the restriction of freedom.

VI. Conclusion

The innate right of humanity is the basis of any further rights a person must have, because it is the entitlement that each person has to self-mastery, and so, as a result, also a right that limits the ways in which force may be used. So long as every person acts in conformity with the innate right of others, no coercion is used; the entitlement to coerce is simply the entitlement that others exercise their freedom consistent with your own. This same structure of equal freedom understood as restrictions on coercion governs further aspects of right, including both private right and public right. In private right, it structures the further rights that each person can acquire, and the restrictions on the capacity to acquire new rights. At the level of public right, it also restricts the means available to the state in achieving its public purposes, and imposes certain mandatory duties on it.

Kant, Ripstein and the Circle of Freedom: A Critical Note

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Abstract: Much contemporary political philosophy claims to be Kant-inspired, but its aims and method differ from Kant's own. In his recent book, *Force and Freedom*, Arthur Ripstein advocates a more orthodox Kantian outlook, presenting it as superior to dominant (Kant-inspired) views. The most striking feature of this outlook is its attempt to ground the whole of political morality in one right: the right to freedom, understood as the right to be independent of others' choices. Is Ripstein's Kantian project successful? In this research note I argue that it is not. First, I suggest that Ripstein's notion of freedom is viciously circular. It is meant to ground all rights, but in fact it presupposes an account of those rights. Second, I show that—Independently of its inability to ground a whole political morality—such a moralized understanding of freedom is normatively unappealing.

I. Introduction

Contemporary liberal political philosophy is much-indebted to the work of Kant. Reference is often made to his remarks concerning the dignity of the person, the public character of reason, and the resulting need to justify political institutions to every individual subject to them (see Waldron 1987). Although key contributions to contemporary political theory—beginning with Rawls's *A Theory of Justice* (1999)—claim a Kantian pedigree, their aim and method differ from Kant's own. One may thus wonder what an orthodox Kantian, as opposed to Kant-inspired, approach to political morality looks like, and whether this approach is superior to much self-styled Kantian political theory.

In his recent book *Force and Freedom*, Arthur Ripstein (2009) answers both questions. He offers a comprehensive interpretation of Kant's political philosophy, and presents it as a valuable alternative to the dominant approaches in contemporary legal and political thinking. The most striking feature of this orthodox Kantian outlook is its attempt to ground the whole of political (enforceable) morality in one right—the right to freedom—understood as the right to be independent of others' choices. Whether this Kantian approach stands or falls, then, depends on whether:

1. the right to 'freedom as independence' can plausibly constitute the basis of an entire political morality; and
2. the idea of independence of others' choices offers an appealing interpretation of the concept of freedom.

In this note, I suggest that Ripstein's articulation of the right to freedom as independence fails on both counts. My argument is structured as follows.

In Section II, I offer a brief sketch of Ripstein's Kantian approach. In Section III, I show that there is a vicious circularity in Ripstein's definition of the right to freedom, which prevents it from grounding all other rights. On the one hand, individual rights are said to derive from the right to freedom; on the other, freedom itself is defined by reference to individual rights. To be unfree/dependent on others is to have one's own means or resources used by others for their, rather than one's own, purposes. But in order to know what qualifies as *one's own*, we need a prior account of a person's rights (i.e., a theory of justice), which is precisely what freedom is meant to deliver. Since Ripstein's (Kantian) notion of freedom surreptitiously presupposes an account of justice, it cannot be the sole ground of political morality.¹ In Section IV, I further argue that Ripstein's justice-based account of freedom is normatively unappealing. If freedom is defined by reference to persons' rights, then only rights violations can count as restrictions of freedom, which is counter-intuitive. There are many actions which restrict persons' freedom without violating rights. Think of prohibitions on using others' legitimate property. Such prohibitions clearly diminish one's freedom, and yet are perfectly consistent with rights. In Section V, I conclude by briefly suggesting how to modify Ripstein's Kantian view so as to make it immune to the objections raised in this note. The modifications I suggest, however, bring the view much closer to contemporary theories of justice than Ripstein originally intended.

Before getting started, let me make two prefatory remarks. First, my argument is not of an exegetical nature. I do not comment on the accuracy of Ripstein's interpretation of Kant, but only assess whether Ripstein's Kantian approach successfully delivers what it promises. My focus is on what contemporary political philosophy can learn from this 'orthodox' Kantian approach, rather than on the extent to which the approach is consistent with Kant's texts.

Second, there is much to admire in Ripstein's book that I won't have the space to discuss. In this short piece, I only limit myself to raising some challenges to his view, with the constructive aim of contributing to the development of a sound Kantian approach to political morality.

II. Ripstein's Kantian Approach: A Sketch

Contemporary liberal political philosophy is overwhelmingly preoccupied with the question of how benefits and burdens of social cooperation ought to be distributed (Ripstein 2009: 3).² A just society, on the dominant view, is one that fairly distributes such benefits and burdens, thereby equally protecting the interests of all its citizens.³ The Kantian approach Ripstein defends has instead at its core a concern with individual freedom and the justification of coercion. From this perspective, what matters to the design of a theory of justice—the central task of political philosophy—is not the combination of harms and benefits befalling people, but the particular relations in which people stand

vis-à-vis one another. So long as such relations are consistent with each being her own master—so long as they are consistent with everyone's freedom—a (coercive) social order is justified.

Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law . . . is the only original right belonging to every human being by virtue of his humanity. (Kant, 6: 237, in Ripstein 2009: 13)

The right to freedom as independence is the pillar supporting the whole of Kant's political philosophy. It constitutes the ground on which individuals' rights and entitlements are defined, and specifies the conditions under which the use of (state) coercive power is legitimate. As Ripstein says: '[t]he 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 separation of powers' (Ripstein 2009: 14).

But what is freedom as independence? An agent enjoys freedom as independence when she is not subject to the will of others, i.e., when nobody uses her means for ends she has not consented to. In Ripstein's words, '[y]ou remain independent if nobody gets to tell you what purposes to pursue with your means' (*ibid.*: 34). As anticipated, from this perspective, whether someone is acting unjustly towards you does not depend on the benefits you gain or the burdens you have to carry, but on whether their actions are consistent with your freedom.

For instance, Sam might make John much worse off by opening a shop right next to his, selling similar products at more competitive prices (*ibid.*: 49).⁴ Yet, in so doing, Sam does not wrong John, he does not interfere with his freedom as independence. What happens to John might be regrettable, but does not constitute an injustice, since John is still 'his own master', despite being made worse off. By contrast, the relationship between a master and a slave is paradigmatically one in which an agent's (the slave's) independence is violated. Although the slave might de facto enjoy a wide set of benefits and opportunities thanks to his master's generous disposition, the slave's decisions are always ultimately subject to the master's authorization (*ibid.*: 36). Non-interference in the pursuit of his ends is not 'robust', but extremely fragile, and this is why the slave is appropriately said to be unfree (cf. Pettit 1997: ch. 2, and List 2006).⁵

A perfectly just Kantian social order is one where nobody is subordinated to the will of others, and all enjoy freedom as independence. Indeed, from Ripstein's Kantian perspective, the preservation of this state of affairs constitutes the only basis for justified coercion. The state is justified in using coercion against law-breakers only to the extent that doing so is necessary to preserve the freedom of all, to 'hinder hindrances to freedom' (Ripstein 2009: 30).

Ripstein's Kantian view is appealing. Its focus on freedom sits well with the normative concerns animating most contemporary liberal thinkers. After all, a political philosophy based on freedom alone is quintessentially liberal, and more so than one based on other values (e.g., reciprocity, equality, happiness, etc.). Moreover, the notion of freedom at the heart of this Kantian approach seems

highly plausible, allowing us to account for judgements about freedom and unfreedom (e.g., the case of the slave with a benevolent master) which other conceptions of freedom (e.g., freedom as *actual* non-interference) arguably fail to deliver.

This approach is not only substantively appealing, but also elegant and justificatorily powerful. It reduces the complex set of people's rights and entitlements to one single master-right, the right to freedom, which grounds them all. As Ripstein says, '[b]y making the innate right to freedom the basis for any further rights, Kant imposes an extreme demand for unity on his account of political justice. The rights that each person has against others must be derived from it, as must the fundamental constitutional rights that protect political freedoms and freedom of religion' (*ibid.*: 31).

In light of the above, the Kantian outlook advocated by Ripstein seems to offer a powerful way of articulating the demands of a liberal political morality, so powerful as to put into question alternative, mainstream, approaches to the topic. But does this first appearance stand deeper scrutiny? In what follows, I suggest that it does not.

III. The Circle of Freedom—Why Freedom as Independence Cannot Ground the Whole of Political Morality

In this section, I argue that Ripstein's 'right to freedom' cannot ground all other rights because the notion of freedom on which it relies *presupposes* the very rights it aims to establish. This is what I call the 'circle of freedom'. This vicious circularity arises from Ripstein's endorsement of the following claims:

- a. The right to freedom grounds all other rights.
- b. The right to freedom is the right of each individual to be his/her own master, to be independent of the will of others.
- c. Independence of the will of others consists in the ability to use one's own means to pursue one's own purposes robustly unhindered by others.
- d. One's own means and purposes are the means and purposes one has a right to.
- e. The right to freedom is therefore the right to use the means and pursue the purposes one has a right to, robustly unhindered by others.

As Ripstein puts it, a system where all have freedom as independence 'is one in which each person is free to use *his or her powers*, individually or cooperatively, to set *his or her own* purposes, and no one is allowed to compel others to use *their* powers in a way designed to advance or accommodate any other person's purposes' (*ibid.*: 33, emphases added). But how are we to determine what one's powers and purposes are? Certainly not by looking at their *actual* powers and purposes. To be sure, when policemen stop a thief, they prevent him from using his (positive, as opposed to normative) powers for his (positive) purposes, yet

we would hardly regard such an intervention as unjust, as a violation of the thief's *right* to freedom. This is paradigmatically a legitimate intervention, aimed at 'hindering a hindrance to freedom' (i.e., the freedom of the victim, whose means would serve someone else's, the thief's, purposes).

The freedom referred to in the expression 'hindering a hindrance to freedom' cannot be *any* freedom, but must be the freedom one is entitled to *on grounds of justice*. Until we have an independent account of justice, then, we cannot know whether someone is free or unfree. Unless we know what is ours, we cannot know whether constraints on our de facto agency are violations of our independence or consistent with it. Rather than *grounding* all rights and entitlements, Ripstein's Kantian notion of freedom is derivative of them (i.e., it presupposes them).

