KANT'S JURIDICAL CONCEPTION OF FREEDOM AS INDEPENDENCE

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ABSTRACT:

I defend a juridical conception of freedom as independence as realized only under law. This is understood in contrast to interpretations that take Kant to aim to maximize a right to freedom that people can enjoy prior to submission to the state. Specifically, I argue that law is needed to demarcate the bounds between people's rights, and what counts as questions of right in the first instance. This explains Kant's emphasis on distinctly adjudicative aspects of state authority.

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The *Doctrine of Right* consists in «the sum of those laws for which external lawgiving is possible.»[1] (6:229) Right concerns people's external actions and their external relations among each other. External lawgiving consists in those laws that require only that people do comply with them; people's incentives or motives for compliance are irrelevant from the point of view of right.

Kant grounds his political philosophy in people's innate right to freedom, which consists in people's «independence from being constrained by another's choice,» (6:237), and this is the only right that people have innately, in virtue of their humanity.[2] All other rights and freedoms people have follow on this one innate right. People's innate rights are harmonized under the Universal Principle of Right, which orders people's external relations with one another. It dictates that «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

[1] All references are to Kant's *Metaphysics of Morals*, in *Immanuel Kant: Practical Philosophy*, Mary Gregor trans., (Cambridge: Cambridge University Press, 1996), pp. 353-604. All further references are in-text and refer to the volume and page number of the Berlin Academy edition of the text.

[2] Kant's notion of independence in the *Doctrine of Right* provides only a partial picture of the role of independence in his political philosophy generally. Kant emphasizes the more abstract and formal aspects of independence in the *Doctrine of Right*, and the negative idea of freedom from interference by others. I will be focusing on these aspects here. Independence also plays an important role in Kant's essay «On the Common Saying: That May be Correct in Theory but it is of no use in Practice.» There he develops the more positive incidents of independence, namely, the idea of independent citizens as colegislators or subject only to laws of which they are also authors (an idea that he also emphasizes in the *Doctrine of Right*). Kant also specifies that independent citizens can also vote, and must own property (and be adult males) in this essay. See *Immanuel Kant: Practical Philosophy*, Mary Gregor trans., (Cambridge: Cambridge University Press, 1996), «On the Common Saying: That May be Correct in Theory but it is of no use in Practice,» pp. 273-310, for a fuller picture of this ideal.

everyone's freedom in accordance with a universal law.»[3] (6:230) The Universal Principle of Right is given effect in the civil condition, under the power of an authoritative state charged with coercively enforcing each person's innate right, consistently with the rights of all. Indeed, this is the only principle upon which the state is justified in acting; right can be limited only for the sake of right. The state is therefore not permitted to adopt policies furthering people's interests or promoting their well-being except to the extent that these are requirements of right.

Kant's practical philosophy is often criticized as overly formal and legalistic, and this charge can seem especially well-placed against Kant's doctrine of right given the abstract nature of right. Kant is often read as defending a minimalist state. This has led commentators to, at best, raise concern about the narrow focus of Kant's political philosophy, and at worst, reject it outright as overly libertarian, and political and morally irrelevant. One can see why readers are put off by this basis for political philosophy. So far as it excludes concern for people's needs and interests, freedom as independence can strike some as being of meager moral value, much less to be sufficiently morally important to serve as the guiding political value. Elevating it to such importance that the needs and interests of people must be excluded from political consideration seems coldly indifferent in a political philosophy, inviting critics to wonder whether Kant developed a political philosophy truly worthy of the name.[4] Sympathetic commentators sometimes struggle to explain the moral appeal of Kant's political philosophy.

One tempting line of reasoning is to read Kant through the lens of Mill, and take his principle to be one maximizing individual liberty and minimizing state interference with its exercise. Kant's political philosophy is thus limited to questions of what the state can force people to do on this reading.[5] This approach explains Kant's starting

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[3] or, Kant continues, «if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law.»

[4] See Victor Tadros, *Oxford Journal of Legal Studies,* «Independence Without Interests?» 31(1), (2011), pp. 193-213 for a stinging critique of Kant's emphasis on the principle of right.

[5] Numerous commentators have interpreted Kant along these lines. Howard Williams in his founding work on Kant's political philosophy explicitly interprets Kant as a liberal. Kant's freedom under right, for Williams, consists in the freedom «not to be hindered from acting in whatever way we wish, providing we do not impair the freedom of others to act in that way as well.» *Kant's Political Philosophy,* (New York: St. Martin's Press, 1983) p. 68. (footnote omitted) He continues, it «must centre on the individual. [And] it consists of the individual's freedom to choose and to seek to pursue his own ends in a way that his own individual conscience dictates.» *ibid.* 70. See however Williams's *Kant's Critique of Hobbes: Sovereignty and Cosmopolitanism,* (University of Wales Press, 2003) for a revised version of his view.

More recently, Kyla Ebels-Duggan characterized external freedom as «the ability to move your body around and pursue your ends in a way that is unconstrained by others' choices.» *Philosophers' Imprint,* «Moral Community: Escaping the Ethical State of Nature,» 9:8, August 2009, p. 3. Thomas Pogge argues that «a person's external freedom is

point of the innate right to freedom and it captures the physical aspect of his view of external freedom. However, I will argue, it paints only a partial picture of his account, and it leaves other aspects of Kant's view unexplained. Particularly, it fails to explain the importance of law in Kant's account of freedom and the establishment of the state, and it only partly explains the difficulty Kant raises with people's interactions that gives rise to the problem of right.

More recently, Arthur Ripstein has proposed an alternative understanding of Kant's notion of freedom as independence and the normative relation it bears to the state.[6] Freedom as independence for Ripstein is fundamentally relational for him and it can only be secured under a common public authority.[7] The state is needed, for Ripstein, because, he argues, «each person's entitlement to be his or her own master is only consistent with the entitlements of others if public legal institutions are in place.»[8] Ripstein combines the natural and physical aspects of Kant's view and his formalism in an attempt to unify Kant's account of freedom and the state, though he develops his view in contrast to positions like Mill's.

