

Why there Cannot be a Truly Kantian Theory of Human Rights

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Many human rights advocates seek inspiration in Kant, which explains why references to Kant are legion in the literature on human rights. Indeed, it is commonly argued that the most promising foundations on which to construct a secular account of human rights are to be found in Kant. I shall pose a challenge to this idea, arguing that there can be no truly Kantian theory of human rights. Any careful reading of Kant will reveal him to be not just indifferent to human rights claims but actively skeptical of them.

A few preliminaries. First, by ‘truly Kantian’, I do not mean that there can be no philosophical theory of human rights that has Kantian elements, or that grows out of some part of Kant’s opus. What I mean is that there can be no defense of a Kantian theory of human rights that remains faithful to three constituent planks of Kant’s practical philosophy, namely, (1) Kant’s division between the domain of morality and the domain of right, (2) Kant’s arguments for our moral obligation to exit the state of nature, and (3) Kant’s arguments for unitary sovereignty. This leaves open, of course, for a less ‘truly’ Kantian theory of human rights that drops one or more of his arguments for each of these central tenets. But such a theory will not be faithful to Kant, for whom the three tenets stand at the very core of his practical philosophy. In this volume, Katrin Flikschuh writes: ‘it can be genuinely upsetting—*philosophically*, not psychologically—to see great works in the history of philosophy ransacked for this or that titbit to be used in order to patch up a justificatory gap in some contemporary theory that bears little resemblance to the

position from which the item is lifted'.¹ This strikes me as a useful reminder that, if we are to draw insights from the history of political thought, we had better try to get that history right, rather than to project our own concerns into it. This is why the question which gives this chapter its purpose is, I believe, an important one to answer.

Second, I also need to say something about what I intend by 'human rights' to avoid misunderstanding. Whatever else they are, human rights are critical moral standards that (a) are 'above politics', (b) track violations of great moral urgency, and (c) (pro tanto) license some form of direct external action or pressure to stop violations from happening or continuing. What I mean by 'above politics' is that they are moral standards that any state, regime, or organization must respect whatever they do, whatever their internal organization, and whatever function they happen to have in political and social life. And what I mean by 'direct external action' is that the remedial and protective actions their violation licenses need not be authorized by the state, non-state, or international actor involved in the violation. Pressure of the kind exercised by Amnesty International as well as more coercive forms of international enforcement, for example, could count as (pro tanto) licensed direct and external action in the relevant sense. For our purposes, the definition I am using can be extended to cover the actions of *individuals*, especially though not exclusively actions that have some public significance or impact. The definition also encompasses both 'Orthodox' and 'Political' accounts of the nature of human rights. The critical moral standards that are constitutive of human rights claims can be grounded, that is, in an account of those natural rights that we have in virtue of our humanity (hence the 'Orthodox' reading). Or they can be more general

¹ Katrin Flikschuh, 'Human Rights in Kantian Mode: A Sketch', this volume, ch, 37.

moral standards, not necessarily grounded in natural rights, whose application is restricted to states, and whose violation (pro tanto) justifies either overriding state sovereignty, or pursuing otherwise coercive or non-coercive international action (including, for example, economic and diplomatic sanctions) (hence the ‘Political’ reading). This very weak definition of human rights is enough for our purposes. If no account of human rights that satisfies the broad conditions I have identified can be ‘truly Kantian’, then my argument has gone through. There might, of course, be other accounts of human rights (some of which I will mention in passing later) that might still be compatible with truly Kantian practical philosophy, but they will be highly unconventional ones.

The discussion proceeds as follows. In Sections I and II, I reject the hypothesis that the concept of innate right can provide a foundation for a theory of human rights. In Section III, I turn to Kant’s argument against the right to revolution, and explore whether the distinction between ‘barbarism’ and ‘despotism’ could be used in the service of a theory of human rights. In Section IV, I argue that attempts to ground an account of human right in the Kantian concept of dignity are misguided. Section V concludes.

I

In her contribution to this volume, Flikschuh wonders whether there is a ‘*plausible* Kantian human rights conception’, by which she means a conception that is faithful to Kant while also remaining interesting in its own right. She ultimately believes there is, though we must find it not in Kant’s account of innate right (let alone cosmopolitan right), but in the idea that human right may be a ‘transcendent concept’ akin to God: substantively unknowable, indeterminate, and incapable of empirical instantiation, but

something we must believe in nonetheless. Her reconstruction of such a conception is tentative, because she (rightly) recognizes how difficult it is to shape a full-blown account of human rights in a Kantian mould. I shall argue that Flikschuh should have followed her initial suspicions to a conclusion she seems attracted to but does not ultimately argue for, namely that there can be no truly Kantian conception of human rights.

Flikschuh's reconstruction of a Kantian conception of human rights begins with 'innate right'. According to Kant, innate right is the only right we have merely in virtue of our humanity; all other rights (for example, rights that flow from contract and property) are 'acquired' rights. Innate right gives each human being a right to freedom understood as a kind of independence:

Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity.²

This single innate right entails, Kant claims, several further 'authorizations', namely the right to equal and reciprocal coercion (according to which one cannot be 'bound by others to more than one can in turn bind them'), the right to be one's own master, the right to be 'beyond reproach' (ie, to preserve one's reputation against, for example, libel), and the right to communicate one's thoughts and to make promises (whether insincerely

² *Doctrine of Right* (hereafter *DR*), Ak6:237. All translations are from Immanuel Kant, *Practical Philosophy*, ed. M. Gregor (Cambridge: Cambridge University Press, 1999).

Hereinafter I shall only refer to the Akademie pagination.

or sincerely). These are all entailed (Kant claims) by the several parts of the initial formulation. The right to equal and reciprocal coercion is entailed by the ‘coexistence under universal law’ qualification; the right to be beyond reproach by the supposition that no one has yet entered any relations with others and so must be innocent of all charges against their person; and the right to communicate one’s thoughts by the fact that no right would be possible without such communication. On Flikschuh’s interpretation, innate right and its corollary ‘authorizations’ cannot be the ‘object of any positive law making’; innate right is, as she often puts it, ‘beyond legislation’.³ As a purely formal rather than substantive concept, it sets out a ‘necessary presupposition of positive legislated rights’, and so of all acquired rights (including contract and property) but doesn’t specify their content. This follows from the structure of Kant’s ‘non-foundationalist’ moral and political theory, and implies that there can be no theory of (substantive) human rights that can be grounded in innate right. Treating innate right as a human right would require us to assign, *contra* Kant, a fully specifiable, pre-political content to innate right that is on a par with the acquired rights (including property rights) we would have in a fully functioning civil condition. Innate right, in sum, is too indeterminate, formal, and relationally dependent to function in the way human rights advocates expect human rights to function, namely as pre-legal, determinate, and substantive claims on others.

