

Kant on Right<sup>1</sup>  
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1. Introduction

As moral beings, we make promises, help those in need, and care for our friends and loved ones. When things go well, we incur such obligations of our own accord, not under duress. But some of the promises we make are ones that we can be *made* to keep; some of the aid we should provide for the needy can actually be taken from us on pain of penalty; and some of the special relationships we form cannot simply be exited at will. These promises are contracts, this assistance is redistributive taxation, and these relationships are families. What is this domain of morality that involves force and is regulated by public institutions of law and state? Is there any principled way to determine which relationships belong to this domain? How could force ever accord with the freedom and equality of all? These are just some of the questions to which Kant's theory of *Recht*—a word that encompasses in translation 'right,' 'law,' and 'justice'—provides illuminating answers.

In what follows, I explain Kant's theory of right as developed in the *Doctrine of Right*, the first part of the *Metaphysics of Morals* (1797). I then address the relation between right and the more familiar principle of Kantian morality, the Categorical Imperative. Were one only to read texts such as the *Groundwork* (1785) or *Critique of Practical Reason* (1788), one might conclude that morality for Kant is fundamentally about individuals reasoning all on their own, regulating their desires and inclinations by acting only on principles that can hold for everyone. The solitary enterprise of moral

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deliberation can be undertaken by anyone, anywhere, at any time, and under any political arrangement, or so Kant's moral theory seems to suggest.

As the structure of the *Metaphysics of Morals* makes abundantly clear, this is not Kant's considered view. The book has two parts: a *Doctrine of Right*, which treats legal and political duties, and a *Doctrine of Virtue*, which treats ethical duties and character formation. In this late text, Kant uses 'moral' as a genus concept which branches into distinct but interlocking ethical and political spheres.<sup>2</sup> Just how deep a transformation of the traditional understanding of Kantian moral agency is reflected by this architectonic structure?

In my view, a very marked transformation indeed. Thought through to its logical conclusion, I contend, Kant's theory of right implies that one cannot get *persons*—that is, the basic units of moral deliberation and accountability—fully into view outside the institutions of the rights-protecting state. It is through such a state that persons draw the boundaries of property (what is *mine*) and body (what is *me*) in a manner consistent with the freedom of all. Since I cannot possibly know how I should treat you without knowing just where, practically speaking, your person begins and mine ends, moral interaction outside of the rightful state—morality in a state of nature, as it were—is precarious at best.

This institutionalist understanding of Kantian moral agency is unorthodox.<sup>3</sup> It goes against the grain of two prominent interpretive tendencies. The first treats Kant's political theory as a direct extension of his ethical theory. It holds that it is only because people often fail to act from their ethical obligations that the Kantian state must force

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<sup>2</sup> E.g., *MM* 6:214 and 6:219.

<sup>3</sup> It has affinities with Pallikkathayil (2010), Pippin (2006), and especially with Herman (2022). [1999; *Dividing and Deriving*, 74]

them to do so: if nobody backed out of their promises, there would be no need for contract law. The second treats Kant's political theory as entirely independent of his ethical theory. It holds that the sole purpose of state is to coordinate the actions of free persons, not to render anyone ethically good: the reason I must keep my contracts has nothing to do with the reason I must respect your equal moral worth.

The first interpretation underplays the conceptual differences between juridical and ethical obligation. For Kant, juridical obligations concern what we can be compelled to do by others; ethical obligations concern what we must compel of ourselves. Moreover, the motive for fulfilling juridical obligations can simply be fear of the law, whereas fulfilling ethical obligations requires registering the equal worth of others.<sup>4</sup> The second interpretation recognizes the distinction between right and ethics, and so is a clear advance over the first. But, in driving a wedge between the two halves of the *Metaphysics of Morals*, it risks obscuring the book's richly textured account of the interplay between the interpersonal and the institutional in a well-lived life.

Taking seriously the book's order of presentation—*first right, then virtue*—suggests a form of Kantianism in which politics is necessary for ethics (not independent of it), and in which our interpersonal moral dealings are saturated with background institutional forms. As such, Kant's mature moral theory points both backward and forward in the history of philosophy: backward to the Aristotelian idea that man is a political animal, and forward to the focus on sociality and intersubjectivity often associated with Hegel and the tradition of German Idealism. Political philosophers of a wide variety of persuasions, not just Kant aficionados, should care about Kant's ambitious attempt to unify our ethical and political lives.

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<sup>4</sup> *MM* 6:218-219; 6:381-383.

## 2.1 What is Right?

Right, Kant teaches, is “the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom.”<sup>5</sup> This terse statement says that what falls under the concept of right is, roughly, *everything* that is required (i.e., ‘the sum of the conditions’) for people to exercise their freedom of choice without infringing on that freedom in others. To illustrate: if I decide to deposit my knife in your back, I have exercised my freedom of choice in a way that is incompatible with yours. This is not right—my action cannot possibly be reconciled with a “universal law of freedom.” So, one of the “conditions” of everyone’s freedom of choice, mine included, are laws against murder and assault.

Clearly, such laws cannot secure freedom if nobody follows them. (In fact, Kant also thinks that such laws fail to secure freedom if people do in fact follow them, but only because of their own individual good-will.) Freedom thus requires the existence of a collective coercive body, i.e., a state, that makes, enforces, and applies the laws, thereby coordinating the interactions of persons. At bottom, Kant’s master thought in the *Doctrine of Right* is that individuals cannot work out the conditions of free choice on an atomistic, interaction-by-interaction basis, but only through joint membership in the state.