I will argue for a formal understanding of freedom as independence, but my aim is significantly narrower than Ripstein's. Kant's political philosophy is distinctive in that in developing his theory of the state, his main emphasis is on law. This is unusual since law is normally thought of as an instrument for furthering political ends; the establishment of law is not itself meant to be the end.[9] Why is the establishment of the rule of law the primary political aim for Kant? Why the focus on the fact of settling disputes rather than the content of their resolution? I will argue that law is needed to authoritatively demarcate which disputes are public, to be settled by public authoritative standards, and distinguish these from all other disagreements and disputes people can have.

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constrained exactly insofar as others are obstructing actions that she could otherwise perform if she so chose, and that her external freedom is insecure insofar as others can obstruct her otherwise possible actions. A person's external freedom is secure, then, insofar as possible obstructing actions by others are themselves obstructed.» *The Southern Journal of Philosophy,* «Is Kant's *Rechtslehre* Comprehensive?» Vol. XXXVI, Supplement, (1997), p. 164. Paul Guyer argues that «The principle of right can also be understood as the principle that each person must have the maximal sphere of freedom consistent with the similarly maximal freedom of everyone else.» *Kant* (London: Routledge, 2006), p. 263.

[6] Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy*, (Cambridge, MA: Harvard University Press, 2009). [Hereinafter, Ripstein, *Force and Freedom*]

[7] So, Ripstein specifies, «no issues of right would arise for someone who succeeded in 'shunning all society,' and if there were only one person in the world, no issues of independence or rightful obligation would arise.» Ripstein, *Force and Freedom*, p. 36, citing Kant, 6:236.

[8] Ripstein, *Force and Freedom*, p. 9.

[9] cf. Martin Stone, «Kant's Apparent Positivism: Remarks after Arthur Ripstein's Force and Freedom,» in *Freedom and Force: Essays on Kant's Legal Philosophy*, Sari Kisilevsky and Martin Stone, ed.s, (Oxford, UK: Hart Publishing, forthcoming 2016), remarking on this legalistic aspect of Kant's political philosophy.

This authoritative pronouncement is needed in order for people to fully realize their freedom from one another and their independence from one another's choices. I will thus argue that freedom as independence is a distinctly juridical ideal. Though people can have freedom of movement in the state of nature, their independence from the choices of others in the Kantian sense can be realized only under the rule of law, on my view. I am thus working in the tradition of Ripstein's view so far as I take freedom as independence to be essentially institutional and relational, and my approach is best understood in contrast to those who take Kant's notion of freedom to be something that people possess individually, outside of political institutions. Unlike Ripstein, however, I do not aim to explain the organizing role of freedom in Kant's view of the state in general. Rather, my focus is on the narrowly juridical aspects of Kant's political philosophy.

This approach risks vulnerability to the charge of formalism, making Kant's founding value of freedom nothing more than a theoretical artifact. Far from making freedom an empty abstraction, I argue the formal aspect of Kant's notion of freedom gives effect to an important aspect of responsibility, namely responsibility as public accountability. Holding people another accountable for their actions is part of what it means for people to interact with each other as persons and members of the same community. It arises from Kant's initial problem of politics, which is the fact that people «cannot avoid living side by side.» (6:307) Holding one another publicly responsible for public wrongs requires an authorized shared set of standards demarcating each's rightful sphere of free action consistent with the freedom of all, and a common public body authorized to enforce these standards. In short, I will argue, it requires a juridical solution. Although Kant does not put his argument in terms of public accountability, I believe his juridical account of right and public authority helps to give it effect. And, I believe, this provides a sound moral basis for a political philosophy.

I will begin with a brief overview of the key elements of right. I will then turn to the reading of freedom as negative liberty that serves as a foil to my approach. I will argue that it cannot explain important structural aspects of Kant's argument. I will then turn to Kant's argument for the exit from the state of nature and his understanding of slavery, the opposite of freedom, and argue that both are distinctly juridical. I will draw on these arguments to support the juridical understanding of freedom. Finally, I will address the concern that this solution is overly formal and reduces Kant's founding political value to a product of his architecture. I will argue that to the contrary, this juridical conception of freedom gives effect to an important aspect of responsibility, namely public accountability, which, like right, serves to order people's external relations with each other. Let us begin with an overview of right.

I.

Kant explains right as follows.

> The concept of right, insofar as it is related to an obligation corresponding to it (i.e., the moral concept of right), has to do, *first,* only with the external and indeed practical relation of one person to another, insofar as their actions, as deeds,* can have (direct or indirect) influence on each other. But, *second,* it does not signify the relation of one's choice to the mere wish (hence also to the mere need) of the other, as in actions of beneficence of callousness, but only a relation to the other's *choice. Third,* in this reciprocal relation of choice no account at all is taken of the *matter* of choice, that is, of the end each has in mind with the object he wants; it is not asked, for example, whether someone who buys goods from me for his own commercial use will gain by the transaction or not. All that is in question is *the form* in the relation of choice on the part of both, insofar as choice is regarded merely as *free,* and whether the action of one can be united with the freedom of the other in accordance with a universal law. (6:230)

Right is concerned only with people's outer relations to one another, and the effects that their actions can have on one another. Mere wishes (or hopes or desires) have no bearing on right as on their own, they are not sufficient to result in action; right is only concerned with people's choices so far as they materialize in action. And with respect to people's choices, it is only the «form» of people's choices that are relevant, and not their matter. What is important, for Kant, is that people's choices and actions are undertaken freely, and that they are consistent with the freedom of others in accordance with a universal law; the ends and incentives for which people pursue their actions are not the concern of right.[10]

Right is thus startlingly abstract and formal. It is indifferent to the benevolence or callousness of one's aims or one's deservingness or the neediness with respect to the matter of choice. It allows for vast inequalities in wealth and well-being, requiring redistribution of wealth just to the extent necessary to maintain the state; it imposes no duties on people to act from concern for people's welfare, and indeed prohibits the state from taking concern for people's welfare as its aim.[11] People do not wrong each other when they act cruelly or with cold disregard towards others but consistently with others' rights, and subjecting a person to the needs or desires of another constitutes the utmost violation of right. It also includes in it the right to lie and act insincerely and disingenuously towards others. It is entirely up to the

[10] So, Kant explains, whether someone will gain or lose from a transaction with me is not the concern of right, so long as the transaction is undertaken freely. Notice that this does not mean that people's *intentions* are irrelevant to right: it matters whether someone acted for malice or in self-defense. Internal states are relevant to the extent that they serve to characterize the action a person took. But her incentives for taking the action in the first place are not. So e.g. the fact that a person jumps to another's defense only so she can swindle him out of his money later on is irrelevant from the point of view of right (though her act of swindling might be relevant down the road).

