ROUTLEDGE INNOVATIONS IN POLITICAL THEORY

Kantian Theory and Human Rights

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5 A Kantian Defense of the Right to Health Care*

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> *Those institutions for the benefit of the poor, invalids and the sick which have been set up at the expense of the state (foundations and hospitals) can certainly not be done away with.*
>
> Kant, *MM*, 6:367[1]

In Kantian political philosophy external freedom, understood as the ability to take up means toward the attainment of ends we have set for ourselves, is secured through the three branches of the republican state. Indeed, the state is necessary for the exercise of this freedom. However, in order to provide a condition consistent with the original contract, further institutions are required; in this paper, I argue that a health care system is one of those institutions.

Support for the belief that there is a right to health care has been increasing since its inclusion in the Universal Declaration of Human Rights (UDHR).[2] Indeed, while there is still skepticism—especially from those with an individualist libertarian bent[3]—many are coming to affirm such a right.[4] I believe Kant's political philosophy can be consistently extended to offer an argument in favor of the entitlement to health care. More than this, such an argument takes as its foundation exactly the commitment (i.e., to freedom) that the individualist libertarian employs against proposals for universal health care. Thus the Kantian has the dual benefit of (1) being able to account for a right to health care, and (2) doing so in a way that counters a strong objection to the procedures necessary—viz. coercive taxation—for such a right's implementation. In outlining this view, I hope to demonstrate both that it is not an *ad hoc* extension, and that it is more consistent with Kant's work than health-related rights discussed with reference to the *Groundwork*.[5]

The paper will progress as follows: In Section I, I will introduce the idea of the original contract and its relation to the distinction between the state in idea, and a rightful condition.[6] This, we will see, is important to understanding

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why a citizen's right to health care is not accompanied by a title to coerce the state. Then, in Section II, I will present an argument for preventative health care measures; put simply, I suggest that this is a straightforward exercise of the state's obligation to protect our external freedom. That is, preventative health care is a necessary (though insufficient) condition for the protection of the means we already have. In Section III, I offer an argument for emergency care. I claim that the state's obligation to maintain those citizens who cannot maintain themselves applies when a citizen requires emergency care. Noting that this leaves many forms of health care undefended, I will offer an argument for a more general entitlement in Section IV. This is more difficult to defend because it contrasts, at least *prima facie,* with Kant's belief that the state is not concerned with extending our freedom. My response to this potential worry is two-fold: First, the obligation of the state to maintain itself in perpetuity requires institutions that increase the freedom of its citizens. Second, the extension of freedom for some cannot come at the cost of the basic freedom of others. In Kantian political philosophy, the primary notion of freedom is non-comparative—all that matters is that you have it, not the degree to which you have it. But, this does not mean that a secondary, comparative understanding of freedom cannot also be introduced. Finally, in Section V, I will address two objections to the view I have presented. The first concerns the emphasis on freedom, the second—an interpretive worry—my use of the *Doctrine of Right,* rather than the *Groundwork*.

I. THE IDEA OF THE ORIGINAL CONTRACT

Before we can understand the idea of the original contract, we must first understand Kant's distinction between a "rightful condition" and the "state in idea." The importance of this distinction, both for generating a right to health care and understanding its limits, will become clear later.

A rightful condition is "that relation of human beings among one another that contains the conditions under which alone everyone is able to enjoy his rights."[7] The extent to which a particular relation secures the conditions that make the enjoyment of rights possible admits of degrees. This is made clear in the *Anthropology* where Kant presents four different types of state: (1) an anarchical state, characterized by freedom and law but no force; (2) a despotic state, characterized by law and force, but no freedom; (3) a barbaric state, characterized by force, but no freedom or law; and, finally, (4) a republican state, characterized by force with freedom and law.[8] Only (2) and (4) are considered rightful.

This list, with its characterization of rightful and non-rightful forms of association, is only possible through an appeal to the state in idea; which, as opposed to the juridical state, is the *norm* that governs our judgments concerning actual states.[9] As such, and this will be important later, it is *an*

unachievable ideal.[10] (For Kant, this ideal is of the pure republican state, item (4) on the *Anthropology* list.) This shouldn't be too unfamiliar for us. In the *Groundwork* Kant appears to assert that because of our constitution (as embodied) we will never achieve the ideal given to us by practical reason through the employment of the Categorical Imperative.[11] So too, all actual states—as imperfect instances of the concept of the state in idea—will fail to live up to the standard that idea sets. Nevertheless, each existing state has an obligation to bring itself into conformity with this idea.

This duty of constitutional self-perfection is generated through the idea of the original contract. Kant claims: "Properly speaking, the original contract is only the idea of this act, in terms of which alone we can think of the legitimacy of a state. . . ."[12] That is, the state is legitimate only if it has as its mandate those and only those actions that could have been agreed to by all in an original contract. However, Kant believes that such a contract does not exist (and could not exist),[13] given that original submission to law was "by force."[14] This makes sense; given that public, law-giving institutions are necessary for a condition in which decisions are not made by force, the decision to form such a condition itself cannot have been the product of anything but force. Thus, there cannot have been an original contract.[15] This does not mean, however, that the state is not governed by the idea of such a contract. It is worth quoting Kant at length here. He says:

