

# Immanuel Kant – Justice as Freedom

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## 1 Introduction

Kant's practical philosophy is a philosophy of freedom. For Kant, it is our ability to be free that sets us apart from all other living creatures, and makes it possible for us to act normatively, including be ethically and legally responsible for our actions. The concept of freedom is central to all of Kant's practical works, regardless of whether the work focuses on ethics, religion, politics, right (justice), history, education, or anthropology. Kant is convinced that if we can understand our ability to be free, the appropriate critical standards to apply as we describe and evaluate our actions, interactions, societies, histories, states, and legal-political systems will also become clear.

Kant lived from 1724 to 1804. Despite several interesting early publications, Kant's real philosophical breakthrough occurred relatively late in his life, with the 1781 publication of his main work in theoretical philosophy, the *Critique of Pure Reason*. This work marked the beginning of a formidable period of publication, which lasted for approximately 23 years, until his death. During this period, Kant published works encompassing more or less all areas of philosophy. If we borrow Plato's division between the true, the right, and the beautiful—or between theoretical philosophy, practical philosophy, and aesthetics—then Kant produced in this time one major work (a “critique”) for each of these major areas of philosophy: the aforementioned *Critique of Pure Reason* (theoretical philosophy) in 1781; the *Critique of Practical Reason* (practical philosophy) in 1788; and the *Critique of Judgment* (aesthetics) in 1790. These three works concern, in other words, our ability to experience and obtain knowledge about the world (theoretical philosophy), our ability to be morally responsible for our actions (practical philosophy), and our ability to experience beauty (aesthetics). In addition to these comprehensive

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critiques, Kant wrote several works of varying lengths within each of these fields, as well as quite a few books and articles dealing with historical, anthropological, educational, and religious themes. Considerably limited means and unreliable health made it impossible for Kant to travel, something he compensated for by reading extensively, especially texts concerning geography, anthropology, different legal-political systems, and important contemporary domestic and international legal-political issues.

Kant's comprehensive knowledge about and genuine concern for the world in which he lived are reflected in his many comments on significant contemporary events in his essays and more minor works, such as his comments on the French Revolution of 1789 and European colonization. His first major work in moral philosophy—the *Groundwork for the Metaphysics of Morals*—was published in 1785, 3 years before the *Critique of Practical Reason* (1788). The *Groundwork* is a short book of about 80 pages, and it concerns moral philosophy in general and first-personal ethics in particular. Kant himself thought that this would be his most “popular” work, explaining that he wrote it with an eye to its content being accessible to any enlightened, interested person, not only philosophers. Given how inaccessible this book actually is, it is ironic that Kant correctly predicted it would be his most popular work. For a long time, and somewhat unfortunately, not only students and the interested public, but also philosophers, took this work as representative of Kant's practical philosophy—supplementing it only occasionally with the *Critique of Practical Reason* and various essays. Not until the 1970s did this problem in Kant interpretation begin to be properly remedied, and not until the 1990s did philosophers all over truly attend to Kant's theory of justice—or what Kant calls “right”—in particular to his main work on justice, “The Doctrine of Right.”

“The Doctrine of Right” composes the first half of *The Metaphysics of Morals*, which is one of the last of Kant's published works (1797). This is the only place where Kant systematically outlines the basic structure of his theory of right or justice. All his other published works on right and politics are essays and discuss more limited questions. Among the most important of these essays are: “An answer to the question: What is enlightenment?” (1784); “On the wrongfulness of unauthorized publication of books” (1785); “On the common saying: That may be correct in theory, but it is of no use in practice” (1793); “Toward perpetual peace” (1795); and “On a supposed right to lie from philanthropy” (1797).<sup>1</sup> Although these essays have historically received greater attention than his main work “The Doctrine of Right,” it is reasonable to assume that Kant intended his essays to complement the latter, and this introduction to Kant's legal-political philosophy is written under that assumption.

As when reading Kant's work in general, it is also useful to remember that no one engages Kant's texts because they are easy to understand or beautifully written. One must therefore approach the ideas in this introduction with the kind of patience

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<sup>1</sup>All these works, including *The Metaphysics of Morals*, can be found in *Immanuel Kant: Practical Philosophy*, trans. and ed. by Mary J. Gregor. New York: Cambridge University Press, 1999. All citations from Kant's work are from this translation. I abbreviate the reference to *The Metaphysics of Morals* as MM in this paper, and I refer to particular pages by means of the Prussian Academy Pagination.

one needs to bring to Kant's own texts, a kind of impatient patience: It is only possible to understand Kant if one actively challenges oneself along the way and accepts that one may have to think through the ideas more than once (maybe ten or a hundred times) before they finally click. Those many people, both Kantians and non-Kantians, who are deeply attracted to Kant's philosophy read Kant only because his arguments are fascinating and challenging, and so they find themselves drawn to them again and again. For that reason, rather than over-simplifying the arguments, this introduction aims to outline them in a way that serve well the reader who engages, alongside the introduction, Kant's own texts and the body of secondary literature he has inspired.

After a short explanation of Kant's distinction between right (justice) and virtue (ethics), I sketch his theory of "private right," which are the rights individuals have in relation to each other. Subsequently, I address the question of why we have states and public legal-political systems, followed by the issue of states' rights (public right), specifically, the question of whether the state has (public) rights that extend beyond the (private) rights individuals have in relation to each other. The final two parts of this introduction focus on the distinction between "active" and "passive citizens," the relation between right (justice) and politics, the issue of global justice, and, briefly, the historical influence of Kant's ideas about justice.

## 2 Kant's Distinction Between Right and Virtue

Jean-Jacques Rousseau's opening lines in Chapter One from *Of the Social Contract* (1762) are among the most famous ones in the history of philosophy: "Man is born free, and everywhere he is in chains. One believes himself the others' master, and yet is more a slave than they. How did this change come about? I do not know. What can make it legitimate? I believe I can solve this question." (Rousseau 1962: 351)<sup>2</sup> Rousseau's deep influence on Kant's ideas about justice is hardly disputed. Like Rousseau, Kant focuses on the question of what limitations can be forcibly placed on our actions in the name of freedom—and, so, in the name of justice. In fact, it would not be an exaggeration to say that the question concerning which coercive limitations our actions can be subjected to without our freedom being disrespected is a main question of Kant's, not only in all of his shorter legal-political writings but also in "The Doctrine of Right." Time and again Kant emphasizes that the issue of right fundamentally concerns the rightful use of, or, the authority to use coercion, where coercion is, exactly, defined as a hindrance of freedom:

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

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<sup>2</sup>The text reference here uses the standard pagination, but the translation is from *Rousseau's: The Social Contract and other later political writings*, ed. Victor Gourevitch. New York: Cambridge University Press, 1997.

freedom in accordance with universal laws, that is, it is right. Hence there is connected with right by principle of contradiction an authorization to coerce someone who infringes upon it (MM 6: 231).

For Kant, the rightful use of coercion—the “chains” on freedom we can justify—is only that which is necessary for reciprocal, respectful freedom, or reciprocally free choices. The only rightful limitations of freedom, the only legitimate laws are those that are necessary because they make interaction under universal laws of freedom possible for all.

The domain of right is the domain of rightful coercion: those restrictions upon our choices that we can be forced to respect for the sake of freedom when we interact. In this way, Kant sets a high threshold for the rightful use of coercion. Virtue or ethics, in contrast, is properly understood as an analysis of what we *ought* to do as individuals, that is, of the type of action through which we prove our ability to be truly free. The importance of this point to Kant’s philosophy of right cannot be emphasized enough, including because it entails that his analysis of virtuous actions in, for example, the *Groundwork for the Metaphysics of Morals* cannot be directly applied to the sphere of right or justice. More generally, one of Kant’s major contributions to moral or practical philosophy is his proposal for how virtue (ethics) should be distinguished from right (justice).

