KANT AND THE ETHICS OF TAXATION

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Abstract

In this article I address the normative basis Kant provides for taxation. There exists a significant literature already that applies "Kantian" principles to the understanding of taxation but it does so in a limited way that shows little grasp of the structure of Kant's ethics. Here I set the justification of taxation Kant provides in the setting it requires prior to treating his account of different types of justified taxation. The relationship between Kant's ethics, his political theory, and his view of taxation thus becomes clearer. Subsequently I treat at some length the degree and nature of Kant's view of redistributive taxation before concluding with a discussion of some implications for views of redistribution in contemporary political philosophy.

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The discussion of the normative basis of taxation tends to fall into two parts with one part concerned with the possibility of justifying taxation *as such* and one part concerned with specific taxation policies, particularly with the question of the ethical ground for redistributive forms of taxation. There is a third type of discussion that is occasionally also engaged in, which concerns the justifiability or otherwise of principled resistance to taxation,

which latter concern is a specialized part of the theory of civil disobedience.[1]

I will touch on all the first two elements of the ethical discussion of taxation in this article but there is a question, which is prior to any of them in principle although it is rarely raised. This is the question of the relationship between discussions of taxation, however conducted, and ethics as a generic inquiry into standards of justified conduct. The general absence of this question is part of the tendency of social and political theorists to fail to provide an account of the relationship of political institutions to ethics. It is, however, an important part of Kant's philosophy of right to establish a ground on which the question concerning what it is that is right is related back to supreme governing principles of ethics. Further, it is this specific focus of Kant that enables recourse to his theory in a way that promises a unified approach to the more specific questions raised at the beginning of this paragraph.

If these considerations indicate a rationale for looking at Kant's views on taxation they also show a need to place his views within the wider context of his ethics and in so doing to provide the basis for a philosophical approach to taxation that relates it carefully to foundational questions of political theory. In this article I will endeavour to chart a course between Kant's own theory and contemporary interpretations of it.

The interpretations that are current in the secondary literature either begin by moving directly from foundational ethical principles to an account of taxation, incorporating thereby Kantian insights into a wider theory that is only partially Kantian or they refer to the primary Kantian texts on taxation but for purposes that are not clearly those which Kant himself had when he explicitly discussed taxation. The structure of this paper will be dictated by a response first to some of these contemporary readings prior to providing a more detailed response to the specific considerations that Kant himself is concerned with, both in his philosophy of right

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[1] Given the length of this article and the number of topics raised within it I don't here discuss the notion of civil disobedience with regard to taxation here.

and in the limited, but revealing, discussion he especially provides of taxation. Subsequently I will provide prospectus for an account of how Kant's view of taxation is connected to contemporary disputes concerning whether redistributive taxation is philosophically justifiable.

Contemporary Applications of Kantian Ethics to the Justification of Taxation

There are two types of application of principles of Kantian ethics to the justification of taxation in current literature that is devoted to public policy assessments of behaviour with regard to taxation. One type of response is to invoke certain kinds of avowedly "Kantian" principles in relation to variations of games theory and/or social choice theory. On these lines, for example, Jean-Jacques Laffont (1975) considers a form of rational universalization of maxims that is explicitly modelled on Kant's Formula of Universal Law where this is understood in the following way: "we postulate that a typical agent assumes (according to Kant's moral) that the other agents will act as he does, and he maximises his utility function under this new constraint".[2]

The purpose of this approach is simply to figure out ways of expanding altruistic behaviour so that tax evasion is capable of being minimised. This type of research does not overtly consider either whether or if there is a basic normative rationale for taxation in the first place; it simply assumes that the general public good is forwarded by taxation and tries to provide scenarios that would consist in expansion of the presumed altruistic motivation involved in agreeing to pay it. The reference to "Kantian" principles is here also left at the most general level with the reference to universalizable maxims simply assumed to provide the privileged

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[2] Jean-Jacques Laffont (1975) "Macroeconomic Constraints, Economic Efficiency and Ethics: an Introduction to Kantian Economics" *Economica* 42:4, pp. 430-1.

basis of Kant's theory and no real problems considered in its application.[3]

Laffont's "Kantian" principle has been objected to on the grounds that it makes unrealistic behavioural assumptions and implies "unconditional commitment" or, in other terms, assumes that beneficence is a sustainable pattern of behaviour even without reciprocity. This criticism led to a modification of the principle so that the benevolent behaviour assumed fits more standard characterisations of rational choice.[4] Such a modification of Laffont's original formulation still belongs within the same logic as the original proposal and does little to directly challenge the view that Laffont has characterised "Kantian" principles correctly.

The modified form of Laffont's view was directly applied to the analysis of tax evasion by Bordignon (1993) who claims that it produces the assessment of fairness in regard to taxation policy of the following sort: "a taxpayer considers it fair to pay his Kantian tax if and only if he perceives that everybody else does the same and that he revises his desired payment otherwise".[5]

This conception of fairness with regard to the tax burden is one that seems a plausible reading of a lot of empirical reasoning with regard to taxation and to indicate some of the bases of tax evasion as a justified behaviour from people who otherwise claim high moral standards. However, regardless of its possible empirical plausibility, it is a large step away from the original construal of

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[3] Laffont does, however, indicate the following reservation: "heterogeneity of people creates great difficulties for the definition of modes of Kantian behaviour" (437). This point indicates that Laffont takes the normative notion of universalization to seriously apply given some important constraints on whom one is dealing with, and hence does not easily show, in an empirical way, that the "Kantian constraint" has the universal power in application that the argument might, up to this point, have persuaded one that it did.

[4] For this modification of Laffont's principle see Robert Sugden (1984) "The Supply of Public Goods through Voluntary Contributions" *The Economic Journal* 94: 376, esp. p. 774.

[5] Massimo Bordignon (1993) "A Fairness Approach to Income Tax Evasion" *Journal of Public Economics* 52: p. 350.

Laffont and also one that appears to vitiate the general point of Kant's ethical theory as the latter is self-consciously "rigorist" in standards and explicitly sets up a problem, in the examples of the *Groundwork*, with acting in ways that involve making exceptions to a general rule for oneself.

So Bordignon's conception, whatever its other merits, seems a long way from a plausible interpretation of a Kantian view of duties of taxation. Since Bordignon is, in any event, part of a response to the question of taxation that does not attempt to provide any general duty of taxation based on a presumed normative good standing of the practice of taxation, it clearly does not address the basic question of whether there is a Kantian ground for the *practice* of taxation.

If the first type of response to Kantian principle with regard to taxation couches the former in terms that are deemed appropriate for forms of rational choice theory, the other kind has, rather, related questions of justification of taxation policy to arguments grounded on part of the import of Kant's Formula of Humanity. Like the first set of responses I have already previewed this second type of view still tends to take the principal point of reference for Kant to be direct appeal to the categorical imperative in some form and hence to view taxation policy as something the judgment of which Kant would have seen mainly through the veil of his ultimate ethical principles rather than in terms of his philosophy of right.

Robert W. McGee thus appeals to the Formula of Humanity in response to graduated income taxes suggesting that Kant's formula would have led him to oppose such forms of taxation on the grounds that they involve treating some people as means to the ends of others.[6] Whilst McGee does not directly state this, it appears the logic of this argument, like that of Bordignon, is that

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[6] Robert W. McGee (2012a) "Four Views on the Ethics of Tax Evasion" in R.W. McGee (ed.) (2012b) *The Ethics of Tax Evasion: Theory and Practice* (Springer: New York & Dordrecht), p. 16 and see also p. 25 where the same argument is made again.

taxation relationships that appear subjectively unfair are ones that there could be principled resistance to on the behalf of tax-payers and that the principle in question is even Kantian. [7] There are, as I will argue below, some good reasons to doubt this argument has serious Kantian pedigree.

The Categorical Imperative and the Structure of Kant's Moral Theory

The appeal made to formulas of Kant's categorical imperative in the discussions of taxation mentioned above is problematic for a number of different reasons. In this section I aim to lay out a consideration of the structure of Kant's moral theory that sets out both some important questions concerning the interpretation of the categorical imperative and also present some first reasons for thinking that neither of the formulas reported as appealed to in the discussions above are suitable for providing a Kantian view of taxation. The account of the moral theory given in this section of the paper will not, however, provide a *positive* account of Kantian principles that *are* applicable to the consideration of taxation, as that will be deferred until a subsequent section.

There are three basic objections to the type of procedure that has been shown to exist with regard to the invocation of "Kantian" principles in reference to the understanding of taxation. The first concerns the way that these principles are taken directly from Kant's foundational works on morals and directly applied to considerations of taxation policy and appraisal of behavioural patterns. The second concerns the basic indifference displayed within such treatments to the specific way Kant discusses taxation as part of the philosophy of right, an omission that is the direct consequence of the first problem.

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[7] For a slightly different argument to the same effect, which uses this time a version of the Formula of Universal Law, see Robert W. McGee (2012c) "An Analysis of Some Arguments" in Robert W. McGee (2012b) p. 53.

The third problem is that even were it allowable on Kantian terms to directly apply principles of foundational ethics to the formation of policy considerations, this would still bypass the central question of the justifiability of taxation as such. The last point is tacitly assumed with it only being a matter of dispute as to whether any justification of taxation that Kant does provide can extend to redistributive taxation. These points are essentially connected but, prior to answering them, I want first to demonstrate that, even if they were to be disregarded, there would be little ground for the types of approach adopted in the literature surveyed.

Assuming that there was a basis for applying foundational Kantian ethical principles directly to discussions of policy the question would still remain as to how these principles themselves are to be understood. Unfortunately, the extensive disputation that exists within the secondary literature on Kantian ethics does not display the assurance that appears to be felt by those applying Kantian principles to questions of taxation policy and behavioural analysis. There are two levels of problem at this stage, firstly, with regard to the appropriateness of specific principles and their interpretation and secondly with regard to the understanding of what types of application they are fit for. I will tackle these points in this section.

Kant's investigation of foundational ethical principles is undertaken in two of the works of his Critical period, the *Groundwork for the Metaphysics of Morals* and the *Critique of Practical Reason* and both contribute some essential elements that need to be considered in terms of what types of principles Kant formulates, how he defends them and to what he takes them to be applicable. The *Groundwork* is the earlier of these two works and in it Kant states he has the intention of providing a "search for and establishment of the *supreme principle of morality*" adding that this is "a business that in its purpose is complete and to be kept

apart from every other moral investigation" (Ak. 4: 392).[8] That Kant intends this work to have such a specific focus is central to its interpretation.

The search for the "supreme principle of morality" leads Kant, in the second part of the *Groundwork*, to the statement of what he terms the "categorical imperative" which is intended to represent "an action as objectively necessary of itself, without reference to another end" (Ak. 4: 414). The "mere concept" of such an imperative is also taken to be sufficient to provide us with its formula, a formula that contains the "proposition which alone can be a categorical imperative" (Ak. 4: 421).

The basic formula of the categorical imperative is then presented in its classic form as: "*act only in accordance with that maxim through which you can at the same time will that it become a universal law*" (Ak. 4: 421). This is known generally as the Formula of Universal Law and is the principle that was invoked by Laffont in his description of a "Kantian constraint" on behaviour. There is a sense in which the principle is intended to constrain behaviour by setting a universalizability test for maxims and the nature of the test in question is demonstrated by Kant's subsequent recourse to examples. Before looking at the examples, however, a key and somewhat vexed question of Kant interpretation has to be stated.

This concerns the problem that although Kant has just argued that there is, as he puts it, a "single categorical imperative" and, that this appears to be found in the formula just stated, a subsequent multiplicity of formulas appears to be invoked by him.[9] Immediately after stating the Formula of Universal Law,

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[8] Here and throughout, as is standard with all Kant's works other than the *Critique of Pure Reason*, I will refer to pagination by reference to the Prussian Academy edition of his works.

[9] Quite how many formulas Kant subsequently gives in the *Groundwork* is a matter of some dispute. H.J. Paton (1947) *The Categorical Imperative: A Study in Kant's Moral Philosophy* (University of Pennsylvania Press: Philadelphia) presents a case for Kant having five different formulas. Philip Stratton-Lake

Kant modifies it and it is the modified form of it that is related to the examples he gives of how to test the universalizability of a maxim.

The modified form of it is termed by Kant the "universal imperative of duty" and states: "*act as if the maxim of your action were to become by your will a universal law of nature*" (Ak. 4: 421). It is after the modification of the initial formula by reference to this inclusion of the notion of a "universal law of nature" that Kant appeals to examples. However, prior to looking at the examples Kant gives, I want to draw attention to some of the key reasons why Kant modifies the initial formula before applying it to duties as some of the implications of this modification do have importance for the subsequent articulation by Kant of principles of right even though, for reasons I will go on to discuss, the latter principles are importantly distinct from the foundational principles of ethics discussed in the *Groundwork*.

The move from the Formula of Universal Law in its basic sense to the modification of it that Kant allows as providing a link to duty is one that is not seriously explained in the *Groundwork* and it goes by so quickly that it is not surprising that the distinction between these two statements of universal law does not always merit comment.

In the *Critique of Practical Reason*, however, Kant not only repeats the transition from the basic statement of the Formula of Universal Law to this modified form, he also there sets the move out as part of a consequence of applying a procedure within practical philosophy that mirrors one performed in theoretical philosophy. This procedure is known as "schematism" by which concepts that are purely a priori are made fitting for experience.[10]

(1993) "Formulating Categorical Imperatives" *Kant-Studien* 83: pp. 317-40, by contrast, argues for only three formulas. There is an extensive literature on this topic, however, which it is beyond my purview to address here.

[10] The discussion of this process of schematization is a highly involved part of Kant's philosophy and it cannot be treated here. For an account of how it is part of the practical philosophy see Gary Banham (2007) "Practical Schematism, Teleology, and the Unity of the *Metaphysics of Morals*" in Kyriaki Goudeli (et

In the *Critique of Practical Reason* the modified form of the reference to universal law is stated slightly differently from in the *Groundwork* as, in the latter work, Kant situates it as a "rule of judgment under rules of pure practical reason" and presents it in a hypothetical form: "ask yourself whether, if the action you propose were to take place by a law of the nature of which you were yourself a part, you could indeed regard it as possible through your will" (Ak. 5: 69).