I will argue that Flikschuh endorses the correct conclusion—innate right cannot be a basis for human rights—but for the wrong reasons. My argument begins by showing that Flikschuh’s proposed non-foundationalist reading of innate right is not sufficient to establish the impossibility of a human rights theory based on it. Consider that the formal

³ Flikschuh, this volume, ch. 37, xxx.

structure of innate right could be used as a higher-order ‘test’ for generating a list of human rights *even on Flikschuh’s non-foundationalist reading*.⁴ Flikschuh does not, after all, deny that innate right and the Universal Principle of Right (UPR) can serve as *constraints* on law making (in the same way, say, the CI can serve as a constraint on permissible maxims in the domain of morality).⁵ But if innate right (and the UPR) can function as *constraints* on law making, then they could also surely function as *human rights*. Here’s how such a construction might go. We would begin with the idea that innate right sets moral constraints on any possible rightful condition. For example, we know that to be in accordance with innate right, all positive rights must be granted on equal terms to all (such that no one may be bound by others to more than one can in turn bind them), and be consistent with each person’s original independence (such that no one be forced, through no choice of their own, to be subject to another’s choice—as in, say, feudal relations between lord and serf). From such higher-level implications of innate right, one could then derive a list of (lower-level) human rights. These would be the necessary preconditions that any system of rights must satisfy in order to count as a system of, as Flikschuh puts it, ‘strictly reciprocal independence relations’. Some examples might include: All human beings have a right to independence; no human being

⁴ It might do this more explicitly when conjoined with the UPR (‘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’).

⁵ ‘Yet to systematize is nonetheless to introduce divisions and distinctions, which impose constraints’ (Flikschuh, this volume, ch. 37, xxx).

shall be subject to a feudal order, or be born a slave; all have a right against libel; no human being shall be so economically dependent on another that he is forced to beg; all human beings have a right to a republican constitution⁶, etc.⁷ Such (Kantian) human rights would be rights that (a) are possessed merely in virtue of our humanity, (b) prescind from any specific division of property or system of contract law, and (c) constitute the limits or outer bounds of any fully rightful legal order. The fact that innate right is ‘non-foundationally’ justified as the necessary presupposition of any reciprocally rightful condition rather than by appeal to a ‘foundational’ intuition is not relevant in this context.

The indeterminacy of innate right, similarly, does not constitute a stumbling block for a theory of innate-right based human rights. Flikschuh treats the issue as turning on how ‘substantively determinate’ or ‘empirically instantiable’ a human right is, and then concludes that innate right cannot be a human right (or a basis for human rights) because

⁶ See, eg, *Perpetual Peace* (hereafter *PP*): ‘the *republican* constitution is the only one that is compatible with the right of human beings’ (8:336).

⁷ It should be noted that there is some obscurity in Flikschuh’s account of the idea that ‘innate right’ is incapable of ‘empirical instantiation’. Surely, innate right rules out certain legal arrangements (such as the ones just mentioned). Why don’t such further ‘rights’ or authorizations count as ‘instantiations’? If they aren’t possible instantiations of innate right, then what is? We can grant that innate right does not, by itself, stipulate what the content of any specific law or legal right should be, but that does not imply that it can’t be ‘instantiated’ or be the plausible ‘object of positive law making’. If my law making is constrained by innate right (or the UPR) then isn’t my law making taking innate right as an ‘object’ in the relevant sense? More on this later.

it is a merely formal concept, and hence substantively indeterminate and empirically uninstantiable, whereas human rights, properly understood, must be both substantive and instantiable. But I do not see that there is really any difference between the ‘determinability’ or ‘instantiability’ of innate right as against human rights. Like any system of abstract moral rights, human rights standards are just that: standards. No human rights advocate would deny that they require interpretation, and that individuals will reasonably differ regarding what they mandate in any specific case. And, as we saw earlier, we can derive a list of outer bounds or limits that any legitimate legal order must respect directly from the concept of innate right (such as the idea that no human being ought to be born a slave, or all human beings have a right to a republican constitution) just as we can derive a series of lower-level human rights (for example, the right to freedom of the press, or to education) from more abstract moral rights, such as, for example, the right to freedom of expression or to minimal provision (as in James Griffin’s account of human rights).⁸ The only way to preserve a distinction along this axis would be to deny that one can derive *any* implications from Kant’s abstract right to freedom. But then Kant’s theory of right would become maximally permissive: any stable and predictable legal order would be compatible with right, even one that enslaved all its inhabitants to a single ruler.⁹ Kant’s theory of right is (as we will see) fairly permissive, but not *that* permissive.

⁸ See, eg, James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), 50.

⁹ On some further problems with Kant’s conception of innate right, see Andrea Sangiovanni, ‘Can the Innate Right to Freedom Alone Ground a System of Public and Private Rights?’, *European Journal of Philosophy*, 20 (2012): 460–9; Andrea

So why can't innate right form the basis of a truly Kantian theory of human rights? As we have seen, the reason does not have to do with how determinate or instantiable innate right is, or with the non-foundationalist function of innate right. Rather, I shall argue that innate right cannot be a basis for human rights because human rights must be directly and externally imposable in a way that innate right (or those rights derived directly from innate right) cannot be. As I mentioned in the introduction to this chapter, for a moral right to count as a human right, it must license direct action to stop violations from happening or continuing. Action is 'direct' when the remedial actions the protection of human rights licenses are not authorized by the state, non-state, or international actor involved in the violation. Put in more Kantian terms, it is constitutive of a human right (in my sense) that its violation licenses *unilateral* action by third parties (whether states, other organizations or even individuals). Such a license, as we will see in a moment, is straightforwardly denied by Kant's account of the moral obligation to exit the state of nature.

In the state of nature, both our innate right to freedom in our own person and our (provisional) right to external objects are insecure. Because there is no political agent capable of coordinating our wills, and because we cannot know with any certainty others' intentions or designs, we are thereby permitted, Kant says, to 'do what seems right and good to us'.¹⁰ Each one of us is permitted, that is, to protect our person and provisionally

Sangiovanni, 'Rights and Interests in Ripstein's Kant', in S. Kisilevsky and M. Stone *Freedom and Force: Essays on Kant's Legal Philosophy* (London: Hart Publishing, forthcoming).

