Kant on Citizenship

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A thesis submitted for the degree of
Doctor of Philosophy
Trinity Term 2018

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This thesis argues that Kant has a systematic account of citizenship. Kant claims that citizens possess three attributes: (i) freedom, (ii) equality, and (iii) independence. Each of these attributes specifies a relation between the state and its members. Freedom is the institutionalised version of the innate right to freedom. Citizens possess freedom when the state only permits its members to perform those actions that are compatible with the innate right. Equality is possessed by citizens when each member of a state bears the same relationship to the law as every other member. Finally, independence is the attribute possessed by members of a state who are not under the authority of any other member and who contribute to the state.

There are three kinds of rights in Kant's political philosophy: the innate right to freedom, acquired rights, and public rights. Each of the attributes of citizenship provides us with additional resources for thinking about one of these rights. Freedom sheds light on the innate right by specifying the requirements of that right in the only condition in which it imposes constraints on the actions of others (i.e., the state). Equality sheds light on acquired rights. This is because the implications of Kant's account of the equality of citizens primarily concern those rights. Kant's account of equality tells us both that privileges associated with a certain status cannot be hereditary, and that great material inequality is permissible. Independence sheds light on public rights. Those who are independent are active citizens. Active citizens are free and equal members of a state who contribute to the existence and the laws of that state. In doing so, they also contribute to a necessary condition for the validity of the rights of each.

Acknowledgements

I would first like to thank my supervisors, the /ɹælfs/: Bader and Walker. This thesis would not be what it is had it not been for their suggestions and advice. But, more than this, both have been indefatigable in their support as I try to find my way in this discipline. Ralf Bader has supervised me from this project's origin as my BPhil thesis. I have benefitted immensely from striving to meet his exceptional standards for clarity, insight, and rigour in philosophical work. Ralph Walker took me on in my second year on the DPhil. I have greatly enjoyed the conversations we have had over the last two years, and have learned much from him. Regarding reading Kant, each /ɹælf/ offered a different but important lesson: Ralf Bader taught me to look for all the ways in which things can fit together; Ralph Walker taught me that sometimes they don't have to.

I would also like to thank my family. Even at a distance, they have all been a constant source of support and encouragement. In addition to the support of my family, I am lucky to have had the support of Steph 'the Snail' Wales throughout this process. She has helped to keep me at least partially grounded in the real world, and has always dragged me out of Oxford at the times I needed that most.

The 'lunch crew' of the philosophy faculty, in its various forms, has provided (at times much needed) humour, distraction, and camaraderie over the last four years. For coffee breaks, lunch breaks, and advice given in the hallway, thank you to Laurenz Casser, Christopher Fowles, James Kirkpatrick, AJ Gilbert, Milena Bartholain, Matt Hewson, and Maya Krishnan. I have also been lucky to have the friendship and support of Liam Cattell, Chris Neufeld, and Mina Sewell-Mancuso.

I have also benefitted from numerous conversations and written feedback during the course of writing. For support in this way, I am particularly grateful to: Joseph Bowen, Robert English, Gabriele Gava, L.P. Hodgson, Jakob Huber, Stefano Lo Re, Reidar Maliks, J.P. Messina, Adrian Moore, Ela Naegele, Ketan Ramakrishnan, Arthur Ripstein, Paola Romero, Thomas Sinclair, Jacob Weinrib, Marcus Willaschek, and Mira Wolf-Bauwens.

Over the course of the DPhil, I been fortunate to attend conferences and workshops at which I learned much, and was welcomed by friendly and engaged audiences. Notable among these were the 2015 and 2016 Leuven Kant conferences, the 2016 Kant PhD conference in Halle, the 2017 LSE graduate political theory conference, the 2017 ECPR Kant standing group, the St. Andrews Kant Colloquium, and the 2018 Oslo workshop in Kant's legal and political philosophy.

For financial support over the course of many years of university study, I would also like to express my gratitude to my father. Without him, I certainly would not be here. I am also very grateful for additional support from the Oxford Philosophy Department and Merton College.

For my family

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Abbreviations

References to nearly all of Kant's works refer to the abbreviated title, volume, and page number of the German (formerly Prussian) Academy of Science edition of his collected works, commonly known as the *Akademieausgabe* (*Kants gesammelte Schriften*, Berlin: G. Reimer/W. de Gruyter, 1902).

There are three exceptions to this. First, references to the *Critique of Pure Reason* follow the standard A/B format, referring to the pagination of the first and second editions of that work respectively. Second, there are some passages that are not included in the *Akademieausgabe* text, but do appear in *Nachforschungen zu Briefen und Handschriften Immanuel Kants* (2014) edited by Werner Stark. References to those texts are cited using 'Stark' and the pagination from that volume; for example, 'Stark 244'. Third, references to transcriptions of lectures undertaken by Kant's student Johann Sigismund Kaehler refer to the pagination in *Immanuel Kant: Vorlesung Zur Moralphilosophie* (2004) also edited by Stark; for example, 'Kaehler 241'. References to Kant's 'Reflections' include the number of the specific reflection in addition to the information listed above; for example, 'Refl 7938 19:560'.

The bibliography contains details of the translations used. I have mostly followed the translations in the *Cambridge Edition of the Works of Immanuel Kant*. Any modifications of those translations are noted, except in cases in which I modify the text to reflect British spelling. All emphasis in quoted passages is in the original unless otherwise indicated.

Abbreviations used throughout are as follows:

A . . . . *Anthropology from a Pragmatic Point of View*
C . . . . *Correspondence*
CF . . . . *Conflict of the Faculties*
CPR . . . . *Critique of Pure Reason*

DCF . . . . . Drafts for the *Conflict of the Faculties*
DMM . . . . . Drafts for the *Metaphysics of Morals*
DPP . . . . . Drafts for *Toward Perpetual Peace*
DTP . . . . . Drafts for “Theory and Practice”
I . . . . . “Idea for a Universal History with a Cosmopolitan Aim”
MM . . . . . *Metaphysics of Morals*
Mo/Collins . . . . . Moral Collins
Mo/Kaehler . . . . . Moral Kaehler
Mo/Mron . . . . . Moral Mrongrovius
Mo/Vig . . . . . Moral Vigilantius
NF . . . . . Natural right lecture notes by Feyerabend
OBS . . . . . *Observations on the Feeling of the Beautiful and the Sublime*
PP . . . . . *Toward Perpetual Peace*
Refl . . . . . Reflections
Rel . . . . . *Religion within the Boundaries of Mere Reason*
ROBS . . . . . Remarks on *Observations on the Feeling of the Beautiful and the Sublime*
SR . . . . . “On the Supposed Right to Lie from Philanthropic Concerns”
TB . . . . . “On Turning out Books”
TP . . . . . “On the Common Saying: That May be True in Theory, but it is of no use in Practice”
WUP . . . . . “On the Wrongfulness of Unauthorised Publication of Books”
WE . . . . . “An Answer to the Question: What is Enlightenment?”

Introduction

Kant's account of citizenship forms an important, but largely overlooked, part of his political philosophy.[1] While current literature on this subject is attentive to some features of Kant's discussion, his full account has been left undeveloped. The aim of this thesis is to remedy this lack of attention; I argue that Kant has a systematic account of citizenship, and that this account provides us with important resources for understanding his political philosophy as a whole.

Kant tells us that, in terms of rights, the attributes of citizens are: (i) lawful freedom, (ii) civil equality, and (iii) civil independence.[2] Each of these attributes provides us with resources for thinking about one of the three stages in the development of Kant's political philosophy as a whole: the innate right to freedom, acquired rights, and public right. Lawful freedom is the institutionalised version of our innate right to freedom, and sheds light on that right. The innate right is a negative claim to not be interfered with when performing permissible actions. Citizens of a state possess lawful freedom when the state only permits its members to perform those actions that are compatible with the innate right to freedom. Equality is possessed by citizens when each member of a state bears the same relationship to the law as every other member. The right to equality sheds light on acquired rights. This is because the implications of Kant's account of the equality of citizens primarily concern our acquired rights. In particular, Kant tells us both that privileges associated with a certain status cannot be hereditary, and that great material

[1] For the purposes of this thesis, when I refer to citizenship, I mean domestic citizenship unless otherwise stated. For a developed account of Kant's account of world citizenship, see Kleingeld (2012).

[2] In what follows, I simply refer to 'freedom', 'equality', and 'independence' in my discussion of the attributes of citizens (dropping the terms 'lawful' and 'civil') except in cases in which to do so would create ambiguity.

inequality is permissible. Finally, independence is the attribute possessed by members of a state who are not under the authority of any other member and who contribute to the state. An understanding of independence sheds light on Kant's view of public right. Kant says that independent members of a state are active citizens. Active citizens are united both in their support for the continued existence of that state and the giving of laws in that state. Insofar as they contribute to the existence of the state and its laws, active citizens also contribute to a necessary condition for the validity of the rights of each.

The critical attention that Kant's account of citizenship has received in recent literature is mostly negative. This is due, in part, to the fact that this literature has focused on the distinction Kant draws between active and passive citizens. A passive citizen is a member of a state who is protected by that state and under an obligation to obey its laws, but who cannot participate in lawgiving. An active citizen is also a member of a state who is protected by that state and under an obligation to obey its laws. However, active citizens are permitted and required to participate in lawgiving. Many readers have been dissatisfied with the criteria by which Kant determines who qualifies as an active citizen. This is because his criteria appear both (i) to favour, in a seemingly arbitrary way, those who occupy a social status similar to that of Kant himself, and (ii) to be morally dubious because they rule out women and the poor altogether. This has led commentators to doubt the philosophical currency of Kant's discussion of citizenship as a whole. Indeed, if we were to rely solely on existing literature for an understanding of Kant's discussion of citizenship, we would likely come to the conclusion that he merely makes some unfortunate remarks about who can possess that status; we would likely conclude that Kant does not have anything resembling an *account* of citizenship at all.

Thus, from what I have already said—and will substantiate throughout the course of this thesis—the state of the literature on Kant's account of citizenship is unsatisfactory for two related reasons. First, focusing narrowly on the distinction between active and passive citizens obscures the fact that Kant has a broader, and more systematic account of citizenship. On both of the occasions in which Kant explicitly distinguishes between active and passive citizens, this distinction is preceded by a discussion of freedom, equality,

and independence. It is these three attributes that form the core of Kant's account of citizenship. The distinction between active and passive citizens is a distinction between those who are civilly independent and those who are civilly dependent. This distinction does not exhaust Kant's account. Second, by failing to appreciate the depth and scope of Kant's full account of citizenship we also lose the insight into Kant's political philosophy more generally that such an account is able to provide.

A brief note on methodology. My primary aim here is exegetical. The project of this thesis is to demonstrate that Kant has an account of citizenship, and that this account forms an important part of his political philosophy. The primary mode of the thesis is thus interpretative rather than normative. I am interested in accounting for what Kant tells us, rather than defending his view (or a 'Kantian' view) against alternative accounts of citizenship. However, Kant is often unclear, and his discussions are sometimes too brief. This is especially so in the Public Right section of the *Doctrine of Right*, where we find the account of citizenship. Regarding this section, Kant admits that he has "worked with less precision [...] than might be expected" (MM 6:209). For this reason, some reconstruction of Kant's views is also necessary. When reconstruction is necessary, I endeavour to ascribe to Kant the strongest position available to him. I make an effort in what follows to note when I am reconstructing Kant's views, rather than simply interpreting a passage. But, the line is sometimes thin between these two activities, and disagreement can surely arise concerning the view I attribute to Kant. When a text is ambiguous, or cast at too high a level of abstraction, I rally both textual and philosophical resources in support of my reading.

Chapter 1 sets out Kant's 'General Division of Rights'. This brief section of the *Doctrine of Right* introduces the distinctions between private and public right, and innate and acquired rights. The distinction between private and public right is a distinction between two different doctrines of right. Private right rests solely on *a priori* principles. Public right is the sum of laws that have been promulgated by a legislator. The distinction between innate and acquired rights is a distinction between two different kinds of private right.

The innate right is a negative claim to not be interfered with when performing permissible actions. Acquired rights entitle us to property, contractual rights, and rights concerning relations of status. Kant claims that public right is a necessary component of the 'General Division' because of two problems in the state of nature that make individual rights claims invalid: the assurance problem and the disagreement problem. The state, understood as a condition of enforced public law, is uniquely able to solve these problems.

Chapters 2 to 4 discuss the attributes of citizens. Chapter 2 discusses the right to freedom of citizens. This right is grounded on the innate right to freedom, and for this reason the innate right and the right to freedom of citizens are substantially similar. However, the right to freedom of citizens is a right against the state. It requires that the state only permits certain forms of relation between its members—i.e., those that are compatible with the innate right. Given some of Kant's comments, it is understandable to think of the innate right as a property right in one's body. However, Kant explicitly denies this. We are not self-owners. He has two arguments for this claim, which I call the *Status Argument* and the *Liberty Argument*. The status argument claims that self-ownership is impossible because it requires that one possess both the status of a thing and the status of a person at the same time but these are mutually exclusive. The liberty argument claims that self-ownership is impossible because only those objects that do not impose duties on us can be owned but we have duties to ourselves. Neither of these arguments fully support Kant's conclusions. Both are compatible with a limited right of self-ownership.

Chapter 3 discusses the right to equality of citizens. Members of a state are equal for Kant if (and only if) each member bears the same relationship to the law as every other member. Civil equality thus concerns our relation to public institutions. There are two central implications of this right. First, there can be no hereditary privileges. Second, great material inequality is permissible, since this is compatible with formal, legal equality. Kant's account of equality does not provide positive grounds for the provision of welfare for those who are unable to maintain themselves. However, it is worth considering whether any of Kant's commitments do provide such grounds. I discuss four approaches to thinking about Kant on welfare and argue that all fail at their task due to being either

textually or philosophically implausible. These approaches are (i) the enforced charity approach, (ii) the wrongful dependence approach, (iii) the rational consent approach, and (iv) the Kantian left-libertarian approach.

Chapter 4 discusses independence. Independence is an attribute of full citizens, not a right possessed by every member of a state. I argue that independent members of a state for Kant are those who (i) are not under the authority of any particular other person or group of people, and (ii) make a contribution to the state. Independent members of the state are active citizens. Active citizens are permitted and obliged to participate in lawgiving. However, Kant claims that participatory institutions are not necessary. A state only needs to be ruled in a republican manner, and this does not require any actual input from citizens. This poses a problem for Kant's account of citizenship. In particular, it risks the possibility that all members of a state will end up passive citizens, thus eliminating the significance of civil independence. I conclude this chapter by sketching a solution to this problem. Active citizens of the state, I suggest, are those who contribute to the continued existence of that state. This solution departs from Kant's stated account, but is largely consistent with it. In particular, it preserves the connection, albeit in a modified form, between active citizenship and the laws of a state. Moreover, I believe that it is an attractive picture of citizenship. That is, on this account, full citizens are those members of a state who contribute to a necessary condition for the validity of the rights of each.

Chapter 1

Kant's 'General Division of Rights'

The broad contours of Kant's political philosophy are now well known.[1] Kant argues that the institution of a state is necessary for the validity of individual claims of right. Lacking a state, we have the grounds of rights, but such grounds fail to impose constraints on the actions of others. The content of individual rights claims is specified by the innate right to freedom and our acquired rights. The innate right to freedom is a negative claim to not be interfered with while performing permissible actions. This right only entitles us to claims concerning our body and objects that we are holding. Acquired rights go beyond this; they comprise property rights, contractual rights, and rights concerning relations of status (such as those a parent has over a child). Jointly, the principles governing innate right and acquired rights comprise what Kant calls *private right*. Kant identifies private right with natural right—i.e., those laws of right that are discoverable on the basis of *a priori* principles alone. One of Kant's fundamental political insights is that *a priori* principles of right are insufficient for the validity of individual rights claims. As I have already mentioned, the state is a necessary condition for the validity of such claims. Thus, Kant tells us, a system of *public right* is also necessary. Public right is those laws of right that have been publicly promulgated and are coercively enforced. Kant's political philosophy is thus developed in three stages: the innate right to freedom, acquired rights, and public right. The innate right to freedom entitles us to the use of our body and objects we are holding. Acquired rights entitle us to objects external to us. Finally, public right is that

[1] See, for example, Ripstein (2009), Flikschuh (2000), Byrd and Hruschka (2010), and Stilz (2011b).

condition in which innate and acquired rights are secured and the laws governing them are publicly promulgated.

In this chapter, I elaborate on this picture by examining Kant's 'General Division of Rights'. This is important for the following reasons. First, the 'General Division' provides us with the resources to draw the three-fold distinction between the kinds of rights that we can possess. Since individual rights claims determine the extent of our external freedom, and external freedom is the central concern of Kant's political philosophy, understanding this section of the *Doctrine of Right* is important for understanding Kant's political philosophy more generally. Second, as we will see over the following three chapters, each of the attributes of citizens also provides us with additional resources for understanding one of the kinds of rights in Kant's 'General Division'. Lawful freedom sheds light on the innate right to freedom. Civil equality sheds light on acquired rights. And, civil independence sheds light on public rights.[2] Thus, the 'General Division' provides us with an overview of the structure of Kant's political philosophy, and a way of understanding the relationship between that structure and his account of citizenship.

This chapter is split into three sections. In the first section, I briefly introduce the connection between Kant's moral concept of right, individual rights claims, and external freedom. In the second section, I construct Kant's general division of rights by appeal to the distinctions he draws between private and public right, and innate and acquired right. Taken together these distinctions form a three-fold division in the kinds of rights we can possess: the innate right, acquired rights, and public rights. Public rights do not add to the matter of private right, and so do not extend the domain of external freedom. Rather, they only concern the form that our relationship to the state must take in order for our private rights to be fully determinate and secure. In the third section, I explain why public right is necessary. In order to understand why we need public right, we must understand Kant's arguments for the necessity of the state. I argue that the state, understood as a condition of enforced public law, is necessary for Kant because the state of nature is a condition in

[2] In what follows I will sometimes refer to 'public right' and sometimes to 'public rights'. The former indicates the doctrine of right that has been publicly promulgated in a civil condition, the latter indicates the individual rights possessed as a member of that civil condition.

which rights are both insecure and indeterminate.

1.1 Right, rights, and external freedom

Before coming to the 'General Division of Rights', we must first consider the connection between Kant's moral concept of right, individual rights, and external freedom. Briefly, the connections are as follows. The moral concept of right tells us that right is concerned with the formal relation between the imputable external actions of distinct individuals. A necessary and sufficient condition for the rightfulness of an external action in general is that it is consistent with the external freedom of all others. We are obliged by the universal law of right to act only in ways that are rightful. Individual rights claims specify the content of this general obligation by specifying the sphere of each individual's external freedom. There can be no individual rights claims that could not form a part of a system of equal freedom. Let me now elaborate.[3]

Kant's definition of the moral concept of right in §B of the 'Introduction' to the *Doctrine of Right* states that, "Right 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 is explained with reference to three features. 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 of another [...] but only a relation to the other's choice [*Willkür*]. Third, in this reciprocal relation of choice no account at all is taken of the matter of choice. (MM 6:230)

First, right is concerned with the reciprocal influence of the deeds of distinct individuals. A deed is an action that can be imputed to the agent who performed it.[4] Right is thus concerned with the relation between the imputable actions of distinct individuals. Second,

[3] For helpful remarks on the structure of the 'Introduction' to the *Doctrine of Right*, see Wood (2002) and Flikschuh (2015).

[4] See MM 6:223: "An action is called a *deed* insofar as it comes under obligatory laws and hence insofar as the subject, in doing it, is considered in terms of the freedom of his choice. By such an action the agent is regarded as the *author* of its effect, and this, together with the action itself, can be *imputed* to him."

right only concerns the relation between the choices of each.[5] It takes no account of an agent's wishes. Both choices and wishes result from the human faculty of desire. We can only choose something when we have the means to bring about the object or state of affairs we desire.[6] When we do not have sufficient means for this task, we can only wish for the object or state of affairs. Since the wishes of one cannot interact with the external actions of another (wishes do not terminate in external action), they are excluded from consideration. Third, right is concerned only with the form of the relation of choice between the agents involved, not the matter of their choice. That is, right is indifferent to the ends that people are pursuing and their reasons for that pursuit. To sum up, right is concerned with the formal, external relation between the imputable choices of distinct individuals.

Following the moral concept of right, Kant introduces the universal principle of right. This 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)

The universal principle of right tells us that a sufficient condition for the rightfulness of an action is that it can coexist with everyone's freedom in accordance with a universal law. Kant also tells us that if an action is not in accordance with the freedom of all others under a universal law, then it is wrong.[7] Acting in accordance with the freedom of others under a universal law is thus both a necessary and a sufficient condition for the rightfulness of an action. The universal law of right, which is the universal principle of right in its imperatival form, commands that our actions satisfy this condition. It says: "act externally that the free use of your choice can coexist with the freedom of everyone in accordance

[5] For Kant, choice (*Willkür*) is the elective aspect of the will that chooses between self-love and duty. It is thus—strictly speaking—something internal to the agent. However, here, choice should be understood to signify the external actions performed; more specifically, those external actions that can be imputed to the agent who performed them.

[6] See MM 6:213: "Insofar as [the faculty to do or refrain from doing as one pleases] is joined with one's consciousness of the ability to bring about its object by one's action it is called choice; if it is not joined with this consciousness its act is called a wish."

[7] See MM 6:230-31: "If then my action or my condition generally can coexist with the freedom of everyone in accordance with a universal law, whoever hinders me in it does me wrong; for this hindrance (resistance) cannot coexist with freedom in accordance with a universal law."

with a universal law" (MM 6:231). Any action that transgresses this command is wrong. Such actions are not actions that one is free to perform, and so their performance may be rightfully hindered by others. The freedom of external action of each individual is thus limited by the like freedom of all. The general constraint imposed by the universal law of right is made more specific by individual rights claims. The actions that an agent is free to perform are determined by the rights of that agent. The rights that can be possessed by that agent are, in turn, limited by the idea of a system of equal external freedom. There can be no individual rights claims that are incompatible with such a system.

We turn next to Kant's 'General Division of Rights'. Given the connection between individual rights claims and external freedom, this brief section of the *Doctrine of Right* is important. This is because it specifies the kinds of rights that we can possess. In doing so, it also specifies, in general terms, the permissible forms that the external relation between the deeds of distinct individuals can take.

1.2 Constructing Kant's 'General Division'

Kant's 'General Division of Rights' is both brief and a bit puzzling. Given that it immediately follows his 'General Division of Duties of Right', one would expect Kant to draw some connection between the two; a statement, perhaps, that the rights correspond to the duties. No such statement is made. Rather than presenting three rights that correspond to the duties, Kant instead presents his reader with two distinctions. The first is between natural and positive right. (Kant also uses the terms private and public right to draw this distinction, and those are the terms that I will employ, see MM 6:242). The second is between innate and acquired rights. We are not told how these distinctions relate to each other or how they relate to the duties of right.[8] Following the 'General Division of Rights', Kant proceeds to discuss the content of the innate right to freedom, and the division of the *Metaphysics of Morals* as a whole. No further discussion of the two distinctions is

[8] The relation between the 'General Division of Duties of Right' and the 'General Division of Rights' is, I believe, complicated by the fact that the 'General Division of Rights' is primarily concerned with the grounds of obligation *in others*, but the 'General Division of Duties of Right' contains a duty to oneself (*honeste vive*). I leave this problem, and the 'General Division of Duties of Right', aside in what follows.

given except to say that the innate right was introduced in order to solve disputes about acquired rights (§2.1.2). Here is the full text of the 'General Division of Rights':

> (1) As systematic *doctrines*, rights are divided into *natural right*, which rests only on *a priori* principles, and *positive* (statutory) *right*, which proceeds from the will of a legislator.
>
> (2) The highest division of rights, as (moral) *categories* for putting others under obligations (i.e., as a lawful basis, *titulum*, for doing so), is the division into *innate* and *acquired* rights. An innate right is that which belongs to everyone by nature, independently of any act that would establish a right; an acquired right is that for which such an act is required.
>
> What is innately mine or yours can also be called what is *internally* mine or yours (*meum vel tuum internal*); for what is externally mine or yours must always be acquired. (MM 6:237)

What should we make of this short section? I believe that these two distinctions are combined to generate the familiar three-fold division in the kinds of rights that we can possess: the innate right, acquired rights, and public rights. Before getting to the division between kinds of rights we must know more about the two distinctions. The first of these distinctions is between private right and public right. The second is between the innate right and acquired rights.

Private/public. Kant tells us that the distinction between private (natural) and public (positive) right is a difference between two systematic doctrines of right. A doctrine of right is the sum of laws for which external lawgiving is possible (see MM 6:229). While Kant is not clear about this, it makes sense to think of a doctrine of right as the laws necessary for the realisation of a system of equal freedom. Private right is the sum of laws that rest only on *a priori* principles. Public right is the sum of laws that have been promulgated by a legislator. Public right is constrained by private right. There can be no public law that conflicts with the principles of private right. This does not mean that all public laws are specified in advance by private right. There may be some public laws that are neutral with respect to principles of private right. For example, public law may require that drivers keep either to the right or to the left of the road. Neither of these options is any better or any worse than the other from the

perspective of private right, and so both are permissible. What is ruled out are public laws that are inconsistent with principles of private right.

Innate/acquired. This is a distinction between kinds of private rights. An innate right is a private right that belongs to each person originally, by virtue of her humanity, and so prior to any legally relevant act on her part. Kant believes there is only one innate right: the right to freedom under universal law. Acquired rights are, to the contrary, private rights that require some act for their establishment. For Kant, acquired rights comprise property, contract, and status rights (see MM 6:247).

Private/public and innate/acquired are both exhaustive distinctions. The laws governing rights have either been publicly promulgated or they have not. Private rights are either innate or they are acquired. Jointly, these distinctions can be used to construct a three-fold division between the kinds of rights that we can possess. This 'general division of rights' thus comprises three categories of right, which are represented in the following table according to the way in which the private/public and innate/acquired distinctions interact:

	Innate	Acquired
Private	1. The innate right	2. Acquired rights
Public	x	3. Public rights

There are no innate, public rights because membership in a particular civil society, which is a necessary condition for possessing public rights, is not an innate status but an acquired one.

In what follows, I will develop this three-fold distinction in the kinds of right that we can posses. We have already seen that Kant's political philosophy is concerned with the external freedom of each under universal laws. Each right in the 'General Division' corresponds to a different aspect of our external freedom. The innate right comprises our freedom over our bodies and objects that we are holding. Acquired rights extend that freedom by permitting ownership of objects that are external to us. Acquired rights thus

make it the case that interference with objects that are external to us would wrong us even when that interference does not affect our body. Public rights do not further extend the domain of external freedom. Rather, they are rights that we possess as members of a civil condition that both secures and fully determines our private rights.

The focus of my discussion in this chapter will be the structural role of each of the three rights in the general division, and not their content. I have already mentioned that the attributes of citizens provides us with additional resources for understanding the three rights in Kant's 'General Division of Rights'. Thus, in presenting the content of the attributes of citizens in later chapters I will also be filling out the content of the rights in the 'General Division' to the extent necessary for my purposes here.

1.2.1 The innate right

Kant tells us that the innate right is a private right for which no act of acquisition is necessary. It is a right we possess merely by nature or as human beings.[9] While Kant is not clear about this, it makes sense to believe that the innate right follows from the universal principle of right. The universal principle of right states that a sufficient condition for the rightfulness of an action is that it is consistent with the freedom of others under a universal law. The innate right can be read as a statement of the moral status of those subject to this principle (see Flikschuh 2015: 662). This status both (i) constrains the acquired rights that we may possess and (ii) states that all those who are subject to the universal principle of right are equal in terms of their juridical freedom and that certain substantial rights follow from this. Kant's explanation of the innate right states,

> *Freedom* (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a

[9] There have been many different accounts of the grounding of the innate right in recent years. They can be separated into two broad categories: foundationalist and non-foundationalist (see Flikschuh 2017). Foundationalist readings claim that the innate right is grounded on some normative feature of the agent, such as the capacity to set and pursue ends or the capacity for rational agency (see Ripstein 2009, Hodgson 2010, Stilz 2011b, and Byrd and Hruschka 2010). These are sometimes combined with a discussion of Kant's notion of humanity. Non-foundationalist readings, to the contrary, claim that the innate right specifies a form of moral relation between persons (see Flikschuh 2009, 2010, 2015, 2017 and Ludwig 1988). What I say about the innate right above does not concern the grounds of that right, and is compatible with both the foundationalist and non-foundationalist approaches. For this reason, I leave this debate aside here.

> universal law, is the only original right belonging to every man by virtue of his humanity. (MM 6:237)

I discuss what the innate right entitles us to more fully below (§2.1). What is important for us here is the fact that Kant claims the innate right is possessed by virtue of one's humanity. There is no act that we must perform before we possess the innate right. This is why Kant calls the innate right 'original'. For Kant, we possess a right originally if we possess it prior to any legally relevant act (see MM 6:246n).[10]

It is due to the fact that the innate right is an original right that it constrains the possible acquired rights that we are permitted to possess. No person can possess a right that would conflict with her innate right, or the innate right of another. This is because the rights we are permitted to acquire are constrained by pre-existing rights. The innate right necessarily exists prior to all acquired rights, and no right exists prior to the innate right. It is important to note that the priority here has to be understood in normative rather than temporal terms. The innate right is *normatively* prior to acquired rights. If the priority were understood in temporal terms, then the acquired rights of those who were born at an earlier time would restrict the innate right of those who were born later. This is an unacceptable consequence. Kant believes that the innate right entitles each person to be wherever nature or chance has placed them; it entitles us to occupy whatever space we occupy through no fault of our own. (I discuss the right to occupy space more fully below, §2.1.3). If we understood the priority of the innate right over acquired rights simply in temporal terms, then the innate right of some would not entitle them to occupy space in a world in which all land was acquired before they were born. This is because, in such a world, the temporally prior acquired rights of the landowners would restrict the innate right of the person who was born later. Such a conclusion is certainly not one that Kant would have endorsed. This is because it would make the permissibility of the mere existence of those born later contingent on facts about the acquisition of land. For

[10] See, for example, Kant's discussion of original possession in common: "The possession by all human beings on the earth *which precedes any acts of theirs that would establish rights* [...] is an *original possession in common*" (MM 6:262, first emphasis is mine; §§3.2.3-3.2.4). Kant also discusses original acquisition of land in order to signify first acquisition of land, in contrast to acquisition that is derived from the right of another (see MM 6:263-70). Here the sense of original is different, since original acquisition of land requires an *act* of acquisition.

this reason, we should think of the priority of the innate right over acquired rights in normative rather than temporal terms. This means that the acquired rights of some cannot restrict the innate rights of others, even if those rights were acquired prior to the birth those whose innate right is in question.

Thus, all acquired rights are constrained by the innate right to freedom, and the innate right is constrained by nothing but itself.[11] Any supposed claim of acquired right the satisfaction of which would violate the innate right of another cannot be a right at all (see MM 6:238).