Some key arguments from his ethical theory help to illustrate Kant’s proposed distinction between right and virtue (or, between justice and ethics). Recall that in the *Groundwork of the Metaphysics of Morals*, Kant maintains that acting virtuously (ethically) involves *both* acting on the basis of maxims (first-personal or subjective rules of action) that can be “universalized” (can pass the test of the “categorical imperative”), *and* doing what is right (so understood) *because* it is right (actions have “moral worth” only when we act “from duty” or from a “moral motivation”). In the *Groundwork*, Kant also emphasizes that we have both perfect (“strict”) and imperfect (“wide”) ethical duties. Somewhat simplified, we may say that the perfect duties concern our obligation never to act aggressively or destructively against ourselves or others, while the imperfect duties concern our obligation to both develop our own capacities and assist others in their pursuit of their ends (their pursuit of happiness). We have perfect duties not to kill or lie, for instance, while we have imperfect duties to seek knowledge about the world in which we live and to aid others who are struggling. Furthermore, however, if we abstain from killing others only because we are afraid of ending up in jail, then we do not act virtuously, but strategically. Our choice (not to kill) is in agreement with what our reason (morality) demands of us, but it does not have “moral worth” because the moral motivation (duty) is absent; we’re not doing what is right *because* it’s right. Similarly, Kant argues, if we give money to the poor because we want others to think that we are such wonderful, virtuous people and not because it’s the right thing to do, then we are not practicing beneficence (but, for example, pursuing our self-interest).

In the introductions to the *Metaphysics of Morals* and “The Doctrine of Right,” Kant highlights some important consequences of the fact that virtue (ethics) essentially concerns maxims and moral motivation. First, Kant argues, this entails that right (justice) and the law cannot “reach” ethics or virtue, because being forced



to act in a way consistent with virtue, such as being forced to give money to the poor, is not to be forced to act virtuously (in this case, beneficently). Virtue or ethics, Kant argues, concern “internal” (subjective or first-personal) lawgiving, while right concerns “external” (coercively enforceable) lawgiving. To act virtuously is to act on universalizable maxims from a moral motivation; without both of these elements present, whatever we are doing is not to act virtuously. And, the maxim and the motivation are only accessible from an internal, first-personal perspective; only I can know what I’m doing (which maxim I’m acting on, or which end I’m pursuing) and why I am doing it (whether my motivation is moral—whether I’m doing it simply because it is the right thing to do). Coercion (the use of external force) cannot, therefore, give an action moral worth, or make it an ethical or virtuous action. Coercion can make me act consistent with a certain end, like helping the poor, but it cannot make me set that end (act on that maxim) or do it because it’s the right thing to do (act from a moral motivation). At most, coercion can function as a threat that makes me conform to an end (such as by making me part with some of my money). On Kant’s account, it follows from this that everything having to do with ethics or virtue (maxims and moral motivation) necessarily lies beyond the scope of right (justice), whereas everything that lies within the domain of right is accessible from the point of view of ethics (i.e., I can and ought to follow just laws *because* following them is the right thing to do). Hence, the sphere of virtue (ethics) is wider than and encompasses the sphere of right, and while duty is the motivation of virtue (ethics), external force is the motivation of right (justice). Although right and virtue are not diametrically opposed, from the point of view of right, an action that falls within the boundaries of the law suffices, while from the point of view of virtue, an action must be done *because* it is the right thing to do in order to have “moral worth” (MM 6: 220).

Kant also emphasizes a second significant consequence of the fact that virtue (ethics) essentially concerns maxims and moral motivation. He argues that because actions that express imperfect duties require a moral motivation to qualify as such actions, any attempt by a legal system to force people to perform imperfect duties will necessarily fail. As indicated above, this implies that the duty of beneficence can only belong to the sphere of virtue and *not* to the sphere of right. Applying the same example, if a person is forced to give a certain amount of money to the poor, this person is not thereby forced to act beneficently. A beneficent action presupposes that someone both chooses to give money to the poor *and* does so *because* it is the right thing to do (acts from duty or with a moral motivation). Since no one can be forced to set a particular end or to act from a moral motivation, no one can be forced to perform beneficent actions. This is true, according to Kant, despite the fact that a person can, of course, be forced to give up money, which can then be given to the poor, and many of us can be threatened into acting in a way consistent with virtuous ends, such as by giving money to the poor.

In the introduction to “The Doctrine of Right,” Kant expands upon the implications of this distinction between right and virtue by proposing some principles constitutive of a legal-political theory that conceives of justice in terms of freedom. He starts by emphasizing that though right is inherently normative, and is therefore inherently concerned with questions of how to act morally, it is crucial to note three things

about it. First, right only concerns *interaction* in the world, and not all action. Therefore, as long as *Robinson Crusoe* remained alone on the island the issue of right (justice) did not arise for him; only ethical questions concerning how to take care of and develop himself were relevant to him. There was no interaction until Friday arrived, so only when he did, did right or justice become an issue—the issue of how to interact in such a way that reciprocal freedom under universal laws of freedom was possible.

The second point to notice about right, Kant argues, is that it only concerns the question of whether a person's actions are reconcilable with respecting others' external (or outer) freedom, that is, with others' rights to set and pursue their own ends with their means. Right does not concern itself with whether a person's ends are ethical or virtuous; it does not ask whether or not we set ends or use our means in ways virtue demands. Not only does this entail, as mentioned above, that imperfect duties like beneficence or generosity cannot be duties of right (duties we can be forced to respect), but also, importantly, that the duties of right are not identical to the perfect ethical duties. For example, even if I live in conflict with my perfect duty not to act in self-destructive ways—if I stupidly waste all my money on parties or gambling—I have not done anything wrong from the point of view of right (justice).

Third, a theory of right (justice) that takes freedom seriously cannot predetermine specific ends that everyone must pursue. This is not merely a reiteration of the earlier point that no one can be forced to act on a specific maxim (i.e., set particular ends) because the most anyone can be forced to do is act in conformity with particular ends. Rather, the point is that all people have a right to live their own lives and to set their own ends with their means. In other words, the principles of right (so, any rightful laws) must be universal in the sense of not presupposing any specific ends on behalf of those subject to the laws; right (justice) can only properly demand that every person's choices (ends) respect all others' freedom to choose ends for themselves, too. Right or justice secures reciprocal freedom, or equal freedom for every person interacting under universal laws of freedom, which means that no particular ends are presupposed by the principles involved—they are *universal laws of freedom* (Kant MM: 230).

Combining these arguments with Kant's insistence that a rightful state cannot attempt to enforce beneficence, it might appear that Kant rejects both the notions that we can be forced to assist the poor and that states can establish welfare institutions to protect their poor. For a long time, many people drew exactly this conclusion about Kant's theory. Consequently, some scholars tried to develop Kantian theories of justice that overcame this apparent consequence, such as John Rawls in *A Theory of Justice* and Onora O'Neill in *Bounds of Justice*. Others used the arguments they found in Kant to criticize these Kantian developments. The most famous debate of this kind is probably still right-wing libertarian Robert Nozick's criticism of the redistributive principle in John Rawls's *A Theory of Justice*.<sup>3</sup> In *Anarchy, State, and Utopia*,<sup>4</sup> Nozick argues at length that Rawls's theory is not

<sup>3</sup>Rawls, John (1999) *A Theory of Justice*, revised ed. Cambridge, Mass.: Harvard University Press.

<sup>4</sup>Nozick, Robert (1974) *Anarchy, State, and Utopia*. Basic Books.

reconcilable with the normative fact that respecting freedom demands that no one can ever be forced to help others *simply because they need help*; of course, it is ethically wrong not to help if one can, but it ought not be seen as unjust, criminal, or a legally punishable wrong. The failure to help is an ethical, not a legal, wrong in a just (liberal) state; along Kantian lines, Nozick argues that failing to respect others' rights to set their own ends (including selfish ones) with their means is to treat them as mere means and not as ends in themselves. Controversially, Nozick claims it follows from this that a just state cannot tax its citizens in order to provide assistance to the poor (which would be coercive redistribution). Consequently, on his account, the existence of even extreme poverty *as such* is not a sign of injustice in a state.<sup>5</sup> The state should be "minimal," in that it should not tax its population to redistribute resources in response to the needs of the poor. As will become clear in the discussion of states' rights (public right) below, some contemporary libertarian Kantians still maintain this interpretation. Other contemporary Kantians (in the republican interpretive tradition) maintain that even if Nozick correctly interprets Kant as rejecting the idea that the state can tax some citizens *merely* in response to other citizens' needs, Nozick incorrectly concludes from this that Kant rejects all forms of poverty relief by the state. These interpretations of Kant hold that "The Doctrine of Right" convincingly refutes an assumption that Nozick's argument requires, namely, the assumption that (excluding the administrative laws needed for the establishment of a legal-political institutional order) the rights of the state (public right) are, in principle, identical with the rights that private citizens have in relation to each other (private right). As is further discussed below, once we reject this assumption, the conclusion that the state must be "minimal" no longer follows; the state is not only permitted to provide unconditional poverty relief, but required to do so (as it must secure legal access to means for the poor).