This appears clear once we notice that the cases Ripstein offers to illustrate instances of dependence and independence only work for his purposes if we *assume* a certain background account of justice. For instance, in the example offered earlier, involving market competition between Sam and John, a tacit assumption was made about the entitlement-generating character of free market processes. Recall that, in Ripstein's view, Sam's driving customers away from John does not constitute a violation of John's freedom as independence. This can only be so on the assumption that free market exchanges are entitlement-generating independently of their outcomes. This assumption is controversial, and certainly not 'implicit' in the meaning of freedom. On some accounts of justice (Rawls's, for instance), free market processes need to be regulated in order to be *consistent with* individuals' rights. If such processes lead to excessive inequalities, Rawls argues, their outcomes need to be rectified in order to preserve free market exchanges over time (Rawls 1993: 266).⁶

Whether the interaction between Sam and John involves a breach of freedom as independence, then, depends on what particular account of rights and entitlements one holds. The right to freedom as independence is not the answer, but an independent (and necessarily controversial) account of persons' rights is needed to know what freedom as independence is.

If my argument up to this point is correct, the unified nature of the Kantian approach offered by Ripstein is only illusory. His articulation of the right to freedom cannot constitute the ground of all other rights because freedom *itself* is defined in terms of persons' rights. Without a prior account of what those rights are, the notion of freedom as independence is empty; with such an account, it is expositioally parsimonious, but surreptitiously presupposes a complex theory of justice.

IV. Moralized Freedom—Why Freedom as Independence is Counter-Intuitive

I have suggested that Ripstein's articulation of the notion of freedom presupposes an account of individual rights and thus cannot strictly speaking *ground* any such rights. Despite its lacking rights-grounding capacity, this notion may still be of value. That is, it may offer a plausible account of freedom, which we

might want to employ in elaborating our all-things-considered theory of persons' rights and entitlements. After all, as we saw earlier, this notion is more in line with at least some of our intuitive judgements about freedom than the popular notion of freedom as non-interference.⁷

Freedom as independence conceives of persons' freedom in relation to their in-principle subjection (or lack thereof) to the will of others. Recall that a slave with a benevolent master is still unfree because in principle subject to the master's will. Even though the master does not interfere with the slave in the actual world, there are many nearby possible worlds in which such interference would occur (the master is indeed legally entitled to interfere with the slave), and this fact, says the proponent of freedom as independence, must be taken into account when judging whether the slave is free (cf. the discussion in Pettit 1997: ch. 2, and List 2006).

Although such a focus on the robustness of non-interference renders freedom as independence rather appealing, the appeal is significantly undermined by this notion's reliance on a prior conception of rights. If to be independent of the will of another is to not have one's rights violated (robustly across possible worlds), then limitations of one's capacity to act that do not violate rights do not count as restrictions of freedom. On this view, my freedom is not restricted when I am not allowed to access property that is not mine.⁸ Or else, my freedom is not restricted whenever I am forced to pay taxes (if such taxes are demanded by justice). Even more strikingly, I cannot say that my freedom is restricted if I am justly incarcerated for violating others' rights.

All of these judgements are deeply counter-intuitive, but they inevitably follow from an understanding of freedom according to which someone is free if she can robustly use the means and pursue the purposes *she has a right to* use and pursue. What we would intuitively call 'justified' restrictions of freedom are no restrictions of freedom at all, on Ripstein's account.⁹

It is worth noting at this point that these counter-intuitive implications of freedom as independence are not fully transparent from Ripstein's text. In fact, there are passages, discussing the use of coercion, which explicitly exclude them. Ripstein tells us that 'Kant does not conceive of coercion in terms of threats, but instead as the limitation of freedom' (Ripstein 2009: 54). From this it would seem to follow that acts of coercion that are consistent with freedom (i.e., with people's rights) simply do not count as coercive because they do not limit freedom. Again, forcing a criminal to go to jail, on this view, would not be 'coercive' because it would be consistent with his freedom as independence (i.e., the freedom he has a right to). Yet Ripstein does not use the language of coercion in this way. Instead, he distinguishes between legitimate and illegitimate coercion, the former being coercion exercised in accordance with people's rights, the latter being coercion exercised in breach of those rights. He illustrates this with the following example:

Using force to get the victim out of the kidnapper's clutches involves coercion against the kidnapper, because it touches or threatens to touch him in order to advance a purpose, the freeing of the victim, to which

he has not agreed. The use of force is rightful because an incident of the victim's antecedent right to be free. (*ibid.*: 55)

In this quote, Ripstein appeals to a notion of freedom which differs from the moralized one we encountered in the previous section. If it is true that the use of force to free the victim limits the kidnapper's freedom because it prevents him from using his resources to achieve his purposes, then 'his resources' and 'his purposes' have to be interpreted in positive rather than normative terms. 'His' resources and purposes are not those he has a right to, but those he happens to possess.

There thus appear to be two notions of freedom at play in Ripstein's work, one (the dominant one, it seems to me) is moralized, the other non-moralized¹⁰:

$F_{\text{Moralized}}$ = A is free if, and only if, A can use the means and pursue the purposes A has a right to, robustly unhindered by others.

$F_{\text{Non-Moralized}}$ = A is free if, and only if, A can use the means A happens to possess and pursue the purposes A happens to have, robustly unhindered by others.