In this hypothetical formulation the point of the modification of the basic reference to universal law becomes much clearer. Firstly, it enables Kant to make more manifest the nature of the test that reference to universality involves, which is one in which a question about willing is asked. Not only is this reference to willing made explicit here but when Kant goes on, in the *Critique of Practical Reason*, to apply the modified form of the universal law to treatment of the same examples mentioned in the *Groundwork*, he here runs the examples in question together in order to pose some questions that rise above the specific cases of each of the examples. We can see this in the following citation:

> If *everyone* permitted himself to deceive when he believed it to be to his advantage, or considered himself authorised to shorten his life as soon as he was thoroughly weary of it, or looked with complete indifference on the need of others, and if you belonged to such an order of things, would you be in it with the assent of your will? Now everyone knows very well that if he permits himself to deceive secretly it does not follow that everyone else does so, or that if, unobserved, he is hard-hearted everyone would not straightaway be so toward him; accordingly, this comparison of the maxim of his actions with a universal law of nature

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al) (eds.) *Kant: Making Reason Intuitive* (Palgrave Macmillan: London and New York), pp. 1-15.

> is also not the determining ground of his will. Such a law is, nevertheless, a *type* for the appraisal of maxims in accordance with moral principles. If the maxim of the action is not so constituted that it can stand the test as to the form of a law of nature in general, then it is morally impossible. (Ak. 5: 69-70, emphases in the original.)

The examples that are here considered are set into a general picture by means of the device of thinking of the maxims underlying the given cases as potential candidates for applying to the way nature is itself structured. This imaginative device is one that Kant invokes in order to make clearer some questions about the possibility of a maxim being a moral one. There are three features of the notion of a "law of nature" that Kant uses here to bring out a practical test for maxims. Firstly, a law of nature has a universal application but it is not merely something that applies universally, it also does so *of necessity*. In other words, a law of nature is an *unconditional* law. So if a maxim were to be of the form that it could pass for a law of nature it would have to include this unconditional element within its form. Now, if a maxim being taken to have this unconditional character presents us with a problem this is taken by Kant in his test to demonstrate that it lacks moral possibility. So the maxims in question cannot, if they are to meet Kant's test, be ones that we adopt only on occasion or in special circumstances.

So the first effect of the appeal to the device of the law of nature is to show that the form of maxims that would be morally possible is one that cannot be purely particular. Not only is this the case, however, but laws of nature are also laws that are *public* in character. In adopting maxims of *secret* deception and *unobserved* lack of beneficence we are not *actually* comparing the maxims of our action with the law of nature. This lack of *actual* comparison permits resort to a way of reasoning grounded on viewing the maxim that is being followed as one that is alright, as far we are

concerned, precisely given that it is *not* going to be universally followed.

It is, in other words, the case that such maxims are ones that are grounded on practices of deception and contain reasoning that is intrinsically incapable of being revealed to others if it is to have the desired effect. This *publicity criterion* is stressed by John Rawls in his account of the device of reference to the law of nature as showing that acceptable precepts are ones we should view as "belonging to the public moral legislation" of a moral community.[11]

Alongside this *publicity criterion* Rawls also follows the implications of the unconditionality notion involved in the reference to universal laws of nature by indicating that the types of laws required as possible moral ones should be understood as being a permanent part of the equilibrium of the social whole they belong to. In other words, there is, alongside the *publicity criterion* a *perpetuity condition* for possible moral maxims. This latter condition specifies essentially that the form of the maxim in question has to be one that we could view as a settled and enduring part of the composition of the social world but given the *publicity criterion* that we already derived from the reference to the law of nature is one that has ruled out maxims of certain form we can be clear that whatever would not fit this could also not be taken to be fitting to be perpetually established.

Even without looking yet at Kant's other formulas it should already be evident that the direct application of the universality test to considerations of public policy, if attempted, could not secure the type of results discussed in the previous section of this article. It could not, that is, legitimise an attitude towards taxation or any

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[11] John Rawls (2000) *Lectures on the History of Moral Philosophy* (Harvard University Press: Cambridge, Mass and London), p. 171.

other public policy that was grounded on opting out of a generally recognised good for subjective reasons.[12]

Rawls' interpretation of the modified form of Kant's reference to universal law enables the test that this law has for maxims' moral possibility to be seen as one that relates morality fairly clearly to the shape of a possible social world. So it is not that foundational principles of Kantian ethics are without relevance for conceiving of social conditions. This does not entail, though, for reasons I will discuss in the next section, that it is possible to directly apply foundational ethical principles of a Kantian kind to the formulation of considerations of public policy.

Kant does not conclude his treatment of formulas, however, by merely modifying the Formula of Universal Law in the way sketched. Rather, Kant also invokes further considerations that lead to other formulas also being provided. The next formula that is discussed after the account of universalization in the *Groundwork* is the Formula of Humanity to which we saw McGee (2012a) appealed. The interpretation of this formula is, however, especially vexed.[13]

The reason why Kant appeals to this formula is due to his attention to the basic structure of willing, the notion that we saw emerged as important when the reference to universal law was considered in its modified form. Willing is a process of end-setting and this notion of end-setting leads to Kant describing the

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[12] Problematic in its own way as Lakoff's account of Kantian principles is, the modification of it by Sugden is one that ensures that any link back to foundational Kantian ethical principles has been clearly severed.

[13] I should not, however, imply that there are not considerable difficulties and complexities with regard to the discussion of universal law. For a description of some classic difficulties thought to plague the application of Kant's account of universal law see Richard Galvin (2009) "The Universal Law Formulas" in Thomas E. Hill (ed.) (2009) *The Blackwell Guide to Kant's Ethics* (Wiley-Blackwell: Oxford and New York), pp. 52-82. It would be a matter for a different article to assess whether the difficulties that are classically raised for the formulas of universal law should, however, be taken to be as central as Galvin and many others take them to be.

difference between types of ends. Generically ends that require reference to something that is taken as pre-given material are termed by Kant "hypothetical" ends. Hypothetical ends have clear worth but the kind of worth they possess is relative to the acceptance of the goal to which they are related. This indicates that hypothetical imperatives require a kind of means-ends connection in which the end is *good-for* something.[14]

Before contrasting the ideal notion of the hypothetical imperative sketched in the above paragraph with the reasoning at work for Kant in the categorical imperative it is worth following Christine Korsgaard in making some distinctions within the account of goodness.[15] If something being *good-for* something is a form of instrumental goodness, it is not correct to contrast this notion, as is often done, with that of intrinsic goodness since something could be both intrinsically good and yet also instrumentally good (education appears to possess both these characteristics for example).

Instrumental goodness is correctly contrasted not with intrinsic goodness but rather with final goodness where the latter is not a form of good that can be related to in a fungible way. The incomparable character of a final good is what ensures it cannot be exchanged and a final good is a type of good that cannot be aggregated. If final goods are what contrast to instrumental goods, extrinsic goods contrast to intrinsic goods.

Intrinsic goods are good in themselves but this does not mean that an intrinsic good is thereby also a final good. It is common, for example, to think of art works as intrinsically good in

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[14] The account given here of the notion of the hypothetical imperative is a generic one. For an argument for approaching it in this way see Thomas E. Hill, Jr. (1973) "The Hypothetical Imperative" *The Philosophical Review* 82:4: pp. 429-50.

[15] Here I am condensing the account given in Christine M. Korsgaard (1983) "Two Distinctions in Goodness" in Christine M. Korsgaard (1996) *Creating the Kingdom of Ends* (Cambridge University Press: Cambridge and New York), pp. 249-74.

the sense that the goodness they possess, if they do possess any, is not one that comes from something extrinsic to themselves. This does not, however, entail that art works are thereby to be viewed as final goods since there are goods that can be seen to be higher in value even though the value of art works is not derived from something beyond themselves.

So intrinsically good things can still be regarded as lesser in value than other things given that the magnitude of value that is related to in the notion of a final good is of a different type to that described in an intrinsic good.

Having made these distinctions we can return to the characterisation Kant provides of what he terms an "end in itself" in his Formula of Humanity. When describing this notion of an "end in itself" Kant determines it as a final good since he describes it as having an "absolute worth" that is contrasted to the relative worth that attaches to something that is the subject of a hypothetical imperative.

However, it is not only that Kant characterises the "end in itself" as having an absolute worth and thus determines it as a final good. In also describing this end as having its worth "in itself" Kant also determines it as intrinsically good. So two forms of value are united in Kant's conception of the "end in itself" and this has some significance. The "end in itself" is for Kant a "person" and since the person has final value they cannot be used "merely as a means", that is, purely instrumentally. Similarly, since they have intrinsic worth, their existence is "in itself an end". This is what leads Kant to state the Formula of Humanity in the way he does: "*So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means*" (Ak. 4: 429).

The Formula of Humanity thus combines two forms of value in one and in doing so imposes on us at least two requirements in following it. These would be what we could term the *mere means requirement* on the one hand and the *respect requirement* on the other. The *mere means requirement* is the element of the Formula of Humanity that is commonly picked out

of it and which we noted in the previous section was emphasised by McGee (2012a) in his connection of the formula to considerations of taxation and specifically used by him as a basis for disagreement with redistributive taxation.

This requirement is grounded on the *final value* attributed here to persons. By contrast the *respect requirement* of treating others with respect, a requirement that is less explicit in the formula than the *mere means requirement*, relates not to the *final value* of persons but rather to their *intrinsic* value and is given some specific emphasis by Kant in the Doctrine of Virtue. Separating these elements of the Formula of Humanity out ensures that the distinct forms of goodness recognised in the formula can be maintained as analytically different even though the formula is also pointing to the intimate connection between these forms of goodness in the case of persons. It also helps to see how Kant emphasises distinct forms of goodness in his characterisations of applications of the Formula of Humanity.

To see the way the division of emphasis between these two requirements works for Kant it is enough to note how he looks at the four examples of testing maxims by reference to the Formula of Humanity. Kant uses the same four examples as were mentioned by him when he invoked the modified notion of universal law but he divides these four examples here with regard to the two forms of requirement that arise from the Formula of Humanity. With the first two examples (which relate to maxims concerning suicide and lying promises) Kant emphasizes the mere means requirement and indicates the moral impossibility of certain kinds of maxim on the basis of this appeal.

Notably, however, in the context of treating the case of lying promises, Kant also implies a relationship of the mere means requirement to the notion of *possible consent* and here refers explicitly as well to the example of "attacks on the freedom and property of others" as based on contravention of the mere means

requirement.[16] The notion of "possible consent" involved is one that connected to the sense that such consent requires reference to the non-fungible notion of the other person. The connection of this point to the reference to attacks on freedom and property is left opaque by Kant at this point, however, and will require further commentary subsequently. That Kant connects freedom and property to the mere means requirement here, however, is likely the basis of a comment like that given by McGee (2012a) in opposition to redistributive taxation.[17]

The key point about the reference to the mere means requirement is made when Kant passes on to the two examples that invoke the respect requirement. When opening his account of the duty to develop one's talents Kant states that with regard to what he terms "contingent (meritorious) duty" it is "not enough that the action not conflict with humanity in our person as an end in itself, it must also *harmonize with it*" (Ak. 4: 430).[18] The difference is that whilst the first two types of duty are consistent with the mere "*preservation* of humanity", that the second two types of duty require also the "*advancement* of this end" (Ak. 4: 430).

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[16] On the basis of this reference to "possible consent" Parfit (2011) suggests that there is a *consent requirement* that is specifically distinct from the *mere means requirement* even though it is clearly invoked in the case of lying promises in connection with the mere means requirement. Parfit also, in developing this notion of consent moves towards a very particular conception of "consent" that is far removed from any that Kant explicitly adopts or, in my view, could possibly allow. But this point would require a separate discussion as would Parfit's dismissal of the idea that there is a *respect requirement*.

[17] For reasons that will become apparent later the true means of assessing Kant's response to the question of redistribution is grounded on the understanding of a certain right that is explicitly discussed in the philosophy of right and not on this comment though it would be of interest to treat this comment elsewhere.

[18] The duty of development of talents is a "contingent (meritorious) duty" to oneself whilst that of beneficence that follows is a similar duty to others and in both cases Kant is forwarding the case that there is a duty here that requires going beyond the mere aim of not conflicting with humanity in our person and requires the further positive sense of harmonizing with this.

The difference could thus be presented as that between "negative" and "positive" duties so long as it was understood that this is not parallel to a distinction between duties of commission and omission. Both kinds of duty command positive actions but the duties of the former sort are strictly required for moral personality to be whilst the latter two are, rather, duties that forward the development of this personality and thus show *respect* for it. With regard to the moral personality within oneself the failure to develop talents shows disrespect for one's powers and is equivalent to treating oneself with contempt. The other kind of duty that is mentioned here is a duty towards others, which involves beneficence towards them and leads to viewing the ends of others as ones that one has a duty to promote.[19]

The key difference between the two requirements that emerge from the Formula of Humanity is thus that those that state the *mere means requirement* are essentially defensive of the moral personality in one's person and are thus *basic* duties whilst those based on the *respect requirement* are meritorious precisely in doing more than being defensive of moral personality. The duties grounded on the *respect requirement* are duties which advance moral personality whether in oneself or others and in so doing have a character I will term "positive".

John Rawls is further helpful here in terming the duties of the *respect requirement* "capacities and skills to be developed by culture" as opposed to being grounded in the basic and essential characteristic of humanity, of mere possession of moral personality. Rawls, however, relates to the negative duties as

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[19] The scope and character of this duty of beneficence is one of the many difficult and fascinating questions of Kant's general moral philosophy. For three quite different treatments of this duty see David Cummiskey (1996) *Kantian Consequentialism* (Oxford University Press: Oxford and New York), Chapter 6, Richard Dean (2006) *The Value of Humanity in Kant's Moral Theory* (Clarendon Press: Oxford and New York), Chapter 8 and Barbara Herman (1984) "Mutual Aid and Respect for Persons" in Paul Guyer (ed.) (1998) *Kant's Groundwork of the Metaphysics of Morals: Critical Essays* (Rowman & Littefield: Lanham), pp. 133-64.