The innate right is also a substantive right: it entitles those who possess it to not be interfered with when performing permissible actions. Flikschuh has argued, contrary to this claim, that the innate right is not a substantive right. She claims that the innate right "functions as an *a priori* necessary presupposition of any substantive rights doctrine [... and that] given its status as a formal *presupposition* of morally valid substantive rights claims in general, the innate right cannot itself be an object of substantive rights legislation" (2015: 663). The innate right itself cannot be the object of substantive rights legislation because it is presupposed in any such legislation. The function of the innate right, Flikschuh claims, is solely to restrict the kinds of acquired rights that we can possess. It is not a substantive right itself. It seems to me that this moves too quickly. While we may believe that the innate right imposes a restriction on the kinds of acquired rights that can be possessed, and that it forms a necessary presupposition of any substantive legislation, this does not rule out that it is also a substantive right. For example, we might believe that the moral status that makes substantive legislation necessary (and which restricts the acquired rights we may possess) must also be protected by that legislation. Kant appears to endorse the view that the innate right has substantive content. He mentions, in connection with the innate right, the right to communicate one's thoughts just so long as in doing so one does not deprive another of what is theirs (see MM 6:238). This is an authorisation that Kant claims is not distinct from the innate right, and it is surely a candidate for legislation in the form of a limited right to self-expression (§2.1.2). Thus, it seems that Flikschuh's account

[11] For discussion of this, see Hodgson (2010), Weinrib (n.d.).

of the innate right as a formal presupposition for legislation concerning acquired rights does not commit us to believing that this right cannot also be the object of substantive rights legislation.[12]

More importantly, the view that the innate right is not a substantive right also has significant unpalatable consequences. Flikschuh herself understands the innate right as akin to a right to bodily integrity (see 2010: 301). It is this right that explains why certain kinds of interference with a person's body are wrongful. Consider a familiar Kantian example: I wrest an apple from your hand. On the view that Flikschuh prefers, this is a violation of the innate right because it is a violation of your bodily integrity—in order to take the apple I must interfere with your body, but I am not entitled to use your body as I see fit and so that interference wrongs you. The unpalatable consequence that follows from thinking that the innate right cannot be the matter of substantive rights legislation is that there could be no law prohibiting violating another person's right to bodily integrity in this way. We might believe that, in this specific example, laws governing property rights would achieve the desired result. My action would be prohibited on the grounds that it is an interference with your property (i.e., the apple), and that such an interference is necessarily also a violation of your status as an equal juridical subject. But this won't be able to account for cases in which there is no property involved. What if, rather than wresting an apple from your hand, I merely grab your hand, perhaps breaking one of your fingers? Here there can be no recourse to property-related legislation as no property is involved. Yet, it seems wrong to think that there could be no legislation protecting against this treatment.

Kant appears to include substantive content in the innate right, and there are significant unpalatable consequences if we strip the innate right of this content. Due to this, we should believe that the innate right both restricts the acquired rights that we can possess and is itself a substantive right.

Let us now turn to acquired rights.

[12] Huber (2017) also makes this point.

1.2.2 Acquired rights

Acquired rights are the second kind of rights in Kant's 'General Division'. They are rights for which some act of acquisition is necessary. Kant claims that there are three types of acquired rights: property rights, contractual rights, and rights concerning relations of status (such as the rights a parent has over a child). Acquired rights cannot be justified by the innate right to freedom, since the innate right only provides us with an entitlement to the use of our bodies. Instead, acquired rights are justified by what Kant calls the postulate of practical reason with regard to rights. This postulate states that the acquisition of external objects of choice (those objects that are the concern of acquired rights) is consistent with the innate right to freedom of each. For this reason, such acquisition must be permissible. If it were not, then external freedom would be limited by something other than freedom itself.[13]

The innate right entitles us to non-interference with external objects that we are (rightfully) holding. This use is called 'empirical possession' (see MM 6:249). Consider again the case, already discussed above, in which I wrest an apple from your hand. If we are only considering empirical possession, the wrong done to you by my action has to be explained by appeal to your innate right. This is because in order to take the apple from you I must interfere with your body. Empirical possession does not constitute a property right in an object. Compare the case in which I wrest the apple from your hand with a case in which I interfere with what you are holding *without* interfering with your body. For example, imagine that you are holding a matured dandelion and that I have a fan powerful enough to disperse the seeds that now make up its head. Or imagine that you have a cup of water, and that I have a straw that allows me drink that water without

[13] My discussion below focuses on property rights, and leaves out a discussion of contractual rights and rights concerning relations of status. The reason for this is that property seems to pose a problem that contract and status do not (see Walla 2018). This is because the acquisition of something unowned creates a duty in others not to interfere with that thing, and this is not a duty to which those others have consented. Contract does not introduce the same problem, since contractual obligations must be freely agreed to (see MM 6:271). A person cannot non-consensually enter into a contractual obligation. Relations of status, such as marriage, are also freely entered into and so do not raise a similar problem to property. The same is not the case with the relations of status that exist between parents and a child. A child does not decide to enter into those relations, because she cannot decide whether or not to be born. Thus a problem arises about how the act of having a child can be rightful. This concern forms the basis of Kant's belief that the parents have a duty to take care of the child (see MM 6:280-81).

touching you (or the cup). If I use my fan or my straw, then have I wrongfully interfered with your empirical possession? No, because my interference with the object is not also an interference with your body, and interfering with your body is a necessary condition for violating empirical possession.[14] We require a stronger account of possession in order to make sense of the possible wrongfulness of acts such as these.

The right of empirical possession thus falls short of a property right. In order for a person to have a property right, it must be the case that interference with an object is wrongful even when that interference does not affect the body of the person who owns it. This definition may appear to differ from the one that Kant gives in that it may appear more inclusive. Kant says that the real definition of ownership (what he calls 'intelligible possession') is the following: "something external is mine if I would be wronged by being disturbed in my use of it *even though I am not in possession of it* (not holding the object)" (MM 6:249). According to this passage, the wrongfulness of all acts of interference with an object that one is holding can be captured by the innate right. Intelligible possession is meant to capture the wrongfulness of interference with objects that I am not holding. This might not appear inclusive enough because it may seem to be unable to account for cases in which I interfere with something that you are holding without interfering with your body (as in the cases of the dandelion and the cup of water above).

But, I believe that Kant's definition can accommodate these cases if we appropriately specify what it means to hold an object. In particular, we should only count as holding an object if interference with that object would also count as an interference with our body. Thus, in the example above, I do not count as holding the water in the cup. I am only holding the cup itself (or, if they are separable, the parts of the cup I am touching). In the case of the dandelion, I am only holding that part of the stem that is in contact with my hand. A person who cuts the stem above where my hand is wrapped around it (for example, by cutting the head off the flower) would not violate my empirical possession. This is because, in cutting the stem, they would not be interfering with my body. If we understand what it means to hold something in this way, we see that Kant's definition

[14] Kant says, "the proposition about empirical possession in conformity with rights does not go beyond the right of a person with regard *to himself*" (MM 6:250, my emphasis).

of intelligible possession is not too narrow. The water in the cup, and the head of the dandelion, do not count as objects that I am holding. For this reason the wrongfulness of interfering with them can be captured by the account of intelligible possession.

What justifies intelligible possession? We know that it cannot be the innate right, because that innate right only entitles us to empirical possession. Thus, what we need is an additional claim that external freedom can be extended to include rights to objects external to us and that we are not holding. This additional claim is what Kant calls the postulate of practical reason with regard to rights, which is identified as a permissive law that entitles us to acquire external objects of choice. Here is the postulate and Kant's subsequent explanation of it:

> It is possible for me to have any external object of my choice as mine, that is, a maxim by which, if it were to become a law, an object of choice would *in itself* (objectively) have to *belong to no one* (*res nullius*) is contrary to rights.
>
> For an object of choice is something that I have the *physical* power to use. If it were nevertheless absolutely not within my *rightful* power to make use of it, that is, if the use of it could not coexist with the freedom of everyone in accordance with a universal law (would be wrong), then freedom would be depriving itself of the use of its choice with regard to an object of choice, by putting *usable* objects beyond any possibility of being *used* [...]. — But since pure practical reason lays down only formal laws as the basis for using choice and thus abstracts from its matter, that is, from other properties of the object *provided only that it is an object of choice*, it can contain no absolute prohibition against using such an object, since this would be a contradiction of outer freedom with itself [...].
>
> This postulate can be called a permissive law (*lex permissiva*) of practical reason, which gives us an authorisation that could not be got from mere concepts of right as such, namely to put all others under an obligation, which they would not otherwise have, to refrain from using certain objects of our choice because we have been the first to take them into our possession. Reason wills that this hold as a principle, and it does this as *practical* reason, which extends itself *a priori* by this postulate of reason. (MM 6:246-47)

There is a lot going on in this passage, and I will not address it all. One significant question that attends thinking about the permissive law, however, is: what, exactly, does it entitle us to? This is a difficult question, and Kant does not give us very much to go on. It is unlikely that the permissive law is able to give us a full blown property right, as Kant believes that

such rights can only exist in the civil condition (see MM 6:312).[15] However, this negative characterisation does not help, as there can be many reasons why full-blown property rights are not possible in the state of nature (§1.3).

Some commentators believe that we should understand permissive laws in the *Doctrine of Right* as giving us a right to do wrong. This is how permissive laws are characterised in *Perpetual Peace*.[16] In particular, Kant claims that a permissive law is a permission to do wrong given the circumstances in which an action takes place (see PP 8:348). In discussing the external relation of a despotic state to other states, he claims that the despotic state need not give up its unjust constitution if doing so will bring about its own destruction. Rather, it may wait until a time that it is more secure before making the necessary internal changes.[17] Thus, a permissive law as it is understood in *Perpetual Peace* permits a wrong to occur in anticipation of a future rightful condition. In the context of the *Doctrine of Right*, this account of permissive laws can be understood as allowing us to treat our acts of appropriation as though they are successful in the state of nature in anticipation of a future rightful condition. (This reading will be clarified below).

One strength of this reading is that it asserts that Kant's understanding of permissive laws remained consistent between *Perpetual Peace* and the *Metaphysics of Morals*. It thus allows for some coherence between two of Kant's central works of political philosophy. Another strength is that it captures the Kantian claim that a unilateral will cannot impose obligations on others (see MM 6:256, MM 6:261). On this reading, the permissive law permits us to act as though we can acquire external objects of choice in the state of nature,

[15] Indeed, it seems that Kant's argument does not actually support the strong conclusion that we are entitled to rights of private ownership at all. The passage only appears to support the weaker conclusion that we are entitled to use-rights in otherwise unowned objects. That is, he moves too quickly from discussing the possibility of current use to the possibility of excluding others from all future use. While the permissive law does allow for the possibility private property, this is not the only option available. Below I will argue that private ownership is not incompatible with the freedom of others, and so is at least permissible. We can simply note for now that Kant owes us an account of why private ownership rather than some other system of possession should be favoured. Either way, Kant's claim in this passage extends the entitlements that we have regarding external objects of choice beyond what are are entitled to by the innate right.

[16] For accounts according to which permissive laws in the *Doctrine of Right* are understood in the same way as in *Perpetual Peace*, see Brandt (1982), Flikschuh (2000), Gregor (1963: 57), Huber (2016: 14), Kersting (1984), and Ypi (2013). For those who draw a distinction between the two see: Byrd (2010; 2015), Hruschka (2004), Roff (2013), and Weinrib (2014).

[17] See PP 8:373n: "These are permissive laws of reason that allow a situation of public right afflicted with injustice to continue until everything has either of itself become ripe for a complete overthrow or has been made almost ripe by peaceful means" (see also DPP 23:157).

thus permitting us to coerce others on the basis of this supposed acquisition; something that, so this view says, we are not otherwise entitled to do. This view of the permissive law is also bolstered by the claim of many contemporary commentators that the inability to rightfully acquire external objects of choice in the state of nature is one of the central reasons for Kant's belief that we must establish a civil condition. This is often referred to as the problem of unilateral choice.[18]

The problem of unilateral choice is understood as a problem about each person's *authority* to make decisions about right in the state of nature. Imagine that I'm walking around in the state of nature and I find something on the ground and take it as my own—a pine cone perhaps. By acquiring the pine cone, I make it the case that you can no longer act in a way that would previously have been permissible. More specifically, I make it the case that you cannot interfere with it. You are no longer free to kick it as you walk down the street, or to throw it into a nearby pond. But, some commentators believe, this sort of imposition is incompatible with your innate freedom. By asserting that I have the right to whatever it is I have picked up, I have made a decision for you about what you can do. In the state of nature there has been no promulgation of the law that justifies my acquiring the object. I simply judge that my action is permitted, and so I take it. However, in doing this, and here is where the problem arises, I assert (even if only implicitly) that my choice can unilaterally bind you. I assert that what I think the law permits me to do can impose obligations on you that you did not have before, and that you did not agree to take on. But, these sorts of assertions are incompatible with your innate freedom, which entitles you to not be subject to the necessitating choice of others. Now, all assertions of one's right will necessarily be assertions of what one takes to be right when we are in the state of nature, and so all assertions of right in that state will be expressions of a unilateral will. But, because a unilateral will cannot impose obligations on others, no act of acquisition can be successful in the state of nature.

One difficultly with this view is the fact that, if acts of acquisition are not successful because it is wrong to unilaterally create new duties for others, then acts of procreation

[18] The problem of unilateral choice is discussed in, among other places, Ludwig (2002), Pallikkathayil (2010; 2017), Ripstein (2009), Sinclair (2018) and Stilz (2011b).

must also be considered wrongful. Like acts of acquisition, acts of procreation unilaterally impose duties on all others that they did not have before. Particularly salient for us here is the fact that they impose the duty not to occupy the space now being occupied by the child who results from the procreative act.[19] In this regard, the act of procreation creates a duty that is similar to the duty created by the act of acquiring land. Both restrict a person's movement in a way that it was not restricted previously. Due to the fact that the mere existence of the child means that there is now one less space on the surface of the earth that it is permissible to occupy, the duty created by the act of procreation does not constitute a mere modification of a pre-existing duty. This does not constitute a knock-down objection to the view that acts of acquisition in the state of nature are not successful. The proponent of that view may concede that the choice to have a child in the state of nature wrongs others because it unilaterally imposes an obligation on them. However, it does put pressure on that view. The choice to have a child is not normally considered a way of wronging others. Moreover, there appears to be no salient asymmetry between acquisition and procreation such that procreation can remain permissible once acquisition is ruled out.

There are also positive reasons for believing that the postulate of practical reason with regard to rights gives us an entitlement to acquire external objects of choice even in the state of nature. Kant tells us that the postulate and the permissive law are an *a priori* extension of practical reason (see MM 6:247). This seems to indicate that whatever we are entitled to on the basis of the postulate we must be entitled to in the state of nature. This speaks in favour of the view that the permissive law entitles us to make claims of right against others regarding external objects of choice in the state of nature. Consider again the passage in which Kant introduces the postulate of practical reason with regard to rights. I believe we should understand Kant as claiming that the acquisition of external objects is not necessarily contrary to the innate, external freedom of others. Due to the fact that no person can have an innate entitlement regarding any particular external object, acquisition of an external object does not necessarily violate a person's innate right. If acquisition of external objects was prohibited, external freedom would be deprived of a legitimate

[19] Thanks to Ralf Bader suggesting this objection to me.

object of choice. For this reason, acquisition of external objects must be permissible. Thus, rather than saying that the acquisition of external objects of choice is permitted as a result of my authority, we can think that it is permitted on the grounds that a prohibition on acquisition would be incompatible with the freedom of each.[20]

The view that acquisition of external objects of choice does not wrong others in the state of nature is also supported by Kant's claim that the there is a general will united *a priori* that grounds possession of external objects of choice. He says,

> The possessor [of an external object of choice] bases his act on innate possession in common of the surface of the earth and on a general will corresponding *a priori* to it, which permits private possession on it (otherwise, unoccupied things would in themselves and in accordance with a law be made things that belong to no one). By being the first to take possession he originally acquires a definite piece of land and resists with right anyone else who would prevent him from making private use of it. Yet since he is in a state of nature, he cannot do so by legal proceedings because there does not exist any public law in this state. (MM 6:246n)

In this passage, Kant clearly states both that he is concerned with the acquisition of external objects of choice in the state of nature, and that such acquisition is justified by appeal to the general will that corresponds *a priori* to the innate possession of the earth in common.[21] Rather than requiring the move to a civil condition for the rightful acquisition of external objects of choice, this passage states that the united will necessary for such acquisition already exists in the state of nature.

This reading of Kant's account of acquisition leaves us with a gap to fill. More specifically, some explanation of Kant's concern with unilateral action now needs to be given. I believe that we should think about unilateral action as action that violates *a priori* principles of right. Such actions are those that make illicit use of coercive force. We act unilaterally

[20] Pallikkathayil (2017: 46) makes a similar point, saying: "I do not need to stand on my own authority when I try to acquire property rights in the state of nature; I can instead stand on the authority of the requirements of freedom." For Pallikkathayil, the difficulty associated with acquisition of external objects of choice is not that of unilateral choice, but rather of indeterminacy. On this, see my discussion of the problem of disagreement (§1.3.2).

[21] See also DMM 23:219: "But the possibility and authorisation to be able to acquire everything usable is necessary *a priori*: consequently so is the unification of their powers of choice of all human beings regarding all objects. Thus by the same principle of acquirability which all human beings have, they also acquire the obligation to be able to acquire only in accordance with the idea of the unification of their powers of choice regarding the very same object in accordance with laws of freedom."

when we act in a way that the general will united *a priori* could not endorse. What exactly this means is of course a difficult question and the level of abstraction at which Kant casts his political philosophy does not help matters.[22] However, it does allow us to make sense of the fact that Kant was concerned with unilateral action without thinking that such a concern rules out the acquisition of external objects of choice in the state of nature.

Thus, I believe the postulate of practical reason with regard to rights, and with it the permissive law, is best understood as extending the domain of freedom to objects external to us by giving us the capacity (*Vermögen*, see MM 6:257) to put others under an obligation to refrain from using an object because we were the first to acquire it.[23] This does not mean that all acquisition of unowned objects of choice will constitute a full blown property right in the state of nature. However, this is not due to the postulate of practical reason with regard to rights, but rather the normative features of the state of nature (§1.3).

1.2.3 Public right

The innate right entitles us to the use of our body and external objects that we are holding, but nothing more. Acquired rights extend the domain of external freedom to include external objects that we are not holding. These comprise property, contract, and status rights. The innate right and acquired rights jointly comprise what Kant calls private right. Private right is the sum of laws that rest only on *a priori* principles for a civil constitution. Public right, however, is the sum of laws that have been promulgated by a legislator. The matter of private right is the same in both private and public right. This is because private right restricts public right. There can be no publicly promulgated laws that conflict with principles of private right. The laws in a condition of public right "have only to do with the rightful form of [...] association (constitution) in view of which these laws must necessarily be conceived as public" (MM 6:306). The difference, then, between a condition of private and public right is that the latter is a condition in which the laws governing innate and acquired rights are publicly promulgated and enforced. Kant tells us that the difference

[22] See Sangiovanni (2012) and Valentini (2012) for discussion on this topic in relation to Ripstein's understanding of Kant.

[23] See Hruschka (2004) for a discussion of the principle "*prior temper, potior iure*".

between the state of nature and the civil condition is "only that the civil condition provides the conditions under which [laws concerning what is mine or yours] are put into effect" (MM 6:313).

We might wonder why public right is necessary. If our private rights entitle us both to the use of our body, and to acquire and use property, make contracts and participate in relations of status, then why bother with public right at all? The reason for this is that there are two problems that plague the state of nature (a condition in which there is no enforced public law). These problems result in our claims of private right being made invalid. What it means for a claim of right to be invalid is that it does not impose constraints on the external action of others. In the state of nature, we have the grounds of rights (*Rechtsgründe*), which indicate the constraints that will be in effect once we move to the civil condition, but we lack the conditions in which those grounds impose actual constraints (see Refl 7651 19:477). Without at least the grounds of rights in the state of nature, there would be nothing to secure and the state would not be necessary.[24] Due to the fact that claims of private right are invalid in the state of nature, Kant tells us that "human beings do *one another* no wrong at all when they feud among themselves" in that state (MM 6:307). Public right provides the conditions in which claims of private right are valid. Thus, it is the only condition in which claims of right impose constraints on the external actions of others.

I turn now to Kant's discussion of the problems of the state of nature and the way in which the state is meant to solve those problems. As we will see, there is a significant barrier (one of which Kant was well aware) to the achievement of the solutions. This is because they require that public officials have perfect insight in the requirements of right and can fully secure the rights of each, but no human is capable of this.

[24] See MM 6:256: "Any guarantee, then, already presupposes what belongs to someone (to whom it secures it)" (see also: MM 6:313-14).

1.3 The necessity of public right

Contemporary work on Kant's political philosophy has made his claim that the civil condition is necessary for rights well known.[25] The necessity of the state is able to explain the need for the category of public rights in the 'General Division of Rights'. However, understanding the problems that plague the state of nature, and how exactly the state is meant to solve those problems, is a difficult task. One significant reason for this difficulty is simply that Kant isn't consistent about this himself. For example, he claims both (i) that rights in external objects are indeterminate in the state of nature and that the state is necessary in order to make them determinate (see MM 6:266, DMM 23:279), and (ii) that a civil condition is merely a condition in which rights are secured but *not* settled or determined (see MM 6:256). In addition to conflicting statements such as these, Kant does not present his reader with a clear discussion of the problems of the state of nature. We must piece his claims together from scattered comments made throughout his published works, lectures, and notes. Finally, Kant's claim that the civil condition is necessary for claims of right is philosophically challenging, and raises many questions about the nature and purpose of the state. Any interpretation of Kant's views on this matter will thus be subject to textual and philosophical dispute.

In this section, I argue that rights are provisional in the state of nature for Kant because of two problems in that state that result in rights claims being invalidated: the assurance problem and the disagreement problem. These are problems that civil society is meant to uniquely be able to solve. In the state of nature, we lack a guarantee that those with whom we interact will respect our rights. However, because rights relations must be reciprocal, no person is bound to respect the rights of others unless there is a guarantee that those others will do the same. The lack and impossibility of the relevant form of guarantee in the state of nature is the assurance problem (§1.3.1). The problem of disagreement arises because, Kant claims, the state of nature is a condition in which different opinions about right are possible. More specifically, each person in the state of nature is entitled to be

[25] See, for example, Flikschuh (2000), Hodgson (2010), Pallikkathayil (2010), and Ripstein (2009).

the judge in her own case, and so may disagree with others about the extent of the others' rightful entitlements (§1.3.2). These two problems are distinct. It is possible that those in the state of nature agree about each others' rights (both in terms of general principles of right and the application of those principles to particular cases), but lack assurance that others will respect those rights. This means that the problem of disagreement may be solved without a resolution to the assurance problem. It is also possible that there could be a third party who could guarantee assurance but a lack of agreement concerning who should be assured of what. This means that the problem of assurance may be solved without a resolution to the problem of disagreement.

Each of these problems is solved by one of the features of public law (§1.3.3). In "Theory and Practice", Kant characterises public law as both irresistible and irreprehensible (TP 8:299; elsewhere Kant attributes these characteristics to the sovereign, see I 8:23). It is irresistible because the state must be powerful enough to enforce laws. It is irreprehensible because it is "beyond reproach [...] with regard to right" (TP 8:299). By virtue of being irresistible, public law is able to guarantee that rights will be reciprocally respected. It thus solves the problem of assurance. By virtue of being irreprehensible, public law is able to make determinations about right in particular cases without wronging those for whom the decision is binding. It thus solves the disagreement problem.[26] Both of these solutions face a serious challenge, of which Kant was well aware. Namely, public laws are administered by human beings, and no human is both irresistible in their power or irreprehensible in their judgement. This means that public laws will not be both irresistible and irreprehensible. However, these characteristics are necessary for public laws, and public laws are necessary for us to leave the state of nature. Thus, the fact of human fallibility creates a significant barrier to our leaving the state of nature and entering a civil condition.

[26] Flikschuh (2008: 383) calls the two necessary conditions for valid claims of right the 'entitlement claim' and the 'enforcement claim'. For her, the entitlement claim concerns what the right is an entitlement to, and the enforcement claim concerns those against whom the right is held and how. While this characterisation of the enforcement claim may sound different to what I discuss under the heading of the assurance problem, Flikschuh's concern is with the impossibility of unilateral imposition of sanctions (2008: 384) and the importance of reciprocity in relations of right. This is very much in line with my discussion of assurance below.

1.3.1 The assurance problem

Kant characterises of the state of nature as a state of war.[27] He says, for example, that "the juridical state of nature is a state of war of every human being against every other" (Rel 6:96-97). And that the "non-rightful condition is a condition of war (of the right of the stronger), even if it is not a condition of actual war and actual attacks being constantly made" (MM 6:344; see also CPR A752/B780, PP 8:348-49, Refl 7939 19:560-61). The reason that the state of nature is a state of war is that, lacking a guarantee that rights will be respected, each may legitimately view every other as a threat. A state of war is not necessarily a state of violence. It is merely a state in which pre-emptive violence is permissible as a means of responding to a threat (see Rel 6:97n). On this Kant says,

> A human being [...] in a mere state of nature denies me this assurance and already wrongs me just by being near me in this condition, even if not actively (*facto*) yet by the lawlessness of his condition (*state iniusto*), by which he constantly threatens me. (PP 8:349n)

By virtue of the fact that no person is able to assure any other that they will respect that other's rights, merely interacting with another constitutes a threat.[28] Moreover, as a result of the fact that each person is a threat to the rights of those with whom they interact, each person is liable to coercion with respect to their own rights. The result of this is that no one in the state of nature needs to respect the rights of those with whom they interact; rights claims in such a state are invalid.[29] Here is Kant again,

[27] This section is indebted to Bader (n.d.). However, Bader believes that the disagreement problem is a part of the assurance problem (as does Waldron 1996), whereas, as I have already mentioned above and will substantiate below, I believe that they are distinct. On the assurance problem, see also: Ripstein (2009) and Pippin (1999).

[28] We do not constitute a threat to those with whom we do not interact, and this is why the duty that we have in the state of nature is disjunctive: either stop interacting with others *or* enter into a civil condition in which the rights of each are secure (see MM 6:237; Bader n.d., Ludwig 2002). This is also why Kant says that we can *either* force others to enter into a civil condition with us *or* we can force them to "leave [our] neighbourhood" (PP 8:349n).

[29] The passage quoted above from *Perpetual Peace* does not sit perfectly with this interpretation. This is because Kant says in that passage that another person *wrongs* me just by being near me in the state of nature, but this presupposes that my right can be violated. It is difficult to know what to make of this given Kant's claims elsewhere that the state of nature is a state in which we do no wrong to each other (see MM 6:307, MM 6:312). We can assuage the worry caused by this passage partly by noting that the claim is not repeated elsewhere. The passages in which Kant says that we cannot wrong each other in the state of nature far outnumber those in which he says the opposite. Furthermore, we might think that Kant is speaking from the perspective of a given individual in the state of nature here. Thought of this way, the passage would be

> I am [...] not under obligation to every other to leave external objects belonging to others untouched unless everyone else provides me assurance that he will behave in accordance with the same principle with regard to what is mine [...] [It] is only in a civil condition that something external can be mine or yours. (MM 6:255-56)
>
> No one is bound to refrain from encroaching on what another possesses if the other gives him no equal assurance that he will observe the same restraint towards him. (MM 6:307; see also Refl 7732 19:502)

Which rights lose their validity when one constitutes a threat to others? According to the first passage just quoted, it is only one's acquired rights, and thus the innate right to freedom does not lose its validity in the state of nature.[30] This is the view advocated by Ripstein (2009: 161-63, 180). For Ripstein, the assurance problem is generated by the fact that, absent any assurance that one's own rights will be respected, any respect for the rights of others is a violation of one's own innate independence (and thus conflicts with one's duties to oneself). Lacking the guarantee of reciprocity, respect for the acquired rights of another merely amounts to allowing the choice of a particular person (and not a universal law) to determine what one can do. Moreover, any enforcement of an acquired right in the state of nature is a violation of the innate independence of the person being coerced (and thus conflicts with the duty not to wrong others). This is because, lacking a guarantee that rights will be respected, no one is obliged to refrain from interfering with the property of others. But, because no one is obliged to refrain from interfering, coercion to stop such an interference is wrong (see 2009: 159). The innate right is not made invalid by the assurance problem, Ripstein claims, because, "Your entitlement to use force to exclude others from your own person is consistent with your obligation to refrain from interfering with the person of another" (2009: 161). My entitlement to defend what is innately mine is consistent with my obligation not to interfere with what is innately yours. For this reason, says Ripstein, the assurance problem does not affect the innate right.

The second passage quoted above says that, lacking assurance, no one is bound to

providing a first-personal justification of the use of pre-emptive force—'she has not assured me that she will respect my rights, so I am entitled to the use of pre-emptive force'. However, since each person is entitled to employ the same reasoning from her own perspective, we get the assurance problem.

[30] See also MM 6:313 where Kant claims that if *external objects* were not provisionally mine or yours in the state of nature, then there would be no obligation to move to a civil condition. This speaks in favour of the view that what belongs to a person internally, the innate right, is not merely provisional in the state of nature.

refrain from encroaching on what another possesses. It doesn't say that we are only concerned with external possessions (acquired rights), but merely makes a general claim.[31] Should we read the restriction of the assurance problem to acquired rights present in the first passage into the second passage (and others that make general claims)? That is, should we believe that only acquired rights lose their validity in the state of nature? I think not. The logic of the assurance problem does not seem to be restricted to acquired rights.[32] If, as a result of their interaction, one person poses a threat to another, there is no principled reason why that threat should not also concern the innate right of each. Ripstein claims that the "innate right does not give anyone a right to interfere with the person of another except to protect his or her own person" (2009: 162). This is correct. It also tells us why Ripstein ought to conclude that the innate right is made invalid by the assurance problem. In particular, a pre-emptive response to a threat to one's body is a circumstance in which a person may interfere with the body of another in order to protect herself. As Kant tells us, "No one [...] need wait until he has learned by bitter experience of the other's contrary disposition; for what should bind him to wait till he has suffered a loss before he becomes prudent?" (MM 6:307). Just as we have no assurance that others will respect our acquired rights, so too we have no assurance that they will respect our innate right.[33] So, the problem generated by the fact that we lack a guarantee that others will respect our rights applies equally well to the innate right as to our acquired rights. For this reason, we should think of all rights as lacking validity in the state of nature, not just our rights to external objects of choice.

[31] See MM 6:242 and MM 6:305-06 for two more cases in which Kant makes a general claim, and not one restricted to acquired rights.

[32] Pallikkathayil (2017) also argues that Ripstein is wrong to think that the innate right is conclusive in the state of nature because the problems that affect property rights also affect the innate right (see also Hursthouse 1990). Flikschuh (2010: 303) claims that it is at least unclear whether we have an enforceable innate right in the state of nature. Her reasons for doubt, however, concern whether or not defence of this right requires an omnilateral judgement, and are thus related to the problem of disagreement and not the assurance problem.

