

Kant on Right
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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 be directly taken from us on pain of penalty. Some of the special relationships we form cannot simply be exited at will. In other words, some promises are contracts, some assistance is redistributive taxation, and some relationships are families. What is this domain of morality that involves matters of coercion—i.e., not just what one *should* do, but what one can be *forced* to do—as regulated by public institutions of law and state? Is there any principled way to determine which relationships belong to this domain? How could coercion 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 his *Metaphysics of Morals* (1797). Careful attention to this theory warrants major revisions to the traditional understanding of Kantian moral agency. Were one only to read the *Groundwork* (1785) or *Critique of Practical Reason* (1788), one might conclude that morality for Kant is fundamentally about individuals reasoning entirely on their own, regulating their desires and inclinations by acting only on principles that can hold for all. The solitary enterprise of moral deliberation can be undertaken by anyone, anywhere, at any time, and under any political arrangement, or so Kant’s moral theory would seem to suggest.

As the structure of the *Metaphysics of Morals* indicates, however, 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 his late masterpiece, Kant uses 'moral' as a genus concept which branches into distinct but interlocking ethical and political spheres (e.g., MM 6:214, 219).

The philosophical implications of this new architectonic structure run deep. Thought through to its logical conclusion, I contend, Kant's theory of right implies that one cannot get *persons*—i.e., 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 (i.e., what is *mine*) and body (i.e., what is *me*) in a manner consistent with the freedom of all. Kant's mature moral theory thus intimates a dependence of morality on political institutions.

This is as it should be. What must I actually *do* in order to treat others well? I cannot answer this question unless we've collectively settled what's mine and what's yours—just where, practically speaking, you begin and I end. (Imagine: I try to use *your* body to shield an innocent from enemy fire, or steal your car to help out a friend in need.) Trying to settle questions of possession simply by my own say-so would undermine the very respect for persons that moral agency seeks to honor. So, moral interaction outside a system of public law—morality in a state of nature, as it were—is precarious at best.

Such an institutionalist spin on Kantian moral agency is, admittedly, unorthodox.¹ But it unlocks Kant's rich account of the dynamic interplay between the interpersonal and the institutional in a free and so well-lived life. Taking seriously the *Metaphysics of Morals*'s order of presentation—*first*

¹ Though it has affinities with Pallikkathayil (2010); Pippin (1999), (2006); and Herman (2022a), (2022b), (2022c). In the final section of this chapter, I briefly address two more prominent ways of connecting Kant's moral and political theory.

right, *then* virtue—suggests a form of Kantianism in which interpersonal morality requires just political institutions for its proper enactment. As such, Kant’s final 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 more 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.

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” (MM 6:230). 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 persons to exercise their freedom of choice without that freedom being infringed upon by others. Kant calls the freedom of not being subordinated to another’s choice “independence” (MM 6:237). Independence is the master concept of Kant’s political philosophy.²

What exactly does it mean to be independent of another’s choice? This question will occupy us throughout much of what follows. As a first approximation, consider this: if I choose to deposit my knife into your back, I have clearly exercised my freedom of choice in a way that thwarts your freedom to choose. This is not right—my choice 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. Of course, such laws cannot secure mutual independence if nobody

² Here, I follow Ripstein (2009).

follows them, or if each person simply interprets them for themselves. Independence thus requires the existence of a collective coercive body, i.e., a state, that creates, enforces, and applies the laws, thereby coordinating the interactions of persons. At the heart of Kant's theory of right lies a surprising claim: independent persons cannot work out the conditions of free choice on an atomistic, interaction-by-interaction basis, but only through joint membership in the state. The independence of individuals requires them to become cooperating citizens.