Behind the myriad legal and political ‘conditions’ of freedom discussed in the *Doctrine of Right* stands the “Universal Principle of Right,” an abstract rule for classifying actions. It states: “Any action is *right* if it can coexist with everyone’s freedom in accordance with a universal law, or if on its maxim the freedom of choice of

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<sup>5</sup> MM 6:230.

each can coexist with everyone's freedom in accordance with a universal law."<sup>6</sup> This classificatory rule generates an equally abstract injunction, the "Universal Law of Right," which directs us to refrain from any actions not compatible with everyone's freedom of choice.<sup>7</sup> As the argument of the *Doctrine of Right* unfolds, these formal notions acquire more content, and so we gradually get into view Kant's vision of a world marked by genuine freedom of choice.

## 2.2 Choice and External Freedom

In order to apprehend that vision, we must first better understand the conception of choice which underpins it. In this section I address the connection between choice, rights, and what Kant calls 'external freedom.'<sup>8</sup> In the next two sections, I explain Kant's claim that right concerns not the specific choices people make, but "the form in the relation of choice."<sup>9</sup>

I am externally free when I can move about in the world, acting in the service of ends I have set for myself. By contrast, internal freedom is the freedom to rationally reflect on my desires and act only on those that conform to the moral law. Otherwise put, external freedom is the freedom of not being pushed around by other people, and so of shaping my relation to the shared world; internal freedom is the freedom of not being pushed around by one's desires, and so of shaping my inner mental landscape.

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<sup>6</sup> *MM* 6:230. Why does right concern *maxims*, i.e., inner principles or reasons for action? Isn't that the stuff of Kantian ethics? Perhaps because assessing someone's reasons for action is often crucial for figuring out just what it is that they have done: e.g., was it murder or manslaughter? On the role of maxims in the Universal Principle of Right, see Newhouse (2016).

<sup>7</sup> *MM* 6:231.

<sup>8</sup> *MM* 6:214. Alternatively translated: 'outer freedom' (*äußere Freiheit*)

<sup>9</sup> *MM* 6:230.

The Universal Principle of Right governs the realm of external freedom; the Categorical Imperative governs the realm of internal freedom.

Two aspects of external freedom are crucial for everything that follows. First, external freedom is a normative notion. That is, it does not refer to the mere fact that people set ends for themselves, but rather to their *entitlement* to do so. Kant makes this point by stressing that external freedom is the product of laws or rules by means of which rational beings self-consciously guide their action and conduct.<sup>10</sup> Second, external freedom is a *relational* concept concerning how one person may treat another. I am externally free just insofar as other people do not stand in the way of my power to choose.

In my view, if external freedom is not understood in normative and relational terms, the project of the *Doctrine of Right* falls apart. Since this point is controversial, let me explain it further. According to an opposed line of interpretation, external freedom is not a normative concept, but refers instead to each person's *factual* ability to set and pursue their own ends. On this interpretation, rights protect people's external freedom and in so doing promote their agency.<sup>11</sup>

But if this is what external freedom is and why it matters, then a giant boulder that rolls down from the mountain and blocks my path would be just as much a hindrance to my external freedom as a person who stands menacingly in my way. (In fact, the rock might pose even more of a threat, since I can at least try to persuade the person to stand down.) In that case, it would be profoundly mysterious why Kant insists that the *only* purpose of the freedom-protecting state is to secure people's rights.

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<sup>10</sup> *MM* 6:214.

<sup>11</sup> This is a heavily-simplified version of a view developed with much greater sophistication in Ebels-Duggan (2009), (2012); Pallikkathayil (2010); and Hodgson (2010).

Engaging in massive boulder-clearing projects (metaphorically speaking) should be just as important. More problematically still, if the purpose of rights is simply to promote or protect agency, then rights should be infringed whenever doing so better realizes that aim. Perhaps there would be more (or better) agency in the world if the intelligent were allowed to control the stupid. But the idea that rights can be infringed whenever doing so realizes important ends, including the end of promoting agency, is not, to put it mildly, a recognizably *Kantian* view.

Combining the points about normativity and relationality, I suggest that external freedom should be understood in jurisdictional terms. That is, I am externally free just insofar as I am *in charge of myself*, where this means: where nobody else is entitled to choose for me.<sup>12</sup> The point of rights is not to promote agency, but to ensure that no one has illegitimate authority over anyone else. Rights enable persons to be “independent” of the wills of others, each “his own master (*sui iuris*),” and so not subordinated to another.<sup>13</sup>

Add the essential interconnection of right and coercion developed early in the *Doctrine of Right*—“right and authorization to use coercion...mean one and the same thing”<sup>14</sup>—and one arrives at the basic aim of Kant’s theory of right: to provide a principled account of the forms of coercion necessary for people to be in charge of themselves. Rights create boundaries think: (‘stand back’; or, ‘that’s mine!’) that demarcate each person as distinct. In relations of right we stand to one another as “one among others equally real,” to borrow Thomas Nagel’s evocative phrase.<sup>15</sup>

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<sup>12</sup> I borrow the phrase ‘in charge of’ from Ripstein (2016).

<sup>13</sup> *MM* 6:237-238. See also *MM* 6:282.

<sup>14</sup> *MM* 6:232.

<sup>15</sup> Nagel (1970), 14.