[33] It may be true that fewer conflicts arise about our innate rights, because the limit of our body is less subject to dispute than the limit of our property entitlements, or the requirements of a specific contract, for example—though see Pallikkathayil (2017: 46-53) and Fabre (2006) who both give us good reasons to doubt that our entitlements to our bodies are in any way clearer than those to external objects of choice. But, this doesn't help us with the assurance problem, because the assurance problem is concerned with threats to our entitlements and not the boundaries of those entitlements. Another way to put the point is as follows: the assurance problem would still arise if our rights were all determinate.

1.3.2 The disagreement problem

In addition to characterising the state of nature as one in which a guarantee that others will respect our rights is necessarily absent, Kant also claims that it is a condition in which many different opinions about right are possible. It is this characteristic of the state of nature that leads to the disagreement problem. Kant says,

> *Status naturalis* is the one and only state where *leges externae* are observed. Here many different opinions about right are possible and it is thus a condition of [...] *status justitiae privatae*. (NF 27:1381)
>
> However well disposed and right-loving human beings might be, it still lies *a priori* in the rational idea of such a condition (one that is not rightful) that before a public lawful condition is established individual human beings, peoples and states can never be secure against violence from one another, since each has a right to do what seems good and right to it and not to be dependent upon another's opinion about this. (MM 6:312; see also DMM 23:278-79)

In the first passage, Kant affirms that the state of nature is one in which many different opinions about right are possible. It is a condition of private right and not a condition of public right. Underlying the claim in this passage is the view that public right is a condition in which a single interpretation of the requirements of right is promulgated and enforced. In the second passage, Kant claims that even if people were right-loving, they might still disagree about the requirements of right. This is an important claim. Even those who want to perform lawful actions may disagree about what those actions are. Moreover, no person is required to heed the decision of another in the state of nature; each can do what seems good and right to her. What we lack in the state of nature is a single interpretation of right to which all can appeal. However, lacking such an interpretation, all we have recourse to is what each of us judges to be right and these judgements can differ. The result of different judgements about right is that conflict about the extent of each person's external freedom is always possible. This does not mean that the problem of disagreement only arises when there is actual conflict. Rather, it is simply the possibility of conflict in the state of nature that causes a problem. That is, the problem of disagreement would still arise even if we all happened to agree about the extent of each others' rights in the state of nature. This

agreement would only be contingent, and the possibility of disagreement would still exist.

Some commentators believe that the state of nature is one in which different opinions about right are possible because rights are necessarily indeterminate in that state. Rather than speaking of a problem of disagreement, they speak of a problem of indeterminacy.[34] Here is Stilz on the problem of indeterminacy:

> [While] a principle of equal freedom provides us some information about what just property distributions should look like, the principle's content is underspecified, and therefore cannot be directly applied [...]. Many possible systems of property—collective allocation, market socialism, unfettered private ownership—are potentially consistent with that sense of equal freedom. And under each one of these many possible systems, there will again be many possible particular rules consistent with everyone's freedom. (Stilz 2011b: 40)

The idea here is that principles of right (Stilz is primarily interested in the innate right) are insufficient to determine the bounds of rightful property acquisition. Due to the fact that many different systems of right are possible, and that each person's entitlements under those systems would differ, there simply isn't a fact of the matter when it comes to our acquired rights in the state of nature. That is, the possibility of disagreement is a result of the fact that general principles of right on their own are insufficient to determine each person's claims in the state of nature. For this reason, we can reasonably disagree about the boundaries of each person's acquisition.

What should we say about this way of understanding the grounds of disagreement? I will admit that, given the picture of acquisition that I have presented above, I am unsure what it would look like for individuals to acquire external objects of choice in the state of nature with different systems of property in mind. On the view I prefer, the acquisition of external objects of choice does not rely on an explicit (or implicit) appeal to a system of property into which the individual act of acquisition is integrated. Rather, we simply take unowned objects as our own and make use of them. There is no appeal to a law that we take ourselves to be acting under, or system of property to which we appeal.

There are also textual considerations that speak against the view that disagreement can be explained by indeterminacy. Kant characterises natural right as "that [which] can

[34] See Mulholland (1990), Ripstein (2009), Stilz (2011b), and Williams (1983).

be cognised *a priori* by everyone's reason" (MM 6:296-97). So, we might think that while it is possible that we do in fact disagree about whether I am entitled to some particular external object of choice, there can be no disagreement in principle. That is, we may think that there can be no *justified* disagreement between individuals. If everyone had the same knowledge of principles of right, there would be no disagreement at all. Kant acknowledges this claim in his lectures on natural right, saying,

> If I assume that the nature of a human being is just, i.e. that such a human being would not have the intention to wrong anyone, if I posit that all human beings would have the same insight into right and the same good will, then a status civilis would not be necessary. (NF 27:1381)

Kant here appeals to two features of human nature that are individually necessary and jointly sufficient for us to not need the civil condition. These are that humans (robustly) have no intention to wrong one another, and that they have the same insight into right. (This insight should be taken to include the knowledge that others have no intention to wrong one another, otherwise the assurance problem will recur). These correspond to the two problems of the state of nature. If no one ever had the intention to wrong anyone else and others knew this, then the problem of assurance would not arise. If everyone had the same insight into the requirements of right, then the disagreement problem would not arise. Thus, if both of these conditions were satisfied, then the civil condition would not be necessary. The second of these conditions speaks against characterising disagreement in terms of indeterminacy. If rights were indeterminate in the state of nature, then whatever insight a person could have into right in that state would be insufficient for solving the problem of disagreement. Insight into underspecified principles does not rid us of the need for the state; the state would still be necessary for making claims of right determinate.

Nevertheless, a worry remains. In particular, this response appears to eliminate the philosophical significance of disagreement, thus rendering it puzzling why Kant would have characterised the state of nature as a condition in which disagreement is possible. If disagreement does not arise due to any indeterminacy, then one (or both) of the parties to the disagreement could simply be wrong in their judgement. There would be nothing philosophically interesting about the disagreement itself. Disagreement would

only indicate that one person has not understood either a general principle of right or its application to the particular case. We might think that disagreement is meant only to signify the possibility of conflict, and not the existence of indeterminacy. This would bring the problem of indeterminacy closer to the problem of assurance (see Bader n.d.). However, the problem of disagreement does not appear to be one more way in which we lack a guarantee that others will respect our rights. As we have seen, even those who are right-loving, and even in the presence of a third party guaranteeing security, the problem of disagreement can still arise. The problem of disagreement does not then appear to be reducible to the problem of assurance. Moreover, there does seem to be something correct about the claim made by contemporary commentators concerning the indeterminacy of requirements of right in the state of nature. So, while Kant is ambiguous on this point, it does make sense to think of the state of nature as a condition in which rights claims are indeterminate.

We can distinguish between three different kinds of disagreement, two of which rest on a form of indeterminacy. We can disagree about:

1. General principles. That is, we may believe, following Stilz in the passage quoted above, that the normative resources available to us in the state of nature are insufficient to determine general principles of right. If we believe that acquisition must be made with some system of property in mind, and that different permissible systems will generate conflicting results concerning particular acts of acquisition, then the state of nature will be a condition of indeterminacy about general principles of right.

2. The application of principles. Even if we can know general principles of right in the state of nature—as we have seen, Kant claims they are cognizable *a priori* by everyone's reason—that does not mean that those principles will be sufficient to make fully determinate judgments in particular cases. For example, while I argued above that acquisition of external objects of choice is possible in the state of nature, it is still possible to disagree about the extent of any particular act of acquisition. That is, we

may disagree about the way in which any particular act of acquisition is subsumed under the general principle.

3. Empirical facts. We may also disagree about the relevant empirical facts that are being subsumed. For example, we may agree that the general rule for acquisition of land is "*prior temper, potior iure*", but disagree about who arrived first. This is not disagreement about a general principle, or about the application of that principle to a specific case. Rather, it is disagreement about an empirical fact relevant to the claim of right. While this form of disagreement is not the result of any indeterminacy (there will be a fact of the matter about who arrived first), it still raises a significant difficulty. This is because no one is in an epistemically privileged position with regard to the empirical facts.

Thus, there can be disagreement about rights stemming from three different sources. We can disagree about general principles, the application of those principles, and the relevant empirical facts. The first two sources of disagreement arise due to indeterminacy about rights in the state of nature. The last does not arise from any indeterminacy. Rather it arises because no one is in an epistemically superior position to any other about the relevant empirical facts.

1.3.3 Addressing the problems: a sketch

The state of nature is a state in which there are two problems for right. First, rights are insecure because each person lacks a guarantee that others will respect their rights. Second, there can always be disagreement about each person's rightful entitlements. Due to the fact that humans are not by nature fully moral, and do not possess perfect insight into principles of right (and the relevant empirical facts), these two problems make the state of nature a condition in which rights claims lack validity. While the grounds of rights exist in the state of nature, those grounds do not impose constraints on the external actions of others.

Kant claims that the establishment of a civil condition solves these problems. His

claim is not just that the state is the best of a number of different ways in which the problems of the state of nature can be solved. The state is not simply the most convenient or ready option. Rather, the assurance problem and the disagreement problem make a civil condition morally *necessary*. That is, the civil condition is meant to be uniquely able to solve the problems that plague the state of nature. Kant characterises a civil condition as a condition in which individuals are subject to public, coercive laws.[35] A civil condition has public laws if it has promulgated a single interpretation of the requirements of right that is accessible to all. This feature of the civil condition is meant to solve the problem of disagreement. In a condition in which there is only one interpretation of the law, no disagreement should arise. More specifically, the problem of disagreement is addressed by the legislative and judiciary branches of the state. Legislation addresses disagreement about general principles of right by promulgating the law publicly. The judiciary addresses disagreement about the application of those general principles to particular cases when conflict arises.[36] The fact that the laws are enforced coercively is meant to solve the assurance problem. This is because the state acts as a third party that is able to provide the guarantee that rights will be respected. Once this guarantee is in place, no person is permitted to pre-emptively protect her own rights since others no longer pose a threat.

The view that the state is a condition in which a single interpretation of the law is publicly promulgated and enforced is supported by a claim Kant makes in "Theory and Practice". He says:

> For, provided it is not self-contradictory that an entire people should agree to such a law, however bitter they might find it, the law is still in conformity with right. But if a public law is in conformity with this, and so beyond reproach (*irreprehensibel*) with regard to right, then there is also joined with it an authorisation to coerce and, on the other's part, a prohibition against actively resisting the will of the legislator; that is, the power within a state that gives effect to the law is also unstoppable (*irresistibel*). (TP 8:299; see I 8:23)

[35] See Rel 6:95: "A *juridico-civil* (political) *state* is the relation of human beings to each other inasmuch as they stand jointly under *public juridical laws* (which are all coercive laws)."

[36] See Bader (n.d.) and Ripstein (2009). Ripstein argues that there are three problems in the state of nature (he includes the problem of unilateral choice), and that the three branches of a republican government correspond to these problems. On my reading, there are only two problems of the state of nature, and they are solved by the two features of public law.

Kant's primary aim in this paragraph is to defend the view that no resistance to the state is morally permitted.[37] In defending that claim, Kant tells us that public laws in conformity with right are irreprehensible and irresistible. Insofar as they are irreprehensible, they cannot wrong those who are subject to them. Insofar as they are irresistible, they provide a guarantee to each person that her rights will be respected. It is these features of public law that solve the problems of the state of nature. By virtue of being irreprehensible, public law is able to settle cases of disagreement. This is because it provides a public standard that is beyond reproach from the point of view of right. By virtue of being irresistible, public law secures the rights of each.

The problem that arises for both of these solutions is the fact that those who run the state are human, and humans can only approximate the requirement that public law is irresistible and irreprehensible. *If* there was a person who had perfect insight into the nature of right (and others recognised this), was well-intentioned, and had the power to enforce the rights of each, then the problems of the state of nature would be solved. This is because this person would be able to institute public laws that satisfy the conditions Kant specifies. Unfortunately, any sovereign (whether a single individual or group of individuals) is human, and so does not possess the relevant insight, intentions, or power. Kant was aware of this problem. He says, to take two examples:

> Even when the legislative power is present, the judge still is not possible, since humans are not infallible and not innocent. The difficulty is, how beings who must be coerced to be just, can produce for themselves a representative of justice. (Refl 7714 19:498)
>
> The highest supreme authority, however, ought to be just in itself and yet a human being. This problem is therefore the most difficult of all; indeed, its perfect solution is even impossible; out of such crooked wood as the human being is made, nothing entirely straight can be fabricated. (I 8:23; see also Refl 7683 19:489, NF 27:1391)

The worry presented in these passages is that that state requires public officials (including a supremely powerful sovereign) who make decisions in accordance with right, but that all

[37] For discussion of Kant's claims concerning resistance, see Ripstein (2009), Byrd and Hruschka (2010), Korsgaard (2008), and Maliks (2013).

public officials will be human and thus fallible.[38] This fallibility leaves open the possibility that the subjects will be wronged by those officials and that the state will be unable to fully secure the rights of each. However, since the civil condition is meant to be a condition in which rights are secured, and in which disagreement does not arise, the problem of human fallibility appears to constitute a serious problem for establishing a civil condition. How to address these problems is beyond the scope of this thesis. It is enough for my purposes simply that we have an outline of the reasons that Kant believes a state, and thus public right, is necessary.[39]

Kant's 'General Division of Rights' separates the rights that we can possess into three kinds: the innate right to freedom, acquired rights, and public rights. The innate right to freedom is a right that we possess prior to any act on our part. It is a negative claim to not be interfered with when performing permissible actions. The innate right also constrains the acquired rights we may possess. Acquired rights extend our entitlements beyond our body. They are rights to external objects of choice, to the performance of a particular action by another (contractual rights), or rights regarding relations of status. Finally, public rights are those rights that we acquire in a civil condition. They are rights that concern our membership in a state that secures and fully determines our rights.

The civil condition is necessary because of two problems in the state of nature that make claims of right invalid: the disagreement problem and the assurance problem. The disagreement problem arises because each person is entitled to her own opinion about right in the state of nature. The assurance problem arises because the state of nature is a condition in which the guarantee that rights will be respected is necessarily lacking. The two features of public law are meant to be uniquely able to solve these problems. That law is irreproachable solves the disagreement problem, since it is then able to promulgate a single interpretation of right without wronging those for whom the law is binding. That

[38] See Sinclair (2018) for discussion of the related problem that public officials are unable to insulate their private judgements from their public judgements when acting in their capacity as a public official.

[39] In §4.3.1, I discuss the possibility that active citizenship can overcome the difficulties associated with the solution to the problem of disagreement. However, I suggest that this proposed solution is unsuccessful.

the law is irresistible solves the assurance problem, since coercive enforcement of rights provides a guarantee that rights will be respected.

Chapter 2

Freedom

Freedom is the first of the rights that Kant claims comprise the essential attributes of citizenship. It is a right that he says we possess as human beings. The right to freedom of citizens is grounded on the innate right to freedom. For this reason, the innate right and the right to freedom of citizens are substantially similar. However, the innate right is a right that is held by individuals against other individuals. The right to freedom of citizens is a right that is held by individuals against the state; it requires that the state only permit certain forms of interaction between its members. The forms of interaction that are permissible are those that are consistent with the innate right to freedom. Thus, by specifying the requirements of the right to freedom of citizens, we also specify the requirements of the innate right in the only condition in which it imposes constraints on the actions of others (i.e., the state).

This chapter is split into two sections. In the first section, I discuss what the right to freedom of citizens is a right to. I begin this section with a discussion of the innate right, and the three authorisations that Kant claims are contained in that right: 1) to act in accordance with one's innate equality, which is understood in terms of being one's own master; 2) to have only those actions that you have performed attributed to you (to be beyond reproach); and, 3) to do that which does not deprive another of what is hers. Then I discuss a further implication of the innate right for members of a state. Namely, the implication that there must be spaces that those members can occupy.

In the second section, I discuss how we should characterise our innate entitlements. While the innate right might appear to constitute something like property in one's own body, Kant explicitly denies that we should understand it in this way. We are not self-owners. I examine this view by considering Kant's two arguments against self-ownership, which I call the *Status Argument* and the *Liberty Argument*. The status argument claims that self-ownership is impossible because it requires that one possess both the status of a thing and the status of a person at the same time, but these are mutually exclusive. The liberty arguments claims that self-ownership is impossible because we cannot own anything that imposes an obligation on us, but we have duties to ourselves. I find that the conclusions Kant draws from the status argument are not supported by that argument. In particular, I argue that the status argument does not prohibit the selling of non-essential body parts. I also argue that there is no reason to think that Kant's view is incompatible with a weak form of self-ownership according to which there are limits to how we may treat our bodies.

2.1 Innate freedom

Kant claims that citizens possess the right to freedom "as human beings" (TP 8:290). To say that we possess the right as human beings—and not as subjects or citizens of a state, the statuses by which we possess equality and independence, respectively—already indicates that we should understand the right to freedom of citizens along the lines of the innate right to freedom. The rights we possess as human beings are not ones that we can acquire by some act. In the drafts for "Theory and Practice" Kant makes it clear that the freedom of citizens is to be understood in this way when he says that the first quality of each member of a people in relation to the government is "freedom as a human being according to the innate right" (DTP 23:136). So, it is appropriate that we should turn to the innate right to freedom in seeking to determine the content of the right to freedom of citizens.

We have already seen the structural role that the innate right plays. It is a statement of the moral status of those who are subject to the universal principle of right. While

itself a substantive right, the innate right also restricts the acquired rights that we can possess. In this section, I take a closer look at the content of the innate right. First, I examine the passage in which Kant introduces this right. As we will see, according to this passage the innate right is a negative claim right that entitles us to be independent from the necessitating choice of others (§2.1.1). Then, I introduce the three authorisations that Kant claims are 'already involved' in the innate right: the entitlement to act in keeping with one's own innate equality, to have only those actions that you have performed attributed to you (being beyond reproach), and being entitled to do whatever does not diminish what belongs to another (§2.1.2). Finally, I discuss the implication of the innate right that there must be spaces that members of a state can occupy (§2.1.3).

2.1.1 The innate right

The innate right to freedom is a negative claim against others to not be interfered with when one is performing permissible actions. When one person violates the innate right of another, she treats that person as a mere means for the achievement of their own ends. (I discuss how to understand this below).

Here is the passage in which Kant introduces the innate right:

> *Freedom* (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity. – This principle of innate freedom already involves the following authorisations, which are not really distinct from it (as if they were members of the division of some higher concept of right): [1] innate equality, that is, independence from being bound by others to more than one can in turn bind them; hence, a human being's quality of being *his own master* [...], as well as [2] being a human being *beyond reproach* [*unbescholtenen*] [...], since before he performs any act affecting rights he has done no wrong to anyone; and finally, [3] his being authorised to do to others anything that does not in itself diminish what is theirs [...] – such things as merely communicating his thoughts to them, telling or promising them something, whether what he says is true and sincere or untrue and insincere [...]; for it is entirely up to them whether they want to believe him or not. (MM 6:237-38)

Kant here characterises the innate right to freedom in terms of independence (*Unabhängingkeit*) from the necessitating choice of another. This should be a understood as a

negative claim against others that one not be interfered with when one is performing permissible actions. There are two important features of this understanding of innate independence. First, that a person is only entitled to freedom from interference when performing permissible actions entails that a person is made no less free when their performance of impermissible actions is interfered with. Kant's account of innate freedom is moralised (see MM 6:231). It is not a restriction of my innate freedom that I am coercively stopped when stealing something that belongs to you.[1] Second, the innate right does not protect against every interference with permissible actions. It only protects against *wrongful* interference with those actions. A simple example will help to illustrate this: let's say that I am on my way to the theatre in order to buy tickets for tonight's show, but I get caught in traffic. In getting caught in traffic, I arrive at the box office too late and am unable to buy a ticket. Thus, the traffic was an interference with my permissible pursuit of a permissible end. Was my innate right violated? No, because the other drivers on the road did not constitute a *wrongful* interference. The innate right to freedom is a right against wrongful interference in one's pursuits, it does not entitle a person to be successful in her pursuits.

Violations of the innate right take the basic form of treating another person merely as a means. When we treat someone as a mere means, when we wrong that person, our external actions treat that person as if they were a mere thing. Consider the following example: if I force you at gunpoint to give me a piano lesson, at the end of which I then give you $50, I have treated you as a mere means even though I have paid you for your time. The reason for this is that I have used you in order to achieve my own ends without taking into consideration the fact that you also have ends that you want to achieve. Even if my forcing you to give me a piano lesson provided you with a benefit (you now have $50 that you didn't have before, and that's a good rate for a lesson), it did so only by treating you as something that does not decide for itself how its powers are to be used.[2] How do

[1] There are limits to the ways in which an impermissible action can be interfered with. These include, for example, proportionality constraints. While it is difficult to determine to the precise limits of permissible interference with an impermissible action, the general idea here is that a necessary condition for interference to be rightful is that it counteract the wrongful action and nothing more (see MM 6:231; see also Ripstein 2004).

[2] See DMM 23:293, "One may not even benefit someone against his will".

we take the fact that others are persons and not things into consideration when acting? We agree (formally with a contract or informally) to perform certain actions together. There is nothing wrong with our agreeing that you give me a piano lesson for which I pay you $50. This is not wrong because neither of us has decided unilaterally what actions the other will perform; we have decided upon those actions together.

Here is an important clarification. Treating someone as a "mere means" in the context of Kant's political philosophy is not to be understood in the same way that it is understood in Kant's ethical philosophy. We have seen that right is concerned only with the external actions of individuals, and not the ends they are pursing or the reasons for that pursuit (§1.1). For this reason what it is to treat someone as a mere means from the perspective of right must differ from what it is to treat someone as a mere means from the perspective of ethics. It is possible that we treat someone as a mere means from the perspective of right while acting on a maxim that is universalisable. This is most easily illustrated by cases of misinformation. For example, if I mistake you for a mannequin and push you over while I am walking past, then my external action has treated you as a mere thing. However, given the fact that I thought that you were a mannequin, it was not my maxim to use you, a rational entity, as a mere means. In this case, I have used you as a mere means from the perspective of right, but not from the perspective of ethics. There was nothing impermissible in my maxim, and yet my external action wronged you. With that said, in many cases a person who treats another as a mere means from the perspective of right will also be acting impermissibly from the perspective of ethics (as in the example of the piano lesson discussed above).

There are two ways in which a person can be treated as a mere means in the context of right, both of which rest on the idea that some decide unilaterally what others will do.[3] In the first, a person is (wrongfully) made unable to commit an action that they are entitled to commit. That is, they are forced to omit a certain action. This occurs when, for example, you forcibly stop me from entering the theatre to buy tickets. In the second, a person is (wrongfully) made to commit an action that they did not choose to commit.

[3] This is just a schematic representation of the ways in which the innate right can be violated.

We should understand necessitation in this context as including both irresistible physical force and compelling but still resistible force.[4] Irresistible physical force is that form of necessitation that takes place when one person physically overpowers another person thereby making that person commit or omit a certain action. This treats a person as a mere means by literally treating them as a thing that can be physically manipulated as one pleases. Compelling but still resistible force is that form of necessitation that takes place when one person defrauds another, for example. This latter form of necessitation is (physically) resistible. A person need not act on fraudulent claims. However, such claims (when they diminish the rights of the defrauded person) are nevertheless wrong (§2.1.2).[5]

There is one further clarification that must be made before continuing. Kant's characterisation of the innate right states that this right entitles us to be *independent* from the necessitating choice of others. The appeal to independence here threatens us with an easy misunderstanding. That is, we may think that Kant's discussion of innate independence has considerable bearing on his account of the independence of citizens. Thus, we might believe that the independence of citizens is the institutional version of innate independence. Such a view should be resisted. Innate independence and civil independence refer to different attributes, and Kant uses different terms to mark these differences in the *Doctrine of Right*. When discussing innate independence he uses *Unabhängigkeit*. When discussing civil independence he uses *Selbstständigkeit*.[6] Innate independence is the *entitlement* to be free from the necessitating choice of another (when one is performing permissible actions), as we have seen. Civil independence is the *attribute* of members of a state who are not under the authority of any particular person or group among the people and who make a contribution to the state.[7] This may seem to conflict with Kant's claim that

[4] See Byrd and Hruschka (2010: 78-79) and Ripstein (2009: ch. 2).

[5] A complete account of the innate right should also be able to make sense of threats and coercive offers. However, each of these presents their own problems. A threat is wrong, but does not rule out permissible options for the person threatened, it merely makes them more difficult to perform. Moreover, a threat relies on the threatened person choosing a particular option, and so doesn't straightforwardly involve treating them as a mere means in the way that physically overpowering someone does. Similarly, coercive offers are offers that a person agrees to, but are nevertheless wrong. How to account for each of these on Kantian terms, if indeed that is possible, is beyond the scope of this chapter.

[6] *Pace* James (2016), whose criticisms of Kant's account of citizenship rest on an equivocation between *Unabhängigkeit* and *Selbstständigkeit* (see also Riedel 1981). On this distinction, see Dierksmeier (2002) and Shell (2016).

[7] The claim that these two kinds of independence are distinct is substantiated in §4.1, where I discuss civil

innate independence entails that one is one's own master. However, I think that we must distinguish between two ways in which a person can be said to be her own master. First, a person is her own master *innately* just in case she is not wrongfully interfered with in the pursuit of her permissible purposes. Second, a person is her own master *civilly* if she is not under the authority of any other person and she makes a contribution to the state. According to the former conception of independence, one may be one's own master even if one is under the authority of another. This is because rightful relations of authority do not constitute a wrongful interference with one's actions. What one is permitted to do will be limited by the legal relation of dependence, but one's innate freedom will not thereby be violated. Innate independence is thus compatible with being under the authority of another person.

Failing to distinguish between these two senses of independence would require us to believe that Kant is flatly contradicting himself when he claims that passive citizens (those who are civilly *dependent*) are nevertheless both innately free and equal members of a state (see MM 6:315). Since there are good reasons to distinguish between these two senses of independence, and since there is textual evidence suggesting that Kant did in fact make this distinction, we should not collapse civil into innate independence or *vice versa*. This allows us to say that civilly dependent members of a state may nevertheless maintain their innate freedom.

2.1.2 The three authorisations

In addition to being a negative claim right against wrongful interference with one's permissible purposes, Kant also tells us that the innate right involves three authorisations that are not really distinct from it. (I identified these with square brackets in the quote introducing the innate right above). There is not a real distinction between each of these authorisations and the innate right because each of them is one aspect of the innate right. Each authorisation concerns an entitlement possessed by each person prior to any legally relevant act that they have performed. The authorisations permit each person: 1) to act in

independence in more detail.

accordance with their own innate equality, which is understood in terms of being their own master; 2) to have only their own actions attributed to them (to be beyond reproach); and, 3) to do that which does not deprive another of what is hers. I address each of these in turn.

Innate equality

Kant characterises innate equality in terms of one's entitlement to be bound only in those ways that one could bind another. This is taken to entail that each person is her own master.[8] We have seen that the innate right should be understood as a claim that one not be subject to the necessitating choice of another. Innate equality requires that this claim be reciprocal. No other may use me as a mere means, and I may not use any other as a mere means.

It is important to be clear on how reciprocity is to be understood here. It is not the case that each act of coercion must be such that the person being coerced is entitled to coerce the other in the same way at the same time. Property taken by a thief may be coercively retrieved, but the thief may not coercively take it back. This does not threaten innate equality. The reason for this is that the equality in question here is equality before any particular deed has been performed. That is, as a matter of right, it cannot be the case that birth determines that one person should be able to (rightfully) tell another what to do. This is why Kant says that the right to freedom is "against hereditary subjection" (DTP 23:136). No one is another person's master by birth, and no one is another's slave. Prior to the performance of any rightful deed, entitlements are equal.

It may appear odd that Kant associates the innate right with the impermissibility of hereditary privileges. This is because in the final version of "Theory and Practice" Kant discusses the impermissibility of hereditary privileges as an implication of the right to equality, and not the right to freedom (see TP 8:293). This can be explained. Kant's account of the equality of citizens does not add additional resources to our thinking about equality than those provided by innate equality. Thus, the resources available for thinking about

[8] See MM 6:238: "[...] independence from being bound by others to more than one can in turn bind them; *hence* a human being's quality of being his own master" (my emphasis).

civil equality are the same as those available for thinking about innate equality. The central difference is that, in the context of the innate right, Kant is concerned with the relation between distinct individuals. In the context of the right to equality of citizens, Kant is concerned with the relation of each member of a state to the law. Innate equality excludes one person treating another as if they were superior or inferior in terms of rights from birth. Civil equality excludes legal relations that treat some members as either superior or inferior in terms of rights from birth.

Being beyond reproach

For Kant, a possessor of the innate right is beyond reproach because prior to performing any legally relevant act she does not wrong anyone. That is, no person can wrong another prior to having performed a deed. The central consequence of the right to be beyond reproach is that a person only has those deeds that she has performed attributed to her. One way in which we can gloss this entitlement is as the right to a good name prior to the performance of any rights-affecting actions.

Due to the fact that the right to be beyond reproach entitles a person to only have those deeds that she has performed attributed to her, it provides the grounds for laws prohibiting defamation. A defamer seeks to ruin the good name of another by falsely asserting that the other performed deed that they have not performed. For this reason, such assertions conflict with the entitlement to be beyond reproach and are prohibited.

Doing what does not diminish what belongs to another

The final authorisation contained in the innate right is the entitlement to do to others anything that does not diminish what is theirs. Kant's examples of this are communicating thoughts to others, and telling or promising others something regardless of whether what is said is true and sincere or false and insincere.[9] This seems a strange entitlement for

[9] We might wonder why Kant focused on cases of speech, when the entitlement appears much broader than that. This could be because speech presents a difficult case for the entitlement. While my discussion will also focus on speech, it should be noted that the right to do what does not diminish what belongs to another will also entitle a person to, for example, occupy space that is not owned or occupied by another, to make use of an object that does not belong to another, to offer to buy something that belongs to another, etc.

Kant to endorse. He appears to claim that one is entitled to lie to others. Indeed, it is difficult to understand precisely what Kant is attempting to rule out here. There are three clarifications that are worth mentioning about this authorisation.

The first is that the entitlement to intentionally tell a lie to someone should not be taken as a statement about the ethical status of lying. The point here is not that, from an ethical point of view, lying is permissible. Rather, the point is that the innate right entitles one to lie in cases in which doing so does not diminish what belongs to the person being lied to. This can be true even if lying is wrong from the point of view of ethics.

Second, we might worry that what Kant says here conflicts with his claim in "Supposed Right to Lie" that it is impermissible to lie to the murderer at the door (see SR 8:426). In the *Doctrine of Right*, Kant claims that a lie is permissible unless it constitutes a diminishment of the rights of those to whom it is told. In "Supposed Right to Lie" Kant is explicit that no such violation occurs when lying to the murderer at the door, and yet telling the lie is still deemed impermissible. Since the discussion in "Supposed Right to Lie" is concerned with right and not with ethics, these claims do not fit very easily with each other. One possible resolution to this tension is to say that the focus of the two discussions differs. In the *Doctrine of Right* discussion, Kant is concerned with what one is authorised to do as a matter of private right. Private right permits lies that do not directly violate the right of another. In the "Supposed Right to Lie" discussion, Kant is concerned with public right. Public right prohibits lies because, Kant says, the lie is a wrong "in general" (SR 8:426). Kant does not believe that telling a lie in this context wrongs particular other people, but rather that it "is a wrong inflicted upon humanity generally" (ibid.). Elsewhere in his political writings, Kant associates wrongs in general with those that take away validity from the concept of right itself (see MM 6:307-08, MM 6:344, PP 8:382). A discussion of this kind of wrongdoing does not belong in the discussion of private right since it does not bear on the relation one has to particular other people. Instead it concerns one's relation to humanity generally. Thus, in the *Doctrine of Right*, Kant is concerned with those actions that one can perform without violating the private rights of particular other people. In "Supposed Right to Lie" he is concerned with those actions consistent with right in general.

