

## Cosmopolitan Right, Indigenous Peoples, and the Risks of Cultural Interaction

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**Abstract.** Kant limits cosmopolitan right to a universal right of hospitality, condemning European imperial practices towards indigenous peoples, while allowing a right to visit foreign countries for the purpose of offering to engage in commerce. I argue that attempts by contemporary theorists such as Jeremy Waldron to expand and update Kant's juridical category of cosmopolitan right would blunt or erase Kant's own anti-colonial doctrine. Waldron's use of Kant's category of cosmopolitan right to criticize contemporary identity politics relies on premises that upset Kant's balanced right to hospitality. An over-extensive right to visit can invoke "Kantian" principles that Kant himself could not have consistently held, without weakening his condemnation of European settlement. I construct an alternative spirit of cosmopolitan right more favorable to the contemporary claims of indigenous peoples. Kant's analysis suggests there are circumstances when indigenous peoples may choose whether to engage in extensive cultural interaction, and reasonably refuse the risks of subjecting their claims to debate in democratic politics in a unitary public. Cosmopolitan right accorded respect to peoples; any "domestic" adaptation of cosmopolitan right should respect indigenous peoples as peoples, absent a serious public explanation by a democratic state for why it has now become appropriate to treat indigenous peoples merely as individual citizens.<sup>1</sup>

**Key words:** Immanuel Kant, indigenous peoples, cosmopolitan right, Jeremy Waldron, multiculturalism, historical injustice.

Much commentary on Immanuel Kant's essay *Perpetual Peace* focuses on the First Definitive Article for Perpetual Peace ("The civil constitution in every state shall be republican.") and the Second Article ("The right of nations shall be based on a *federalism* of free states."). Comparatively less has been written on Kant's Third Definitive Article for Perpetual Peace: "Cosmopolitan right shall be limited to conditions of universal *hospitality*" (1996, 322, VIII:350 PP; 325, VIII:354 PP; 328, VIII:357 PP).<sup>2</sup> The few contemporary writers who do talk about cosmopolitan right (or cosmopolitan law<sup>3</sup>) tend to go beyond

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1] An earlier version of this piece was presented at the 2005 meeting of the American Political Science Association. I thank the chair, Melissa Williams, and my fellow panelists Dale Turner and Jeremy Waldron. For their comments on various drafts, I owe thanks to Brian Barry, Michael Doyle, Jon Elster, Andrew Grossman, Lauren LeBlanc, Thomas Pogge, Ross Poole, Anna Stilz, Nadia Urbinati, Jeremy Waldron, Athena Waligore, and Joseph Waligore. The responsibility for what follows is mine.

2] Emphasis in original. Unless otherwise noted, English translations of Kant's political works are taken from the Cambridge edition edited by Mary Gregor, *Practical Philosophy* (1996). This article's citations to Kant's work will first reference the page number of this translation, then the volume number (as a roman numeral) and page number of the Academy edition of Kant's complete works (*Akademie-Ausgabe*, *Kant's Gesammelte Schriften*), followed by an abbreviation for the work, and (if appropriate) a section number or label. PP = *Towards Perpetual Peace*. TP = *On the Common Saying: That May Be Correct in Theory, but It is of No Use in Practice*. MM = *The Metaphysics of Morals* (including the *Rechtslehre*).

3] Like Mary Gregor, I use the word "right" to translate the German *Recht* or *recht*. *Recht* has a broader meaning than the English term "right." *Recht* is the German equivalent of the Latin word *ius*, the

Kant's own minimal specification of cosmopolitan right.<sup>4</sup> Kant himself articulated a limited right of hospitality, condemning the practices of European imperialism and settlement, while also defending a limited right to visit foreign lands in order to approach others with offers to engage in commerce (1996, 328-29, VIII:357-358 PP; 489, VI:352-353 MM §62). I argue that contemporary attempts to update and expand Kant's category of cosmopolitan right threaten to blunt or erase Kant's anti-imperialism, and distort the meaning of how cosmopolitan right should be applied in the context of reasoning about the just terms of association in multicultural democracies.<sup>5</sup>

I focus specifically on the way in which Jeremy Waldron conceives of the category of cosmopolitan right and its negative implications for issues of identity politics in contemporary democratic politics and the rights of indigenous peoples (Waldron 2000b, 1999a, 1999b, 1992, 1996a, 1996b, 2000a, 2002, 2003, 2004, 2006a). Waldron diverges from the particulars of Kant's analysis, and concentrates on using Kant's juridical category of cosmopolitan right as a starting point for his own theorizing. I am sympathetic to Waldron's claim that Kant's model of cultural interaction is useful for addressing indigenous issues. However, Waldron's neglect of the particulars leads him to wrongly reconstruct the spirit of cosmopolitan right and reach the wrong conclusions on contemporary debates over indigenous issues. The particulars are important because they show how Kant's version of cosmopolitan right balanced facilitating interaction among peoples with condemning imperialism. Obtaining the consent of local peoples is an important part of Kant's cosmopolitan right. Waldron's revisions put him in danger of producing an unbalanced version of hospitality, which unduly favors communication and interaction over consent and anti-imperialism. My argument is not simply a textual point about Waldron's use of Kant. Waldron invokes one part of what he sees as the deep structure of Kant's thought, without drawing out the implications from another important part of Kant's thought. I worry that when Waldron takes a stance on indigenous issues in the context of 21<sup>st</sup> century democratic politics, Waldron invokes "Kantian" principles that Kant could not have consistently held without also weakening his condemnation of European settlement.

Section I sets up the general problematic of cosmopolitan right, outlining Waldron's argument and how I will attack it. In section 2, I argue for the textual claim that Waldron

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Romanian word *drept*, and the French word *droit*. See Gregor 1996.

4] Seyla Benhabib argues for expanding cosmopolitan right to include the right to membership. See Benhabib 2006; Benhabib 2004. Many argue that Kant's category of "cosmopolitan law" can be expanded beyond the limited right of hospitality to the institutionalization of human rights. See for example, Eleftheriadis 2003; Kleingeld 1998; compare Anderson-Gold 2001, chs. 2-3. See also the works, especially the piece by Jürgen Habermas, in Bohman and Lutz-Bachmann 1997. Though "cosmopolitan right" is often mentioned in that volume, it is often not clearly separated from the category of "international right."

5] For useful interpretations and historical discussions of Kant and cosmopolitan right, see Muthu 2003; Muthu 2000; Cavallar 2002; Simmons 2001, ch. 9; Flikschuh 2000, chs. 4-6. See also Kleingeld 1998; Müller 1999; Waldron 1996a. After writing the bulk of this essay, I came across the pieces by Niesen 2007; Williams 2007. I have reworked section III especially to include references to Niesen's piece.

cannot account for the respect Kant actually accords to the autonomy of indigenous peoples.

In section 3, I draw from Kant's writings on prudence and politics to make an argument about when it is acceptable for indigenous peoples to refuse extensive engagement with others. Cosmopolitan right requires the consent of Native peoples before any extensive interaction is to take place. Waldron favors a vision of domestic politics influenced by his version of cosmopolitan right, yet he neglects this element of consent. Waldron suggests that indigenous peoples are now side-by-side and cannot refuse engagement with their neighbors. Waldron says that the discipline of politics, and sharing the Earth and sharing a local territory, demands that we not present our convictions (and culture) in a non-negotiable manner (2000b). In response, I begin with the point that Native peoples often have a reasonable fear about how the state will treat them because of past violations of cosmopolitan right. I suggest that, in circumstances of past injustice, it may be allowable for indigenous peoples to take a prudent stance of engaging in less extensive interaction. Kant says generally that peace needs to be established and requires an assurance (1996, 322, VI:348-349 PP). A society might claim to offer assurance that it will provide secure protection of their rights and hear indigenous claims fairly. If this assurance stems from a claim by a society to have adopted principles for governing cultural interaction stemming from norms of cosmopolitan right, then the larger society must be clear in its commitment to cosmopolitan norms. The problem arises when an unjust history has undermined the conditions of trust. To assure the historically oppressed group of a renewed commitment to cosmopolitan norms, a society should begin by articulating an account of how past imperialism violated cosmopolitan norms, and an account of how long reparations are owed after a violation of cosmopolitan norms. Until reparations are given, or a serious account for why they are not owed is given, indigenous peoples have reason to doubt the commitment of citizens of the larger state to cosmopolitan norms. Cosmopolitan right accorded respect to peoples; a domestic adaptation of cosmopolitan right should respect indigenous peoples as peoples, unless a serious explanation is given publicly for why it has now become appropriate to treat indigenous peoples merely as individual citizens in the context of a unified sovereign state.

In section 4, I will argue that if Waldron does not want to justify past injustices, he should avoid relying on presuppositions that entail an over-extensive right to visit. Waldron cannot use Kant to support his approach to domestic politics without relying on something like Francisco de Vitoria's over-extensive right to visit, or James Tully's interpretation of Kant as justifying imperialism. The right *to offer* commerce should not become a right *to* commerce. Waldron's attempt to update Kant's cosmopolitan right to deal with issues of culture and indigenous peoples neglects the balance that Kant established between attempts to engage in intercourse and the right to refuse interaction. With a more enlightened understanding of cosmopolitan right, we can approach issues of historical injustice in the proper spirit.