"duties of justice" and argues they require no more than "the mutual endorsability of the maxims governing our outer actions" so that we conduct ourselves in ways that are "publicly justifiable".[20]

Now we noted above that the modification of the initial universal law formula also helped to bring out a reference to publicity though not only to publicity but Rawls' emphasis on this with regard to the negative duties is not meant to state that the positive duties are not publicly justifiable but to instead suggest that the latter involves "a pure practical interest in associating with others" in the public endorsement of ends. It is the inclusion of such a sense of ends that marks out the second type of duty from the first.

However, Rawls' assimilation of the negative duties to duties of justice has some problems since, in fact, Kant treats the negative duties subsequently in *The Metaphysics of Morals* not as duties of justice but as perfect duties of virtue and viewing them as cases of justice would impose on the requirement, for example, of false promising, a burden that it could hardly bear. What is clear, however, in Kant's reference to rights of property and freedom in connection with false promising, is that there are some types of promise that can be viewed as cases of right and are thereby duties of justice.[21] The difference between justice and virtue is not

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[20] Rawls (2000) pp. 188-92 which, in adopting the view that the negative duties can be assimilated to duties of justice essentially follows Onora Nell (1975) *Acting on Principle: An Essay on Kantian Ethics* (Columbia University Press: New York).

[21] Kant's discussion of lying promises is extended also in his 1797 essay "On A Supposed Right to Lie From Philanthropy" where the emphasis should be on the term "right" not, as it usually is, on lying *per se*. For perhaps the best treatment of this question in the current literature see Jacob Weinrib (2008) "The Juridical Significance of Kant's 'Supposed Right to Lie'" *Kantian Review* 13:1, pp.141-70. A more extended discussion of how the "perfect" duties of virtue relate to the juridical duties of right would require another work, one which could distinguish between coercively enforceable duties of justice and juridical requirements that lacked the possibility of external coercibility.

presented within the pages of the *Groundwork* but is central to *The Metaphysics of Morals*, which is divided essentially into two works, the Doctrine of Right and the Doctrine of Virtue precisely in order to make this distinction central to Kant's way of marking the difference between political and generally ethical concerns.

Should the treatment of taxation or other matters of political concern be related to the Formula of Humanity it would require reference to one or other of the requirements I have described as having distinct force in Kant's general moral philosophy. McGee (2012a) treated taxation in connection with the *mere means* requirement and thus viewed it as relating to the *final value* of persons rather than their intrinsic value and as commanding a negative type of duty.

Viewed in this way, however, duties of taxation would not permit the lee-way that McGee (2012a) assumes could apply to them since such duties are strict in nature. McGee (2012a) utilises the reference to the mere means requirement to also rule out specific types of taxation but, as we will see later, the same requirement has been used by others to mandate precisely the types of taxation ruled out by McGee (2012a). At this point, however, the key point is less one of indicating whether or not the mere means requirement supports or undermines certain types of taxation and more one of indicating that the duties Kant is here speaking of are specifically not part of a developed philosophy of right in the *Groundwork*. When Kant does develop such a philosophy, as we will see, considerations of a different type to those involved in his foundational ethical principles are at work.

Before leaving the terrain of the general moral philosophy and turning to giving an account of the way Kant develops the philosophy of right it is useful to conclude with a key point of method in Kant's moral philosophy which we shall see to have importance later also in the philosophy of right where it is less frequently remarked. This concerns what Kant refers to in the *Critique of Practical Reason* as "the paradox of method" in the work and in his moral philosophy generally. This is to the effect that "*the concept of good and evil must not be determined before*

the moral law (for which, as it would seem, this concept would have to be made the basis) but only (as was done here) after it and by means of it" (Ak. 5: 62-3).

In Kant's moral theory we do not begin with something taken to be good and then frame moral laws in terms of this pre-given good. Rather the sense of what is viewed as good is based on the notion of the law and is arrived at by means of it. This is one reason why the Formula of Humanity (which includes, as we have seen, distinguishable notions of goods) is given subsequent to the formulas of universal law and, indeed, why the procedure of this latter formula has to be grounded on the form of law given in the previous formula.[22] To make this claim is to follow the argument of John Rawls that Kant's ethics involves what he has famously termed "the priority of the right over the good".[23]

Since what can be viewed as good is what correlates to the law and moral personality is the disposition that is shown precisely in following the law, the capacity of personality named in the Formula of Humanity is one we are able to arrive at precisely *after* having situated the law in the prior formulas of universal law. The procedural importance for this point in Kant's subsequent

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[22] In making this claim I am taking sides in a dispute within Kantian ethics that concerns not a mere verbal question about the relationship between formulas but has substantive import for the shape of ethical reflection. For the contrary view to the one given here see Allen W. Wood (2008) *Kantian Ethics* (Cambridge University Press: Cambridge and New York), particularly Chapters 4 and 5. And, for a view which is broadly consonant to that defended here, see Andrews Reath (2003) "Value and Law in Kant's moral theory" *Ethics* 114: pp. 127-55.

[23] For an extended treatment of the priority of the right over the good and for a distinction of it from "deontology" see Samuel Freeman (1994) "Utilitarianism, Deontology and the Priority of Right" in Samuel Freeman (2007) *Justice and the Social Contract: Essays on Rawlsian Political Philosophy* (Oxford University Press: Oxford and New York), pp. 45-74. John Rawls himself states this notion of the priority of the right over the good in several places in *A Theory of Justice*. See John Rawls (1971) *A Theory of Justice* (Oxford University Press: Oxford and New York), §§5, 6, 23, 26, 40 and 68. One of the key points concerning the link between Kant and Rawls turns precisely upon this shared feature of emphasizing the priority of the right over the good.

development of a philosophy of right will become apparent in due course.

Moral Philosophy and the Philosophy of Right

Kant's explicit attention to the questions of right occurs in the Doctrine of Right, the first half of his *Metaphysics of Morals*. There are a number of controversies concerning the interpretation of this work, both with regard to the relationship between the Doctrine of Right and the Doctrine of Virtue, on the one hand, and between the Doctrine of Right and the general moral philosophy on the other.

I will not here address the former set of questions.[24] However, whilst the question concerning the relationship between the general moral philosophy and the Doctrine of Right is one I will here tackle, there are dimensions of it that would require a more comprehensive account than can be given here.[25] All I will here attempt to show is that the basic foundational principles of the

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[24] For my view of them see Gary Banham (2007).

[25] There are two types of such question. One concerns whether or not Kant's view in the Doctrine of Right is equivalent to what John Rawls has termed a "comprehensive" view or not. For the view that it is not see Thomas W. Pogge (2002) "Is Kant's *Rechtslehre* A 'Comprehensive Liberalism'?" in Mark Timmons (ed.) *Kant's Metaphysics of Morals: Interpretative Essays* (Oxford University Press: Oxford and New York), pp.133-58. Pogge takes the question to turn on whether Kant's "liberalism" is one that "cannot be presented as anything but an integral part of Kant's philosophical world view" and argues that the view in the Doctrine of Right "does *not* presuppose either Kant's moral philosophy or his transcendental idealism" (p. 135). The relationship of the account of right to transcendental idealism would be a large issue that will not be visited here but I will be touching on questions about the relation to the moral philosophy. However the range of issues that could be involved in doing so is much larger than I will be treating and comprises the second type of question, one that is distinct from the "comprehensiveness" issue as it is more specific. For two views of this latter issue see Marcus Willaschek (1997) "Why the *Doctrine of Right* Does not Belong in the Metaphysics of Morals: On Some Basic Distinctions in Kant's Moral Philosophy" *Jahrbuch für Recht und Ethik* 5: pp. 205-27 and Paul Guyer (2002) "Kant's Deductions of the Principles of Right" in Timmons (2002): pp. 23-64.

Doctrine of Right are stated by Kant to have a relationship to the overall principles of his moral philosophy and to give some basis to this claim in order to subsequently look in more detail at what is specific to the principles of right.

In the "Introduction" Kant wrote to the whole of the *Metaphysics of Morals* he describes preliminary concepts that are applicable both to the consideration of right and virtue. Here Kant writes again about the categorical imperative, the central point of his moral philosophy, and describes it as representing an action as objectively necessary not through the relation it has to something else but "through the mere representation of this action itself (its form), and hence directly" (Ak. 6: 222).

The ground of its possibility, however, is that it refers to the property of choice that is generally termed "freedom". The supreme principle stated in the categorical imperative is, however, one that determines maxims according to their ability to be adopted as universal law, just as we found to be the case in both the *Groundwork* and the *Critique of Practical Reason*. However, whilst this much links the Doctrine of Right to the general moral philosophy there is also an important difference between the two, one which concerns not the basis of the law itself but rather the motivation to act in accordance with it, a distinction Kant explains thus: "That lawgiving which makes an action a duty and also makes this duty the incentive is *ethical*. But that lawgiving which does not include the incentive of duty in the law and so admits an incentive other than the idea of duty itself is *juridical*" (Ak. 6: 219).

When, in the first part of the *Groundwork*, Kant considered the idea of ethical motivation, he did so in a way that is essentially mirrored by the way the distinction between ethical and juridical lawgiving is determined in the "Introduction" to *The Metaphysics of Morals*. In the first part of the earlier work Kant described the case of a shopkeeper who charged everyone, including an innocent child, the same price for his goods, not because of the ethical demand that everyone be treated equally but only because of the prudent rationale that this would be best for business. Although, in

this case, the shopkeeper has certainly done nothing wrong, he has also not acted in a way that has what Kant terms in the *Groundwork* "moral worth".

However, put in the terms of the "Introduction" to *The Metaphysics of Morals*, we can also consider his case in a different way. The shopkeeper's actions have here conformed to juridical lawgiving as it is, after all, a law commanded by external legislation that governs trade that requires the shopkeeper to act in the way he has and this law has the structure of one that does *not* require the underlying ethical basis of such a law to be taken to be the motivation of the shopkeeper. So the shape of the juridical law is one that is akin to the reasoning imputed to him in the *Groundwork* case by Kant, namely, accordance with the law's requirements but on the grounds of an incentive other than that of duty itself.[26]

When we are engaging with Kant's general moral philosophy we can discern a problem with the actions of the shopkeeper in the case mentioned which is why Kant can determine that he acts in a way that lacks "moral worth", although, even here, that naturally does not mean that he has acted in a way that could simply be viewed as "wrong". When we are thinking about the philosophy of right, however, quite a different judgment is in order, though it conforms to that made in the general moral philosophy. In terms of the general moral philosophy we say of the shopkeeper that he acts *in conformity* with duty but not *from* duty and, when we are viewing the situation from the standpoint of right, this becomes the claim that the shopkeeper has acted in a way that is *right*.

This demonstrates that although the ultimate ground of obligation in the case of juridical lawgiving may well be the same

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[26] Kant discusses the case of the shopkeeper at Ak. 4: 397 and for an interesting recent account of this example see Marcia Baron (2006) "Acting from Duty (GMS I, 397-401)" in Christoph Horn and Dieter Schönecker (eds.) *Kant's Groundwork for the Metaphysics of Morals* (Walter De Gruyter: Berlin), pp. 72-92.

as for ethical lawgiving, that the difference in motivation is also part of a different way that judgments of certain kinds of action can be expressed even though they are consonant with each other. Kant summarizes the contrast thus: "The doctrine of right and the doctrine of virtue are therefore distinguished not so much by their different duties as by the difference in their lawgiving, which connects one incentive or the other with the law" (Ak. 6: 220). It follows from this that there are ethical obligations to perform right actions but that the kind of law which is stated in the notion of right is not itself one that commands adoption of the incentive to act in accordance with ethical obligation but provides, instead, a different kind of incentive by which action would still be right.

The Foundations of Kant's Philosophy of Right

Having clarified the basic kind of relationship the account of right possesses to the description of general moral philosophy it is now necessary to look at the ground of Kant's general description of right. Kant prefaces his description of forms of right with a general introduction to the Doctrine of Right and here the foundational principles of right are set out to which the rest of the doctrine has to fundamentally conform. Kant describes the concept of right as related to obligation by means of three characteristics. These are, firstly, that there is an external practical relation between persons inasmuch as their deeds have influence on each other. Secondly, right is concerned with the choices that relate persons to each other.

Thirdly, the relation to choice is not one that determines the matter of choice but only its form "insofar as choice is regarded merely as *free*" and, importantly, whether the actions of distinct persons can be united with each other freely in accord with a universal law. This threefold account is summarised in the following way: "Right is therefore 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" (Ak. 6: 230).

This summation could also be stated as saying that right governs external formal relations of choice between persons

insofar as their choice is free. Kant further specifies the notion of "free" choice here in terms of what can be effectively done by actors. This is done in two ways, firstly, by stating the universal or supreme principle of right and secondly by connecting this principle to an authorisation of coercion that determines the rightful basis of coercion.

The universal principle of right is stated in the following formula: "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" (Ak. 6: 230). The two ways of stating the universal principle of right are variations on the same point. The general determination of right is one that is immediately social and it is meant to determine the basis of rightful social interaction as one in which the nature of an action is taken to be allowable so long as it does not illegitimately curb the freedom of choice of others.

Now, the legitimacy of curbing the freedom of choice of others is next understood through the reference to universality and this important connection of free action with universality is what describes the manner in which we can see whether an action that would so curb the freedom of others would nonetheless meet the conditions of being allowable.

Should someone hinder action that meets the criterion of action by reference to the universal principle of action then, in so curbing this action, they have acted in a way that is *wrong*. Since it is actions that we are concerned with in terms of right we also further see its difference from general morals. In the case of right it is not the reference to the subjective determination of action that is our first interest. It is rather, and quite basically, the *action itself*. Actions that curb my action and do so in a way that does not conform to the universal principle of action are actions that are strictly wrong.

Not only are they so describable but the nature of this description can be restated as saying simply that wrong actions are ones that illegitimately curb actions of others. This point leads

Kant from the universal principle of right to an authorisation of coercion that he argues is based upon it: "if a certain use of freedom is itself a hindrance to freedom in accordance with universal law (i.e., wrong), coercion that is opposed to this (as a *hindering of a hindrance to freedom*) is consistent with freedom in accordance with universal laws, that is, it is right" (Ak. 6: 231).

The authorisation for coercion is that it relates to the self-consistency of universal right. The tests of the formulas of the categorical imperative in the *Groundwork* were tests of self-consistency of maxims in relation to universal laws and meant to show that the adoption of certain maxims was morally impossible. The authorisation of coercion is one that states a test with regard to right but does so in a different way with regard to the maxims tested in the cases examined in the *Groundwork*. The basis of the difference is simply that whilst, in the case of the *Groundwork*, it was maxims that were the issue, in the case of the Doctrine of Right, maxims are not strictly relevant, as it is rather actions themselves that are our concern.