> But the *spirit* of the original contract . . . involves an obligation on the part of the constituting authority to make the *kind of government* suited to the idea of the original contract. Accordingly, even if this cannot be done all at once, it is under obligation to change the kind of government gradually and continually so that it harmonizes *in its effects* with the only constitution that accords with right, that of a pure republic, in such a way that the old (empirical) statutory forms, which served merely to bring about the *submission* of the people, are replaced by the original (rational) form, the only form which makes *freedom* the principle and indeed the condition for any exercise of coercion, as is required by a rightful constitution of a state in the strict sense of the word.[16]

By thinking of the obligations of the state in this way, the relation between the sovereign and the individual ceases to be that of a solitary superior ruling over all; it becomes the united will of all ruling over each individual. Kant emphasizes this point: "And one cannot say, the human being in a state has sacrificed a *part* of this innate outer freedom for the sake of an end, but rather, he has relinquished entirely his wild, lawless freedom in order to find his freedom as such undiminished, in a dependence upon laws. . . ."[17] This passage is deceptive because, for Kant, "wild, lawless freedom" is not freedom in a full sense at all; what we may think of as freedom in the state of nature is merely the form of freedom without the necessary institutions for its realization.[18] However, in the state of nature, we still do have a right

to freedom. Kant claims that this is the "only original [—or innate—] right belonging to every man in virtue of his humanity."[19] This right contains four individually identifiable, though analytically indistinct, rights:[20] (1) the right to innate equality; (2) the right to be your own master, which should be understood as the right to be a legal entity—a bearer of rights; (3) the right to be beyond reproach (i.e., the right not to be faulted legally for what you have not done); and, (4) the right to act in ways that affect others just so long as it does not infringe their rights.

An important characteristic of all these rights is that, though they exist in a state of nature, a juridical state is necessary for their realization. If the innate right to freedom is a quasi-human right[21]—as I believe Höffe has convincingly argued that it is[22]—then it should be understood as something like the right to be a member of a state, or the right to citizenship. The satisfaction of this right, then, provides a necessary precondition for the rights we can have *as members of a state*. In this regard, the most central authorization that would be connected to the innate right is that of coercing others to form a state. I am skeptical that rights we possess in virtue of our citizenship—including those rights discussed in this paper—would have the same universal dimension that is necessary for human rights. This is because only the innate right to freedom belongs to all embodied rational beings as such.

Thus, it is not just that the idea of the original contract is employed to protect our freedom; freedom is only possible through it. The state exists to protect our external freedom; which, recall, should be understood as the ability to take up means towards the attainment of ends we have set for ourselves. Kant's characterization of this is that of being your own master—independent of the constraint of another's choice.[23] It is important to note that this characterization of freedom is necessarily relational. We have external freedom only insofar as we are in a rightful condition *with others*. Thus, the mandate of the juridical state is (1) to strive towards the ideal imposed by the state in idea, and (2) to secure the freedom of its citizens.[24] The relationship between the state in idea, the juridical state and the idea of the original contract should now be somewhat clearer, but let me make three points of clarification:

1) The state in idea gives form to the idea of the original contract. Given that Kant believes republicanism—which resembles what we call representative democracy—is the only legitimate form of government, and that this form of government requires that the sovereign represent the general will of the people, the only way for the state to be legitimate is if we have all agreed to its rule, and the conditions of that rule. However, as I have already stated, there *can be* no such contract; thus, the state must act *as if* there were.

2) The conformity to the idea of the original contract legitimizes the power held by any juridical state. This should be clear from (1). Without the idea of the original contract, and consequently without even the regulative ideal of self-rule, state power cannot be legitimate. This is precisely why a barbaric regime fails to count as a rightful condition. Even though there is some social

structure (or even a quite complex social network), there is no freedom; and society without freedom cannot be rightful as it fails to address exactly those problems that make the state necessary.[25]

3) Finally, as the norm for all rightful conditions, the state in idea sets upon each juridical state the duty of constitutional self-perfection. This, however, does not correspond to an entitlement on the part of the citizen to coerce the state if the ideal is not achieved. This is because such coercion would contradict the purpose of the state's existence. It would become a condition in which the force of the citizen, as individual, was the locus of control. More concisely, it would be a state in which might equals right. There is an unsurprising similarity to Kant's claim that there is no right to revolution here. Just as a citizen is unable to use force to overthrow a government, so too he or she cannot have a legal right to coerce the state.

II. PREVENTATIVE CARE: THE MEANS WE ALREADY HAVE

So far, I have tried to demonstrate that the state in idea and the juridical state are connected through the idea of the original contract, and that the primary purpose of the state, for Kant, is to protect our external freedom.[26] I have given two characterizations of this type of freedom: (1) that it is the ability to take up means towards the attainment of ends you have set for yourself; and (2) that having this freedom is equivalent to having the capacity to be your own master. For the sake of brevity, I am going to assert, rather than argue for the equivalence of these two characterizations. What is important for our purposes here is that entitlement to freedom on both of these characterizations doesn't entail an entitlement to attain the objects of the ends you have set for yourself. If you are entitled to freedom in sense (1), then you are entitled only to set your own ends. Similarly, if you are entitled to freedom in sense (2), then you are entitled not to be the subject of another's choice. The protection of freedom for Kant, then, must be the protection of the ability to take up the means you already have towards ends you have set for yourself; it is the protection of your capacity to choose for yourself.