¹⁰ DR, Ak6:312.

acquired property with violence if necessary. So far, Kant is like Hobbes. But for Kant there is a further problem in the state of nature, which creates an enforceable *moral* (rather than merely prudential) obligation to attempt exit from it. The problem is that, in each interpreting for ourselves what the protection of our innate freedom and property requires, we must *unilaterally* impose our will—our view regarding what is within our power by right—on others. I sincerely believe that this particular piece of land is mine and your use of it counts as a trespass; you disagree. I sincerely believe that you have no right to take pictures of me without my permission; you disagree. Because we are both authoritative interpreters of the (provisional) rights that define the limits of our freedom, the actions we take under our own conception of freedom therefore necessarily subject the choices of others with whom we interact. This would be true even were we to agree with others what right (or a system of rights) requires of each of us; it would be true, that is, even if our rights were *fully determinate*. Because there is no mechanism available that can assure me that you will continue to comply with the currently agreed distribution of (provisional) rights, there is an important sense in which I still remain subject to your choice to continue supporting the agreement. If you change your mind, and begin acting on a set of (provisional) rights that I believe prejudices my freedom, then I have no recourse.¹¹ Kant concludes that remaining in the state of nature is therefore ‘wrong in the highest degree’.¹² We must set up a rightful civil condition capable of coordinating our wills under a single authority—thus creating an *omnilateral* will from what were merely an aggregate of *unilateral* wills—or continue wronging others.

¹¹ *DR*, Ak6:255–7.

¹² *DR*, Ak6:307–8.

This argument, at the very heart of Kant's political philosophy, has a very important upshot with respect to the legitimate imposition of human rights norms. Once a civil condition is up and running, the state that protects it acquires a strong right of non-interference. As Kant writes in *Perpetual Peace*, “No state shall forcibly interfere in the constitution and government of another state.” For what can justify it in doing so? Perhaps the scandal that one state gives to the subjects of another state? It can much rather serve as a warning to them, by the example of the great troubles a people has brought upon itself by its lawlessness; and, in general, the bad example that one free person gives another (as *scandalum acceptum*) is no wrong to it’.¹³ This makes sense once we understand Kant's argument for the moral obligation to exit the state of nature. Any will that is external to the omnilateral will governing the state—for example, the will of a foreign state or league of foreign states (or indeed the will of a non-state actor such as what we today call an NGO)—must be *unilateral* with respect to it. It would therefore be ‘wrong in the highest degree’ to impose it on the state concerned. Importantly for our purposes, and as Kant makes clear in the just cited passage, the right to non-interference also binds external actors where the state concerned is *unjust*—where, for example, it violates the innate right of its inhabitants by, say, undermining their independence. As long as the unjust state operates with a unitary legal system that secures a stable and predictable set of (legal) rights—which makes its will omnilateral in the required sense—it retains its claim to non-interference.¹⁴ In sum, innate right cannot provide a basis for a

¹³ *PP*, Ak8:346.

¹⁴ We discuss Kant's closely connected arguments against the right to revolution later.

theory of human rights, since the imposition of innate right against the will of foreign states (and the actors within them) would count as unilateral.

To be sure, the fact that states with respect to one another remain in a ‘lawless condition’—where each state’s will counts as unilateral with respect to all the rest—is also wrong in the highest degree. States, Kant argues, therefore have a duty to exit the *international* state of nature by joining a voluntary federation that will regulate their conduct with respect to one another. Could this be a site for a Kantian theory of human rights? Might a Kantian say that the federation must, to be rightful in itself, secure the protection of innate right (and its corollaries) within each of its member states? Could the Kantian mandate the creation of regional human rights organizations flanking the federation (on the model of the European Convention of Human Rights (ECHR))? I shall argue that there is no space within a Kantian theory even for such regionally bounded, human rights instruments.

To fix ideas, let us imagine that a group of member states voluntarily create both a Court with powers to oversee the implementation of innate right within each member state and an executive mechanism for enforcing its judgments. The institution of such a Court would, I shall now argue, divide sovereignty, and so be in violation of Kant’s conditions for a rightful condition. This is fairly easy to see. Imagine the Court came to a judgment that a duly enacted member state law was in violation of innate right. And let us say that the member state disagrees with the judgment. Who decides (as a matter of law)? If we assume that the higher-level Court was acting within its powers, and that its judgments are supposed to be ultimately binding on its member states, then clearly the member state should either change its law or leave the union. For a Kantian, if it leaves

the union, it would be violating a moral duty. So it must change its law. But, according to Kant's unitary conception of sovereignty, if it changed its law, it would be effectively recognizing that it is no longer sovereign. Having lost the ultimate (normative) power to decide in all cases, it has either dissolved (and hence returned to a state of nature), or simply transferred sovereignty to the higher level. In the latter case, the federal union would now be the relevant 'state', and the former member state merely a subordinate jurisdictional unit within it. With respect to divided constitutions, Kant echoes Hobbes and Bodin:

Indeed, even the constitution cannot contain any article that would make it possible for there to be some authority in a state¹⁵ to resist the supreme commander in case he should violate the law of the constitution, and so to limit him. For, someone who is to limit the authority in a state must have even more *power* than he whom he limits, or at least as much power as he

¹⁵ Kant is here thinking of *internally* divided constitutions (such as Britain's, which he discusses at *PP*, 8:303), but the point is still valid with respect to *externally* divided constitutions, in which some part of sovereignty is exercised by a foreign rather than an internal body. This was of course a central issue in the constitutional theory of the time, especially regarding the structure of the Holy Roman Empire. cf, eg, Pufendorf's attempts to reconcile his theory of sovereignty with the possibility of (regular and irregular) composite states, Samuel Pufendorf, *Of the Law of Nature and Nations*, trans. B. Kennett (London: Walthoe et al., 1729 [1672]), VII.5.15–22, but see also VII.2.22. It is relevant that Pufendorf took himself to be superseding (mainly Aristotelian) theories of mixed government (see, eg, *Law of Nature*, VII.5.19).

has; and, as a legitimate commander who directs the subjects to resist, he must also be able to *protect* them and to render a judgment having rightful force in any case that comes up; consequently he has to be able to command resistance publicly. In that case, however, the supreme commander in a state is not the supreme commander; instead, it is the one who can resist him, and this is self-contradictory.¹⁶

We might be tempted into thinking that the problem here lies with the ‘outdated’ view of sovereignty, not with Kant’s argument for our obligation to exit the state of nature. Could the Kantian abandon the former while retaining the latter? No. Kant’s commitment to a unitary conception of sovereignty follows, I now want to argue, from his account of unilateral imposition.