Since it is actions themselves that are being regulated by reference to the supreme principle and certain kinds of action are such that they illegitimately curb the actions of others there is authorised the ability to curb these actions in turn as actions that are a use of freedom that is wrong.

This point is reinforced by Kant's reference to the notion of "strict" right, which is right that is "not mingled up with anything ethical" and thus requires *only* external grounds for determining choice. When we conceive of right in this way we can simply drop the reference back to general moral philosophy keeping in mind only that there is an ultimate basis for right in general moral philosophy but not expecting anyone to have their actions governed by reference back to it.

When right is stated in terms of this strict reference authorisation to use coercion becomes equivalent to right itself

(Ak. 6: 232).[27] Prior to now turning to how this general description of right allows Kant to state his own view about the justification of taxation there are two elements that need to be discussed that provide important context for it. These are, firstly, the basic treatment of property and possession that Kant gives, and, secondly, the relationship of this treatment to the distinction between private and public right that Kant provides.

Property, Possession and Private Right

Kant divides the main discussion in the Doctrine of Right into two halves, one concerned with "private" right and one with "public" right although the nature and justification of this division is not explicated by Kant until he begins to discuss "public" right. There are a number of topics that are dealt with under the heading of "private" right though the division between property, contract and "right over a person akin to that over a thing" encompasses the three major parts of the discussion.

However, prior to setting out any of these headings, Kant first has a general account of the notion of having something external as one's own that introduces the central points on which I wish to focus.[28]

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[27] Kant invokes an elaborate and interesting analogy subsequently that relates reciprocal coercion to an example from pure mathematics (Ak. 6: 232-3). However the authorization to use coercion could also be linked to the way Kant moves from the initial Formula of Universal Law to its specification by reference to laws of nature as that specification provided us with a reference to duties and the authorization of coercion likewise provides the real basis of duties of right.

[28] There are a number of interesting difficulties with regard to the specific later discussions, not least with regard to property and contract though these do not directly touch on the central core of the argument being developed here. In relation to property, see Kenneth Westphal (2002) "A Kantian Justification of Possession" in Timmons (2002) and in relation to contract see B. Sharon Byrd (1997) "Kant's Theory of Contract" *The Southern Journal of Philosophy* Vol. XXXVI, Supplement, pp. 131-53.

Firstly, Kant distinguishes between two different notions of "possession", a notion identified by him as the subjective condition of any possible use of something. The reason why there needs to be distinguished two senses of "possession" is to mark the difference between physical holding of something (which Kant terms "empirical" or "sensible" possession) on the one hand, and a claim to something as a matter of right despite its non-physical way of being held. The latter kind of claim is one that Kant terms "intelligible" possession.[29]

In beginning with "possession" however, Kant is tracing the claimed right that is manifested in property back to its ground in the bases of possessive holding. Since essentially possession of a merely physical sort is necessarily extremely limited in nature it follows that the right to property is grounded in intelligible, not merely sensible, possession.

One of the points about intelligible possession is that it states a claim that is not merely a priori as far as Kant as concerned, it is also *synthetic* a priori as it adds a concept that goes beyond that necessarily contained within the very notion of possession of something else and the possibility of this requires reference to a further principle than the universal principle of right. This further principle is what Kant terms the "postulate of practical reason".

The postulate states that it is possible to have an external object of choice as one's own but does so only on the grounds that denial of it would involve a contradiction with the notion of right itself. The key point here is simply that, given the universal principle of right, which concerns the form of action only, it follows that there can be no absolute prohibition against using an object simply because any such prohibition would make freedom inconsistent with itself. Since such inconsistency of freedom with itself is the general form of wrong as we have learned from the

[29] The way Kant has of marking this distinction relies upon transcendental idealism although the distinction itself does not and is one that could be clearly recognized in some form by most theorists of property.

combination of the universal principle of right with its authorisation to use coercion, it follows that removal of this hindrance to freedom is itself coercively justifiable.[30]

The right that is expressed through the conception of intelligible possession is one that relates not to "holding" in the sense of having under immediate control but rather to "having" in the sense of placing under a conceptual claim that has rightful force. One of the reasons for thinking of property as grounded conceptually in intelligible possession is precisely that such a form of possession establishes a form of "having" in relation to promises (as in contracts) and rightful relations between persons that are similar to those that persons express in regard to things (as when one "has" a marriage partner).

However, whilst the argument given is sufficient to show that there is a basis to property in intelligible possession, there is still something further required in order that the claim that is made in the case of intelligible possession be understood as right. This is the acceptance of the mutual reciprocity of the claim that right involves as "a unilateral will cannot serve as a coercive law for everyone with regard to possession that is external" since such a will would itself infringe upon universal freedom (Ak. 6: 256). So the rightful claim to property as grounded in intelligible possession is not one that authorises *individual* right in the sense of showing that the basis of the claim in question rests upon a status that belongs to individuals *qua* individuals.

Rather, the claim is one of *relation* and this relation is based on an acceptance of reciprocity of rights as the conclusive ground of the rightful claim. This points to something that goes beyond the claim of intelligible possession itself: "it is only a will putting everyone under obligation, hence only a collective general

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[30] Kant's discussion of the kind of cognition involved in intelligible possession relates it to the bases of freedom that can be derived from the categorical imperative and thus shows another connection to the general moral philosophy but does so only in terms of the way this general moral philosophy is grounded on a self-limitation of theoretical reason (Ak. 6: 252) so the connection is both very involved and quickly stated.

(common) and powerful will" (Ak. 6: 256) that provides assurance that the required reciprocity of relation is accepted. This is the reason why it is "only in a civil condition" that something can be externally rightfully claimed.

The notion of the "civil condition" belongs, for Kant, to the heading of "public right" and I will look in a moment at the ground Kant provides for it, since this is essential to grasping his account of taxation. However, just before doing so, it is important to clarify the relationship between "private right" and "public right" on Kant's account as it is essentially delimits not specific grounds of *authorisation* but rather specific types of possibility. The rights that are specified in the terms of "private right" are rights that are "possible" separately from the civil condition since the civil condition "secures" these rights rather than being what establishes them.

Another way of putting this is to say that the civil condition provides a "guarantee" or "assurance" that these rights will be reciprocally recognised but what this amounts to is only a conclusive establishment of the rights in question, not a statement that constitutes these rights *as* rights that are possible as such. The possibility of the rights that are stated in private right is grounded in intelligible possession, not in the civil condition. But, whilst this shows that the rights that Kant terms "private" rights are structurally derivable from something other than the civil condition, it is nonetheless the case that it is only *in* the civil condition that they can be rightfully claimed.

Even though one who claims in the state of nature a right of intelligible possession is doing something that conforms to the guarantee provided in the universal principle of right, such a person is nonetheless claiming this right unilaterally and hence their claim "has as little lawful force" as does that of those who deny him his claim. So, in a state of nature, all that can really be established, even though it has its ground in intelligible possession, is simple physical possession even though it also carries with it a presumption "that it will be made into rightful possession through

being united with the will of all in a public lawgiving" (Ak. 6: 257).

So what we can see from Kant's basic treatment of the elementary possibility of property being grounded in intelligible possession is that even physical possession, to be a claim of right, is a claim that goes beyond physical possibility and requires something further to have even presumptive legitimacy. However, the presumptive legitimacy it does possess in the state of nature is one that itself is stated in an essentially unilateral way and this unilateral status of it prevents it from having the actual status of being right that it presumptively embodies. So there is a clear problem with the claim that can be seen to exist in the state of nature and this problem points us beyond the state of nature to the civil condition.[31]

Before leaving the terrain of "private right" for the purposes of this argument, it is worth finally stating then that not only does Kant's argument here not ground the right that can be seen to be based on intelligible possession on individual status alone, it also does not ground any claim that relations that are purely conceivable within the state of nature alone are of a proto-civil kind. The *possibility* of certain right claims is given in a derivation from intelligible possession and such possession, considered purely *as* possible, is not grounded in the analysis of the civil condition.

Nonetheless, stating that this is so is not equivalent to saying that there is a *natural authorisation* of private right that separates it normatively from rights that are public in nature. The essential relation of the postulate of practical reason to the universal principle of right is one that exhibits the manner in which the possibility of intelligible possession can be seen to be based on a self-consistency of freedom.

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[31] The host of problems that beset claims made in the state of nature are set out in Arthur Ripstein (2009) *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press: Cambridge, Mass and London), Chapter 6.

However, private right alone is structurally insufficient to demonstrate that the claim made in the statement of intelligible possession includes the reciprocal guarantee that makes for right. And, without this guarantee, there is still something necessarily wrong even in a presumptively rightful claim. Given that this is so, private right is not a separate and distinct ground of authorisation for a specific kind of right.

Rather, right in general, including private right, is authorised fully (or, as Kant also puts it, "conclusively") only in the civil condition and this ensures that all authorisation of right belongs within this condition.

The Basis of Public Right

Having established that the rightful claim to intelligible possession that grounds property right is not established conclusively in private right but requires in addition public right, it is necessary now to see the grounds on which Kant justifies the civil condition. Central to this will be the question of how Kant articulates the right of the state to exist and the grounds for delimitation of this right that he provides since resolution of these points will be central to interpreting Kant's explicit treatment of, and justification for, taxation.

Now the basis of the civil condition's rightful claim is not, with regard to the basics of intelligible possession we have traced under the heading of private right, any different in its formal claim that was the case in the state of nature. The formal claim is the same in both since it refers in both cases to "pure rational concepts alone" (Ak. 6: 312). These clams, which are set out in the discussion of private right are not capable of having lawful establishment without reference to the "omnilateral" or "general" will and it is this which is added to them in the civil condition.

The basic laws of right that found the state are grounded on the same claims as those of private right. However, the state itself has its own form, a form that arises as that which is one capable of giving lawful establishment in a conclusive sense to the rights that

we already deduced from the form of the principles of right in the discussion of private right. The account of the state that Kant gives is through a "norm" that serves as the guide any actual union needs to be related to.

The basis of the state is "the idea" of a social contract, which, like the "norm" that is set up as the notion of the state, is not to be confused with something actual. The idea of this contract is the idea of the conversion of separate persons into a people so that citizens are created. In this contract there is an exchange that is undergone by those who have been transformed through it. The exchange is of "wild, lawless freedom" which is entirely foregone for freedom that depends upon laws, that is, upon the "lawgiving will" of the people.[32] It is an exchange grounded upon the "postulate of public right" that states that when it is impossible to avoid living alongside others then it follows that "you ought to leave the state of nature and proceed" to a rightful condition (Ak. 6: 307).

The essential case for the state is thus presented as the basis for realization of the rights that we have articulated in the area of private right (including, as the prime case, the right to property as grounded on intelligible possession). Now the realization of them was already conceptualized in the basic argument for right as inclusive of an authorisation for coercion in relation to actions that contravene the basic claim for free actions that are themselves

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[32] This reference to the "lawgiving will" echoes a formula of the categorical imperative I did not discuss in the previous section on Kant's general moral philosophy, the formula of autonomy. It is, I think, right to see the basis of the general will as founded on the collective autonomy of the persons who are transformed by it rather than viewing the formula of autonomy as a kind of echo of the general will as is done by Andrews Reath. See Andrews Reath (1997) "Legislating for a Realm of Ends: The Social Dimension of Autonomy" in Andrews Reath (2006) *Agency and Autonomy in Kant's Moral Theory* (Oxford University Press: Oxford and New York), pp. 173-95 and, for a reply to theories like Reath's, see Katrin Flikschuh (2009) "Kant's Kingdom of Ends: Metaphysical, Not Political" in Jens Timmermann (2009) (ed.) *Kant's Groundwork of the Metaphysics of Morals: A Critical Guide* (Cambridge University Press: Cambridge and New York), pp. 119-39.

rightful. So it follows that the state is the institution to which delegation of the authorised right to coercion has been transmitted in the constitution of the civil order.

If the state's idea is that it incarnates the general will then its lawful form is that it acts from this will "from which all right proceeds and which must therefore be incapable of doing wrong to anyone" (Ak. 8: 294). It follows thus that its legislative form has to be in accord with fundamental principles of right as defined through the basic concepts of private right.

The problem with the state of nature was not that we could not establish the central conceptions of right that would have to apply even within its province.[33] It was rather that we could find no way of ensuring that the conceptions of right so explicated would find a means of being authorised there due to the absence of any agreed upon common form of lawful authority. So it is *the form* of such authority that is given in public right. The laws of public right are only concerned with the "rightful form" of "association" or constitution, which shapes the form of public law and on which it is based (Ak. 6: 306).[34]

As Arthur Ripstein correctly states, the omnilateral will that is given form in the state "provides a form of choice, by providing

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[33] Taking this point gave me the argument that right is, in a sense, *de jure* even in the state of nature in Gary Banham (2007b) "Publicity and Provisional Right" *Politics and Ethics Review* 3:1, pp. 73-89. I am retaining the point that there is nothing wrong as such with the law that can be stated in private right and the accompanying point, made forcefully by Kant, that the condition of public right "contains no further or other duties of human beings among themselves" than the condition of private right did (Ak. 6: 306). Further, I think the earlier article's case, as stated with regard to international right, is still a good one but that it could be misleading if seen as a statement about right in the state as being based upon an authorization derived from private right.

[34] So the constitution sets the basic laws that provide the norm for all specific legislation and, as we have seen, the ground of this is here shown to reside in the means by which the authorization of the concepts of right can be given conclusive basis by providing them with the ground of such authorization in public law. So public right is the only ground of *authorization* of right. There is no separate private ground of authorization.

procedures through which laws can be made, applied, and enforced".[35] It follows from this analysis that the freedom whose protection and regulation is stated in the universal principle of right is essentially *constituted* through public law. Without public law there is no basis for the view that such freedom can be exercised since no authority exists that can ensure its exercise will be protected and furthered.