My hope is that the argument for preventative health care should be predictable at this point. However, before setting it out, I would like to make an assumption explicit: I am not going to give an argument for the efficacy of preventative care. Not being a health care professional, or trained to assess empirical data in any way, I do not think that I could convince a skeptic in this regard. If I had to try, though, I would point to the significant drop in, let's say, polio or hepatitis B since the vaccines for those conditions were invented; or I would point to the benefit that regular check-ups and cleanings at the dentist can accrue. The specification of which preventative measures actually work is the subject of another paper; what is important here is that some such measures are effective for the prevention of disease. If it should turn out that this were not the case, then I concede my argument would not go through. With this in mind, let's look at the argument:

1) The state has an obligation to protect our external freedom.
2) This (i.e. the duty of the state) should be understood as a protection of the means we possess.
3) Preventative health care is a necessary (though insufficient) way of protecting our means.
4) Thus, the state ought to provide preventative health care.

A few general comments: First, the freedom in question is external, and exists only in the state. It's not that we create the state to protect the freedom we already have (as Locke believes[27]); instead external freedom exists only in a state. To put the point differently: for Kant, the public, lawgiving institutions of the state are analytically necessary for the possibility of external freedom, not an effective though contingent means of bringing that freedom about.

Second, I want to emphasize that the purpose of preventative care is not to improve the lot of whomever is receiving treatment. The focus of preventative care is healthy people; its goal: to keep them that way. In this regard, I maintain that its provision is a straightforward example of protecting our purposiveness.

Third, and finally, I want to attempt to assuage a potential concern with the relation between preventative care and freedom. It might be argued that freedom is not the relevant concern when we are discussing a possible right to health care. It is reasonable to assert that, in discussions of health, we are interested in well-being, normal functioning, or something similar. However, even if I were to concede that preventing debilitative illness was not an effective method of protecting current means, there still might be a possible response to this objection; however, this objection can also be leveled against the argument for emergency care, and so I will wait to address it.

III. EMERGENCY CARE: MAINTAINING RIGHTFUL RELATIONS OF DEPENDENCE

As I have already stated, I think that Kant's claim that the state has an obligation to maintain those citizens who cannot maintain themselves can be used as the basis of the right to emergency care. For the purpose of this paper, I understand emergency care as that which provides immediate, life-saving treatment for a non-chronic illness or malady.[28]

In order to understand this argument, we must first look at Kant's discussion of the poor. He claims both that the rich have an obligation to the commonwealth and can be taxed for its benefit;[29] and further that certain relations of dependence cannot be upheld in a rightful condition[30]—specifically, those relations in which one person is wholly subject to the arbitrary choice of another.[31] This follows directly from the definition of freedom given above, as to be subject to the choice of another excludes the possibility of being your own master. Important for Kant is the fact that, without the appropriate institutional arrangements, the destitute in a society will be in

exactly this form of relation. In societies where no government aid is given to the poor, that section of the population is dependent on the beneficence of those who are better off. However, the form of this dependence (as non-contractual and thus non-enforceable) means that the poor are subject to the choice of the rich; they are not their own masters.[32] Due to this, Kant asserts that the rich should be taxed in order to provide for the poor. Now, from the *Groundwork* we know that there is an ethical duty to give to charity.[33] However, and this will connect to the argument against the use of Kant's ethical writing to support legal rights, such a duty is both imperfect and non-enforceable. Thus, from the point of view of the state's obligations to the destitute within its borders, the existence of such a duty does not matter; institutional safeguards are also required.[34]

I want to suggest that reliance on others when you are ill falls into a similar category (for ease of comparison, it is best to assume that neither the poverty-stricken nor the ill member of society has become that way due to some foreseeable error in their own judgment). Though the reasons are different, a person who is ill relies on the beneficence of others—others who must make that person's ends their own. Thus, just as institutions are necessary for the care of the poor, so too they are necessary for the care of the sick.

It is important to note here that only immediate, debilitative conditions will be covered by this argument. Conditions that could not possibly alter a person's capacity to set ends would not be appropriate targets of state funding—Kant's claim is that only those "who are unable to provide for even their most necessary natural needs"[35] ought to be taken care of. So, for example, treatment for mild alopecia would not be covered. It is for this reason that I have restricted the scope of my argument to cover only emergency care. This argument, then, is the following:

1) Immediate, debilitative conditions decrease the ability of the afflicted person to set their own ends.
2) People suffering from such conditions rely on others to incorporate their ends.
3) Such reliance, when not mediated through a public institution, makes the freedom of some contingent on the arbitrary choice of others.
4) The form of relation mentioned in (3) cannot be upheld in a rightful condition.
5) Some people do suffer from immediate, debilitative conditions.
6) Thus, the state ought to provide emergency health care to eliminate the wrongful dependence relation between citizens.

Again, I would like to make a few general comments: First, that a health care institution is required because of the empirical fact that being sick diminishes your capacity for choice does not conflict with Kant's requirement that the obligations of the state be known *a priori*. That the state protects freedom is known; how it ought to protect that freedom will change

depending on the particulars of the rightful condition. We can think of Rousseau's comments about the Legislator in a civil society from *The Social Contract* here. For Rousseau, this figure frames laws that are both consistent with the general will of the people and fitted to that people's history, geographic location, and culture.[36] What is important is the fact that the general will remains the same; the principle that governs the association doesn't change even if the particulars of that association do. We can think of Kantian political philosophy in a similar manner. The principles of the state will remain the same, even if the institutions that develop in accordance with those principles change. This is also affirmed by the quote from *MM* 6:340–6:341 above (see note 16). Kant says that the government must change "gradually and continually so that it harmonizes *in its effects* with the only constitution that accords with right." This requires that change be based on the empirical effectiveness of the current institutions. Importantly, the obligation of the state does not change, even if the ways in which that obligation must be satisfied does.