## I. THE PROBLEMATIC OF KANT'S COSMOPOLITAN RIGHT

Cosmopolitan right is a juridical category introduced in Kant's discussion of public right at the end of the *Rechtslehre*, the first part of *The Metaphysics of Morals* (1996, 489, VI:352 MM §62; cf. 328, VIII:357 PP). *Recht*, or "right," refers, roughly put, to the a priori principles of jurisprudence or law. The other two categories of public right are domestic civil right (which concerns relations between individuals at the local level, including the principles for the constitution of a state) and international right (which concerns relations between states only) (Kant 1996, 455, VI:311 MM §43; 482, VI: 343 MM §53). Cosmopolitan right is concerned not simply with interactions between states. Cosmopolitan right deals mainly with encounters between peoples and individuals from distant lands, and how peoples share our finite world with other peoples (Waldron 2000b, 230). Cosmopolitan right includes the principles that should regulate interaction prior to, or abstracted from, any actual agreements made between Native peoples and specific outsiders, or those acting on their behalf.

Kant proposes only a minimal specification of the content of the principles in cosmopolitan right: "Cosmopolitan right shall be limited to conditions of universal *hospitality*" (1996, 328, VIII:357 PP, emphasis in original). Individuals, and even whole peoples, have a right to travel to foreign lands and seek further interactions with the local inhabitants. The visitors may offer to trade or to settle in the neighborhood. The locals cannot be hostile merely because the outsider made an offer, and the outsiders cannot be hostile to the locals merely because the locals refuse their offer. A visitor cannot be turned away if this would cause his destruction, but he can be repulsed if this does not destroy him (Kant 1996, 329, VIII:358 PP). At the same time, this limited right of hospitality does not entail a right to be treated as an honored guest, which would require a special pact. Kant condemns forcible settlements that encroach on Native land. Unlike John Locke, Kant does not condition land ownership on agricultural use. Kant argues that colonists must respect the first possession of indigenous peoples, even if their societies are not organized as state, that is, even if they do not live in a state of domestic civil right. Kant does say that a people may settle on land that is sufficiently far away from any other people's territory. Still, where land is already inhabited and used, the settlers must have the explicit, actual, and informed consent of the Natives—that is, a contract (Waldron 1999a; 2000b; 2004; Kant 1996, 417-18, VI:266 MM §15; 419-420, VI:268-269 MM §17; 490, VI:352 MM §62; 329, VIII:358 PP).

Jeremy Waldron accurately describes the specifics of what Kant himself states. However, Waldron says he wants to begin his discussion of cosmopolitan right by putting aside these particular judgments made by Kant. Waldron says that Kant used the term "cosmopolitan" not to describe a particular thesis about how the world should be organized; rather, he says the category of cosmopolitan right is a juridical category in which we may analyze certain issues. Talk of "cosmopolitan" right connotes a certain attitude, or spirit, in which to approach problems surrounding how different peoples are to interact with those

with whom they must share a globe (Waldron 2000b, 230). Waldron is not interested in Kant's specific theses in cosmopolitan right. He is first interested in finding out the presuppositions of the category itself, and then in developing his own theses in cosmopolitan right that hold to the Kantian spirit. For this reason, we might see it as important that Kant maintained the right to visit, despite the potential for abuse by Europeans who might overstay their welcome. This seems to support the notion that Kant held a friendly attitude towards cultural intercourse and contact, over and above any value that might be placed on the protection of cultural purity and integrity for its own sake (Waldron 1999a, 230).

Waldron makes a distinction between Kantian cosmopolitan right and cultural cosmopolitanism, but says that some links exist between the two, as the discussion of cosmopolitan right speaks to how we as citizens should conduct ourselves in politics at the state level. In particular, the spirit of cosmopolitan right should lead us to question identity politics, which Waldron sees as "a way of presenting oneself and one's cultural preferences *non-negotiably*" to those with whom we now share the world (2000b, 230-231, emphasis in original). Waldron takes from Kant's writings the idea of a "proximity principle." The proximity principle requires us to come to terms with all those whom we are unavoidably side-by-side. As Waldron interprets it, this requirement extends to neighbors with whom we do not share values, and those who are our neighbors as a result of historic injustices (2000b, 239, 241). Since human beings are always moving across the surface of a finite globe, "there is no telling who we will end up living alongside of, no telling who our neighbors may turn out to be" (Waldron 2000b, 239). Additionally, Waldron says that the spirit of the proximity principle means that we have a civic duty to participate responsibly in politics; we should do this in a manner that does not diminish prospects for peace and that pays proper attention to the interests of others (2000a, 155).

I will argue below that Waldron has not properly reconstructed Kant's juridical category of cosmopolitan right. Because of this, he has not correctly identified the spirit of cosmopolitan right. Waldron makes claims in the form of "Kant would not have spoken of X in cosmopolitan right if Y were not also true." I argue that talking about the category of cosmopolitan right does not require accepting Waldron's view of the essential conditions or presuppositions of that category. Further, Waldron's specification of cosmopolitan right would exclude many of Kant's own particular judgments in cosmopolitan right. Waldron exaggerates the significance of the right to visit, while neglecting Kant's qualification that visitors obtain consent. While this alone may make us doubt Waldron's claims, my argument does not merely revolve around a textual analysis of what Kant said. It says first, that Kant shows a possibility that Waldron sidesteps, and second, that ignoring this possibility puts us in danger of undermining the balance Kant struck between his anti-imperialism and his positive attitude towards cultural interaction.<sup>6</sup>

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[6] Waldron is clear he does not intend his work on cosmopolitan right to be an exegesis of Kant (2004, 55 fn1). I myself stray from Kant as well, so a textual dispute certainly does not settle matters. Like Waldron, I use an analysis of the text to look at what Kant's deep principles really are, or at least how they might be seen. That my interpretation is a possible and plausible one is significant, given that Waldron's ar-

Waldron's mischaracterization of cosmopolitan right undermines his ability to draw lessons from it regarding the discipline of politics at the domestic state level. Waldron seems correct in claiming that Kant's proximity principle requires us to come to terms with those with whom we share a fate. However, we can come to terms with each other in more than one way. We should not slight these other possibilities.<sup>7</sup>

To the extent that we should follow the proximity principle in our thinking today, the principle does not lead us to the approach for which Waldron argues. Indeed, Kant's stances in cosmopolitan right suggest a different spirit of cosmopolitan right. The protections accorded to indigenous peoples can be seen as involving a respect for indigenous peoples *qua* peoples. Indigenous peoples generally want to be recognized as peoples, not simply as individual indigenous persons. They make claims based on their prior sovereignty and self-rule before contact with Europeans. That peoples share a fate does not always mandate that they share a unitary state, as individuals with undifferentiated citizenship. Cosmopolitan right offers a useful way to view relations between indigenous peoples and their neighbors.

The next section of this article argues that Waldron cannot account for the respect Kant actually accords to the autonomy of indigenous peoples. Waldron is able to invoke Kant in support of Waldron's favored conclusions about domestic politics by transforming Kant's spirit of cosmopolitan right. In later sections, I will argue that this transformation could weaken Kant's (and Waldron's) ability to use cosmopolitan right to condemn imposed interaction and settlement on the land of indigenous peoples. Waldron's attempt to update Kant's cosmopolitan right to deal with issues of culture and indigenous peoples neglects the balance that Kant established between attempts to engage in intercourse and the right to refuse interaction.

## II. THE SPIRIT OF COSMOPOLITAN RIGHT AND THE RIGHT TO VISIT

Cosmopolitans have accused multiculturalists of wanting to protect cultures in their purity, isolating them from any risk of change. The argument can run as follows: Cultural intercourse and mixing has been a constant feature of our world (Waldron 2003). Guaranteeing

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gument has to do with what is ruled out by Kant's category of cosmopolitan right. My criticism of Waldron's use of Kant is that he cannot interpret Kant's deep principles in a way that both supports his favored view and also does not weaken Kant's condemnation of settlement in cosmopolitan right.

7] To be sure, Waldron recognizes that we may come to terms with others in more than one way. He explicitly says this with regard to historical entitlements (2004). Waldron also states that someone might formulate group rights as part of cosmopolitan right (2000b). For example, claims for a cultural exemption from a general law may be permissible, so long as such claims must be argued for, and subject to a certain discipline (Waldron 2007). Waldron is officially open to the possibility of such bottom-line claims about cultural rights succeeding, even if he thinks most claims are unlikely to be up to the challenge. My point is not so much about what bottom-line solution is adopted. Rather, my view is that Kant's proximity principle allows a much larger leeway about solutions involving shared sovereignty and about the legitimate way in which we reach the terms on which we interact.

cultural survival is hopeless, as cultural exchange always involves risk. We cannot rule out the possibility of a culture's change or even its destruction in its encounters with others (Habermas 1998). In the modern world, a culture that is protected from change becomes a museum piece. This argument can be brought to bear on domestic constitutional politics, to say that indigenous peoples have to risk misrecognition if they want their claims heard (Means 2002). One might say that a culture can only live by risking death in confrontation with other cultures.<sup>8</sup>

The cosmopolitan element to Jeremy Waldron's version of this argument is that democracies should seriously hear out cultural claims in a manner that is inspired by the spirit of Kant's cosmopolitan right (Waldron 2000b, 2003, 1999a). Waldron holds that we have to find a way to live in peace with our neighbors. In describing what he labels Kant's domestic "proximity principle," Waldron says we have a natural duty to come to terms with those with whom we are likely to come in conflict, whether or not we share a common culture or even a sense of justice with them (2004, 55 fn1). Since we have differing views about what is just and right, but we nonetheless feel we a need for a solution to shared problems, we must have an authoritative procedure that determines for a community what is our solution (Waldron 1999b). Waldron says Kant's general stance suggests a civic duty not to propose terms of interaction that undermine the possibilities for peace (2000a). According to Waldron, this means no one should engage in an identity politics where one presents one's cultural preference in a non-negotiable manner (2000b, 231).