Once there is a public authority, by contrast, the exercise of such freedom is given its lawful form in an explicit and external way, providing with this external form the existence of incentives to act in accord with the universal principle of right as was stated already in the basic claim that right and the authorisation of coercion belong together. So, given that we have the authorisation for public law and that this law is one that can be related back to both the universal principle of right and to the rights specified under the terms of private right it follows that there is legitimate ground for state coercion to ensure that action that is not in accord with right is either prevented or deterred. This is sufficient to give us the basics of an argument for state regulation of action but it remains to be seen what basis with specific regard to taxation it provides as far as Kant is concerned.

Kant's Legal Order and Taxation

Before proceeding at last to Kant's specific discussion of taxation and considering its basis it is first necessary to outline the nature of the legal order on Kant's account. The reason for this brief detour is that elements of this order are specifically referred to in the presentation of the case for taxation that Kant gives. Not only is this the case but, given that taxation creates a form of required action that is evidently distinct from anything given in the account of private right, it may appear that Kant's justification of

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[35] Ripstein (2009) p. 196 who also rightly adds "the rule of law constitutes its authority by creating reciprocal limits on freedom through common institutions" (198).

the state is insufficient to provide a ground for the practice of taxation.

To pre-emptively provide grounds for response to such a view it is necessary to indicate how the legal order's basic constitution is to be understood on Kantian grounds. Kant describes the state, which, after all, is a state of law, as containing three authorities inside it: "the general united will consists of three persons (*trias politica*); the *sovereign authority* (sovereignty) in the person of the legislator; the *executive authority* in the person of the ruler (in conformity to law); and the *judicial authority* (to award to each what is his in accordance with the law) in the person of the judge (*potestas legislatorial, rectoria et iudicaria*)" (Ak. 6: 313).

The unitary will that has established the state is divided between three forms of expression in accord with the notion of law. This involves the division between legislature, executive and judiciary in which the first named is expressive of sovereign authority as most directly representing the united will that is the foundation of the ideal state. Neither is to usurp the authority of the other as each governs separate provinces of the legal order.

The *government* of the state is vested in the person of the ruler or executive who issues the directives that are administered by means of the recognised laws as interpreted and defined by the judiciary. But the separation of powers between the executive and judiciary is essential to the sense that we have a legal order and not despotism.[36] The separation between executive and legislature is

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[36] Kant generally characterizes despotism as a state that lacks legal form and this account of it ensures that it has few advantages over a state of nature as within it there is something like a large gang or criminal conspiracy which is exercising a unilateral and private authority over those who it "governs". The legal order that is mandated by Kant is, by contrast, a "republican" one. Kant defines this latter in the following way: "A constitution established, first on principles of the *freedom* of the members of a society (as individuals), second on principles of the *dependence* of all upon a single common legislation (as subjects), and third on the law of their *equality* (*as citizens of a state*) – the sole constitution that issues from the idea of the original contract, on which all

likewise essential to the sense that there is a legal order as the latter includes amongst its authority that of deposition of the former who is subject to its authority. Should the ruler be identified with the legislature it would follow that he had usurped its place. Similarly, if the distinction between executive and judiciary is not recognised it would follow that law was understood as only a private matter and not a public one and there would be a reversion to the form of the state of nature.

The form of the three powers and the division between them creates the constitution of public right, a constitution termed by Kant *republican*. It is within the conception of this division and in terms of its governance that Kant sets out the right of the state to taxation and provides, correlatively, a basis for the claim that there is a duty on citizens to pay taxes. The case for this is related closely back to the form of the legal order and the justification in general of public right and has to be tested in demonstration of its conformity to these principles which is why it was necessary to treat them first.

Kant discusses taxation in regard to three specific types of cases and the basis of his justification will be treated. The three types of cases are in relation to land, the need for police power (which is understood by Kant in a wide sense) and in relation to what he terms the "perpetuation" of the people, the last of which raises questions about redistribution. I will take the three cases in turn, beginning with the account of taxation of land.

Kant's Justification of Taxation of Land

After explicating the form of the legal order Kant turns to the "effects" of the social union and one of the first topics he discusses concerns the relationship of the sovereign to the ownership of land and his remarks here are very important, not just in relation to taxation but also in connection with what kind of

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rightful legislation of a people must be based – is a *republican* constitution" (Ak. 8: 350). The relationship between this view and that of Rousseau, and the differences between Kant and Rousseau as political theorists, would require separate treatment.

right property right really is when it is connected to public right. Understanding the status of property right in public right is, in fact essential to seeing the basis of Kant's justification for the taxation of property. The reason why Kant begins his account of taxation with an account of land is simply that the ownership of land is what makes possible the having of "external things as one's own" (Ak. 6: 323) so that intelligible possession in practice is founded on property in land. Property in land is the first and most basic instance of property as such.

Since this is the case, what relation does ownership in land stand with regard to the sovereign? If the point of institution of sovereignty is to guarantee and secure right as such and the prime instance of right is given in the power to own land then the sovereign must be that which ultimately has vested in it the regulation and governance of all land. This is why Kant writes that with regard to ownership of land: "all such rights must be derived from the sovereign as *lord of the land*, or better, as the supreme proprietor of it" (Ak. 6: 323).

The formation of the civil union constitutes not merely the citizenry and the legal order, it is all the basis of there being recognised proprietorial control of land. Since this is so the proprietorial control that is recognised is vested ultimately in the sovereign power itself. Another way of putting this is to state that the recognition of private ownership is founded upon the institution of public ownership and flows from it. Hence private ownership is parasitic upon public ownership and not the other way around.[37]

This claim is likely to seem counter-intuitive so it is worth stating the logic behind it. The institution of sovereignty does not create the rightful claim to property as we have seen from

[37] The conception that public ownership is parasitic upon private ownership is the basic conviction that guides libertarian thought and this conviction is grounded upon philosophical premises that are not Kantian but Lockean. The contrast between Kant and Locke on this matter will be examined briefly below in relation to contemporary political philosophy but would be worthy of extended separate discussion.

examining the notion of private right.[38] But although the rightful claim to property right is founded simply on intelligible possession the exercise of such right in a manner that is recognisably rightful requires, for reasons previously stated, the existence of a civil condition and this civil condition includes necessarily the sovereign power that formulates the way the property right is settled.

In instituting the legal order something has been created that is more than another private party as it exercises in practice a power that expresses the united will of all in stating, in accordance with the universal principle of right, the laws that are expressive of the freedom of all. For land to be divided between citizens as private property requires that land first be grasped *in its entirety* by the sovereign power. Only if the sovereign power first has entire disposal of the land can the legal recognition of private ownership be grounded on public right. Otherwise private powers would have a status equivalent to that of the public order and there would therefore be a conflict of powers, which would be no progress upon the state of nature.

So it is a conceptual necessity of the existence of public right that land be first held by the sovereign and thus that public ownership of property be logically and rightfully prior to private ownership. It has to be recalled, however, that the sovereign power in a rightfully constituted legal order is the legislature as the legislature expresses the general will.

Thus to claim that ownership of all land is given in a rightfully prior way to the sovereign power before being held privately is not to put another private person's claim ahead of that

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[38] Because of this claim it follows that Kant's account of property right is not a strict form of conventionalism. Kant does recognize that the ultimate basis of property right is natural, not conventional, in its claim but, whilst this is the case, the claim's guarantee and its formulation in practice, is founded on a legal order, not on a natural authorization. Kant's position is thus distinct from the conventionalism stated by Liam Murphy and Thomas Nagel (2002) *The Myth of Ownership: Taxes and Justice* (Oxford University Press: Oxford and New York).

of other private persons. The sovereign power is that which states the general will in its formulation of law by aligning law to the universal form of right. So the rightfully prior claim to ownership of land by the sovereign power is not a claim that arrogates it to anyone in particular. It is precisely because the claims of public right are *not* claims that are those of any particular party that we have arrived at a situation that supersedes the state of nature.

So the claim of the sovereign to rightfully prior ownership of all land is what creates the condition under which subsequent private ownership of land can be given. In simpler terms, the private ownership of land is something that is created if not in terms of basic right, still in terms of legal right and in terms of determinate particularity.[39]

The generic point that public ownership is the basis of private ownership does not lead to a claim of a private sort for the ruler since the ruler, *qua* ruler, has no property of his own and thus, as Kant puts it, "no estates for private use" (Ak. 6: 324). The ruler, like the sovereign legislature, possesses nothing at all if we think of their control as private or, rather, possesses only that which can be given privately under law to anyone. But considered as public, the ruler and the sovereign legislature are in possession of everything inasmuch as they relate to all in terms of right.

If property ownership in land is, however, entirely governed rightfully by the state then it also follows that any given private ownership is at the disposal of the state for uses that accord

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[39] This point about determinate particularity is another basis for the need for public right. Whilst the structure of private right allows for the understanding of how right in a basic sense has a form separate from the justification of public right, it is the case that the right stated at the level of private right has a high degree of generality and that public right is required for the determination of detail. Not only is this so in a general sense but the private right guarantee of the notion of property right is not itself sufficient to give a sense that there is private ownership. Considered purely at the level of private right the only property right that is guaranteed is a subsistence right coupled with a general right that there be property. It takes the statement of public right for property right to be generally given as a right for *private property*.

with right. Hence any given recognised private ownership can be dissolved by state order "provided it compensates" for this (Ak. 6: 324). So there is no perpetuity condition that can relate to any given private ownership of land, even should that private ownership be in the hands of a respected corporation such as the church: "The holdings of the church can be…revoked if public opinion has ceased to want masses for souls, prayers and a multitude of clerics appointed for this as the means for saving the people from eternal fire" (Ak. 6: 324). The holdings of the church are granted under law and can be revoked by law as "the reason for their possession hitherto lay only in the *people's opinion*" (Ak. 6: 325) and can lapse once that opinion has changed.

Given this account of the general dependence of private claims to ownership of land on a presumptive prior holding by the public power it is not surprising that Kant provides a basic justification for taxation of land. The justification provided rests simply upon the right of the sovereign power as rightfully first holder of the land in question. Given the land is presumptively public initially the gain made from private ownership or even the granted right to private ownership is a legitimate matter of public concern and thus open to public taxation.

So, on these grounds, Kant justifies not only tax on private owners of land but also "excise taxes and import duties" which fall on either the product of the use of land or the entry of that which will be turned to use on private ownership of it. Necessarily the taxation that is justified is one that has to be expressed through the instituted power of the general will: "This must…be done in such a way that the people taxes itself, since the only way of proceeding in accordance with principles of right in this matter is for taxes to be levied by those deputized by the people" (Ak. 6: 325). In such deputies there is, however, also granted the ability to extort revenue in ways that depart from recognised custom and to act in ways that involve "right of majesty" should the state be in serious danger.

Given this point it follows that the recognition of the need to safeguard the state has priority over the continued recognition of

limits to taxation on land should the will expressed in the legislature state this need has become imperative. It follows from this that land ownership as the primary case of ownership is not only granted at the behest of the sovereign power and under review by it but that taxation in relation to it is variable in accordance with the need of the sovereign power to guarantee its own perpetuity. This point leads on naturally to the general justification that Kant gives of taxation in regard to the police power of the state.

Kant's Justification of Taxation in Relation to the Police Power of the State

We saw at the conclusion of the discussion of the justification Kant provides for taxation of land the opening of a more general case for taxation. This more general case has two dimensions, one in terms of the functional governance of the state and its means of ensuring that conformity to law is provided with the appropriate external incentives on the one hand and the way it balances these incentives with certain types of establishment for some on the other.

The questions that arise with regard to the latter are particularly vexed and will be explored below. But before looking at those questions it is necessary first to look at a form of taxation that is generally accepted in some form by anyone who recognises the need for a state, even a minimal one. This is the form of taxation that relates to the need for a "police" power.

Police powers are generally those powers that ensure that rightful law is enforced and maintained. This way of stating the point shows that taxation in relation to police power is rightfully exacted as a means for maintaining the general order that exists in virtue of the legal system. However, there are two separate ways that the account Kant gives of taxation in relation to the police power is wider than might be expected. The first is that Kant connects the police power to a general right that the existence of the legal order entails to administration of "the state's economy, finances and police" (Ak. 6: 325).

In stating that the police power is part of the general right of administration Kant relates governance of the economy and finances to the maintenance of order, a connection that has implications for the later discussion of the grounds for perpetuation of the civil condition. Once we have a civil condition we have something other than relations of private right although we have got the relations of private right in a form that allows its relations to be instituted. What we have once the civil condition is given is the constitution of an economy.

There was, prior to the civil condition, no means of reliable settlement of relations since there was nothing to authorise such settlement. With the civil condition comes not just a way that private ownership can be determinately stated by means of legal form but with this a regulated possibility of transfers of such ownership as has been recognised. And this is nothing other than the economy in general.

As with land ownership, so, with the economy, the existence of it is rightfully grounded on the sovereign power's granting of relations that are settled in their possible manner by the way in which the state allows and regulates them. So the economy that is so granted form is one that has to be simultaneously regulated and thus taxed. The taxation of the economy is part of its possibility of existence since it is what provides the revenue that allows for its governance which governance is integral to its actuality.

Just as the economy is founded in and through the civil condition so, with the arrival of the economy and its taxation, emerges the need for the state's own finances to be regulated. Further, since the regulation of the economy was integral to its existence and justified taxation of it, so the finances that emerge from this for the state have themselves to be regulated in their manner of being managed and this requires further taxation to be extracted. The regulation of state finances is a central matter of public interest since the need of the state for such finances is essential to its perpetuation and thus there is a matter of general security connected to this.

Hence the extraction of taxation for the purposes of financing the regulation of state finances is related to the governance of the economy in general. Once these points have been drawn out it becomes clearer as well why it is that Kant relates the police power to the justification of administration by the sovereign power. The forms of regulation of the economy and the finances of the state are forms of policing of these parts of the civil order. Policing is thus correctly understood as a way of framing public administration as a general function since such administration has as its general end the rightful functioning of the legal order.

If Kant has extended the sense of policing in one way by relating it to the general administrative action of sovereignty, he extends it in another when he states what it is that the police power provides. The usual way of thinking about the police power is to take it as providing order but Kant's description of it is broader than this as he says that it provides: "public *security*, *convenience* and *decency*" (Ak. 6: 325).