In sum, external freedom is realized in a condition of equal jurisdiction: everyone exercising their rightful authority to choose for themselves without being bossed around by another.<sup>16</sup>

### 2.3 “The Form in the Relation of Choice”

Suppose I am right that external freedom is equal jurisdiction. We might then wonder, can external freedom ever be realized, or is it simply a utopian ideal? After all, it seems as if *everything* I choose to do restricts what others can choose to do, thereby challenging their authority over themselves. I stop to smell the roses, and in so doing, limit your options: you must now wait or walk around me. Have I thereby overstepped my bounds and so violated your rights? To see why Kant is not saddled with this ridiculous view, we must more clearly distinguish the particular choices we make from our *capacity* to choose. The purpose of rights, Kant says, is to preserve “the form in the relation of choice” between interacting persons.<sup>17</sup> In this section I explain this difficult idea.

Let me get at the topic another way. Here you and I stand, two embodied rational beings, each able to act and in so doing limit or circumscribe the actions of the other. Of the myriad interactional possibilities at stake between us, which pertain to the “form” in the relation of our choices?

We can look to Kant’s definition of right for help:

The concept of right, insofar as it is related to an obligation corresponding to it (i.e., the moral concept of right), has to do, *first* only with the external and indeed practical relation of one person to another, insofar as their actions, as deeds, can have (direct or indirect) influence on each other. But, *second*, it does not signify the relation of one’s choice to the mere wish

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<sup>16</sup> See also Flikschuh (2021); Zylberman (2016); and Ripstein (2017).

<sup>17</sup> *MM* 6:230.

(hence also to the mere need) of the other, as in actions of beneficence or callousness, but only a relation to the other's *choice*. *Third*, in this reciprocal relation of choice no account at all is taken of the *matter* of choice, that is, of the end each has in mind with the object he wants; it is not asked, for example, whether someone who buys goods from me for his own commercial use will gain by the transaction or not. All that is in question is the *form* in the relation of choice on the part of both, insofar as choice is regarded merely as *free*, and whether the action of one can be united with the freedom of the other in accordance with a universal law.<sup>18</sup>

This dense passage delimits the domain of right in terms of three essential features.

Following Kant's own language, let us call them: externality, the exclusion of need, and formality. Actually, a fourth feature, though largely implicit, is necessary to a proper grasp of the other three. Call it: correlativity. In my view, each of these four features can only be fully understood in its relation to the others. (Spelling out this out would require another paper.) At the very least, we cannot understand right's formality without at least some appreciation of the other three features.

*Right is correlative*, i.e., "related to an obligation corresponding to it." This means that, in our universe of two, my right allows me to place you under a duty.<sup>19</sup> So, for example, to have a right to my body means that I can obligate you to keep away. (Since rights are connected to coercion, I can push you off if you get too close.)

*Right is external*, i.e., it governs the way our "actions...can have (direct or indirect) influence on each other." This means that rights-claims take hold between us only insofar as we each *do* things that have tangible, physical manifestations in the world. What matters for rights are the effects of what one person does to another, not anything that pertains to only one of the relata, such as one person's reasons, motivations, thoughts, beliefs, or wishes. (This follows from correlativity.) One practical

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<sup>18</sup> *MM* 6:230 (emphases in original).

<sup>19</sup> Rights are "(moral) capacities for putting others under obligations" (*MM* 6:237).

implication of the externality of right is that I could not have a right that you refrain from entertaining malicious thoughts about me—to hold that one person’s beliefs can violate another person’s rights is, on the Kantian framework, a category mistake—though I may have a right that you not publish your slanderous lies. [contra to contemporary doxa...]

We have now learned that the realm of right is populated only with actions and their effects on other people, not with agents’ inner states. But which actions and which effects? Do I violate your rights by refusing to do you a good turn or providing you with what you want or need?

No, says Kant. *Right excludes needs*: “relations of right do not signify the relation of one’s choice to the mere wish (hence also to the mere need) of the other, as in actions of beneficence or callousness, but only a relation to the other’s *choice*.” In other words, when it’s just you and me here, your needs are, for me, nothing other than mere wishes. Kant’s exclusion of need might seem callous. (Doesn’t my extreme hunger give me a right to take your extra bread?<sup>20</sup>) As we will see, this callousness is eventually softened when Kant turns from the relation between me and you to the relation between citizens and state. But Kant’s basic point about needs both follows from the correlativity condition (and so is internally justified), and is independently plausible.

The exclusion of need follows from the correlativity condition because needs and wishes once again concern one of the relata and not the relationship itself. My needs and wishes indicate a lack or deprivation in me, not anything you did to me. (On the other hand, if the reason I need something is that *you* stole it from *me*, then we are

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<sup>20</sup> According to one commentator, Kant’s understanding of right “seems to sanction hoarding, protect the assets of the already rich and powerful, and generally sustain the status quo.” See Uleman (2004): 590.

within the relational apparatus of right.) The exclusion of need is independently plausible because it is simply Kant's way of expressing the familiar juridical thought that just because I need something does not necessarily give me the authority to take it from you. (Maybe what I should do is take it up with the government instead.) You might be a horrible person for failing to assist me, but surely not all of your moral failings rise to the level of rights-violations.<sup>21</sup>

We've now added to our knowledge of right: of all possible actions and effects, right does not concern what each of us would like to have happen or for the other to do for us, but only what we are entitled demand of them. But everything now hangs on what precisely it is that we can demand of one another. The formality condition answers this question.