[11] Kant does posit a duty on the state to support the poor and church organizations. But he justifies this on the basis of the state's need to maintain itself, not for the sake of people's well-being. See his discussion of the state's right of taxation in 6:326.

hearer to decide whether or not to believe the representations of another, for Kant.[12] Why, then, this austere approach to political philosophy?

One natural understanding of Kant is to understand rightful freedom in terms of the negative liberty to act unimpeded by the actions and pursuits of others. People are subject to others' choices to the extent that people's choices (and actions) interfere with one another's pursuits. Two problems arise for this understanding of Kant however. First, it leaves key questions driving Kant's political philosophy unanswered. Secondly, it under-describes the problem Kant poses. If people are unfree when they are subject to the choices and actions of others, then *any* action (or choice) people take interferes with the actions and choices of others. Why limit the problem to matters of right?

II.

As we have seen, one common line of interpretation is to think of Kant as maximizing negative liberty, understood as people's right to move about freely in the world, free from impediments imposed by other people. This line of reasoning explains Kant's narrow focus on right, and the broad right of freedom that he accords to people in the civil condition.[13] It also helps to justify Kant's narrow conception of the powers of the state and why people can have the right to freedom innately. But this leaves open some of the key questions driving Kant's political philosophy. If what matters is simply freedom to act, free from interference by others, why does it matter that it is equally distributed? If some people could enjoy vast amounts of freedom (conceived as freedom of movement, or freedom of unimpeded activity) by constraining just a few, why would this be less good than, or

[12] The right of innate freedom «already involves» three authorizations, including the authorization «to do to others anything that does not in itself diminish what is theirs, so long as they do not want to accept it.» (6:238) Kant interprets this as including the right to lying and making insincere promises (short of fraud).

[13] Writers subscribing to the «negative liberty» view of freedom often defend a «trade-off» view of submission to the state. Thomas Pogge argues, «persons' external freedom is enhanced far more by the security that some of their options gain by being protected through an effective legal order than it is reduced by the added obstacles to their remaining options from legal prohibition. Therefore, persons benefit on balance from the existence of a juridical condition.» Thomas Pogge, *op. cit.* p. 172 (footnote omitted). Howard Williams argues that the state is a «necessary evil» to which people must sacrifice part of their autonomy for the sake of protection against the virtually inevitable possible that people will break the law. *op cit* p. 70f.

Kyla Ebels-Duggan argued that although property rights restrict people's external freedom to the extent that each person's right in a thing limits all others' freedom to use an object, but this limitation «much less serious» that the restrictions people would face if they couldn't acquire property rights at all, and so they are worthwhile. People have reason to establish a state in order to make their property rights conclusive. *op. cit.* p. 4. This is an interesting variation on the trade-off view, but it still diverges significantly from the idea of freedom as realized under law.

at least not as good as, a system of equal freedom? On the other hand, if what matters is *protecting* people's freedom, providing them with the security that they are free to exercise their liberties within some protected sphere of activity, why must these boundaries be upheld by *the state*? Shouldn't a political philosophy deliver the ideal body for securing people's liberties, whoever that is? (A mighty protector perhaps?) This is not what Kant's political philosophy seeks to explain.

If maximizing liberty in this sense of freedom to act is what matters, then what accounts for the broad range of non-coercive interactions that Kant permits? The distinction between tvhose actions that Kant considers coercive, and all other manners of influencing people's behaviour is notoriously arbitrary from the point of view of liberty. Perhaps Kant aims to protect people's physical security. But if security is what matters, and the state is justified exercising force for the sake of increased security, why limit its exercise of power to just that which minimally impedes people's liberty? Why not further limit (some?) people's freedom for the sake of increased security?

If freedom as independence is understood as some right that people have independently of the establishment of a state, that their submission to a state authority aims to maximize, then it seems it cannot be play the organizing role that it does for Kant's political philosophy. Instead, Kant remarks,

> one cannot say: the human being in a state has sacrificed a part of his innate outer freedom for the sake of an end, but rather, he has relinquished entirely his wild, lawless freedom in order to find his freedom as such undiminished, in a dependence upon laws, that is, in a rightful condition. (6:316)

That is, the freedom vindicated by people's submission to the state is not something that people enjoy to greater extent in the state of nature. The justification for people's subjection to the authority of the state does not involve a sacrifice of the freedom they enjoy in the state of nature for the sake of some other good. It is not a trade-off between something valuable for the same of something of greater value. It does involve the relinquishment of people's natural freedom, but this is «wild, lawless freedom.» Submission to a state authority vindicates people's innate right to freedom, undiminished.

III.

The idea that the state maximizes some right to freedom that people have independently of the state, whose protection requires the establishment of a state authority also sits uncomfortably with Kant's argument for the exit from the state of nature. The argument is consistent with this idea, but Kant's emphasis on the resolution of disputes misses the mark. I will argue that Kant's point here has more force if on the understanding of freedom as independence as a juridical notion realized under an authoritative system of law.

The state gives effect to people's innate right to freedom by establishing an authoritative body for settling disputes. The state of nature for Kant is a condition

which lacks «distributive justice.»[14] This is an unfamiliar notion to modern readers, and it is a non-standard use of the term. Distributive justice for Kant is, roughly speaking, law.[15] Specifically, it consists in the existence of an authorized body for rendering authoritative decisions about the application of the law to particular cases.[16] It is for this reason that a court is called the «justice» of a country, Kant explains. (6: 306) And, he continues, «whether such a thing exists or does not exist is the most important question that can be asked about any arrangements having to do with rights.» (6:306) It is the presence or absence of such an authorized body that marks the distinction between a rightful and non-rightful state.

The state of nature, for Kant, can be relatively peaceful and harmonious. It is not characterized by hostility and strife, and it is not from «bitter experience» that people learn of the malevolent and violent tendencies of humankind. People are not impelled to leave it to escape the danger posed by one another's wickedness or malice.[17] Indeed, the state of nature may contain societies «compatible with rights.» (6:306) Nonetheless, it is considered a state of violence, devoid of justice, though not necessarily a state of *injustice*, for Kant.