For a coercing will to be omnilateral with respect to an individual or corporate agent, and hence rightfully binding, it must speak with one voice. If there were two (potentially) contradictory voices, then one of them must be ‘external’ to the agent. Kant writes:

The legislative authority can belong only to the united will of the people. For since all right is to proceed from it, it *cannot* do anyone wrong by its law. Now when someone makes arrangements about *another*, it is always possible for him to do the other wrong; but he can never do wrong in what he decides upon with regard to himself (for *volenti non fit iniuria*). Therefore only the concurring and united will of all, insofar as each

¹⁶ See also *DR*, Ak6:320 and *PP*, 8:303.

decides the same thing for all and all for each, and so only the general united will of the people, can be legislative.¹⁷

This argument presents us with a dilemma. First horn: If our hypothetical Court speaks in the name of the federation, then its will must be *unilateral* with respect to the dissenting member state. It must be unilateral because it is deciding for ‘another’ (the member state people ‘people’) rather than solely for itself. As the above quoted passage makes clear, within a system of divided sovereignty, it will always be true that at least one of the coordinate bodies must speak with a unilateral voice to the other. Second horn: If we assume, on the contrary, that the hypothetical Court speaks with the *omnilateral* voice of a united people, then the *federation* must be sovereign, and the member state a merely subordinate unit within it. On the first horn of the dilemma, we have unilateral imposition, and on the second, we cease to have a federal league of *states*. This also explains why Kant is very clear that the only matters to be regulated by the *foedus pacificum* are matters necessarily arising *between* states, rather than matters arising only *within* them:

This league does not look to acquiring any power of a state but only to preserving and securing the *freedom* of a state itself and of other states in league with it, but without there being any need for them to subject themselves to public laws and coercion under them (as people in a state of nature must do).¹⁸

¹⁷DR, Ak6:313–14.

¹⁸PP, Ak8:356.

It is important that, in this passage, Kant speaks of the freedom *of a state* rather than the freedom of *individuals within it*.

One might think that all this argument shows is that states must join a world state in which the human rights of all are respected. Kant clearly rejects this proposal, though it is unclear whether he was consistent in doing so.¹⁹ But we need not decide the dispute. To see why, assume that all current states do indeed have a Kantian duty to enter a world state. Would that be a route to a fully fledged Kantian human rights doctrine? No. Once within the state, the only authoritative interpreter of the outer bounds of our innate right (ie, what I have called human rights) would be the world government itself. Because of Kant's arguments against a right of revolution (to which we will turn in the next section), there would no longer exist even the *possibility* consistent with Right of an external, extra-legal recourse. By joining a world state, we would be eliminating the very bulwark against illegitimate state action that human rights were meant to secure in the first place! What are human rights for if not to protect against the 'standard threats' posed by the existence of states (which would surely be exacerbated by the existence of a single, all-powerful world state)?

So innate right and its corollaries cannot provide the basis even for a regionally authoritative human rights instrument, let alone a basis for a system of (legal) human rights that has the status in international law of a peremptory norm (ie, *jus cogens*). At most, if we want to remain within the Kantian framework, we might envisage an

¹⁹ '[S]tates . . . have a rightful constitution internally and hence have outgrown the constraint of others to bring them under a more extended law-governed constitution in accordance with their concepts of right' (*PP*, Ak8:355).

international body that provides merely advisory opinions. Such a body could issue recommendations to states on how to improve their protection of innate right (and the reciprocal system of equal freedom such right mandates), but it could not impose or demand enforcement of its judgments *in any form*. This is a far cry from the kinds of human rights that contemporary advocates and practitioners see themselves as fighting for.

II

Before turning to two further ways in which a Kantian might try to build a viable theory of human rights (via the distinction between barbarism and despotism and via the idea of dignity), I want (albeit too briefly) to consider Flikschuh's alternative proposal, briefly mentioned earlier. Recall that Flikschuh also comes to the conclusion that innate rights cannot form a basis for human rights. However, as a Kantian, she doesn't give up on human rights altogether. Instead, she reconstructs an account of human rights as a 'transcendent concept': 'On the view of human rights as transcendent concept, there are no particular substantive demands we can raise or underwrite on its basis in relation to any given system of positive law making.'²⁰ Innate right (according to Flikschuh) is similarly indeterminate and uninstantiable. The difference, she claims, is that innate right functions as a necessary presupposition for morally legitimate law making. Transcendent concepts don't even do that. They come 'after' morally legitimate law is up and running, and are meant to serve as 'an objectively indeterminate (hence objective insufficient) yet

²⁰ Flikschuh, this volume, ch. 37, xxx.

subjectively necessary, regulative idea of reason'.²¹ A good example of a transcendent concept is God. For Kant, God does not provide the objective basis or ground of the moral law. Rather, the idea of God (and the afterlife) is necessary because it makes it subjectively possible for the human agent to seek the 'highest good' (the happiness that ought to follow from a life of virtue) even though they know that the life of virtue will often produce subjective *unhappiness*. In the same way, Flikschuh believes that the concept of human rights cannot provide the basis or ground of a legitimate legal order, but a belief in the idea can make it more likely that fallible human beings will secure political relations that are in accordance with Right. On this reading, we could not specify or know what human rights actually *are* (any more than we can know what God is). She writes: '[Like freedom or the moral law, human rights exceed] all possible understanding for us: we comprehend at best [their] incomprehensibility'.²² I take these and related comments to mean that there are no human rights that we can actively seek to implement. And, indeed, Flikschuh concedes that, on her view, 'there are no particular substantive demands we can raise or underwrite on its basis in relation to any given system of positive law making'.²³ This entails that we cannot say, for example, that states violate the human rights of their subjects when they torture them, or that they violate the human rights of their subjects when they engage in genocide.

So what kind of normative guidance do they offer? At most, she claims, the idea of a 'transcendent' human right can afford the legislator a new perspective on the 'moral

²¹ Flikschuh, this volume, ch. 37, xx.

²² Flikschuh, this volume, ch. 37, xx.

²³ Flikschuh, this volume, ch. 37, xx.

enormity of public office'. Their very ineffability, she claims, is meant to alert us to the moral gravity and fragility of ruling others. What they do not do is offer any moral limits to legitimate state governance. The account is so strongly revisionary as to amount, I believe, to changing the subject. While I have no doubt that public officials ought to be more cognizant of the moral enormity of their office, what do we add by calling that mindfulness 'human rights'? The idea of human rights as transcendent takes us too far away from human rights practice. Better to conclude, as I am arguing we should, that there simply is no truly Kantian theory of human rights.