Behind the myriad legal and political 'conditions' of independence discussed in the *Doctrine of Right* stands the "Universal Principle of Right," an abstract rule for classifying actions as right or wrong. 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 each can coexist with everyone's freedom in accordance with a universal law" (MM 6:230).³ This classificatory rule generates the equally abstract injunction, the "Universal Law of Right," which directs persons to refrain from any actions incompatible with others' freedom of choice (e.g., MM 6:231). The injunction to realize mutually consistent freedom of choice obviously requires further elaboration through a system of law and rights before it can provide any determinate guidance as to *how* exactly to do that. Such systematic elaboration is the task of the *Doctrine of Right*.

Unlike many contemporary rights-based theories, Kant does not begin with the individual and her schedule of rights. Rather, he begins with the idea of mutually consistent freedom—*Right* is prior to rights. As such, Kantian liberalism does not rely on methodological individualism.

³ 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 actually done: e.g., was it murder or manslaughter? On maxims in the Universal Principle of Right, see Newhouse (2016).

2.2 Freedom of Choice: Sheer Decision or Normative Power?

We have seen that for Kant I am independent when others cannot interfere with my ability to freely choose for myself. Clearly then, a proper appreciation of Kant's politics of independence requires understanding the conception of freedom of choice which underpins it. In this section, I explain Kant's somewhat unusual account of free choice (*freie Willkür*). In the next two, I discuss Kant's claim that right concerns "the form in the relation of choice" between interacting agents (MM 6:230).

Here is an account of free choice, and of a politics focused on it, that will be familiar to denizens of modern liberal societies. Grownups possessed of normal rational and physical capacities make all kinds of choices—some good, some bad; some moral, some immoral. Yet notwithstanding the all too human tendency toward bad choice, the capacity to make one's choices for oneself, and thereby to direct one's own life, is a crucial value that states should promote. Undoubtedly, some of the immoral, stupid, or otherwise bad choices people make are deeply detrimental to others' like entitlement to direct their own lives. So, the state should intervene, regulating those choices for the sake of the value of choice itself. Think: my choice to drive my sportscar at 110 miles per hour down a quiet residential street must be forestalled so as to ensure pedestrians' freedom of choice to take a safe evening stroll. Hence: traffic laws. At the limit, regions of choice central to our ability to plan our own lives must be protected through legally-enshrined rights.

This familiar liberal story understands free choice in essentially morally neutral terms. Call such an understanding: free choice as *sheer decision*.

Whatever there is to be said for the vision of the freedom-based state just sketched, it cannot be Kant's, for he rejects the sheer decision view of free choice.⁴ Kant does not understand free

⁴ My thinking in this section is indebted to Flikschuh (2021) and Herman (2007).

choice as the capacity to set just *any* ends for ourselves. Rather, we choose freely insofar as we set *morally permissible* ends. The freedom at work in free choice is thus not the freedom of wild, spontaneous decision-making, but the freedom of rational self-governance—the most famous exponent of which is, of course, none other than Kant himself. Kant writes, the “choice which can be determined by *pure reason* is called free choice,” where pure reason involves, “the subjection of the maxim of every action to the condition of its qualifying as a universal law” (MM 6:213). My initial illustration of threats to free choice must therefore be qualified. Strictly speaking, since my ‘choice’ to deposit my knife into your back is not in fact rationally justifiable, according to Kant’s philosophical framework it is not actually a proper exercise of my free choice at all.⁵ Kant treats free choice not as sheer decision but as *normative power*.

The normative power and sheer decision views of free choice have very different understandings of the relation between free choice and laws. According to the sheer decision view, laws are a means of *externally regulating* the capacity to choose for the sake of the value of choice. Whereas on the normative power view, laws *internally constitute* the capacity for free choice. This is a difficult point. Let me illustrate it with an example.