It is a state of violence, for Kant, because, as he famously argues,

> however well disposed and law-abiding 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 its own right to do what seems right and good to it and not be dependent on another's opinion about this. (6:312)

It is the fact that the use of force is decisive in settling disputes, rather than the actual prevalence of attacks, that renders it a state of violence, and impels people to

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[14] «A condition that is not rightful, that is, a condition in which there is no distributive justice, is called a state of nature.» (6:306) My point is about how Kant uses the term and the emphasis he places on it in this context.

[15] «For in the state of nature, too, there can be societies compatible with rights (e.g., conjugal, paternal, domestic societies in general, as well as many others); but no law.» (6:306)

[16] In his three-partite division of public law (into protective justice, justice in acquisitions, and distributive justice), Kant explains distributive justice as «what is the decision of a court in a particular case in accordance with the given law under which it falls, that is, what is laid down as right (*lex iustitiae*).» (6:306)

[17] Kant notes, «no one, therefore, need wait until he has learned by bitter experience of the other's contrary disposition, for what should bind him to wait till he has suffered a loss before he becomes prudent, when he can quite well perceive within himself the inclination of human beings generally to lord it over others as their master (not to respect the superiority of the rights of others when they feel superior to them in strength and cunning).» (6:307) Elsewhere, Kant writes, «it is not from experience from which we learn of the maxim of violence in human beings and of their malevolent tendency to attack one another before external legislation endowed with power appears, thus it is not some deed that makes coercion through public law necessary.» (6:312)

leave the state of nature and enter the civil condition. This insecurity renders the state of nature a state *devoid* of justice, though not necessarily a state of injustice in which disputes are settled by might.[18]

Violence in this context thus consists in the absence of a public, common standard for settling disputes, where each person has the right to act on her own private judgment and do what seems right and good to her.[19] In such a state, people's «strength or cunning» is what determines the cordiality or hostility among members of a community (6:307); people have no reason beyond mere inclination, or superiority (or inferiority) in strength and cunning (or mere force of personality), to respect one another's rights. It is in this sense that rights are merely provisional for Kant in the state of nature.[20] And it is for this reason that, although not necessarily *unjust*, it is a state *devoid* of justice for Kant. Although it can be a compatible with rights, there is no authority or rule upholding right, and «strength or cunning,» or private judgment, is elevated to law in the state of nature.

The state of nature is thus formally defective for Kant. People are not necessarily materially worse off than they are in the civil condition (though they likely lack the gains from trade and commerce that a community with reliably enforced private rights enjoys). Though they likely live under greater threat of theft or hostility, this is not what makes the state of nature defective.

This explains Kant's famous injunction to leave the state of nature and exercise coercion against those who refuse to do so, since, he explains

> men do *one another* no wrong at all when they feud among themselves; for what holds for one also in turn for the other, as if by mutual consent. … But in general they do wrong in the highest degree by willing to be and to remain in

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[18] «It is true that the state of nature need not, just because it is natural, be a state of *injustice* (*iniustus*), of dealing with one another only in terms of the degree of force each has.» (6:312)

[19] Notice again that this is not a familiar use of the term. Violence in the context of the state of nature does not mean the prevalence of physical violence, but rather in the threat of violence that can arise from the absence of an authoritative public standard for settling disputes and people's reliance on private judgment for settling them. In this respect, Kant's understanding of violence is like Hobbes's explanation for a state of war, on which war consists not only in the physical battles, but in the «tract of time wherein the will to contend by battle is sufficiently known.» Hobbes, Thomas. *Of Man, Being the First Part of Leviathan*. Vol. XXXIV, Part 5. The Harvard Classics. New York: P.F. Collier & Son, 1909–14; Bartleby.com, 2001. www.bartleby.com/34/5/, checked June 20, 2016. Hobbes explains that just as «the nature of foul weather lieth not in a shower or two of rain but in an inclination thereto of many days together, so the nature of war consisteth not in actual fighting but in the known disposition thereto during all the time there is no assurance to the contrary.» *ibid*. So too with violence for Kant.

[20] The idea that rights are provisional in the state of nature is one of Kant's more obscure claims in the text. See, e.g., Jeremy Waldron, *Harvard Law Review*, «Kant's Legal Positivism,» vol. 109, no. 7 (May, 1996), pp. 1535-1566, discussing this idea.

> a condition that is not rightful, that is, in which no one is assured of what is his against violence. (6:308, Latin translation omitted)

Kant is here distinguishing between materially wronging another, and committing a formal wrong («wrong in the highest degree»). Men who feud among themselves do not *materially* wrong one another, when, say, one accepts a challenge to a feud or one avenges a wrong with a like attack. Here, «what holds for one also in turn for the other,» and it is «as if [they are feuding] by mutual consent.» But, in general they do wrong «in the highest degree» when they resort to feuding to resolve their disputes for, in so doing, they are elevating revenge and violence to the status of law. What is wrong with retaliatory violence, for Kant, is not the material wrongfulness of the attack but the fact that it replaces law with violence.[21]

So too with people who refuse to leave the state of nature. Although they do not materially wrong anyone by willing to remain in a state devoid of justice, they commit wrong «in the highest degree» by remaining in this state, and elevating strength and cunning, or private judgment, to the status of law. People are therefore justified in using force to compel others to exit the state of nature and submit to a public authority even though no material wrong, or violation of a right, has been committed.

The primary reason for people to exit the state of nature and establish a public authority is to establish a public adjudicator. The civil condition enjoys, while the state of nature lacks, distributive justice, namely, a common, public authority for settling disputes. In the state of nature, by contrast, there is «no judge competent to render a verdict having rightful force.» (6:312) Instead, each is entitled to do «what seems right and good to it,» which, though it may be *compatible* with rights, is nonetheless a state devoid of justice and hence a state of violence, for however well-disposed and law-abiding its inhabitants might be, their good disposition and law-abidingness rests on nothing more than their superiority in strength and cunning, or their private judgment, elevating private judgment, rather than right to the status of law. Kant thus proposes the postulate of public right, holding that «when you cannot avoid living side by side with all others, you ought to leave the state of nature and proceed with them into a rightful condition, that is, a condition of distributive justice,» (6:307) impelling people to exit the state of nature and enter into the civil condition.

