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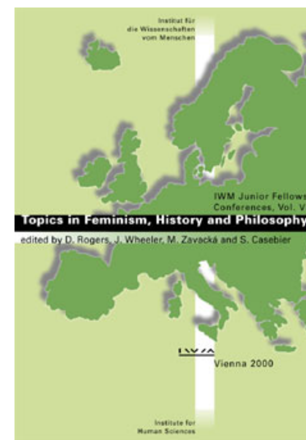


# Revisiting the Problem of Non-Coercible Rights in Kant's Legal Philosophy

by Joshua Wheeler

## *Setting Out the Problem*

Immanuel Kant is not known for mincing words. Normally terminological and grammatical complexity cloak a philosopher in the safety of multiple interpretations. With Kant, however, these two salient features combine with a third, namely systematicity, and tend instead to push him further out on a philosophical limb. Nowhere is this more apparent than in his moral philosophy, where one encounters such terms as 'categorical imperative' and 'apodeictic'. The most notable example of Kant's stringency is perhaps the desert island case from the *Rechtslehre.*[1] Kant writes:

[1] The "Rechtslehre," or "Doctrine of Right," is part one of Kant's two part *Die Metaphysik der Sitten,* "The Metaphysics of Morals." Unless otherwise indicated, the German text used is: *Kant's gesammelte Schriften,* Prussian Academy ed., vol. 6 (Berlin: Georg Reiner, 1907; 1969). Unless Otherwise indicated, all English translations are from: Mary Gregor, trans. and ed., *The Metaphysics of Morals,* Cambridge Texts in the History of Philosophy, eds. K. Ameriks and D.M. Clarke (Cambridge: CUP, 1996). Wherever possible, citation of English transla-

> Even if a civil society were to be dissolved by the consent of all its members (e.g., if a people inhabiting an island decided to separate and disperse throughout the world), the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve and *blood guilt* does not cling to the people for not having insisted upon this punishment; for otherwise the people can be regarded as *collaborators* in this public violation of justice.[2]

After reading such a passage, one might be tempted to side with Schopenhauer, who said that this book is "not the work of [Kant], but the product of an ordinary common man;"[3] to agree with Hannah Arendt when says that "if we want to study the philosophy of law in general, we shall certainly not turn to Kant but to Pufendorff or Grotius or Montesquieu;"[4] and, in short, to dismiss Kant's *Doctrine of Right* altogether. Such a response, however, would be a mistake, for it would ignore the substantial impact that Kant's legal writing has had on Western legal and political thought. Hannah Arendt thinks that "to inquire into Kant's political philosophy has it difficulties [because] unlike so many other philosophers [Kant] never wrote a political philosophy.[5] In her *Lectures,* Arendt moves from this debatable fact to her attempt to construct, or reconstruct, Kant's political philosophy. This move has problems. First, in order to be assured of the former, she must dismiss the importance of the *Rechtslehre.* Second, in dismissing this book, and in her reconstruction generally, she understates the profound connection, for Kant, between freedom and morality on the one hand, and law and civil society on the other.

Leaving Arendt's interpretation to one side for the moment, there are serious reasons to think both that Kant made an original contribution to political philosophy and that this contribution has influenced significantly subsequent Western legal and political thought. As Leslie Mulholland puts it in the introduction to his book *Kant's System of Rights*: "Political and social philosophers who wish to provide a theory of rights that, as Ronald Dworkin has put it, takes rights seriously, often find

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tions will be accompanied by the corresponding reference to the Prussian Academy (AK) edition.

2 Gregor, *Metaphysics of Morals,* 106 [AK 6:333.17–25], emphasis added.

3 Quoted in Hannah Arendt, *Lectures on Kant's Political Philosophy,* ed. Ronald Beiner (Chicago: University of Chicago Press, 1982), 8.

4 Ibid., 8.

5 Ibid., 7.

themselves driven back to Kant for a moral basis that is adequate for the purpose."[6] Closely related to this point is that Kant's natural-law justification of political rights has proved to be seminal both for subsequent natural law and positive law theorists, not to mention political theorist generally.[7] Secondly, as Keneth Baynes argues, most ethical Constructivism—whose great recommendation is that it provides normative grounds for social and political criticism, while simultaneously avoiding the dual pitfalls of foundationalism's dogmatism and relativism's insecurity—finds its roots in Kant.[8] The third, and perhaps subtlest, point emerges from a reading of Onora O'Neill's book *Constructions of Reason.*[9] In her book, she makes the case that (American) society needs to return from its ultra rights-centered view of politics to a more obligation-centered conception of politics in order to prevent the extinction of wide duties, e.g. charity, from the political life. What interests us is the unstated corollary to O'Neill's argument, namely, that Kant's moral justification or rights, and later writings drawing on it, have been so successful at defending rights—even to the point of making them unassailable—that rights have been divorced from their correlative obligations. Thus, since talk about rights is so prominent in the current political climate, it seems almost unnecessary to have to point out that it is unjustified to dismiss out of hand Kant's *Rechtslehre,* which is his most systematic and most sustained discussion of rights.

At this point, we have defended the appropriateness of investigating Kant's so-called "unwritten" political philosophy and, with the introduction of the rights-duties distinction, just begun to examine the technical details of Kant's theory of rights. Before proceeding further, then, it is appropriate to sketch out the general plan of this paper. What is fortunate is the we can further elaborate on the rights-duties distinction at the same time as we outline the paper's argument. For Kant, rights and duties are correlative. In other words, what it means for someone to have 'a right' is that someone else has an 'obligation' (or 'duty') to the right-bearer, and 'the right' of the former is the 'title to coerce' the performance of the duty by the latter. Now, a productive way to think about any distinction, is to consider the case

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6 Leslie Mulholland, *Kant's System of Rights* (New York: Columbia University Press, 1990), 1.

7 The following is only a sample of the myriad legal philosophers and jurists who have struggled with Kant's thought, whether they agree with it or not: Reinhart Brandt, Ronald Dworkin, John Finnis, H.L.A. Hart, Roscoe Pound, and John Rawls.

8 Kenneth Baynes, *The Normative Grounds of Social Criticism: Kant, Rawls, and Habermas* (Albany, N.Y.: State University of New York Press, 1992).

9 Onora O'Neill, *Constructions of Reason: Explorations of Kant's Practical Philosophy* (Cambridge and New York: Cambridge University Press, 1989).

where it breaks down: Within this discussion, we are looking for someone who only has rights, but no duties, or vice-versa. Although this scenario contradicts Kant's general theory of rights, this is precisely the position he takes with regard to the distinction between sovereign and subject.

> Hieraus folgt nun der Satz: der Herrscher im Staat hat gegen den Unterhan lauter Rechte und keine (Zwangs-)Pflichten [AK 6:319.19–20].[10]

More interesting still is the conclusion Kant makes from this principle, namely, his categorical prohibition against rebellion and revolution. It is this problem that we shall proceed to analyze in the remainder of this paper. First, we will examine the basis and development of Kant's theory of right in general. Secondly, we will consider the formulation of Kant's views on rebellion and revolution, with an eye towards how consistent the latter is with the former. And, lastly, we will examine how any inconsistencies that may be found might be explained or resolved.

(Note: This contribution is a fragment of a work in progress.)

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10 "Now follows therefrom the proposition: the ruler in the state [i.e., the sovereign (as opposed to the supreme executive, or "Oberbefehlshaber")] has against the subjects only rights and no coercible duties. My translation.