On the normative power view, the capacity for free choice is akin to the capacity to play a rule-governed game such as chess. The capacity to play chess involves the ability to make permissible moves in light of one’s grasp of the rules. ‘Moves’ that do not respect the rules are, in

⁵ Is Kant committed to the claim that people fail to choose freely whenever they choose impermissible ends? I do not have space here to address Kant’s theory of freedom and moral responsibility. But let me offer a quick interpretive suggestion. Perhaps Kantian free choice comes in degrees. Choice is free (enough) just so long as the agent is at least somewhat alive to moral considerations. If the person who deposits the knife in my back is, say, a psychopath or toddler, attribution of the concept of free choice gets no grip.

fact, not moves at all. So, suppose I, a novice chess player, drag my pawn backward. You correct me by returning the pawn to its original square, issuing the gentle reminder, “pawns don’t move like that.” Precisely the *wrong* way to understand this interaction would be to think that you’ve somehow restricted the exercise of my chess playing capacity for the sake of some further (perhaps entirely) justifiable end, such as an enjoyable play of the game. Rather, since my ‘move’ was in no way an exercise of my chess-playing capacity at all, your correction does not impinge upon this capacity, but, in fact, supports or expresses it.

Contrast the relation between the capacity to play chess and the rules of chess with the capacity to drive and the rules of the road. One can certainly drive in a completely anarchic manner, rounding bends at high-speeds and hitting the brakes as the spirit moves you: reckless driving is still driving, and so quite unlike ‘moving’ the pawn backwards. Of course, driving in this manner would prove to be an unmitigated social disaster. Traffic rules are therefore needed to regulate the capacity for a variety of further ends (e.g., public safety, efficient travel, etc.). Still, it’s entirely possible to exercise one’s capacity to drive paying no attention to the rules of the road: traffic laws regulate rather than constitute the capacity.⁶

Kantian free choice is more like chess-playing than driving. If the capacity to play chess is constituted by the rules of chess, what are the rules that constitute the capacity for free choice? To answer this question, we must consider how choice can *fail* to be free. For Kant, two sorts of obstacles impede the exercise of free choice: ‘internal’ obstacles (roughly, those stemming from myself), and ‘external’ obstacles (roughly, those stemming from other people) (e.g., MM 6:214). Exercising the capacity for free choice thus depends on being free both internally and externally.

⁶ I draw here on Rawls’s (1955) classic discussion of rules.

Persons are externally free when they are independent. Recall: this is the freedom of not being pushed around by other people, and so of controlling one's own actions. By contrast, internal freedom is the freedom of not being pushed around by one's desires, and so of controlling one's inner deliberative landscape. The Universal Law of Right—recall: this is the meta-rule for the making of legal rules—governs the realm of external freedom; the Categorical Imperative governs the realm of internal freedom. In short, the rules that constitute the outward expression of the capacity for free choice are the rules of right. The rules that constitute its inward expression are the rules of ethics. The complete system of juridical and ethical duties tells us how to use our choice freely, where 'freely' means: in accordance with the requirements of reason (e.g., MM 6:219f and 6:216-217).

Understanding free choice as normative power illuminates Kant's otherwise puzzling claim that rights are intrinsically connected to coercion: "right and authorization to use coercion...mean one and the same thing" (MM 6:232). Were the basic political task the promotion of free choice as sheer decision, this striking equivalence claim would be deeply puzzling. Surely not everything I need to help me make my own choices is something I can *force* others to provide for me? If free choice is treated as a rule-governed normative power, however, there is no mystery. Go back to chess. The capacity to play chess involves both making permissible moves in light of the rules, and restricting or taking back impermissible moves. If you correct my illegitimate move by returning the pawn to its original square, all you've done is express our chess-playing power, yours and mine both. Call the ability to correct or prevent a wrongful move *coercion*. In this sense, coercion is internal to the

exercise of the capacity itself.⁷ *Qua* chess player, I can move my pawn forward and prevent you from moving it backward.

We've now arrived 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 independent of the wills of others, where independence means: able to freely choose all and only those ends which are compatible with others like ability to so choose. Rights express our independence by creating boundaries—think: 'stand back!' (i.e., bodily rights); or, 'that's mine!' (i.e., property rights)—that demarcate each person as distinct, "one among others equally real," to borrow Thomas Nagel's evocative phrase.⁸

2.3 "The Form in the Relation of Choice"

Can the ideal of mutual independence ever be realized, or is it merely utopian fantasy? After all, it seems as if *everything* I choose to do—including acting from morally permissible ends—restricts what others can choose to do. Does this threaten their independence?