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[21] Compare this to Kant's own explanation of wrong «in the highest degree,» and the right to exercise coercion against those who refuse leave the state of nature. There, he argues that

> The distinction between what is merely formally wrong and what is also materially wrong has many applications in the doctrine of right. An enemy who, instead of honorably carrying out his surrender with the garrison of a besieged fortress, mistreats them as they march out or otherwise breaks the agreement, cannot complain of being wronged if his opponent plays the same trick on him when he can. But in general they do wrong in the highest degree, because they take away any validity from the concept of right itself and hand everything over to savage violence, as if by law, and so subvert the right of human beings as such. (6:308)

If Kant aimed to maximize some conception of liberty that people possess independently of their subjection to the state, then this emphasis would seem off-base. It *helps* address the threats to people's freedom in the state of nature, but from this perspective it is not what matters most. The establishment of an authoritative adjudicator provides only a partial solution if freedom is understood in terms of some independent ideal. The defects of the state of nature that Kant lists seem less urgent, and Kant's solution seems less central.

Kant outlines three defects of the state of nature that threaten people's freedom, and that the civil conditions resolves. They are people's lack of mutual assurance that their claims will be respected in the state of nature,[22] the fact that rights can be indeterminate and call for judgment for their application to particular circumstances,[23] and the fact that people in the state of nature must rely on their private judgment to settle such questions, thereby imposing their unilaterally will on all others.[24]

So far as the initial problem of assurance goes, questions of adjudication are at best secondary. What is important for assurance is that one's rights are respected. This requires in the first place a coercive body to enforce people's rights; adjudication settles remedial questions of disputes over rights. Disputes can arise with respect to violations, though so far as adjudication goes, this bears more on questions of indeterminacy and unilateralism. So far as the problem is one of assurance itself, it seems that it calls for a different solution.

The establishment of an authoritative adjudicative body for authoritatively settling disputes about rights is central to solve problems of indeterminacy in matters of right and the unilateral imposition of people's wills on each other. The boundaries between people's rights are indeed indeterminate, and absent an authoritative body for settling controversies, disputes over rights would be intractable, and could be resolved by nothing more than the imposition of a person's unilateral will on another. Even if freedom is something people possess independently of law, these problems still require an authoritative resolution.

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[22] Kant notes, «now, a unilateral will cannot serve as a coercive law for everyone with regard to possession that is external and therefore contingent, since that would infringe upon freedom in accordance with universal laws. So it is only a will putting everyone under obligation, hence only a collective general (common) and powerful will, that can provide everyone this assurance.» (6:256) Kant develops these arguments in the context of private property, though I take the problem to generalize to all matters of right.

[23] Again, Kant argues, «the indeterminacy, with respect to quantity as well as quality, of the external object that can be acquired makes this problem (of the sole, original external acquisition) the hardest of all to solve.» (6:266) This problem is solved in the civil condition.

[24] Finally, Kant notes, «now, a unilateral will cannot serve as a coercive law to everyone with regard to possession that is external and therefore contingent, since that would infringe upon freedom in accordance with universal laws.» (MM 6:256). See Kyla Ebels-Duggan, *Philosophy Compass*, «Kant's Political Philosophy,» 7:12, Dec. 2012 for an overview of these arguments and the positions that commentators have taken on this question.

But to the extent that these are problems with questions of right, they are not limited to questions of right; *all* aspects of people's interactions with one another are indeterminate and depend on people's unilateral judgment. There are unending ways in which people's actions and choices unilaterally interfere with others' pursuits. Why limit the establishment of an authoritative adjudicator to just questions of right? Matters of right are important, but they are not necessarily more important than other aspects of social life, and settling disputes about the margins of their application is not necessarily the most important aspect about them. Family relationships, friendship, and so on are also of paramount importance in people's lives involving complex questions of people's relations to each other whose answers are indeterminate, and that require reliance on people's unilateral judgment for their resolution. Why doesn't this wrongfully subject people to one another's choices? Kant does not provide an account of people's needs or interests that he aims to protect; all that matters is the innate right to freedom on his view. But if this is what matters, what determines the bounds of right? Why do these questions, and not other aspects of social life, require authoritative determinate resolutions?

Kant's insistence on the establishment of a public adjudicator makes more sense if freedom as independence is conceived as a juridical ideal, realized only in the civil condition, under authoritative laws demarcating the bounds of right, and an authoritative adjudicator applying them to particular circumstances. In particular, what people gain when they exit the state of nature and submit to an authoritative body for settling disputes about right is an authoritative pronouncement on what constitutes a question of right, and which interferences with people's choices and pursuits fall within a person's free exercise of right, and which violate the free exercise of others. This is needed in order to release people from potentially unending subjection to the actions and choices of others that, for Kant, give rise to the problem of right.

IV.

The problem of right arises for Kant from the fact that people «cannot avoid living side by side with all others.» (6:307) People's physical proximity to one another of course makes them more vulnerable to attack. But that is not the only problem they face. Even if people are perfectly good, their ends and aims might conflict. This problem generalizes however.

The problem of people living «side by side» is not that people are physically bumping into one another; if this were all there was to the problem, people could just spread out. Kant aims to protect not just people's bodies, but their ability to move about freely and their interests in using moveable objects to further their ends. But the only natural limits on people's ability to do this is the presence of other people, and physical impediments to freedom of movement. It is the fact that space is finite, not that there is not enough of it, that gives rise to the problem. The fact that one person is using an object or moving about in space limits the available

actions for all others; the fact that people cannot avoid living side by side thus places *some* constraint on what people can do in pursuit of their ends. The physical continuity between people in space thus gives rise to the problem of politics, whether or not people are actually bumping into each other.[25]

Kant illustrates this difficulty nicely in his discussion of private property. Any individual person's acquisition of any object constrains everyone else's ability to use it. But this can't make rights in external objects impossible. Kant argues that it must be possible to acquire property rights in objects; holding otherwise would put usable objects beyond people's reach. There must therefore be some way that people can acquire rights in external objects so that each can better realize her right to freedom. Kant therefore posits the Postulate of Practical Reason with Regard to Rights, holding that «it is possible for me to have any external object of my choice as mine.» (6:250)

We can extrapolate from this discussion to the problem of politics more generally. People's shared occupation of the finite surface of the earth means that any action that a person takes limits everyone else's ability to occupy the same space. People must therefore establish some standard for demarcating those actions and choices that people make rightfully, and releasing them from constraint by all others' choices. From the point of view of nature, there is no way to distinguish between those actions and choices that wrongfully interfere with the freedom of others and those that are within a person's rights. What is needed then is some authoritative standard specifying the limits of the freedom of each consistently with the freedom of all is. Such a standard could release people from their natural subjection to all of the choices and actions of all others. The juridical conception of freedom supplies this.