The former notion of freedom presupposes an account of justice, and for this reason leads to rather counter-intuitive judgements (e.g., the use of force against the kidnapper does not limit his freedom). The latter notion delivers much more plausible judgements but can hardly form the basis of a tenable political morality. Specifically, understanding the right to freedom as the right to use the means one happens to possess and pursue the purposes one happens to have (robustly unhindered by others) generates two difficulties for a freedom-based account of justice.

First, it leads to an implausibly *status-quo*-biased political morality, according to which people's positive entitlements automatically determine their moral entitlements. Second, given that people's ends inevitably conflict, a world in which each can pursue the ends she happens (or wants) to have unhindered by others cannot exist, and therefore represents an invalid ideal of justice (on the Kantian assumption that 'ought implies can'). As Ripstein himself notes, '[t]he Kantian right to independence . . . is always an entitlement within a system of reciprocal limits on freedom' (*ibid.*: 34, emphasis added). But if this is the case, then one is not either free or unfree, but one can enjoy more or less freedom, depending on the nature of the relevant limits. This idea of reciprocal limits on freedom, I think, implicitly contains a solution to the difficulties discussed in the present piece.

V. Conclusion

The most fruitful way of reading Ripstein's Kantian proposal, I suggest, is to see the right to freedom not as a right to freedom (or independence) simpliciter, but as a right to a certain 'quantity of freedom'. From this perspective, each should robustly enjoy a sphere of agency, delimited by her rights and entitlements, in which to pursue her ends and goals without being interfered with by others. In

turn, the principles determining how much freedom each should have (equal, sufficient, etc.) are best kept 'outside' the notion of freedom itself. So understood, the notion of freedom would not surreptitiously presuppose an account of justice, it would not indicate 'the freedom one has a right to'. The questions of (1) what freedom is and (2) how much freedom each ought to have (i.e., how much freedom each *has a right to*) would be kept separate. This would of course make the account openly less unified, relying on a variety of different considerations, but would avoid the circularity and counter-intuitiveness problems highlighted earlier in my discussion.

A full development of an account of political morality based on a 'right to a certain amount of freedom' would also necessitate a defence of a particular metric of freedom.¹¹ For instance, it would need to answer questions such as: Should freedom be measured only by reference to the quantity of options available to the agent, or should it also include reference to their quality (i.e., to specific freedoms protecting particular interests)? Should considerations about quantities of freedom take into account the robustness of the options available to the agent (across different possible worlds), or simply focus on the actual world? And so forth.

Ripstein's Kantian view does not directly engage with these questions, and unsurprisingly so, since these are precisely the sorts of questions that mainstream contemporary theories of justice ask (e.g., think of Sen's (1999) and Nussbaum's (2000) capabilities approach, or Rawls's own theory—both of which can be seen as offering different accounts of how much freedom each person ought to have in a just society). On the view I suggest, freedom is not 'self-limiting' in the way Ripstein believes it to be (Ripstein 2009: 32), and theories of political justice *do* deal with the 'distribution' of something: benefits and burdens in the form of freedom and unfreedom.¹²

If I am correct in suggesting that this is a fruitful way of avoiding the difficulties with Ripstein's Kantian approach, then it may very well be that the latter approach, in its original form, does not offer a viable alternative to existing, more 'mainstream', accounts of justice. There is much, I believe, we can learn from Ripstein's book—and some of those lessons would be kept in the heavily revised version of his view I am suggesting—but it may be that the best we can draw from Ripstein's Kant are precisely *lessons*, rather than a whole theory.¹³

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NOTES

¹ Kyla Ebels-Duggan 2011 has independently raised a similar worry concerning Ripstein's view. See also Andrea Sangiovanni's contribution to this symposium. For other recent discussions of Ripstein's view see Tadros 2011 and Edmundson 2010.

² This is famously the question at the heart of Rawls's *A Theory of Justice*.

³ This may be seen as a statement of what liberal normative individualism—the idea that human beings are ultimate units of moral concern—requires of social institutions.

⁴ To be precise, Ripstein offers an example with an identical structure, but without mentioning the names Sam and John.

⁵ The term robustness is not used by Ripstein himself, but strikes me as fully consistent with his view. Indeed, as he acknowledges, the view has much in common with the republican account of freedom as non-domination (Ripstein 2009: 42–3). One of the key features of republican freedom is precisely its robustness. See Pettit 1997 and List 2006, the latter for a more technical treatment of the notion of robustness.

⁶ This is one of Rawls's main arguments against Nozick's libertarianism, recently repropposed by Ronzoni 2009 in the context of debates on global justice.

⁷ This is also known as negative freedom. See Berlin 1969.

⁸ For the opposite conclusion, see the discussion in Waldron 1991.

⁹ A very similar problem arguably arises in the case of the republican 'cousin' of freedom as independence, namely freedom as non-domination. See Carter 2000 and Valentini 2011: ch. 7 for discussion. As Ripstein (2009: 43) acknowledges, there are many affinities between non-domination and independence. See also G. A. Cohen's 1995 critique of moralized notions of freedom.

¹⁰ Cf. the independently developed discussion in Ebels-Duggan 2011.

¹¹ On the topic of developing a metric of freedom see Carter 1999.

¹² I sketch how such an approach could be developed in Valentini 2011: ch. 7.