III

Kant famously argues that there is no right to revolution. No matter how unjust a government of a particular state turns out to be, there can be no right withheld by the people (either collectively or individually) to overthrow it. A government has, of course, a duty to seek and protect a fully rightful condition, but no one can force it into doing so.²⁴ In the essay 'On the Common Saying . . . ', Kant writes:

[A]ny resistance to the supreme legislative power . . . is the highest and most punishable crime within a commonwealth, because it destroys its foundation. And this prohibition is *unconditional*, so that even if that power or its agent, the head of state, has gone so far as to violate the

²⁴ See, eg, *DR*, Ak6:340f: 'But it must still be possible, if the existing constitution cannot well be reconciled with the idea of the original contract, for the sovereign to change it, so as to allow to continue in existence that form which is essentially required for a people to constitute a state'.

original contract and has thereby, according to the subjects' concept, forfeited the right to be legislator inasmuch as he has empowered the government to proceed quite violently (tyrannically), a subject is still not permitted any resistance by way of counteracting force.²⁵

This follows from the same argument that led to the affirmation of unitary sovereignty. Imagine a dispute between a group of private citizens and the government over whether the regime has the legitimacy to carry on enforcing its laws. If there is no higher-level, formally authorized body to resolve the dispute between the people and the government, then the rebellious people are, by their action, effectively claiming a right to re-institute a state of nature, which is (recall) a state 'devoid of justice' and hence 'wrong in the highest degree'. The rebellious would have, by their action, dissolved the single, univocal, omnilateral will required for a fully rightful condition, and left in its place a cacophony of unilateral wills. And in the cacophony of unilateral wills, everyone's right to freedom is necessarily violated: 'a unilateral will cannot serve as a coercive law for everyone . . . since that would infringe upon freedom in accordance with universal laws'.²⁶

But there is, arguably, one exception—an exception that, as we shall see in a moment, might be used to ground a theory of human rights as limits to state legitimacy.²⁷

²⁵ 'On the Common Saying', Ak8:300; see also Ak8:305.

²⁶ *DR*, Ak6:256.

²⁷ Ripstein argues for the exception in Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009).

At the very end of the *Anthropology*, Kant draws a distinction between *barbarism* and *despotism*, and distinguishes both from a *republic* and *anarchy*:

- A. Law and freedom without force (anarchy).
- B. Law and force without freedom (despotism).
- C. Force without freedom and law (barbarism).
- D. Force with freedom and law (republic).²⁸

A state of ‘despotism’ is a defective form of republic, in which there is a lawful condition that is not fully rightful. Kant is clear that we have an obligation to obey such a regime, even if its injustice is evident to all. But what about a state of ‘barbarism’? Arthur Ripstein has recently argued that we can understand a state of barbarism not as a defective form of a republic, but as a defective form of the *state of nature*. If a regime rules by force alone, without law and without freedom, then its will cannot count as ‘omnilateral’. As a unilateral will imposed on the people it governs, it can be opposed in the same way as any unilateral will in a pure state of nature. Just because a group of people secures a monopoly of force on a territory, in other words, is not sufficient to make it a state. If they don’t enforce their rule via the rule of law, then they are no better than gangsters.²⁹

²⁸ *Anthropology*, Ak330-1. Translations are taken from Immanuel Kant, *Kant:*

Anthropology from a Pragmatic Point of View, ed. R.B. Louden (Cambridge: Cambridge University Press, 2006).

²⁹ See also Sharon Byrd and Joachim Hruschka, *Kant’s Doctrine of Right: A Commentary* (Cambridge: Cambridge University Press, 2010), 91, 181.

This is relevant for our inquiry into a Kantian theory of human rights because one might try to build a conception of the limits of legitimate rule by appeal to Ripstein's reconstruction of Kant's distinction between barbarism and despotism. On this view, human rights would be identified as the standards constitutive of a minimally decent (and hence non-barbaric) regime. Should any of those standards be violated, the government's commands could no longer be considered as securing and protecting the rule of law; it would then be ruling, that is, by force alone. In that case, those subject to it (as well as international actors not subject to it) would have not only a right to 'rebel' but perhaps also a duty to bring the wrongdoers (and everyone else) into a proper civil condition by rebelling.

As we have seen, we can be in a civil condition that violates the 'original contract' test, namely where there are laws that it would be impossible for a people to give itself, but where we still have a duty to obey. But how do we draw a distinction between a *mere* 'civil condition' and a fully 'rightful condition'? Ripstein's answer is the *rule of law*. Because the presence of 'law' distinguishes barbarism from despotism, we can identify a barbaric regime as one that cannot purport to rule by properly legal authority. But the question now arises: What counts as ruling by legal authority for Kant? Ripstein bases his discussion on Kant's definition of a civil condition as a 'condition in which what belongs to each can be secured to him against everyone else'.³⁰ The constitutive condition of the rule of law is, in short, the existence of a system of mutually consistent public rules in which each person's property and person is secured against others. How restrictive is this condition? Consider that, in Kant's view, it is the state that

³⁰ Ripstein, *Force and Freedom*, 336.

ultimately determines the division of property rights. In principle, it would be possible (though unjust) for a legal order, through proper legislative channels, to expropriate the holdings of its entire population (though not to strip them of the ability to re-acquire property in the future, on which more later), to prevent them from voting, and to bar them from public office *while still remaining a legal order*.³¹ When challenged that it is not protecting each person's property and person, the regime could reply, 'We *are* protecting property and person according to the laws of the land: if you no longer have any property to protect, then that is because of the law that has expropriated you'. The legal order would be unjust, and its subjects would be right in protesting, but it would still remain wrong to resist. The state cannot, however, do just *anything* in a systematic and public way and still remain a legal order. If the state, for example, made its subjects slaves by stripping them not only of their property (as in the previous case) but also their ability to lawfully acquire property in the future, or sought to exterminate them without trial,³² then

³¹ It is relevant here to remember that Kant infamously believed that women and children ought to have (as a matter of justice[!]) only a status as 'passive' citizens, with no right to vote, and restricted rights over their own labor and freedom of movement, and no rights to represent themselves in civil matters. See, eg, *DR*, 6:314–15.

³² Though it is important to note that Kant does allow the death penalty for murder and even the enslavement of criminals as not only minimally legitimate but also just. See *DR*, Ak6:333: 'Whoever steals makes the property of everyone else insecure and therefore deprives himself (by the principle of retribution) of security in any possible property. He has nothing and can also acquire nothing; but he still wants to live, and this is now possible only if others provide for him. But since the state will not provide for him free of

it would cease to be a civil condition and descend into barbarism. In such cases, the state cannot claim to be protecting people's person or property, since it is actively seeking to deny their ability to act in the name of either. At that point, its subjects could, Ripstein plausibly argues, resist. The Nazi regime (especially after 1938, the year of Kristallnacht) clearly satisfies this condition for barbarism.³³

Kant's discussion of the distinction between servants and slaves is useful in seeing the distinction between rule by force alone and rule by law, but also its limitations. In the *Doctrine of Right*, Kant writes,

Servants are included in what belongs to the head of a household and, as far as the form (*the way of his being in possession*) is concerned, they are his by a right that is like a right to a thing; for if they run away from him he can bring them back in his control by his unilateral choice. But as far as the matter is concerned, that is, what *use* he can make of these members of his household, he can never behave as if he owned them (*dominus servi*); for it is only by a contract that he has brought them under his control, and a contract by which one party would completely renounce its freedom for

charge, he must let it have his powers for any kind of work it pleases (in convict or prison labor) and is reduced to the status of a slave for a certain time, or permanently if the state sees fit.—If, however, he has committed murder he must *die*. Here there is no substitute that will satisfy justice'. For the argument pursued in the text, we therefore must imagine a situation in which no one has been convicted of a crime.