Security is the generally accepted function of policing and this clearly enables the prosecution of private purposes since it safeguards them, if not always in a particular case, then in general. This general provision provides the overall background of all activity in the civil condition and since it does this it is not only the most manifest benefit of existence in the civil condition, it is also, and more importantly from the standpoint of right, the basic way that action in accord with right is secured through authorised coercion.[40]

Since this is so, taxation for the purposes of maintenance of the police power with regard to security is not generally

[40] In making this point in this way I am not merely repeating a point that follows from the previous argument but also distinguishing Kant's view here from those consequentialist arguments that ground recognition of the need for policing on a reference to "benefit". In stating such a view they depart from the basic ground of right, which is not one of "benefits" but rather the self-consistency in action of freedom.

controversial even if the form of Kantian argument that supports it is different from others that are often given.

The reference to the police power as inclusive of "convenience" is an addition to the basic need for security that is commonly recognised. Not only is this so but the notion of such "convenience" indicates a general way that policing operates *to facilitate* the civil condition, not merely to safeguard it. Maintenance and provision of the infrastructure of rightful relations is central to their efficient operation and generally requires state action, either directly through state provision or indirectly by means of regulation.

Either way requires policing through implementation of the rightfully mandated means of ensuring that such infrastructure operates to provide convenient means of rightful action taking place. Given that state action, in either possible way, requires revenue to be financed, there is a justification for taxation in regard to its operation.

The third part of the police power that Kant mentions involves "decency" and is perhaps the most controversial form of the police power since it is most open to abuse. However, whilst direct inclusion of this notion in the account of the police power is not initially obvious, Kant is very cautious about what type of activity should be viewed as open to policing in relation to this notion. So, although Kant discusses decency as related to conduct that "offends the moral sense", all that is included under this heading explicitly by him are incidences of begging, riot, public smells and prostitution.[41]

All these activities impede public space or make it unusable so they violate the universal principle of right by hindering

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[41] Begging is likely to be controversial to many but Arthur Ripstein provides a good general description of the problem it involves: "As a matter of private right, it is up to the passerby to decide whether to pay attention to the beggar. As a matter of public right, however, the beggar does wrong by appropriating public space for private purposes" (Ripstein, 2009, p. 263).

authorised forms of freedom.[42] As such, they are wrong and need to be policed and such policing, again, requires public finance and thus there is a basis for taxation with regard to this policing.[43]

Kant's Justification of Taxation With Regard to the Perpetuation of the Civil Condition

The final area in which Kant discusses taxation is the one that is related most closely to controversies in more recent political philosophy and is worth some attention with regard to Kant's specific arguments. Although the notion of "perpetuation" of the civil condition is one we have touched on already in terms of national security arrangements that may countenance unusual variation of taxation and even confiscation of property, it is not these topics that I am returning to here.

This is because Kant assumes that there are other matters that touch upon the perpetuation of the civil condition than just attack on it by enemies either within or without.

The argument Kant gives for what he terms an "indirect" right to impose taxes on the people for the sake of its own preservation is one that requires assessment both in terms of its nature and its extent. The majority of argument has concerned the *nature* of this "indirect" right for such taxation to be exacted but, as we will discuss in the next section, it is also necessary to work out the *extent* of the right claimed here.

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[42] With regard to prostitution a much more complicated and involved question arises given that the trade it involves could, and often is, carried out without much overt or manifest intrusion into public space. This general point indicates that the ground for legal action with regard to prostitution would require considerable work, work that Kant does not explicitly provide.

[43] Kant justifies another form of policing which includes the monitoring of organizations so that they are unable to secretly subvert the public well-being. Although this is treated by Kant as belonging to a different heading of policing (concerning inspection) it is, I think, really part of the general case for policing to guarantee security of the civil condition and thus not worthy of a special further treatment.

Unfortunately, since the *nature* of the "indirect" right Kant claims here is one that has provoked an unusually wide divergence of views concerning its interpretation, it will be necessary to articulate at much greater length the justification Kant provides of this form of taxation than the other forms already treated. In order to provide this, I will first give a preliminary run through of Kant's exact argument prior to addressing the range of interpretations of it that have been offered.

Kant's discussion of this "indirect" right of taxation for the people's preservation is introduced to allow the state to "support organizations providing for the *poor*", with *"foundling homes*" and "*church organizations*", specifically mentioned and the nature of them as "charitable or pious institutions" referred to. However, whilst this is the specific reference Kant explicitly presents for this "indirect" right to taxation, the nature of the argument he gives for this right is what has provoked the controversy over the real nature of the right that has been granted. The argument for this form of taxation is worth quoting at greater length given the controversial nature of what Kant is here justifying:

> 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 reasons of state the government is therefore authorized 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. (Ak. 6: 326)

The brevity of this statement is in some contrast to the range of interpretations that have been provided of it. As will be seen in some length the rationale that Kant has provided here has struck a number of commentators on Kant's text as puzzling with some overtly and directly declaring it is out of keeping with the fundamental basis of the Doctrine of Right, namely, the universal principle of right.

Before looking at these interpretations and assessing their grounds it is first worth patiently unpacking the citation just given and relating it to the whole passage of which it is part. Kant's opening statement in the citation is to the effect that in forming the civil condition the general will has created something whose existence should be perpetual. In making this point about perpetuity we find an echo of Kant's revised form of the universal law formula of the categorical imperative, which we also found involved a notion of perpetuity.

Unlike in the case of the revised formula of universal law, however, Kant here is referring not to specific laws but rather to the condition under which there is such a thing as effective, conclusive and established external right at all. Once a civil condition is given, there could be no rightful grounds of its annulment, only of its improvement with regard to its matching the conditions of right that serve for Kant as a "norm" for all existent states and governments. So the first point we take from the citation is the sense that it is a question concerning *right* that the civil condition, once it has come to be, should take measures to ensure its perpetuation. As we will see subsequently, this is a key point.

The second point in the citation is to the effect that the end of the perpetuation of the civil condition has been taken to be the basic end that has been adopted by the general will once it has formed the civil condition. So this end has to inform all legislation within such a condition since it is the legislative power that is expressive of the general will within the civil condition. Now, from this point about the need for legislation to be informed by the basic

end of perpetuation of the civil condition, Kant moves next to the statement that this requires that the state, in its internal operation, to have the end of maintenance of those who are unable to maintain themselves.

Notably, since this point is grounded upon the previous point that the legislation of the general will has to have as a key integral end, the maintenance of the civil condition, this reference to a requirement of the state to maintain those unable to maintain themselves, is understood here to be part of the maintenance of the civil condition itself. Since we have understood the maintenance of the civil condition, however, to be viewed as rightful, it would follow, should we accept the point about the maintenance of those unable to maintain themselves, that the maintenance of these persons is related in a sense to the maintenance of the civil condition.

The reference to taxation to provide for this "indirect" right is mentioned next with the assumption made that the end so adopted can best be guaranteed by extraction from the wealthy. Kant refers later to different ways this could be done: "either by imposing a tax on the property or commerce of citizens, or by establishing funds and using the interest from them" (Ak. 6: 326). The first means would thus justify a further tax on estates (a form of additional land tax) or a tax on gains of the wealthy by means of capital or income, though Kant leaves the latter unspecified.[44] Since it is the wealthy who are the target of the tax in question and the purpose of the tax is to provide means for those unable to maintain themselves it is clear that the tax has a redistributive effect even without providing direct income for the indigent. Furthermore, it is evident that Kant has no problem with this point and expects it to be granted given the argument provided.

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[44] Since it is the wealthy who are taken to be the target of the tax, were it to be a tax on income, it would have to be some form of "super" tax as otherwise it would fall on groups who were not the intended target of it. There would be numerous empirical questions to work through here concerning the rate at which taxation would begin, the level at which it would be set, etc. but such questions are not ones of *principle* for Kant and hence are not here treated.

What is the reason for the taxation that Kant here provides grounds for falling specifically on the wealthy rather than on society in general? This is the next point in the argument. Kant states that the wealthy have "acquired an obligation to the commonwealth" and the way they have so acquired the obligation in question is that they owe their existence to the commonwealth, as it is the commonwealth that has provided the conditions of their very existence.

This point about existence has two dimensions though Kant does not trouble to disentangle them. On the one hand, the *physical* existence of the wealthy is dependent upon the existence of the commonwealth since it guarantees them security. Although taxation for the provision of this physical existence has already been touched upon there are costs additional to the mere provision of the police power to ensure it, since those citizens who are poorly provided for require incentives of various types to ensure that public order is maintained.

However, it is also the case that the *material* existence of the wealthy is dependent upon the existence of the commonwealth since the background of all the activities required for wealth to be gathered by separate parties and to be maintained in existence, also requires the commonwealth which guarantees and maintains the institutional background of all these activities. Most importantly of all, however, the *formal* existence of the wealthy is dependent upon the existence of the commonwealth since they exist within the order that the commonwealth has created.

So, in a sense, the existence of the wealthy is heavily dependent on the commonwealth and this dependence of it is the basis of an obligation the wealthy owe to the commonwealth in return. It has enabled the wealthy to prosper by providing the conditions under which this was possible so it is far from true, as entrepreneurs are fond of saying, that they owe the existence of their wealth entirely to their own efforts. The basis of such efforts having a field in which to act, be regulated and maintained, is what allows their efforts to bear fruit.

The "protection and care" of the commonwealth does not, however, come gratis but requires expenditure on the part of the state and this general expenditure to sustain all the institutions that allow the prosperity of the citizenry to take place has itself to be consistently related to as requiring revenue. So there is a ground for taxation of the wealthy *in particular* as the wealthy have benefited greatest from the conditions of right that the commonwealth has provided. This ensures that the wealthy have an especial obligation to the state with regard to maintenance of the whole of the citizenry and this obligation is a matter of right.

The rest of Kant's argument for this "indirect" right is one that concerns particulars as the fundamental justification has here been provided. Kant points out that since the right in question is one of the state has as against the people that coercion, in the sense of "public taxation" is justified for the end in question and that this shows that this end is an end of right and not one of mere charity.[45] These "legal levies" are ones that, in terms of the reciprocity that is at the heart of the general notion of right, best understood in terms of current contributions from the population rather than in terms of assets accumulated.

The second part of Kant's discussion refers specifically to care of children "abandoned because of poverty or shame" and here the state is taken to have "a right to charge the people with the duty of not knowingly letting them die" (Ak. 6: 326) even though they are a part of the population who, through their entire dependence on the public, are scarcely welcome to it. This form of taxation is one that Kant is less clear about with regard to implementation but he still grounds it in the "indirect" right stated.[46]

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[45] So although Kant's explicit reference at the beginning of the argument is for an "indirect" right of the state to tax in order that charitable endowments for the poor are established it is not charity *as an end* that is being required to be supported.

[46] This tax is, like that to establish care for the poor, taken to fall on the wealthy though Kant here worries whether it should particularly fall on the wealthy who

The final part of the discussion concerns churches but is a negative part of the argument since Kant denies that there could be a right to charge the state for "the expenses of maintaining churches" as this must rather be charged to the congregations of them (Ak. 6: 328). This is of a piece with the remarks concerning church lands in the justification of land tax that we have already reviewed.[47]

What Kind of Right is the "Indirect" Right to Tax for Perpetuation of the Civil Condition?

Having reviewed the basic argument for this form of taxation that Kant gives I am now going to look at the controversy concerning it and assess the views that have been offered for what kind of right Kant has here provided a case for. The controversy really centres on the kind of obligation that Kant is speaking about when he indicates that the "indirect" right to taxation is for the perpetuation of the civil condition. It is common to view this obligation, as Jeffrie G. Murphy does, as one of "public welfare" and then to declare, as he does, that "it is by means clear that this view is consistent" with Kant's general theory of right.[48]

Murphy puzzles because of this over what it could be that Kant was after when he introduced this passage into the Doctrine of Right and comes to the conclusion that a minimal form of relief from distress is grounded on the right of freedom in each person

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are unmarried which seems to imply that since the surplus use of their wealth is not required for their own offspring, that the state is entitled to the use of it or at least some of it (Ak. 6: 326-7) Whilst this specific requirement is not one that Kant seems ultimately happy with, the argument for it is not different in kind to the generic one justifying taxation of the wealthy.

[47] Since the treatment of the churches is in relation to the "indirect" right discussed it is peculiar that Kant's argument is entirely negative unless there is something about churches that makes them less than reliable as instruments of provision in relation to poverty and Kant's remarks about the way churches encourage the lazy (Ak. 6: 326) suggests that he thought this.

[48] Jeffrie G. Murphy (1970) *Kant: The Philosophy of Right* (Mercer University Press: Macon), p. 124.

due to the claim that certain kinds of disadvantage severely limit the exercise of such freedom. Notably, Murphy's case for the "indirect" right has two problems as an interpretation of Kant's argument.

Firstly, Murphy views the obligation that is stated here to be one that is best viewed in terms of virtue, not right, as when he argues that it is a "*perfect*" duty, a term that derives from the Doctrine of Virtue, not from the Doctrine of Right. Secondly, the argument is couched purely in term of the exercise of freedom of those for whose benefit the tax is extracted but no mention is made of the obligation that is owed by the wealthy to the commonwealth. The lack of reference to the latter notion ensures that the obligation appears to be a form of charity, not of right, and thus ensures that it really does not belong in Kant's theory as Murphy worried it might not.

Ernest J. Weinrib takes a view that is substantively of a piece with Murphy's when he claims that the poor are supported not on the grounds of a right but due to being beneficiaries of a duty, one that the state "takes over" from the people as it "reflects the people's necessary emergence from the state of nature".[49] Weinrib, like Murphy, also takes the duty to be one only *towards* the poor and not as based upon an obligation *incurred* by the wealthy. The claim that Weinrib makes to the effect that a duty has "been taken over" from the people arises from the way Kant introduces the "indirect" right since Kant states when he introduces it that this right is one that belongs to the ruler "insofar as he has taken over the duty of the people" (Ak. 6: 326).

This argument is used by Allen Rosen to support a similar kind of interpretation of Kant's notion of an "indirect" right to that given by Weinrib and Murphy. Rosen's more sophisticated interpretation avoids the conflation of right with virtue on the part of those from whom the tax is extracted to import this conflation instead into a description of the grounds of the state's ability to

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[49] Ernest J. Weinrib (2002-03) "Poverty and Property in Kant's System of Rights", *Notre Dame Law Review* 78, p. 818.

extract the tax. This can be seen in the following passage: "The state cannot force any individual to adopt a duty of benevolence, because this duty requires the voluntary adoption of an end from the motive of duty. Nevertheless, such a prohibition does not imply that the state may not have its *own* duty of benevolence, for in Kant's view the state is a moral person, and is thus as capable of having its own moral duties as any other moral agent".[50]

There are quite a few problems with the way Rosen views the "indirect" right. Firstly, the assumption that the "duty" that has been taken over from the people is a duty of beneficence, is based on his claim that "no other duty" would fit the description with which Kant opens the discussion of the "indirect" right and this is simply untrue.