I stop to smell the roses. You must now wait or walk around me. In limiting your options, have I overstepped my bounds and so violated your rights? To see why Kant is not saddled with this implausible view, we must more clearly distinguish between the particular choices we make and our *capacity* to choose anything at all, what Kant calls the 'form' of our choice. Rights, Kant says, preserve "the form in the relation of choice" between interacting persons. I turn now to this idea.

⁷ This paragraph interprets Kant's statement that "if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a *hindering* of a *hindrance to freedom*) is consistent with freedom in accordance with universal laws, that is, it is right" (MM 6:231).

⁸ Nagel (1970, 14).

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 numerous ways in which our choices can affect one another, 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 (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 (MM 6:230; emphases in original).

This dense passage delimits the domain of right in terms of three essential features. Following Kant’s own language, let us call them: externality, exclusion of need, and formality. Actually, a fourth feature, though largely implicit, is necessary for a proper grasp of the other three. Call it: correlativity. To understand right’s formality, we need 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 places you under a duty.⁹ So, for example, my right to my body means you have a duty to keep away. As we’ve seen, rights are connected to coercion. So, my right to my body entitles me to push you away if you come too close. The correlativity condition suggests that rights are only conceivable in a world of at least two persons. On Kant’s way of thinking, were I all alone

⁹ Rights are “(moral) capacities for putting others under obligations” (MM 6:237).

on a desert island, I would still have moral duties to myself, but my rights would as it were lie dormant, awaiting the arrival of the other.¹⁰

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 actually *do* things that have tangible, physical manifestations in the world. What matters for rights are the effects of what one person does to another person, 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 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 simple category mistake—though I may have a right that you not publish your slanderous lies.

We’ve now learned that the realm of right is populated only with actions and their effects on other people, not with agents’ inner deliberative states. But *which* actions and 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 claim that you need something does not in and of itself generate a right that I provide it for you. From my point of view as a rights-bearer, your needs are but mere wishes. Kant’s exclusion of need from the determination of rights might seem callous. (What if what I need is food? Doesn’t my

¹⁰ Byrd and Hruschka (2010, 79).

extreme hunger give me a right to your extra bread?¹¹) As we will see, this apparent callousness is eventually softened when Kant turns from the relation between me and you as private persons 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, I think, independently plausible.

The exclusion of need follows from the correlativity condition because, once again, needs and wishes concern one of the relata, 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 firmly 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 my needs don't, say, entitle me to steal from another. (Maybe what I should do is take it up with my government instead.) Ethically speaking, you might be a horrible person for failing to assist me, but not all of your moral failings rise to the level of rights-violations.

We've now further delimited the domain of right: of all possible actions and their 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 to demand of them. But now everything hangs on what precisely it is that we can demand of one another. The formality condition elucidates.

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 here. 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 contingent objects of our wants and needs. By contrast, the 'form' of

¹¹ 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" (Uleman 2004: 590).

choice is something like choice's essence—that which all acts of choice have in common *qua* choice. (Just as the form of a house is what unites Modern Tudors and thatched huts.) 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 manifestations of a single power of human agency? The answer cannot be located in 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 further reflection on the nature of the capacity to choose. As a first pass, think of the *matter* of my choice as the specific ends I choose and of the *form* of choice as my power to set any ends at all.¹²

In sum, the formality condition enjoins persons to forbear from choosing in any way that interferes with another's 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 complete authority to decide the ends for which the slave acts at all. In this sense, he interferes with the slave's choice-making capacity.