The two passages do not conflict because they are written from different perspectives; the perspective of private right in the former case, and the perspective of public right in the latter.[10]

The third point of clarification is that the diminishment in question here must be thought of in terms of rights. If we assume that telling an intentional lie will diminish the trust that the person lied to has when speaking to others, this would not be relevant to the speaker's entitlement to tell that lie according to the innate right. (Though, as just noted, Kant may have other reasons related to right for judging a lie that has this effect is impermissible). Kant clarifies this in a footnote, saying:

> Telling an untruth intentionally, even though merely frivolously, is usually called a *lie* (*mendacium*) because it can also harm someone, at least to the extent that if he ingenuously repeats it others ridicule him as gullible. The only kind of untruth we want to call a lie, in the sense *bearing upon rights*, is one that directly [diminishes (*Abbruch tut*)] another's right, e.g., the false allegation that a contract has been concluded with someone, made in order to deprive him of what is his. (MM 6:238n, my emphasis; see also MM 6:429)

Here Kant distinguishes between what is normally called a lie (the intentionally telling of an untruth) and what constitutes a lie in the sense bearing upon (private) rights. When rights are in question, the only lies that count are those that *directly* diminish the rights of another. How should we understand this? On one possible account of the limits of speech (in terms of rights), we are free to say what we like just so long as our speech *does not result* in the violation of the rights of another. Consider a case in which I tell a lie to someone and that person's belief that the lie is the truth is the cause of her wronging another person. For example, I tell someone that the apple in front of us is unowned, when it does in fact belong to someone. As a result of this lie, the person I have spoken to eats the apple, thus wronging the person to whom it belongs. It seems that in this case my lie results in a wrong occurring. Had I not lied, we can suppose, the third person would not have been wronged. On Kant's account, is my lie permissible? I believe that it is.

The reason that the lie is permissible is that Kant was concerned with cases in which the lie directly infringes the rights of another. These are cases in which the lie *constitutes* a

[10] For discussion of this, see Weinrib (2008) and Varden (2010).

violation of rights, rather than cases in which the lie merely results in a violation of rights. When I tell a lie to someone generally speaking, that other person can decide whether or not they want to believe me and so they can also decide whether or not they want to act on what I have said. In this way, a lie might lead to a violation of rights but does not constitute a violation.

What sort of lie constitutes a direct violation of another's right? This is difficult to determine, and it is not fully clear what kinds of actions Kant is attempting to exclude. In many cases a lie might help one to *get away* with a violation of rights, but does not count as a violation itself. This happens when, for example, I lie to a shop clerk about having bought an item that I am now leaving the store with or lie about the completion of a contract. Here the lie aids, but does not constitute, the wrongdoing. It is the theft that is wrong. But, we can think of other cases. Defamation, for example, appears to be an instance in which the lie itself constitutes a violation of the right of another. (Kant discusses defamation at MM 6:295ff). In cases of defamation, my lie directly violates your right to a good name. Are there other cases? It seems that there are. Imagine for example that I have taken your laptop. You call the police as a result of my theft. When the police arrive, I lie, saying that the laptop is mine. If the police believe me, we might think that the lie constitutes a violation of your right. We might also think that lying in court is an example of the kind of case that Kant was interested in. If a witness lies in court, for example by saying that another person was at the scene of a crime when really they were not, that lie has a direct bearing on the right of that other person. More specifically, it appears to violate their right to be beyond reproach.[11] But, these cases are also difficult. In the case of your laptop, I rely on the police believing me. In the case of lying in court, witness testimony may only provide part of the evidence against someone. Thus, we can

[11] There are more difficult cases than this. When I yell "fire" in a crowded theatre, despite knowing that there is no fire, have I performed a wrongful act? While this act appears intuitively wrong, it is not clear that Kant has the resources to forbid it (*pace* Ripstein 2009: 51 and Byrd and Hruschka 2010: 84). This is a result of the fact that the lie itself must constitute a wrong. Can Kant get out of this by loosening the connection between the lie and the wrong so that, for example, the lie which results in a wrong is to be legally prohibited? Perhaps, but it then must be decided how close a connection it is that counts. If I tell a lie as part of a joke that a person takes for the truth and then acts on, am I legally responsible for the wrongs that occur? This isn't clear, and it is beyond the scope of this chapter to address this question. Needless to say, such cases may pose a problem for Kant.

question how directly these actions infringe another's right, and thus how well they fit the type of action that Kant wants to rule out.

In the context of the civil condition, the right to do what does not diminish what belongs to another requires a restricted right to freedom of expression. This might not appear to be an obvious implication of the view. Or, at least, it might appear overly narrow as an interpretation of the institutional conditions required by the right. For this reason, it is important to recall that Kant's examples of this right are merely communicating one's thoughts to another, and telling another something regardless of whether that thing is true or not. We have already seen that this right is not making a statement about the ethical status of lying, but only stating that one can be held juridically accountable for lies that violate the right of another. Lies that do not violate the rights of another are still ethically wrong, but they do not legally wrong the person to whom they are told. For this reason, such lies may not be rightfully enforced. Thus, for Kant freedom of expression is limited to those cases in which no right is directly violated by that expression.

2.1.3 Occupying space

In addition to being a negative claim to not be interfered with when performing permissible actions, the innate right entitles us to be our own master, to be beyond reproach and to do what does not diminish the rights of others. Another implication of the innate right concerns the importance of having physical space that members of the state can occupy. The importance of this space is a result of the fact that each person has an original entitlement to be wherever nature or chance has placed them. Each person, Kant tells us, has a right to a place on the earth. This should be understood as a right to occupy whatever space we occupy through no fault of our own. It is not a right to be wherever we choose, but merely a right to be *somewhere*.

Concerning the right to a place on the earth, Kant says:

> All human beings are originally (i.e., prior to any act of choice that establishes a right) in a possession of land that is in conformity with right, that is, they have a right to be wherever nature or chance (apart from their will) has placed them. The possession by all human beings on the earth which precedes any

> acts of theirs that would establish rights (is constituted by nature itself) is an original possession in common [...] the concept of which is not empirical and dependent upon temporal conditions, like that of a supposed *primitive possession in common*. (MM 6:262)

The right to be wherever nature or chance has placed you is an original right. It is a right that exists prior to any act of choice on the part of the right-bearer. This means that it must be an implication of the innate right to freedom.[12] Kant makes this connection explicit in his drafts for the *Metaphysics of Morals*: "all human beings by right occupy the place on the earth upon which nature or chance has placed them without any choice, and thus in accordance with an innate right [...]" (DMM 23:318; see also DMM 23:320, DMM 23:281). Kant's discussion of possession of the world in common can be misleading. He is not advocating a view according to which all people originally and jointly own all objects.[13] The right to a place on the earth is simply a right to be wherever nature or chance has left you. It is thus not a right to be in some particular place of your choosing. Moreover, this possession is not to be understood in terms of each person *acquiring* a place on the earth. Acquisition of a piece of land requires an *act* of acquisition and thus cannot be original. How shall we understand this right? I believe we should understand it as the claim that you do no wrong just by occupying space through no fault of your own.[14]

Kant does not believe that trespassing laws are unjustified, which might seem to be an implication of this right. It is not the case that you do no wrong no matter what space you occupy. Instead, you do no wrong by occupying the space that you do as the result of no

[12] See Guyer (2000: 252-53) on this point: "since to deprive someone of a place to stand on the earth requires the forcible removal of his person from that spot, the basic right to a place on the earth follows from the innate right to freedom of the person." Huber (2017) argues that the right to a place on the earth is neither an innate nor an acquired right. He believes that it is not an innate right because the specific empirical circumstances under which the right becomes a right for us (i.e., the boundedness of the earth's surface) cannot be taken into consideration in discussions of the innate right, which must be determined *a priori*. However, I believe, contrary to Huber's claim, that the right to a place on the earth is just a right that one's body not be interfered with *before one has performed any deed*. It is simply an entitlement to be free from coercion when one hasn't performed a legally relevant act. For this reason, it fits easily with Kant's characterisation of the innate right. Kant also makes this clear in the passage from the drafts for the *Metaphysics of Morals* quoted above.

[13] On Kant's view, the position that all people originally and jointly own all objects is called primitive possession in common. Primitive possession in common is an instituted system of possession in which each gives up private possession so that all own everything jointly (see MM 6:251). Because this form of common possession is *instituted*, it must be based on some prior act. For this reason, primitive possession cannot be original, and those who seek to defend claims about acquisition on the basis of it must provide historical proof of the contract by which it was instituted (ibid.).

[14] See Byrd and Hruschka (2010: 128), Ripstein (2009: 296, 373; 2012: 52-53), and Mulholland (1990: 218).

choice of your own. It is important that we keep in mind that this right only entitles us to be wherever nature or chance has left us. It does not entitle us to be anywhere we please. However, this still has significant implications. It means that we cannot violate the right of another just by being born. And that, if we find ourselves on someone's land through no fault of our own, this cannot be considered as wronging the owner.[15]

The right to be wherever nature or chance has placed us forms the basis for an argument concerning the importance of having spaces that members of a state can rightfully occupy. This is because a situation in which a person would do wrong merely by occupying space is a situation that is impermissible in terms of rights.

Ripstein asks us to consider a case in which all land is owned and all ownership is private. We can imagine that each plot of land stops where the next one begins, so there is no public space.[16] In this scenario, those who own no land would always need the permission of those with land merely to occupy space. Absent public spaces, Ripstein maintains, the mere physical existence of those without property would be wrong without the permission of others. This would clearly violate the innate right to freedom of those without land. Here is Ripstein on this point:

> If private owners are entitled to exclude from their land [...] the poor could find themselves with no place to go, in the sense that they would do wrong simply by being wherever they happened to be. They would be entirely subject to the choice of those who owned land [...]. The person who is entirely dependent on the grace of another to occupy space, or to use physical objects, is not merely lacking in self-determination, or somehow on the losing end of the bargain that makes up the social contract [...]. Instead, the person who can only occupy space with the permission of others has no capacity to set and pursue his own purposes. As such, the person in need is like a slave, and the contract creating such a situation is, like a slave contract, incoherent. (2009: 280)

Being permitted to occupy space is a basic condition for the exercise of one's innate right

[15] The question of innocent trespass is more difficult, however it can be dealt with by appeal to Kant's distinction between a mere fault and a crime. A mere fault is an unintentional transgression of the law that can still be imputed to the agent (i.e., it is an action that the agent chose to perform). A crime is an intentional transgression (see MM 6:224). Consider a case in which I act freely when entering your land, but innocently because I believe that the land is public. In such cases you are entitled to kick me off your property (and if I realise my mistake, I must leave), but I have not committed a crime.

[16] Ripstein's own example includes public highways that connect privately owned pieces of land but cannot be lived on. Nothing is lost in leaving this out, as one is not permitted to stay on public highways; they are not candidates for spaces that a person could rightfully occupy.

to freedom. Without this permission, a person is unable to perform any action rightfully. Their mere existence counts as a wrong. On Ripstein's view, public space is necessary in a civil condition because a system of wholly private property would create a wrongful system of dependence between those who have land and those who do not. Those with land would be able to decide whether the very existence of those without land was permissible.

This is not the only option that we might take to resolve the problem created by the possibility of some having nowhere to go. We might first note that public space is only necessary in a society in which at least one person does not own land. If everyone owned land, then no one would necessarily do wrong just by occupying space; each could occupy her own space. Thus, public spaces would only appear to be necessary given certain empirical facts about the world (i.e., that some people do not own land). And then, even if there were some who did not own land, that still does not mean that we need public spaces. Consider again the first sentence of the passage quoted from Ripstein above. It is a conditional claim. If we deny the antecedent of this claim, supporting the idea of a regime of private property in which it would be impermissible to exclude from one's land those who have no land of their own, then there would be no need for public property. Under such a regime, no one would do wrong merely by occupying space.

In terms of right, it is not clear that a condition in which there were numerous public spaces would be superior to a condition with no public spaces but in which private owners lacked the authorisation to exclude the landless from their property. Both of these options would adequately address the concern that motivates the discussion of space in the first place: the landless must have a place to go.

2.2 The inner mine

So far we have seen what sorts of relations the innate right rules out, but we don't yet know how to understand this right in terms of its positive characterisation. Kant understands the innate right as a right to bodily integrity. It is a right that you, not others, decide what happens to your body. This is not always clear in the text. Before introducing the innate

right to freedom Kant claims that the highest division of rights is that between innate and acquired rights. "What is innately mine or yours," he says, "can also be called what is *internally* mine or yours [...]; for what is externally mine or yours must be acquired" (MM 6:237). This seems to indicate that the difference between innate and acquired rights concerns only the method of acquisition of those rights. While the innate right requires no act for its acquisition, acquired rights require some act on the part of the potential right bearer. The innate right might then appear to constitute something like property in one's own body.

However, Kant explicitly denies that we should understand our relationship to ourselves in terms of property ownership. He has two arguments in support of that view. One argument, which appears in the Collins and Kaehler lectures, claims that self-ownership is impossible because it requires that one have the status of both a thing and a person at the same time, but these are mutually exclusive. Call this the *Status Argument* against self-ownership. The second argument appears in the *Doctrine of Right*. It has not received nearly as much attention in the literature as the status argument. This argument claims that self-ownership is impossible because only those objects that do not impose duties on us can be owned but we have duties to ourselves. We cannot be self-owners because we lack certain liberties with respect to ourselves. Call this the *Liberty Argument* against self-ownership. In neither case do Kant's arguments fully support his rejection of self-ownership. In particular, they do not prohibit the selling of non-essential body parts or rule out the possibility of a weak form of self-ownership according to which there are limits to the way we treat our bodies.[17]

2.2.1 The status argument

The status argument is found in the Collins (1774/75-1776/77) and Kaehler (1777) transcriptions of Kant's lectures on ethics. According to those transcriptions, Kant claims the following:

[17] Most of the contemporary literature discussing Kant on self-ownership has focused on the status argument; see, for example, Cohen (1995), Ripstein (2009), Rosen (1993), Esposito (2015a), Gracia (1998), and Williams (2013). Esposito (2015b: 120ff) is an exception, in that he discusses the liberty argument. However, his central concern is with slavery in his discussion, not self-ownership.

> Man cannot dispose over himself, because he is not a thing. He is not his own property – that would be a contradiction; for so far as he is a person, he is a subject, who can have ownership of other things. But now were he something owned by himself, he would be a thing over which he can have ownership. He is, however, a person, who [has property, so he cannot be a thing in which he can have property]; for it is impossible, of course, to be at once a thing and a person, a proprietor and property at the same time. (Mo/Kaehler 241, Mo/Collins 27:386)[18]

Kant's argument against self-ownership in this passage can plausibly be reconstructed as follows. Nothing can have the status of a person and a thing at the same time. However, self-ownership requires that one be both a person and a thing. So, self-ownership is impossible.[19]

We might wonder what justifies Kant's claim that nothing can be both person and a thing at the same time. If a person could also be considered a thing, then there would be no contradiction in the idea of self-ownership. A person-as-person would be able to own herself as person-as-thing. However, this option is not available. Nothing can be both a person and a thing at the same time because 'person' and 'thing' refer to incompatible moral statuses on Kant's account. That is, the distinction between a person and a thing is a moral distinction between two statuses that an entity might possess. Persons (animate, rational entities) have dignity, and for this reason are owed respect. Thus, persons cannot be treated as mere means. Things (inanimate, and animate but non-rational, entities) do not have dignity and so may be used as a mere means (see G 4:428, MM 6:434). The mistake we make in thinking that self-ownership is possible is thinking that a person can

[18] Here the Collins and Kaehler transcriptions differ, and I follow Kaehler. The difference is the following. Kaehler records: "*nun ist er aber eine Person, die da Eigenthum hat, demnach kann er keine Sache seyn, an der er ein Eigenthum haben kann [...]*". Collins records: "*Nun ist er aber eine Person, die kein Eigenthum hat, demnach kann er keine Sache seyn, an der er ein Eigenthum haben kann*". I favour Kaehler here as his transcription appears to make best sense of Kant's argument. It should be noted that Heath's translation (in Kant 1997) does not faithfully represent either the Collins or the Kaehler transcriptions. He translates the relevant section as follows: "He is, however, a person, who is not property, so he cannot be a thing such as he might own."

Despite the necessary modification to the above passage, I make use of Heath's translation of Collins in what follows unless otherwise stated. For arguments that we should rely on Kaehler over Collins, see Stark (2004). For a defence of appeals to the Collins transcriptions, and use of Heath's translation, see Schneewind (2015).

[19] The status argument strongly resembles the argument Kant gives against voluntary slavery in the *Doctrine of Right*. He claims that voluntary slavery contracts require that the would-be slave be treated simultaneously as a thing incapable of rights and duties, and a person who is contractually, and so normatively, bound (see MM 6:283). Since this is impossible, so too is voluntary slavery.

have both the status of a person and the status of a thing at the same time. This explains what Cohen (1995: 212) gets wrong about the status argument. He believes that Kant begs the question by deploying a conceptual distinction in order to draw a moral conclusion. However, Kant's distinction between a person and a thing is already a moral distinction, and one that plays a central role in the rest of his moral philosophy.

We should consider two objections at this point. First, someone might object that Kant's argument, as I have presented it, is proving too much. If it is true that 'person' and 'thing' refer to different moral statuses, and so no entity could be both a person and a thing, then this would rule out involuntary slavery as well as self-ownership. Since the slave still has the moral status of a person, she could not also be a thing that is owned by another (see MM 6:331). However, Kant believes that involuntary slavery is possible. A person can become a slave by committing a crime, though she cannot sell herself into slavery (see MM 6:283, MM 6:333). This seems to speak against the reading of the passage that I have given since it commits Kant to having contradicted himself. On my reading of the status argument, involuntary slavery is ruled out along with self-ownership. But, Kant endorses involuntary slavery.

We might, instead, think that Kant is primarily making use of the property/proprietor distinction and not the thing/person distinction. The property/proprietor distinction also appears in the passage above. If we could read the passage this way, then there would be no worry about contradiction; the argument would claim that nothing that can be owned can also be an owner. This leaves open the possibility of involuntary slavery, since it does not follow that an entity being considered the property of another requires that that entity have the status of a thing. However, the passage quoted above is ambiguous. Kant refers to both the thing/person distinction and the property/proprietor distinction, and it is not clear which is doing the work. The last sentence of the passage even appears to identify the two distinctions. The passage containing the status argument, thus, does not appear to help.

However, there is textual evidence that speaks in favour of the view that Kant was, in fact, employing the thing/person distinction. In his remarks following the introduction

of the status argument, he explicitly appeals to the thing/person distinction in order to rule out self-ownership (see Mo/Collins 27:387; I quote this passage below, in response to the second objection to my formulation of the status argument). Since Kant appeals to this distinction, and not the property/proprietor distinction, it makes sense to believe that this is what was doing the work in the status argument.

But this still leaves us with a problem. What should we say about the fact that this argument proves too much? I believe we can say two things. First, we might say that Kant was not interested in involuntary slavery in this passage. For this reason, he may not have been attentive to the consequences that his argument against self-ownership would have for his claims about involuntary slavery. In an effort to demonstrate the impossibility of self-ownership, he may not have been thinking about other kinds of ownership that would also get ruled out. Second, we might also think that the status argument gives us good grounds to deny the possibility of involuntary slavery on Kantian grounds. Kant's position on involuntary slavery in his political writings are hard to reconcile with his ethical views. Given this difficulty, we might use the status argument as a starting point for an argument to the effect that Kant himself was not entitled to speak of involuntary slavery in the way that he did.[20]

Second, one might object here on the grounds that a distinction that Kant himself draws could allow that a single human being could be both a person and a thing. This is the distinction, made possible by his transcendental idealism, between the noumenal and phenomenal selves of a person. When considered from the perspective of her noumenal self, the human being is thought of as an intelligible being free from the influence of sensibility. When considered from the perspective of her phenomenal self, the human being is thought of as an animal being who is affected by sensibility (see MM 6:418, Mo/Vig 27:593). We might therefore think that the noumenal self is a person, while the phenomenal self is merely a thing. This would allow for self-ownership in the sense that the noumenal self could own the phenomenal self.

[20] I will not discuss whether Kant's discussion of involuntary slavery is consistent with his broader moral commitments further. It is sufficient for my purposes here simply to note that there is at least an apparent difficulty raised by my understanding of the status argument. For discussion of Kant's views on slavery, see Kleingeld (2007).

The problem with appealing to the distinction between the noumenal and phenomenal selves is that it would not explain why Kant believes, for example, that the impossibility of self-ownership entails that no one is entitled to sell a body part (see Mo/Collins 27:386, Mo/Kaehler 241-42). If we identify the self only with one's noumenal self, and not with one's body, then we would not be selling our selves by selling a part of our body. No problem should arise. In any case, this interpretative option is not available. When Kant discusses self-ownership, he has in mind the unification of the noumenal and phenomenal selves of a person. This is the reason that selling a part of one's body is ruled out by the impossibility of self-ownership. Kant tells us,

> that man is not his own property, and cannot do as he pleases with his body; for since the body belongs to the self, it constitutes, in conjunction with that, a person; but now one cannot make one's person a thing [...]. (Mo/Collins 27:387; see also Mo/Vig 27:593)

The body belongs to the self not in the sense of being *owned* by the self, but by partly constituting it. Thus, when Kant speaks of the self in his discussion of self-ownership, he is interested in the unification of the noumenal and phenomenal selves of a person. For this reason we cannot use this distinction defend the view that Kant allows for a single human being to be both a thing and a person.

Let's now consider the liberty argument.

2.2.2 The liberty argument

The liberty argument is found in the *Doctrine of Right*. It is like the status argument in some ways, but the focus is not on one's moral status, but on the duties that one owes to oneself by virtue of that status. It therefore constitutes a distinct, though related, argument. Kant says,

> An external object which in terms of its substance belongs to someone is his *property* (*dominium*), in which all rights in this thing inhere (as accidents of a substance) and which the owner (*dominus*) can, accordingly, dispose of as he pleases (*ius disponendi de re sua*). But from this it follows [by itself (*von selbst*)][21] that an object of this sort can be only a corporeal thing (to which

[21] Here I slightly modify Gregor's translation, which does not take '*von selbst*' into account.

> one has no obligation). So someone can be his own master (*sui juris*) but cannot be the owner *of himself* (*sui dominus*) (cannot dispose of himself as he pleases) – still less can he dispose of others as he pleases – since he is accountable to the humanity in his own person. (MM 6:270)

The argument in this passage can plausibly be reconstructed as follows. If something can be owned, then its owner may dispose of that thing as she pleases. But, we are each accountable to the humanity in our own person; we have duties to ourselves. Thus, only a corporeal thing, to which we have no duties, can be owned. Thus, we cannot own ourselves.

A clarification is in order concerning Kant's claim that if a person owns some external object as property, then she can dispose of that property as she pleases. In particular, it is important to note that disposal of external objects of choice will have limits. I may not dispose of my property by throwing it out of the window of my car whilst driving on the highway, thereby risking damage to your property and person. Nor may I dispose of my property by leaving it on your land without your permission. Nor may I sell it to you by making threats if you fail to buy it. These limits are the result of your innate and acquired rights. I may not use what I possess in a way that violates those rights.

Given these restrictions, why does Kant claim that the owner of an object can dispose of it as he pleases? He says this because the object *itself* doesn't impose any limits on its (normatively) possible use. Indeed, Kant's nominal definition of ownership of external objects states that "that outside me is externally mine which it would be a wrong (an infringement upon my freedom which can coexist with the freedom of everyone in accordance with a universal law) to prevent me from using as I please" (MM 6:248-49). My use of a corporeal thing that I possess is not limited by that thing itself, but only by the rights of others and the duties I owe to myself. The limits set on property rights already take these restrictions into account. However, there are no other restrictions that may be placed on my use of a thing beyond these. A person's freedom is only limited by the freedom of others and the duties she owes to herself. Thus, if no rights are violated by a particular use of an object (including the right of humanity in one's own person), then that use must be permissible.

Thus, according to the liberty argument, we do not have a property right over our bodies. This is because there are limits to the ways we can dispose of our bodies. These limits are set by duties we owe to ourselves corresponding to the right of humanity in our own person. Such limits are contrary to Kant's belief that ownership of something entails that one can dispose of that thing as one pleases.

2.2.3 Assessing Kant's conclusions

Kant's arguments seek to establish that self-ownership is impossible. The status argument does this by claiming that self-ownership would require that one possess two incompatible moral statuses. The liberty argument does this by appeal to the presumed fact that only those objects that do not impose duties on us can be owned. There are many questions that we can ask of these arguments. I focus on just two: (i) whether the conclusions about selling body parts that Kant draws from his arguments are correct, and (ii) whether Kant's arguments are compatible with a weaker form of self-ownership according to which there limits to the way we use our bodies. Concerning (i), I argue that Kant's arguments do not support the claim that we cannot sell any body part. Concerning (ii), I argue that Kant's arguments do not rule out a weaker form of self-ownership. In both cases Kant asserts stronger conclusions than those to which he is entitled.

Selling a tooth

Kant notoriously claims that because a person does not own herself, she "is not entitled to sell a tooth" or any other body part (Mo/Collins 27:386). Even if we agree that self-ownership is impossible, we might still question whether Kant is right to think that these actions are ruled out. I believe they cannot be ruled out by Kant's arguments.

According to the status argument, the sale of parts of one's body is prohibited because such a sale would require treating oneself as a person and a thing at the same time. This is like what happens, for example, in the case of voluntary slavery contracts. A voluntary slavery contract requires that a person be treated both as a thing that can have no rights or duties, and a person who is contractually bound. However, selling a member is not

equivalent to contracting to become a slave. Those who sell a tooth do not undermine their status as a bearer of rights and duties, nor do they undercut the validity of the contract they have entered into.

During his discussion of selling sex, Kant claims that "it is evident that if someone concedes a part of himself to the other, he concedes himself entirely" (Mo/Collins 27:387; see also Refl 7880 19:543). This passage points to Kant's belief in the inseparable unity of members in a person (see MM 6:279). The reason that selling a member is wrong, according to this passage, is that such a sale is equivalent to the surrendering of one's whole self. This would explain why selling a tooth is wrong. Such a sale would constitute the selling of one's whole body, thus making self-ownership comparable to voluntary slavery. It is unclear whether we are to consider the inseparable unity of members of a person empirically or normatively. Either way this argument runs into problems. Empirically, it is not true that one's members are inseparable. When I pull a tooth out and sell it, it is simply not the case that I have sold my whole body. There are also problems if we consider the claim normatively. Consider the case of selling sex, which is Kant's explicit concern when he speaks of the inseparable unity of the members of a person. Here the discussion is restricted to cases in which a body part is used by another, but not alienated. Has the person in these cases surrendered herself wholly as a thing? Not necessarily. The person might set strict limits to the transaction, thereby setting limits to the ways in which her body may be used—consider: "No kissing!", or "Only on the condition that I can read my book at the same time". Given that restrictions can be placed on another's use of one's body, it seems that body parts are normatively separable. For this reason, the argument against selling non-essential body parts fails. Kant has drawn too strong a conclusion from his argument.

Perhaps, then, it is only some members that it is impermissible to sell. This view seems to be suggested by Kant's claim in one of his reflections that, "One must distinguish what belongs to the person of the human being and what to his possession, to the last organ, faculty, and everything over which freedom has power" (Refl 7862 19:538). The distinction here is between what is a part of ourselves, 'the person of the human being', and what is in

our possession but not a part of us. This seems to indicate that we can draw a distinction between parts of the body that it is impermissible to sell and those that it is permissible to sell. The former are those parts that belong to the person of the human being, the latter to her possession. What, according to this distinction, would be impermissible to sell? This is a difficult question. However, one plausible answer is that only the sale of body parts essential to our continued rational existence would be made impermissible on this account. It is impermissible to sell these parts because doing so would constitute turning oneself into a thing. Of course, this cannot explain Kant's claim that it is impermissible to sell a tooth or *any* of our members. Neither a tooth nor a finger, for example, is necessary for one's continued rational existence. For this reason, it would not belong to the person of the human being and its sale would be permissible. Even though this option cannot accommodate everything Kant claims, it is able to salvage the core of his concern. In addition, it would also explain the inseparable unity of the members of the person. If those members that it is impermissible to sell are those whose sale would result in the loss of rational agency, then those members *will be* inseparable from all the other members of the person. This is because, absent those members, the person would also not exist.[22]

Can we defend a prohibition on the sale of body parts that are not necessary for our continued rational existence? We might think, for example, that by selling a hand we make the achievement of preserving our rational existence more difficult, even if not impossible. This might provide grounds for ruling such a sale out. I am not convinced that actions such as selling a hand are wrongful. This is because I believe a closer connection between the loss of the body part and the loss of rational existence is necessary for calling the sale wrong. But, it must be admitted that figuring out where to draw the line is difficult. Kant, I believe, drew the line in the wrong place. However, the difficulty that we face thinking about these issues makes Kant's quite conservative position at least understandable.

Thus, Kant's arguments do not demonstrate the moral impermissibility of selling

[22] A full account of this distinction would have to provide some explanation of what it means for a member to be essential to one's continued rational existence. Numerous questions arise here. Some concern the nature of rational functioning—do we only need to retain the capacity to act from the moral law or is something more expansive required? Others concern the relation between biological and rational functioning—what about parts of me that are necessary for normal functioning, but not necessarily rational functioning? I cannot address these questions here.

a tooth or *any* of one's members. However, his arguments do support the view that it would be impermissible to sell those members that would result in the loss of one's rational agency. What members, exactly, this rules out is subject to change.[23] For example, selling a kidney when you have two would not be ruled out on this account. Selling a kidney when you only have one (and there is no prospect for a replacement of some kind) would be ruled out.

Limited self-ownership

Even if we restrict Kant's claims about self-ownership to those parts of the body that are necessary for continued rational functioning, we might still ask whether a weaker form of self-ownership is compatible with Kant's claims. Weaker forms of self-ownership are certainly logically possible. For example, it is possible to have an account of self-ownership according to which we do not have the liberty to dispose of ourselves as we please (see Taylor 2004, who argues this is possible on Kantian grounds). It is therefore worth considering whether Kant has the resources to reject weaker forms of self-ownership such as this one.