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Form and Matter in Kantian Political Philosophy: A Reply

Arthur Ripstein

Abstract: This paper responds briefly to four reviews of *Force and Freedom*. Valentini and Sangiovanni criticize what they see as the excessive formalism of the Kantian enterprise, contending that the Kantian project is circular, because it defines rights and freedom together, and that this circularity renders it unable to say anything determinate about appropriate restrictions and permissions. I show that the appearance of circularity arises from a misconstrual of the Kantian idea of a right. Properly understood, Kantian rights are partially indeterminate, but not in a way that causes problems for the account. Ronzoni and Williams seek to broaden the reach of public right, arguing that Kant's abstract approach overlooks pressing questions of social and political life, (Ronzoni) and that public right should allow for democratic deliberation about purposes that go beyond the requirement that a state provide a rightful condition for its members (Williams). I argue that the Kantian view makes room for these factors, but that each must be understood in relation to the formal constraints of right.

I am grateful to Valentini, Sangiovanni, Ronzoni and Williams for their careful engagements with *Force and Freedom*.¹ This brief response will be divided into two parts. In the first part, I will engage with Valentini and Sangiovanni's arguments. Both take issue with what they see as the excessive formalism of the Kantian enterprise as I explicate it in *Force and Freedom*. Both make two related claims: that the Kantian project is circular, because it defines rights and freedom together, and that because of this circularity, it is unable to say anything determinate about appropriate restrictions and permissions. I will suggest that the appearance of circularity arises from a misconstrual of the Kantian idea of a right. Once this misconstrual is corrected, Kantian rights are partially indeterminate, but not in a way that causes problems for the account.

In the second part, I will engage with the arguments of Ronzoni and Williams, each of whom seeks to broaden the reach of public right; both acknowledge the power of the Kantian project but want it to make room for more content than I seemed to suggest it would allow. Ronzoni argues that Kant's approach operates at a level of abstraction that deprives it of the resources to say anything about many pressing questions of social and political life, Williams that public right should allow for democratic deliberation about purposes that go beyond the requirement that a state provide a rightful condition for its members. Ronzoni contends that the particular ways in which a rightful condition operates must be

attuned to moral concerns going beyond those raised by right; Williams believes that the mandate of the state must itself go beyond questions of right. I will suggest that the Kantian view makes room for both anthropological factors and democratic deliberation, but that each must be understood in relation to the formal constraints of right.

I.

Valentini and Sangiovanni both diagnose a circularity in the Kantian idea of a right to freedom, understood as independence of the choice of another, consistent with the same freedom for others. Although the details of their presentations of the point differ, their strategy of argument is similar. Each makes a pair of interrelated claims. The first of these is that Kant's universal principle of right is empty; the second is that it works with a definition of the right to freedom that presupposes some characterization of what is and is not permissible. If this charge is correct, then the universal principle of right provides no analytical purchase; despite appearances, it ultimately provides little more than a format in which results derived in some other way can be stated.

Valentini's formulation of the point emphasizes circularity, as she maintains that the Kantian approach provides no resources for determining whether someone is free or not, except through an antecedent characterization of what rights people have. From this she concludes that the idea of a right to freedom is illusory. Sangiovanni's formulation of the point emphasizes emptiness, drawing on examples that he contends are indistinguishable from the point of view of freedom but morally very different. Both deploy a mode of argumentation that has its roots in Sidgwick's *Methods of Ethics* (Sidgwick 1981 [1907]: 341) and, unsurprisingly, both Valentini and Sangiovanni follow Sidgwick in suggesting that we must attend to welfare and interests rather than freedom.

I want to suggest that neither charge can be sustained. Valentini and Sangiovanni are alike in taking my opening presentation of Kant's view to exhaust the argumentative and analytical resources available to a Kantian view. Both quote my remark about the justificatory burden borne by innate right. Both omit mention of the sequenced nature of Kant's argument, which introduces new concepts at different stages, developing from each person's innate right of humanity, through the possibility of private rights and then to public right and the right of nations. At each stage, concepts of right are applied to new classes of objects and relationships, including those between individual human beings, and those between citizens and the state. By overlooking this sequenced development, Valentini and Sangiovanni misrepresent Kant's position in two ways. First, they take him to be some sort of libertarian, with respect to politics, unwilling to permit redistributive taxation, despite my reconstruction of his arguments in chapter 9 of *Force and Freedom*. Second, both aver that he introduces an unargued premise about the moral value of markets. In so doing, they telescope arguments concerning the nature and possibility of acquired rights.

Not only does this distort Kant's position as I presented it, it also misrepresents the Universal Principle of Right not as the starting point of Kant's argument, but instead, as a principle that is supposed to be sufficient to determine exhaustively what is and is not permissible. In so doing, they suppose it to have a status equivalent to that assigned by Bentham and Sidgwick to the principle of utility, that is, a criterion of rightness that requires only factual information in order to answer every possible question within the scope. That is not, however, how the universal principle of right figures in Kant's approach; indeed, if it did, then Kant, like Bentham and Sidgwick, would be committed to a thoroughgoing instrumentalism about legal and political institutions. Yet Kant's signature contribution to legal and political philosophy is his resolute anti-instrumentalism, his insistence that legal and political institutions are required in order to make the universal principle of right apply to a plurality of human beings interacting with each other. At each stage in the argument, the relevant norms are not tools for bringing about a moral result that could be characterized without reference to them; innate right is not a way of bringing about successful lives; private rights are not a way of seeing to it that objects are used effectively, and public right is not an implement designed to make private rights operate more smoothly.