³³ cf Kristen Rundle, 'The Impossibility of an Exterminatory Legality: Law and the Holocaust', *University of Toronto Law Journal*, 59 (2009): 65–125.

the other's advantage would be self-contradictory, that is, null and void, since by it one party would cease to be a person and so would have no duty to keep the contract but would recognize only force.³⁴

The importance of this passage is twofold. First, Kant is clear that, where people have been entirely stripped of their civil status, the law no longer applies to them *as law*, and the person therefore is under no obligation to obey. Because the relation between a slave and his master is no longer a relation between two (legal) persons, it is characterized, Kant says, 'only by force', and so cannot even purport to be rightful. This is what makes slavery a form of barbarism in Kant's technical sense. Second, the passage also, however, demonstrates the *limits* of Kant's view, since Kant is clear here (and elsewhere) that quite severe restrictions of person and property are compatible not only with a civil condition (and so minimal legitimacy) but also with Right itself. In the passage just cited, Kant imagines a domestic servant renouncing rights to freedom of movement through a contract, but Kant argues that the same limitations are compatible (indeed just) with respect to women without even the need for a contract. In the *Anthropology*, for example, he writes,

Children are naturally immature and their parents are their natural guardians. *Woman* regardless of age is declared to be immature in civil matters; her husband is her natural curator. If she lives with him and keeps her own property, then another person is the curator.—It is true that when it comes to talking, woman by the nature of her sex has enough of a mouth to represent both herself and her husband, even in court (where it concerns

³⁴ DR, Ak6:283.

mine and thine), and so could literally be declared to be *over-mature*. But just as it does not belong to women to go to war, so women cannot personally defend their rights and pursue civil affairs for themselves, but only by means of a representative.³⁵

One might argue that Kant's acceptance of women's (legal) 'immaturity' is a product of his times, or in any case based on false beliefs about women's ability to reason and think for themselves.³⁶ Kant, if he had applied his theory correctly, would have come to the conclusion that it is unjust for women to be subjected in this way. But I see no reason why such restrictions (which, remember, include restrictions on the property-less and on domestic servants as well) could plausibly be regarded as destroying the very basis of a civil condition as Kant himself understands it. Domestic servants and women, for example, can both own property, and are protected by the criminal law. While their dependence may be unjust (correctly understood), it does not dissolve the legal relation existing between them and their 'masters'.

The problem with a theory of human rights grounded in the distinction between barbarism and despotism is that it would be too narrow. While the theory would cover human rights against genocide and enslavement, it would not cover *any* of the other human rights listed in the Universal Declaration of Human Rights (UDHR) or other international covenants. There would be no human rights objection, for example, to the treatment of women, in, say, Saudi Arabia, which is ranked at 130 (out of 134) on the UN Gender Equality Index, or to a denial of any of the civil and political freedoms (including

³⁵ *Anthropology*, Ak209.

³⁶ See also *Anthropology*, Ak185, 207, 214–15, 303–4, 307. And *DR*, 6:279.

rights of association, marriage, employment, movement, expression, religious worship, etc.). It is arguable whether we would even have a human right against torture, given that torture does not (or need not) undermine our very capacity to own property or to be legal subjects.³⁷ Torture is the infliction (or threat) of severe pain in order to coerce; if we survive it, there is no sense in which we necessarily cease to be subject to the law. One might argue that this is not a real problem for the theory; at most, it would serve as a problem for any human rights practice that claims to go beyond rights against enslavement and genocide. I leave the reader to decide whether a truly Kantian theory of this kind would be worth defending. We have achieved our goal if we have shown how narrow and constrained a theory of human rights would be within a truly Kantian framework, and how far it would take us from Kant's written text (given how little weight is given to the distinction between barbarism and despotism in Kant's own writings), and from current human rights practice.

IV

One of the most pervasive ideas at the heart of human rights discourse is the idea of human dignity. In an oft-cited passage, the UDHR, for example, proclaims the 'inherent dignity' of all human beings, who are declared to be 'equal in dignity and rights'. There is also almost universal agreement that the most prominent exponent of the idea in its secular form is Kant. One might think, as a result, that a truly Kantian theory of human rights can be grounded solely in Kant's conception of the dignity of humanity as an end in itself, thus sidestepping Kant's arguments for unitary sovereignty, for the obligation to

³⁷ Consider, eg, how permissive Kant's theory of punishment is. See n 31.

exit the state of nature, and against revolution. In this section, I show why this would be a mistake.

The argument is simple. Dignity is, in the Kantian system, a *moral* notion that governs the character of our ‘internal’ attitudes, reasons, and action. It does not govern the ‘external’ domain of Right, which sets limits to our actions but remains silent on the character of our reasons or attitudes towards those actions or towards the law governing those actions. It is no surprise, as we shall examine more closely in a moment, that there is *no* use made of the idea of the dignity of humanity as end in itself in all of Kant’s political writings, most important of which are the *Doctrine of Right*, but also ‘Perpetual Peace’, ‘Idea of Universal History’, ‘What is Enlightenment?’, and ‘On the Common Saying’. This is in contrast to the *Groundwork* and the *Doctrine of Virtue* where use of the concept is pervasive and central.³⁸ If we accept the division Kant draws between the ‘internal’ domain of morality and the ‘external’ domain of Right (which I have classed as one of the central tenets of any truly Kantian account), then dignity cannot ground a theory of human rights, since human rights fall squarely within the domain of Right *simpliciter*.

In the introduction to the *Doctrine of Right*, Kant defines Right as involving only the ‘external and indeed practical relation of one person to another, insofar as their

³⁸ It is worth noting that the notion is less central to the *Critique of Practical Reason*, no doubt because, in that work, he sought primarily to reformulate the relation between freedom and the moral law first laid out in Section III of the *Groundwork*, rather than further elucidate the three formulations of the CI. See, eg, Ak5:87–8.

actions, as deeds, can have (direct or indirect) influence on each other'.³⁹ He clarifies that Right has nothing to do with the way one's actions relate to the mere needs or wishes of others, as in 'actions of beneficence or callousness'; it only defines how one's own domain of external freedom interacts with that of others. Where morality commands our 'internal' attitudes towards the law and others, Right is silent. Right does not serve an 'incentive' (or reason or motive) to action; rather it represents merely an 'authorization to coerce'⁴⁰ whatever one's incentives. From the point of view of Right, it does not matter if you honor your contract with me solely because it will further your interests, or whether you only refrain from killing yourself because you are frightened of the pain. From the point of view of morality, on the other hand, it does: an action only has 'inner worth' if it is done from the motive of duty alone.⁴¹ Right could be satisfied even among a 'race of devils'; morality could not.⁴² As long as a legal order effectively harmonizes our external freedom in such a way as to make our domains of choice mutually consistent (and does so consistently with our innate right to freedom), then, from the point of view of Right, we can have no complaint; while from the point of view of morality, of course, we can.