Flikschuh (2010: 301-04) gives an argument on behalf of Kant against even this weaker form of self-ownership. This argument appears in her response to Ripstein's characterisation of the innate right. According to Flikschuh, Ripstein can be read as characterising the innate right to freedom along the lines of a property right in one's own body.[24] Why does this matter? Flikschuh tells us: "The systematic reason in favour of avoiding the inclusion of even anything merely akin to property rights in one's body under the innate right is that including such rights undermines a relational reading of acquired rights" (2010: 301). Recall that on a relational reading of rights, rights exclusively concern the relation between distinct individuals. This means that rights cannot be held in isolation from our interaction with others. Thus, Flikschuh worries that by ascribing to each person an innate property right in her own body, we thereby imply that such a right can be held

[23] *Pace* Esposito (2015a: 103), who claims while discussing Kant that, "If a body or part of it has ever been a person, it will continue to be so under any condition; and if, instead, at a certain time it has become a thing, then it was so from the beginning". According to the view I am suggesting above, what parts constitute the person can change over time, depending on the circumstances.

[24] Neither Ripstein's account nor the accuracy of Flikschuh's characterisation of it are important here. All that is important is the argument that Flikschuh gives in response to what she takes to be Ripstein's view.

in isolation from others and so non-relationally. Moreover, since the innate right is the basis of any acquired rights, the relationality of acquired rights might also be threatened by a non-relational understanding of the innate right.[25] But, she continues, the relational nature of right is meant to be a key component in Kant's claim that the state is necessary for valid claims of right. Thus, on Flikschuh's view, to believe that we have property rights in our own bodies strongly undermines what is meant to be significant and distinct about Kant's political philosophy. In order to retain the distinctively Kantian approach to rights and the state, we must reject the idea of a property right in one's body. This argument, if it is a good one, would explain why even the weaker form of self-ownership described above should be ruled out.

However, I do not think that Flikschuh's argument is a good one. This is because I do not think a limited right of self-ownership would necessarily be non-relational. If property rights in general are relational on a Kantian account, and the right to one's own body is modelled on property rights, then why would the right to one's own body fail to be relational as well?

Perhaps Flikschuh's worry is that the *innateness* of the right to one's own body would cause problems for understanding it relationally. As the right is innate, it might therefore be thought that it can be held in isolation from others. This would, indeed, threaten its relational status. This is because it would no longer concern the relation between the actions of distinct individuals. It would be a right that we possess even in isolation. However, we need not understand the right to one's own body in this way. For example, we might believe that the right is only triggered when one has interacted with others. On this view, when no interaction has taken place it wouldn't make sense to speak of one's right to one's body. This is because there would be no one against whom the right is held. This is a possible (and I believe, plausible) *relational* understanding of the right to one's own body. For this reason, Flikschuh is wrong to think that the introduction of a property right in our own body *necessarily* threatens the relational nature of right.

[25] Here is Flikschuh on this point: "But if we do make innate right the basis of any further rights and if we include under it a non-relational right over our own bodies, it may be hard to sustain a fully relational reading of acquired rights. For we are then at least inviting the thought that one's rights in external objects of one's choice are a more or less natural extension of one's rights in the use of one's own body" (2010: 302).

Thus, contrary to Flikschuh's belief, it is not clear to me that there is a significant difference between characterising our relationship to our bodies as a right of bodily integrity and as a limited property right to one's body. The difference is only significant if we are considering an unrestricted ownership right in one's body. This is because in the unrestricted case, we once again allow for the sale of essential body parts.

The right to freedom of citizens is grounded on the innate right to freedom. The innate right is a negative claim right against others that one not be wrongfully interfered with when performing permissible actions. If one person violates the innate right to freedom of another, they treat that person as a mere means for the achievement of their own ends. The right to freedom of citizens is a right held by members of a state that the state not permit actions that are ruled out by each person's innate right. As we have seen, the right to freedom of citizens also can be used to support a limited right to freedom of speech and the availability of physical spaces that each person can rightfully occupy.

Kant does not understand the innate right to freedom as a property right in one's body. According to Kant, we are not self-owners. He has two arguments for this claim, which I call the *Status Argument* and the *Liberty Argument*. The status argument says that self-ownership is impossible because it requires that one be both a person and a thing at the same time, but these are incompatible moral statuses. The liberty argument says that self-ownership is impossible because only those objects that do not impose duties on us can be owned. Despite the fact that these arguments differ, Kant commits a similar mistake in his discussions of both. In both cases, he claims more than he is entitled to on the basis of his argument. More specifically, he believes that the status argument rules out selling non-essential body parts and that the liberty argument rules out all forms of self-ownership. Neither of these claims is true. The status argument can only rule out the selling of essential body parts, and the liberty argument still leaves room for a weaker form of self-ownership.

Chapter 3

Equality

The right to equality is the second of the rights Kant claims comprise the essential attributes of citizenship. It is a right that he says we possess by virtue of our status as subjects. Kant has a particular understanding of equality. Rather than focusing on an equal distribution of goods, or welfare, or the equal possession of any other material resource, Kant's discussion of equality focuses on the form of each person's relationship to the law. More specifically, members of a state are equal if (and only if) each member bears the same relationship to the law as every other member. The right to equality sheds light on Kant's account of acquired rights. In particular, it tells us both that large discrepancies in the acquired rights of members of a state are permissible, and that no member of a state can stand in a relationship to the law that is superior or inferior to any other member. Acquired rights are restricted by formal, legal equality.

This chapter is split into two sections. In the first section, I examine Kant's account of formal equality before the law and two consequences of that account. The first consequence concerns the impossibility of hereditary privileges. Since hereditary privileges require that some members of the state are subject to different laws than other members, such privileges conflict with Kant's account of equality and are thus impermissible. Kant's arguments against hereditary privileges can also be used to support anti-discrimination laws. Since traits such as, for example, gender, sexual preference, and ethnicity are not the result of a deed, they cannot determine one's social standing (in terms of rights). The

second consequence of Kant's account of equality is that great inequality of wealth is permissible. While privileges may not be inherited, all other acquired rights may be. This is so even if it leads to substantial differences in the acquired rights of the members of a civil society.

In the second section, I address the question of whether Kant can account for the provision of welfare for those who are unable to maintain themselves. As we will see, Kant's account of equality does not provide positive grounds for defending the provision of welfare. In addition, there are two aspects of Kant's political philosophy that speak against the possibility of defending such a provision: (i) coercive taxation for the purposes of redistribution appears to violate the rights of those who are taxed and (ii) Kant tells us that all duties of right are negative, but welfare is normally considered a positive duty. Nevertheless, it is worth considering whether a faithful Kantian has grounds for defending coercive taxation in order to provide for those who do not have enough. I discuss four approaches to thinking about Kant on welfare and argue that all fail at their task either on textual or philosophical grounds. These approaches are (i) the enforced charity approach, (ii) the wrongful dependence approach, (iii) the rational consent approach, and (iv) the Kantian left-libertarian approach.

3.1 Equal before the law

For Kant, equality between members of a state is achieved when each member bears the same relationship to the law as every other member. That is, members of a state are equal when no member is considered superior or inferior to any other member from the point of view of the law. Kant characterises this type of equality in terms of a person's coercive rights. He tells us,

> Each member of a commonwealth has coercive rights against every other, the only exception being the head of state (since he is not a member of the commonwealth but its creator or preserver), who alone is authorised to coerce without himself being subject to a coercive law. But whoever is subject to laws is a subject within a state and is thus subjected to coercive right equally with all the other members of the commonwealth [...]. (TP 8:291)

> [External] (rightful) *equality* within a state is that relation of its citizens in which no one can rightfully bind another to something without also being subject to a law by which he in turn *can* be bound in the same way by the other. (PP 8:350n; see also MM 6:314, TP 8:294n, DTP 23:136, Stark 245)

In these passages, Kant claims that each member of a state both has coercive rights and is subject to coercive right equally. This means both that each member is entitled to coercive protection from violations of her rights and to redress through the state for actual violations, and that each member is subject to state coercion should she violate the rights of others.[1] Kant emphasises this point in a note from "Theory and Practice", saying that even princes, who are not yet the head of state, must be held legally accountable to "the least of their servants" in cases of wrongdoing (TP 8:294n). The fact that a member of society may hold a high rank within that society does not mean that they are not subject to coercion if they violate the rights of another member.

The focus on the entitlement to coerce and subjection to coercion makes the relationship between individuals appear central to the right of equality. However, as is only implicit in the passages above, it is each subject's relationship to the law that is the defining feature of equality between citizens. The relationship to other subjects is secondary. That is, the right of equality is a right that state institutions be set up in such a way that the same coercive laws apply to everyone. If a person is entitled to protection or remedial action by some law, then she is also subject to coercive force should she violate that law. Indeed, in the note from "Theory and Practice" mentioned above, Kant claims that servants have coercive rights against their princes "by means of the head of state" (TP 8:294n). This is an important addition as it makes clear both that one's rank does not does not make one legally inferior or superior, and that it is each individual's relationship to the law that is being considered.

It is also important to note that the protection that each member of a state is entitled to regarding potential violations of their rights, and the redress that is possible through the state due to actual violations, does not entail that all members of the state are equally

[1] The head of a state is exempt from possible subjection to coercion. If the head of state were so subjected, Kant claims, "he would not be the head of state and the sequence of subordination would ascend to infinity" (TP 8:291; see also Refl 8051 19:594). This does not cause a problem for Kant's account of the equality of members of a state, however, as the sovereign is not a member of a state, but its creator or preserver.

suited to represent themselves regarding these violations. That is, just because a member of a state bears the same relationship to the law as every other member, it does not follow that she is capable or entitled to represent herself in her dealings with the law. The next chapter will discuss Kant's claims about which members of a state are permitted represent themselves, and some of the reasons for his exclusions. For now we can note that the fact that formal legal equality does not entail a capacity or entitlement to represent oneself is not in itself problematic. For example, that children require someone to represent them in no way diminishes their status as equal members of a commonwealth. They are just as entitled to coercive protection and redress for wrongs as any other member. The same may be said of other members of the commonwealth who lack the capacity or entitlement to represent themselves. What is important for the right of equality is that each person bears the same relationship to the law, not that each person is able, or entitled, to represent themselves in their dealings with the law.

One question we might ask is whether the content of the right to equality of citizens differs in any significant way from the innate equality contained in the innate right. I believe that it does not. Just as innate equality entitles each person to be bound in only those ways that they can bind others, so too the right of equality of citizens entitles each person to be subject to the same coercive laws as all others. The right of equality of citizens does not introduce any additional resources into our thinking about equality. However, the focus of innate equality and the equality of citizens differs. Innate equality is primarily concerned with the rightful form of interaction between individuals. It makes sense to speak of innate equality even in the state of nature. The same is not the case for the equality of citizens. As we have seen, this kind of equality is primarily concerned with the relationship between the members of a state and the head of that state.

There are two central consequences of the right to equality of citizens as Kant describes it. The first is that it rules out hereditary privileges, positions reserved for certain members of society merely on the basis of birth (§3.1.1). The second is that it is consistent with great material inequality (§3.1.2). I will consider each in turn before addressing possible arguments for the provision of welfare on Kantian grounds (§3.2).

3.1.1 Against hereditary privilege

Kant takes a central consequence of his view of equality to be that members of a state must have equal opportunities for the achievement of a higher rank in that state (aside from the rank of sovereign). This entails that there can be no hereditary privileges.[2] Consider the following passage from "Theory and Practice":

> From this idea of the equality of human beings as subjects within a commonwealth there also issues the following formula: Every member of a commonwealth must be allowed to attain any level of rank within it (that can belong to a subject) to which his talent, his industry and his luck can take him; and his fellow subjects may not stand in his way by means of a hereditary prerogative (privileges [reserved] for a certain rank), so as to keep him and his descendants forever beneath the rank [...].
>
> Now since birth is not a *deed* of the one who is born, he cannot incur by it any inequality of rightful condition and any other subjection to coercive laws than merely that which is common to him along with all others, as subjects of the sole supreme legislative power; hence there can be no innate prerogative of one member of a commonwealth over another as fellow subjects, and no one can bequeath to his descendants the prerogative of the *rank* which he has within a commonwealth and so also cannot, as if qualified by birth for the ruling rank, coercively prevent others from attaining by their own merit the higher levels of subordination [...]. (TP 8:292-93; see also DTP 23:141, MM 6:329, DMM 23:292, TB 8:433-34)

What it means for each to be able—subject to her talent, industry, and luck—to achieve any rank within a commonwealth is understood in terms of a prohibition on allowing birth to determine the rank one may attain. Inequality in rank itself is permissible. Kant's argument against hereditary privileges is not an argument against there being *privileges*. Rather it is an argument against privileges being *hereditary*. What is impermissible is a state of affairs in which one group of people is entitled to maintain their rank in a way that is incompatible with others rising to it.

What is wrong with hereditary privileges? The basic idea is that they subject different

[2] Discussions of hereditary privilege were common just after the French Revolution, around the time that Kant wrote "Theory and Practice". As Maliks has noted (2014: 48), this discussion was especially "salient in [Kant's] [...] Prussia, where the nobility had gained an increasingly powerful position in the bureaucracy, economy, and military during the eighteenth century" (see also Rosen 1993: 28). Kant's preoccupation with the issue is therefore not surprising. Philosophically, the issue is an interesting one, as we can use the argument against hereditary privilege to rule out all those institutions which would keep some at a lower rank regardless of their talent, industry, and luck.

people to different laws just on the basis of birth. There are rules that govern the inheritance of a title and the privileges that comprise that title (i.e., the first-born son inherits the estate and rights associated with that). This means that there will be some who, just as a matter of birth, are excluded from those privileges. Moreover, this exclusion would obtain no matter how talented, industrious, or lucky those not born into the position are. Such a situation is inconsistent with formal equality. Here is Kant again:

> Now a *hereditary* nobility is a rank that precedes merit and also provides no basis to hope for merit, and is thus a thought-entity without any reality. For if an ancestor had merit he could still not bequeath it to his descendants: they must acquire it for themselves, since nature does not arrange things in such a way that talent and will, which make meritorious service to the state possible, are also *hereditary*. (MM 6:329)

A hereditary nobility is a thought-entity without any reality because parents cannot bequeath merit-based entitlements to their children. There are different ways that we can understand this claim. We might think that Kant is making an empirical claim regarding the suitability of certain people for a given position on the basis of genetics and family upbringing. On this way of reading him, hereditary privileges cannot be sustained because there can be no guarantee that parents will be able to cultivate the appropriate traits in their child. Even if the parent possesses the necessary traits and takes appropriate steps to cultivate them in the child, the child may still fail to develop them. This reading leaves the permissibility of hereditary privileges contingent on the empirical facts (see Ripstein 2009: 290). If it were the case that the relevant traits could be inherited, then hereditary privileges would be appropriate. However, since it is possible that the child will not possess the relevant traits despite the parents' best efforts, it turns out that hereditary privileges are impermissible. This is not, I believe, the kind of argument that Kant was after. He was not concerned with the wrongfulness of hereditary privileges given certain facts about genetics and upbringing, but rather with the wrongfulness of hereditary privileges as a matter of right. It is thus worth looking for a different understanding of the passage.

Another way of understanding the passage, which I believe is plausible, is the following. Privileges cannot be hereditary because merit is something that must be earned. Since no one is born having performed the deeds necessary to have earned any merit, privileges

cannot be hereditary. On this understanding, merit cannot be bequeathed to descendants because it is not something that one owns in the way that one owns property. Merit might take the form of a contribution to the state (i.e., the completion of some service), or the acquisition of relevant forms of experience. These are not things that a child can inherit from her parent. This is true even if the parent's experience help to make the child well-suited to make a contribution or gain the relevant experience in future. This second reading does not make the permissibility of hereditary privileges contingent on the empirical facts. Since merit requires that one perform a specific deed, but birth is not a deed, birth alone will always be insufficient to entitle one to a rank. This means that hereditary privileges will never be permissible.

Due to the fact that hereditary privileges assign ranks on the basis of birth and not merit, Kant claims that a sovereign cannot uphold them. He says: "Since we cannot admit that any human being would throw away his freedom, it is impossible for the general will of the people to assent to such a groundless prerogative, and therefore for the sovereign to validate it" (MM 6:329; see also TP 8:297, PP 8:351n). The endorsement of hereditary privileges would constitute throwing away one's freedom because it involves a (coercive) restriction on what one may do that does not correspond to the protection of another's freedom. Since the sovereign is not entitled to uphold institutions that throw away the freedom of some members of the state, a sovereign may not uphold the institution of hereditary privileges.[3]

Thus, hereditary privileges are impermissible because they are inconsistent with the equality of members of a state. The equality of members of a state requires that each person is bound to the same law as every other, and this is understood in terms of the reciprocal possibility of coercion. Privileges that assign rank on the basis of birth violate this form of equality. Let me make two further remarks about hereditary privilege and equality of opportunity.

[3] The appeal to freedom here may appear out of place. However, as we have already seen (§2.1.2), innate equality is one of the entitlements of the innate right to freedom. The appeal to freedom here must then refer to that entitlement. Since the equality of citizens does not add anything to our understanding of equality (it merely prohibits institutional arrangements that conflict with our innate equality), it would be a violation of civil equality for the sovereign to uphold hereditary privileges.

First, a consequence of Kant's account of equality of opportunity for the achievement of rank is that neither material inequality nor a lack of natural talent can be used to support an argument for the provision of resources for those who are born into a low rank. To see why this is the case we must recall Kant's distinction between a wish and a choice (see MM 6:213, §1.1). We can only choose something when we have the means to bring about the object or state of affairs we desire. When we do not have sufficient means for this task, we can only wish for the object or state of affairs. Kant's definition of right states that it is only concerned with the relation between agents' choices; it takes no account of their wishes. In the context of equality of opportunity this means that a person who is without the means to achieve a higher rank has no claim of right to those means. Another way of putting this point is that it is permissible for one's luck and one's circumstances to play a significant role in determining the rank one is able to achieve (see MM 6:329, TP 8:293-94). If, however, a subject would be formally unable to achieve a higher rank given sufficient means (including luck), then a claim of right has been violated.[4]

We may wonder whether a person lacking the means to achieve a high rank should be given those means. If the difference between a wish and a choice is, at least in some cases, a matter of the material resources a person has, then we might think that redistribution would be appropriate. This is the sort of policy that would be recommended by a view according to which equality required that all start on a level (or reasonably level) playing field. However, such an option is ruled out by Kant's account of property (§1.2.2). Coercively redistributing property (or other forms of wealth) for the purposes of providing some with the means to attain a higher rank would wrong those whose property was taken.[5] The fact that Kant's account of equality does not support the provision of resources for those in a low rank is thus a consequence of his account of external freedom.

Second, while material inequality and lack of natural talent cannot be appealed to as a part of arguments in favour of supporting those who have less, Kant's argument against

[4] See TP 8:293-94, where Kant claims that a subject may be considered happy "provided he is aware that, if he does not reach the same level as others, the fault lies only in himself ([his lack of] ability or earnest will) or in circumstances for which he cannot blame any other, but not in the irresistible will of others who, as his fellow subjects in this condition, have no advantage over him as far as right is concerned."

[5] We will take up a similar problem below, in the discussion of welfare (§3.2).

hereditary privileges can be used to support anti-discrimination laws.[6] Just as whether or not one is born to parents of a high rank is not a deed (and so not an act that can determine what rights one has), neither is whether one is born to a particular gender, race, ethnicity, religion, or sexual orientation. For this reason, these characteristics cannot be used to determine one's social standing (in terms of rights). The state is not permitted to enforce, or allow others to enforce, discriminatory laws or policies. To do so would be to restrict the freedom of some despite the fact that they have not performed a legally relevant act.

3.1.2 The permissibility of material inequality

We have seen that Kant's understanding of equality is purely formal. It takes no account of the differences in holdings in material resources between subjects. However, if a law exists that allows one person to coerce another in a way that he cannot in turn be coerced, the form of the relationship is unequal and thus impermissible. This formal, legal equality is consistent with significant inequality in material wealth. Thus, the second important consequence of Kant's account of the right of equality is that great inequality is wealth is permissible. Kant says:

> But this thoroughgoing equality of individuals within a state, as its subjects, is quite consistent with the greatest inequality in terms of the quantity and degree of their possessions, whether in physical or mental superiority over others or in external goods and in rights generally (of which there can be many) relatively to others; thus the welfare of one is very much dependent upon the will of another (that of the poor on the rich); thus one must obey [...] and the other directs [...]. (TP 8:291-92)

In this passage, the nature of material inequality appears as though it could cause a problem for Kant. This is because he acknowledges that material inequality will result in a form of dependence. The poor are dependent on the rich. This may at least appear inconsistent with the innate right, since it might allow that the rich are able to subject the poor to their whims. That is, we might worry that dependence of this kind can lead to the domination of the poor by the rich. If material inequality leads to the dependence of some on the

[6] To my knowledge, Kant does not put his view of equality to this use. And, even if he does, such an argument does not feature prominently in his published works. Nevertheless, support for anti-discrimination laws appears to be a consequence of support for his account of equality.

will of others in this way, surely it must be impermissible on Kant's account. The tension, however, is quickly resolved. The passage continues,

> But in terms of right (which, as the expression of the general will, can be only one and which concerns the form of what is laid down as right not the matter or the object in which I have a right), they are nevertheless equal to one another as subjects; for, no one of them can coerce any other except through public law (and its executioner, the head of state) [...]. (TP 8:292)

Despite the existence of material inequality, each subject is equal under the law. That is, each subject is equal in terms of coercive right, regardless of whether they depend on another. This is the only kind of equality that matters in the eyes of the law.

In order to be consistent with right, the material dependence of the poor on the rich can only exist within a relationship of formal, legal independence.[7] To say that material dependence is limited by formal independence is to say that, for example, an employee is entitled to redress in the case of wrongs perpetrated by the employer. So, while there may be a relation of dependence—the employee needs the job to sustain herself—that dependence cannot be arbitrary from a legal perspective. The employee may be under the authority of the employer, but the employer is not entitled to violate the innate or acquired rights of the employee, and is subject to coercion by the state if such a violation occurs. This again demonstrates that Kant's account of equality is is concerned with each individual's relationship to the law, and not their material standing.

3.2 Kant on welfare: 4 approaches

Kant claims that the right of equality is satisfied when each member of a state bears the same, equal relationship to the law as every other member. Moreover, he claims that this formal, legal equality is consistent with great material inequality. For this reason, it seems that Kant's account of equality is unable to provide positive grounds for the provision of welfare. The destitute may stand in the same relationship to the law as the rich. Despite this, it is worth considering whether Kant is able to consistently provide arguments for the

[7] Here I use 'independence' merely as a contrast to 'dependence', not in the technical, Kantian sense to be introduced later (§4.1).

provision of welfare. In this section, I argue against four ways of defending the provision of welfare on Kantian grounds. This does not demonstrate that such a defence is impossible. Rather, it merely demonstrates that it is much more difficult than recent literature appears to suggest.

Kant's account of the equality of members of a state does not provide positive grounds for the provision of welfare. In addition to this lack of support from the account of equality, there are also features of Kant's political philosophy that speak against such a provision. As we have seen (§1.3), people have rights provisionally in the state of nature, and provisional acquisition is true acquisition (see MM 6:264). While provisional rights are insecure and not fully determinate, they nevertheless amount to entitlements on the part of the right-bearer.[8] On Kant's account, the transition to the civil condition is necessary for those rights to be secured and fully determined. This creates a problem for those wishing to justify welfare on Kantian grounds because coercive taxation appears to violate the acquired rights of those being taxed. If rights entitlements exist prior to entry into the civil condition, then it is difficult to see how the state may be justified in taking the property of some in order to give it to others.[9] Second, Kant believes that all duties of right are "just duties of omission. The whole of law contains merely negative duties" (Mo/Mron 29:632; see also Mo/Vig 27:514, Mo/Vig 27:587). Duties to redistribute resources are commonly thought of as positive duties. Kant's belief that there are no positive duties of right thus makes the problem of defending a right to the provision of welfare especially difficult.[10]

Thus, there are three separate problems that attend thinking about Kant on welfare. The first is that Kant's comments about legal equality provide no positive grounds for the provision of welfare. Inequality of wealth is perfectly compatible with formal, legal

[8] We must therefore disagree with Kaufman (1999: 11) who claims that the state need not protect any specific allocation of property. On the view I am defending, the state must protect that allocation that existed in the state of nature.

[9] In this way, Nozick (1974: 238) is reminiscent of Kant.

[10] Indeed, while there has been an influx of accounts of welfare on Kantian grounds in recent years, there are many commentators who believe that Kant is unable to provide a consistent account of the provision of welfare. See: Aune (1979: 156-59), Byrd and Hruschka (2010), Hayek (1976: 43), LeBar (1999: 248), Murphy (1994: 123-125), Pinzani and Madrid (2016: 34), Pogge (2002: 157), Williams (1983: 195-98) and Kersting (1992b: 153). Williams and Kersting seem to revise their positions in Williams (2013) and Kersting (1992a), respectively. See Riley (1983: 111-13) for concerns over the fact that Kant wasn't more attentive to inequalities of wealth.

equality. Thus what may appear to be an obvious place to look for a justification of coercive taxation for the purposes of redistribution is ruled out on Kant's account. The second, more difficult, problem is that it seems that the state would violate the rights of some of its members by coercively redistributing wealth (or any other resources). The third problem is that Kant believes that all duties of right are negative, but the right to the provision of welfare is normally thought of as a positive duty.

Nevertheless, it is worth considering whether Kant is able to account for the provision of welfare. I am not sure that he can. In what follows, I outline four attempts at justifying the provision of welfare on Kantian grounds. The first states that welfare is the legal institutionalisation of each individual citizen's duty of beneficence (§3.2.1). The second states that welfare is necessary for the alleviation of a form of wrongful dependence in the state (§3.2.2). The third states that the legitimacy of any system of property depends on that system being rationally acceptable to all who are a part of it. A system that doesn't redistribute to the poor will not be rationally acceptable to all (§3.2.3). The fourth states that welfare can be justified on left-libertarian grounds (§3.2.4).[11] None of these four proposals is satisfactory. Each faces serious challenges on either textual or philosophical grounds. The conclusion to draw from this is not that a Kantian cannot defend the provision of welfare. Such a conclusion would require a demonstration of the impossibility of such a defence, and that is not my purpose here. Rather, the conclusion to draw is simply that the task of defending the provision welfare on Kantian grounds is a difficult one; one whose success we should not take for granted.

Before getting to these attempts it is worth mentioning a passage in the Public Right section of the *Doctrine of Right* in which Kant himself says that the state may redistribute wealth. This passage has been the focus of many contemporary commentators.[12] In that passage, Kant claims that the state has the right to coerce the wealthy in order to provide for those who "are unable to maintain themselves" (MM 6:326).[13] The strategy of focusing

[11] There is one view that I do not consider here. According to this view, state legitimacy requires democracy, and democracy requires the provision of welfare. While this view may seem appealing (and has certainly been argued in non-Kantian contexts, see Cohen 2002 for just one example), Kant did not believe that democracy is necessary for state legitimacy (§4.3.1). Thus, we cannot argue for welfare on these grounds.

[12] See, for example, Baiasu (2014), LeBar (1999), Rosen (1993), Shell (2016), Walla (2015), Weinrib (2003).

[13] This is the full passage:

on this passage makes sense. Not only is the passage an explicit statement of support for the permissibility of some form of welfare provision, but, to my knowledge, it is the only one that appears in Kant's political writings. But there is reason to doubt the usefulness of this passage. Kant claims that coercive taxation in order to provide welfare is justified "for the sake of the state [*Von Staatswegen*]". Kant elsewhere uses the same phrase when discussing the forcible relapse of a person who has gained civil maturity into a state of civil immaturity due to poor handling of his estate (A 7:210). This seems to indicate that the state is taking away the status of independence from a person who is legally mature (*mündig*) on instrumental grounds; namely, because another person would better handle the management of his estate. Thus, we might worry that Kant's appeal coercive redistribution 'for the sake of the state' indicates an instrumental concern and not a justification based on his account of right (see LeBar 1999 for similar concerns).[14] This raises the worry that the rights of some will be violated on the grounds of an instrumental concern, and this is not consistent with the general principles of Kant's political philosophy. With this in mind, I believe that what we can get out of the MM 6:325-26 passage is limited.[15] For now, let's turn to four ways in which commentators have sought to defend a right to

> To the supreme commander there belongs *indirectly*, that is, insofar as he has taken over the duty of the people, the right to impose taxes to support organisations providing for the *poor*, *foundling homes*, and *church organisations*, usually called charitable or pious institutions.
>
> The general will of the people has united itself into a society which is to maintain itself perpetually; and for this end it 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. [For the sake of the state (*Von Staatswegen*)] the government is therefore authorised to constrain the wealthy to provide the means of sustenance to those who are unable to provide for even their most necessary natural needs. 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. (MM 6:325-26)

Here I have modified Gregor's translation of '*von Staatswegen*', since her rendering of this phrase as 'for reasons of state' invites Machiavellian connotations absent from the passage. However, as I suggest above, this phrase appears to be used by Kant to note a departure from justifications based on his account of right.

[14] Kant makes another such concession in the *Doctrine of Right*. I have in mind specifically his claim that in cases in which the punishment of all those involved in a crime would cause the dissolution of a state, then the sovereign can impose a more lenient sentence that could not be arrived at according to principles of public law (see MM 6:334). It is difficult to know what to say about these passages.

[15] There are other puzzling features of the passage that speak against its usefulness in this context. For instance, Kant claims that the right to coercively tax belongs to the state insofar as the state has taken on a duty of its citizens. He also claims that the wealthy, who are the ones being taxed, owe an obligation *to the commonwealth*, and this is the basis of the state's right. In addition, Kant does not mention a right of the destitute to receive welfare, only a right of the state to coercively tax in order to provide it. For these reasons, I leave this passage aside in what follows.

welfare on Kantian grounds.

3.2.1 Enforced charity

In his ethical writings, Kant claims that individuals have a duty to be beneficent (see G 4:423, MM 6:393-94). We each have an (imperfect, wide) obligation to help others. Due to this, one might view the provision of welfare as a form of enforced charity.[16] There are three problems with this view.

First, ethical duties cannot be externally enforced.[17] Ethical duties for Kant are concerned in the first instance with a person's maxims. But, a person cannot be compelled to adopt a particular maxim. For this reason, ethical duties are not externally enforceable. This strongly speaks against the view that the state could take over its citizens' duty of beneficence. The state is able (though perhaps not permitted) to coercively redistribute wealth. However, because the duty of beneficence requires that agents adopt particular maxims, coercive taxation cannot be a way of fulfilling the duty to be beneficent.[18] In light of this difficulty, one might claim that the state is entitled to coercively redistribute in order to bring about the same *effects* as would be brought about had all its citizens not violated their ethical duties. But this alternate justification depends on the view that the state has a right (and perhaps even an obligation) to bring about certain substantive outcomes. This is incompatible with Kant's understanding of the state as a system of public law that solely secures and determines rights. Moreover, beneficence is a wide duty. It permits latitude in its execution. This means that the duty doesn't specify whom one should help or the form this help should take. (It does not even specify that help should involve giving up one's own property—lending something or volunteering one's time are also ways of

[16] This is the view that Rosen (1993: 179) develops (with the MM 6:326 passage in mind): "Kant says that rulers take over a duty from the people. Presumably, the duty he has in mind is benevolence; no other duty fits the description." For other views according to which redistribution of wealth is justified by appeal to Kant's ethics, see Williams (1983: 198) and O'Neill (2008).