Ronzoni's contribution shows one respect in which Valentini and Sangiovanni go awry: what they characterize as circularity is better understood as indeterminacy. Abstract conceptions of right need to be made determinate in specific ways and, indeed, it is one of the three pillars of Kant's argument about the need to exit the state of nature that positive law is required to give effect to the Universal Principle of Right. As Ronzoni points out, Kant's argument as a whole not only concedes indeterminacy, but, the indeterminacy of the application of basic concepts of right is a cornerstone of his argument for the need for a state. Abstract concepts do not classify particulars on their own, and people might, in good faith, disagree about their application, as Kant puts it 'no matter how good and right loving they might be' (Kant 1996a [1797]: 456). Instead, concepts of right provide conceptual resources for thinking through particulars, especially the distinction between interfering with a person's means and changing the context in which those means are used.

No less significantly, in addition to misrepresenting the place of the universal principle of right in the Kantian argument, both Valentini and Sangiovanni also misrepresent the universal principle of right itself. Valentini urges that there cannot be a right to freedom by drawing attention to the way in which freedoms might come into conflict with each other. Yet the universal principle of right does not say that each person has a right to freedom; so understood, freedoms would not form a consistent set, and so could not be subject to a right. Instead, Kant's claim is that each person has a right to freedom consistent with the same freedom for others. As such, the question of whether something falls within a person's right to freedom cannot be answered except in terms of whether everyone else could enjoy the same freedom. The universal principle of right asks how one person's exercise of choice can be independent of each other.

person's exercise of choice. As I explain in Chapter 2 of *Force and Freedom*, this requires a distinction between interfering with means that someone already has, and merely changing the context in which that person uses those means. Although there might be grounds for objecting to this distinction, Valentini does not even mention it.

Sangiovanni does mention the distinction between changing the context in which someone acts and interfering with something to which that person has a right, and concedes that Kantian freedom must be understood as focused on one person's action in relation to another. Despite this concession, he then writes that the idea of an interference with freedom would only have analytical purchase if it is understood in non-moral terms; a moralized version of the interference would have to hold that one person wrongs another just in case the first interferes with the other in a morally forbidden way. To do so would, of course, be entirely circular. However, Sangiovanni overlooks the explicit structure of the universal principle of right. It does not look to the effect of one person's action on another. Instead, it focuses on whether every member of plurality of interacting beings could enjoy such rights under universal law. As I sought to explain in *Force and Freedom*, you can have a right to decide what purposes you will pursue with your own body or property, because everyone could have that right, but, by contrast, you could not have a right that others use their bodies and property in ways that best serve your preferred ends. In the same way, the ways in which you use your body and property are restricted by the entitlement of others to the security of their person and property. Sangiovanni overlooks this structure, and so concludes that the universal principle of right is unable to draw this basic distinction. Sangiovanni's examples overlook this distinction, and focus only on one person's plans leading another to change the other's plans.

If the right to freedom is understood in this way, it must be distinguished from several formally different, though superficially similar ideas. It is not a right that you be in this or that specific condition or situation, or that you get to do what you want, or that you get to do it in the way that you want to. Nor is it even the idea that nobody gets to impose his or her will on you. If it were understood in any of these ways, then it would certainly be the case that preventing someone from wrongdoing another would be as much of a violation of that person's freedom as the initial wrong was. Kant is explicit, however, that your right to freedom must be understood as a right 'under universal law'. That is also why he supposes that 'hindering a hindrance to freedom' is itself consistent with freedom, that it is an instance of a system of equal freedom, and in no way a violation of any person's right to freedom. Overlooking this element of systematicity leads Valentini to present Kant's view as though he is claiming that two wrongs make a right: if an interference with freedom is bad, then interfering with freedom to prevent an interference with freedom must also be bad. While talk about wrongdoing in terms of goods and bads is at home in Bentham's philosophy, it has no place in Kant's. Sangiovanni makes a slightly different mistake; he pays attention to 'under universal law' but then understands it in a purely qualitative and comparative sense, supposing that any set

of uniform rules—including even the Hobbesian ‘right to all things’—satisfies it equally well. Here, too, he is recasting Kant’s arguments in a Benthamite vocabulary, supposing that the only sense of generality imaginable would be uniformity along some dimension that can already be characterized without reference to concepts of right.

These references to Bentham may seem to be beside the point, since neither Valentini nor Sangiovanni defends any form of utilitarianism. However, both of their arguments share Bentham’s conception of what it would be to give a philosophically adequate account, as both suppose that the concept of a right must either be grounded in something that can be expressed without any reference to the concept of a right, or else must fail because circular. Kant’s project, as I presented it in *Force and Freedom*, works out the implications of a set of interrelated and irreducible moral ideas. By Benthamite standards, such an approach must seem circular, because the concept of a right is never eliminated in favour of something empirical. Instead, the rights that we have are explained in terms of their place in a larger system of right, as developed through the sequenced stages of Kant’s argument. So understood, no issue of circularity or emptiness arises.

II.