*Right is formal*, i.e., "all that is in question is the form in the relation of choice on the part of both." Philosophers usually draw attention to form in order to contrast it with matter. Kant is no exception. The passage quoted above speaks of "the *matter* of choice, that is, of the end each has in mind with the object he wants." In other words, the matter of choice refers to what it is we are trying to bring about: the objects of our wants and needs. By contrast, the 'form' of choice is that which all acts of choice have in common. (Just as the form of a house is what is shared by Modern Tudors and thatched huts alike.) What makes getting some strawberry ice cream from the freezer, consoling one's child, and working to bring about the kingdom of heaven on earth all

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<sup>21</sup> This is essentially the lesson behind Judith Jarvis Thomson's famous thought experiment. You wake up one morning to find yourself hooked up to an unconscious violinist who now depends on your kidneys for his life. Can you be forced to remain in the hospital bed? Thomson concludes no: "The fact that for continued life [the] violinist needs the continued use of your kidneys does not establish that he has a right to be given the continued use of your kidneys. He certainly has no right against you that *you* should give him the continued use of your kidneys" (1971, 55). Thomson's italicized 'you' captures the relational form of Kantian right.

manifestations of a single power of human agency? It cannot be the ends one is trying to achieve, since these differ so widely, but must rather be located in the capacity itself. To understand the *form* of choice thus requires understanding the nature of the human capacity to choose. Think then of the *matter* of choice as what is chosen and of the *form* of choice as the power to choose anything at all.<sup>22</sup>

In sum, the formality condition enjoins us to forbear from choosing in any way that makes it impossible for another to exercise their capacity to choose. For illustration, consider the relation between master and slave. The master doesn't just frustrate the particular choices the slave makes; he arrogates to himself the authority to decide how and when the slave chooses anything at all.

Right obviously prohibits slavery, but what else? To answer this question, we must further reflect on the formal elements of choice.

#### 2.4 'Mine and Yours'

In the Introduction to the *Metaphysics of Morals*, Kant defines choice as "the faculty of desire in accordance with concepts... insofar as it is joined with one's consciousness of the ability to bring about its object by one's action."<sup>23</sup> I take Kant to mean that choosing something involves actually undertaking to do it. In other words, choice should not be understood as a purely psychological act of inner volition, but rather as the first moment in action. Choice initiates a process of self-conscious movement guided by reasons. On Kant's philosophical framework, my choice to get ice cream is displayed in and through my walk to the freezer.<sup>24</sup>

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<sup>22</sup> See also the helpful discussion of formality in Stone (2017, 1-11).

<sup>23</sup> *MM* 6:213.

<sup>24</sup> I have benefitted here from Herman (2007) and Engstrom (2010).

Given then that choice is about what the agent actually does, not about what she merely thinks about doing, it involves knowing what is genuinely within one's power to do. Kant contrasts choice with mere wish, which does not involve the thought of what I can do or achieve given the nature and scope of my powers and the means at my disposal.<sup>25</sup> I can wish to fly, but I cannot choose to fly.<sup>26</sup> Knowing what I can do involves knowing both my abilities and knowing what is mine to use, i.e., my means. In short, for Kant the capacity to choose is the capacity to deploy one's powers and one's means in the service of one's ends. Understood formally, choice is: persons using their powers and their means for their purposes.

We can now better understand the formality condition on right. As I argued above, in being directed to act towards others only in ways that preserve the "form in the relation of choice," I am not being asked to further anyone's ends, but only to forbear from damaging or controlling others' capacity to set ends at all. Since, as we've just seen, the capacity to choose involves using one's powers and one's things for one's purposes, right says: let everyone use themselves and their things for their own purposes.<sup>27</sup> Or, said even more simply: hands off me and my stuff.

That there is a distinction between limiting my choices and interfering with my capacity to choose seems fairly obvious. One can proliferate illustrative examples.<sup>28</sup>

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<sup>25</sup> *MM* 6:213.

<sup>26</sup> Can't I choose to do something without having any further thoughts about whether or not I can actually achieve my end? Can't I *choose* (rather than merely wish) to escape the room in which you've imprisoned me? In some sense yes, but to see whether my motivational state counts as one of choice in the Kantian sense one would need to see what else I do. Do I kick at the door and scream for help, or meditate peacefully in the corner? From the fact that people sometimes choose to do that which they are in fact incapable of doing, one should not conclude that choice is a purely inner state of mind only contingently connected to action.

<sup>27</sup> For development, see Ripstein (2009, ch.2).

<sup>28</sup> For an account of how this distinction explains the law of torts, see Ripstein (2016).

Consider: you buy the last sweater at the mall, versus you lock me in your basement. In the first case you've just limited my choices and perhaps frustrated my wishes and needs. (No issue of right here, Kant says, because right excludes needs.) Whereas in the second case you've done something very different: you've arrogated to yourself what is in fact *my* authority to set my own ends by using what is most paradigmatically mine: my body. False imprisonment, like battery, is clearly incompatible with preservation of the "form in the relation of choice."

What underpins all such examples is a distinction between failing to provide me with a world favorable to my desires, and interfering with what is already *mine*.<sup>29</sup> Thus, in order to figure out which of our interactions count as interfering with the form of another person's choice, and so as violating their rights, we need to know what's mine and what's yours. (In the abstract, the injunction not to interfere with what's not yours offers me little in the way of practical guidance.) Accordingly, one of the central tasks of the *Doctrine of Right* is to explain how persons can draw the boundary between *mine* and *yours* in a way that respects each person's independence.<sup>30</sup> Kant's account of how this can be done depends on a central distinction between what he calls the domain of "private right"—which covers the topic of what can so much as be mine (think: body and property)—and "public right"—which covers the topic of the conditions necessary for me to make things mine consistent with the freedom of others (think: the state). So, it is to state that we must now turn.