I began this section by raising a worry about the over-demandingness of Kantian independence—does *any* exercise of choice block the independence of another? As we've now seen, the response to this worry is that right only enjoins us not to interfere with another agent's *capacity* to choose. This is perfectly consistent with restricting the specific choices they make. It's fine for me to stop and smell the roses, thereby limiting your options, but it's not acceptable for me to enslave you and allow you to act only by my say-so. Fine and well. But now we have a worry about under-demandingness: do I adequately recognize your independence simply by leaving you *some* choices to make for yourself? Depositing my knife into your back removes significant options from your

¹² Cf. the helpful discussion of formality in Stone (2017, 1-11).

discretion—say, spending a leisurely afternoon at the café—but suppose I promptly exit the scene of the crime and leave you in peace to call 911? Besides slavery, what else does right prohibit?

To respond to this worry, let us return the ‘form of choice.’ From the interpersonal vantagepoint proper to right, free choice is the capacity to act from ends that do not impede the same capacity in others. But what does free choice look like from the agent’s own point of view?

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* (MM 6:213; emphasis mine). 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 of an unfolding action. Choice initiates the process of self-conscious movement guided by reasons. My choice to get ice cream is displayed in and through my walk to the freezer.¹³

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 (e.g., MM 6:213; G 4:394). I can wish to fly, but I cannot choose to fly.¹⁴ Knowing what I can do involves knowing my abilities. But it also

¹³ I have benefitted here from Engstrom (2010).

¹⁴ Can’t I choose to do something without having further thoughts about whether I can actually achieve my end? Can’t I *choose* (rather than merely wish) to escape the fortress in which you’ve imprisoned me? In some sense yes, but to see whether my motivational state counts as *choice* in Kant’s sense one would need to see what else I do. Do I kick at the

involves—and this will be key for what follows—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 further specify 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 particular ends, but rather to forbear from damaging or controlling another’s capacity to set ends at all. As we’ve just seen, the capacity to choose involves using one’s powers and one’s things for one’s purposes. So right says: let everyone use themselves and their things for their own purposes.¹⁵ More simply: hands off me and my stuff. Slavery violates independence, but so does any condition in which others interfere with what is mine.

That there is a distinction between limiting my choices and interfering with my capacity to choose seems obvious. One can easily proliferate illustrative examples. 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 rights are not based on 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.”

door and scream for help, or just sit peacefully in the corner? People sometimes choose to do that which they are in fact incapable of doing. But it need not follow that choice is a purely inner state of mind only contingently connected to action.

¹⁵ For development, see Ripstein (2009, ch.2).

What underpins all such examples is the distinction between failing to provide me with a world favorable to my desires, and interfering with what is already *mine*.¹⁶ As I read him, for Kant the following concepts are equivalent: interfering with the form of someone's choice, interfering with their capacity to choose, interfering with what is theirs, and violating their rights. 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 a way of determining what's mine and what's yours. Accordingly, some of the most important sections of the *Doctrine of Right* explain how persons can draw the boundary between *mine* and *yours* in a way that respects mutual independence (e.g., *MM* 6:245). 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: 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.

Before proceeding, I want to register just how noteworthy it is that an abstract inquiry into the nature of choice has taken this decidedly political direction. I have suggested that, on Kant's conception of choice, choosing to do something—as opposed to merely wishing that it comes about—involves knowing what is mine to use. But if I can't know what exactly is mine to use

¹⁶ Kant states his position on the essentially negative character of rights 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" (LE 27:526, emphasis mine)

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.”¹⁷

It is not a giant leap from this conclusion to 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 simply by warm feelings; I am required to actually do things for others. 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. Enacting my duty of beneficence requires institutions of property to settle what belongs to whom.¹⁸ The *Metaphysics of Morals*’ order of presentation—first right, then virtue—makes good sense.

3.1 Natural Right and the State

Kant’s account of how rights are realized in law and state is dizzyingly complex. The *Doctrine of Right* deploys a sequential form of argument in which specific categories of rights are introduced—e.g., to body, property, and contract—only to be subsequently shown to depend for their genuine

¹⁷ Herman (2008, 347).

¹⁸ Herman (2012).

exercise on later stages of the argument—e.g., the state and its powers.¹⁹ This means that one cannot fully understand Kant’s starting point (mutual independence) until one arrives at the book’s end.²⁰

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 deployed simultaneously, as when Kant purports to deduce from reason alone that there are only three possible categories 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* (MM 6:247-248).