Ronzoni agrees that the Kantian account has the resources to explain the need for judgement to bring its abstract concepts of right to bear on particulars. She worries, however, that in invoking the concept of judgement, the Kantian lets himself off too easily, treating empirical and anthropological factors as external to political philosophy. I want to acknowledge that there is a sense in which they are external, but not in a way that makes them insignificant. In one sense, questions about appropriate judgement, and the empirical factors to be taken account of, can be seen to be required by the principle of right, but not supplied by it. In ‘On a Supposed Right to Lie from benevolent Motives’ Kant argues that the concept of right can only brought to bear on particulars via a ‘principle of politics’ that is ‘drawn from experiential cognition of human beings, that have in view only the mechanism for administering right and how this can be managed appropriately’ (Kant 1996b [1798]: 612).

So in one sense, the principle of right, according to which the use of force can only be justified in order to protect individual freedom, does not depend upon empirical or anthropological findings. Kant’s *Doctrine of Right* takes as its central focus the question of political philosophy that every child thinks to ask: ‘Why do you get to make the rules?’ He addresses it in two steps. First, why does somebody get to make rules at all? Second, why is it *you*, in particular who gets to make the rules? Kant says more about the first question in the second, because the first provides the answer to the second: whoever is ruling is the one who gets to make the rules because there can be no freedom except under law. At the same time, not any rules will do; a rightful condition must create a system of equal

freedom and, in order to avoid itself turning into a system of domination, must live up to its own internal standard of enabling the people to rule over themselves. Far from succumbing to Valentini's allegation of quietism, as she puts it, an '*implausibly status-quo-biased political morality*', Kantian political morality demands that every state act to improve itself in this way. To do so, then, the state must give effect to the principle of right in the concrete condition in which it finds itself. This can only be done through what Kant calls a 'principle of politics,' taking up empirical and anthropological factors. So I agree with Ronzoni that not just any exercise of judgement will do; if I disagree with her about anything, it is her implicit suggestion that on my reading Kant would be committed to anything else.

Ronzoni's more specific concern is with particular forms of oppression in contemporary societies. As I understand her proposal, it is not merely consistent with Kant's approach, but strictly required by it. A rightful condition's duty to perfect itself must identify such problems in terms of concepts of right, and so bring those concepts of right to bear on particulars. A society with a history of a particular type of discrimination may need to take extra account of that; so, too, the legacy of the specific form that sexism or religious intolerance has taken in a particular society is essential to creating and improving the society as a system of equal freedom. 'Discrimination' 'oppression' and 'intolerance' all name defects that can only be identified by means of the concepts of Kantian right; neither interests nor needs are up to the task, because these defects of right always involve the relation of one person's choice to another. In emphasizing the role of judgement in Kantian theory, I did not mean to suggest that so long as something is conceivably an interpretation of requirements of right, after that anything goes. My suggestion instead is that it is only once the requirements of right have been properly articulated that it is possible to identify the space within which particularity is relevant. So Kant's account is anything but silent on such questions, and avoids Ronzoni's allegation that Kant's 'theory cannot provide meaningful insights for crucial areas of potential disagreements'. That is why, in discussing what Kant characterizes as the 'duty to support the poor' I emphasized the historical and cultural features that must be taken into account to identify particular forms of dependence. At the same time, the Kantian approach does not embrace the 'radical democracy' Ronzoni mentions in her appendix; the idea that citizens must rule themselves through institutions does not entail that any interpretation of equal freedom embraced by a majority is for that reason adequate.

Williams expresses a different concern about the Kantian enterprise as I articulate it in *Force and Freedom*, and seeks to radicalize democracy in a different direction. At the risk of overstatement, where the other commentators worry that the Kantian conception of freedom is incomplete, Williams's concern is that the Kantian conception of freedom is *too* complete, and precludes an important sense of public freedom. The thought here is that the state as a whole is unable to exercise freedom. Williams uses the vocabulary of democracy, but acknowledges that potential difficulty of letting the majority decide for a minority with respect

to a question that the group as a whole does not need to solve in order to be in a fully rightful condition. Instead, Williams takes the general requirement that citizens accept the outcome of democratic procedures applies to the pursuit of any end selected by the majority, quite apart from whether it is required for the maintenance or improvement of a rightful condition. Williams correctly notes that the Kantian state would say that even if citizens unanimously accept the outcome of their deliberations, they would not be entitled to use the state for what can be nothing other than a widely shared private purpose.

Williams makes his case for the legitimacy of the state acting for a conception of the good that is not itself immanent in the requirements of a rightful condition by suggesting that we can legitimately impute to all citizens a commitment to working together for shared purposes. Williams puts the point by analogy with the necessary imputation, on grounds of right, of an unwillingness to be merely passive. Citizens must be supposed to be committed to their own rightful honour. So, too, Williams suggests 'A democracy may impute to its members the purpose of participating in collective self-rule, in order that we take responsibility for the conditions of our common life. For this to be possible, citizens must empower one another by a willingness to compromise—that is, to participate in projects that they might not have chosen individually'.