Given that Kant is here describing the *perpetuity* of the civil condition as a requirement of the general will it is manifest that the "duty" in question relates to the maintenance of the commonwealth as it is expressly said to. Since this is so the "duty" in question cannot be a duty of beneficence since beneficence is a matter of virtue and not of right whilst Kant expressly and overtly states that what is in question here is a right, albeit an "indirect" one. In assuming that the question turns on virtue and seeing this virtue as one of beneficence Rosen's view, like all those reviewed thus far makes two central errors.

Firstly, it takes the right in question to be a claim of charity made by the poor, something that does not fit the argument for taxation at all since charity would be rightly met by voluntary contributions alone. Secondly, in assuming like all the authors reviewed thus far that the duty is primarily one *owed to* the poor rather than being ground on an *obligation of* the rich, Rosen's interpretation, like the others mentioned, fails to grasp the reciprocity claim that is at the heart of Kant's argument.

Finally, Rosen adds to these errors a third one when he assumes that the reference Kant makes, in quite a different context,

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[50] Allen D. Rosen (1993) *Kant's Theory of Justice* (Cornell University Press: Ithaca), p. 191.

to the "moral personality" of the state ensures that the state has duties of a kind that are akin to those of ordinary persons. The context in which Kant discusses the state as a "moral person" is that of international right where Kant is relating states to each other and making claims of right concerning their conduct in matters of peace and war.[51]

In this context Kant makes no appeal to principles of beneficence and nor does he parallel the duties states, as moral persons, are under to each other, with those that ordinary persons are under to each other except in one respect, the requirement to leave the state of nature. It is this requirement, one of right, which carries with it an obligation that the state has taken over as a "duty" from the people and which it expresses in the general will of the legislature which has a requirement upon it to maintain and sustain the condition of right *perpetually*. It is this context, and not one of beneficence, that is the background of the "indirect" right in question.

Unlike the readings of Kant's account of the "indirect" right that turn on conflating right with virtue, Leslie Mullholland does view the claimed right in terms that relate it to the general universal principle of right's reference to freedom. Mulholland justifies the "indirect" right in the following way: "Because the general will controls all land, the state, in making specific decisions that it means to accord with the general will, has the obligation to ensure that its administration does not violate the right to freedom. But it can do this only by the provision of public welfare….the innate right to self-help is incompatible with the

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[51] This is specifically set out in *Perpetual Peace* but is a topic that has many dimensions in Kant's theory, the review of which would require further extensive discussion. For a reading of *Perpetual Peace* in relation to the philosophy of right see Gary Banham (2002) "Kant's Critique of Right", *Kantian Review* 6: pp. 35-59.

political community. Hence, the state must provide some other procedure for the maintenance of existence."[52]

Mulholland's argument is certainly preferable to those reviewed previously since it is the clear point of his interpretation to view the "indirect" right as a form of right and to relate this right to the grounds of freedom. However, it is still an odd account of Kant's argument. Firstly, in suggesting that the agency of some has been undercut by being brought within the civil condition it gives succour to the view that there was something preferable about the state of nature.

Secondly, the argument that the division of property that the state allows in accordance with right takes away the condition of being able to help oneself makes little sense. The accumulation and exchange of property is not something restricted even though it does necessarily include exclusion of others from what is guaranteed. That which enables this division allows for those from any position to partake of means to accumulate and does not rightfully prevent this by any. Thirdly, I am only entitled to a right that others not deprive me of means to sustenance, not to a positive demand on them that they supply me with it.

Fourthly, Mulholland's account is insufficiently clear on the point that the justification of the taxation right here is one that is explicitly presented by Kant as an *obligation* of the wealthy towards the commonwealth in virtue of the commonwealth having provided them with the ability to become as wealthy as they are. In ignoring this point Mulholland fails to get to the point about reciprocity that underpins the claimed right.

Like Mulholland, Allen Wood takes Kant's argument for the "indirect" right to really be grounded on "the physical

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[52] Leslie A. Mulholland (1990) *Kant's System of Rights* (Columbia University Press: New York), p. 395 where Mulholland does, unlike all the writers previously mentioned, also indicate recognition that the wealthy owe their position and their property right to the civil condition. Despite recognizing this, however, Mulholland still fails to draw the point in Kant's terms, namely that the wealthy have *an obligation* that arises on the basis of their position in the civil condition.

preservation of the individuals who are members of the state" adding that: "physical survival is a necessary condition for any human being to exercise free agency".[53] This interpretation of Kant's account makes it one that is understood only in an instrumental way and, furthermore, as stated, only applies *in extremis* as with the argument Kant explicitly gives for the right of abandoned children to help.

But Kant does not offer the same reasoning for the "indirect" right with regard to the poor, as he does with regard to foundlings as would be required on Wood's account. It is the maintenance, not merely the sustenance, of the poor that Kant discusses even though he does especially draw attention to the "most necessary needs" they have. Wood's interpretation also neglects the need of the perpetuation of the civil condition, which is precisely the overall aim of the right Kant defends. And, once again, there is no attention paid to the obligations of the wealthy within the civil condition, obligations treated by Kant as matters that are ones of *right*.

Paul Guyer's account of the "indirect" right marries Mulholland's notion that the duty of self-help with regard to survival be taken over by the state with Wood's idea that the right in question is substantially one of physical survival stating that the right mandates "a minimum standard for the rational acceptability of any system of property rights, where the rational acceptability of such a system is in turn a necessary condition of its morality".[54]

This line of argument is one that suggests that the "indirect" right is one that guarantees a basic standard of living on the grounds that such a basic standard is a rational requirement anyone would make on any social system. Whilst there are grounds for taking this to be a good anthropological assumption it is not an

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[53] Allen. W. Wood (2008) *Kantian Ethics* (Cambridge University Press: Cambridge and New York), p. 196.

[54] Paul Guyer (1997) "Kantian Foundations for Liberalism" in Paul Guyer (2000) *Kant on Freedom, Law & Happiness* (Cambridge University Press: Cambridge and New York), p. 254.

argument founded on right. Kant makes no reference in the argument from the passage over which the interpretative controversy rages to rational acceptability and nor does the Doctrine of Right generally develop an independent view of rationality that is taken to underpin its account of right. Guyer's view, as is common, makes no reference to the standard of requirements that can rightfully be laid upon the wealthy and essentially conflates grounds of right with an independent standard of practical rationality which latter is even broader than Kant's general moral philosophy.

Alexander Kaufman, like Leslie Mulholland, is on the right lines in relating Kant's justification of the "indirect" right to the ultimate basis of right in the protection of the conditions of external freedom that is the whole point of the institution of the civil condition. However, Kaufman relates the defence of the "indirect" right to the distinction within Kant's general moral philosophy between positive and negative conceptions of freedom as given in the Formula of Humanity.

This defence effectively requires us to see that the positive duties that Kant articulated in his discussions of benevolence and the development of talents is reflected in a political sense in the "indirect" right. Whilst Kaufman does not view the "indirect" right as a case of requiring acts of political benevolence it remains the case that his defence of the right in question is grounded on making this right analogous to benevolence. Kaufman rightly refers to "the mutual dependence of citizens" in the rightful condition but also views the "indirect" right as implying "a right to freedom from asymmetric coercion" that authorises the sovereign power to "define and implement a distributive principle".[55]

Kaufman's understanding of the "indirect" right has much to commend it by contrast to others given. In recognising the mutuality of dependence of citizens in relation to the sovereign power's constitution Kaufman goes some way to grasping the

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[55] Alexander Kaufman (1999) *Welfare in the Kantian State* (Clarendon Press: Oxford), pp. 33-4.

sense that the indirect right is an *obligation* of the wealthy towards the commonwealth. However, despite the fact that Kaufman moves closer to recognition of this point than most he still does not state it.

In speaking of "asymmetric coercion" as involved in the condition of right due to the unequal division of property Kaufman makes a point akin to that of Mulholland's defence of the substitution of self-help by state help. Just as the condition of property division is grounded on the institution of the commonwealth, however, so also is the free ability to alter one's position in the social order, a fact that ensures that if the "asymmetric coercion" Kaufman refers to exists, it is not directly at the level of any given individual.

Further, there is nothing in the argument for the civil condition to prevent reorganisation of property relations since they are at the command of the sovereign power, as representative of the general will. The "indirect" right does authorise a notion of redistribution as Kaufman indicates though the *extent* of this has yet to be determined clearly. Finally, in reverting back to the Formula of Humanity for his sense of the freedom realized in the commonwealth, Kaufman threatens a conflation of right with general moral philosophy as is explicitly at work in other readings of the discussion of the "indirect" right.

Arthur Ripstein's view of the "indirect" right is, however, certainly the best on offer in the secondary literature. Ripstein stresses that the wealthy "owe their existence" to the civil condition in a *formal* sense writing: "their wealth consists entirely in their entitlement to exclude others from their goods, which in turn is consistent with equal freedom only when consistent with formal conditions of the general will".[56] Ripstein and Kaufman alone seem to have caught the centrality of the claim that the "indirect" right is first and foremost not something that is a *right to* welfare on the part of the poor but rather an *obligation of* the wealthy to the commonwealth. Ripstein correctly points that the

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[56] Ripstein (2009) p. 283.

material existence of the wealthy *as* wealthy is grounded upon the formal entitlements that are given within the civil condition, chief amongst which is the exclusive right to ownership of property.

On this basis Ripstein, unlike Kaufman, underlines the effect of the failure of enforcement of this right which would be that the poorer members of the society would be directly dependent upon the largesse of the wealthy so that it would be "a system of dependence" and would thus be based not on an omnilateral will as it would be "inconsistent" with the "innate right of humanity" of the poorer.

Unfortunately, in stating that the system of dependence that would result from failure to enforce the "indirect" right would be inconsistent with the "right of humanity" of the poorer, Ripstein still relapses into a conflation of right with general moral philosophy. It is not that such a system would be inconsistent with the "right of humanity"; it is rather that it would be inconsistent with the universal principle of right since mutuality of external freedom would be directly compromised. Even Ripstein's generally correct view thus fails to capture part of the point of the justification of the "indirect" right.

The reason why Kant's justification of the "indirect" right is controversial and has produced such a variety of interpretations is due to the unease many commentators have felt with the suggestion of recognition of material "need" that Kant appears to have included in his system here, one that is clearly felt not to be consistent with the formality of his general philosophy of right.

However, this is to misunderstand the point of the justification Kant has made here, and generally in his philosophy of right. Right involves mutual relations that are inescapable in their sociality. It is precisely because of this that it is necessary to arrive at a statement of the conditions that make conditions of universal external freedom consistent with themselves.

Such conditions are *not* consistent, as Ripstein rightly points out, if what emerges is a "system of dependence" in which some are structurally unable to protect the basic rights that can be stated even in the conditions of private right. This being so,

however, it does not follow either that the justification of taxation for the purposes of the "indirect" right is a kind of reversion to conditions of private right within the civil condition or that it requires reference to the terms of Kant's general moral philosophy.

Conditions of external universal self-consistent freedom are themselves conditions of mutuality and this is why there are obligations incurred towards the commonwealth by those who are most successful at accumulation of wealth through the utilisation of its conditions. This *obligation* of the wealthy is not one of benevolence towards the poor and nor is an obligation on their part *towards* the poor.

Rather, it is an obligation of the wealthy *towards the commonwealth*. The existence of citizens within the commonwealth is an existence within conditions of right and the continued existence of the commonwealth is placed in danger not simply, as Wood would have it, by the threat to the *physical* existence of particular members.

It is rather a question of ensuring that relations between the members of the commonwealth are maintained in their mutuality of dependence of each upon the universal conditions of right that regulate, govern and protect the status of all. The failure to respect the basic human condition of *any* member of the commonwealth is a matter of concern to *all* members of it. This is what is meant by universal recognition of conditions of reciprocal relations. Failure to recognise and enforce the right that Kant here claims is "indirect" would involve structural decay of the system of right back into relations that would structurally be only those of private right.[57]

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[57] Thus I don't think it is accidental that immediately after the section on the "indirect" right Kant next includes a sustained account of the need for equality of opportunity in relation to all civil offices, an argument that explicitly condemns aristocracy. It is the kind of feudal relations that involve aristocracy that include care for the poorest only as a matter of charity and recognize no question of right here. Such a case is contrastive with the one Kant makes for the "indirect" right and would be worth treating elsewhere in connection with it.

Redistribution, Taxation and the Extent of Kant's Justification of Taxation for the "Indirect" Right

Having elaborately described and defended the *nature* of the "indirect" right Kant has articulated for a form of redistributive taxation and thus, in the process, shown how it belongs within his system of right, it is now time to look at the *extent* of the right claimed.

This can be done on two different grounds, one which would concern the extent of it within Kant's Doctrine of Right and accompanying texts directly. This will be the task of this section. The other question is the extent to which Kant's defence of a form of redistributive taxation can be extended by political philosophers working within a broadly Kantian tradition. That will be the focus of the next section.

Kant's specific discussion of the *extent* of the "indirect" right within the Doctrine of Right is circumscribed in two ways. Firstly, it refers to the contributions as ones that are made by the commonwealth on behalf of the poor who are "unable to provide for even their most necessary natural needs" (Ak. 6: 326). Whilst the determination of who would fit such a criteria would require empirical work of a sort that is distinct from the foundational work Kant himself has here undertaken, it is clear enough that provision is intended only for those who are the very poorest of the society.

Kant's "indirect" right is thus not framed in its *extent* to address the wider range of social problems that contemporary defences of redistributive taxation commonly have in view. It is also evident that the redress offered for those in such conditions of distress is of a piece with Kant's justification for police power action against begging. The beggar's intrusion into the public sphere is prevented by reference to the need for public security but his need, by contrast, is addressed by the contributions built up by application of the "indirect" right. The other extension of the "indirect" right is towards foundlings who become wards of the state. This second extension clearly is distinct from a general duty of the state towards the welfare of children as is upheld in many contemporary states.