[17] This objection is raised by van der Linden (1988: 203), Varden (2016: 101), and Walla (2015: 40). Byrd (1989: 168) claims that duties of charity generally may be externally enforced, because the act of giving to charity itself can be externally enforced. However, she acknowledges that the ethical duty to give to charity is unenforceable.

[18] Rosen believes that the state isn't able to release private individuals from the duties that are imposed upon them by the categorical imperative. For this reason, the state's duty of benevolence on his view must be "derived from, without reducing or eliminating, private citizens' duties of benevolence" (1993: 179). The state has *its own duty* of benevolence that is derived from the duty of its citizens.

helping). So, even if the state were permitted to coercively redistribute wealth in order to bring about certain outcomes, there would be no way of telling how much (if any) wealth should be redistributed or where it should go.[19] The latitude in the duty of beneficence means that there would be no principled way in which the state could bring about the same effects as would be brought about if none of its citizens violated their ethical duties.

Second, the view does not offer a solution to the problem of why the state is entitled to coercively redistribute wealth. Even if ethical duties were externally enforceable (which they are not), and even if the state could determine which people and needs would be helped were those duties not violated (though it cannot), that still would not explain why the state would be entitled to coercively tax its citizens. That is, it would not explain why the external enforcement of the duty was *rightful*. We don't believe that all ethical duties are suitable candidates for external lawgiving. If they were, then the state would be permitted to act paternalistically. It would, for example, be able to coerce us to go to the gym or to learn another language. But, this sort of coercion is not permissible. Thus, we need some justification for why the duty to be beneficent permits rightful coercion when other imperfect, wide duties do not. However, it is difficult to imagine how such a justification might proceed given the difficulties just outlined.

Third, the explanation of the state's entitlement to coerce our duty of beneficence would also have to explain why the state could violate a perfect duty in order to avoid the violation of an imperfect duty. On Kant's account, perfect duties have priority over imperfect duties. A perfect duty cannot be violated in order to avoid the violation of an imperfect duty. But this is what would occur if the state violated the property rights of some so that those same people would not violate their imperfect duties of aid.

These three objections are fatal to the enforced charity view of the provision of welfare. Let us consider another view.

[19] See Moran (2016) and Guyer (2000: 256).

3.2.2 Wrongful dependence

According to a second view, a wrongful form of dependence exists between the wealthy and the destitute. This is because the destitute rely on the charity of the wealthy in order to survive.[20] In what follows, because it has been the most influential, I will use Ripstein's argument to explain the view that the relation the poor stand in to the rich is one of wrongful dependence.

Ripstein's argument for the coercive taxation of the wealthy in order to provide means for the poor, which makes use of this appeal to wrongful dependence, is explained by reference to the discussion of the right to occupy space that we have already seen in the previous chapter (§2.1.3). Recall that Ripstein argues that public spaces are necessary. The reason for this is that a system of wholly private property would create a wrongful form of dependence between those who have land and those who do not. Those with land would be able to decide whether the very existence of those without land was permissible. The importance of this for our purposes is that Ripstein believes that the poor in a society lacking the provision of welfare occupy exactly the same position as the landless in a society lacking public spaces. He says:

> The spatial version of the problem illuminates actual cases of poverty and need because the juridical significance of biological survival is that it consists in a person's keeping control of his or her own person [...]. [If] another person is entitled to determine whether you will maintain control of your own person, you are subject to that person's choice *in exactly the same way* as the person who cannot occupy space except through the choice of another. Each is entirely subject to the choice of another. (2009: 280, my emphasis)

Ripstein here argues that just as the landless are dependent on land owners for their survival (when all land is owned), so too the poor are dependent on the wealthy. This is because the poor depend on the charity of the wealthy in order to survive. Importantly, Ripstein understands biological survival as *juridically* significant. It is a necessary condition for a

[20] For versions of this second view, see Allais (2015), Davies (2014: 75-76), Hasan (2018), Moran (2016), Ripstein (2009: 270-86), Stilz (2011b: 98-101), Varden (2009), and Weinrib (2003). Pettit (1997: 158-163) gives a non-Kantian republican defence of the provision of welfare that bears similarities to the wrongful dependence account. See Hodgson (2010) for a discussion of the difference between Kant and Pettit's accounts of external freedom.

person's control of her own body. So, to say that the poor are dependent on the wealthy for their biological survival is to say that they are dependent on the wealthy for remaining in control of their own body. But, Ripstein believes, your right to be in control of your body just is the innate right to freedom. Thus, the innate right to freedom of the poor is dependent on the charity of the wealthy. This dependence is wrongful because the wealthy have discretion over the recipients, and amount, of their charitable donations. If correct, this proposal would tell us why the state is entitled to coerce the wealthy in order to provide for the poor. The relation that holds between the poor and the wealthy is one that is not rightful, and so coercion (in the form of taxation) is both permissible and necessary.

We can doubt the similarity between the two cases Ripstein describes, and, on this basis, the 'wrongful dependence' strategy in general. The crux of the difference between the two cases is the following. A person without land (when all land is owned, and it is permissible to exclude the landless from one's property) does not have an entitlement to be anywhere without the permission of another. However, an impoverished person retains her entitlement to use her body despite the fact that what she may hope to achieve with it has been diminished.[21] The person with no land is dependent on others for the permission to use what she has (i.e., her body). Her very existence is wrong without another's permission. The poverty stricken person, however, has permission to use the means at her disposal (i.e., her body and what little she owns), but those means are meagre. What she depends on the wealthy for is not the permission to use what means are available to her, but the material resources to increase her means so that she can satisfy one of her ends. Here, that end is survival. In the case of the landless person, what is at stake is the permissible use of her means at all. In the case of the impoverished person, what is at stake is the enlarging of the means available to her. Due to the fact that her appeal is not to the use of means at all, but only the increase of her means to a level that is sufficient for the achievement of one of her ends, the impoverished person has no rightful claim against the state to the coercive redistribution of wealth.[22] This, I think, presents a serious

[21] Shell (2016: 15n, 18) and Hasan (2018: 2) make a similar points to this.

[22] Guyer (2000: 257) makes a similar point, I believe, when he says: "Such an argument [that the state is

difficulty for the wrongful dependence view. It only succeeds if we allow a slip between a discussion of the use of one's means at all, and the increase in one's means. Only the former provides grounds for state coercion on Kant's account, but the argument for the provision of welfare relies on the latter.

Might a proponent of this view argue that the cases are sufficiently morally similar, even if they are not exactly similar?[23] I think not. According to Ripstein, what is meant to be wrong about the case of the landless person is that they are reduced to the status of a slave (see 2009: 280). They lack the capacity to use their own means without the permission of another. The impoverished person is not in this position. They do not lack the capacity to use their own means, they simply lack the means for the achievement of one of their ends. Recall again Kant's distinction between a wish and a choice. We can choose something when we have the means to bring about the object or state of affairs we desire. When we do not have sufficient means for this task, we can only wish for the object or state of affairs (see MM 6:213). Wish is excluded from considerations of right. However, since the impoverished person does not have the means for the end she desires, wishes are all she has. Coercive taxation in order to increase her means would thus violate the freedom of those being coerced because the grounds of coercion would be the wish of another.

Let us consider a third view.

3.2.3 Right and reasonableness

According to a view proposed by Guyer, any system of property must be rationally consented to by all. Moreover, a system of property that does not provide for those who cannot maintain themselves cannot be rationally consented to. Thus, any system of property must include some provision of welfare.[24]

Guyer's argument begins with the claim that, for Kant, the only unconditional value

entitled to redistribute wealth on the grounds that it is a means to the end of self-sustenance] would come close to an argument that the state ought to regulate property in the interest of the happiness of all its members, an argument the premise for which Kant strongly rejects" (see also Mulholland 1990: 317).

[23] Thanks to Thomas Sinclair for suggesting this possibility to me.

[24] Gilabert (2010: 407-08) gestures towards a similar argument, labelling it 'left-libertarian'.

for human beings is the freedom of human choice and action. This includes the external action relevant to Kant's political philosophy, "the freedom of human beings to move their own bodies and to exercise them upon other objects [...] in accord with their own choices to the extent compatible with a like freedom for all other human beings" (2000: 237). At least initially, our external freedom only extends to our use of our bodies. The extension of external freedom to objects external to us—i.e., the acquisition of property—requires an act of acquisition on our behalf (see MM 6:237). However, Guyer claims, any such act "inherently impinges upon the like freedom of others who might otherwise be able to control or use the object" (2000: 238). Since an act of acquisition impinges upon the freedom of others, external objects of choice can only be acquired through the deference of those others. (As we have seen, §1.2.2, this is an instance of the problem of unilateral choice). This deference takes the form of consenting to the system of property of which the act of acquisition is a part. The idea here is the familiar one. An otherwise wrongful act is made rightful by the addition of consent. Without consent, acquisition of external unowned objects by some wrongs all others who could have made use of the object. With consent, acquisition of the object becomes rightful.

Under what conditions is a person able to rationally consent to a system of property? A necessary condition for rational consent to a system of property is that the person is no made worse off by the implementation of that system than they would be in the state of nature. Guyer sees his view as bolstered by Kant's claim that the state of nature is one in which the world is possessed in common. Each has a liberty right to occupy various places on the surface of the earth, and an equal opportunity to maintain themselves. He says:

> Kant's analysis of property, then, leads to the conclusion that an opportunity to maintain one's own existence at least equivalent to that which would have been enjoyed in an original common possession of the earth is a necessary condition of the rationality of free agreement to any system of property and thus a necessary condition of the rightfulness of property itself [...]. (2000: 254)

And, further on,

> the right of the state to control the distribution of property or wealth is a consequence of the fact that the possibility of the rational consent of all to the

> distribution of property is a necessary condition of the existence of property at all. (2000: 258)

The earth is originally possessed in common, and any individual property must be derived from that common ownership. A condition for the legitimacy of any system of property is thus that it doesn't make any person worse off (understood in terms of their ability to maintain themselves) than in a condition in which the world is owned in common. If some were made worse off in this way by the enforcement of a system of property, then they could not have (rationally) consented to that system and thus its enforcement would wrong them.

Thus, for Guyer, the provision of welfare is a necessary condition for the legitimacy of state enforcement of a system of property. The central worry for this view, as it is stated, is that Kant does not appear to be worried about the problem of unilateral choice (§1.2.2). That is, he believes that objects can be acquired in the state of nature without wronging others, and that such acquisition is true acquisition. However, since the acquisition of external objects does not wrong others, the deference of those others is not necessary. For this reason, it seems that Guyer's view, as it stands, fails.

However, Guyer might accept these considerations. Rather than relying on the state to institute a system of property to which all could consent, he might claim that there is a standard of acquisition in the state of nature. This standard would only permit those acts of acquisition in the state of nature to which others could rationally consent. It is to this kind of view that I turn now.

3.2.4 Kantian left-libertarianism

On a fourth view, Kant's claims about the original possession of the earth in common generate a standard against which we measure acts of acquisition.[25] Coercive taxation for the purposes of redistribution is justified on the grounds that some have acquired more

[25] It is the centrality of these claims that justify the 'left-libertarian' label. But, this should not be taken to mean that Kant is a left-libertarian as that is understood now (see Williams 2013). For instance, he denied that we are self-owners (see MM 6:270, Mo/Collins 27:386, §2.2), and this belief conflicts with the left-libertarian view that "agents own themselves in just the same way that they can have maximal private ownership in a thing" (Vallentyne 1998: 611; see also Cohen 1995). However, Kant does endorse strong claims about self-*mastery* combined with claims about the common ownership of the earth.

than they are entitled to according to that standard. The provision of welfare is thus not a positive duty of aid, but a redress for a wrong.[26] To my knowledge, amongst Kantians there are no advocates of this view (though, as mentioned above, I believe Guyer comes close).

This section is split into three parts. In the first, I discuss Kant's claims about common ownership as a standard against which individual acts of acquisition are to be judged. In the second, I sketch the implications that this standard has for welfare in the Kantian state. In the third, I raise some difficulties with the view. While I believe that this view offers a plausible defence of coercive taxation on textual grounds, it ultimately fails on philosophical grounds. This is because it faces serious epistemic difficulties in determining who has been wronged and the extent of the wrong.

Common ownership: a standard for acquisition

Kant says that the world is owned originally in common by all those who occupy its surface. While this is not possession in terms of a property right (§2.1.3), it does form the backdrop against which all individual acts of acquisition take place. Kant tells us,

> The possessor [of an external object of choice] bases his act on innate possession in common of the surface of the earth and on a general will corresponding *a priori* to it, which permits private possession on it. (MM 6:246n; see also DMM 23:219)

Acts of acquisition must be in accordance with the general will that corresponds to innate possession of the earth in common. For this reason, we might think that the idea of the community of those who occupy the surface of the earth provides us with a standard against which we limit our acquisition. Indeed, Kant seems to appeal to this idea in the following passages:

> On seeing, therefore, that the provision is universal, I have obligations to limit my consumption, and to bear in mind that nature has made these arrangements for everyone. (Mo/Collins 27:414)

[26] Waldron (2005) makes a similar claim about the possibility of coercive redistribution on a Lockean account in response to Nozick. I am indebted to Waldron's paper for getting me thinking about these issues.

> One actually has a right to coerce others, that they by means of maintaining their own lives are reducing ours to most extreme need, because property is only a share in the communal endowment of nature.[27] (Refl 7193 19:268)

The first passage says that we have to limit our acquisition because nature has made arrangements for everyone. The second, though itself quite puzzling, says that a person has the right to coerce others to maintain herself because property is just a share in the common endowment of nature. Neither of these passages constitute a knock-down argument for the view that Kant thought that innate common possession of the earth sets a standard for acquisition. The first passage makes an appeal to teleology mostly missing in Kant's later works of political philosophy. The second passage appears to suggest that one can only coerce another person in order to make use of the ways in which that person is already maintaining herself.

Nevertheless, in conjunction with Kant's claim that individual acts of acquisition occur against the backdrop of possession of the world in common, the passages do indicate that Kant believed there was *some* standard governing acquisition of external objects of choice. The thought behind this is simple enough. Due to the fact that we have to share the common endowment of nature, there is a limit to what each person is permitted to acquire. No person may take more than her fair share of the communal endowment of nature because each is beholden to the standard provided by the original community of possession. How should we understand this original community? Kant is explicit that it should not be understood as joint positive possession of the land and everything on it. This is what he calls a 'primitive community', which would need to be *instituted* by a contract by which each chooses to give up private possession. However, a community is original when no act is necessary to bring it about. Thus, a primitive community cannot be original in Kant's sense (see MM 6:251). We should instead understand Kant's original possession of the earth along the lines of what Simmons has called 'divisible positive community'. In such a community,

> each person has a (claim) right to a share of the earth and its products equal

[27] "*Man hat aber doch ein recht, andere zu zwingen, daß sie mit Ehrhaltung ihres Lebens zugleich das unsrige nothdüftigst erhalten, Weil Eigenthum nur ein Anteil an der gemeinschaftlichen Ausstatung Natur ist.*"

> to that of every other person. Each may take an equal share independent of the decisions of the other commoners; each has property in the sense of a claim on an equal share (but not possession of or a claim on any particular share). (Simmons 1992: 238)

In a divisible positive community, each person is entitled to acquire external objects from the commons without the express consent of others. However, the amount that each person can acquire is limited by the fact that every other person is also entitled to an (equal) share. This does not mean that shares are somehow allotted in advance. No one is entitled to any particular object or piece of land. Rather, each person is entitled to some share of the earth's products or land. Simmons claims that divisible positive community is characterised by each having an *equal* share of the earth and its products (see also Steiner 1977). Should we attribute this strong claim to Kant? Certainly nothing in his writings appears to suggest this view. However it is plausible to believe, especially in light of the passages quoted above, that each is entitled to at least that share of the common endowment of nature that they need to survive. This minimal entitlement is sufficient to set a limit on acts of acquisition, and to provide grounds for the provision of welfare in the state.

Welfare in the Kantian state

Once we see that there is a limit set on the acquisition of external objects in the state of nature, we can exploit that in order to defend the provision of welfare. Due to the fact that each person has a claim to at least those resources necessary to survive in the state of nature, they must have such a claim in the state as well. This justifies coercive taxation on the part of the state.

One might object that this proposal appears to conflict with the requirements that the provision of welfare not (i) violate the rights of those being taxed and (ii) not be the result of a positive duty. Coercive taxation for the purposes of redistribution appears to fail on both those counts. Let me explain why it does not. In the state of nature, if a person has exceeded the limit on acquisition, one does not wrong her by taking those objects in her control that exceed what she is permitted to own.[28] Since she is not entitled

[28] Assume that we agree that a person has more than she is entitled to. What is it appropriate to take from

to the additional resources she has in her control, her rights are not violated when those resources are forcibly taken away. This is the case whether it is the state or an individual who executes the coercion. So, state coercion would not violate the rights of the wealthy.

At this point we might ask why individuals may not simply take those additional resources to which the others have no entitlement. The reason is that this option is not available. Once the move to civil society has been made, the possibility of coercing another person in order to meet one's basic needs no longer exists. This is due to the fact that the state coercively enforces the rights of each. However, the extent of what is in our control does not necessarily line up with what we are entitled to. Since the state has no special means of determining whether one is entitled to what one has in one's possession (relative to the standard set by original common possession), it will end up coercing on the basis of possession and not right. This means that those of us who have too little in the state of nature will still have too little once the move to the civil condition has been made, and those of us with too much will still have too much. Moreover, because the state enforces the rights of each on the basis of possession, individual coercion will no longer be available as an option for those who cannot maintain themselves. This introduces a wrongful state of affairs in which the state coercively protects what is in each person's control regardless of the status of their entitlements.

Coercive taxation in order to provide for basic welfare is a remedy for this wrong. It enforces the obligation that each has not to acquire more than that to which they are entitled, and secures a means of preservation for those who cannot maintain themselves. It does this, moreover, while taking seriously Kant's claims that (i) the civil condition merely secures rights and (ii) all duties of right are negative.

Worries

We should consider two problems for the Kantian left-libertarian view. The first concerns the limit on acquisition. The second concerns who is entitled to receive welfare. I will only sketch a possible response to the first worry. To the second, I have no response.

her? Must one take those objects that pushed her over the limit of what is permitted? Can we take anything? These are among the many difficult questions that I leave aside here.

First, we might ask how the limit on acquisition set by each person's claim to a share of the common endowment of nature is transgressed. Consider first a simple example. Imagine two people who live on an island with a limited amount of food. One person walks around the island collecting all the food for themselves claiming everything they can see as their own and leaving nothing for the other person. In this extreme case, the person collecting the food has surely transgressed the limit on acquisition. They have left the other person with no food. This does not mean that they have *wronged* the other person.[29] Rather, the act of acquisition simply does not amount to a property right in the food. For this reason, interference with the food will not wrong the person who has attempted to take it into their possession. But this is just a simple case. Imagine another. What if there are 100 people on the island, and one person claims 75 percent of the islands resources for herself. The remaining 99 people have enough to get by, but only just. What should we say now? This is more difficult to determine.

This example also raises an important question. Namely, can an individual alone violate the limit on acquisition (in normal circumstances)? What would this look like? Imagine another island case. Now there are 10 people. Divided evenly, there are enough resources for each person to maintain themselves. One person takes 20 percent of the resources. Would this person's protection of what they have in their control wrong any of the other inhabitants of the island? If the answer is yes in the case in which the remaining 80 percent has also been acquired (leaving one with nothing), is it also yes when nothing else has been acquired? Given the circumstances, it seems the person has already violated the limit on acquisition. But we are also supposing that 80 percent of the resources of the island have not been acquired by this point.

These are all difficult questions. Questions that a full defence of the Kantian left-libertarian view would need to fill out. They are also questions for which I do not have

[29] Wronging only occurs if the person hinders others from accessing what she has taken into her control. If we stick with the example above, if the person who has collected all the food beats up anyone who attempts to take some, then they have wronged that person. There are other ways of making it impossible for people to access common resources that are more difficult to deal with. What if the person eats all the food as they walk around the island? In this case, they haven't coercively stopped others from getting the food themselves, they've just made that action impossible. Has a wrong occurred in this case? If so, when? These are questions for which I don't have good answers.

satisfactory answers. However, in order to mitigate the challenge that this presents to the Kantian left-libertarian view, we can note that those who subscribe to something like Locke's proviso are similarly situated. The difficulties presented by these questions are not unique to the position I am describing. Thus, while it seems that this view does not do better than some others with respect to this, it also does no worse.[30]

A more difficult problem concerns determining who is entitled to welfare on this account. A simple answer would be 'those who do not have enough to survive'. But, this moves too quickly. Not everyone who is unable to maintain themselves will be in that position because they have not had access to their fair share of the earth's resources. Some people may simply have squandered their share.[31] Thus, the mere existence of a person who is unable to maintain herself is not evidence that some have acquired too much. However, all we have to go on is whether or not a person has enough to survive. Since this on its own is insufficient to determine whether those people are entitled to be the beneficiaries of welfare, the view faces a serious epistemic problem.[32]

I am not sure that a good response to this worry can be given. It points to a serious epistemic limitation to implementing this view. Moreover, the centrality of securing rights to Kant's political philosophy makes this worry especially pressing. To get the wrong answer is either to violate the rights of those being taxed or to leave a wrong unaddressed. Again we might point to other views that suffer a similar problem. For example, serious epistemic difficulties arise for luck-egalitarianism since it must determine which actions of an agent were the result of genuine choice and which were not.[33] This is, however, unsatisfactory. Rather than conclude that this saves the left-libertarian reading of Kant, we might simply say that it provides grounds for also rejecting luck-egalitarianism. Thus, while I believe that this way of defending Kant's claims about welfare fairs better than some of the others that we have seen, and is textually well-grounded, it is also deeply

[30] Of course, one might ask why a different view was not then endorsed; one that does not encounter these problems at all. I hope that §§3.2.1-3.2.3 in this chapter has demonstrated the difficulties associated with this suggestion.

[31] Kant himself worried that the provision of welfare might "make poverty a means of acquisition for the lazy" (MM 6:326).

[32] Thanks to Thomas Sinclair for pressing me to address this concern.

[33] See Cohen (1999: 934) and Miller (2014: 142).

philosophically unsatisfactory.

The right to equality of citizens is right that each member of the commonwealth be subject to the same laws as every other member. Kant does not understand equality in terms of the equal distribution of some good. Instead, he understands equality solely in terms of each person's equal relationship to the law. Each person is subject to coercion should they violate (or attempt to violate) the rights of another, and each person is entitled to seek redress when they have been wronged. There are two central consequences of this view. The first is that there can be no hereditary privileges. The second is that great material inequality is permissible. Since material inequality does not affect each person's relationship to the law, Kant's account of equality does not speak against it.

The right to equality of members of a state does not provide positive grounds for the provision of welfare in the state. In addition to this, there are two features of Kant's political philosophy that speak against such a provision: (i) the state would violate the acquired rights of some by coercively redistributing wealth, or any other material resource. (ii) all duties of right are negative duties. This does not mean that it is impossible to defend the provision of welfare on Kantian grounds. However, such a task is one whose success we should not take for granted. Indeed, we have seen that difficulties arise for four approaches to thinking about Kant on welfare: (i) the enforced charity approach, (ii) the wrongful dependence approach, (iii) the rational consent approach, and (iv) the Kantian left-libertarian approach.

Chapter 4

Independence

Independence is the third of the essential attributes of citizenship. It is an attribute that Kant says we possess *as citizens*. As we have seen, the rights to freedom and equality have concerned the content of the laws of a state. Both freedom and equality are rights to something. The right to freedom is a right that the state not permit actions that would constitute a wrongful interference with the pursuit of one's permissible purposes. The right to equality is a right to bear the same relationship to the law as every other member of the commonwealth. Independence is not a right. Rather, it is an attribute possessed by some members of the commonwealth.

Kant characterises a person who is independent (*selbständig*)[1] as one who owes "his existence and preservation to his own rights and powers as a member of the commonwealth, not to the choice of another among the people" (MM 6:314). He also tells us that the "quality of being independent [...] requires a distinction between active and passive citizens" (ibid). Active citizens are permitted and required to participate in lawgiving. Passive citizens, Kant claims, are "mere associates" of the state, who may not participate in lawgiving but are nevertheless protected by the state's laws and possess the rights to freedom and equality (MM 6:315). This distinction is important given the importance that Kant assigns to the laws of a state. More specifically, participation in lawgiving is

[1] Recall that there are two different senses of independence operative in the *Doctrine of Right*, innate independence (*Unabhängigkeit*) and civil independence (*Selbständigkeit*) (§2.1). Innate independence is the *entitlement* to be free from the necessitating choice of another (when one is performing permissible actions). Civil independence is the *attribute* of members of a state who are not under the authority of any particular person or group among the people and who make a contribution to the state.

important because publicly promulgated laws are a necessary condition for the rights of each to be secure and determinate. Active citizenship gives some members of a state a say in these laws.

This chapter is split into three sections. In the first, I argue that in both the *Doctrine of Right* and "Theory and Practice" Kant characterises independent members of a commonwealth as those who are under the authority of no particular person or group among the people. Not only is this able to make sense of Kant's puzzling examples, it also frees us from the concern that his account of citizenship necessarily excludes women and the poor. However, this does not mean that this criterion for active citizenship is satisfying. In fact, I argue that Kant is wrong to believe that those who are under *any* relation of authority should be ruled out from consideration as active citizens.

In the second section, I discuss a passage in the drafts for "Theory and Practice" that contains a further condition for independence. Namely, Kant claims that independent members of a state must make a contribution to that state. Since this is most readily understood in terms of a material contribution, this condition exacerbates the worry that the poor will be ruled out from active citizenship on Kant's account. However, I argue that contribution to the state can take many forms, and not all of them require a material contribution. Thus, the poor are not necessarily excluded from the status.

In the third section, I consider a problem that arises for Kant's characterisation of active citizenship. In each of the passages in which Kant discusses active citizenship, he tells us that active citizens are entitled to vote but passive citizens are not. However, Kant also claims that a state only needs to be ruled in a republican manner, and this does not require any actual input from the members of that state. The result of this claim is that the distinction between active and passive citizenship appears meaningless. This is because it is compatible with Kant's views that all members of a state remain passive. This is problematic because it appears to eliminate the significance of independence, which is meant to be an *essential* attribute of citizens. I finish by sketching a solution to this problem. This solution departs from Kant's stated account, but is largely consistent with it. Active members of the state, I suggest, are those who contribute to the continued

existence of that state. In doing so, they contribute to the condition of public law that is uniquely able to solve the problems of the state of nature. Passive citizens are those who make no such contribution. This allows us to draw the distinction between active and passive citizens even when the state lacks participatory institutions. It also offers an attractive picture: one in which active members of the state are those who are united for maintaining the conditions under which the rights of each are determinate and secure.

4.1 Characterising independence

Kant's criteria for who counts as independent has been the subject of much critical scrutiny, and for good reason.[2] For example, he explicitly excludes women from that status. We might therefore worry that Kant's account of civil independence is inseparable from his well-known sexism.[3] He also appears to exclude the poor from active citizenship by making property ownership a necessary condition for independence. Moreover, the examples Kant deploys to help us understand the distinction between independent members of a state and mere associates of a state are far from transparent, and thus open to the charge of arbitrariness. This is exacerbated by the fact that Kant himself would count as independent according to the account he gives in his published works.[4] I argue in this section that there is more to be said on behalf of this account.

Kant's account of independence is primarily contained in two passages, one from the *Doctrine of Right* and the other from "Theory and Practice". While these passages do not present identical accounts of citizenship, both support the authority reading of

[2] For critical comments, see Beiner (2010: 23-27), Baynes (1989: 455), Ellis (2006: 551-52), George (1988: 204-05), Grcic (1986: 454-55), Kersting (1992a: 357), Kersting (1992b: 153-54), Kleingeld (1993: 137-38), Mendus (1992: 168-174), Mulholland (1990: 330), Pateman (1988: 171), Pogge (2002), Potter (2002: 269-71), and Uleman (2004: 596). Weinrib (2008) is one of very few defenders of Kant's comments on citizenship.

[3] I have in mind here Kant's discussion of the 'Character of the sexes' in *Anthropology from a Pragmatic Point of View* (see A 7:303-311). It is perhaps worth being explicit that the worry is not whether Kant was a sexist. This is, perhaps, a settled issue. (I introduce some passages that support this belief in what follows). The worry is whether his sexism is entailed by or derivative from his more systematic beliefs. I will argue below that it is not. A similar charge has been raised with respect to Kant's beliefs about race (see Eze 1997). For a defence of Kant's against the charge that it entails his racism, see Hill and Boxill (2001).

[4] Ellis (2005: 197) and Beiner (2010: 25) criticise Kant for privileging his own profession when drawing these distinctions, thus supporting the view that the distinctions Kant draws are merely arbitrary. Weinrib (2008: 12n) suggests that it is Kant's commitment to independence that prompted him to change his position from private tutor to professor. Absent further evidence, I find such a statement difficult to assess.

independence that I want to defend. Since the *Doctrine of Right* plausibly represents Kant's mature thoughts on the matter, we will start there.

The *Doctrine of Right*

We have already seen that Kant characterises independent members of the commonwealth as those whose existence depends on their own rights and powers and not the choice of another among the people. However, it is worth quoting the full passage in which Kant introduces the distinction between those who are independent and those who are dependent (active and passive citizens respectively).

> This quality of being independent, however, requires a distinction between *active* and *passive* citizens, though the concept of a passive citizen seems to contradict the concept of a citizen as such. — The following examples can serve to remove this difficulty: an apprentice in the service of a merchant or artisan; a domestic servant (as distinguished from [one in the service of the state]); a minor (*naturaliter vel civilter*); all women and, in general, anyone whose preservation in existence (his being fed and protected) depends not on his management of his own business but on [the direction (*Verfügung*) of another (except that of the state).] These people lack civil personality and their existence is, as it were, only inherence. — The woodcutter I hire to work in my yard; the blacksmith in India, who goes into people's houses to work on iron with his hammer, anvil, and bellows, as compared with the European carpenter or blacksmith who can put the products of his work up as goods for sale to the public; the private tutor, as compared with the school teacher; the tenant farmer as compared with the leasehold farmer, and so forth; these are mere underlings of the commonwealth because they have to be under the [command (*befehligen*)] or protection of other individuals, and so do not possess civil independence.[5] (MM 6:314-15)

The dominant reading of this passage is what I call the 'economic dependence reading'. According to this reading, an independent member of the commonwealth is someone who does not rely *economically* on particular others among the people in order to survive.[6]

[5] There are a few modifications to Gregor's translation here, which are marked with square brackets. I'm grateful to Ralf Bader for suggesting these changes to me. Varden (2016: 116) also suggests the view that Kant was concerned with authority, but does not elaborate on its implications. She claims that the central problem for this view is how to reconcile the distinction between active and passive citizens with the innate right to freedom (2016: 117). I am not sure that any such problem arises, since being under the authority of another particular person is compatible with one's innate freedom (§2.1).

[6] A good example of this reading is Pinzani and Madrid, who claim that "economic autonomy translates directly into political autonomy" (2016: 27). See Baynes (1989), Dierksmeier (2002), Kersting (1992b), Kleingeld (2018b: 74), Maliks (2014: 105ff) Mendus (1992), Rosen (1993: 39), Stilz (2011a: 203n) and Weinrib (2008) for a few more examples of proponents of this reading.