Second, I want to acknowledge the potential objection that this argument, as an argument for health care, protects the wrong thing.[37] We might be inclined to think that health care is meant to relieve suffering, or provide palliative care for those who need it. In other words, we might think that it is meant to protect some form of well-being that has been diminished. The grounding of a right to emergency or preventative care in the protection of freedom would thus miss the point.[38] Possible Kantian responses to this problem might sound unsatisfactory. Recall that he states, "By the well-being of a state must not be understood the *welfare* of its citizens and their *happiness*."[39] The well-being of the state is measured by the extent to which it conforms to the ideal set by the idea of the original contract. This leaves no room at all for the use of happiness or comfort as the basis of a legal right. This, however, need not be as concerning as it sounds at first.

I am going to assume that we all agree that the state ought not to be responsible for providing everything its citizens desire—everything, that is, which would make them happy. Thus, if we think that *some* things would be worth protecting, a reason is required to defend that choice over others. One method of deciding what to protect has been to assert that it is needs, not desires, that ought to be guarded by the state. This makes sense if we are discussing health. We might think that the state has an obligation to provide for at least basic needs, and that health needs are among the most important categories of need.[40] There are a few concerns here, though: I have said nothing about the justification for needs over other considerations, or the way in which we determine what needs to protect (or what counts as a need at all). Authors like David Braybrooke and Norman Daniels have sought to ground needs in an understanding of biological functioning, but this has its own problems.[41] For example, how do we either (1) separate the social aspects of human functioning from the biological, or (2) develop an appropriate socio-biological standard of need that is suitably impartial?

While appeal to need is only one of the ways in which the state's obligation to care for its citizens has been asserted, it is representative of many other possibilities. That is, even the appeal to need must be grounded in something deeper—something more basic. Space restrictions make it impossible for me to argue for freedom as the basic principle here; I only want to stress that arguments in favor of health care cannot just rest on the improved (subjective) well-being of the sick. This would require too much; we need further principles to determine the appropriate forms of well-being to promote. This amounts to the requirement that arguments in favor of health care must rely on some deeper principle. Thus, the objection that an argument in defense of health care that seeks to protect freedom targets the wrong level of concern does not go through.

I have now offered arguments for both preventative and emergency health care from a Kantian perspective. In short, the argument for preventative care asserted that its provision is a simple extension of the state's obligation to protect the freedom of its citizens. The argument for emergency care, as we have just seen, protects freedom by ensuring that the ill are not subject to the choice of the healthy. In what follows, I want to offer one final reason that health care ought to be offered by the state; one that relates to Kant's claim that the state is to maintain itself in perpetuity.[42]

IV. A GENERAL ENTITLEMENT: THE LONGEVITY OF THE STATE

Taken at face value, the claim that the state must maintain itself in perpetuity can be understood as asserting that, by forming a state, the citizens have submitted to the authority of the government, and relinquished the idea that might can make right. Kant says:

> The general will of the people has united itself into a society which is to maintain itself in perpetuity; and for this end has submitted itself to the internal authority of the state in order to maintain those members of the society who are unable to maintain themselves.[43]

If the state were formed with the idea of its potential collapse in mind, this could not be the case. This is because, in believing in the eventual collapse of the state we would at the same time be acknowledging a return, at some point, to a condition in which 'might equals right'; a condition that is merely suspended for the time in which the state exists. The requirement that we view the state as existing in perpetuity is paired with the prohibition on looking to the start of the state for the purposes of calling it illegitimate. We must think of the state as always having provided a rightful condition, and also of that condition being extended into the future indeterminately. But,

rather than just imposing a negative constraint on the citizens of the state, I maintain that this also places a positive burden on the state.[44]

As we have already seen, the state has an obligation to bring itself into conformity with the idea of the original contract, but there is some question as to what this requirement actually entails. What does the state in idea look like? We know from the *Anthropology* list that the republican state is one in which there is force constrained by freedom and law. I believe that we should understand this combination as requiring the least amount of force to provide the highest amount of freedom and law. This would require the state to bring about a condition in which law reigns in such a way that coercion is minimized and freedom is maximized. There will, however, always be the threat of coercion, given that—for Kant—it is internal to right itself.[45] The point, however, is that if we want to maximize the amount of freedom, then the state is, at least minimally, concerned with generating means. Here I draw a distinction between relational and comparative freedom. Relational freedom is that which concerns the form of the relationship between citizens in a rightful condition—it is the type of freedom targeted by the Universal Principle of Right.[46] Comparative freedom, on the other hand, concerns the comparative availability of means. While it is possible that each is relationally free in a rightful condition—indeed, this is one of the defining features of such a condition—there may be varying levels of comparative freedom. So, to say that the state ought to be concerned with increasing means, I am saying that it ought to take an interest in the comparative freedom of its citizens.

In asserting that the state should be concerned with extending the freedom of its citizens, rather than merely securing that freedom against the action of others, I am departing from Kant's concerns of the *Metaphysics of Morals*. There, he does not advocate the extension of freedom, but only the creation of the formal conditions that secure the relational freedom of all. My concern with comparative freedom, however, is not entirely without textual support: in *The Critique of Pure Reason* Kant asserts that the ideal republic would provide "*the greatest* human freedom according to laws that permit the freedom of each to exist together with that of others."[47] This, in terms of health care, might correspond to state-funded research into, and treatment of, conditions that wouldn't count as preventative or emergency health concerns. For example, the means available to a person born without a limb can be significantly less than those available to others. Indeed, disability is another case in which the likelihood of a person's choice being dependent on the will of another is much greater.