Waldron's spirit of cosmopolitan right allows that minority cultures may have better solutions to how to structure family law and other problems about how we govern social life. Members of minority cultures should be able to make these arguments without their claims being dismissed out of hand. At the same time, members of minority cultures should not insist that their very identity makes it so certain claims of theirs are non-negotiable. Cultural traditions and practices should not be seen as merely decorative costumes put out for display. Rather, they should be seen and offered as serious standards for how life should be lived in one's community. It is only when cultural norms are put forth in this manner can we begin the hard work of determining what will be the norms for this territory, through bargaining, compromise, voting, and authority (Waldron 2000b, 242-43).

For Waldron, the spirit of cosmopolitan right says that peoples must come to terms with each other, given that they share a limited earth. Even if the intermixing of peoples originally occurred through injustice, the current generation did not choose to be born here, and we are now unavoidably side-by-side in Kant's sense (Waldron 2000b, 239). A people should not simply insist on their own sphere of jurisdiction as if intermixing never occurred, nor should they refuse to argue why they should be granted exemptions from general laws (cf. Waldron 2007). Waldron says that Kant's cosmopolitan right suggests we all must, at some point, share the Earth with others whom we did not choose to be near, and so we should be prepared to come to terms with whomever we find ourselves side-by-side (Waldron 2000b, 239). All should honestly strive to reach common solutions to shared problems, rather than retreating into

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8] An allusion to the *Phenomenology of Spirit* (Hegel 1977, 113).

identity politics and refusing to justify one's claims to others. Engaging in democratic politics always carries the risk that one's claims will be denied (Waldron 2000b, 241-2).

Whatever the merits of the above argument, it should be not be forgotten that in historical encounters across borders, cultural interaction has often involved the "risk" of the violent suppression of entire cultures and the literal destruction of the individual members of these cultures. Cosmopolitans can point out that such destruction was in violation of cosmopolitan norms, an "abuse" of cosmopolitan right. For example, Kant's cosmopolitan right seems to clearly condemn past European imperialism. However, this begs the question: Why is it appropriate to say that indigenous peoples should now risk interaction with their historical oppressors? Waldron acknowledges that there are risks involved in living in a state, but he says that these are risks we are morally required to take on Kant's account of the state (Waldron 2006b, 183).<sup>9</sup>

My positive claim is that the very structure of cosmopolitan right points to conditions under which we may not be morally required to take these risks. When a group has unjustly denied another group secure enjoyment of rights in the past, it can be reasonable (or not unreasonable<sup>10</sup>) for the successors to the victims to be wary of extensive contact with the successors to the oppressors. In such circumstances, a degree of measured separatism may be justified. Past injustice has undermined the conditions for trust, and for a peaceable cultural exchange of ideas. While cultures cannot be completely static, indigenous peoples generally have more reason, compared to other groups, to not risk exposure through exchanging reasons in a domestic politics. They may demand a separate sphere of jurisdiction, and may do so not unreasonably, given that the past history of injustice involved a forcible deprivation of self-rule as independent polities. It is not enough to say that democratic politics would be ideal if based on a serious consideration of all reasons, including culturally-based reasons. If the promise of democratic politics in a particular community is based on adherence to the norms of cosmopolitan right, indigenous peoples have a reason to remain suspicious in certain circumstances. The instance I have in mind is when the bulk of citizens of a democratic state today are the successors to those who historically violated cosmopolitan norms and perpetrated great injustice on indigenous peoples. In such circumstances, democratic citizens may be required to provide a general account of when a prior self-governing people no longer has to be treated specifically as a people following a history of unjust interaction. Indigenous peoples are owed

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9] Note that in the article I cite here, Waldron is not discussing cosmopolitan right specifically, but Kant's theory of the state at the level of domestic civil right.

10] This alludes to John Rawls' distinction between the reasonable and rational in *Political Liberalism*. I am using the term "reasonable" in the limited sense of a willingness to propose and abide by fair terms of cooperation. My use, I think, accords with Rawls' view that our willingness to actually establish a framework for social cooperation is subject to the proviso that we can rely on others to endorse and act on the terms of the framework. "Without an established public world, the reasonable may be suspended and we may be left largely with the rational, although the reasonable always binds *in foro interno*, to use Hobbes's phrase" (Rawls 2005, 54).

sincere and demonstrated assurances that citizens of a democratic state have seriously thought through how indigenous claims should be heard, before citizens can condemn their stance as an identity politics based on a refusal to give reasons or limit one's claims. Without such assurances, a relative disengagement by indigenous peoples does not seem unreasonable. In the context of talking about politics generally, and also in cosmopolitan right specifically, Kant invokes prudence; I extend this analysis to suggest that indigenous peoples may allowably take a prudent stance of limited engagement in response to a past history of injustice. Before citizens of a state can expect indigenous peoples to put their trust in a democracy using norms based on cosmopolitan right, citizens must seriously consider what they might still owe indigenous for peoples based on past violations of cosmopolitan right, such as forced settlement. This assurance, for the most part, has not yet been given.

In preparation for presenting my positive claim, I first argue for a negative claim. Jeremy Waldron argues that a juridical category is never entirely neutral and involves substantive presuppositions about its subject matter. Talking about cosmopolitan right as a juridical category presupposes an attitude or spirit about how to approach law and rights at a global level. So what are the "presuppositions or circumstances of cosmopolitan right?" (Waldron 2000b, 230) Waldron posits that to speak of cosmopolitan right is to assume that disputes in relations between peoples should not be solved merely by violence. The right to visit can be seen by us now as involving a friendly attitude toward the prospect of contact between cultures (Waldron 1999a). Waldron writes:

[One] would not talk about cosmopolitan right if one believed that, for the sake of cultural purity or cultural integrity, the peoples of the world should have as little as possible to do with one another. Cosmopolitan right, for Kant, is the department of legal right concerned with peoples' sharing the world with others, given the circumstances that this sharing is more or less inevitable, and likely to go drastically wrong, if not governed by juridical principles. (2000b, 230, underscore added)

Waldron is mistaken about elements of this spirit, particularly because Waldron conflates cultural purity and cultural integrity, and different types of interaction.

My negative claim in this section is that we cannot, through Kant's presuppositions of cosmopolitan right, rule out the forms of identity politics that aim to protect cultural integrity. This is true even if we can rule out the forms of identity politics that are akin to cultural purity. Waldron also conflates two kinds of interaction. Weak interaction involves an initial approach to offer further commerce. Strong interaction involves trade and other types of interaction. I will argue that only in a weak sense is sharing the world really inevitable in a moral sense. Cosmopolitan right assumes the possibility of some interaction, and sets principles for such contacts. It does not assume that justice requires extensive interaction between peoples.

If Kant thought that every culture should without exception remain pure, and be free from any outside influence whatsoever, he would not have talked about *any* right to visit. As Sankar Muthu notes, Kant never advocated stopping transnational ties. This is in contrast to Diderot, who proclaimed that Europeans should leave Tahiti alone (Muthu 2000, 33). And

neither did Kant think, as Fernando Vazquez did, that God created people to remain separate and that navigation itself was bad (Tuck 1999, 76). Vazquez would certainly never have talked of cosmopolitan right! We can indeed conceive of peoples who would resent having literally any contact with other people, including the contact it takes for the visitors to make their offer for further dealings. For Kant, this possibility does not negate a world citizen's right to travel the Earth, and to make this initial offer without being treated with hostility. Any right to visit rules out extreme cultural purity. Kant's right to visit does not protect cultures that insist on the right to always live in a completely self-contained bubble for the sake of cultural purity.

If cultures had to be pure in order to have identities, and literally any contact disturbed their purity, then cosmopolitan right would indeed be incompatible with a concern for cultural identity. Still, Kant's presentation of "the right to visit" is compatible with, and even demands, protections for cultural integrity. A culture constituting a society should have some control over the terms of its intercourse with others. Cultural integrity is a different matter than cultural purity. Having literally no contact need not be a requirement of cultural integrity.

While cultural change and mixing has been a constant, distinct cultural traditions exist. Within cultures, members often struggle to deal with change within those traditions. As Samuel Scheffler says, cosmopolitan ideas could "promote sympathy for a certain kind of traditionalist project . . . concerned not with the purity of a cultural tradition but with its integrity" (2001, 128-129). The question is not about cultural purity. Waldron fails to distinguish between proponents of cultural purity and proponents of cultural integrity in Scheffler's sense. Similarly, Will Kymlicka says: "[T]here is no inherent connection between the desire to maintain a distinct societal culture and the desire for cultural isolation" (1995, 103). Kymlicka points out that a desire to try to survive as a "culturally distinct society" is not necessarily a desire for "cultural purity."