V.

This juridical conception of freedom helps to make sense of Kant's explanation of his aim in introducing the three authorizations in right. Kant offers an explanation for his aim in introducing a division within right that perhaps obscures more than it illuminates.[26] He writes,

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[25] Would the problem of politics be solved if each person lived on her own individual planet in space? Perhaps, since space is infinite, giving people infinite space between them. On the other hand, there is still physical continuity between people, they just have more space between them. This might be no different than enlarging the earth's surface indefinitely. In any event, I believe the problem is too farfetched to be helpful in this scenario.

[26] Kant notes that the innate right of humanity «already involves the … authorizations, which are not really distinct from it» (6:237) the innate equality of all persons («independence from being bound by others to more than one can in turn bind them,» (6:237f)) hence each person's right to be her own master. It also contains («involves») the right to be *beyond reproach* («since before he performs any act affecting rights he has done no wrong to anyone»);[26] and the authorization to do to others anything that does not in itself diminish what is theirs, so long as they do not want to accept it. (6:238)

This passage is dense and receives little elaboration, and I will not attempt to explain it here. Indeed, Kant's explanation of the aim of introducing this division into right is

> The aim of introducing such a division within the system of natural right (insofar as it is concerned with innate right) is that when a dispute arises about an acquired right and the question comes up, on whom does the burden of proof (*onus probandi*) fall, either about a controversial fact, or, if this is settled, about a controversial right, someone who refuses to accept this obligation can appeal methodically to his innate right to freedom (which is now specified in its various relations), as if he were appealing to various bases for rights. (6:238)

Kant is here arguing that his point in developing the notion of innate right in this way is to provide people with a standard to which they can appeal (he can appeal «methodically to his innate right to freedom») as if he were appealing to various bases for rights when disputes about the factual bases for people's rights, or the rights themselves arise. Innate right vindicates the equal and distinct standing of each to choose and act for herself, separate from her particular needs, desires, or interests and the particular needs, desires, etc. of the people around her.

Again, this raises the question of why the primary function of a principle of right is to settle disputes. Even more puzzling, why would it be to relieve people from shouldering a burden of proof? This seems to be, at best, an ancillary question. Kant's answer is helpful if we understand the innate right to freedom juridically, as I am suggesting. The principle of right, and the divisions contained in it can settle controversies between people «as if [they] were appealing to various bases for rights» so far as once people establish an authoritative system demarcating the bounds between people's rights, a person can appeal to these «methodically» to settle disputes («we are equals (you have no more right than me, you are not my superior,…);» «I am beyond reproach;» «I acted within my rights») as if «he were appealing to various bases for rights.» No further argument needs to be advanced beyond appeal to the authoritative pronouncement of right.

This juridical conception of freedom as independence is also reinforced by Kant's understanding of its opposite, slavery, in his discussion of right. It is of course impossible for Kant for a person to literally make herself the slave of another since one must be a person in order to have legal standing to enter into such relations in the first place, resulting in a contradiction.[27] If people's actions and choices

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also obscure and receives little explanation. It can be argued that Kant is referring here not to his aim in introducing the three authorizations of right, but rather the general division of rights that he draws at the beginning of the section, where he distinguishes between rights as systematic doctrines (which is itself divided into natural right and positive or statutory right), and the division between innate and acquired right. (6:237) I find this interpretation of his explanation less plausible though as I don't see how the explanation he provides illuminates this division. I thus interpret the passage as explaining the three authorizations already involved in right. But this passage is opaque and I don't purport to have a complete explanation of it. My comments are meant in an interpretive spirit.

[27] Kant explains that «no one can bind himself to this kind of dependence, by which he ceases to be a person, by a contract, since it is only as a person that he can make a contract.» (6:330)

potentially affect the freedom of all others to act, then a theory of right must provide an account of which actions violate the innate right of others or their freedom as independence. Kant's account of slavery helps to fill in the conceptual notion of denial of a person's freedom, even if it is juridically impossible.

Kant explains that no human being in a state can be without dignity, since all human beings have at least the dignity of being a citizen.[28] (6:329) The only exceptions are criminals. Once imprisoned, a criminal must let the state have his powers for any kind of work it pleases (6:335) in order to earn his upkeep. He is thus reduced to the status of a slave (6:335), or, Kant explains, made a «tool of another's choice.» (6:330) A person is another's tool when he is made subject to the will of another, either as a thing to its owner, or as a servant to a master (as in the case of a criminal who is divested of his civil status). He might contract away his powers unto despair and death, attach himself to soil or property, as a serf; serve himself up for surety for a bond, as a bondsman, etc. All of these would involve divesting oneself of one's personality. An owner can exchange or alienate a slave as a thing, or use him at her will, except, Kant explains, for «shameful purposes,» and dispose of the slave's powers at her will, though not her life or members. (6:330)

Notice that these relations are all juridical. Contracting away one's powers, selling oneself into slavery, attaching oneself to property or serving oneself up for surety are legal, not natural relations. Bad treatment, abuse, physical violence and coercion though wrongful, do not constitute enslavement, and even a benevolent master denies his slave her innate right to freedom, regardless of the scope of material freedom and comfort he provides her. The wrongfulness lies in the relation of ownership of another, something that can only be realized in a civil condition. Making oneself a «tool of another's choice» is therefore a juridical relation – one that is impossible, to be sure, but juridical nonetheless.

What counts as denying someone's innate right to freedom is therefore an act of law; mere natural dependence on the choices of others in the state of nature is not a denial of their freedom. My suggestion is that so too is releasing people from their natural dependence on the choices of others, and vindicating their innate right to freedom a juridical notion; it requires authoritative standards for demarcating the bounds of people's rights, and their independence from the actions and choices of those around them. The state of nature may be more or less harmonious, and people may or may not be capable of pursuing their interests, and warding off threats from others in the state of nature. But they are only *free* to be their own masters, free from constraint by the unilateral choices of others under authorized institutions guaranteeing this freedom. People have a *right* to freedom as independence innately, but it requires authorized institutions to give it effect.