I should mention a qualification. In order to reach the point at which it is possible to discuss extending means, the state must already have secured the basic freedom of its citizens. This, however, is no easy task. The brief discussion of poverty above should have been enough to indicate that there are still wrongful relations of dependence in even the most developed countries

of the world. I believe that it would be a misuse of state power to consider extending the means of some at the expense of securing the freedom of others. The fundamental conception of freedom in Kantian political philosophy is non-comparative—we are either able to take up means towards the ends we have set for ourselves, or we are not. I think this focus is correct. However, I also believe that Kantian principles can be consistently extended to support consideration of comparative freedom.

This final argument, then, rests on a very particular reading of the requirements of the state, as set out by the idea of the original contract. On this reading, a state that has already secured the freedom of its citizens must also seek to increase their means. The freedom in question here changes its form—it becomes not merely relational, but also comparative. But, as I just mentioned, this cannot be the first goal of a state; rather, it is an ideal set out by the state in idea.

V. OBJECTIONS

Before concluding, I would like to address two objections; one seeks to expose a tension in the use of freedom. The other addresses the inclination of many to appeal to the *Groundwork* when discussing patient or other rights in bioethics. Put simply, this latter objection takes the form of the question: Why the *Doctrine of Right*?

Freedoms in Conflict[48]

The first objection I would like to address concerns the way in which resources for both preventative and emergency care will be generated. The problem is this: In order to provide such public institutions, taxes will need to be coercively collected. This can be viewed as the violation of the freedom of some citizens to the benefit of others. Presumably, if the state has an obligation to provide such institutions, then citizens will not have a choice as to whether or not they should be taxed in order to support them. If this is the case, then providing public health care might wrong some citizens.[49] I believe there are two possible responses to this challenge:

First, we need not think that the use of taxes as a means of supporting public institutions necessarily violates freedom in the sense that Kant understands it. That is, it is not clear that taxation diminishes a person's capacity to take up means towards ends that he or she has set for him or herself. Heavy taxation of an individual might considerably diminish that individual's means, and thus be wrong in those cases;[50] but that does not make taxation wrong in general. An additional argument would be needed, on the part of those who oppose this form of taxation, which demonstrates that Kant's understanding of external freedom needs revision.

Second, and relatedly, we have seen that Kant believes the wealthy in a society have an obligation to contribute to the maintenance of their fellow citizens. He says:

> The wealthy have *acquired an obligation* to the commonwealth, since they owe their existence to an act of submitting to its protection and care, which they need in order to live; on this obligation the state now bases its right to contribute what is theirs to maintaining their fellow citizens.[51]

That is, by virtue of living in a rightful condition, those who are best off have an obligation they would not have otherwise had. More specifically, they have an obligation to help maintain those who are least well off. This is because the wealthy are able to enjoy their wealth only because they live in a state. From this benefit, a duty is owed. Thus, what may appear to be the infringement of the freedom of some for the sake of others is actually just the coercion required by right.[52]

Why the Doctrine of Right?

This question is particularly salient because it represents, what I believe to be, an error of interpretation that pervades the literature addressing Kantian moral philosophy. Many interpreters of Kant have read his legal philosophy as an application of his ethical philosophy.[53] This is easy to understand. Much of Kant's ethical terminology appears in the "Doctrine of Right." For example, just in the discussion of punishment, he asserts both that "the law of punishment is a categorical imperative"[54] and that a sentence is matched to a "criminal in proportion to his inner wickedness."[55] The former statement appears to assert that punishment is a duty required by the Categorical Imperative, the latter that punishment is concerned with the wrongness of the criminal's *motivation*. However, despite these and other apparent similarities, ethics and the law are distinct for Kant. Each is determined by a different principle, and concerned with a different aspect of behavior. Due to this, any attempt to base an interpretation of Kant's legal philosophy on his ethical philosophy is bound to fail.[56]

We can understand the difference between ethics and the law by the type of behavior to which each applies. All that matters, in the eyes of the law, is external conformity to the law, *regardless of ones feelings towards it*. This is not the case with ethics, which requires that the right action be done for the right reason. Ethics, therefore, is concerned with the internal motivations for a person acting. The law, on the other hand, is concerned only with external behavior. The difference between these two foci can be seen most clearly in the different principles Kant employs in his ethical and legal philosophy. The supreme principle of ethics, articulated in the *Groundwork*, is the Categorical Imperative; the first formulation of which states: "Act only

in accordance with that maxim through which you can at the same time will that it become a universal law."[57] This formulation clearly states that the Categorical Imperative is a test for the sufficiency of your motivations (or, reasons) for acting. Furthermore, only those reasons that pass the test of universalization will be considered ethical. There is no consideration of external behavior when considering the ethical worth of an action.

To the contrary, the principle of Kant's legal philosophy, the Universal Principle of Right, states: "Any action is right if it can coexist with everyone freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone freedom in accordance with universal law."[58] While I maintain that the characterization of the law given in the Universal Principle of Right bars considerations of internal motivation, there is still a worry here. Both the Categorical Imperative and the Universal Principle of Right are concerned with universality in relation to freedom. This appears to weigh strongly in favor of those who understand Kant's legal philosophy as an application of his ethical philosophy. There are, however, two considerations that assuage the concern generated by this similarity. The first concerns the type of freedom in question, the second Kant's division of laws in the Introduction to the *Metaphysics of Morals*.