On which side, 'external' or 'internal', does the idea of the dignity of humanity reside? Put another way, does human dignity govern and delimit the sphere of Right or of morality, or both? I have two arguments supporting the conclusion that dignity solely governs the domain of morality. The first is the argument from the uses of 'dignity' as a

³⁹ *DR*, Ak6:230.

⁴⁰ *DR*, Ak6:231.

⁴¹ See, eg, *Groundwork* (hereafter *G*), Ak4:397-8; see also *DV*, Ak6:390-1.

⁴² *PP*, Ak8:366.

term of art. Kant uses the term ‘dignity’ primarily in two different senses, only the second of which is relevant for our purposes. First, he uses it to refer to designations of civil status and the corresponding rights and duties of office. For example, in ‘Perpetual Peace’, Kant claims that it would be ‘beneath’ the ‘dignity of a ruler’ (or minister) to sign a peace treaty while harboring a mental reservation to break it when the occasion should prove fruitful.⁴³ In the *Doctrine of Right*, similarly, he refers to the will of a legislative authority which, regarded in its ‘dignity’, should be considered irreproachable.⁴⁴ Second, he uses it to refer to what has unconditional, absolute worth, and so is ‘above all price’. In this second sense, dignity is a property of both humanity and the moral law: ‘morality, and humanity insofar as it is capable of morality, is that which alone has dignity’.⁴⁵ The second sense is the one that is relevant for a theory of human rights, yet Kant *never uses it in any of his writings on politics or Right*.

It is worth pausing to explain why it would never have occurred to Kant to do so. And this brings us to the second argument for the conclusion that dignity is relevant to morality but not Right. Kant tells that our humanity *qua* rational nature has *dignity*. It is ‘above all price’, greater in value than, and also incomparable with, anything else. Why? Kant tells us that our capacity for rational choice raises us above the order of nature. By willing rationally, we make ourselves into *law-makers* rather than merely *law-takers* (in the way the rest of nature is). It is for this reason that we must always treat others as ends in themselves and never merely as means. To treat them as mere means would be to

⁴³ *PP*, Ak8:344.

⁴⁴ *DR*, Ak6:316; see also *PP*, 8:368; *DR*, 6:317–18; 6:328; 6:329–30.

⁴⁵ *G*, Ak4:435, 84.

degrade and disrespect the dignity—the unconditional, incomparable, and absolute value—of their capacity for rational willing. In the *Groundwork*, Kant writes:

the mere dignity of humanity as rational nature, without any other end or advantage to be attained by it—hence respect for a mere idea—is . . . to serve as an inflexible precept of the will, and . . . it is just in this independence of maxims from all such incentives that their sublimity consists, and the worthiness of every rational subject to be a lawgiving member in the kingdom of ends; for otherwise he would have to be represented only as subject to the natural law of his needs.⁴⁶

And, in the *Doctrine of Virtue*, he writes:

Every human being has a legitimate claim to respect from his fellow human beings and is *in turn* bound to respect every other. Humanity itself is a dignity; for a human being cannot be used merely as a means by any human being (either by others or even by himself) but must always be used at the same time as an end. It is just in this that his dignity (personality) consists, by which he raises himself above all other beings in the world that are not human beings and yet can be used, and so over all things.⁴⁷

The dignity of humanity sets limits to how I may permissibly treat not only others but also myself, and commands that in acting, I always respect their and my own capacity for rational choice.

⁴⁶ *G*, Ak4:439.

⁴⁷ *DV*, Ak6:462.

Now imagine that you walk into my store, and I cheerfully tell you how good you look in that shirt. I do so in order to get you to buy the wares that I offer. Say that I have no concern for you, and that I would gladly ignore you were it not for your usefulness in building my business. And say further that it is a blatant lie that you look good in that shirt. In fact, you look awful. Have I respected the dignity of your humanity? According to Kant, plainly not: in lying to you, I have used you as a mere means. And not only have I violated *your* humanity, but I have also degraded *my own*:

By a lie a human being throws away and, as it were, annihilates his dignity as a human being. A human being who does not himself believe what he tells another . . . has even less worth than if he were a mere thing; for a thing, because it is something real and given, has the property of being serviceable so that another can put it to some use. But communication of one's thoughts to someone through words that yet (intentionally) contain the contrary of what the speaker thinks on the subject is an end that is directly opposed to the natural purposiveness of the speaker's capacity to communicate his thoughts, and is thus a renunciation by the speaker of his personality, and such a speaker is a mere deceptive appearance of a human being, not a human being himself.⁴⁸

But has what I have done violated any precept of Right? Clearly not. Despite my lie, I have not violated any contract. I may not even have harmed you, if the wares and kind words I offer would do you some good. Kant writes: 'In the doctrine of right an intentional untruth is called a lie only if it violates another's right; but in ethics, where no

⁴⁸ *DV*, Ak6:429.

authorization is derived from harmlessness, it is clear of itself that no intentional untruth in the expression of one's thoughts can refuse this harsh name'.⁴⁹ The duty to respect the dignity of humanity is a constraint on internal lawgiving, but no constraint on *external*. But, if this is correct, then dignity can't serve as the sole constraining ground for an account of human rights, which are concerned solely with external freedom.

One might insist that the concept of dignity at the heart of the Formula of Humanity—act in such a way as to treat humanity always as an end and never merely as a means—could be used to derive duties of Right *directly* by telling us which external actions are permissible and which ones are not; on this reading, it could be used to delimit a mutually consistent set of external freedoms, and so a mutually consistent set of *human rights*. By appealing solely to the ethical writings, we could then bypass the arguments for unitary sovereignty, exit from the state of nature, and the strict division between right and ethics. This reading cannot succeed because the CI (including the Formula of Humanity) is, I shall now argue, neither necessary nor sufficient for establishing mutually consistent domains of external freedom. We have just given one example that shows why it is not sufficient: Lying is a violation of another's dignity, yet it is not wrongful from the point of view of Right. How could, then, the CI alone explain this permission? One might think that the CI can be extended by thinking of Right as the application of the CI to a special case, namely the case of external freedom. But why would the CI not make all instances of lying wrong (given how strongly it prohibits it in the domain of ethics) *also* under principles of Right? Why the 'exception'? We need here some analysis of the domain of Right and its special character before such an argument

⁴⁹ *DV*, Ak6:429.

could go through (of the kind the *Doctrine of Right* aims to provide). Put in terms of human rights, we would need some further argument (not provided by the CI or its various justifications) why there is no human right not to be lied to, especially given the fact that lying degrades one's own and others' dignity.