It is important to attend to a few further points from the introduction to "The Doctrine of Right" in order to understand Kant's approach to questions of right (justice): Kant's proposal that the Universal Principle of Right (and not the Categorical Imperative) is the fundamental principle of right; Kant's view that each individual has an innate right to freedom; and, finally, his conception of freedom of speech. These points are intimately connected to what has already been discussed above, but let me briefly engage with each one before moving on to Kant's doctrine of private right.

Kant quickly clarifies in the introduction to "The Doctrine of Right" that when it comes to questions of right (justice), the standard or principle we should apply is not the Categorical Imperative (from his ethics), but the Universal Principle of Right. The Universal Principle of Right states: "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

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<sup>5</sup>For Nozick, whether or not an instantiation of extreme poverty is a sign of injustice depends on its history, or how it came about. See the paper on Locke in this volume for more on this issue, as well as on how the rights of the poor remains a live issue in the Lockean tradition, one that separates "right-wing" from "left-wing" Lockeans.

universal law" (MM 6: 230). Kant then emphasizes that the demands that follow from the Universal Principle of Right are, of course, compatible with virtuous (ethical) action (with persons acting on universalizable maxims from duty, or, with the Categorical Imperative), but virtuous action cannot be demanded from the point of view of right (MM 6: 231).

Next, Kant stresses that there is only one innate right, which is each individual's right to freedom: "Freedom (independence from being constrained by another's choice), insofar as it [one's freedom] 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... [one's] humanity" (MM 6: 237).<sup>6</sup> Freedom is, in other words, understood as independence from subjection to others' choices and reciprocal respect for each other's exercise of freedom under a universal law. Moreover, any restrictions upon freedom must be demanded by freedom itself or respect for each person's right to freedom when interacting, such that any justifiable restrictions are understood in terms of reciprocal freedom under universal laws of freedom, since universal law cannot presuppose any contingent ends. This is a point over which Kant disagrees with earlier, major political philosophers, and it becomes apparent how important this point is for Kant when considering the nature of that disagreement. Thomas Hobbes and John Locke, for instance, assert that the individual's fundamental right (the innate right) is the right to preservation or self-preservation.<sup>7</sup> For Kant, self-preservation (the right to life) is a natural force or drive; it is not the fundamental moral right we have in virtue of our capacity for freedom. Justifiable restrictions on freedom cannot involve appeal to any contingent ends, which means that freedom cannot rightfully be limited by ends we have in virtue of our biological natures (e.g., self-preservation). Kant's theory is a universal theory of freedom that only permits coercive restrictions on interacting persons' external freedom if those restrictions follow from how persons must respect each other's freedom when interacting.

Finally, let me say just a few words about Kant's conception of freedom of speech. Words do not, in themselves, have coercive power. Consequently, Kant argues, right cannot limit the mere use of words as such. Because speech, in itself, does not have coercive power, talking *simpliciter* cannot wrong anyone, and so all just legal systems must recognize the right to freedom of speech. Simply by saying something to me, you do not *thereby* interfere with my external freedom; after all, I can easily choose not to respond and ignore what you are saying, or, at least, choose to do what I want or think I ought to do. Laws that outlaw mere speech

<sup>6</sup>I have amended Mary Gregor's translation here, since she pays insufficient attention to how in the original Kant's German is gender neutral. This is not to say that Kant's account of women is unproblematic; he simply doesn't use sexist language here, hence, in fairness, the translation shouldn't either. The original German reads: "Freiheit (Unabhängigkeit von eines Anderen nötiger Willkür), sofern sie mit jedes Anderen Freiheit nach einem allgemeinen Gesetz zusammen bestehen kann, ist dieses einzige, ursprüngliche, jedem Menschen kraft seiner Menschheit zustehende Recht."

<sup>7</sup>For elaboration, see the papers in this volume on Thomas Hobbes and John Locke.

therefore fundamentally misunderstand both freedom and force (power). They presuppose that words have a force or power that they do not have, that is, coercive power. In addition, of course, such laws express a lack of respect for each person's right to freedom, since they limit an individual's freedom even though the individual has wronged no one. To express this point in "Kantianese": such laws hinder freedom rather than hinder hindrances of freedom, which is why these laws are always and necessarily unjust.<sup>8</sup>

### 3 Private Right

Having clarified fundamental principles his theory of right rests upon, Kant proceeds to outline his account of private right, which is his account of the rights private individuals have in relation to each other. To get a good handle on the account of private right, it is important to be aware that in it Kant engages many ideas at once. For one thing, he relates his theory to the theories of justice that were then prominent, such as the so-called "natural right" theories of Thomas Hobbes, Jean-Jacques Rousseau, and John Locke.<sup>9</sup> He also aims to present a theory that incorporates the different juridical categories of private right, specifically those of private property right, contract right, and what gets referred to in some legal systems as "relations of status," which includes family right. Finally, Kant seeks to situate, where useful, his theory of right within his own overall philosophical system. Once again, the complexity of Kant's theory and the way in which he presents it make it very attractive to many philosophers though challenging to understand. Impatient patience both with Kant and with oneself is a prerequisite.

Natural right theories dominated in Kant's day. These theories are called natural right theories in part because they typically begin their account of right or justice by analyzing which "natural" rights and duties individuals have in relation to each other. To investigate that issue, these theories typically appeal to a thought experiment<sup>10</sup> that involves imagining individuals living together before they establish states, in the so-called "the state of nature" or the "natural condition." The resulting analyses typically reflect upon how human beings ought and are likely to interact prior to the construction of states and legal systems, and they commonly include arguments

<sup>8</sup>For a comprehensive study of Kant's conception of freedom of speech, see Niesen, Peter (2008) *Kants Theorie der Redefreiheit*. Baden-Baden: Nomos. For a shorter engagement in English, see Varden, Helga (2010) "A Kantian Conception of Free Speech," in *Free Speech in a Diverse World*, ed. Deirdre Golash. New York: Springer Publishing, pp. 39–55.

<sup>9</sup>It seems clear that an important source of many of the questions asked and issues attended to by Kant must have been Grotius since so many of the questions Kant addresses or clearly pays attention to are explicitly raised by Grotius. The relationship between Kant and Grotius is mostly unexplored territory in the current secondary literature, however.

<sup>10</sup>Of course, sometimes this involves, at least, an analysis of how people actually did live together before states/legal systems were established.

concerning why and how states and legal systems ought or are likely to be established. Kant's theory is not an exception to this model: he provides an analysis of which principles should regulate individuals' interaction in the state of nature—what he and many legal systems call principles of private right—as well as arguments concerning why and how legitimate states and legal systems are established and should function.

Kant interpreters still disagree extensively over many parts of his analysis of the state of nature and the proper establishment of a state's legal systems—as they do with regard to virtually all aspects of Kant's philosophy—so let us start with the aspects that are not, at least any longer, very controversial. Kant begins his analysis of the state of nature and private right with two important observations. First, he suggests that there are three kinds of things we describe as “our own”—that we think we can possess in some way: objects, other persons' actions, and other persons. For example, we might say, “this is my mug,” “you owe me 3 h of work,” and “this is my daughter.” Second, Kant emphasizes the importance of noticing that the possessive relation expressed in these statements is thoroughly normative and not empirical. In other words, if the mug really is mine, it is not only my mug while I hold it in my hand (and have empirical, or—one of Kant's favorite terms—“phenomenal” possession of it). Rather, it is also mine once I put it on the table and leave it there for a while (I have normative, or—another of Kant's favorites—“noumenal” possession of it). Calling something *mine* is not a fundamentally empirical statement, but a normative one. Hence it describes not a relation between a person and empirical things in the world (since empirical things cannot act normatively), but a normative relation between you and me with regard to something empirical. Empirical and normative possession only coincide, Kant holds, in our possession of our own bodies: from a juridical point of view, my body and my person are one; it is an “analytic” relation, in Kant's terms. In contrast, all other possessive relations are synthetic in nature: they inherently involve seeing a person as normatively related to something distinct from her- or himself (MM 6: 249–250). Because empirical and normative possession are united with regard to our bodies, infringements on someone's bodily integrity are particularly grave wrongdoings; to violate another person's body is to violate another's person.