The analogy seems to me to break down for two reasons. The first is that if the rest of the Kantian analysis is successful, the commitment to rightful honour is a precondition of a plurality of rights-bearing human beings living together. It is not clear what the analogous precondition is supposed to be in the case of a democracy. Certainly a democracy requires a commitment to participating, and to being bound by the decisions of bodies properly constituted in accordance with democratic procedures. However, that does not yet go to the question of the subject matter of this readiness to compromise. Again, the idea of citizens shaping their common life can either refer to the shape of a social life that they necessarily share by participating in common institutions, or instead to some idea of bringing in content external to those shared institutions, and using those institutions to give effect to it. Where the Kantian view focuses, as Williams notes, on the way in which extrinsic content might make abstract requirements of right more determinate in a way that citizens can recognize and appreciate, Williams seems to have the opposite in mind, that is, that public institutions give effect to extrinsic content, on the basis of some assessment of the merits of those ends assessed in terms of something other than the requirements of right. To be sure, Williams does not suggest that public purposes should be indifferent to right, they must, at least be consistent with it. But his proposal, as I understand it, is that provided such consistency is secured, public right does not preclude citizens, acting through their democratic institutions, from using the state to collectively determine which private purposes should receive state support.

It is this significant departure from the Kantian approach to which I want to object. The question of whether a purpose is consistent with right is, finally, just a question about the means through which it is pursued; on Kantian premises, there can be no public means available through which even a unanimous

citizenry can rightfully pursue private ends. Democratic citizens should be ready to compromise, but the topic of their democratic deliberations does not extend to the satisfaction of private wishes, no matter how widely held.

The basic idea is that, although the state is in a fundamental sense a moral person, like any other artificial moral person, such as a corporation, university, or club, the state lacks free purposiveness. In saying this, I am not making an empirical observation about the lack of some set of mental states requisite to freedom. Instead, I am making a normative and conceptual point. As an artificial person, the state must act on behalf of the people, where the people, in turn, is understood as the citizens considered as a collective body. In Kant's technical vocabulary, the people has to be understood as a unity, rather than a plurality. Its unity is constituted by the fact of its acting together through institutions, and thus through officials. The difficulty is that state officials, whether government officials or even individual citizens, acting as voters, must act on behalf of the citizens as a collective body. As such, they are already precluded from acting for private purposes. This is a general feature of any relation of acting for another. When parents act on behalf of their children, they are required to do so for their children's (imputed) ends, not for their own parental, private ones. When an officer of a corporation or university acts for the organization, he or she is precluded from doing so for private purposes. In the latter set of examples, the private purposes that are most frequent, and so most widely discussed, are pecuniary purposes: trustees must not use a position of power to enrich themselves. But the same point applies for philanthropic purposes: the trustees of the university cannot decide to give the university's assets away to a worthwhile charity, even if they all agree. That is not because the charity is not a worthwhile end. Instead, it is because they have been entrusted with the university's monies for the university's purposes, and so are precluded from deciding, even correctly, what would be for the best overall.

The same point applies to officials of a legal system: they are precluded from acting for private purposes. Once public right enters the stage, public officials have powers that no private person could have, including the powers to make laws, tax, punish and impose binding resolutions on disputes. Those essentially public powers are conferred to create and sustain a rightful condition, which is to say that the moral structure of the legal system already necessarily entails the prohibition on acting for private purposes. That, in turn, entails that the state lacks free purposiveness. The citizens are not entitled to act for themselves considered severally; they can only act for themselves considered as a collective body. Public officials are thereby precluded from acting for the citizens considered severally. That means, however, that something has gone wrong when a legislative body considers questions about what would be worth doing except from the point of view of purposes that make the state necessary.

I should also disclose my misgivings about the type of public freedom that Williams advocates. In the closing pages of *Liberalism and the Limits of Justice*, Michael Sandel writes 'when politics goes well, we can know a good in common that we cannot know alone' (Sandel 1982: 183). Sandel's suggestion can

be read in either of two ways. The first way makes it entirely congenial to the Kantian project, because the good that we can know together is one of living together under just institutions. The second way is deeply opposed to the Kantian project, because it imagines that the good that we can know together is one of a sort of collective empowerment that comes from ruling together in the name of whatever ideal we happen to share. I do not find this second idea uplifting. It is not that I doubt that people can find satisfaction in public life, or that a person's deep commitments inevitably shape her judgements about it. Nor do I imagine that life's satisfactions take place individually and privately, rather than through collective activities. Williams generously acknowledges that I am prepared to allow space for such factors. Instead, my misgivings are rooted in the inevitable tension between voluntary self-realization and the mandatory nature of political life.

I want to close by bringing my response to Williams to bear on the charges against Kantian right levelled by Valentini and Sangiovanni, and, to a lesser extent, Ronzoni. Each of them points to questions that the abstract idea of external freedom is not in a position to address. Valentini and Sangiovanni focus on pairwise interpersonal interactions; Ronzoni notes that there are fundamental questions for political philosophy to which certain answers are better and certain answers worse, yet the quality of those answers cannot be assessed exclusively from the standpoint of concepts of equal freedom. The difficulty with Williams's proposal reminds us that there are still some fundamental questions of political philosophy that can be addressed without reference to harms or benefits, social context, or democratic deliberation. The most important of these, and the one most easily forgotten by those who would substitute concepts of benefit and burden for those of right, or who would assign greater weight to anthropological factors or public deliberation, is the basic idea that a state behaves rightfully only when it acts for properly public purposes. That, in turn, is an expression of a fundamental Kantian idea: political institutions are not tools for achieving a morally desirable outcome that can be specified without reference to concepts of right. Rights are not tools for allocating benefits and burdens, and public institutions are not tools for giving people what they say they want.²

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NOTES

¹ See Valentini 2012, Sangiovanni 2012, Ronzoni 2012 and Williams 2012.

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