First, it is important to note that "it cannot be required that I make [the Universal Principle of Right] the maxim of my action; for anyone can be [externally] free so long as I do not impair his freedom by my external action, even though I am quite indifferent to his freedom or would like in my heart to infringe upon it."[59] That is, we cannot force people to act from the right motivation, but we can coerce them into acting in accordance with the external freedom of others. A legal right cannot be grounded in the Categorical Imperative because it cannot be employed to evaluate the appropriate behavior. Similarly, it is very difficult to see how enforcement could be justified by the Categorical Imperative. This is because enforcement must be justified by appeal to external behavior, but the Categorical Imperative makes no such appeal. Thus, the freedom referred to by the Universal Principle of Right is external freedom, while the freedom referred to by the Categorical Imperative is solely internal. Furthermore, as external freedom is not reducible to internal freedom, so too Kant's legal philosophy is not reducible to his ethical philosophy.

Second, the distinction between ethics and right is supported by the division of laws that Kant presents in the Introduction to the *Metaphysics of Morals*. He states: "In contrast to laws of nature, these laws of freedom are called moral laws. As directed merely to external actions and their conformity to law they are called juridical laws; but if they also require that they (the laws) themselves be the determining grounds of actions, they are ethical laws."[60] Thus, the morality of a given action contains both the ethical and legal status of that action. Morals is the genus under which the distinct species ethics and law are found.[61] As moral laws are the broadest category of laws of freedom—or, to continue with my characterization, they are the highest in the taxonomic order—it is not difficult to see why each principle found in a division of morals

will also concern itself with some form of freedom. Important for us here is the fact that the forms of freedom can, and do, differ.

There is one more challenge that must be considered in order to bar appeals to the *Groundwork* when discussing bioethical rights. Namely, that to sever right and ethics seems to conflict with the assertion that to stay in the state of nature is "wrong in the highest degree."[62] This is because, in making this claim, Kant appears to state that we have an ethical justification for leaving the state of nature. However, given what I have already mentioned, I think this cannot be a correct interpretation. By remaining in the state of nature—a state in which "human beings do one another no wrong at all when they feud among themselves"[63]—we act in a way that denies the importance, even the existence, of one aspect of freedom internal to morals. Kant states: "They [—those who choose to remain in the state of nature—] take away any validity from the concept of right itself and hand everything over to savage violence."[64] That is, we act in a way that denies the possibility of any assurance that our external rights (our right to our bodies, and our property) will be met. The wrong cannot be legal, because there is no external law that binds us in the state of nature. It also cannot be ethical, because it takes no account of our motivation. The wrong, therefore, must relate to morals more generally—indeed, we have seen that it connects to the only innate right we possess in virtue of our humanity. It is wrong in the highest degree because neither division of morals is sufficient to explain its significance; we must look to the highest taxonomic order of the *Metaphysics of Morals* to understand the nature of the wrong. Thus, both the type of freedom referred to and the division of morals supports the distinction between ethics and the law in Kant's philosophy. Any attempt to ground legal rights in ethical philosophy is thus bound to fail.

CONCLUSION

In this paper, I have argued that it is possible to consistently extend Kantian political philosophy to provide a defense of the right to health care—understood primarily in terms of preventative and emergency care. Preventative care protects our current means; emergency care maintains those citizens who cannot maintain themselves. I have also suggested an understanding of Kant's ideal republicanism that requires that once the freedom of all is secured, the state has an obligation to seek to increase the means of its citizens. That is, once relational freedom has been secured, the idea of the original contract requires that the state be concerned with comparative freedom. Important for health concerns is the fact that this obligation can be used to support state funded medical research. However, this should not be done at the expense of securing the relational freedom of some. Finally, I attempted to demonstrate that appeal to the "Doctrine of Right" when discussing matters of legal right in Kantian philosophy is more consistent than appeals to the *Groundwork*.