The normative fact that we can make objects distinct from us—empirical things in the world—our own (make them into what Kant calls “external objects of our choice”) is crucial for our freedom. What it means for embodied beings like us to be free is to set and pursue ends in the world, and setting and pursuing ends in the world requires being able to make things our own in order to use them as means by which we pursue our ends. Being able to make things our own is inherent to freedom. Moreover, the kinds of things we can control and thereby make into our means limit the kinds of ends we can choose to set for ourselves. For example, though I wish I could fly like Peter Pan, I cannot choose to fly like Peter Pan since my body doesn't have the function of flight. In order to fly, I have to make an airplane by transforming materials in the world into one. And to do this, I need to be able to make these materials (these means) into my own. Kant's theory of private right outlines the principles he believes we use when we make things in the world our own.



These principles concern **property, contract, and status relations**. Although the details of Kant's account cannot be fully engaged here, a brief exposition may be helpful.

According to Kant, the three principles of private right are structurally distinct from each other: the first principle (of private property right) is one we apply unilaterally in the state of nature; the second (of contract right) is one we apply bilaterally (together as two); and the third (of status right) omnilaterally (together as many).<sup>11</sup> Regarding the principle of private property, Kant argues that our first step in making something our private property is applying our own power or force to it, so that we can control it. For example, I may take possession of a piece of land on which I plan to grow vegetables and fruit. By taking possession of the land, I make it into a means for myself. This account differs from Locke's, for example, as Locke contends that my *labor* on the natural resources in the world determines how I make something become mine through physical action. In contrast, Kant argues that it is taking *control* over things through our physical power that is the first step of possession. These different types of accounts imply different answers to classical questions in the philosophy of right concerning private property, including land ownership. For example, who owns the hare that gets shot if two different hunters, unbeknownst to each other, have chased it? Or, if my bees fly away and settle somewhere else, do I still own them? Alternatively, the famous question of why, as seems to be the case, we cannot own the oceans? To put this question by means of Nozick's famous objection to Locke's labor theory of acquisition: why do I not get to own the ocean when I pour tomato juice into it (mix my labor with it), but I do obtain possession when I, say, to stay with the example above, plough a field and plant my vegetables in it? Kant's answer is: because it is not the mixing that is the clue, but control: you can't control the ocean, whereas you can control the field. All we can control of the oceans, really, is the water close to the shore, that part of the water can be controlled from land, or so "as far as our canons can reach." Hence the oceans cannot be owned, but the waters outside our shores can. In addition to arguing in a way that shows clear awareness of these legal puzzles (whatever we take Kant's actual answers to be), Kant also focuses on another central philosophical question in the discussion of private property right, namely, how the fact that I have taken something under my control can obligate others to abstain from using it. How can, if at all, the fact that I've chosen to subject something, such as a piece of land, to my physical power or force issue a normative obligation to others to stay away from it? I return to this issue shortly.

The second type of private right is contract right. Making a binding contract involves a normative agreement between two parties, Kant maintains, a bilateral agreement about doing something (exercising causality) for each other. For example, you and I may enter a binding agreement, according to which I will paint your car in exchange for a certain amount of money from you. Or, we might agree that you will sell your horse to me at a certain price. Kant's proposed principle for this type of agreement is that ownership is transferred only once something changes hands.

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<sup>11</sup>These three principles are, according to Kant, the normative employments of the relational categories of the understanding (substance, causality, and community).



Only once the horse has been delivered, for instance, is it mine; up until the point of its delivery it is not mine. This standard becomes central to the understanding and resolution of disagreements over contracts. As we will see below, however, Kant's analysis of how contract disagreements should be understood and solved is disputed in the secondary literature.

Finally, relations of status concern how two or more people share a home. These relations pertain to a certain kind of claim we can have on other people, that they are "ours" in an important sense and how they become "ours" in a way that is legally binding. Kant presents three categories within relations of status: relations between parents and children; between spouses; and, between families and their servants. Although these types of relations are all unilateral because they all involve the establishment of a shared private life, they are importantly distinct from each other, too. Children are neither equals with their parents nor free: children do not and cannot consent to be a part of the family; they are born without providing consent, they are as yet incapable of assuming responsibility for their choices, and they are born into their parents' family. Unlike children, two spouses are both free and equal; they both have to choose each other as spouses (say "yes" to marrying each other). And finally, unlike both children and spouses, although both servants and the families they serve are free, they are not equal with each other: within the home, servants are not the equals of the heads of the family (their employers).

All of these types of status relations are, Kant continues, especially vulnerable because they involve a fusion of several people's private lives. For that reason, he treats status relations separately, rather than subsuming them under an analysis of private property or contract right. The special danger in these relations arises because they involve shared private lives. Hence, there is a real possibility for the shared home to become a place where might replaces right, and the weaker become the slaves of the stronger in their own homes. It can easily become the case that the lives and choices of the more vulnerable members of the household are subjected to the decisions of the stronger. Recognizing this, Kant became one of the first philosophers to detail a separate set of private right principles applying to relations in private homes (relations between parents and children, between spouses, and between families and their servants). His private right principles for relations of status recommend a way of realizing right or justice in the home, so that homes do not become unjust spaces where the right becomes identified with the choices of the stronger. I return to the topic of relations of status with a brief discussion of some of the disagreements it has generated in contemporary Kant interpretation.

#### **4 Why Do We Establish States? Three Different Kantian Answers**

At this point in Kant's account of the private right principles, the details of both his arguments and the disagreements among the different interpretations of his arguments are becoming a little too complicated for an introductory text such as this one.

At the same time, since there is so much disagreement in the secondary literature concerning the remainder of Kant's account of private right, it is hard for newcomers to the "The Doctrine of Right" to make heads or tails of this secondary body of work. In an effort to provide some help to those readers trying to orient themselves in this literature, I sketch some of the distinctive lines of interpretation below. Informing this categorization of the secondary literature is the idea that some of these become apparent if we focus on how to understand the relationship between Kant and other prominent theories of justice in his time. More specifically, some of the disagreement in the secondary literature may be understood as arising in virtue of whether or not the theories understand (or are fundamentally informed by the assumption that) the structure of Kant's theory as very similar to Hobbes's absolutist legal positivism, Locke's libertarian theory, or a republican development of Rousseau that is also deeply influenced by (at least) Hobbes and Locke. In this section, I consider the question of Kant's relationship to these other theories of justice by examining the different interpretive traditions' understandings of Kant's account of private right, and in particular in relation to the question of why we must establish states (public legal-political institutional systems backed by a monopoly on coercion) at all. In the subsequent section, I outline how the different interpretive traditions answer the question of what the legal-political institutions of a just state look like.

According to Hobbesian lines of interpretation, Kant agrees with Hobbes's claim in the *Leviathan* that it is impossible to realize rights in the state of nature because human beings so often act irrationally, in the sense of acting in strategically unwise ways, or not in ways an enlightened self-interested person would act. Therefore, given human nature and the context of the state of nature (where everyone must fend for themselves), the trust required for peaceful, rightful interaction simply does not exist. Hence Hobbes famously says that life in the state of nature is one characterized by "continuall feare, and danger of violent death;" indeed the "life of man" in this condition is "solitary, poore, nasty, brutish, and short." (Hobbes, *Leviathan*, ch. 13)<sup>12</sup> Since our reason is fundamentally prudential or strategic in nature, Hobbes continues by arguing that we do not have a right to remain in the state of nature. We do not have a right to act as stupidly, irrationally, or imprudently as the choice to stay in the state of nature is. Consequently, we can be forced to leave the state of nature and enter the civil condition by becoming subjects of the Leviathan or a state.