[28] Presumably, in the cosmopolitan sense as a citizen of the world.

The account I offer is closely related to Philip Pettit's republican conception of freedom as non-domination.[29] Freedom as non-domination consists in the freedom from the possibility of arbitrary interference by another.[30] Like freedom as independence, it is realized only under an authoritative state securing this freedom. Pettit argues that freeing people from subordination requires putting procedures in place forcing those with power to act in their interests, and providing those with less power meaningful avenues of recourse should they fail. It requires constitutional procedures guaranteeing institutional protection of subjects' interests, including procedures providing people redress for abuse, holding those with power accountable for their actions and for imposing penalties for violations. The state is a protector of freedom when it is structured so as to reliably track the interests of the public,[31] whatever they are,[32] and decisions are open to contestation and revision by the public, should people's interests change.

This solution to the problem of subjection to the wills of others wouldn't do for Kant. Indeed, if this was all there was to state power, then people would continue to be unfree under the state for Kant. The mere fact that the state reliably protects people's interests is not what guarantees their freedom. It is the fact that it provides *authoritative* standards for action (backed by the authority to coerce) that relieves people from subjection to one another, not the fact that the state protects their interests. Kant insists that only a general, common will can issue coercive laws freeing people from their subjection to the unilateral wills of others.[33] As we know,

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[29] Philip Pettit develops his account of freedom as non-domination as an alternative to familiar conceptions of positive and negative freedom. Domination consists in subjection to another's unchecked power. Victims of domination are subject to the «arbitrary sway» and the «potentially capricious will or the potentially idiosyncratic judgment of another.» Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997), 5. [Hereinafter «Petit, *Republicanism*.»] This understanding of freedom provides an elegant explanation for why the slave of a benevolent master remains unfree, something with which proponents of these other views struggle. The overlap with Kant's view is important and illuminating, but a detailed discussion would lead me too far astray. For an excellent discussion of the similarities and differences between these approaches, and the advantages of Kant's conception of freedom, see Louis-Philippe Hodgson, *Ethics,* «Kant on the Right to Freedom: A Defense,» 120 (July, 2010): pp. 791-819.

[30] See especially Pettit's discussion in his introduction, *Republicanism*, pp. 5-7.

[31] Particularly, it must track the public, non-factional interests of the public. Pettit, *Republicanism*, p. 56.

[32] These are determined on the basis of the particular circumstances of the community. Pettit, *Republicanism*, p. 57.

[33] Kant develops this argument most clearly in the context of his discussion of acquired rights, and the need for a state in order to secure something external as one's own. Ownership of external things poses a problem for Kant, because in claiming something as one's own, a person unilaterally puts all others under an obligation to refrain from interfering with it. But this subjects all others to her unilateral will. Kant thus argues

> a unilateral will cannot serve as a coercive law for everyone with regard to possession that is external and therefore contingent, since that would infringe upon freedom in accordance with universal laws. So it is only a will putting everyone

people's interests, and their protection and promotion play at best a secondary role in Kant's political philosophy. The establishment of some group or body empowered to use force to protect people's interests would constitute just another form of subjection, or domination, for Kant. It is only if the standards for behaviour, and the exercise of coercion are issued from an authorized source – that is, from a general will – that people are free from subjection to one another for Kant. This is why the defect of the state of nature is the absence of an authoritative standard for settling disputes.

VI.

So conceived, freedom as independence is an artifact of law, for Kant. It is a freedom that is conferred by law, and it is wholly explained by law. This makes Kant's political philosophy seem like nothing more than a product of his formalism. If freedom as independence has no value at all outside of Kant's formal system, then what moral basis is there to his political philosophy in the first place? I will close by arguing that notwithstanding its formalism, freedom as independence gives effect to an important aspect of responsibility, namely, responsibility as public accountability.

As we have seen, political philosophy, for Kant, is a response to the fact that people «cannot avoid living side by side with all others.» To exist is to influence and be influenced by the existence and activities of all others. From the point of view of right, every action a person takes affects the possible actions available to every other person. Law systematically demarcates the bounds of each person's right of free action that she can take, free from interference by all others, subject to the like freedom of everyone else, under a universal law.

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under obligation, hence only a collective general (common) and powerful will, that can provide everyone this assurance. (6:256)

Importantly, a bi- or multi-lateral will is still unilateral so far as it is not properly constituted to reflect the will of all. («For a unilateral will (and a bilateral but still particular will is also unilateral) cannot put everyone under an obligation that is in itself contingent; this requires a will that is omnilateral, that is united not contingently but a priori and therefore necessarily, and because of this is the only will that is lawgiving.» (6:263)) It is only under a common, general will uniting the will of all a priori that a person's unilateral actions can put all others under an obligation, under a universal law. ([33] «But the *rational title* of acquisition can lie only in the idea of a will of all united a priori (necessarily to be united), which is here tacitly assumed as a necessary condition *(conditio sine qua nan);* for a unilateral will cannot put others under an obligation they would not otherwise have.» (6:264)) It is thus only so far as standards demarcating the bounds of right are issued and upheld by an authorized body that they can give effect to right and free people from subjection to the choices of others. See Katrin Flikschuh, *Kant and Modern Political Philosophy*, (Cambridge, UK: Cambridge University Press, 2008), ch. 5 (pp. 144-178) discussing the role of the general will in Kant more generally.

This is not simply an artificial problem that is a product of Kant's formalism. Where to draw the bounds of people's rightful actions in their interactions with one another, and how to divide the consequences of people's actions organize questions of responsibility as accountability in general. And there is a very natural tradition of treating these as primarily questions for law.

Tony Honoré discusses of our practices of holding people publicly accountable in detail. They are an inescapable aspect of our interactions as persons. Honoré argues, «agents are responsible because the behaviour is theirs. They have intervened in the world and changed it. Their conduct is the cause of that change.»[34] It is because people's actions and choices have natural consequences that we hold one another accountable for them. These practices are central to our interactions as persons. It is what distinguishes our actions and choices from other natural events in the world. Honoré explains,

> For outcome allocation is crucial to our identity as persons; and, unless we were persons who possessed an identity, the question of whether it was fair to subject us to responsibility could not arise. If actions and outcomes were not ascribed to us on the basis of our bodily movements and their mental accompaniments, we could have no continuing history or character. There would indeed be bodies and, associated with them, minds. Each would posses a certain continuity. They could be labeled A, B, C. But having decided nothing and done nothing these entities would hardly be people.[35]

The fact that people actions and choices have natural consequences for one another gives rise to the fact that they have moral and political significance too. It is by according these consequences and interactions moral significance that we interact with one another as persons in the first place. If the fact that people cannot avoid living side by side gives rise to the problem of politics, then, it also generates the need for holding one another accountable.