If one way the "indirect" right is restricted is in terms of the group contributions are intended to help, the other way it is restricted is in terms of the means contributions are gathered. Kant explicitly indicates that contributions should be "current" and not assets gradually accumulated over time, intending by this restriction to ensure that a principle of reciprocity is stated that works within lifetimes of individuals. This restraint by reference to the manner in which contributions can be gathered has a number of problems and demonstrates that Kant did not envisage questions about future generations coming to have a place in considerations of right.[58]

Although Kant refers in a later supplement to the Doctrine of Right to a further extension of the "indirect" right to cover health care (Ak. 6: 367) this extension is one whose form is left indeterminate given, as Kant here argues, that such care might be better provided by cash payments to the poor than the provision of permanent institutions. Further, the extension in question still fits only a narrow band of society.[59] What these points bring out is that the "indirect" right Kant has defended, a right that does have clear, explicit and intended, redistributive effect, is one that is narrow in its range, especially when compared to the practices of contemporary states and to the justifications offered by contemporary political philosophers.[60]

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[58] In §44 of *A Theory of Justice* John Rawls treats questions of inter-generational distribution as part of the theory of justice and is perhaps one of the earliest to have done so. See John Rawls (1971) *A Theory of Justice* (Oxford University Press: Oxford and New York), pp. 251-9 revised edition/284-93 original edition.

[59] Similar caveats have to apply to Kant's very limited discussion of public education, which is touched on very briefly only in *The Conflict of the Faculties*.

[60] Alexander Kaufman offers a brave defence of much more extensive welfare rights than I think can be justified by reference to the Kantian text alone, partly by drawing on other texts than the Doctrine of Right. However, it is notable that the "model" for social welfare theory provided in Chapter 6 of Kaufman (1999) is almost entirely devised without reference back to the Kantian texts and

Redistributive Taxation, Recent Political Philosophy and Kantian Principles

Whilst the previous section settled fairly clearly the argument that the *extent* of Kant's "indirect" right is relatively narrow compared to both the practice of contemporary states and the justifications of redistributive taxation provided within contemporary political philosophy it is not sufficient to settle the question of the *extent* of such justified taxation purely by reference to Kant's explicit statements on the question.

Much of the debate amongst more recent political philosophers has concerned justification of redistributive taxation in reference to political principles that have an alleged Kantian ground and it is not obvious that simply because Kant does not defend a very extensive right to redistribution that his principles cannot be extended in ways that he did not envisage. Tackling the range of questions that this point raises is, however, clearly beyond the scope of one article.[61]

So, here, I only wish to refer to the terms of the debate and indicate some of the questions that would have to be addressed in thinking about it.

One side of the divide over this question is Robert Nozick who, notoriously, viewed taxation generally as "on a par with forced labour" and was particularly vociferous in attacking redistributive taxation.[62]

Nozick's argument is essentially Lockean in flavour as is evident from the type of account he gives of the state of nature and the failure to understand the notion of public right as involving

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nothing like contemporary welfare provision can be located in the arguments Kant explicitly presents.

[61] Given the length this piece already has it would clearly require further pieces to treat this question adequately. Hence this discussion should only be viewed as a prospectus for a separate treatment.

[62] Robert Nozick (1974) *Anarchy, State and Utopia* (Blackwell: Oxford and Malden), pp. 169-72 and 265-68.

obligations on the part of citizens towards the social whole from which there is derived reciprocal benefit. As such, Nozick's account is directly contrastive with Kant's but this does not prevent Nozick from helping himself to the *mere means* requirement of the Formula of Humanity in his attack on redistributive taxation, which he regards as treating those taxed as "mere means" for the benefit of others. This transposition of Kant's general moral philosophy to the consideration of taxation is directly in contrast to Kant's own practice and of a piece with the basically non-Kantian form of Nozick's theory.[63]

By contrast to Nozick, John Rawls articulates a theory of justice that is presented as having Kantian roots though it also has debts to other theorists than Kant. Rawls defends two major principles of justice, one of which, concerned with equal liberty, has clear Kantian antecedents.

The second of Rawls' principles, however, is the one that is designed to have redistributive potential and includes reference both to fair equality of opportunity and to what is termed the "difference" principle which requires reference to the least materially favoured to be shown for a measure to be justified. The "difference" principle is evidently related to Kant's notion of an "indirect" redistributive right though it is also intended to be both wider in scope and greater in extent of provision provided.

However the justification provided for the "difference" principle is, like Nozick's argument *against* redistribution, presented in terms of the *mere means* requirement of the Formula of Humanity.[64] In making his defence of the "difference" principle

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[63] The key notion in Nozick's theory is "self-ownership", a notion not found in Kant's political theory though there are echoes of it in the Doctrine of Virtue. For a critical examination of this notion in Nozick see G.A. Cohen (1995) *Self-Ownership, Freedom and Equality* (Cambridge University Press: Cambridge and New York).

[64] Rawls states this in §29 of *Theory* where he refers to regarding persons as ends in themselves as entailing agreeing "to forgo those gains which do not contribute to everyone's expectations".

contingent upon this reference Rawls makes the same error as Nozick, albeit with different effects and less excusably given that his theory is intended as a "Kantian" one.

Nor is it necessary for Rawls to do this since the "difference" principle can rather be regarded as a very extended version of the "indirect" right Kant has argued for and, conceived in this way, retains a clear Kantian descent. Whether such an extended version of the "indirect" defence can be given on Kantian grounds would be a different matter and would require extensive treatment.[65]

What is apparent, however, is that the case for a more extended justification of redistributive taxation than Kant provides, on Kantian grounds, is one that would require relation to the "indirect" right and to questions concerning the universal principle of right and *not* to arguments depending upon the Formula of Humanity.

Wolfang Kersting provides a different kind of justification of extension of Kant's "indirect" right to that given by Rawls. Kersting replies directly to the Nozickian notion of the "minimal state" and does so by suggesting that "the philosophy of right must require a compensatory extension of the principle of the state of

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[65] There are a host of issues here since the "difference" principle is treated in different ways at different times and is, in any case, not treated as a "constitutional" essential in John Rawls (1993) *Political Liberalism* (Columbia University Press: New York) where it is replaced by a more limited notion of a social minimum that can be given more obvious relation to Kant's "indirect" right. For a discussion of the different forms of the "difference" principle see Philippe van Parijs (2003) "Difference Principles" in Samuel Freeman (ed.) (1993) *The Cambridge Companion to Rawls* (Cambridge University Press: Cambridge and New York) and, for an extended Kantian reconstruction of *A Theory of Justice* that criticizes Rawls' subsequent "political" turn see Robert S. Taylor (2011) *Reconstructing Rawls: The Kantian Foundations of Justice As Fairness* (Pennsylvania State University Press: University Park, Pennsylvania).

right through measures toward a social and welfare state in the interest of the human right of freedom itself".[66]

The notion of grounding an extension of the "indirect" right in a freedom-based argument is an appealing one though, in stating this, Kersting would have done well to refer directly to the universal principle of right. However, the idea of a "compensatory" extension indicates an argument of the kind favoured by Paul Guyer's notion of rational acceptability as opposed to Kant's own requirement of an *obligation* of the wealthy towards the commonwealth.

Not only is this so, but an extension of Kant's argument that was based on the *obligation* of the wealthy has more intuitive appeal than the "compensatory" notion of Kersting since it could conceivably be extended in relation to the general scale of social wealth rather than being only viewed in connection to the relative poverty of the poorest.[67]

It is evident, in any case, that the extension of Kant's limited "indirect" right to encompass wider areas of social life is not in principle inconceivable or necessarily in contradiction with the basic tenets of Kant's philosophy of right. Given that this is so, there is not only no succour for those opposed to redistributive taxation from explicit Kantian texts but also no principled Kantian argument appears to be current which demonstrates that this right is one out of keeping with the general thrust of Kant's argument. So it would appear there are grounds for consideration for

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66 Wolfgang Kersting (1992) "Politics, freedom and order" in Paul Guyer (ed.) (1992) *The Cambridge Companion to Kant* (Cambridge University Press: Cambridge and New York), p. 357.

67 In a basic sense the division between these two ways of extending Kant's "indirect" right would surely be one that produced quite different understandings of the way it could be extended. For a non-Kantian notion of "compensatory" provision see Corey Brettschneider (2012) "Public Justification and the Right to Private Property: Welfare Rights as Compensation for Exclusion" in Martin O'Neill and Thad Willamson (eds.) (2012) *Property-Owning Democracy: Rawls and Beyond* (Wiley-Blackwell: Oxford and Malden), pp. 33-52.

arguments, in Kantian spirit, for more extensive treatment of redistributive taxation.

Publicity, Tax Avoidance and Tax Evasion

The question of whether there are Kantian grounds for avoidance of tax is one that can be dealt with briefly. The universality of the general principle of right is intended by Kant to infuse the whole treatment of the subject. As such, it applies also to the taxation that he has provided grounds for. So, assuming that there is a state, which accords in broad terms with the norms set by the philosophy of right, there is no justification within this state for evasion of taxation.

This does not mean that practices of tax avoidance are therefore in themselves disallowed though the boundary between avoidance and evasion is often difficult to set. The preservation and extension of rightfully earned income is an activity guaranteed by principles of right and certainly nothing wrong is done when tax avoidance is practiced with these ends in mind. However, there is no ground for principled tax evasion on Kantian grounds, as can be seen when we look at Kant's treatment of principles of publicity.

In the final part of *Perpetual Peace* Kant discusses what he terms "*the form of publicity*", the possibility of which is involved in every claim to a right. Right is that which has to be stated publicly and conduct that is incapable of being publicly justified is conduct which fails to accord with right. Kant states this both negatively and positively. The negative formulation is: "All actions relating to the rights of others are wrong if their maxim is incompatible with publicity" (Ak. 8: 381). This is introduced as an explicitly *juridical* and not merely ethical principle but it is one that is exclusively negative in form.[68]

In justifying this notion Kant also attacks those who would deny rights any reality and who prefer, as is the wont of libertarian theorists, to "construe all duties as benevolence only" (Ak. 8: 386).

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[68] It is used by Kant to demonstrate the reasons why there can be no "right" to rebellion.

However the negative formula is taken by Kant to be insufficient since it can be used by those who have overwhelming power in a situation, such that they do not hesitate to state their maxims publicly, although these maxims are far from right. Due to this, Kant next formulates an affirmative principle of public right: "All maxims which *need* publicity (in order not to fail in their end) harmonize with right" (Ak. 8: 386). In the latter case we have a demanding criterion that is akin to the positive construal of the Formula of Humanity but different from it in providing a principle of right.

When we relate practices of tax avoidance and tax evasion to the two principles of publicity it is evident that tax evasion is only compatible with the first principle if there is a corrupt state. It is incompatible with the second principle, however, even in such a condition. Further, assuming that the laws of the state have a basic accordance with right, then the purposes of tax gathering have an implicit justification even in the latter case. Only in the case of a declared despotism is there any possible basis of justification of resistance to taxation and despotism would require the absence of public law and replacement of it by private decree (thus would be a state of nature).

Tax avoidance, by contrast, would be in accord with the negative principle of right directly since there is nothing to prevent its maxim from being publicly stated. With regard to the affirmative formula of public right a more demanding case is made and it is not difficult to imagine cases where tax avoidance would not meet this criteria.[69]

The Priority of the Right over the Good and Taxation

In conclusion I want to return to the key methodological innovation in Kantian ethical theory, an innovation that is replicated at the level of the philosophy of right. This is of the

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[69] It would clearly fail as a maxim in cases of national emergency for example though it also has to be remembered that in such cases the legislative general will retains discretion, in any event, for confiscation.

priority of the right over the good. Kant's treatment of questions of public policy interest is in terms of a philosophy of right that we have seen to be based upon a universal principle that refers to the conditions of justifiable coercion through reference to mutuality of conditions of free action.

This basic reference to the conditions of free action is one that we find constitutes the possibility of there being a civil condition and it is in this condition that we have found there to be obligations of the citizenry, especially the wealthy, towards the commonwealth that has enabled them to thrive. In putting the matter this way Kant effectively reverses a great deal of the debate that surrounds the justification of taxation.

Murphy and Nagel in their work on taxation refer to what they term "everyday libertarianism" which is founded on the following basic assumption: "pretax distribution of material welfare is presumptively just" and "the question of justice in taxation is therefore properly a question of determining what is a fair distribution of sacrifice as assessed from that baseline".[70] This "everyday" assumption is quite different to the structural way in which Kant examines right.

Rather than taking a set distribution as good and then determining what is right with regard to it, Kant rather sets out an elaborate description of the conditions of what is right and then assesses how distribution of property and taxation of it can conform to these conditions.

So the set pattern and distribution of wealth does not have a presumptive validity in the first instance. Rather, the way in which material wealth is distributed is one that ensures free action in structured conditions of right, entails distributive effects that the state can adjust in ways that reflect the general will as represented in the legislature.

It is the legislature, in its conformity with principles of right, which determines the justice or otherwise of the distribution of income, property and assets, and it is the task of the legislature

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[70] Murphy and Nagel (2002) p. 35.

to review this in relation to the generic standards of right. One of the constraints on the legislature is to ensure that "decency" is maintained through the provision of the police power to prevent the importunity of the poor but, balanced with this, the legislature also has the job of taxing the wealthy in order to provide means for those unable to help themselves.

This balance is part of the priority of the right over the good as the "good" that wealth provides is not structurally one to which there is a set entitlement on behalf of the wealthy even though their accumulation of it has been in accord with right. The wealthy owe a debt to the civil condition generally as it is the base line that allows for their accumulation and it is *to the civil condition* that they repay their debt in taxation.

Taxation, whilst experienced as a burden by those from whom it is extracted, is a device required by the state in order that there be conditions of right. Such conditions of right require maintenance and provision and have to be, once instituted, maintained in perpetuity.

A rightful way of ensuring this is to make it possible that all citizens are supplied with the basic freedom that allows their survival, both physically and rightfully. This is ensured through the system of taxation and this system itself, as part of the basic rightful condition, has a presumptive validity over and above the material good that citizens themselves prize. Hence its justification precedes and makes possible the manner in which citizens are given lee-way to pursue their good and is structurally prior to it.