The civil condition, in turn, is understood as characterized by law-regulated stability backed up by overwhelming force (an effective monopoly on coercion). In virtue of the law-governed stability such a legal-political system offers, it is strategically wiser to live within its boundaries even when the actual laws are unfair and oppressive; choosing to live under bad laws is more rational, strategically speaking, than choosing to stay in the brutal condition of the state of nature, where all lives are miserable and end in premature, violent deaths. Those who read Kant in this kind of way do not, of course, agree with Hobbes that human beings have only strategic rationality. Rather, they emphasize the places where Kant describes human beings

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<sup>12</sup>Hobbes, Thomas (1996) *Leviathan*, revised student edition, ed. Richard Tuck. Cambridge: Cambridge University Press, p. 89.

as both good and bad—such as Kant's claim that we are made out of so very crooked timber, "aus so krummem Holze"—and maintain that it is this view of Kant's that leads him to argue that we cannot realize right or justice in the state of nature. Because of our unreliable characters (our liability to vice), we are incapable of interacting rightfully on our own (in the state of nature), and this is why we can be forced into the civil condition. In the civil condition, our propensity to act wrongly is tamed by the real threat of punishment from the state. This Hobbesian approach to Kant's theory entails that we can be obliged to obey a public authority even if we have not consented to its establishment or existence.<sup>13</sup>

A second prominent interpretation of Kant's theory views it as structurally similar to libertarian theories. On these lines of interpretation, Kant is seen as arguing that we can realize justice in the state of nature as long as every individual respects everyone else's bodily integrity, and conscientiously and correctly regulates her or his interactions by all three principles of private right. Those who read Kant in this way agree with the Hobbesian interpreters' claim that our frequently unwise (stupid), ignorant, imprudent, biased, and evil actions are the main impediment to the realization of justice in the state of nature. Hence, they agree that the establishment of the state more effectively realizes justice. Creating a set of laws that are posited by legislators, applied by impartial judges, and enforced by the police is much smarter than leaving it to individuals to do all of that on their own. Moreover, they continue, because we are obliged to deal with our innate badness (our propensity to act in wrongful ways), we can be forced to enter the state since it provides everyone with security against everyone's badness. At this point, though, libertarian-style interpretations clearly diverge from Hobbesian ones. They argue against the Hobbesians' legal positivism, the legal positivist claim that any law-governed monopoly on coercion can issue political obligations. Libertarian-type interpreters argue that since we have knowledge of the laws of nature and how to apply them in the state of nature, and since the laws of nature are laws of freedom, the only rightful state we can establish is the liberal state, a state composed of these same laws of freedom that individuals in the state of nature ought to use to regulate their interactions. Hence, only liberal states can issue political obligations, according to libertarian interpretations of Kant.<sup>14</sup>

The third line of interpretation can be understood as a republican tradition.<sup>15</sup> Republican interpreters maintain that Kant challenges a presupposition shared by

<sup>13</sup>See, for example, Onora O'Neill (2000) and Howard L. Williams's (1986) *Kant's Political Philosophy*. New York: Palgrave Macmillan, for interpretations along these lines.

<sup>14</sup>Most recently, Sharon B. Byrd & Joachim Hruschka (2010) presented an interpretation along these lines in their *Kant's Doctrine of Right: A Commentary*. New York: Cambridge University Press.

<sup>15</sup>Of course, the nature of these republican interpretations of Kant's private right argument vary greatly. Contrast the following, for example: Ebbinghaus, Julius (1953) "The Law of Humanity and the Limits of State Power." *The Philosophical Quarterly*, Vol. 3, No 10, pp. 14–22; Flikshuh, Katrin (2008) "Reason, Right, and Revolution: Kant and Locke," in *Philosophy and Public Affairs*, Vol. 36:1, pp. 375–404; Kersting, Wolfgang *Wohlgeordnete Freiheit. Immanuel Kants Rechts- und Staatsphilosophie*. Berlin: de Gruyter, 1984/Frankfurt: Suhrkamp 2nd ed. 1993; Ripstein, Arthur

both the Hobbesian and the libertarian strands of interpretations; namely, the idea that only our irrationality prevents the realization of justice in the state of nature. Republicans contend, in contrast, that Kant provides ideal reasons for why the realization of justice requires the civil condition (the establishment of a rightful state or a public authority). Hence, even on the assumption that we never act imprudently or unwisely, justice remains impossible in the state of nature; the state is seen as ideally constitutive of the realization of justice. These interpretations argue that it is impossible in the state of nature rightfully to use coercion or establish a coercive power that can normatively obligate everyone to obey it. This is because all use of power in the state of nature is thoroughly private, which means it expresses some set of individuals' choices, whereas rightful coercion is the subjection of interaction only to universal law. No one can be obliged to subject themselves to or obey another private person's choices, since everyone has an innate right to be free—to be subject only to universal law and independent of subjection to another's arbitrary choices. Hence justice requires a public authority: a rightful, institutional public "us" with a monopoly on coercion. To realize justice, we need to establish a forceful "us," which can be understood as a public representation of what Rousseau usefully called a "general will". Only if we establish such a common representative "us" through which we can specify, apply, and enforce laws will it be the case that we can transform the threat and use of physical power or force from wrongful violence to rightful coercion. We establish rightful states or public authorities, therefore, not only because our typical lack of prudence or virtue, but because only in this way can we establish and secure rightful interaction, including the possibility of a rightful, authoritative use of coercion.

Since this republican strand of interpretation is slightly harder to understand than the other two, let me illustrate a common line of reasoning by focusing on what is sometimes called the "indeterminacy argument." As mentioned, on this approach to the "Doctrine of Right," Kant argues that our frequent imprudent and evil actions are not the only or most important reason why we cannot rightfully specify, apply, and enforce the principles of private right in the state of nature. Rather the most important reason why justice, which requires rightful use of coercion, is impossible in the state of nature issues from the fact that there are many reasonable ways to specify and apply the principles of private right in specific situations. Because there are many such reasonable ways, a person cannot rightfully use coercion to enforce her own choice of specification without thereby forcing those with whom she interacts to her arbitrary choice (rather than subjecting their interactions to universal

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(2009) *Force and Freedom – Kant's Legal and Political Philosophy*. Cambridge, Mass.: Harvard University Press; Pogge, Thomas (1988) "Kant's Theory of Justice." *Kant-Studien* 79, pp. 407–433; Varden, Helga (2008) "Kant's Non-Voluntarist Conception of Political Obligations: Why Justice Is Impossible in the State of Nature," in *Kantian Review*, vol. 13–2, pp. 1–45; Waldron, Jeremy: "Kant's Theory of the State," in Kleingeld, P. (2006) *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*. New York: Yale University Press, 2006, pp. 179–200; Weinrib, Ernest (1995) *The Idea of Private Law*. Cambridge, Mass.: Harvard University Press.

laws, as the Universal Principle of Right and respecting the others' innate right to freedom requires).<sup>16</sup>

To illustrate this argument, consider Locke's theory of private property appropriation. According to Locke, all individuals have a right to a fair share of the world's natural resources ("the enough-and-as-good proviso"), and they have a right to use coercion to take and defend their fair share. According to Kant, however, even if we accept this as the correct principle of private property appropriation (which, as we saw above, he doesn't do), it is impossible to figure out exactly which particular parts of the world's resources are, objectively speaking, mine. After all, no one is in a position to decide how much any specific part is objectively worth. There is no objective value that attaches to objects in the world, like specific coconuts, trees, pieces of land, lakes, etc. Alternatively, if we go with Kant's general rule of first possession, the fact that I have chosen to take something as mine cannot, in itself, issue an unproblematic, normative obligation on all others to stay away from it: I cannot subject their freedom to my choices in this way. Therefore, regardless of which principle of private property appropriation we choose (Locke's or Kant's own), Kant's argument holds: my decision to make something mine remains normatively problematic, since it renders our interactions, including how we distinguish between what is yours and mine, irreducibly subject to my choice (rather than simply to universal laws of freedom).

At this point, one might, of course, object by pointing to the scenario in which we all happen to agree on the value of each specific thing or who gets to possess each thing, so that we never need to use coercion to settle any disagreement. But there is no reason to think this must happen, Kant is seen as arguing, since the type of disagreement under discussion does not track unreasonableness. Moreover, even if we do happen never to disagree on anything in the state of nature, what we have is not a condition of justice or injustice, but rather a condition "devoid of justice" (MM 6: 312). In such a scenario, it is mere chance that no one disagrees, and though this may tempt us to think that we do not need to establish a state, this is mistaken.

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<sup>16</sup>The indeterminacy argument is, in my view, best viewed as referring to both the problem of specifying the abstract or universal principles of right as general laws or rules for interaction and the problem of specifying how to apply these laws in particular situations. In turn, the first problem of specification is, again in my view, best seen as linked to why we need a public, legislative authority, whereas the second problem of specification can usefully be seen as linked to why we need a public, judiciary authority. Another, separate kind of argument is sometimes referred to as the "assurance" argument, which usefully can be seen as a sophisticated development of Hobbes' security argument. For reasons of simplicity, I am not outlining this argument here. Again, my suggestion is that this problem of assurance is linked to why we need a public executive power. Hence, solving the three problems explain why we need a tripartite public authority: the two problems of specification (specifying how which general laws captures best the abstract principles of right and specifying how these general laws should be applied in particular situations) explain why we need the legislative and judiciary authorities, whereas the problem of assurance (a problem of securing rightful trust through power) explains why we need a public executive power with a monopoly on coercion. To what extent the various republican interpreters defend both types of indeterminacy arguments as well as the assurance argument varies. In addition, as mentioned above, the exact way in which these scholars understand these arguments differ quite a lot too.