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<sup>29</sup> Kant states the essentially negative character of his conception of rights more clearly in his lectures on the *Metaphysics of Morals*: "All juridical laws pertain to rights of coercion, and are utterly negative, insofar, that is, as they are considered solely with respect to the form of freedom. For they amount to this, that they carry with them no benefit (and hence no end or matter), but *merely present a theft of what is mine*, whether it be a physical object or my right" (emphasis mine) (LE 27:526.)

<sup>30</sup> E.g., MM 6:245.

Before proceeding, I want to register just how noteworthy it is that an abstract inquiry into the nature of choice must take this decidedly political direction. I have suggested that, on Kant's conception of choice, choosing to do something involves knowing what is mine to use. But if I can't know what exactly is mine to use outside the institutions of the state, then the surprising conclusion, one drawn by remarkably few commentators, is that for Kant "the state is a necessary condition of rational action."<sup>31</sup>

This conclusion, if true, supports my earlier remarks on the unity of the *Metaphysics of Morals*. Rational action is central to moral agency per se, not just to its specifically political manifestations. For example, I can't satisfy my ethical duty of beneficence by warm feelings alone; I am required to actually do things for others. So, if rational action depends on the state, and *all* morality requires rational action, then I can only properly fulfill my ethical obligations against the background of the right institutional forms. Something is morally awry if I know I should assist you, but don't know exactly what is mine to give. Beneficence thus requires institutions of property to adjudicate what belongs to whom.<sup>32</sup> The *Metaphysics of Morals'* order of presentation—first right, then virtue—makes good sense.

### 3.1 Natural Rights and the State

Unfortunately, Kant's account of how relations of right are realized in law and state is labyrinthian in complexity. The *Doctrine of Right* deploys a sequential form of argument in which specific rights are introduced—e.g., to body and property—only to be shown to depend for their genuine exercise on later stages of the argument—e.g., the

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<sup>31</sup> Herman (2008, 347).

<sup>32</sup> I draw here on Herman (2012).

state and its powers.<sup>33</sup> This means that one cannot fully understand Kant's starting point (right as equal jurisdiction) until one arrives at the book's end.<sup>34</sup>

As if this developmental structure weren't complicated enough, Kant presents his argument in a highly idiosyncratic language, one that borrows from Euclidean geometry (e.g., 'postulates' and 'deductions'), Kant's own philosophy of transcendental idealism (e.g., 'noumenal' versus 'phenomenal' possession), early Modern political theory (e.g., the 'state of nature'), and Roman law (e.g., 'rights *in rem*' versus 'rights *in personam*'). These frameworks are often simultaneously deployed, as when Kant purports to deduce from reason alone that there are only three possible domains of natural right—property, contract, and family—and then aligns this deduction with the fundamental categories of substance, causality, and community developed in the *Critique of Pure Reason*.<sup>35</sup>

Many (myself included) find deciphering all this endlessly fascinating and philosophically fruitful. But here I set myself a different hermeneutic task. My goal is to explain Kant's views on rights and the state with only minimal reliance on his tortured idiom. To do so, I first address why Kant thinks we have natural rights, before turning to his account of why the proper exercise of those rights requires the state.

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<sup>33</sup> In fact, the sequence continues beyond the state to relations of cosmopolitan right: "a peaceful, even if not friendly, thoroughgoing community of all nations on earth" (MM 6:353). If the book's sequential structure is taken seriously, Kant's view is that securing even the basic rights of the individuals requires global cooperation. (This seems plausible. If a multinational corporation can enter my country, buy up all the local businesses, and force me to work in conditions resembling modern slavery, is my right to my person really secure?) Flikschuh (2000), (2017); Ellis (2005); and Messina (2019) are all instructive on the global dimensions of Kant's political philosophy.

<sup>34</sup> This point is underappreciated in the secondary literature, although it is touched on by Ripstein (2009, 6-7) and Weinrib (2003, 801-810).

<sup>35</sup> MM 6:247-248.

To answer the first question, we must return once again to the nature of choice. Consider a successful exercise of the power of choice: achieving an end one has set for oneself. How do human beings do this? In essence, by moving their bodies in transaction with the world of things. For embodied rational animals like us, agency does not occur in a vacuum chamber. Right now, I am pressing my fingers on a keyboard. When I tire, I will eat dinner and then lie down in a bed. Even standing quietly doing nothing at all is, as Kant reminds us, standing *somewhere*.<sup>36</sup> Purposive agency is, everywhere, thing-use.

The body is the most basic means or equipment of action: I use my hands to type. But movement of my body is already transaction with the material world: the wiggles of my fingers only count as ‘typing’ because they make contact with a keyboard. And transaction with the material world already has consequences for others: not only do I write this for an audience, but in so doing I must not use the thoughts and words of others without proper attribution. Generalizing from this quotidian bit of academic life, reflection on the nature of choice reveals a division of the practical landscape into body, possession, and public world.<sup>37</sup> Consequently, if our collective task as free beings is to make the world a home for the exercise of choice on terms of independence, we must have rules for the protection of body and person as well as for the acquisition and control of things.

We can determine which rights we have just by reflecting on the nature of embodied human agency. So these rights are natural rights, meaning that they are not created by positive law. This point carries several crucial implications. For one, unlike,

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<sup>36</sup> *MM* 6:262.