Kant does not put his point in terms of questions of responsibility and public accountability. But the problem of public right and freedom as independence from another's choices is just the flip side of the question of when we can hold people accountable. And like questions of right, questions of accountability are very often understood as ordered by law. This is not to say that there are not independent questions of moral responsibility that arise separately from people's legal accountability for their actions. Rather, it is that when we think about questions of moral responsibility, very often we understand it in terms of law.[36]

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[34] Tony Honoré, «Being Responsible and Being a Victim of Circumstance,» in *op. cit.* p. 122.

[35] Tony Honoré, «Responsibility and Luck,» in *op. cit.*, p. 29 (footnote omitted)

[36] Honoré, again, arguing for the significance of legal notions of responsibility on ascriptions of moral responsibility.

> There are three sources of human responsibility. The primary one is our responsibility for our own conduct. Then there is the responsibility for other people, things and events that we choose to take on. Lastly, there is the responsibility that society thrusts on us, either informally or through the law, for example

Most importantly, Kant provides an account of the authority of the state to hold people publicly accountable and to authoritatively demarcate the bounds of people's free action. In drawing his foundational distinction between attributive and accountable aspects of responsibility, Gary Watson argued that accountability

> is not just a matter of the relation of an individual to her behavior; it also involves a social setting in which we demand (require) certain conduct from one another and respond adversely to one another's failures to comply with these demands.[37]

Ascriptions of accountability are ineliminably social. Holding a person accountable necessarily implicates not only the actor being held accountable, but the person or group *holding* her accountable, and the shared standards and mutual expectations involved in the ascription of responsibility. These shared standards fix the standards governing the behaviour of members of the moral community as it relates to the other members, beyond of questions of the attributability of an action to an agent. A person might make life decisions – career choices, choice of friends, how to spend her money, etc. – that reflect badly on her character. One might say she sold out, is cowardly, is overly indulgent etc. Here she is responsible for her actions in the sense that they are attributable to her and impugn her character and her choices. But it would not be appropriate to *hold her accountable* in the sense of answerable to others or the community for her actions. It is not so much that her actions do not affect those around her – they might – but, they are not subject to the shared standards of the community.[38]

Crucially, ascriptions of accountability license various responses by members of the moral community. [39] Questions of authority run through responsibility as

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> responsibility to one's family and community. If these three sources are kept in mind, some false ideas can be nailed at the outset. One is that we are responsible only for our own behaviour; a second that we are responsible only when we are to blame; a third that we are responsible only when we choose to be. None of these is true. Being responsible for our own behaviour is the primary example of responsibility but not the only one. A person can be both responsible and legally liable for something they have not done. An employer can, for example, be vicariously liable for the act of an employee. Nor is this a legal quirk. People can be morally responsible for the behaviour of others. Parents can, for example, be morally responsible for the way in which their children behave even when they are not legally liable for it. In that case the person who is morally responsible should act somewhat as if the responsibility were legal. If the children have broken the neighbour's window they should pay for the damage. This is one of the many ways in which morality, as conceived in western culture, follows the legal model.

Tony Honoré, «Being Responsible and Being a Victim of Circumstance,» in *op. cit.*, p. 126.

[37] Watson, «Two Faces of Responsibility,» in *Agency and Answerability*, (Oxford, UK: Clarendon Press, Oxford University Press, 2004), p. 262.

[38] Watson, «Two Faces of Responsibility,» in *op. cit.* p. 266f.

[39] Jeffrie Murphy writes,

accountability. There are questions of who sets the standards, who interprets and applies them, who enforces them and imposes sanctions for violation, and so on. At the heart of ascriptions of accountability lies the question, «who is to judge?,»[40] meaning, who has authority to make such ascriptions? Subjection to standards of blame and accountability represent a «continuous attempt […] to recruit people into a deliberative community that shares ethical reasons.»[41] Only those with authority to impose standards that are authoritatively binding on members of the shared moral community have standing to issue such judgments.

Kant's political philosophy organizes these questions. Kant places the question of the bounds of people's free interaction and the conditions under which they can be held to public account at the centre of his political philosophy, and makes the establishment of a public body authorized to issue such decisions the first question for political philosophy. By solving the problem of independence from the choices of others and the authoritative demarcation of the bounds of right, Kant gives effect to this ordinary notion of public accountability, one that orders many of our interactions with one another. Far from being an artifice of Kantian formalism, then, establishing the juridical bounds of people's free interaction with one another is fundamental to ordering people's interactions in space.

This understanding of freedom as independence as a distinctly juridical notion thus helps to illuminate a distinctive aspect of freedom, namely the freedom that is realized under a system of law, demarcating the bounds of public accountability that people bear to one another, and empowering them to engage in juridical relations with one another. This is freedom-enhancing so far as it enriches the kinds of relations people can enter into with each other, even if it is not maximizing freedom in the sense of some independent, non-juridical value.

> when we engage in the activity of imputation we often do so, not merely to satisfy intellectual curiosity or otherwise to amuse ourselves, but rather to set in motion powerful institutional and psychological mechanisms—mechanisms of blame and condemnation, of stigmatization and ostracism, of resentment and hatred, and—in the law—of such coercive state responses as criminal punishment.

«Cognitive and Moral Obstacles to Imputation,» in *Character, Liberty and Law: Kantian Essays in Theory and Practice*, (Dordrecht, The Netherlands: Kluwer Academic Publishers, 1998), p. 43.

[40] See Jeffrie Murphy, citing Kant, taking this to be as central as questions of the agent's responsibility in matters of accountability. *op. cit.*

[41] Bernard Williams, «How Free Does the Will Need to Be?,» in *Making Sense of Humanity and Other Philosophical Papers 1982-1993*, (Cambridge: Cambridge University Press, 1995), p. 29. Such attempts rest on a fiction that these reasons are always available to the agent, but ascriptions of blame and responsibility in this sense rest on this fiction nonetheless.