Such a peace would rest on contingent facts (our chance agreement), and there is still no possibility of rightful use of coercion in this condition. And an account of justice must be able to explain how we can use coercion rightfully, and as this is only possible in the civil condition, the fact that there can be peaceful times (de facto agreement) in the state of nature is insufficient to show that we have an enforceable right to remain in the state of nature. Because justice is impossible in the state of nature, the establishment of civil society is viewed as constitutive of justice, and we do not have a right to stay in the state of nature. Since rightful coercion is only possible through the public, legal-political institutions of the state, we have, instead, an enforceable duty to enter civil society. This is why, these interpretations maintain, Kant says that choosing to stay in the state of nature is to do “wrong in the highest degree” (MM 6: 307).

## 5 The Rightful (Just) State: Three Kantian Answers

These interpretive disagreements about why we have states at all are also reflected in interpretive approaches to Kant’s conception of the rightful or (minimally) just state, which includes the issue of whether we have a right to revolution. After a brief sketch of those issues, I return to Kant’s views on the responsibilities the state has to address poverty among its citizens. These disagreements in the literature illustrate well the different ways the three types of approaches read the first of three chapters on public right in “The Doctrine of Right,” the one Kant entitles “The Right of a State” (MM 6: 311). I return to the other two chapters on public right, which deal with global (international and cosmopolitan) justice, in the final section below.

Simply put, the absolutist (Hobbesian) interpretations maintain that according to Kant, any stable system of law that is enforced by a sufficiently powerful state is legitimate. If one considers the civil condition as the solution to an extremely dangerous state of nature, this is of course the view that follows, because almost all states will be more capable of preserving life than individuals on their own in the state of nature. And it is easy to find support for such an interpretation in Kant’s texts. For example, this reading fits quite well with Kant’s claim that we do not have a right to revolution, not even under very unjust conditions (MM 6: 318ff). It also accords with some of Kant’s remarks about the French Revolution, especially those in which he seems to say that even if no one had a right to participate in it, it took humankind in the right direction.<sup>17</sup> Those Kantians who promote this reading of Kant are also typically frustrated with his theory of right and its apparent implication

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<sup>17</sup>Generally, those who read Kant’s “Doctrine of Right” in this absolutist way are likely to emphasize: the so-called assurance or security arguments one finds in the first chapter of the private right part (MM 6: 245–257); Kant’s arguments in support of the claim that citizens do not have a right to use coercion against the public authority (MM 6: 339–340, 370–372); and Kant’s conclusion of the private right discussion (MM 6: 305–308) as well as his opening paragraphs of the public right discussion (MM 6: 311–313).



that one is politically obliged to obey even the most oppressive and unjust states, including Hitler's Nazi-Germany. Consequently, these interpreters often attempt to develop (what they see as) revised Kantian theories of justice that can explain why one is not politically obliged to obey just any gruesome regime with a monopoly on coercion.

Libertarian (Lockean) interpretations, in contrast, typically hold that a just and legitimate state is one that establishes a legal-political system to specify, apply, and enforce all the private right principles that individuals (ideally) utilize in the state of nature to regulate (justly) their interactions. The major difference between the rights of the state (public right) and the rights of individuals (private right) is that the state has certain additional rights in consequence of it having to establish a legal-political institutional system. For example, the state has to establish laws of public administration, something individuals obviously have no need of in the state of nature. On the libertarian reading, Kant's idea of a rightful state is a "minimal" one. It is minimal because, beyond the laws it needs to fulfil its administrative tasks (public law), the state creates no new types of rights and laws, but only posits those laws needed to secure the rights individuals already possess in the state of nature (private law). Moreover, once established, if a state doesn't respect the rights of individuals in its use of power, then, on these interpretations, there ceases to be a civil condition. Since, in such circumstances, individuals find themselves thrown back into the state of nature, they have to defend their rights against violations as best as they can. Hence, on this interpretive line, when individuals in these circumstances resist "state officials," they are actually not engaging in revolution (strictly speaking) but find themselves in the state of nature where they are, yet again, enforcing their rights by their own means (individually).<sup>18</sup>

The third strand of interpretation considers, as mentioned, Kant's state a (Rousseauian) republican alternative to (Hobbesian) absolutism and (Lockean) libertarianism.<sup>19</sup> Republican interpretations object to the absolutist claim that all stable, law-regulated uses of power qualify as civil conditions. A Kantian republic, they argue, must establish "freedom as independence," where this independence is enabled by the establishment of a representative, public authority comprising a certain institutional structure. The precise meaning of this latter claim, however, is a highly contentious issue. Some republican interpretations, characterized as more liberal, hold that Kant's distinction between "barbarian" and "civil" conditions hinges on whether or not the laws of the state *represent* the people, which means securing certain private and public principles of right for all citizens, thereby

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<sup>18</sup> Naturally, these interpretations also pay careful attention to Kant's arguments about assurance or security, but they also emphasize that individual rights are what must be secured. Especially important parts of Kant's text, for these scholars, tend to be chapter 2 in "The Doctrine of Right," which concerns the private right principles (especially the principles concerning private property and contract right, pp. MM 6: 258–280, 284–286), and the concluding arguments and claims in the private right section (MM 6: 256–257, 305–308).

<sup>19</sup> To defend their position, republican interpreters often point to what Kant says in the beginning of the "public right" section (MM 6: 311–313), in addition to challenging the readings of the text absolutist and libertarian interpretations highlight.



guaranteeing their status as free, equal, and independent.<sup>20</sup> Other republican interpreters contend that with the term “representation,” Kant firmly commits himself to democracy as the only just form of government.<sup>21</sup> Finally, yet other republican interpretations downplay certain aspects of Kant’s text that seem to espouse liberal rights, and argue instead for normative, non-absolutist, yet legal positivist interpretations of Kant. According to these interpretations, a state is legitimate as long as there is a condition of stability enabled by its citizens’ normative (and not merely de facto) recognition of the state’s authority over them.<sup>22</sup> Despite these internal disagreements concerning the importance of liberal rights and democracy, all republican interpreters agree with the libertarian interpreters that not any form of rule-governed use of power constitutes a legitimate state, in Kant’s view. But, they argue against the libertarian claim that the Kantian position can recognize a *right* to realize justice on their own if they find themselves subjected to an illegitimate state. Hence, it does not matter, they argue, whether or not we call such use of coercion the exercise of a right to revolution; what matters is that we cannot call such use of coercion *rightful*. Since justice is impossible in the state of nature, we cannot have a *right* to reassume our natural rights or we cannot describe what we are doing as re-establishing rightful relations (since rightful relations are only possible in civil society). This is why Kant says, they maintain, that we do not have a *right* to revolution. The republicans also typically deny the libertarians’ view that the rights of the state (public right) are, with the exception of the additional laws necessary for public administration, coextensive with the rights of individuals (private right).

Let me conclude this section by returning to the issue of what responsibilities the state has, if any, with regard to poverty among its citizens, which illustrates some of the key differences between what I have called the absolutist, libertarian, and republican interpretations. According to both the Hobbesian absolutist interpretations and the legal positivist republican interpretations, this issue is (or at least should be) quite simple. Presupposing, as these interpretations do, that on Kant’s view most stable and rule-governed states are legitimate, then such states may redistribute resources or not without this affecting their political legitimacy one way or the other. On the absolutists’ reading, the will of the sovereign authority properly determines how the state responds to citizens’ poverty, whereas according to the legal positivist republicans, the “normativity” of the people (whether linked to a democratic will or otherwise) determines the state’s proper response. Problematically,

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<sup>20</sup>In my view, Arthur Ripstein (2009), Helga Varden (“Kant’s Non-Absolutist Conception of Political Legitimacy: How Public Right ‘Concludes’ Private Right in the ‘Doctrine of Right,’” *Kant-Studien*, Heft 3: 331–351, 2010), and Jeremy Waldron (2006) fall within this camp of interpreters.

<sup>21</sup>Both Pauline Kleingeld (*Kant and Cosmopolitanism: The Philosophical Ideal of World Citizenship*. New York: Cambridge University Press, 2010) and Ingeborg Maus (*Zur Aufklärung der Demokratietheorie. Rechts- und demokratietheoretische Überlegungen im Anschluss an Kant*. Frankfurt: Suhrkamp, 1992) defend such democratic interpretations of Kant.