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.

¹⁹ In fact, the sequence continues beyond the state to cosmopolitan right: “a peaceful, even if not friendly, thoroughgoing community of all nations on earth” (MM 6:353). Taking seriously the book’s sequential structure, Kant’s view seems to be that even securing the basic rights of the individuals requires global cooperation. (This seems plausible to me. 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.

²⁰ This point, underappreciated in the commentary, is mentioned by Ripstein (2009, 6-7) and Weinrib (2003, 801-810).

To answer the first question, we must return (yet 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* (e.g., MM 6:262.) 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 other people: not only do I write this for an audience, but in so doing I must not use your thoughts and words 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.²¹

What follows from Kant’s action-based social ontology? Suppose one thinks, as Kant does, that free persons stand under a collective duty to create a society in which everyone can exercise their choice on terms of independence.²² We now know more precisely what this means: free persons must institute rules for the protection of body and person and for the acquisition and control of things.

I’ve just offered a brief sketch of an argument for the claim that we can determine which rights we have solely by reflecting on the nature of embodied human agency. If this is correct, then

²¹ This approximates Kant’s distinction between “innate,” “acquired,” and “public” right.

²² This is how I read Kant’s account of the duty to exit the state of nature (e.g., MM 6:256, 6:307).

we can say, following Kant, that such rights fall under the “doctrine of natural right” (MM 6:229). What this means is that positive law doesn’t just create such rights out of normative materials they are not already intrinsically right-involving. For example, Kant does not understand rights as instruments for achieving basic human interests, the greatest happiness for the greatest number, etc. As we will see in more detail below, however, classifying rights as ‘natural’ need not entail that persons possess a fully completed schedule of rights prior to legal or political arrangements.

Still, Kant’s use of the idiom of natural rights carries two crucial implications. First, the reason people have rights to their bodies and things is not simply that the laws around here happen to grant them such rights. In this respect, obligations to respect the person of others are most unlike the obligation to, say, drive on the right side of the road. To put the point 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, rational choosers. Second, these rights, *qua* natural, set the standard of justice for legal orders: any system of law that does not afford its subjects protection of body and property is highly deficient, in urgent need of reform.²³

Reflection on the nature of choice also tells us something about the content of natural right. Let me explain this point with reference to property rights, vindication of which lies at the core of the *Doctrine of Right*.²⁴ 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 permissible ends. From this it follows that property rights, should there be

²³ MM 6:229: rights provide “the immutable principles for any giving of positive law.”

²⁴ 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.

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 mix their labor and leave "enough and as good for others."²⁵ Rather, on Kant's account I have a property right to 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.

Let us grant Kant's intricate argument for the claim that dominion does not in fact violate the rights of others.²⁶ 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 (e.g., *MM* 6:256).²⁷

The idea that I can 'have' natural rights without being able to exercise them is, undoubtedly, obscure. Matters are not simply cleared up by Kant's statement that "in a state of nature something

²⁵ Locke (1689, §27, §33). Kant 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).

²⁶ For the argument, see Kant's "Postulate of Practical Reason with Regard to Rights" (*MM* 6:246).

²⁷ Why a state, as opposed to informal social conventions? For critique of Kant on this score, see Christmas (2021).

external can actually be mine or yours but only *provisionally*” (MM 6:256; emphasis in original). In the next section, I endeavor to shed further light on this topic.

3.2 Provisional Right

I have elsewhere explained the concept of provisional right with close reference to Kant’s texts.²⁸ Here, I instead illustrate the concept by means of an extended example.