NOTES

1. Immanuel Kant, *Practical Philosophy.* trans. Mary Gregor. (Cambridge, UK: Cambridge University Press, 1996). All subsequent references to Kant's works will cite the Akademie pagination.
2. Article 25 (1) of the UDHR states: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and *medical care and necessary social services,* and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." (UN General Assembly, *Universal Declaration of Human Rights,* 10 December 1948, 217 A [III]. Emphasis is my own.) See also the UN and WHO "Right to Health" factsheet, available at: http://www.ohchr.org/Documents/Publications/Factsheet31.pdf.
3. For a few examples, see Richard E. Ralston, "How Our Rights Are Destroyed" from *Americans for Free Choice in Medicine,* http://www.afcm.org/howourrightsaredestroyed.html, and Leonard Peikoff "Health Care Is Not a Right" from *Americans for Free Choice in Medicine,* http://www.afcm.org/hcinar.html. Arguments such as these turn on the idea that the only rights suitable for protection from the state are negative rights—i.e., those in which the correlative duty is to refrain from acting in some specified way. Negative rights are contrasted with positive rights, in which the correlative duty requires some action on the part of the duty-holder. I do not believe it is necessary to go into the details of the particular positions that would fit this individualistic libertarian characterization; I will, however, explicitly address the challenge such a view presents in Section V.
4. Again, for a few examples see Sofia Gruskin, Michael Grodin, George Annas, Stephen Marks, eds. *Perspectives on Health and Human Rights* (New York: Routledge, 2005); Thomas Pogge, "Human Rights and Global Health" *Metaphilosophy* 36, no. 1/2 (Oxford: Blackwell, 2005): 182–209; Allen E. Buchanan, "The Right to a Decent Minimum of Health Care," *Philosophy & Public Affairs* 13, no. 1 (Winter 1984): 55–78; Norman Daniels, *Just Health* (Cambridge, UK: Cambridge University Press, 1999). The reasons provided for a right to health care presented in the above publications are diverse, and it is not the purpose of this paper to examine them. I do not want to claim that there cannot be more than one reason for asserting that there is a right to health care. That is, I want to leave open the possibility that the entitlement to such a right is overdetermined. The purpose of this paper is to defend such a right from a Kantian perspective; something that, to my knowledge, has not yet been done. (Alexander Kaufman mentions the epigraph above but does not offer a specific argument in its defense. See: Kauffman, *Welfare in the Kantian State* [Oxford: Oxford University Press, 1999], chap. 1.)
5. The use of "Kantian" ethical principles in the context of health-related rights is near ubiquitous. This often takes the form of employing the 'Formula of Humanity' statement of the Categorical Imperative, which requires that we treat people always as an end and not merely as a means to our own ends (*G,* 4:429), or glosses this requirement with the phrase "respect for persons." The idea is simple enough: Kantian ethics requires that we respect persons by treating them always as an end in themselves. This then gets used as the basis for biomedical policy and law. See, for example, Buchanan's introduction to *Contemporary Issues in Bioethics* (Belmont, CA: Wadsworth Publishing Company, 1982) or Alan Donagan's "Informed Consent in Therapy and Experimentation," (in *Journal of Medical Philosophy* 2, no. 4 (1977): 307–329. In her book *Autonomy and Trust in Biomedical*

Ethics, Onora O'Neill is skeptical of the way in which Kantian ethical principles have been applied in contemporary discussions (Cambridge, UK: Cambridge University Press, 2002). See chapter 6 especially. The problem, we will see in Section V, is that ethical obligations are not candidates for coercion when unfulfilled; but, for Kant, matters of external (that is juridical) right must be.

6. I will use the terms "juridical state" and "rightful condition" interchangeably.
7. *MM,* 6:306.
8. *A,* 7:330.
9. *MM,* 6:313.
10. For an excellent discussion of this distinction, see B. Sharon Byrd and Joachim Hruschka, *Kant's Doctrine of Right: A Commentary* (Cambridge, UK: Cambridge University Press, 2010), chap. 7.
11. *G,* 4:414–4:415.
12. *MM,* 6:315.
13. *MM,* 6:340.
14. Ibid.
15. We can also think of this in a different way: In the state of nature, contracts are not binding because we have no assurance that the other party, or parties, will uphold their end of the agreement. Public, law-giving institutions are a necessary condition for the validity of contracts because they make settling disputes and enforcing violations possible. But, if this is the case, then no contract could precede the existence of public institutions. Thus, the original contract cannot be anything but an idea.
16. *MM,* 6:340–6:341. Emphasis is from the original.
17. *MM,* 6:316. Emphasis is from the original.
18. The reasons for this are familiar, and I won't go into them in detail. It is enough to say that the trinity of problems in the state of nature (acquisition, assurance, and indeterminacy) can only be solved through public, law-giving institutions. The legitimacy of these institutions—or more precisely, the legitimacy of the power these institutions exert—is possible only through the idea of the original contract. For discussion of the problems of the state of nature, see Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009), chap. 6.
19. *MM,* 6:237.
20. Ibid. Also see Otfried Höffe, "Kant's Innate Right as a Rational Criterion for Human Rights," in *Kant's Metaphysics of Morals: A Critical Guide,* ed. Lara Denis. (Cambridge, UK: Cambridge University Press, 2010), 87–90.
21. 'Quasi' because it isn't clear that the innate right will map perfectly onto our contemporary notion of a human right, though it gets close.
22. Ibid.
23. *MM,* 6:237.
24. These two goals, while seemingly distinct, are but one principle of the state. Given that the purpose of the constitution of the state is to bring it more into conformity with principles of right, which principles require that each be free as consistent with the same freedom for all, constitutional perfection is nothing but the state's securing the freedom of all.
25. For a useful discussion of this, see Ripstein, *Force and Freedom,* chap. 11.
26. The phrasing here appears to imply that the state is generated to provide some end, distinguishable from it. However, this is not true for Kant. The question of external freedom for him is a question of social organization, which in turn is the question of the legitimacy of one person's rule over another. Thus, the state is not here to protect something we can talk about without reference to it; rather it is here because that is the only way for external freedom to exist.