Only those who are materially self-sufficient count as independent. One strength of this reading is that it seems to make sense of Kant's claim that dependent members of the state rely on others for their 'preservation in existence'. This at least appears to signal a concern with economic standing. As we see below, it also appears to be supported by Kant's discussion in "Theory and Practice". However, I believe that the economic dependence reading does not capture Kant's view of civil independence. (Below I discuss the possibility that economic concerns underlie the authority reading of civil independence that I defend, §4.1.1).

The central worry for the economic dependence reading is that it is unable to make sense of Kant's examples: it will characterise some of those who Kant claims are dependent as independent, and some of those who Kant claims are independent as dependent. If an 'Indian' blacksmith or private tutor are exceptionally good at what they do, and so are in high demand, it would not be true that they depend economically on the particular other people for whom they work presently. This is because they would be able, by virtue of being in such high demand, to find work elsewhere should their current arrangement falter. While they do work for a particular other person or group of people, they do not economically depend on just that person or group of people.[7] Thus, the economic dependence reading risks characterising those who Kant believes are dependent as independent. It also risks characterising those who Kant believes are independent as dependent. This is because, for example, the 'European' blacksmith still relies on her patrons in order to survive. Even those who Kant believes are independent rely economically on others. If, for example, the 'European' blacksmith only had a single patron, from whom she received all of her income, the economic dependence reading would have to label her a dependent member of the commonwealth. Thus, the economic dependence reading only gets Kant's examples right contingently. It has to assume that certain circumstances obtain in order for the examples to work. For this reason, the economic dependence reading appears insufficient as an explanation of Kant's account of civil independence. It is at least worth looking for another explanation of Kant's views.

[7] In what follows, I will only refer to dependence on a 'particular other person'. However, this should be taken to mean dependence on a 'particular other person or group of people'.

On my preferred reading, Kant should instead be understood as claiming that independent members of the commonwealth are those who are *not under the authority* of any particular person. Dependent members rely on the direction of another among the people for their preservation in existence. Independent members do not rely on other particular people in this way.

We might wonder why independent members are characterised as not being under the direction of any *particular other person or group of people*. Why not just say that those who are independent are not under relations of authority at all? The reason for this is that all members of a state are under the direction of the state. Each member of the state is subject to the authority of the state. Moreover, this subjection to state authority is necessary for the preservation in existence of those members (see MM 6:326). Thus, if being under *any* relation of authority for one's preservation in existence was sufficient to make a person civilly dependent, then no one could count as civilly independent on Kant's view. For this reason, Kant's authority condition for civil independence should be understood as only concerned with the relations of authority between members of a state. Those who are not under the authority of another particular person count as civilly independent. Those who are under the authority of another particular person count as civilly dependent.

In contrast to the economic dependence reading, Kant's examples can be explained by appeal to the authority reading of civil independence. The difference between each of the pairs is that one of them is under the direction of particular other person, but the other is not. Let us consider three examples:

Those in the service of the state and domestic servants. A person who is in the service of the state counts as independent because she is employed by the state, which does not express the will of any individual but the general will. Domestic servants, on the other hand, are employed by a family. They require the permission of 'another among the people' in order to perform the tasks by which they support themselves. The reliance of domestic servants upon particular others is made especially clear if we consider that many of the tasks they perform require handling the property

of another. Such handling would constitute a wrongful interference with the external freedom of another if it was performed without permission. Thus, there is no chance for domestic servants to exercise their skill without the permission and direction of a particular other person. The same is not the case with those in the service of the state, who depend on no particular person. For this reason, those employed by the state count as independent but domestic servants do not.

School teachers and private tutors. At the time Kant was writing, legitimate schools in Prussia received support from the state. This support was used to subsidise the pay of teachers and the construction/maintenance of the schools.[8] For this reason, despite the fact that they were paid little, school teachers occupied a similar position to those in the service of the state. This is because state subsidies meant that they no longer relied on any particular member of the people. While families still had to pay school fees, those fees were made compulsory by the state along with attendance for school-aged children. Private tutors, on the other hand, relied on the head of the family for whom they worked, and often lived in the house of that family. Private tutors thus occupied a similar status to domestic servants (see Kuehn 2001: 96). For this reason, school teachers count as independent and private tutors count as dependent.

'European' and 'Indian' blacksmiths. The idea here remains the same as in the other cases. Kant identifies 'European' blacksmiths as those who are able to produce their goods prior to any specific demand, and then sell those goods in public. They do not depend on the direction of any other particular person in order to exercise their skills. This does not mean that they do not require patrons in order to survive. Someone must buy their goods. However, this economic dependence on others does not undermine their civil independence. What matters for Kant is that they do not require permission from another person in order to exercise their skills. Blacksmiths who must travel door-to-door, which Kant identifies as 'Indian'

[8] This subsidisation was a result of the 1763 General-Landschul-Reglement, though financial support on a large scale only occurred in the 1770's. On this, see Melton (1988).

> blacksmiths, do depend on particular other people. They only exercise their skills on the condition that another has given them permission, and space, to do so.

Thus, by adopting the authority reading of independence we are able to make sense of Kant's examples. As we have seen, the same is not true on the economic dependence reading. This gives us reason to support the authority reading of civil independence over the economic dependence reading. However, defenders of the economic dependence reading may argue that the primary support for that reading is not the *Doctrine of Right*, but "Theory and Practice". Let us turn to that now.

"Theory and Practice"

Here is the relevant passage from "Theory and Practice":

> He who has the right to vote in this legislation is called a *citizen* [...]. The quality requisite to this, apart from the *natural* one (of not being a child or a woman), is only that of *being one's own master* (*sui juris*), hence having some property (and any art, craft, fine art, or science can be counted as property) that supports him — that is, if he must acquire from others in order to live, he does so only by *alienating* what is *his* and not by giving others permission to make use of his powers — and hence the requisite quality is that, in the strict sense of the word, he *serves* no one other than the commonwealth. (TP 8:295)

While there are many similarities between this passage and the one from the *Doctrine of Right*, they also differ. For example, "Theory and Practice" is primarily concerned with property that can be alienated. Moreover, in "Theory and Practice" Kant explicitly identifies two characteristics necessary for active citizenship. The first is the quality of not being a women or a child. The second is the quality of being your own master, which is understood in terms of having some property that supports you. For now, I will leave aside Kant's problematic exclusion of women from the status of active citizenship. (We will return to it below, see §4.1.1).

What about the quality of being your own master? Understood in terms of requiring that one has some property, this does not appear to support the authority reading of independence. In fact, it has been taken to provide support for the economic dependence

reading (see Kersting 1992b and Riedel 1981). In "Theory and Practice", possession of property is a necessary condition for active citizenship. This appears to allow a person's material standing to determine her civil status. However, the case for the economic dependence reading is not as strong as it first appears. Kant explicitly understands property in a broad sense in the passage above. A footnote further clarifies this, and brings the view presented in "Theory and Practice" into closer proximity to the view developed in the *Doctrine of Right*. Kant tells us:

> Someone who makes an *opus* can convey it to someone else by *alienating* it, just as if it were his property. But *praestatio operae* is not alienating something. A domestic servant, a shop clerk, a day labourer, or even a barber are merely *operarii*, not *artifices* (in the wider sense of the word) and not members of the state, and are thus also not qualified to be citizens. Although a man to whom I give my firewood to chop and a tailor to whom I give my cloth to make into clothes both seem to be in a quite similar relation to me, still the former [domestic servants, etc.] differs from the latter [tailors, etc.], as a barber from a wigmaker (even if I have given him the hair for the wig) and hence as a day labourer from an artist or craftsman, who makes a work that belongs to him until he is paid for it. The latter, in pursuing his trade, thus exchanges his property with another (*opus*), the former, the use of his powers, which he grants to another (*operam*). It is, I admit, somewhat difficult to determine what is required in order to be able to claim the rank of a human being who is his own master. (TP 8:295n)

The distinction Kant draws in this passage is between a person who alienates something that can exist apart from her, and a person who grants another the use of her powers.[9] When I give my firewood to someone to chop, that person creates something which exists on its own (and which they can sell to another should I refuse to pay). The same is true of a wig-maker. However, a barber does not create an object that can be sold, but rather grants the use of his powers to another. In the sense in which it is used here, Kant believes that only those who support themselves by alienating something that exists on its own can be their own masters. Those who merely grant another the use of their powers serve those others. Kant is explicit about this in the drafts for "Theory and Practice". He says, "The independence that is required to be a citizen of a state is the rightful condition of not

[9] Kant draws a similar distinction in "On the Wrongfulness of Unauthorised Publication of Books" when he says that works (*opera*) "can exist on their own, as things, whereas the latter [actions, *operae*] can have their existence only in a person" (WUP 8:86; see also MM 6:290).

standing under another's orders" (Stark 245). The wigmaker and the person to whom I give my firewood do not stand under another's orders in the relevant sense because they are able to produce something that can stand alone. They do not depend on a particular other person in order to exercise their powers. The barber and the day labourer, to the contrary, may only pursue their trade while under the direction of another.

Thus, while the way in which he draws this distinction differs between "Theory and Practice" and the *Doctrine of Right*, Kant's criterion for independence in both of those texts is that one not be under the authority of any other among the people. Independent members of a state only serve that state and not any member of it.

4.1.1 Women and the poor

With the authority reading of civil independence to hand, it is worth seeing whether something can be said about two common charges that are laid against Kant's account of active citizenship. The first concerns the fact that Kant's account appears to exclude women. The second concerns the fact that the account appears to exclude the poor. Since it is said that the account entails both of these exclusions, it is seen as an unpalatable part of Kant's political philosophy. It might be worth emphasising here that the existence of passive citizens itself is not problematic. It is both understandable and justifiable that a distinction will be made between those who are able to participate in lawgiving and those who are not. For example, it is no cause for concern that children not be able to participate in this way. The concern is rather with the way in which Kant draws the distinction, and not the distinction itself.

In what follows I argue that Kant's account of active citizenship (at least in the *Doctrine of Right*) does not entail the exclusion of either women or the poor. The exclusion of women is a result of Kant's false belief that men are naturally superior to women, and thus that women are naturally under the authority of men. The exclusion of the poor is more difficult to address. However, I believe that they are at least not necessarily ruled out from the status of active citizenship. (I return to this question below, §4.2.2, §4.3.2).

The exclusion of women

As we have already seen, in "Theory and Practice" a necessary condition for active citizenship is not being a woman or a child. Thus, in "Theory and Practice" it *is* an implication of Kant's account of active citizenship that women are excluded from that status. Since Kant also excludes women from active citizenship in the *Doctrine of Right*, we may worry that this condition has been reaffirmed. However, this is not the case. Rather than presenting not being a woman as a necessary condition for active citizenship in the *Doctrine of Right*, Kant merely lists women as an example of those who are dependent. We should read this exclusion as the result of a contingent, historical fact rather than an implication of Kant's mature account of citizenship. In particular, the exclusion of women from the status of active citizenship is a result of the fact that Kant believed that women are naturally dependent on men in precisely the way that is relevant to his account of independence. Indeed, in his account of marriage, Kant claims that the husband commands (*befiehlt*) and the woman obeys (*gehorcht*) because of the man's "natural superiority" (MM 6:279). This view is also endorsed in the *Anthropology*, where Kant claims that, "*Woman* regardless of age is declared to be immature in civil matters; her husband is her natural curator" (A 7:209).[10] Thus, in both his account of marriage in the *Doctrine of Right*, and in his discussion of women in the *Anthropology*, Kant states that women are under the authority of their husbands.[11] Kant's account of civil independence states that those who are under the authority of particular other people do not count as independent. This means that, given his beliefs concerning the natural superiority of men and the inferiority of women, Kant committed himself to viewing women merely as passive citizens.

We do not have to draw the same conclusion as Kant. There are two considerations

[10] Kleingeld (1993) also draws attention to this passage, however she uses it to argue that women lack the rights of freedom and equality. I believe Kleingeld is right to focus on this passage, but wrong about its implications. Dependent members of a commonwealth are both free and equal.

[11] We might think that this gives women a reason not to marry (see Beiner 2010: 27). If having a husband is the condition under which a woman ceases to be independent, then not marrying might be a good way of retaining independence. This was Fichte's view; he believed that a woman can be independent until the point at which she marries. Once she is married, she is under the authority of her husband and so civilly dependent (see Fichte 2000: 301-02). However, it is unlikely that this was Kant's view. This is because he seems to suggest in the *Anthropology* that if the husband is not managing the affairs of his wife, then another man is (see A 6:209). This seems to indicate that Kant considered women as dependent whether they were married or not.

that are important for understanding this. First, many women are no longer dependent on their husbands or other men in the way Kant describes. (We can also add that it is doubtful whether the authority that men claimed over their wives and other women was ever rightful in the first place). Second, Kant's claims about the natural superiority of men over women are false. It is simply not true that women are naturally inferior to, and thus under the authority of, men. Moreover, since Kant's beliefs about the natural inferiority of women are not entailed by his account of citizenship, there is no reason to believe that women could not be active citizens on Kant's account in the *Doctrine of Right*. Indeed, on his mature account of citizenship, many women will count as active citizens.

The exclusion of the poor

Kant's requirement that one own property of some kind has also been the subject of criticism. This is because it appears to exclude the poor from the status of active citizenship. For example, Kersting (1992b: 357) claims that Kant's account of independence "[degrades] those without property into second-class political beings" (see Hasan 2018 for an expression of similar concerns). The worry seems to be that those who have a skill but no material means to exercise it will be barred from active citizenship. This worry has some traction. While Kant's account of independence is concerned with relations of authority, we can ask what conditions lead someone to enter into such relations. Imagine two blacksmiths, both of equal talent. One, who has little, is unable to afford the cost of setting up a shop. She is therefore required to go door-to-door in order to sell her skills. The other, who has inherited a significant sum, is able to set up a shop. The former relies on the direction of another, and so is a passive citizen. The latter does not rely on the direction of another, and so is an active citizen. The only salient difference between them, we can imagine, is their material standing. One is simply wealthier than the other. Thus, we might worry that economic independence underlies Kant's concern with relations of authority. One may buy oneself out of passive citizenship.

But, we should not move too quickly. Even if it is true that one may buy oneself into active citizenship, that does not mean that the poor are necessarily excluded from

that status. That is, possession of material wealth is not a necessary condition for civil independence. For example, those who serve the state count as active citizens on Kant's account. This is not restricted to those who hold significant offices in the state. Kant does not use the term '*Beamte*' in the MM 6:314-15 passage. If he had, we might think that Kant was only concerned with significant public positions, such as those held by judges or ministers. Instead, he excludes all those who are in the service of the state from consideration as passive citizens. Anyone who works for the state—even those who are paid by the state to clean government buildings, for example—will count as independent. Thus, one need not make significant amounts of money, or be independently wealthy, in order to count as independent on Kant's view.[12] We can also note that *if* Kant is able to generate an argument for the provision of welfare, then those in the most dire need will count as independent on Kant's account.[13] The recipients of welfare do not depend on any individual or group among the people for their preservation. They depend solely upon the state. For this reason, they occupy a similar position to those in the service of the state, and thus are candidates for active citizenship.

4.1.2 Authority and participation

Before turning to the second necessary condition for active citizenship, it is worth considering Kant's reasons for thinking that not being under the authority of another particular person or group is necessary for that status. Kant's texts do not help us with this. He gives no account of his reasons for including this condition. I argue here that the most plausible explanation of Kant's position is that he believed that those who are under the authority of a particular other person or group are not at liberty to participate in lawgiving. They are restricted by the fact that their actions are rightfully determined by another. However, even at its most plausible, this view fails because it is too restrictive. Some people who are under the authority of others will still be at liberty to participate in lawgiving, and should

[12] An interesting consequence of this is that the state can increase the number of active citizens by nationalising private sectors of the economy. This would increase the number of members of the state who are subject to the authority of no particular other person.

[13] I am skeptical that we can generate a faithfully Kantian argument for the provision of welfare. For discussion, see §3.2.

thus be candidates for active citizenship.

Before addressing what I take to be the most plausible explanation of Kant's beliefs, let me first consider the dominant view in the literature. According to the dominant view, Kant believed that those who are passive citizens are in some way incapable of making a decision for themselves. For this reason, they are barred from participating in lawgiving. This was not an unheard of opinion at the time. For example, the French theorist Emmanuel-Joseph Sieyès, who was a contemporary of Kant's, believed something like this.[14] He says that some are passive citizens because they are "too dependent to be able to vote freely in favour of their own order" (Sieyès 2003: 109). The reason why some people are not permitted to vote is that they are incapable of making a sufficiently independent decision. The vote they cast would thus be like a second vote for the person on whom they depend. Kant may have held a similar view to this. Indeed, many recent commentators believe that this is the best way to make sense of Kant's comments. Here are a few examples:

> Kant's concern here seems to be that those who lack independence, whether by nature or convention, may taint the public legislation by voting in accordance with their private interests or those of their employer, rather than voting for an interest that all could share. (Weinrib 2008: 3)
>
> We now generally regard as false Kant's anthropological claim that those without independent wealth cannot think independently enough to cast meaningful vote. (Uleman 2004: 596)
>
> Here [Kant] seeks to approximate authoritative political judgment by excluding what he considers to be the social sources of corrupt judgment: servitude, inequality, and dependence. (Ellis 2006: 552)[15]

There are two separate interpretations of Kant's position represented in these comments. One is that Kant thought that dependents were somehow cognitively unable to cast a vote that differed from those on whom they depend. The other is that Kant thought that the (social) power relation between dependents and those on whom they depend was such that dependents were practically unable to cast a vote that represented their own judgement on the matter.

[14] I discuss the possible relationship between the views of Kant and Sieyès below, §4.2.1.

[15] For similar views, see Mendus (1992: 170), Rosen (1993: 39), Pinkard (1999), Hasan (2018: 12), and Maliks (2014: 82).

There are reasons that speak in favour of both of these views. For example, at the time in which Kant was writing domestic servants only had limited access to information beyond what their master told them. This speaks in favour of the view that dependents might not have been able to make a sufficiently detached judgement for their vote to count as their own. What they knew would have been almost wholly determined by their master. We have also seen that Kant believes that women are immature (*unmündig*) in civil matters, and so are in the same position as a child regarding potential contribution to the laws of the state. This again speaks in favour of the view that Kant believed that dependents could not exercise an independent judgement. In addition, Kant may have been thinking about open ballot voting in his discussion of active citizenship, and so may have thought that dependents would be under pressure to publicly act in accordance with what those on whom they depend would want. Thus, on this way of reading Kant, we might think that some members of the state are not permitted to participate in lawgiving because they would be unable to do so on their own behalf. Their contribution would merely constitute a second vote for their master.

There are two considerations that speak against the belief that this is the best explanation of Kant's thinking. The first is that whether or not those who Kant characterises as passive citizens are able to form their own opinions about a particular subject, or vote without the pressure to comply with the judgement of the person on whom they depend, is an entirely contingent matter. For example, a private tutor may be more educated than the head of the household for which she works. She might therefore be fully capable of exercising her judgement independently of her employer. To take another example, a door-to-door blacksmith may feel no pressure to vote in a way that reflects the views of those for whom she works. Moreover, the views of those for whom she works may conflict, making it impossible that she act in accordance with the judgements of each of the people on whom she depends. Thus, the view under consideration does not capture some of Kant's examples of passive citizens.

The second problem with this view is the following. If the arguments I have given above in favour of thinking about independence in terms of authority are correct, then,

on the dominant way of reading Kant, the problem with dependent members of the state will be unconnected to the characterisation of dependence itself. Whether or not a person is able to exercise her judgement independently of another person bears no necessary connection to whether that person is under the authority of another particular person. And, even those who only serve the state might be incapable of making a judgement that differs from that of another particular person. This occurs, for example, in cases in which one person looks up to and idolises another. On the view under consideration, these people should also be considered dependent. Indeed, if dependence on the judgement of another explained why some are unable to vote (or participate in lawgiving in some other way), then we would expect Kant to draw the distinction between active and passive citizens in terms of the capacity for independent judgement. But he does not do this. He casts the distinction between active and passive citizens in terms of relations of authority.

Here is another view, which I believe is more plausible as a reading of Kant (though, as I argue, it is still not plausible). Kant can be taken to believe that those who are dependent on another particular person are not at liberty to participate in lawgiving because the relation of authority of which they are a part forbids them from doing so. Consider the following example. A domestic servant is called for jury duty. We might think that she is unable to take up this call and serve on the jury because she has an antecedent obligation to perform the duties specified in her contract. That is, she is unable to serve on a jury because she is not at liberty to do so once she has entered into the service of the head of the household.[16] The same might be said of other passive citizens. They are not passive as a result of any cognitive incapacity, or due to fear stemming from the social power possessed by those on whom they depend, but simply because they are no longer at liberty to participate in lawgiving. On this way of reading Kant, the reason for excluding those who are civilly dependent from participating in lawgiving is the same as the reason that they are civilly dependent in the first place. A member of a state is considered passive when they are under the authority of a particular other person or group of people. It is also this

[16] Kant also says that domestic servants agree "*to do whatever is permissible for the welfare of the household*" (MM 6:360-61), and so worries might also arise concerning a lack of independence of action. However, in contrast to the dominant reading, the fact that a domestic servant may represent her master is not a result of some cognitive incapacity or social power relation, but rather a contractual obligation.

relation of authority that prohibits their participation in lawgiving. This provides a more cohesive interpretation of Kant's comments than the dominant view in the literature. The exclusion of dependent members of a state from participation in that state is justified by appeal to exactly that feature of their situation that causes them to be dependent.[17]

However, even if this was Kant's view, it is not a plausible one. A first worry that we can have with this view is that being under the authority of a particular other person does not appear to rule out participation in lawgiving. A door-to-door blacksmith need not have all of her time taken up with her duties. She may have additional time between visiting those on whom she depends in which she could participate in lawgiving. Another way of putting this worry is as follows. Even in cases in which a person must be under the authority of another for her preservation in existence, this does not mean that the use of *all* of her time will be determined by another. Moreover, the mere fact that a person must be under the authority of another particular person some of the time is insignificant when thinking about whether that person is able to participate in lawgiving. So, the mere fact that *while working* a door-to-door blacksmith is not at liberty to leave the house of the person for whom she is working in order to participate in lawgiving is insufficient as grounds for thinking that she could not participate at all. Of course, if it were true that a person was contractually obliged to be at the disposal of her employer all the time, then this might speak against the possibility of her participation. The same might be said of a person who has several employers, the obligations for which make participation impossible. In these cases, it would appear that being under the authority of another particular person would rule a member of a state out from the status of active citizenship. However, being under any relation of authority does not rule a member of a state out from this status.

A second worry that we can have with this view is that it does not explain why a contractual agreement that makes no room for participating in lawgiving should be accepted. That is, if we believe that there is something important about participation in giving the laws of the state of which one is a member, then we might also believe that contractual

[17] It is understandable that the literature does not consider the view that passive citizens are those members of the state who are not at liberty to participate in lawgiving, since the economic dependence reading is the dominant understanding of Kant's views of civil independence.

arrangements that prohibit this contribution should not be permitted. If Kant did believe that those under the authority of a particular other person were not at liberty to participate in this way, then it seems that he did not consider the possibility that the nature of contractual obligations should change. This would allow otherwise passive citizens to become active citizens. Since Kant believes that the idea of a passive citizens "seems to contradict the concept of a citizen as such" (MM 6:314), this is an appealing option.

Thus, both ways of constructing the reasons to which Kant could have appealed in ruling out those who depend on another from the status of active citizenship fail to secure that exclusion. It is not true that those who are considered passive will necessarily depend on the judgement of those on whom they depend. Nor is it true that being under the authority of another particular person rules out participation in lawgiving. For this reason, it appears that Kant was wrong to have included not being under the authority of another particular person in any sense among the necessary conditions for active citizenship. (Though, as we have seen, some people under the authority of others will be excluded from that status).

Let us now turn to the drafts for "Theory and Practice", where Kant identifies a second condition for civil independence.

4.2 Contribution to the state

Kant's account of civil independence in the *Doctrine of Right* and "Theory and Practice" is best understood as concerned with relations of authority in the state. Only those members of the state who are not under the authority of a particular other person or group of people count as independent, and so only those members of the state are permitted to participate in lawgiving. We have already seen that this view is not subject to the criticism often levelled at Kant's account of citizenship. Women and the poor are not necessarily excluded from the status of active citizenship. We have also seen that being under *any* relation of authority should not exclude a member of a state from participation in lawgiving.

In what follows, I argue that it is reasonable to believe that there is a further condition

for civil independence on Kant's account: one must contribute to the state. Kant appears to have understood this in terms of a material contribution. This exacerbates the worry that the poor will be excluded from active citizenship, since they lack the means to make such a contribution. However, I believe that we need not understand contribution to the state solely in this restricted way. Thus, even if contribution to the state is a necessary condition for independence, and thus active citizenship, this will not necessarily exclude the poor from that status.

4.2.1 A further condition for independence?

Kant's discussion of citizenship in the drafts for "Theory and Practice" indicates that there is a requirement for independence in addition to not being under the authority of another particular person. More specifically, independent citizens must make a contribution to the state. Kant tells us:

> A citizen is a human being in society who has his own rightful independence [*rechtliche Selbständigkeit*], i.e. can be considered as himself a member of the universal public legislative authority. Consequently every servant [*Gesinde*] is a human being who, like a parasitic plant, is rooted only on another citizen [...]. The possessors of land are the genuine state subjects because they depend on the land for *vitam sustinendo* [sustenance of life]. To the extent, however, that they farm only as much as they need to live they are not citizens of the state. For they could not contribute to the commonwealth. Only possessors of great amounts of land who have many servants, who themselves as servants cannot be citizens, could be citizens, and yet they are citizens only to the extent that their surplus is purchased by others who, as free citizens, do not depend on the land. [...] those whose existence depends on the will of another, thus those who do not enjoy a free existence, have no vote. (DTP 23:137-38)

There is a lot going on in this passage, and I am not going to address it all. We can see, however, that elements of the account found in "Theory and Practice" and the *Doctrine of Right* can also be found here. For example, Kant tells us that domestic servants cannot be citizens, an exclusion also found in his other accounts.[18] Since Kant says that those whose existence depends on the will of another have no vote, we might also think this passage is consistent with the authority reading of civil independence.

[18] Kant's use of '*Gesinde*' in the passage above indicates that he is referring to domestic servants (see MM 6:283 and MM6:360 for other instances of this).

What is important for my purposes here is the fact that Kant claims that only those who own land and produce more than they need are genuine state subjects, and thus presumably full citizens. Given his discussions in the *Doctrine of Right* and "Theory and Practice" this should not be too surprising. Those who own land and are able to produce what they need in order to live will not rely on the permission of another in order to maintain themselves. They will thus be independent according to the authority reading of independence. However, Kant also makes a significant addition. He tells us that those who do not produce more than they need are not citizens because they could not contribute to the commonwealth. This is important, as it appears to indicate that contribution to the commonwealth is a further condition for independence, and thus active citizenship. Before discussing the implications of this addition for the poor members of a state, it is worth addressing a potential concern. Namely we might worry that Kant only explicitly mentions contribution to the state in the drafts for "Theory and Practice". Given this fact, we might think that contribution to the state is not a necessary condition for active citizenship on Kant's mature view. I believe that there are three additional reasons for ascribing this view to Kant. These reasons do not speak conclusively in favour of this position, but they do provide some additional support for it.[19]

The first reason to think that Kant was concerned with contribution to the state is simply that citizenship in Prussia at the time was a special status that had to be earned. Citizens had both rights and duties in addition to those possessed by other members of the state. In order acquire this status some contribution to one's society was necessary.[20] This contribution frequently took the form of a payment in addition to the taxes one already paid. However, one could also marry into citizenship, or become a citizen through membership in a guild (the latter of which was also often accompanied by a membership fee).[21] Given that these were common practices, Kant may not have felt the need to explicitly refer to them in his published works.

[19] In §4.3.2, I adduce an additional reason for thinking that contribution to the state is necessary for active citizenship. Namely, it allows us to draw the distinction between active and passive citizens even when no member of the state participates in lawgiving.

[20] I say 'society', rather than 'state', above, since payment was made to the government of one's town rather than the state itself.

[21] On this see Walker (1971) and Maliks (2014).

The second reason is that two of Kant's contemporaries, Karl Heinrich Heydenreich and Johann Heinrich Abicht, took Kant's position to be that some material contribution to the state is necessary for active citizenship. However, while both of them endorsed the view that some contribution is necessary, they criticised Kant on the grounds that restricting this to material contribution was too narrow. Heydenreich specifically mentions that those who serve in the military should be considered to have satisfied the condition that one contribute to the state.[22] (I discuss different ways of contributing to the state below.)

The third reason is the following. Sieyès's discussion of active and passive citizenship explicitly draws the distinction between active and passive citizens in terms of contribution to the state. Sieyès was one of the central intellectual figures of the French Revolution. He exerted considerable influence on the politics of France at that time, and was involved in writing a new French constitution. To my knowledge, Kant never refers to Sieyès directly in his published writing, lectures, or notes. Even if Kant does make references to him, they do not figure prominently in his work. However, Sieyès's interest in, and admiration for, Kant's work were mentioned to Kant in some letters in 1796 (see C 12:64, C 12:141). More importantly, Karl Thèremin, who was a Prussian diplomat in Paris and part of Sieyès's circle, mentions Kant's respect for both Sieyès, and some of his short essays, in a letter to his brother that same year (C 12:59).[23] We thus have evidence that Kant was aware of Sieyès's ideas, and some of his work. To a certain extent this is unsurprising given Kant's well-known interest in the French Revolution. It is important for us here because Sieyés has a discussion of active and passive citizenship that was published almost a decade prior to the *Doctrine of Right*.[24] Moreover, the views of the two authors are significantly similar. In one of his discussions of citizenship, Sieyès says:

> All the inhabitants of a country should enjoy the rights of the *passive* citizen: all have a right to the protection of their person, of their propriety, of their

[22] See Heydenreich (1794: 117) and Abicht (1795: 140), both cited in Maliks (2014: 99).

[23] Thèremin was keen that Kant and Sieyès should take up a correspondence, but this never happened. It was Thèremin who wrote to Kant about Sieyès's respect for Kant's work.

[24] On the relation between Kant and Sieyès, see Shell (2016) and Maliks (2014). Shell claims that, "Kant's categories of "active" and "passive" citizen are lifted almost verbatim from the French Constitution of 1791, following the recommendations of Abbe Sieyes" (2016: 11).