<sup>37</sup> This approximates Kant’s distinction between “innate,” “acquired,” and “public” right.

say, rules of the road, the reason one must respect the body and things of others is not simply that the law says so. To put the point slightly differently, it is not *because* we are citizens of a particular state that we have rights to the discretionary use of ourselves and the resources of the earth, but because we are embodied choosers. Second, these rights, *qua* natural, set the standard of legitimacy for legal orders: any system of law that does not afford its subjects protection of body and property is no legal order at all, simply organized violence.<sup>38</sup>

Reflection on the nature of choice also tells us something about the content of our natural rights. Let me explain this point with reference property rights, vindication of which lies at the core of the *Doctrine of Right*.<sup>39</sup> Recall once again the point about formality stressed in section 2.3: people do not violate others' rights by frustrating their ends or thwarting their desires, only by interfering with their capacity to choose. From this it follows that property rights, should there be such a thing, are not restricted by people's needs. Unlike Locke, Kant does not conceive of property as what falls to the individual from the common bounty of the earth just as long as they leave "enough and as good for others."<sup>40</sup> Rather, on Kant's account I have a property right in a thing when I am authorized to have it under my exclusive control, no matter how badly others may need it. Property rights entitle owners to nothing less than full dominion.

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<sup>38</sup> *MM* 6:229: rights provide "the immutable principles for any giving of positive law."

<sup>39</sup> Technically, for Kant a right to 'property' (*Eigentum*) depends on the state (*MM* 6:270). Thought in abstraction from the state, all individuals have is a "right to a thing" (*Sachenrecht*) (*MM* 6:260). I refer to both elements as 'property' here simply for ease of exposition.

<sup>40</sup> Locke (1689, §27, §33). Kant sometimes speaks of the 'common possession' of the earth (e.g., *MM* 6:258, 6:261-6262). This might seem to suggest the Lockean view that the earth, and thus property in land, is there to meet everyone's needs. But in fact, Kant is claiming that the world is there to be occupied by individuals and parceled out through their acquisitive acts: land is fit for private property. See Weinrib (2003, 821-828) and Ripstein (2009, 373).

Let us grant Kant's intricate argument for the claim that dominion does not in fact violate the rights of others.<sup>41</sup> What is important for my purposes here are not the details of the argument but its upshot. For Kant, nothing about the state or law plays a role in determining what property rights are: full dominion. But this result still leaves open the question of how a person can make some particular thing their own consistent with the freedom of everyone else. By what authority can I declare *this* plot of land mine, thereby setting it off-limits to you? Doesn't this amount to a kind of subordination of your will to mine? Kant's answer is that, in fact, I cannot do this all on my own consistent with equal freedom. I can only put others under an obligation to respect this particular thing as mine if I draw on an authority that is shared between us. The state provides this shared authority.<sup>42</sup>

The idea that I can 'have' natural rights without being able to exercise them is, undoubtedly, obscure. Matters are not cleared up by Kant's statement that "in a state of nature something external can actually be mine or yours but only *provisionally*."<sup>43</sup> In the next section, I endeavor to shed further light.

### 3.2 Provisional Right

I have elsewhere explained the concept of provisional right with close reference to Kant's texts.<sup>44</sup> Here, I instead illustrate the concept by means of an extended example.

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<sup>41</sup> The argument is contained in Kant's discussion of the "Postulate of Practical Reason with Regard to Rights" (*MM* 6:246).

<sup>42</sup> E.g., *MM* 6:256. Why a state, as opposed to informal social conventions? For a critique of Kant on this score, see Christmas (2021).

<sup>43</sup> *MM* 6:256 (emphasis in original); see also *MM* 6:264.

<sup>44</sup> Hasan (2018a) and Stone and Hasan (2022).

Imagine for the sake of argument that denizens of a pre-political state of nature have a right to means of transportation. The justification of such a right might go something like this: the terrain is simply too expansive and hilly to be traversed by foot, so without transportation it will be impossible for people to live a recognizably human life. A world without transportation will be riven by social hierarchy. Those with stronger legs will move freely and so better meet their needs, while those with weaker legs will be more or less stuck in place. Such hierarchies threaten persons' entitlement to be independent from the wills of others. Now, imagine further that given the specific organization and vulnerabilities of human bodies (e.g., two legs, opposable thumbs, susceptibility to injury at high speeds), bicycles turn out to be the mode of transportation best suited to our needs.

On my understanding of Kant's theory of right, considerations such as these support the claim that people have a right to bicycles. Let me be clear about what I mean. The justification is not exactly that needs per se generate rights—recall: right excludes needs—but rather that unmet needs threaten to generate relations of dependence. Rights prevent or reverse such relations. But, to apply the point about acquisition I made above to the case at hand, Kant also thinks that individuals acting all on their own lack the rightful authority to produce the aluminum and harvest the rubber necessary to manufacture bicycles. Thus, denizens of the state of nature seem to be stuck in an intolerable contradiction: they have a right to bicycles but no way to exercise it. Thankfully, there is a means of resolution: collectively unite and build a bicycle factory.