<sup>22</sup>Prominent interpreters who take such a legal positivist line are Ingeborg Maus and Peter Niesen. The main difference between them concerns the way in which Maus sees normativity as resting on the people’s democratic affirmation of the public authority.

however, these absolutist and republican interpretations require (insofar as they stay consistent with their own basic philosophical commitments) us to disregard most of what Kant says directly about the issue of poverty, including in "The Doctrine of Right," and treating it as somewhat irrelevant to understanding the legal-political structure of Kant's theory. This is a puzzling move, though, since poverty and distribution of resources seem to be important issues for Kant (also) in this work.

An apparent advantage of the remaining interpretations is that they account for or do not (need to) downplay the importance of what Kant says about poverty, although they disagree over how to understand these passages. Recall that on the libertarian interpretations the rights of the state (public right) are coextensive with the rights of individuals (private right) when we exclude public administrative rights. As a result, in order for the state to have a right to redistribute resources to the poor, individuals (in the state of nature) must have such a right in relation to each other too. But, as discussed above, Nozick rejects the possibility of just that sort of individual right in his famous libertarian Kantian objection to Rawls's Kantian position. Individuals cannot, Nozick argues, have an enforceable obligation to redistribute goods in response to the needs of the poor, since that would be irreconcilable with each person's right to set her or his own ends with her or his means (each individual's right to freedom). Consequently, the state cannot have such a right either; all the state has a right to do is to ensure that everyone has a fair starting point, and Nozick revises Locke's "enough-and-as-good" argument to how this can be done. (Obviously, if we go with Kant's first-come-first-served principle of private property acquisition instead, the newcomers get even less than they do on Nozick's Lockean "enough-and-as-good" principle, maybe even nothing.) Notice, however, that even if one can refute Nozick's objection to Rawls, to make the case successfully for state's rights to enforce redistribution of means in response to problems of poverty, the Kantian argument must show that forced redistribution of resources in response to need amounts to something other than failed attempts at beneficence; otherwise, Kant's objection that forced beneficence is impossible becomes relevant. In my assessment, no libertarian Kantians have yet been able successfully to refute these two objections (that is, without giving up something essential to the libertarian account). Therefore, it appears libertarian interpretations of Kant must ascribe to him a minimal state view. The problem with such a view, however, is that it cannot justify the use of public provisions to ensure that the poor's legal access to means are not subjected to other private persons' arbitrary choices (choices to provide them with charity or employment).

Broadly speaking, the liberal rights-oriented republican interpreters reject (or ought to reject for consistency's sake) all of these approaches to the issue of the state's responsibility to deal with poverty among its citizens. On the one hand, they can and should reject any absolutist or legal positivist claim that a legitimate state has the option of engaging in poverty relief or not, and on the other hand, they can and should reject the libertarians' claim that the rights of the state are co-extensive with those of the individuals. In my view, the most promising liberal, yet republican, line of argument proceeds in the following way: a state can rightfully establish a monopoly on coercion only if it also ensures that the legal system as a whole is

reconcilable with each citizen's fundamental right to freedom. The only way to do this is by securing everyone's right to freedom (which includes a right to independence) by guaranteeing or securing each citizen's legal access to means. In other words, if some citizen doesn't own anything at all and everything already belongs to someone else, then this destitute citizen can only obtain access to means either by committing a crime (stealing from the rich) *or* by benefiting from the choice of the rich to give her or him charity or employment. In this latter situation, the poor citizen's possibility of freedom is subjected to rich persons' choices (to provide her or him with charity or employment, or not)—and this is irreconcilable with the poor citizen's right to freedom, which is a right that secures independence from having one's freedom subjected to another person's private choice in this way (and instead subjected to universal laws). For this reason, the minimally just or legitimate state must guarantee all its citizens legal access to means, as part of public right—as one of the claims citizens have on their own public authority (and not with regard to each other as private citizens). The right to poverty relief should therefore be understood as a public right (part of public law), and not a private right (part of private law). On this approach, then, poverty is a systemic problem related to the state's establishment of a monopoly on coercion, and it is a problem the state must assume responsibility for by unconditionally guaranteeing or securing all citizens' legal access to means. It should be noted that the state can address this systemic problem of poverty either by regulating private charitable organizations entrusted with fulfilling this function (by legally committing to give all people equal access to them without having to declare allegiance to a particular religion, for example) *or* by establishing public shelters (what used to be called "poor houses"). The main point remains that the state must assume responsibility for ensuring that all poor citizens' have legal access to shelter and food, an access that is not subjected to rich citizens' choices (to exercise charity or employ them).

In my view, one strength of this republican line of interpretation is that it accords with Kant's claim that such public welfare institutions (what he calls "poor houses") should not be considered forced charity or beneficence; that is because poverty relief of this kind provides the necessary institutional solution to a systemic problem. Poverty relief is necessary in order to reconcile the state's monopoly on coercion (and the actual institution of private property) with each citizen's innate right to freedom.<sup>23</sup> Another strength of this republican line of interpretation is that it avoids Nozick's criticism of Rawls, since that objection presupposes that the rights of the state (public right) are co-extensive with the rights of individuals (private right). In contrast, this republican argument, if it holds up under further scrutiny, shows that citizens have certain claims against their public authority (public right) that they do not have against each other (private right).<sup>24</sup> Consequently, liberal states

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<sup>23</sup> For an excellent account of how this type of account is also consistent with what Kant says about poverty in his ethical works, see Lucy Allais (forthcoming): "What Properly Belongs to Me: Kant on Giving to Beggars," *Journal of Moral Philosophy*.

<sup>24</sup> Interestingly, Nozick himself makes one similar move in his account of why what he calls the "ultramiminal state" must be transformed into a "minimal state." Basically, he argues that once a

have a right and a duty to provide welfare institutions that address problems of poverty, which involves coercive redistribution, despite the fact that private individuals do not have a corresponding legal right and duty against each other.<sup>25</sup>

Another disagreement within the secondary literature concerns how to interpret Kant's distinction between so-called "passive" and "active" citizens in "The Doctrine of Right" (MM 6: 314–315). Kant draws this distinction between those who can (in principle) vote and those who cannot. Kant himself situates all children, servants, apprentices, and women in the category of "passive citizens," while placing all "independent" men in the category of "active citizens." Some of the interpretive controversies arise not only because Kant draws this distinction, but because he claims, a few sentences later, that it must be possible for "anyone" to work one's "way up from this passive condition to an active one" (MM 6: 315). The problem, then, is how to reconcile the distinction he draws between active and passive citizens with his claim that all people must be able to work themselves out of a passive condition and into an active one.<sup>26</sup> This controversial issue in Kantian scholarship has been particularly important for those working on women's and children's rights, and there is significant and increasing engagement with Kant's account of passive and active citizens both in feminist and Kantian literature.<sup>27</sup>

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so-called private protection agency has established a de facto monopoly on coercion, it can force the independents (those who are not cutomers of this protection agency) to use its legal system, but only if it secures the independents with means with which to do so. If necessary, these means will be obtained by the state taxing its members—a consequence of his own argument that puzzles Nozick. An advantage of Kant's account is that similar features of his account are not similarly puzzling on these liberal, republican interpretations since they simply follow (conceptually) from an account of justice consistent with its own starting point; the innate right to freedom.

<sup>25</sup>Five works that highlight the complexity of the Rawls-Kant discussions are, in my view: Katrin Flikshuh's *Kant and modern political philosophy* (Cambridge: Cambridge University Press, 2000); Jean Hampton's "Should Political Philosophy be Done without Metaphysics?" (*Ethics* 99, 1989, pp. 791–814); Thomas Pogge's "Is Kant's *Rechtslehre* Comprehensive?" (*The Southern Journal of Philosophy* (Supplement), 36 (1997), pp. 161–188; Arthur Ripstein's "Private Order and Public Justice: Kant and Rawls," *Virginia Law Review* 92, pp. 1391–1432; Helga Varden's "A Kantian Critique of the Care Tradition: Family Law and Systemic Justice," *Kantian Review*, 2012, 17:2 pp. 327–356. The accounts of public right that are the closest to the one described in this paragraph are those of Ripstein and myself. The best account of how to view this type of Kantian approach to poverty relief to Kant's ethics is found in Lucy Allais' "What properly belongs to me: Kant on giving to beggars," *Journal of Moral Philosophy*, forthcoming 2014.