> liberty, etc., but not all have the right to take an *active* part in the formation of public powers; not all are active citizens. Women, at least in the current state of things, children, foreigners, those also who contribute nothing to the maintenance of the public establishment, should not actively influence the public weal [...]. All can enjoy the advantages of society; but only those who contribute to the public establishment, are like true stockholders in the great social enterprise. Only they are true active citizens, the true members of the association. (Sieyès 1789b: 36-37, cited in Sewell 1994: 176-77)

The similarity between Kant and Sieyès in this passages is striking. Sieyès claims that we should draw a distinction between active and passive citizenship, and that passive citizens have a right to the protection of their person and their property. As we have seen, Kant believes that passive citizens possess the rights of freedom and equality, which protect their innate and acquired rights. Sieyès also excludes women and children from the status of active citizenship, since they do not contribute anything to the commonwealth.[25] Only those who make a contribution count as active citizens on his view. Given that Kant was aware of and respected Sieyès's work, we might believe that this speaks in favour of thinking that Kant was also concerned with contribution to the state and not just relations of authority in his discussion of active citizenship. The similarity between Kant and Sieyès of course does not speak conclusively in favour of this view. Kant may have been influenced by Sieyès without endorsing all of the latter's views. However, given the other evidence of this view presented above, I believe that the similarity between the views at least speaks in favour of thinking that Kant was concerned with the contribution to the state.

Thus, I believe that there are three reasons that speak in favour of the view that Kant's account of active citizenship requires that one make a contribution to the state, in addition to the fact that he endorses this requirement in the drafts for "Theory and Practice". The first is that this practice was common at the time Kant was writing. The second is that some of Kant's contemporaries took him to be endorsing this view. The third is that Kant's work seems to have been influenced by that of Sieyès, and Sieyès explicitly understands the distinction between active and passive citizenship in terms of the contribution that a member of a state makes to that state.

[25] Sieyès, unlike Kant, appeared to have some reservations about the exclusion of women (see Sieyès 1789a: 19-20, quoted in Sewell 1994: 148).

4.2.2 Contribution and the poor

The addition of this further condition is significant for our discussion of the status of the poor. This is because it seems to substantiate the worry that the poor will be excluded from active citizenship, even if they do not depend on another particular person (as in the case of those who receive welfare). If each citizen must contribute in some way to the state, then those who only have what they need to survive will not count as active citizens. This is because they would not have any property to alienate, and thus they would not be able to make a contribution. Those who require the provision of welfare to survive, and those who do not receive welfare but who have little, would not meet one of the necessary conditions for active citizenship.

Thus, it would appear that the further condition for active citizenship that we find in the drafts for "Theory and Practice" exacerbates the worry, already present, that Kant excludes the poor from the status of active citizenship. However, this again seems to move too quickly. Those who are in the service of the state count as active citizens according to Kant. This is the case even if they do not earn very much and so may not have surplus wealth that can be used to contribute to the state. If all those who are in the service of the state count as active citizens, then surplus wealth cannot be a necessary condition for that status.

We might take Kant's examples in the *Doctrine of Right* as an indication that contribution to the state is not a necessary condition for active citizenship on his mature account. But, we need not draw that conclusion. Rather, we can understand Kant's inclusion of those in the service of the state as active citizens an indication that the necessary contribution can take different forms. Unlike the landowner who produces a surplus that can be sold or given away, the person in the service of the state contributes to the commonwealth just by performing the duties associated with her job. Even if all she does is clean government buildings, the job itself constitutes a contribution. Those who are in the service of the state satisfy the condition that active citizens make a contribution simply by going to work and performing their duties.

The assumption that seems to be made in the passage from the drafts for "Theory and Practice" is that a contribution to the state should be understood in material terms. Kant assumes that only those with a surplus of wealth of some kind will be able to make a contribution. If this assumption is correct, then the poor will be excluded from active citizenship, even if they are not under the authority of another particular person. However, there are many ways in which a person can contribute to the state that do not involve a material contribution.[26] As I have claimed above, one may contribute by working for the state. One also contributes by, for example, serving in the military, or volunteering one's time at a state-run community service project. None of these contributions, it would seem, require surplus wealth. We should not think, therefore, that the poor are necessarily excluded from the status of active citizenship on Kant's account.

4.3 Active citizenship

So far I have argued that, on Kant's account, active citizens must both (i) not be under the authority of a particular other person or group of people and (ii) make a contribution to the state. In this section, I discuss a problem that arises for Kant's account of active citizenship (§4.3.1). Kant claims that active citizens are permitted (and required) to participate in lawgiving. However, he also claims that a state only needs to be ruled in a republican manner, and this does not require any actual participation from members of the state. This raises a problem. Namely, it appears to make the distinction between active and passive citizens meaningless. This is problematic because it threatens to eliminate the significance of independence, and Kant tells us that independence is an essential attribute of citizens and a necessary principle for the establishment of any rightful state.

I then sketch a solution to this problem (§4.3.2). More specifically, I suggest that we can maintain a distinction between active and passive citizens on the grounds that active citizens make a contribution to the continued existence of the state, but passive citizens

[26] Kant tells us very little about what would constitute a sufficient contribution to the commonwealth for a member of a state to have satisfied this condition. Numerous questions arise here; to take one example, does any contribution count or must it be a net contribution? I discuss some further questions that we can have about this condition below, §4.3.2.

do not. In making this contribution, active citizens also contribute to the condition that is uniquely able to secure and determine the rights of each.

4.3.1 Lawgiving and Kantian republicanism

Kant understands the distinction between active and passive citizens in terms of the entitlement to vote. In the *Doctrine of Right*, he tells us that the "only qualification for being a citizen is being fit to vote" (MM 6:314). He also discusses voting in his account of independence in "Theory and Practice" (see TP 8:297) and in his comments on citizenship in the drafts for "Theory and Practice" (see DTP 23:138). Understanding the distinction in this way is also appealing. Democracy is an institution to which many are committed. Despite this, I'm not sure that the matter is so straightforward. While Kant's views may be compatible with democratic institutions, I argue here that they in no way require them. A state only needs to be ruled in a republican manner, and this does not require any actual participation on the part of the members of that state.

Proponents of the view that participatory institutions are necessary in the Kantian state may point to the following passage:

> Any true republic is and can only be a *system representing* the people, in order to protect its rights in its name, by all the citizens united and acting through their delegates (deputies). (MM 6:341)

Here Kant claims that a true republic must be a system representing the people. Since he believes that all states must be republican (see PP 8:349), we can infer that all states must represent the people. The question for this view is whether this representation requires democratic institutions. I am not sure that it does.[27] One reason for this is Kant's claim that a state only needs to be ruled in a republican manner and that this can be done without any form of citizen participation (see PP 8:372). Actual consent given by voting is not necessary. A ruler only needs to pass laws that *could* have been consented to by her subjects. Here are two passages in which Kant discusses this point:

[27] See Hanisch (2016: 72) for an expression of similar concerns.

> [...] if a public law is so constituted that a whole people *could not possibly* give its consent to it [...], it is unjust; but if it is *only possible* that a people *could* agree to it, it is a duty to consider the law just, even if the people is at present in such a situation or frame of mind that, if consulted about it, it would probably refuse its consent. (TP 8:297, my emphasis)
>
> One must represent all laws in a civil society as given through the consent of all. The original *contractus originarius* is an idea of the agreement of all who are subject to the law. One must test whether the law *could have arisen* from the agreement of all, if so then the law is right. (NF 27:1382, my emphasis; see also WE 8:39, DCF 19:610, TP 8:299).

These passages support the view that Kant was not committed to the existence of democratic institutions. Rather than acting on actual consent, a ruler only needs to ask whether the people *could have* consented to a law. If they could have consented, then the law is just and the citizens are bound to obey. To put the point another way, Kant only requires that the laws of a state be republican, but this does not require that the manner of government also be republican.

Kleingeld (2018b) argues that the passages quoted above do not represent Kant's mature views on the subject.[28] While Kant believed democratic participation was not necessary at the time of the 1784 lectures on natural right or the 1793 "Theory and Practice", she claims his mind had changed by the time of the 1797 *Doctrine of Right*. Kleingeld cites the MM 6:341 passage quoted above as evidence for her view. This is because that passage no longer uses the language that citizens "could have" consented to a law.[29] Since Kant had consistently used this language previously, it is not unreasonable to suspect that a change in language corresponds to a change in belief.

However, the passage on its own is inconclusive. This is because it is compatible with the view that, while the people must be represented, they do not decide who represents them. On this reading, what Kant says in the *Doctrine of Right* is also consistent with his earlier writings. Moreover, in the 1798 *Conflict of the Faculties*, Kant makes claims similar to those found in the lectures on natural right and "Theory and Practice". He says,

[28] Byrd and Hruschka (2010: 181) also claim that Kant's views changed to support democratic institutions at the time of the *Doctrine of Right*.

[29] Kant's definition of the right to freedom of citizens also says that freedom is the attribute of "obeying no other law than that to which he *has given* his consent" (MM 6:314, my emphasis). This also lends support to Kleingeld's reading.

> The constitution may be republican either in its *political form* or only in its *manner of government*, in having the state ruled through the unity of the sovereign *by analogy with the laws that a nation would provide itself* in accordance with the universal principles of legality. (CF 7:88, the last emphasis is mine)[30]

Here Kant says that sovereign may rule in a way *analogous* to the way a people would rule itself. The people itself does not need to rule. *Conflict of the Faculties* was published one year after the *Doctrine of Right*. Thus, even in his later works of political philosophy, Kant is not committed to actual democratic institutions. The state may be ruled in a way that is compatible with principles of right without seeking the actual agreement of its citizens. This, I believe, casts considerable doubt on Kleingeld's reading. Kant's work around the same time as the *Doctrine of Right* continues to affirm the position of the lectures on natural right and "Theory and Practice", and there is nothing in the *Doctrine of Right* itself that speaks conclusively against that position. Due to this, it is reasonable to believe that Kant's position on this matter remained unchanged.

Might we argue that while Kant's texts do not support the necessity of voting, certain of his commitments do? This is the view that Hanisch (2016) takes. He claims that the innate right can provide the grounds for the necessity of voting. This is because the innate right is meant to contain an element that entitles each of us to positively "authorise and shape the state's coercive institutions" (2016: 86). In order to support this view, Hanisch appeals to Byrd and Hurschka's claim that external freedom comprises both "independence from another's constraining choice [and] simultaneous 'dependence on laws' in a juridical state" (Byrd and Hruschka 2010: 87). There are two things to note about this. First, it is not clear that the innate right contains a positive entitlement. Kant merely characterises the innate right as entitling each person to freedom from the necessitating choice of another (§2.1.1). This entitlement is purely negative. Byrd and Hruschka also understand the innate right this way, claiming that in order to generate the positive aspect of external freedom we need to go further than the entitlements of the innate right (see 2010: 89). Thus, Hanisch appears to mistakenly identify the innate right to freedom with the conditions for external

[30] See also CF 7:91, where Kant states that a monarch can treat her citizens according to principles that "are commensurate with the spirit of laws of freedom [...] although they [the citizens] would not be literally canvassed for their consent."

freedom more generally.

Second, the positive aspect of external freedom as understood by Byrd and Hruschka does not entitle each person to participate in lawmaking. They tell us: "In the positive sense of external freedom, I become free when I move to a juridical state where my rights are secured through public law" (2010: 88). There is no mention of active participation here. The positive aspect of external freedom is understood in terms of one's rights being secure, and participation in lawgiving is not necessary for this.[31] Here is how I believe we should understand the positive and negative aspects of external freedom on Byrd and Hruschka's account. The negative aspect is the entitlement to be free from the necessitating choice of another, as specified by the innate right. The positive aspect is the entitlement to be a member of a state that coercively secures one's rights. The latter aspect is positive only because it requires the institution of the state, and not merely the non-interference of others. What is important for our purposes is that the positive aspect of external freedom can be secured without democratic participation, as we have seen in the numerous passages quoted above.

Hanisch's approach, then, appears to misunderstand the way in which Byrd and Hruschka draw the distinction between positive and negative aspects of external freedom in two ways. He both (i) mistakenly identifies the innate right to freedom with external freedom more generally, and (ii) takes the positive aspect of external freedom to entitle members of a state to democratic participation when all it requires is the institution of a state that secures rights. As we have seen in the passages above, Kant does not believe that democratic participation is a necessary condition for securing rights. While this is not fatal to Hanisch's project, it does mean that he owes us an account of why the positive aspect of external freedom should be understood in terms of such participation.

There are other reasons to be skeptical that Kant was committed to actual democratic institutions. For example, in the *Doctrine of Right* he claims the following:

> The legislative authority can belong only to the united will of the people.

[31] Byrd and Hruschka's own defence of the claim that Kant endorsed democracy in the *Doctrine of Right* concerns Kant's changing beliefs about the different forms of state (see 2010: 179-81). Their view closely resembles Kleingeld's, discussed above.

> For since all right is to proceed from it, it *cannot* do anyone wrong by its law. Now when someone makes arrangements about *another*, it is always possible for him to do the other wrong; but he can never do wrong in what he decides upon with regard to himself (for *volenti non fit iniuria*). Therefore only the concurring and united will of all, insofar as each decides the same thing for all and all for each, and so only the general united will of the people, can be legislative. (MM 6:313-14; see also TP 8:295)

This might be taken to offer support for the democratic reading of Kant. Since one may be wronged by arrangements made by another, each should make arrangements for herself. This, we might think, requires democratic input on the part of the citizens. The worry that arises for arguments making use of this passage is that it presents a very high standard for voting. Kant does not merely claim that each must have a say. He says that each must decide *the same thing* for all and all for each. It is implausible to believe that such a condition could ever be satisfied by democratic institutions, as it would require that each come to the same decision as all others.[32] This speaks against the belief that Kant was concerned with actual democratic institutions.

Let me consider one more argument in favour of the belief that the Kantian state requires democratic institutions. In §1.3.2 we saw that the state of nature is a condition in which disagreement about right is always possible. Some of this disagreement may be the result of indeterminacies about general principles of right, or the application of those principles to particular cases. We can also disagree about the relevant empirical facts. While disagreement about empirical facts cannot be a matter of indeterminacy (there will be a fact of the matter about who claimed this plot of land first, for example), no person is in an epistemically superior position to settle disputes about those facts. Thus, disagreement about empirical facts will also be possible in the state of nature. We also saw that the civil condition is meant to be uniquely able to solve the problem of disagreement (§1.3.3). The legislative branch of the state promulgates a single interpretation of the law publicly, thus making general principles of right determinate. The judiciary settles disputes about the

[32] On certain readings of Rousseau, according to which the general will is generated by actual voting, this problem also appears. Even drawing on his discussions of the important of civic education, it is difficult to see how this strong requirement can be fulfilled. One way to avoid this is to view Rousseau's general will as a standard against which acts of government can be held. I believe that something similar can be said of Kant here. Kant's claim that the general will is united *a priori* provides further support for this reading (see MM 6:246).

application those principles to specific cases. The worry for this solution was that public officials suffer from the same lack of insight into general principles, the application of those principles, and empirical facts as private individuals. Thus, it is not clear how public officials are able to resolve disagreements that arise. We may disagree with the decision of a legislator or a judge in the same way that we may disagree with another private individual.

Active citizenship, understood in terms of democratic participation, may appear to provide a recognisably Kantian solution to this problem. In particular, we might think that the problem of disagreement can be addressed by the fact that active members of the state 'give the law to themselves'. The reason that the state is able to coercively enforce a publicly promulgated interpretation of the law is that the citizens of that state are the authors of that law. They are thus only subject to self-imposed obligations. Not only does this appear to offer a solution to the problem of disagreement, it does so in a way that develops, in the political realm, a popular understanding of Kant's views of ethical obligation in the *Groundwork*. This is the view that the moral law lays an obligation on us because it is a law that we have legislated for ourselves.[33] The political view is thus that external laws can only be rightfully coercively enforced if we are the authors of those laws. Participatory institutions might then be seen as a necessary feature of the Kantian state, since it is only through such institutions that members of a state can become authors of the laws of that state.[34]

The central problem with this view is the following. Not all of the ways in which active citizens participate in lawgiving entail that they are the author of all of the laws of the state. If an active citizen serves on a jury, for example, it is not true that she can thereby

[33] For two prominent examples of this interpretation of Kant's view of ethical obligation, see Rawls (1971: 225) and Korsgaard (1996: 112). Kleingeld (2018a, 2018b) has argued that it is misleading to speak simply of 'giving the law to ourselves' in the context of Kant's ethical philosophy. Kantian ethics, at least at the time of the *Groundwork* is primarily concerned with giving *universal law*. Of course, in giving a universal law, one is also giving the law to oneself. However, this difference in terminology also signals a significant difference in the emphasis of the view. Kant, according to Kleingeld, is not as much concerned with the possibility of self-imposed obligation, as much as the possibility of universal obligation. I do not need to take a position on whether this is an accurate characterisation of Kant's ethics. However, I do believe that it adequately characterises his political philosophy. Kant is not concerned with self-imposed political obligations, so much as obligations based on *a priori* principles of right.

[34] This is similar to the previous suggestion, but distinct from it. The previous suggestion was concerned with the conditions in which a person may be wronged by the actions of the state. This suggestion is concerned with the grounds of obligation for obeying the laws of the state.

be said to be the author of *all* of the coercively enforced laws of a state. As a result of this, disagreement with respect to those laws for which an individual citizen cannot be said to be the author could thus still arise. This is so even when we include voting as a means of participation. Consider a case in which active citizens vote for representatives who then run the state. In such a state, do those active citizens whose representatives were not chosen count as co-authors of the laws? It would seem not, unless we are supposing that members of a state have agreed to majority rule. However, this itself is a matter about which there can be significant disagreement; disagreement that voting cannot resolve. This does not mean that enforcing the laws of a state coercively would not be justified with respect to *any* of the members of that state. If members of a state could be considered to be the authors of some of the laws of that state, then those members would be rightfully subject to coercive enforcement of *those* laws. However, this does not tell us why the laws of a state in general can be coercively enforced when members of that state are active in lawgiving in some form. Disagreement is still possible in a state in which citizens participate in lawgiving. For this reason, we cannot argue for the necessity of participatory institutions on the grounds that such institutions are necessary as a solution to the problem of disagreement.

Thus, there are good reasons to think that Kant was not committed to democratic institutions. A state only needs to be governed in a republican manner, and this does not require any actual input from citizens.[35] This raises a problem. As Meckstroth notes, "if Kant were really concerned only with hypothetical or modal consent (imputed from formal universality), then his distinction between 'active' and 'passive' citizens would be meaningless, since every citizen would be 'passive' in just the sense that he describes" (2015: 128). If the difference between active and passive citizens is that the former are permitted and required to participate in lawgiving but the latter are not, then the fact that the state need not have democratic institutions appears to allow for the possibility that all citizens will be passive. A first response to this worry would be to claim that the entitlement to

[35] We might think that this gets Kant into trouble, since it would appear that he now owes an account of what it means to govern a state in a republican manner. While this is true, I do not believe that it puts him in a worse position than contemporary theorists such as Rawls (1971) or Scanlon (1998), who rely on devices such as the veil of ignorance, or appeals to reasonable rejectability. The vast literature dedicated to determining the obligations that a Rawlsian or contractualist position commit us to speak in favour of the belief that Kant is, at least, not alone in not having fully specified the content of his views.

vote does not exhaust the distinction between active and passive citizens. While Kant may have only spoken about active citizenship in terms of the right to vote, that does not mean that this exhausts the entitlements (and duties) of that status. There are other ways in which a member of a state can participate in lawgiving, and thus other entitlements that active citizens possess and passive citizens do not. For example, active citizens may go to court, serve on juries, and hold significant public positions (like that of a judge). Each of these activities involves participation in lawgiving, and so may only be performed by active citizens. Thus, we might think that the entitlement to participate in these activities allows us to maintain the distinction between active and passive citizens even in states in which no voting occurs.

The difficulty for this response is that if voting is not necessary, then it is unclear why these other forms of participation must be necessary. Kant's claims about voting apply equally well to going to court, serving on juries, and any other form of participation in lawgiving. If the state is run in such a way that each of its decisions is compatible with what the people could have chosen for themselves, then no actual participation is necessary. This is not limited to the selection of representatives. Rather, it applies to all lawgiving. Thus, the permission and obligation to participate in lawgiving associated with active citizenship appears conditional: *if* the state includes participatory institutions, *then* active citizens are those members of that state who are permitted and obliged to participate. Since participatory institutions are not necessary for the state to be governed in a republican manner, the antecedent of this conditional need not be satisfied in all legitimate states. Thus, Kant's claim that participation in lawgiving is not necessary for state legitimacy threatens the meaningfulness of the distinction between active and passive citizenship.

This presents a serious worry for Kant's account of citizenship. Kant claims that independence is an essential attribute of citizens (see MM 6:315). He also claims that freedom, equality, and independence are "principles in accordance with which alone the establishment of the state is possible in conformity with pure rational principles of external human right" (TP 8:290). By eliminating the significance of the distinction between active and passive citizens, Kant thereby also eliminates the significance of civil independence.

Given the fact that participatory institutions are not necessary, a member of a state need not gain any rights or duties by possessing this attribute. As we have seen, the rights to freedom and equality are not threatened by civil *dependence*. This means that we cannot appeal to these rights in order to defend the importance of civil independence.[36] In addition to these systematic concerns, we can also worry that in a state lacking participatory institutions, members of that state will no longer contribute to the condition that secures and determines their rights. Thus, we also lose what appears to be an attractive feature of Kant's account of citizenship.

4.3.2 Active citizens: maintaining the state

In this section, I sketch a possible solution to the problem just raised.[37] My suggestion is that we can maintain the distinction between active and passive citizens by characterising active members of a state as those who contribute to the continued existence of the state, and thus of its laws. Passive citizens, on this view, are those who make no such contribution. Understood in this way, contribution to the state takes on a central place in the account of citizenship. This solution departs from Kant's stated account. On this view, unlike Kant's, the entitlement to vote need not attend the status of active citizenship. However, I believe that this view is largely consistent with Kant's stated account, and that it can help to address the problem raised in the previous section.

The idea, in more detail, is the following. Active citizens are those who make a contribution to the continued existence of the state, even if they do not contribute to the content of the laws of that state. Without some contribution in terms of material resources and time, the state could not be maintained. For this reason, some contribution to the state by its members is necessary. Recall that the state is meant to be uniquely able to solve the problems of the state of nature, and that a solution to those problems is necessary for

[36] If a state had laws that only permitted some members to become active citizens, this would violate the right of equality, which requires that "anyone can work his way up from this passive condition to an active one" (MM 6:315). Thus, in a state in which some members are active citizens, it must be possible for any member (given their talent, industry, and luck) to become an active citizen. However, it is not incompatible with the right to equality that no member of the state be permitted to achieve that status. This is because, in such a state, each member would stand in the same relationship to the law as every other member.

[37] The solution is only a sketch because it raises a number of questions for which Kant's texts do not have answers and that are beyond the scope of this thesis to address.

the security and determinacy of our rights. Due to the fact that the rights that we have determine what external actions we are free to perform, the state is a necessary condition for the full realisation of our external freedom. Contribution to the maintenance of the state by some of its members is thus necessary for the full realisation of our external freedom by virtue of being necessary for the continued existence of the state. My proposal is that those members who make such a contribution should be considered active citizens.

This proposal does not rule out participation in lawgiving. If the state is a democracy, for example, then active citizens will be entitled to vote. They will also be entitled and required to participate in other ways; for example, by serving on juries. The suggestion that we can draw the distinction between active and passive citizens just on the basis of contribution to the state does not alter the fact that, when a state has participatory institutions, only active citizens will have the right and duty to participate. However, even in a state lacking such institutions, this view allows us to maintain a distinction between active and passive citizens. This is because the resources of some will be necessary for the continued existence of the state regardless of whether those members participate in giving the laws of that state. While there is no reason to believe that Kant himself would have endorsed this idea (and I suggest below that he might have rejected it), I believe that it is largely consistent with his account of citizenship. In particular, it both affirms the place of civil independence even in states lacking participatory institutions, and maintains a connection between active citizenship and the conditions in which the rights of each are secured and determined.

We might wonder why contribution to the state should do the work here. On the reading of Kant I have developed, there are two necessary conditions for active citizenship. In addition to contributing to the state, an active citizen is also one who is not under the authority of any particular person or group. For this reason, we might also think that it is this condition that allows us to maintain the distinction between active and passive citizens in cases in which no member of the state participates in lawgiving. Some might be considered active citizens simply by virtue of not being under the authority of another (other than the state). I believe this approach should be resisted. There are two reasons for

this. The first is that, as we have seen, Kant was wrong to believe that being under *any* relation of authority is sufficient to rule a member of a state out from participation in lawgiving. The second is that, of Kant's two necessary conditions for active citizenship, only contribution to the state is concerned with public right. Indeed, it is concerned with a necessary condition for the continued existence of enforced public laws. The benefit of understanding the distinction between active and passive citizens in the way that I am suggesting is thus that it will be understood in terms of a member's relation to the state, and not simply a member's relation to other members.

Let me consider two worries for this suggestion.

First, we might worry that this further exacerbates the problem, discussed at length above, that Kant's account of citizenship will exclude the poor from that status. For example, a person who works several jobs in order support her family may lack both the time for additional activities that contribute to that state and the resources to make a material contribution. It seems that such a person would not count as an active citizen on my revised understanding of Kant. Here the worry is not that the poor are necessarily excluded from the status, but rather that they will be excluded in many cases.

I think this worry can be avoided. This is because, simply by paying taxes a member of a state will be contributing to the continued existence of that state. In this way, a tax-paying member of the state will be considered an active citizen on the account that I am suggesting. By thinking about the distinction between active and passive citizens in terms of contribution to the state, the account can become more inclusive. This does not mean that active citizenship will be a universal status. Some members of the state will still be ruled out on the grounds that they are unable to make a contribution. For example, those who work several jobs and so lack the time to make a non-material contribution to the state, but who do not make enough to pay taxes will be ruled out. One way to assuage the worries that arise for cases such as these would be to introduce alternate ways in which members of a state who have little can contribute. This could be done, for example, through the introduction of paid military or community service. Such possibilities would allow those with little to support themselves while making a contribution to the state (as

we have seen in the case of those in the service of the state, §4.2.1).

This judgement is not one that I believe Kant would share. At the time Kant was writing, active citizenship was a status for which some contribution *in addition to taxes* was necessary. For this reason, we can reasonably believe that Kant would have found the proposal I am suggesting too broad. However, if we understand the contrast between active and passive citizens in terms of contribution to the state, then it is unclear why contribution in terms of taxes should be ruled out. (Indeed, it is unclear why contribution in the form of taxes should be ruled out on Kant's own account). But, even if Kant would have excluded those who did not contribute something in addition to what they paid in taxes, that does not mean that we must as well.

Second, we might wonder how exactly we should understand the relationship between contribution to the state and active citizenship. Kant's discussion of contribution to the state, as we have seen, does not help us with this. Although contribution is a necessary condition of active citizenship, he tells us little about how this contribution is to be understood. Nevertheless, a number of difficult questions arise. For example, contribution to the state is a matter of degree (one may contribute more or less), but whether a member of a state is an active or passive citizen is binary: one either is or is not an active citizen. Thus, we need some method for determining exactly what kind of contribution is necessary for a member of a state to be considered an active citizen.[38] I have already suggested that we should understand contribution broadly, so that those who pay taxes can be said to contribute to the state. However, a full account of this view would have to determine a threshold of contribution after which a person counts as an active citizen. For example, a full account would have to determine if any contribution is sufficient, or any net contribution, or if something greater than this is necessary. It would also have to determine how contribution in non-material terms is to be measured and to explain why those who contribute more are not citizens to a fuller extent than those who contribute less but still enough. These are all difficult questions, and I cannot address them here. It is enough for my purposes to note that a full statement of the position I am suggesting would owe

[38] Thanks to Ralf Bader for suggesting this worry to me.

answers to them.

In the *Doctrine of Right* and "Theory and Practice", independent members of a state, active citizens, are those who are not under the authority of any other member of that state. Dependent members are under the authority of another particular person. This understanding of independence is able to make sense of Kant's puzzling examples, and does not commit Kant to necessarily excluding women and the poor from his account of active citizenship. In the drafts for "Theory and Practice", Kant also discusses an additional condition for active citizenship: active citizens must contribute to the state.

In each of the passages in which he discusses active citizenship, Kant claims that active citizens are entitled to participate in lawgiving. He understands this in terms of the entitlement to vote. However, elsewhere Kant claims that no participation in giving the laws of the state is necessary. The state only needs to be ruled in a way that is compatible with republican institutions, and this does not require any actual input from the members of the state; it only requires that those members could have agreed to the laws by which they are bound. This raises a problem. If active citizens are those who participate in lawgiving, but this participation is not necessary, then the distinction between active and passive citizens disappears. In some states, all members of the state would be passive citizens. A possible solution to this problem is to suggest that we can maintain the distinction between active and passive citizens on the grounds that active citizens are those who make a contribution to the continued existence of the state. While this suggestion departs from Kant's stated position, I believe that it is largely compatible with it. Moreover, by making a contribution, active citizens are also contributing to the existence of the unique condition in which the rights of each are determined and secured. This suggestion thus ties Kant's account of citizenship to one of the central concerns of his political philosophy as a whole.

Conclusion

This thesis has argued that Kant has a systematic account of citizenship. For Kant, a full citizen of a state possesses three attributes: (i) lawful freedom, (ii) civil equality, and (iii) civil independence. Each of these attributes specifies a certain relation between the state and its members. Lawful freedom is the institutionalised version of the innate right to freedom. Citizens of a state possess lawful freedom when the state only permits its members to perform those actions that are compatible with that latter right. Civil equality is possessed by citizens when each member of a state bears the same relationship to the law as every other member. Finally, civil independence is the attribute possessed by members of a state who are not under the authority of any other member, and who contribute to the state.

Recent scholarship concerned with Kant's account of citizenship has mostly been negative. However, contrary to the criticism often raised, this account does not constitute an arbitrary or morally dubious aspect of Kant's political philosophy. Rather, each of the three attributes of citizens provides us with important additional resources for understanding one of the three stages in the development of Kant's political philosophy as a whole. The right to freedom sheds light on the innate right to freedom. This is because the right to freedom is the institutionalised form of the innate right. By specifying those actions that are compatible with lawful freedom, we thus further specify the requirements of the innate right to freedom in the only condition in which that right imposes constraints on the actions of others. The right to equality sheds light on acquired rights. This is because the implications of Kant's account of the equality of citizens primarily concern our acquired rights. In particular, Kant tells us both that privileges associated with a certain

status cannot be hereditary, and that great material inequality is permissible. Finally, those who are civilly independent are active citizens. An understanding of active citizenship sheds light on Kant's view of public right by specifying the way in which members of a state contribute to that state. While participation in lawgiving is not necessary according to Kant, contribution to the state is. Thus, I have claimed that Kant's account of active citizenship presents us with a picture of members of a state united in their support for the continued existence of that state. Insofar as they contribute to the state (and its laws), active citizens also contribute to a necessary condition for the validity of the rights of each.

It has not been my aim here to defend Kant's account against alternate accounts of citizenship. While I believe there is much to be said on behalf of Kant's account, its full defence would require filling in many details about which Kant tells us little, or nothing at all. These details will have to be the subject of future research. Kant's contribution to our thinking about important aspects of political philosophy is now widely recognised, and distinctively Kantian positions are taken seriously in contemporary debates. If the arguments of this thesis have been successful, Kant's account of citizenship should be included among these contributions, and further thought should be given to his position in the contemporary context.

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Word Count:

Excluding bibliography (including citations): 58,167

Abstract: 287