Before the factory is built, what is the status of people's right to bicycles? Kant's thought, I take it, is that people *have* the right, but cannot yet exercise it consistent with

the freedom of all. Since rights generate duties (recall: correlativity), people in the state of nature stand under a collective duty to build the factory. Notice that people aren't asking the factory to *create* a right to bicycles. The people already have such a right, which is precisely what generates their duty to set up the factory. But they also aren't asking the factory to *protect* their right. Their demand is not for the state to institute a system of public locks for their already-existing bicycles; their demand is for the factory to create bicycles in the first place. What the people are asking is for the factory to *recognize* their right, to make it real. Before the factory exists, they 'have the right but only provisionally.'

If this example strikes you as baroque, consider that a similar conceptual logic underlies the rights claims made by aggrieved citizens in the contemporary world. When, in the rough and tumble of political life, citizens declare, 'children have a right to education!', what they mean is that society must create institutions that can make such a right effective. Existing social arrangements must be reformed so that children can exercise the rights they have. Far from being hopelessly obscure, the idea of provisional right elucidates the logic of rights-claims.<sup>45</sup>

To return to Kant's more immediate concerns, when he argues that people have property rights 'in the state of nature but only provisionally,' what he means is that they stand under a duty to create the institutions under which everyone can be property owners consistent with the freedom of others.

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<sup>45</sup> I am indebted here to conversations with Martin Stone, and to Korsgaard (2018).

### 3.3 The Politics of Kantian Right

I have now explained why Kant thinks we have natural rights. In short, because they are necessary for the expression of embodied human agency on terms of freedom. I have also shown why such rights are defective or provisional outside of the state. In short, because there is no way to claim one's rights all on one's own, consistent with the freedom of others. But this still leaves unresolved the scope and extent of the state's powers. Should the Kantian state simply protect people's property? Or should it intervene in existing property distributions in order to ensure the freedom and equality of all citizens? On the first interpretation, Kant is a precursor to modern libertarianism; on the second, Kant is a precursor to modern egalitarianism.<sup>46</sup> What is the *politics* of Kant's theory of right?

Both the libertarian and egalitarian interpretations face textual difficulties. The libertarian interpretation has trouble with the details of Kant's account of the state, which includes many important social welfare functions, such as a public duty of poverty relief. The egalitarian interpretation has trouble with the explicit structure of the book, which grounds state authority in the protection of property rights, not in the pursuit of social equality or distributive justice. The first interpretation offers an unattractively minimalist understanding of the Kantian state. The second interpretation threatens to make Kant's appeal to natural rights empty, since the content of our putatively 'natural' rights turns out to be entirely at the state's discretion.<sup>47</sup>

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<sup>46</sup> For a libertarian Kant, see Byrd and Hruschka (2012), and Rosen (1993, ch.5) for critique. For an egalitarian Kant, see Ripstein (2009, ch. 9); Holtman (2004); and Varden (2010). In Hasan (2018a) I discuss this interpretive dichotomy at greater length. Each of these political outlooks had analogues in Kant's more immediate intellectual milieu. See Maliks (2018, ch. 2).

<sup>47</sup> Brudner (2011) charges Kant's theory of right with emptiness in this way.

Let me explain my own views on this matter, which come closer to the egalitarian interpretation. To do so, I want to consider a remark Kant makes in the Preface to the *Metaphysics of Morals*. He suggests there that to provide a “doctrine” of some part of the moral terrain is to provide a single principle that connects or unifies what might otherwise look to be disparate duties.<sup>48</sup> A ‘doctrine’ of right thus requires a unitary principle that connects what look to be distinct normative requirements—e.g., respecting property rights versus respecting the civic obligations to pay one’s taxes. As we’ve already seen, that unifying principle is independence from the wills of others—what I have called equal jurisdiction or non-subordination. Every step of Kant’s argument must be connected in some way to non-subordination. Otherwise, Kant has produced no ‘doctrine’ of right, merely scattered reflections.

We’ve seen a bit of how this unifying principle works. To review, rights to person and property are necessary for independence, because without them persons would depend on the wills of others. Such considerations establish a strong presumption in favor of unrestricted property rights. So far, we look to be firmly in the land of the libertarians: independence requires the protection of property.

But this neglects that for Kant the only way we can exercise our natural rights consistent with mutual independence is through the state. In my view, the ideal of mutual independence suggests that this state must be at least somewhat egalitarian in form. If the purpose of the state were simply to protect existing property distributions, it would itself become an agent of domination. It would license a situation in which some people (call them: the poor) become subordinated to the wills of others (call them: the rich). For example, suppose you acquire all the land and so the only way I can

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<sup>48</sup> *MM* 6:207.

survive is to become your serf. Such an arrangement looks to be at odds with equal independence. Thus, the very same principle—freedom as independence—that justifies people’s rights to property and justifies the state, also entitles the state to redistribute property so as to ensure that everyone is independent of the wills of everyone else. What justifies the right to property, justifies its redistribution.<sup>49</sup>

Kant’s remarks on economic justice are particularly elliptical and fragmentary. Other interpretations are surely possible.<sup>50</sup> Whether or not I have captured exactly what Kant has in mind, the connection I see him as drawing between distributive justice and independence is normatively compelling and worthy of serious engagement. As I understand him, Kant is arguing that in making a property claim, I am implicitly committing myself to entering into a state with all other potential claimants. But, in an unexpected twist, Kant shows that what is required to render my claim legitimate is not just any state, but rather one that prevents extreme concentrations of wealth that make it impossible for people to live on terms of independence. Since independence was the value that justified my entitlement to acquire in the first place, I am led, by the inner logic of my own acquisitive claim, to accept the legitimacy of the welfare state.<sup>51</sup>

This view of the state and its powers does not fully capture all that many left-leaning people think the state should do. As I interpret Kant, he holds that the state should intervene in property distributions only when the result of non-intervention is the subordination of persons to one another. One might find this still too minimalist, as

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<sup>49</sup> How exactly do inequalities of property violate Kantian independence? I address this question in Hasan (2018b). For doubts that Kantian independence supports property redistribution, see Davies (2020); for doubts that it supports private property in the first place, see Julius (2017).