<sup>26</sup>For brief introductions and proposed solutions to some of these textual controversies, see: Holtman, Sarah W. "Kantian Justice and Poverty Relief," in *Kant-Studien*. 95, pp. 86–106; and Varden, Helga (2006) "Kant and Dependency Relations: Kant on the State's Right to Redistribute Resources to Protect the Rights of Dependents," *Dialogue – Canadian Philosophical Review*, XLV, pp. 257–284. In my view, the current best overview of the Kantian literature on this issue (as well as many other issues) can be found in Elizabeth Ellis (ed.) (2012) *Kant's Political Theory: Interpretations and Applications*. University Park: The Pennsylvania State University Press, but see also the bibliographies of Lara Denis (ed.) (2010) *Kant's Metaphysics of Morals*. New York: Cambridge University Press, and Oliver Sensen (ed.) (2013) *Kant on Moral Autonomy*. New York: Cambridge University Press.

<sup>27</sup>For a relatively comprehensive overview of the relevant literature, see Hay, Carol *Kantianism, Liberalism, and Feminism: Resisting Oppression*; Herman, Barbara (2002) "Could It Be Worth

## 6 Global Justice: International and Cosmopolitan Right

Kant follows his public right discussion of legitimate states (in “The Right of a State” chapter) with two short chapters on public right. The first of those, entitled “The Right of Nations”, addresses international or interstate justice (MM 6: 343–351), whereas the second concerns “cosmopolitan right,” which concern interactions between states and aliens (citizens of other states and stateless persons, including refugees) (MM 6: 352–353). The conclusion of these chapters—and of the entire “Doctrine of Right,” for that matter—is the same as that of Kant’s perhaps most popular legal-political essay: “Perpetual Peace” is the highest political good (MM 6: 355). Perpetual peace is rightful peace and the goal toward which we should strive. Perpetual peace is not merely the absence of coercion, but requires rightful interaction within states, between states (international right), and between states and aliens (cosmopolitan right). Perpetual peace therefore requires rightful relations on the entire planet. For this reason, Kant is uncompromising, for example, in his criticism of European colonialism. It also seems fair to point out, however, that Kant is not confident of our ability to establish perpetual peace, something that is quite clear in his more historical essays. Therefore, in the legal-political texts he aims to show not that there will in fact be perpetual peace, but rather to establish which principles and legal-political institutions are needed for reaching perpetual peace in principle. After all, if we haven’t even clarified the ideals we ought to strive for, then we cannot, except perhaps by chance, move in the right direction. And, of course, if Kant can show the ideals and how we might reach them, then he has shown that perpetual peace is possible. In fact, it seems reasonable to maintain that if Kant can show the possibility of perpetual peace, then he has done all he can as a philosopher; the rest—the actual realization of perpetual peace—is up to each and every one of us, as individuals and together.

The interpretive controversies between the absolutist, libertarian, and republican interpretations concerning the necessity and structure of a public authority and legal system at the national level are paralleled at the international and cosmopolitan level. Indeed, it seems fair to say that the disagreements at those levels are even greater than they are at the domestic levels or regarding Kant’s theory of rightful states. In the case of global justice, one reason for the heightened disagreement among interpretations is the fact that on Kant’s analysis, states already exist once we arrive on the global stage—that is, before we can think about establishing rightful international institutions, we must already have established rightful states. This normative fact complicates the arguments. Regardless of this, many other interpretive

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Thinking About Kant on Sex and Marriage?” in *A Mind of One’s Own*, edited by L. M. Antony & C. E. Witt (ed.), pp. 53–72. Boulder: Westview; La-Vaque-Manty, Mika (2006) “Kant’s Children,” *Social Theory and Practice* 32, No 3, pp. 365–388; Schott, Robin M. (1997) *Feminist Interpretations of Immanuel Kant*. Pennsylvania: Pennsylvania State University Press; Varden, Helga (2012) “A Kantian Critique of the Care Tradition: Family Law and Systemic Justice,” *Kantian Review*, 17:2, pp. 327–356. Hay, Herman, and Varden all propose their own, somewhat different Kantian interpretations of many of these issues.

controversies concern whether or not Kant is defending the claim that worldwide perpetual peace requires the establishment of some kind of global, public authority with or without its own coercive power. For example, there is significant disagreement over: the question of what Kant's assessment of the United Nations would be (was it a (necessary) step in the right direction or not?); the question of whether our aims in global justice should be (more or less) the same as they are in domestic justice, including as concerns poverty and redistribution of resources; and, the question of which rights and duties existing states have given the absence of a well-functioning, global public authority. In this context, there is still as little agreement between Kant interpreters as there is between theorists about global justice more generally. As Thomas Nagel (2009) observes, however, this may very well be a reflection of how philosophical thinking concerning the establishment of global institutions is at a very early stage of development.<sup>28</sup>

## 7 Concluding Remarks

As we have seen, the history of Kant's legal-political philosophy has taken a peculiar trajectory, since most philosophers, even Kantians, did not until quite recently read Kant's main legal-political work carefully. Instead, they focused most of their attention on his moral-ethical works, especially the *Groundwork for the Metaphysics of Morals*, although some also attended to the *Critique of Practical Reason* and some of his shorter political essays, like "Perpetual Peace." This is not to say that Kant's ideas concerning respect for human dignity, freedom, and perpetual peace haven't had a tremendous influence in the public culture of modern, liberal democracies, for

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<sup>28</sup>To see some of these disagreements, compare, for example: Carson, Thomas (1988) "Perpetual Peace: What Kant Should Have Said," *Social Theory and Practice*, Vol. 14, 2, pp. 173–214; Cavallar, George (1999) *Kant and the Theory and Practice of International Right*. University of Wales Press; Dodson, Kevin E. (1993) "Kant's Perpetual Peace: Universal Civil Society or League of States," *Southwest Philosophical Studies*, 15, pp. 1–9; Doyle, Michael W. (1983) "Kant, liberal legacies, and foreign affairs" (Part 1 and 2), *Philosophy and Public Affairs*, 11/12 (3/4), pp. 205–235/326–353; Habermas, Jürgen "Kant's Idea of Perpetual Peace, with the Benefit of Two Hundred Years Hindsight," in J. Bohman, M. Lutz-Bachman (eds.) (1997) *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal*. MIT, pp. 113–153; Hodgson, Louis-Philippe (2012) "Realizing External Freedom: The Kantian Argument for a World State," in *Kant's Political Theory: Interpretations and Applications*, ed. E. Ellis. University Park: The Pennsylvania State University Press; Kleingeld, Pauline (2012) *Kant and Cosmopolitanism*. Cambridge: Cambridge University Press; Mikalsen, Kjartan K. "In Defense of Kant's League of States," *Law and Philosophy* 30 (3), pp. 291–317; Nagel, Thomas (2005) "The Problem of Global Justice," *Philosophy and Public Affairs*, 33(2), pp. 113–148; Pogge, Thomas "Kant's Vision of a Just World Order," in T. E. Hill (ed.) (2009) *The Blackwell Guide to Kant's Ethics*. Blackwell Publishing Ltd, pp. 196–208; Ripstein, Arthur (2009) *Force and Freedom – Kant's Legal and Political Philosophy*. Cambridge, Mass.: Harvard University Press; Rawls, John (1999) *The Law of Peoples*. Cambridge, Mass.: Harvard University Press; "A Kantian Conception of Global Justice," *Review of International Studies*, 2011, Vol. 37, Issue 05, pp. 2043–2057; Williams, Howard L. (2012) *Kant and the End of War: A Critique of Just War Theory*. New York: Palgrave Macmillan.

they surely have. Rather, it is to say that for a long time there was relatively little interest in and much confusion around his main work in legal-political philosophy, namely “The Doctrine of Right” in *The Metaphysics of Morals*. In addition, of course, reading Kant means reading “Kantianese,” that particular type of highly technical philosophical language that not only requires a special kind of patience, but also invites controversy and disagreement. Consequently, many different types of legal-political theories, both at the national and the global levels, have been attributed to Kant. But Kant’s theory has received increasing attention in recent decades. And, although there is still much disagreement among Kant interpreters, there is little doubt that this disagreement now occurs at a much more constructive and interesting level than it did only a decade ago. There is little doubt, also, that philosophers of all stripes agree that Kant’s theory is well worth exploring, and that it is establishing itself as one of the main philosophical resources for thinking about justice.

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