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. Moreover, the practical difficulties of a world without transportation are likely to generate deep social hierarchies. 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’ basic right to be independent from the wills of others. After all, if I literally cannot move about the practical terrain except by your good graces, then there is a sense in which I am not free to use what is most paradigmatically mine: my body. 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 of how to manage human vulnerability under conditions of independence support the claim that people have a right to bicycles. Let me be clear about what I mean. The justification is *not* that our needs per se generate

²⁸ Hasan (2018a) and Stone and Hasan (2022).

rights—recall: needs play no direct role in defining rights—but rather that unmet needs threaten to generate problematic relations of interpersonal dependence. Rights prevent or reverse such relations.

But, to apply the point about acquisition made above to the case at hand, Kant also thinks that individuals acting all on their own lack the rightful authority to take from nature to produce the aluminum and harvest the rubber necessary to manufacture bicycles. Denizens of the state of nature seem to be stuck in an intolerable contradiction: they have a right to bicycles but no way to claim such a right. Thankfully, there is solution: 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 the thing to say is this: people *have* the right, but they cannot yet exercise it consistent with the freedom of all. Since rights imply duties (recall: correlativity), people in the state of nature stand under a collective duty to build the factory. What kind of claim does each person have on this factory *in potentia*? 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, say, institute a system of public locks for their already-existing bicycles. Rather, 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 by making it real—that is, realizable. Before the factory exists, we can say, with Kant, that people have the right “but only provisionally” (MM 6:256).

A similar logic underlies the rights claims made by aggrieved citizens in the contemporary world. When, in the agonism 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 political logic of rights-claims.²⁹

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 in a manner consistent with the independence of others.

3.3 The Politics of Kantian Right

Let's take stock. Why does Kant think we have natural rights? Because they are necessary for the expression of embodied human agency on terms of independence. Why are such rights defective or provisional outside of the state? Because there is no way to claim one's rights all on one's own, consistent with the independence of others. But this analysis 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.³⁰ What is the *politics* of Kant's theory of right?

Both the libertarian and egalitarian interpretations face textual difficulties. The libertarian interpretation has trouble accommodating 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

²⁹ I am indebted here to conversations with Martin Stone, and to Korsgaard (2018).

³⁰ For Kant the libertarian, see Byrd and Hruschka (2010), and Rosen (1993, ch.5) for critique. For Kant the egalitarian, see Ripstein (2009, ch. 9); Holtman (2004); and Varden (2010). In Hasan (2018a) I develop this interpretive dichotomy. Both political outlooks had analogues in Kant's own intellectual milieu. See Maliks (2014, ch. 2).

interpretation has trouble accommodating 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 look empty, since what exactly we have rights to looks to be entirely at the state's discretion.³¹

My own views on this matter come closer to the egalitarian interpretation. Consider Kant's remark 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 (MM 6:207). A 'doctrine' of right thus requires a unitary principle that connects what look to be distinct, even contrasting, 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 choices of others. Every step of Kant's argument must thus be connected in some way to independence; otherwise, Kant has produced no 'doctrine' of right, merely scattered reflections.

We've also seen a bit of how this unifying principle works. To review, rights to person and property are necessary for independence, because otherwise persons would depend on the choices of others for executing the basic functions of human life. Such considerations, Kant thinks, establish a strong presumption in favor of an absolutist conception of property rights, unrestricted by the needs of non-owners. So far, we look to be in libertarian territory.

But stopping there would neglect the crucial point that for Kant the *only* way we can exercise our natural rights consistent with mutual independence is through the state. And it seems to me that independence can only be realized through a state with at least somewhat egalitarian aims. Why?

³¹ Brudner (2011) charges Kant's theory of right with emptiness in this way.

Were the purpose of the state simply to protect existing property distributions, the state would itself become an agent of domination. It would rubber stamp a situation in which some people (call them: the poor) are subordinated to the wills of others (call them: the rich). Suppose you acquire all the land and so the only way I can survive is to become your serf. Such an arrangement seems to be at odds with independence because I now depend on you for the use of what's mine: my body. Thus, the very same principle—independence—that justifies people's rights to property and justifies the state, also entitles the state to redistribute property to ensure that everyone is independent of the wills of everyone else. What justifies the right to property, justifies its redistribution.³²

Kant's remarks on economic justice are elliptical and fragmentary. Other interpretations are surely possible.³³ Whether or not I have captured exactly what Kant has in mind, the connection he draws between distributive justice and independence is 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

³² This is but a quick sketch of a more complicated story. Not all inequalities are so severe as to prevent one person from using what is *already* theirs. Do these inequalities also violate Kantian independence? I address this question in Hasan (2018b). For doubts that Kantian independence supports economic redistribution, see Davies (2020); for doubts that it supports private property in the first place, see Julius (2017).