<sup>50</sup> See Holtman (2018) for a useful overview.

<sup>51</sup> This paragraph draws on both Flikschuh (2017, ch. 2) and Guyer (2000).

it seems to neglect other justice considerations—for example, about fairness in the distribution of benefits and burdens—that cannot plausibly be construed as questions about freedom and subordination.<sup>52</sup>

Perhaps, however, it is precisely because Kant’s vision of economic justice is limited in scope that it can usefully inform contemporary discourse. Many citizens in America and other Western nations are not particularly moved by considerations of social cooperation and fairness, but they do care deeply about their own freedom. If some measure of economic redistribution can be derived from a more individualistic starting point, this is a result of public relevance.<sup>53</sup>

#### 4. The Relation Between Right and Ethics

Let me now return to the question of how Kant’s theory of right relates to the Categorical Imperative as the “supreme principle of morality.”<sup>54</sup> As I mentioned above, the *Metaphysics of Morals* is divided into two branches: the collective regulation of actions through coercive law, i.e., right, and the inner self-regulation of principles, i.e., ethics. But what exactly is the genus concept, *morality*, such that it covers these disparate domains?

Commentators on Kant’s practical philosophy have long-struggled with this important question.<sup>55</sup> Some think that unless there is a way of deriving the Universal Principle of Right from the Categorical Imperative—and so of showing how moral

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<sup>52</sup> One way to put the point is by comparing Kant and Rawls. For Rawls, the aim of justice is to secure social cooperation on terms of equality (e.g., 2001). Whereas for Kant, the aim of justice is to secure the independence of persons. Cf. Ripstein (2006) and Darwall (2013), both of whom downplay the differences between the two thinkers.

<sup>53</sup> I pursue this topic further in *Can Kant Solve the Poverty Problem?*, a manuscript in progress.

<sup>54</sup> *G* 4:409; *MM* 6:226.

<sup>55</sup> For helpful guides through the debate, see Ebels-Duggan (2012) and Pippin (2006, 421-428).

autonomy requires that certain obligations be legally enforced—Kant’s entire edifice stands unsupported. Other commentators deny this and hold that ethics and right are two entirely distinct and unrelated strands of the moral life subsumed under the common principle of freedom.

The debate raises the important question of how to systematically relate ethics and right, but in my view neither derivation nor subsumption is particularly promising. I conclude with a sketch of a relatively underexplored proposal.<sup>56</sup>

Calling the Categorical Imperative the “supreme principle of morality” can make it seem exciting, as though it contains the key for the entire moral life. But, in fact, the results it establishes are quite minimal. The Categorical Imperative is the supreme principle of morality in much the same way as the law of non-contradiction is the supreme principle of thought. One can hardly unlock the mysteries of the scientific world from the simple realization that one cannot think both *p* and *-p*. Similarly, some of the most-discussed arguments in the *Groundwork*, e.g., lying as a form of rational self-contradiction, do not exhaust Kant’s picture of the moral life. The Categorical Imperative is completely formal—‘empty,’ as the post-Kantians liked to say, though for some reason they took this to be an interesting critique rather than just a statement of Kant’s own view.

Moreover, the Categorical Imperative simply governs the moral agent’s own reasoning. In other words, the Categorical Imperative just generates the basic principles about how I should treat others, *should they exist*; in and of itself, the principle does not yet disclose to me the concrete reality of the intersubjective world. As such, the

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<sup>56</sup> I am influenced here by Herman (2002), (2022); and Ripstein (2009, appendix).

*Groundwork* does not yet have the separateness of persons fully in view.<sup>57</sup> Kant's theory of right, by contrast, is about nothing other than the separateness of persons. As I argued in 2.2, our rights are precisely what demarcate us as individual rational beings and so as distinct spheres of jurisdiction. It takes relations of right to secure the biological boundaries of the body on terms of freedom. In short, we need right to delineate the entities to which the Categorical Imperative applies.

This is why, after we have passed through the sphere of right, Kant can return to ethics with a new, more interpersonal angle of vision. As commentators have often remarked, the treatment of morality in the *Doctrine of Virtue* is more richly social and interpersonal than anything on offer in the *Groundwork*.

Ultimately, treating the *Metaphysics of Morals* as a unified whole opens up exciting avenues of inquiry about the institutional dimensions of the moral life. Proper ethical relations to others depend on knowing what is *mine*. (For example, can I give *that* to you to assist you in need? Can I use *my* body in *your* defense?) In this sense, ethics depends on right for its practicability. Conversely, the relationships of care, intimacy, and vulnerability at the core of interpersonal morality carry risks of dependence which require law for their prevention or remedy. In this sense, right depends on ethics for its task. Moreover, a state in which people only obey the law because of fear seems less stable and good than one in which people treat the demands of citizenship as part of their personal morality.<sup>58</sup> The complex ways in the political spills over into the ethical, and the ethical into the political, are a worthy topic of philosophical inquiry. Kant's theory of right opens the door.

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<sup>57</sup> For a different view, see Schaab (2021).

<sup>58</sup> See Laurence (2018).

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