27. John Locke, "The Second Treatise of Government," in *Two Treatises of Government* (Cambridge, UK: Cambridge University Press, 1960).
28. For brevity, I will call these "immediate, debilitative conditions."
29. *MM,* 6:326.
30. *MM,* 6:330.
31. This, of course, does not include the relation of dependence between a child and his or her parents.
32. This may appear to conflict with Kant's comments at *TP,* 8:292. There he states, "the welfare of one is very much dependent upon the will of another (that of the poor on the rich); thus one must obey (as a child its elders or a wife her husband) and the other directs; thus one serves (a day laborer) and the other pays him, and so forth." Thus, there are permissible relations of dependence in a rightful condition. It is important to note, however, that while it is possible that one be dependent on another—as, surely, an employee is on an employer—the dependent cannot be subject to the *arbitrary* will of the other. The dependence relations Kant mentions are permitted because they are relations under law. So, the relationship between employee and employer is not vicious because wrongful termination—and similar wrongs—can be adjudicated through a public institution. Kant says: "But *in terms of right* . . . they are nevertheless all equal to one another as subjects; for, no one of them can coerce any other except through public law . . ." (Ibid.). The subjection of another to one's own arbitrary will would amount to coercion outside of public law and thus be unacceptable; but, it is not actions like this we include in those forms of dependence Kant allows.
33. *G,* 4:398, 4:423, 4:430.
34. For discussions that support this claim, see Sarah Williams Holtman, "Kantian Justice and Poverty Relief," in *Kant Studien* 95 (2004): 86–106; Kaufman, *Welfare in the Kantian State,* chap. 1; and Mark LeBar, "Kant on Welfare," in *The Canadian Journal of Philosophy* 29, no. 2, (1999): 225–249. I discuss a disagreement with LeBar in Section V, footnote 52.
35. *MM,* 6:326.
36. See *The Social Contract,* Book II, Chapter VII in Jean-Jacques Rousseau, *Basic Political Writings,* trans. Donald A. Cress (Indianapolis: Hackett Publishing Company, 1987).
37. This is the objection we left at the end of the last section.
38. I am grateful to Chad Horne for making me aware of this objection.
39. *MM,* 6:318. Emphasis is from the original.
40. From the Kantian perspective, this approach cannot get off the ground. He claims that right "does not signify the relation of one's choice to the mere wish (hence, also the mere need) of the other, as in actions of beneficence or callousness, but only a relation to the other's *choice*" (*MM,* 6:230. I am grateful to Reidar Maliks for pointing this out to me). Thus the objection raised is one that targets the use of the Kantian framework in discussions of health altogether.
41. See David Braybrooke, "Let Needs Diminish that Preferences May Prosper," in *Studies in Moral Philosophy,* ed. Nicholas Rescher (Oxford: Basil Blackwell, 1986) and Norman Daniels, *Just Health: Meeting Health Needs Fairly* (Cambridge, UK: Cambridge University Press, 2008).
42. *MM,* 6:326.
43. *MM,* 6:326.
44. LeBar maintains that this is the only justification available to Kant for state-funded welfare institutions ("Kant on Welfare," 248–249.)
45. *MM,* 6:231–232.
46. The Universal Principle of Right states: "Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its

maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law" (*MM,* 6:230).

47. *CPR,* A 316/B 373. The emphasis is my own.
48. I am grateful to Kian Mintz-Woo and Jonathan Courtney for pressing me to address this objection.
49. Some interpreters of Kant maintain that he would agree with this objection, and support only a minimal state. See, for example: Howard Williams, *Kant's Political Philosophy* (New York: St. Martin's Press, 1983), 195–98; F. A. Hayek, *Law Legislation and Liberty* (London: Routledge & Kegan Paul, 1976), 43. It is my hope that the preceding sections have offered a compelling alternative to this reading.
50. Kant is concerned with the unjust burdening of the wealthy by the government through high taxation but clearly supposes that *some* burden is appropriate (*MM,* 6:326).
51. Ibid. Emphasis is my own.
52. In stating this I am disagreeing with LeBar, who maintains that "As a matter of freedom we are entitled to have others not prevent us from preserving ourselves; it does not follow that we are entitled to be provided for by them" ("Kant on Welfare," 248). He claims that the only justification for taxation of the wealthy is that it is *instrumentally* necessary for the preservation of the state. This, it seems to me, is inconsistent with Kant's general understanding of the necessity of the state—which does not admit of instrumental, and thus contingent, necessity. But, more than that, LeBar's claim also does not acknowledge that without some welfare institutions, the freedom of some would be wholly, and viciously dependent on the will of others. If my argument in Section III was successful, then LeBar's interpretation cannot be correct.
53. For example, Thomas E. Hill, in his paper "Kant on Punishment: A Coherent Mix of Deterrence and Retribution?", can be read as committing this type of error. While he presents what is properly a mixed-theory interpretation of Kant's view of punishment, he believes that the overriding concern is ethical—seen in terms of collective disapproval (Thomas E. Hill Jr., "Kant on Punishment: A Coherent Mix of Deterrence and Retribution?" *Jahrbuch für Recht und Ethik* [Berlin: Duncker and Humblot, 1994]).
54. *MM,* 6:230.
55. *MM,* 6:333.
56. For discussions supporting this, see Ripstein, *Force and Freedom,* chap. 1; Thomas Pogge, "Is Kant's *Rechtslehre* a 'Comprehensive Liberalism'?" in *Kant's Metaphysics of Morals: Interpretive Essays,* ed. Mark Timmons. (Oxford: Oxford University Press, 2002), 133–159; and Thomas Pogge, "Kant's Theory of Justice," *Kant-Studien* 79, no. 4 (1988): 407–433.
57. *G,* 4:421.
58. *MM,* 6:230.
59. *MM,* 6:231.
60. *MM,* 6:220.
61. This is affirmed by Kant in the *Doctrine of Virtue* when Kant states, "This distinction [between the Doctrine of Virtue and the Doctrine of Right], on which the main division of the *doctrine of morals* as a whole also rests, is based on this: that the concept of **freedom,** which is common to both, makes it necessary to divide duties into duties of *outer freedom* and duties of *inner freedom,* only the latter are ethical" (*MM,* 6:406. Emphasis is from the original).
62. *MM,* 6:308.
63. *MM,* 6:307.
64. *MM,* 6:308.

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