Waldron says that, as a factual matter, cultures generally would not be able to maintain splendid isolation, given that cultural interaction is the normal state of affairs in a world full of curious, exploring human beings. Since this is what is normal, Waldron says that the contamination of a culture cannot "reasonably be thought to be at stake" in taking a principled stance against intercultural commerce (2006a, 91-92).<sup>11</sup> Furthermore, he seems to link this position to the "proponent of cultural integrity," failing to clearly distinguish between advocates for cultural purity and cultural integrity.<sup>12</sup> A distinct culture may learn from others. Cultural change can take place through the "impure" means of interacting with other cultures.<sup>13</sup>

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11] Waldron writes that the "inevitability of contact makes it more or less impossible to regard purity, homogeneity, and splendid isolation as the normal condition of culture, and thus makes it impossible to regard the contamination of a culture by external contact as the sort of affront that in itself could reasonably be thought to be at stake in a stance of principled opposition to intercultural commerce" (2006a, 92).

12] Waldron says in this context that "even for the proponent of cultural integrity, isolation would be a lost cause" (2006a, 91).

13] Kymlicka here makes a point that amounts to distinguishing between cultural integrity and cultural purity: "The desire of national minorities to survive as a culturally distinct society is not necessar-

Waldron tries to show how the presuppositions of cosmopolitan right have implications for contemporary issues of identity politics, but Waldron's cosmopolitan right cannot rule out the multiculturalism of Kymlicka, or the sympathy towards the traditionalist project suggested by Scheffler. Perhaps Waldron is right that those who take a principled stand against cultural interaction cannot reasonably see cultural purity as being at stake, given human nature and the circumstances of the world. I am not sure about that, but suppose it is true. It still seems reasonable to take a principled stance that a culture should not have to be subject to unjust terms of cultural interaction. It still seems reasonable to view the character, voluntariness, and extent of cultural interaction as negotiable rather than as determined. While it may not be reasonable to think one can fight off any interaction, it may still be reasonable to think that one's culture should generally not be forcibly "swamped" by the outside world.<sup>14</sup>

The version of the spirit of cosmopolitan right that I offer suggests that there is a normative element behind Kant's insistence about cultures being protected from a non-consensual violation of their integrity, even if not from a violation of their purity.<sup>15</sup> Though Kant's protections may not allow total cultural isolation, Kant accords a right to refuse any engagement with outsiders so long as refusing overtures does not cause the destruction of the outsiders. Respecting a whole people's choices regarding interaction is not the same as valuing freedom from contamination. Valuing protections from violations of integrity does not mean valuing cultural purity. As further evidence of this, Kant required that visitors respect Native peoples' choice of how to live. Additionally, Kant's requirement that visitors obtain the consent of Native peoples is triggered at the point when their collective ways of life are potentially affected. Kant says that peoples may decide to continue their traditional ways of using the land, as long as they stay within their own borders. Kant asks:

Finally, can two neighboring peoples (or families) resist each other in adopting a certain use of land, for example, can a hunting people resist a pasturing people or a farming people, or the latter resist a people that wants to plant orchards, and so forth? Certainly, since as long as they keep within their boundaries the way they want to live on their land is up to their own discretion (*res merae facultatis*). (1996, 417, VI:266 MM §15, emphasis in original)

Kant sometimes gives indications that he believes that existing in a civilized state is superior to a condition of "savage" lawless freedom. Despite this, he seems to endorse let-

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ily a desire for cultural purity, but simply for the right to maintain one's membership in a distinct culture, and to continue developing that culture in the same (impure) way that the members of majority cultures are able to develop theirs. . . . So the unavoidable, and indeed desirable, fact of cultural interchange does not undermine the claim that there are distinct societal cultures" (1995, 105).

14] Kymlicka also says: "It is one thing to learn from the larger world; it is another thing to be swamped by it, and self-government rights may be needed for smaller nations to control the direction and rate of change. . . . We must, therefore, distinguish between the existence of a culture from its 'character' at any given moment. It is right and proper that the character of a culture change as a result of the choices of its members" (1995, 104).

15] For a further exploration of the possible reasons Kant accords this protection, see Waligore 2006. See also Niesen 2007.

ting “savages” choose their own fate based on their own judgments of what is the superior way of life.<sup>16</sup>

Kant condemns involuntary settlement by distant outsiders in the neighborhood of non-sedentary peoples. Settlers need not obtain consent if they are far enough away so as not to encroach on the land of the Native peoples. The requirement of consent, and the potential restriction on outsiders’ freedom, is triggered at precisely the point where Native peoples’ collective ways of life would be threatened:

If the settlement is made so far from where that people resides that there is no encroachment on anyone’s use of his land, the right to settle is not open to doubt. But if these people are shepherds or hunters (like the Hottentots, the Tungusi, or most of the American Indian nations) who depend for their sustenance on great open regions, this settlement may not take place by force but only by contract, and indeed by a contract that does not take advantage of the ignorance of those inhabitants with respect to ceding their lands. (Kant 1996, 490, VI:353 MM §62)

Kant does not say that Native peoples should become farmers and use their land more efficiently. The Native people’s current collective use of the land is the standard for encroachment, and outsiders need to obtain the Native’s informed consent if they wish to settle.

Kant’s protections for Native peoples were more generous than those accorded by Hobbes and Locke. In contrast to Kant, Thomas Hobbes spoke of how colonists could go to “countries not sufficiently inhabited” and “constrain” the Native peoples “to inhabit closer together, and not to range a great deal of ground, to snatch what they find; but to court each little plot with art and labour, to give them their sustenance in due season” (1998, 230, ch. 30). John Locke privileges farming, and denigrates the Native Americans for not improving the land (Locke 1980, 25, §41). Locke speaks of the “waste” lands in America, implying they are open to appropriation by the first person that actually labors on the land (Tully 1993). For Locke, unlike Kant, non-sedentary peoples’ uses of the land do not count.

Going perhaps a bit further than what I said above, cosmopolitan right can, at least in certain circumstances, even authorize cultures to refuse virtually all interaction. Waldron does allow: “Kant does not rule out the possibility of a society sealing itself off against outside contact at least for a time. (He cites the case of China and Japan.)” (2006a, 91-92, underscore added). Waldron’s qualification of “at least for a time” hints at the view that there is a possible point after which it could be wrong for societies to continue to refuse extensive engagement with outsiders.<sup>17</sup> However, Kant does more than “not rule out the possibility...” of future inter-

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16] Sankar Muthu (2000) makes much more out of this than I am prepared to here. Muthu says that Kant’s use of the term “humanity” refers to cultural agency and that Kant’s famous non-paternalism can be applied straightaway to groups (Muthu 2000, 26). I agree that Kant’s texts show that he supported collectivities having discretion, but the texts are not as clear about the basis on which Kant supported such discretion.

17] I disagree with any claim the duty of hospitality includes extensive duties of civic and global engagement. However, I agree with important parts of Waldron’s analysis of Kant’s theory of property. as

action, and Kant does not merely “cite” the examples of China and Japan. Kant affirmatively endorses the actual decisions made by these nations, including a decision by Japan to seal itself off in a virtually complete fashion.<sup>18</sup> Kant writes:

China and Japan (*Nipon*), which had given such guests a try, have therefore wisely [placed restrictions on them], the former allowing them access but not entry, the latter even allowing access to only a single European people, the Dutch, but excluding them, like prisoners, from community with the natives. (1996, 329-330, VIII:359, translator’s insertion in brackets)

The society still should be able to pursue a more isolated path, according to Kant’s principles of cosmopolitan right. Ultimately, Kant allows native peoples to decide when to risk interaction and communication in a world that has shown itself to be dangerous because Europeans have not reciprocated hospitality.

Since Kant says China and Japan acted “wisely,” it is pretty clear that, as a textual matter, Kant finds these actions acceptable and praiseworthy.<sup>19</sup> In response to this, one may object that Kant only praised the wisdom of the Japanese, not their morality.<sup>20</sup> This leads to the positive part of the argument that I mentioned at the beginning of the section. I see it as significant that Kant called the behavior of Japan and Chinese wise rather than merely prudent. This indicates that their avoidance of risky cultural interaction has a basis in the structure of Kant’s doctrine of right. Risk is unavoidable in interacting with others; still, it is reasonable for cultures to make sure they have some safety net before extensive engagement in the cultural marketplace. One can argue against a *laissez-faire* approach to culture, and still be concerned with regulation of the fair terms of interaction, while also agreeing, with Habermas and others, that the cultures cannot be guaranteed survival as if they were endangered species (Habermas 1998, 220). When the conditions of trust are undermined, Kant says this makes peace impossible. The establishment of peace requires an assurance of the secure enjoyment of freedom (Kant 1996, 322, VI:348-349 MM §4). Once peace is established, then people can trade, interact, and dispute with each other in a context in which opposition and differences do not turn violent, and disagreements can be resolved through law. Still, what is to be done when this peace has not been assured, and indeed cultural interaction has historically led to domination and violence? Is there nothing that Kant’s doc-

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outlined in the early part of Kant’s *Rechtslehre* (Waldron 1996b). Property and territorial rights are problematic when one party’s unilateral claim on something puts all others under a potentially burdensome duty to abstain from using that thing without her permission. So I do think that limited duties of hospitality should be met. Specifically, I believe that all titles of ownership to land and jurisdiction should come with two duties of hospitality: sufficiency and non-domination. I discuss this further in chapter 1 of my dissertation (2008).

18] Sankar Muthu has this interpretation of Kant’s view of the actions of the Japanese: “Hence actions that prima facie violate the right to hospitality – in particular, the treatment of foreigners as virtual prisoners – become permissible in light of judgments of historical experience” (2000, 38).

19] In contrast, Adam Smith said that it was unwise for China to isolate itself, as this would hurt China economically, and undermine the conditions for its successful resistance to foreigners (Cavallar 2002, 322-23).