³³ See Holtman (2018) for useful overview.

the first place, I am led, by the inner logic of my own acquisitive claim, to accept the legitimacy of the welfare state.³⁴

This view of the state and its powers does not fully capture the modern egalitarian agenda. Kant seems to think 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 too minimalist, as 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.³⁵

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 not being controlled by others. The project of justifying economic redistribution from the more individualistic starting point of independence is thus of great public relevance.

4. The Relation Between Right and Ethics

Let me conclude by briefly returning to the question of how Kant’s theory of right relates to the Categorical Imperative as the “supreme principle of morality” (G 4:409; MM 6:226). What exactly is the genus concept, *morality*, such that it can cover both the collective regulation of actions through coercive law—i.e., right—and the inner self-regulation of principles—i.e., virtue or ethics?

³⁴ This paragraph draws on Flikschuh (2017, ch. 2) and Guyer (2000).

³⁵ One can make this point 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) who downplays the differences between the two thinkers.

Commentators have long-struggled with this question.³⁶ 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 autonomy requires that certain obligations be legally enforced—Kant’s entire edifice stands unsupported. Others deny this and hold instead that ethics and right are simply two distinct strands of freedom: persons should be free morally and politically. There is nothing more to say.

The debate re-raises the one of the most important questions in Western political philosophy: what is the relation between the good life and the good state? But in my view neither derivation nor subsumption are particularly promising answers. I conclude with a sketch of an alternative proposal.

Calling the Categorical Imperative the “supreme principle of morality” makes 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 not-*p*. Similarly, some of the most-discussed arguments in the *Groundwork* (e.g., lying as a form of rational self-contradiction) hardly exhaust Kant’s picture of the moral life. The Categorical Imperative is 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 governs the moral agent’s own reasoning. It 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 existence of other persons: the *Groundwork* does not yet

³⁶ For helpful guides through the debate, see Ebels-Duggan (2012) and Pippin (2006, 421-428).

have the separateness of persons fully in view.³⁷ Kant's theory of right, by contrast, is about nothing other than the separateness of persons. As I argued above, our rights demarcate us as individual rational being by securing the boundaries of the person on terms of independence. In short, we need right to delineate the entities to which the Categorical Imperative applies. Where do you begin and I end, normatively speaking? Absent the state, the only way to answer that question is through bare self-assertion, hardly a promising route into the moral domain.

After we have passed through the sphere of right, Kant can return to ethics with a new, more interpersonal angle of vision. This is why, as many commentators note, the treatment of morality in the *Doctrine of Virtue* is more richly social and interpersonal than anything on offer in the *Groundwork* or *Critique of Practical Reason*.

Ultimately, treating the *Metaphysics of Morals* as a unified whole opens up exciting avenues of inquiry into the institutional dimensions of the moral life. Proper ethical relations to others depend on knowing what is *mine*. (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 management, prevention, or remedy. In this sense, right depends on ethics for its task. The complex ways 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.³⁸

³⁷ Cf. Schaab (2021).

³⁸ I am grateful for comments from Lucy Allais, Marisa Bass, Anil Gomes, Ross Kilpatrick, Colin McLear, Reidar Maliks, Francey Russell, Paul Schofield, Andrew Stephenson, and my colleagues at Amherst College: Jyl Gentzler, Alexander George, Lauren Leydon-Hardy, Joseph Moore, and Nishi Shah. These comments saved me from many embarrassing gaffes. For any remaining gaffes, I claim sole responsibility

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