In further support of this point, consider that the UPR is explicitly addressed to a different subject than the CI: 'it cannot be required that this principle [the UPR] of all maxims be itself in turn my maxim, that is, it cannot be required that *I make it the maxim of my action*; for anyone can be free so long as I do not impair his freedom by my *external action*, even though I am quite indifferent to his freedom or would like in my heart to infringe upon it'.⁵⁰ Whereas the CI explicitly requires one to make the CI a constraint on one's maxims of action, the UPR does not. The CI cannot, once again, explain why failing to take up respect for someone's external freedom as a as an end (as in the lying example) is *not* wrong. And consider finally that, as Willascheck observes, it is hard to know how the CI could justify the coercion of others entailed by a system of rights, given its strong prohibition on coercion generally. How does the coercion required by public law not treat subjects who do not consent as means to the fulfillment of the state's ends?⁵¹ Furthermore, how could the CI alone ground an entire system of rights, which requires specifying, for example, a set of principles for deriving mutually consistent domains of property? How can the CI alone determine the grounds

⁵⁰ *DR*, Ak6:231.

⁵¹ See, eg, Marcus Willaschek, 'The Non-Derivability of Kantian Right from the Categorical Imperative: A Response to Nance', *International Journal of Philosophical Studies*, 20 (2012): 557–64, 559.

determining the limits governing what is *meum* and what is *tuum*? The CI alone cannot, I conclude, be sufficient for grounding external domains of freedom without the edifice assembled in the *Doctrine of Right*, which includes the arguments for exit from the state of nature, unitary sovereignty, and the division between right and ethics.

The CI is also not *necessary* for establishing mutually consistent domains of external freedom. All the work can be done by the Universal Principle of Right—‘an 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 universal law’. There are two points that can be made in support of this thesis. First, in introducing and expounding the UPR, Kant makes no reference to either to the Formula of Humanity or to the other two representations of the Categorical Imperative. Like ‘dignity’ in the second sense outlined above, the Formula of Humanity (and its derivative forms) plays *no systematic role* in any of the political writings; no rights are grounded in the idea of using another as a mere means, for example, or of treating each person as end in himself.⁵² Indeed, Kant appears to justify the

⁵² With two exceptions, hence my claim that he makes no ‘systematic’ use. At the end of the Introduction to the *Doctrine of Right*, Kant writes, ‘*Be an honorable human being (honeste vive). Rightful honor (honestas iuridica)* consists in asserting one’s worth as a human being in relation to others, a duty expressed by the saying, “Do not make yourself a mere means for others but be at the same time an end for them.” This duty will be explained later as obligation from the right of humanity in our own person (*Lex iusti*)’ (Ak6:236). It is not clear in the text where this duty is ‘explained’ as an obligation from the innate ‘right of humanity in our own person’, or what work it does in the argument for

UPR solely from an analysis of Right, where Right is understood as involving the realization of mutually consistent domains of external freedom among embodied beings whose choices can conflict.⁵³ Second, an increasingly popular reading of the relation between the UPR and the CI has it that the justification of the UPR (and Kant's account of Right more generally) does not presuppose Kant's ethics. While the UPR may be derived from Kant's ethics in conjunction with his analysis of Right, it need not be:

Right. On the contrary, it seems to refer primarily to a *duty of virtue*, and so to a duty of virtue that is derivable from Right rather than the other way around. Indeed, the passages most relevant to the explanation and extension of the idea of rightful honor (and its relation to humanity) occur in the *Doctrine of Virtue* at Ak6:434–7. The other time he alludes to the 'mere means' formulation is in discussion of why it is wrong to use punishment to benefit society rather than simply to sanction a criminal act; it is wrong because 'a human being can never be treated merely as a means to the purposes of another or be put among the objects of rights to things: his innate personality protects him from this, even though he can be condemned to lose his civil personality' (6:331). I think this is a special case (and so not indicative of any systematic use) because it touches on the criminal law, and hence on the moral character of the criminal act (which is of course relevant in determining 'how much' punishment is deserved on Kant's view). See also the further limitations on punishment as stated in the *Doctrine of Virtue* at 6:463; it is relevant that these passages are in the *Doctrine of Virtue* rather than *Right*. See also Ripstein's useful discussion of the other citations of the CI in the *DR*, Ripstein, *Force and Freedom*, 356 fn 2.

⁵³ See the way the UPR is introduced at *DR*, 6:230ff.

neither the validity of the UPR nor its justification depends on the validity or the justification of the CI. This reading has the merit that it would also support and explain the omission of the CI in the *Doctrine of Right*.⁵⁴ I cannot further support the reading here (other than what I have already said), but the important point is that, if it is true, then it would provide further evidence that the CI is not necessary for the UPR. I conclude that if Kant's understanding of dignity and the Formula of Humanity are neither necessary nor

⁵⁴ For more on the supposed independence of Kant's political philosophy from his moral philosophy, see Thomas Pogge, 'Is Kant's *Rechtslehre* a Comprehensive Liberalism?', in M. Timmons(ed.), *Kant's Metaphysics of Morals: Interpretative Essays* (Oxford: Oxford University Press, 2002), 133–59; Ripstein, *Force and Freedom*; Michael Nance, 'Kantian Right and the Categorical Imperative: Response to Willaschek', *International Journal of Philosophical Studies*, 20 (2012): 541–56; Allen W. Wood, 'The Final Form of Kant's Practical Philosophy', in Timmons, *Kant's Metaphysics of Morals: Interpretative Essays*, 1–23; Marcus Willaschek, 'Right and Coercion: Can Kant's Conception of Right Be Derived from His Moral Theory?', *International Journal of Philosophical Studies*, 17 (2009): 49–70. And for some skepticism regarding the idea that the truth and justification of the CI is not necessary for the truth and justification of the UPR, see Paul Guyer, 'Kant's Deductions of the Principle of Right', in Timmons, *Kant's Metaphysics of Morals: Interpretative Essays*, 23–64. Guyer writes: 'Whatever may be analytically "developed" out of the concept of right has no force unless the concept of right itself can be shown to be grounded in the nature and reality of freedom' (32). But here we may wonder: Why isn't the nature and reality of *external* freedom sufficient? Why must it also be *internal*?

sufficient for a reconstruction of Kant's theory of Right, then it is not possible to derive a theory of truly Kantian human rights solely on their basis. While someone may reinvent Kant's concept of dignity for other uses, this would take them beyond what a truly Kantian theory can bear.

Conclusion

In this chapter, I have argued that there can be no truly Kantian theory of human rights. There cannot be, that is, a theory of human rights that respects three central (and interconnected) tenets of Kant's practical philosophy, namely (1) Kant's division between the domain of morality and the domain of right, (2) Kant's arguments for our moral obligation to exit the state of nature, and (3) Kant's arguments for unitary sovereignty. The contemporary appropriation of Kant for such purposes should count as one of the great misappropriations in the history of political thought.