20] I thank Jeremy Waldron for pressing me on this issue.

trine of right can say in absence of assurance, or about what constitutes adequate assurance? Even if Kant does not accord cultures a general right to exist in near-absolute isolation, he still allows for a refusal to risk interaction in cases where the other interlocutor has denied security to the first by showing himself to be untrustworthy or unjust. I devote the next section to arguing for a positive claim regarding the right to communicate with others, and when cultures can refuse certain types of communication and interaction.

### III. CULTURE, RISK, AND PRUDENCE IN NON-IDEAL THEORY

Though Kant says that China and Japan have “wisely” stopped extensive interaction with European visitors, one might object that these actions are not moral. These actions by the leaders of these countries might be seen as problematic because they restrict the right of all individuals to try to communicate with all other individuals. Peter Niesen suggests that one might interpret these actions impinging on an outsider’s ability to communicate with individual members of the Chinese society and Japanese society:

Kant commends China and Japan for their reaction to the evils of colonialism. From this, we cannot infer that he believes their restrictions entirely compatible with hospitality *vis-à-vis* the bearers of subjective cosmopolitan rights . . . In 1757, China had closed all harbours but Canton to international trade . . . Japan had closed the country altogether for foreign travelers in 1635 . . . [China and Japan] clearly prevent[ed] many non-citizens from attempting communication with almost all of their citizens. (2007, 98)

In my view, it would be disastrous to specify the cosmopolitan right to hospitality to include each individual having an unlimited right to communicate with all other individuals simply because they are always already thought to be citizens of the world.<sup>21</sup>

For Kant, the right of hospitality is “the right of foreigner not to be treated with hostility because he has arrived on the land of another” (1996, 328-29, VIII:357-358 PP, underline mine). On one interpretation, what Kant says is compatible with the following view: If the locals have had the experience of inhospitable guests, they may treat them in a hostile manner, not because they arrive in their land, but because they have “given such guests a try” and have found their hospitality abused (Kant, 1996, 329-330, VIII:359 PP). Once the foreigner has undermined the conditions of universal hospitality, the host’s obligation to be hospitable is weakened, perhaps to the point that it effectively does not exist. Kant indicates that the Japanese are merely cautiously and rationally looking out for their welfare. The leaders of Japan are not denying communication with individual Japanese persons based on a whim, but based on wisdom acquired through experience.<sup>22</sup> In contrast, Kant says that

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21] Niesen suggests that Kant’s praise of Japan and China might be explained as allowing for a narrow content-based restriction on commercial speech (2007, 99). Niesen’s own explanation of Kant’s limits on hospitality downplays the right of communication (100).

22] The attempts by the Japanese to pursue their happiness may be worthy of some sort of respect. Compare Waldron’s suggestion that there may be “something in the Kantian pursuit of happiness which is somewhat more rigorous and somewhat more worthy of respect than (say) the mere indulgence of ap-

the European powers make “much ado of their piety and, while they drink wrongfulness like water, want to be known as the elect in orthodoxy” (1996, 330, VIII:359 PP). The commercial European states have demonstrated injustice by abusing the language of morality and committing their acts under the color of law.<sup>23</sup> Japan and China do not act unjustly; at least, they do not act unjustly to any great degree.<sup>24</sup>

Kant’s praise of Japan and China for behaving wisely is not meant to refer to prudence in any pejorative sense, or a sense having no connection whatsoever with morals. It is significant that Kant called their behavior wise rather than merely “prudent.” Political prudence without any basis in a moral end is not wisdom; all its subtilizing is “unwisdom” and veiled injustice (Kant 1996, 350, VIII:385 PP). That Kant said the Japanese and the Chinese acted wisely indicates that he thought their actions were compatible with having as its basis a moral end.<sup>25</sup>

In general, Kant does not condemn prudence, but insists on its proper place. Prudence should not be allowed to pervert the pure standards of right.<sup>26</sup> Kant says that it is permitted for a state to delay the implementation of a local republican constitution, “so long as it runs the risk of being at once devoured by other states; hence, as for that resolution, it must also be permitted to postpone putting it into effect until a more favorable time” (1996, 341, VIII:373 PP). In international right, it can be permissible to postpone putting into effect a federation or world state. In cosmopolitan right, it can be permissible to postpone putting into effect a cosmopolitan community.

At the level of cosmopolitan right, Kant declared: “Cosmopolitan right shall be limited to conditions of universal *hospitality*” (1996, 328, VIII:357 PP, emphasis in original). However, in absence of these conditions, there may not exist an actual right of hospitality that can be violated or infringed. At the very least, the right of hospitality is suspended. However,

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petites or the prudent satisfaction of inclinations.” (2005, 314). Waldron is discussing Kant’s ethics, not his view of right.

23] In the context of discussing the use of religion in justifying terrorism, Pogge says that people who act under the color of morality strike at the very heart of morality; such people are not merely bad but unjust (2008, 12).

24] Compare §42 of the *Rechtslehre*, where Kant speaks of how those who renege on surrender agreements “in general do wrong in the highest degree, because they take away any validity from the concept of right itself and hand everything over to savage violence, as if by law, and so subvert the right of men as such” (1996, 452 VI:308 MM §42).

25] The end to which Kant refers to in this context is the establishment of a federative union of states, which he says is the only rightful condition compatible with the freedom of states. Just before this, Kant said he would pass over cosmopolitan right in silence, because the suspect maxims are analogous to the suspect maxims he examined in international right. So I am not quite sure how to connect the discussion of the Chinese and Japanese (as well as indigenous peoples who may not constitute states) with Kant’s discussion of “unwisdom” here. My point here is to indicate that calling the actions of the Chinese and Japanese “wise” is more significant than just calling them “prudent.”

26] See Appendix I of *Perpetual Peace*. “I can indeed think of a *moral politician*, that is, one who takes the principles of political prudence in such a way that they can coexist with morals, but not of a *political moralist*, who frames a morals to a statesman’s advantage.” (Kant 1996, 340, VIII:372 PP, emphasis in original).

prudence does not justify invoking moral language for merely instrumental purposes. If politicians use moral language for instrumental purposes only, this will ultimately lead to competitive struggle, and undermine the ability of all people to follow morality or right, even if they sincerely want to be upright (Pogge and Busch 2006). The same result may occur, I believe, in cosmopolitan right. Kant says the European powers abuse moral language by claiming the high moral ground while committing great atrocities. Kant says that the Europeans behave inhospitably, and make “much ado of their piety and, while they drink wrongfulness like water, want to be known as the elect in orthodoxy” (1996, 330, VIII:359 PP).

Kant’s approach to prudence, or allowing the suspension of certain principles of right, also appears in his general discussion of property in the section on private right in *The Metaphysics of Morals*. Kant says that individuals do not have an obligation to abstain from encroaching on others’ domains, if another does not give him an assurance he will respect theirs.<sup>27</sup> The obligation dealing with respecting others’ possessions requires universality and reciprocity. What happens where there is not a sufficient assurance others will reciprocally comply? Kant says that reciprocity is part of the rule, and without it there is no obligation. For Kant, in the state of nature, outside of a condition of civil right, there is no such assurance. Non-reciprocity by other parties may justify, or perhaps excuse, conduct that would otherwise be immoral. In a sense, Kant allows “prudence” when reciprocal moral standards are undermined by the immoral acts of others.<sup>28</sup> One of Kant’s main arguments for establishing a state is that only the state can provide a sufficient guarantee that rights will be respected in a local territory. Parties cannot claim they are not obliged to respect others’ rights once the state provides the assurance that their rights will be respected. Even in the state of nature, provisional right or other forms of non-ideal right can still apply.<sup>29</sup> Under provisional right, a party who wants to enter into a civil condition “resists with right” encroachments by parties who do not (Kant 1996, 410, VI:256 MM §9). At the same time, one does not have any obligation (or one has less reason) to sacrifice one’s happiness in order to take direct action on a standard of morality that requires universal reciprocity, when that standard has been publicly violated by others and is thereby undermined (Kant 1996, 409, VI:255-56 MM §8).

This is similar to what Thomas Pogge refers to as the “sucker exemption,” where one’s reason to follow moral norms can be weakened in circumstances where others are not following them (2008, 7). According to Pogge, a previous wrong can weaken one’s reasons for acting morally, especially in a competitive situation where one’s competitors are not abiding by the rules (7). Pogge suggests that the “sucker’s exemption” is most plausible within certain

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27] “I am therefore not under obligation to leave external objects belonging to others untouched unless everyone else provides me assurance that he will behave in accordance with the same principle with regard to what is mine. This assurance does not require a special act to establish a right, but is already contained in the concept of an obligation corresponding to an external right, since the universality, and with it the reciprocity, of obligation arises from a universal rule” (Kant 1996, 409, VI:255-256 MM §8).

28] Kant seems to go further in the so-called “Hobbesian” passages in §42 of the *Rechtslehre*.

29] Indeed, cosmopolitan right has been seen as a non-ideal form of public right, in absence of a global state.

limits: “[T]his idea can indeed be plausible, but only when the victims of an agent’s constraint violations are themselves previous violators of the constraint ... You are not morally permitted to violate your agreements with one person because some other person has violated his agreements with you” (2008, 7-8).

Suppose Pogge’s suggested limit on the “sucker’s exemption” is the correct limit, and one’s reason for acting morally may be weakened only when one’s violation of moral constraints would only wrong parties from whom one had previously been wronged oneself.<sup>30</sup> Suppose it is also correct to say that individual human beings have a right to communicate to each and every individual Native person (cf. Niesen 2007, 99). If both of these suppositions are correct, then only the particular individuals who have previously abused hospitality may be turned away without a hearing. A right of hospitality that includes such an unlimited right of communication would allow different individuals representing the same country (or company) to claim the right of hospitality, even if previous representatives had abused that right.

In contrast, Kant’s writings suggest that he held the more common sense view that Native peoples may permissibly make judgments following their collective experience of oppression by a group of foreigners. Right does not absolutely prohibit them from suspending hearing offers of commerce by individuals from that country. Patterns of abuse may create an exemption from any strictures of hospitality, or make the right of hospitality inapplicable. When representatives of a corporation or nation have left a long trail of abuses, then it is reasonable to suspect that this outside body has designs to subjugate or deprive the Native people.<sup>31</sup> A Native people may then, not unreasonably, see a salient group-based distinction and treat representatives of this corporation or nation differently. Also, group treatment has a basis in cosmopolitan right, to the extent that nations and peoples are “citizens of the world” which accord respect (or not) to individuals and trading companies as extensions of distant peoples or in their capacity as representatives of commercial states.<sup>32</sup>

Past-based injustice can unravel the basis of morality in domestic politics as well. If a powerful group targets another group, then the conditions for trust and secure enjoyment of freedom may cease to hold. These conditions may continue to be absent, even after the powerful group stops actively abusing the other group. Past history may affect the appropriate way to assess what conduct amounts to appropriate assurance. With past

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30] Pogge writes: “But past wrongs may *weaken* such moral reasons, most clearly in cases where P can, through conduct that harms only those who have wrongfully harmed P in the past, recoup some of P’s loss from previous wrongdoing” (2004, 124, italics in original).

31] Compare John Locke’s statement on great revolutions: “But if a long train of abuses, prevarications and artifices, all tending the same way, make the design visible to the people, and they cannot but feel what they lie under, and see whither they are going; it is not to be wondered, that they should then rouse themselves, and endeavour to put the rule into such hands which may secure to them the ends for which government was at first erected” (1980, 113, §225).

32] While Peter Niesen would probably not endorse my claim above, he does provide a useful catalogue of different possible types of citizens of the world (2007, 101; cf. Höffe 2004).

injustice, it may not be enough for the powerful group to change its disposition in a non-public manner; the more powerful group may need to provide some public demonstration of a change in its basic disposition to the other group. When situations of historical injustice make a group salient, it is not unreasonable for these peoples to fear dominance. Indigenous peoples may “reasonably reject” solutions to potential conflicts between groups that involve a coercive state apparatus effectively dominated by their historical oppressors.<sup>33</sup> Past injustice may place peoples into a context where they are dependent on others because of changed facts caused by the historical injustice. Does Kant’s proximity principle really demand that, in all cases, people have a moral obligation to be part of a state, with those with whom they are unavoidably side-by-side? Does the principle demand this even if majority group’s past unjust conduct that made it so the two peoples are now “unavoidably” side-by-side? According to such an interpretation of the proximity principle, the historically oppressed group would then become morally obliged to obey the commands of those who wrongly put them in that dependent condition.

In my view, it is morally problematic for a newly dependent people to be morally obliged to share a state with those who made them dependent. It is not always reasonable to expect peoples to share a unitary state with groups that have historically oppressed them. Instead, the new institutional context might involve shared sovereignty (Tully 2000).

Waldron says that if there is a need for a community to have a single solution to a problem, then this is a reason to have a determinate procedure that results in a univocal pronouncement on what view holds for this community. We can expect there is disagreement among members of the community about which particular solution is best (Waldron 1999b). I would add that just as there can be disagreement about which solution is best, there is and can be disagreement about whether the people in the area constitute a single community. In the realm of right, we may disagree on when we have transferred from a cosmopolitan context to a fully domestic context. That is, there may be disagreement on whether indigenous peoples should be seen as a people, as a sort of separate community, or as simply individual citizens of a unitary state. We may agree (or should agree) that we have an obligation to come to terms with each other in some form, and yet disagree on how to identify when the doctrine of right says we should determine that solution in the context of a fully unitary state. From the perspective of cosmopolitan right, or the entire doctrine of right, there is a real possibility that we have not yet transitioned to a fully domestic context. Right and morality should find it important that groups have reasonable guarantees of their security, so that morality and right are not undermined. Otherwise, it may become reasonable (or not unreasonable) for parties to act in a prudential manner, at least for the time being. I am *not* claiming we affirmatively owe it to all groups and peoples to give them a guarantee of absolute security. I am only suggesting that we have a general

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33] I allude here to Scanlon 1998. See also Barry 1995, esp. 67-72. I also have in mind Barry’s claim about the reasonable acceptability of majoritarian procedures for deciding matters.

obligation to others not to *deny* them reasonable security, at least when we also insist they have certain moral duties.

It might be objected that this analysis seems to apply to all individuals and all groups, whether or not they were historically wronged. In support of this objection, Kant clearly says a party can wrong others simply by being near them in a lawless condition, even before the party commits any active violation.<sup>34</sup> On the other hand, Kant says that all human beings have an original right to be considered beyond reproach since she has “done no wrong to anyone” before she performs any act affecting rights (1996, 393-94, VI:237-238). My resolution to this is the following. In order for one party to be wronged by a second party, through being denied an assurance of peace by that party, the first needs to want to have this assurance. A party cannot consistently invoke the idea of “right” and “wrong” if they do not want a condition of right to come about. Only after one party has called upon a second party for an assurance of peace, and it is not forthcoming, can the former view himself as wronged: “the former, who has called upon the latter for [an assurance of peace] can treat him as an enemy” (Kant 1996, 322, VIII:349 PP). If the first party desires to stay in a condition where disputes are settled by violence, a neighboring second party does not wrong the first party by also wanting to remain in this condition. They in general do wrong by wanting to stay in this condition, but they do not wrong each other, since it is as if they mutually consent (Kant 1996, 452, VI:307-308 MM §42). Further, one has to somehow communicate that one wants this assurance and/or the other has to communicate that they have no intention of giving this assurance.

Generally speaking, it seems plausible that one can call on one’s neighbors for this assurance without harming them. Non-sedentary Native peoples seem to be an exception. Kant’s innate right to freedom says that a human does no wrong to others if her ac-

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34] See also the so-called “Hobbesian” passages in §42 of the *Rechtslehre*: “No one is bound to refrain from encroaching on what another possesses if the other gives him no equal assurance that he will observe the same restraint toward him. No one, therefore, need wait until he has learned by bitter experience of the other’s contrary disposition; for what should bind him to wait till he has suffered a loss before he becomes prudent, when he can quite well perceive within himself the inclination of men generally to lord it over others as their master (not to respect their superiority of the rights of others when they feel superior to them in strength and cunning)? And it is not necessary to wait for actual hostility; one is authorized to use coercion against someone who already, by his nature, threatens him with coercion” (Kant 1996, 452, VI:307 MM §42, underline added). It should be remembered that these passages occur in the context of a discussion of the postulate of public right. This postulate says that you ought to leave the state of nature with all those whom you are unavoidably side by side. Kant says that this postulate proceeds from “private right in the state of nature” (Kant 1996, 451, VI:307 MM §42). I read Kant as saying that the postulate of public right (what Waldron labels the proximity principle) is true on the condition that people have already have rightful possession (at least provisionally) in the state of nature (Kant 1996, 404-406, VI:246 MM §2 in Ak., §6 in Gregor). Kant says people do wrong in the highest degree by wanting to “remain in a condition that is not rightful, that is, in which no one is assured of what is his against violence” (1996, 452, VI:307 MM §42, underline added). If there were no individual possessions, no “mine and thine,” then Kant’s condemnation of the non-civil condition loses force. This seems to help explain why Kant does not insist that non-sedentary peoples, who do not recognize individual property rights in land at least, are not obliged to leave the state of nature.

tion in itself does not diminish what is theirs, so long as they do not consent (1996, 294, VI:238 MM). Non-sedentary peoples form a society that, according to Kant, is not in a civil condition. Moreover, they are apparently not required to enter into a civil condition. We can see them as being ruled by customary law. So long as there are no property disputes, there is no obligation to leave the state of nature and form a civil condition. However, if one visiting “communicator” from the outside is permitted to claim property rights on his own initiative, he can thereby forward a dynamic leading to the creation of a civil state (Niesen 2007, 95). Once someone claims property rights, it seems the outsider could claim we need a state to resolve disputes over property. According to the proximity principle, it seems that he may force others to leave the state of nature.

To the extent Kant addresses this danger, his response is limited to keeping some distances between the groups so that they are neighbors. People that are not proximate cannot invoke the domestic proximity principle, requiring that neighbors leave the state of nature and form a state. I think that this is part of the reason that Kant says in his discussion of cosmopolitan right that any settlement not taking place by contract must be far away from Native lands (1996, 490, VI:353 MM §62). Kant also speaks of how land lying between two groups may be unused, except in the sense that is used by both as neutral ground to keep them apart (1996, 415, VI:265 MM §15). Consent is generally required for distant peoples to become neighbors. We can read Kant as holding that, in effect, it is wrong for outsiders to coercively disrupt the internal dynamics of Native societies. The dynamic of state building should not begin before Native peoples start to claim individual property rights among themselves (Niesen 2007, 95).

In this way, Kant’s cosmopolitan right can be seen as involving principles against undue contextual transformation. If settlers were permitted to trade and settle without the permission of the Native society, then the settlers could begin the process whereby all are required to leave the state of nature. Moreover, the settler who establishes a trading post would have the power to force the Native peoples into a state (Niesen 2007). Through transforming a context, the transgressor would make it unavoidable that we live side-by-side in Kant’s terms. The transgressor would then have the power to coerce the Natives and set up an imperial state. Through the transgressor’s action, the transgressor creates new circumstances of justice whereby the transgressor acquires coercive powers to subordinate the others, and the others acquire moral duties to establish and uphold a coercive state apparatus that the transgressor may rule.

The problem with Kant’s view is that his code of right protects Native societies only so long as they are isolated. As soon as any impure mixing occurs, then Native peoples lose their previous ability to maintain their distance. Kant’s possible barriers against mixing are strong, but brittle. Once actual mixing occurs, Kant seems to offer little protection. Kant does not give due attention to how a successful transgression of cosmopolitan right would result in “unavoidable interaction” on a local level. For Kant, this would lead to a command to leave the state of nature, which the transgressors may enforce. The Native

peoples would then have a moral *duty*, which they may be coerced to fulfill, to become subordinate to the burgeoning settler state.

Unlike Kant, Waldron does attempt to give an answer to what should happen after the principles of cosmopolitan right have been violated. Waldron says that even if the settlements arose through injustice committed by the original settlers, we cannot say their descendents chose to be there, at least after a few generations. They generally have no other home to which to return. We then simply apply Kant's domestic proximity principle (Waldron 2004). And for Waldron, this suggests the Hobbesian (and Kantian) view that a community should have a determinate procedure to reach an authoritative solution (1999b).

Waldron does say that the lessons of cosmopolitan right should show us that there is something inauthentic about identity politics, where culture is something consciously flaunted rather than something we just do. Those who engage in identity politics present non-negotiable demands, saying that to not respect our culture is to not respect us. For Waldron, we should instead see that culture is a set of proposed solutions to common human problems; we have to find a way to regulate our actions through right despite our disagreement (2000b, 241-243; 2002, 219; 1996b, 99-100; 2000a, 168-171). It almost seems as if Waldron uses the category of cosmopolitan right to largely destroy the interesting aspects of cosmopolitan right he identifies. Cosmopolitan right is not doing any special work on intermediate categories such as relations between peoples. The category seems to be invoked simply to justify its irrelevance.

Waldron criticizes identity politics for being inauthentic and reductive. Waldron emphasizes that a culture be seen as giving a set of solutions to common problems (2000b; 2000a). I would add that a societal culture provides an arena in which to work out these problems.

What Waldron labels a "non-negotiable" presentation of identity may involve an assertion that claims should not be worked out in the context of the unitary state model. A stance involving claims based on prior sovereignty may be a legitimate stance for many indigenous peoples. This need not be an impossible demand for isolation or cultural purity or a refusal to share the world on any terms. This could be a demand by a group for its own sphere of jurisdiction so that it can engage in sharing the world on new terms. Dialogue can take place across distinct, but overlapping, public spheres. Negotiation can take place on a nation-to-nation model (Tully 2000).

A more interesting "domestic" adaptation of cosmopolitan right would identify as its subject matter intermediate categories like relations between peoples. I suspect that Waldron has an unfortunate tendency to use the phrase "cosmopolitan right" when he is referring to a broader category like public right or Kant's entire doctrine of right. For example, Waldron says: "[Kant's] own belief in some sort of grand federation of states is thus a thesis *in* cosmopolitan right (as his republicanism is a thesis in constitutional jurisprudence), rather than being, so to speak, the essence of the cosmopolitan" (2000b, 229, emphasis in original). *Pace* Waldron, Kant discusses his thesis of a grand federation

of states as part of *international* right whenever writing about cosmopolitan right.<sup>35</sup> The pacific federation of states is not for Kant a thesis *in* cosmopolitan right, unless Waldron is using the term to identify a different category than the one that Kant meant by it.<sup>36</sup> Waldron's miscategorization obscures the fact that "cosmopolitan right" is itself part of a larger framework of right. Kant suggests that cosmopolitan right is an ideal unwritten moral code supplementing domestic civil right and international right (1996, 330, VIII:360 PP). These must hang together, or the framework will collapse (Kant 1996, 455, VI:311 MM §43).

In revising and updating of Kant for use in contemporary theorizing, we should alter the coercive domestic proximity principle before extending its application to the domain of cosmopolitan right. Kant does not seem to be concerned with how his theory of right might make contextual transformation through wrongs too easy. Transgressors could commit a wrong in one context, quickly turning unjust takings (in the old one context) into just keepings (in the new context). The fact that settlement will unleash a dynamic of detrimental contextual change is a reason for reformulating either the code of cosmopolitan right or domestic civil right. Extending the coercive domestic proximity principle would, in effect, ratify and justify colonialism. Kant's cosmopolitan right should instead be seen as setting guidelines for when it is permissible to engage and disengage in certain types of interaction. Negotiating the terms of interaction from relatively separate places is not in itself against the spirit of cosmopolitan right. Such measured separatism may be allowed and protected, at least for many indigenous peoples.

In sum, the demands of indigenous peoples in contemporary politics, including their demands for the return of land and territorial jurisdiction, cannot be easily dismissed as involving an unreasonable or non-negotiable stance. A non-negotiable stance would be one that refused to share the Earth. Sharing the Earth and a local territory can take many shapes and forms. Which forms of sharing are permissible, and which forms of sharing are required, does not depend only on the present extent of interaction. It also depends on the history of interaction between the different peoples living nearby each other. The spirit of cosmopolitan right, properly reconstructed, permits, and even requires, protections for cultural integrity and recognition of land claims stemming from historic injustice.

The above section shows how an author, Kant, writes on cosmopolitanism in a way that favors indigenous peoples. However, it is not enough to look at Kant's text. I agree with

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35] Waldron is problematically citing Kant's essay, *On the Common Saying: 'This May Be Correct in Theory, but It is of No Use in Practice'*. In that essay, Kant refers to "international right" and "the cosmopolitan level [*kosmopolitischer Rücksicht*]," but does not clearly distinguish between these two; Kant does not mention "cosmopolitan right [*Weltbürgerrecht*]" (1996, 309, VIII:313 TP). The categories of international right and cosmopolitan right are clearly separated only in two of Kant's later publications, *Towards Perpetual Peace* and *The Metaphysics of Morals*.

36] Cf. Kant's *Critique of the Power of Judgment*, where Kant speaks of "a cosmopolitan whole [*Weltbürgerliches Ganze*], i.e., a system of all states that are at risk of detrimentally affecting each other" (2000, 300, V:433 CJ §83, emphasis in original, brackets mine).

Waldron that we should look at the deep structures of Kantian thought. I have tried to do this in the previous section by discussing Kant and prudence. I continue in the next section, where I argue that we ought not write what Kant says about the consent of the Native peoples out of the equation. If we do, we risk committing ourselves to justifying past acts of forced settlement. The principles of cosmopolitan theories are tied to what we think is just. The rest of this article will be devoted to arguing that we must preserve a role for consent, if we want to remember European imperialism as unjust.<sup>37</sup>

#### IV. AN OVER-EXTENSIVE RIGHT TO VISIT AND COMMUNICATE

Kant says that individuals who are side-by-side in a local territory are obliged to leave the state of nature. If they refuse, their neighbors may force them to join a political state. However, Kant's proximity principle only allows coercion for individuals interacting in a local territory. Kant does not clearly allow coercion for this purpose at the level of international right, nor presumably at the level of cosmopolitan right. Kant desires the establishment of a cosmopolitan constitution. It would, however, be a mistake to speak about Kant's cosmopolitan aims in cosmopolitan right, without mentioning how right restricts the pursuit of those aims.

To see why it would be a mistake, I will look at the brief treatment of Kant by contemporary theorist James Tully in *Strange Multiplicity*. James Tully says that "Kant's justification of constitutional imperialism" is similar to John Locke's natural right to punish violators of the law of nature. Tully says of Kant's right of hospitality: "It gives Europeans the right to engage in commerce with Aboriginal peoples and European nations the right to defend their traders if the Aboriginal Peoples are so inhospitable to deny the right" (1995, 81). This could be a description of Francisco de Vitoria's doctrine of hospitality, and other writers' justifications for war in the New World. Tully is wrong to attribute it to Kant. Kant's right to *attempt* commerce is mistaken by Tully as a right *to* commerce. To show that Kant justifies imperialism, Tully gives one extensive quote from Kant:

'In this way distant parts of the worlds can establish with one another peaceful relations that will eventually become matters of public law, and the human race can gradually be brought closer and closer to a cosmopolitan constitution.' (1995, 81, underline mine).<sup>38</sup>

Tully does not mention the immediately preceding sentence in *Perpetual Peace*:

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37] A further problem is that while Kant's text clearly places importance on consent, his motivation is obscure. In fact, it is in tension with his more developed theory of property in the *Rechtslehre*. Indeed, I agree that Kant's analysis leaves open a major question: From where do a Native people (or any people) get the right to claim a large portion of the Earth as their own and thus the right to exclude outsiders? It is highly implausible that peoples can always legitimately claim to occupy a territory, regardless of any costs that it has for others. I have discussed this problem in greater detail elsewhere (2008, chs. 1, 4). Here, I can only briefly say that I think that we can avoid unintuitive consequences if we formulate a theory of property in the correct way.

38] Unlike usual, I am not quoting from Gregor's edition of Kant's works. I repeat here Tully's quote from Humphrey's translation of *Perpetual Peace* (Kant 1983, 118, VI:358 PP).

The inhospitableness of the inhabitants of sea coasts (for example, the Barbary Coast) in robbing ships in adjacent seas or enslaving stranded seafarers, or that of the inhabitants of deserts (the Arabian Bedouins) in regarding approach [*Annäherung*] to nomadic tribes as a right to plunder them, is therefore contrary to natural right; but this right to hospitality — that is, the authorization of a foreign newcomer — does not extend beyond the conditions which make it possible to *seek* commerce with the old inhabitants. In this way . . . (Kant 1996, 329, VIII:358 PP, italics in original, underline mine)<sup>39</sup>

The “in this way” refers to the increase of transnational ties through approaches allowed by the right to hospitality. Transnational ties should not come about through a forceful establishment of trade. A cosmopolitan constitution, which specifies rules governing possible peaceful transnational interaction, should come about by way of attempts to have further, extensive intercourse, where some attempts may rightfully be rebuffed.<sup>40</sup> Cosmopolitan right is not satisfied simply when transnational ties exist. The right to visit does not authorize the creation of denser ties through violations of cosmopolitan right.

In contrast, Vitoria’s doctrine does seem to outline an extensive right of visit, and makes the denial of hospitality a just cause for war. Vitoria says that Europeans “have the right to travel and dwell in those countries, so long as they do no harm to the barbarians and cannot be prevented by them from doing so” (1991, 278, emphasis omitted). The law of nations, according to Vitoria, tells us that there is a duty to treat visitors hospitably and it is inhumane to treat visitors badly without cause. A violation of the lawful rights of Europeans can give the Europeans a right to wage war. Native rulers may not lawfully forbid Europeans from trading with their subjects and from “harmlessly” using natural resources. Vitoria says that if the natives insist on not listening to reason: “It is lawful [for the Europeans] to meet force with force. . . [I]f war is necessary to obtain their rights (*ius suum*), they may lawfully go to war” (1991, 282).

Kant’s right to visit is much less extensive than Vitoria’s right to visit. Achieving a rightful cosmopolitan condition does not justify all means towards a cosmopolitan end. Kant says that even the prospect of the Earth remaining in a lawless condition would not justify violations of cosmopolitan right. Kant asks whether or not forced colonization should be authorized when settlers decide to go into a neighborhood where the local peoples hold out no prospect of civil union:

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39] I am now quoting the Gregor translation. Tully does not quote this passage, but the Humphrey edition used by Tully renders *Annäherung* as “proximity” rather than “approach.” Talking simply of “proximity” might obscure that Kant means to speak of the Arabic Bedouins *coming* near the nomadic tribes, rather than already *being* in near proximity for a long time. Just before this, Kant says: “ships and camels (ships of the desert) make it possible to approach one another . . .” (1996, 329, VIII:358 PP, emphasis in original). Kant is saying that both riders of sea-ships and desert-ships wrongly interpret the right to *come* near people to seek commerce as a right to do violence to them and take what is theirs. Already *being* close neighbors is different than *coming into the neighborhood* of another.

40] This cosmopolitan condition is not necessarily a world-state. Kant is a bit unclear about the possible institutionalization of cosmopolitan right. The cosmopolitan condition, or cosmopolitan constitution, is a rightful condition where there are public laws regulating possible interactions among persons and peoples across the globe. In the contemporary context, we can conceive of “global governance” as consisting of a network of transnational institutions.

[Should we] not be authorized to found colonies by force if need be, in order to establish civil union with them and bring these human beings (savages) into a rightful condition (as with the American Indians, the Hottentots and the inhabitants of New Holland) . . . since nature itself (which abhors a vacuum) seems to demand it, and great expanses of land in other parts of the world, which are now splendidly populated, would have otherwise remained uninhabited by civilized people or indeed, would have remained forever uninhabited, so that the end of creation would have been frustrated? But it is easy to see through this veil of injustice (Jesuitism), which would sanction any means to good ends. Such a way of acquiring land is therefore to be repudiated. (1996, 417-18, VI:266 MM §15)

Cosmopolitan right perhaps shows us that we can hope to have a cosmopolitan constitution regulating possible interactions among persons and peoples across the globe, but cosmopolitan right does so without justifying odious means to that end (Kant 1996, 490, VI:353 MM §62).

Waldron clearly knows and references the portions of the text I have mentioned. I think that the structure of Waldron's mistaken interpretation has affinities with Tully's misinterpretation, but Waldron's is more complex. I believe that Waldron cannot reach his favored conclusions about the presuppositions of cosmopolitan right without also accepting something like the doctrine of hospitality according to Tully or Vitoria.<sup>41</sup> The latter doctrines are too extensive, because they justify unjust actions. While Kant balances encouraging interaction and the right to refuse extensive interaction, Vitoria has an unbalanced notion of hospitality.<sup>42</sup> Vitoria's conception of hospitality puts too much of an emphasis on communication and interaction, at the expense of anti-imperialism and consent. Waldron emphasizes how much Kant favors communication, but Vitoria is the better example of this spirit of communication. Vitoria shows the dangers of such a spirit, if taken too far. If Waldron holds onto his favored presuppositions of cosmopolitan right, he is pushed into accepting something like Vitoria's doctrine, with an extensive right to visit, and all the imperialism it would have justified.

Kant says that the "stain of injustice" cannot be washed away from past European imperialism and other violations of right (1996, 490, VI:353 MM §62). Waldron agrees with this, but argues that we can separate a condemnation of the original event from the question of whether we should try to rectify the event now (1992). My contention is that while we can sometimes separate remembrance and rectification, this response becomes unavailable to Waldron if his analysis directly or indirectly makes it so violations of right would have been justified at the time they were committed.

Waldron's vision of how domestic politics should be conducted relies not so much on the consensual spirit of cosmopolitan right, but on the coercive version of Kant's "prox-

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41] Alternatively, Waldron might need to rely on an outdated teleological doctrine of progress. On this, and further criticisms of Waldron, see Waligore 2005.

42] Some nuances in Vitoria's position may make him a somewhat more sympathetic figure than I have portrayed him here. Vitoria's right to visit is not as extreme as some other authors, but his right to visit is still over-extensive; analyzing his work may serve as a warning to those who would invoke an even more extensive right to communication.

imity principle.<sup>43</sup> The proximity principle, stated generally and potentially applying at all levels of public right, says that those who are unavoidably side-by-side with others ought to leave the state of nature and regulate their interactions according to law (Kant 1996, 451-52, VI:306-307 MM §41-42) The “domestic” version of the proximity principle says that when we unavoidably share a local territory, we have an enforceable obligation to leave the state of nature and establish a civil state (Kant 1996, 456, VI:312 §44). While Kant says that we are authorized to coerce dissenting neighbors who do not wish join a domestic state, the situation is different when we speak of being side-by-side in the sense of merely unavoidably sharing the Earth. Kant does not say we are permitted to use coercion to force others to establish a condition of right at the cosmopolitan level; he takes the opposite view (1996, 490, VI:353 §62).

Despite this difference between the domestic and cosmopolitan level, Waldron argues that cosmopolitan right has important implications for domestic politics. My worry is that Waldron’s spirit of cosmopolitan right cannot be strong enough to support his conclusions about indigenous issues and identity politics at the domestic level, unless the coercive elements of the domestic proximity principle are incorporated back into cosmopolitan right. To avoid justifying past imperialism, we should not adopt a strongly coercive “global” proximity principle justifying the use of force against those who refuse extensive global interaction. Kantians should not interpret cosmopolitan right so as to effectively remove Kant’s strong requirement regarding how visitors must obtain the actual consent of indigenous peoples.<sup>44</sup>

The lesson we should draw from cosmopolitan right is to try to emulate the model of balance and negotiation embodied in Kant’s right of hospitality. Indigenous peoples should be treated as peoples. They are not states, but neither should they be treated merely as undifferentiated individual citizens. Though cultural purity is not possible or desirable, shared sovereignty is a viable option (Tully 2000). A so-called “privileged” or “special” status for indigenous peoples does not reflect a non-negotiable presentation of identity. It is the stance taken when a Native people refuses an offer of extensive commerce by turning away a European visitor. In contrast, Vitoria’s over-extensive right of hospitality meant that *visitors* often presented themselves in a non-negotiable fashion: theirs was an offer that could not be refused.

Cosmopolitan right forbade extensive transnational interaction between peoples in absence of consensual treaties. This spirit of cosmopolitan right can be applied to relations between indigenous peoples and the surrounding settler state. Such a “domestic” adaptation of cosmopolitan right should involve seeing indigenous peoples as peoples, not simply as individuals who share undifferentiated citizenship in a unitary state, which

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43] “Proximity principle” is Waldron’s term. See Waldron 2004, 57.

44] In itself, this does not foreclose the possibility of reading Kant as being committed to condoning imperialism, whatever his official view. What it should foreclose is that possibility combined with a use of such an interpretation to support one’s own work in contemporary normative theory.

has moved beyond its unjust beginnings. The spirit of cosmopolitan right should involve a renewal of a just treaty relationship, not a ratification of the legacy of imperialism. If indigenous peoples are expected to trust the larger polity because the polity supposedly upholds the spirit of cosmopolitan right, indigenous peoples should be assured that the spirit being upheld is not one that would have justified past colonialism.

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