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ARTICLES

BOOK REVIEWS

Why Nothing Is Justified by Justificatory Liberalism

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Abstract: According to justificatory liberalism (JL) legal coercion is legitimate only when exercised for reasons that all reasonable persons can accept. That is, laws are legitimate only if they satisfy JL's unanimity condition. This principle entails that if no law meets the unanimity condition, then no law is legitimate. However, given the diversity of persons who meet JL's own twofold criteria of 'reasonable' – commitment to fair cooperation and recognition of reasonable pluralism – no law would be supported by all reasonable persons in JL's thought experiment, let alone in the real world. I illustrate this diversity of qualified views with an objector inspired by Michael Bakunin, whose revolutionary anarchist views take the state to threaten more than protect equality and pluralism. Therefore, JL would prohibit any use of legal coercion. Nothing would be justified by JL. This result clearly conflicts with commonsense, which recognizes many instances of legal coercion as legitimate even amidst disagreement, and calls into question JL's plausibility.

Key words: political legitimacy, justificatory liberalism, public justification, pluralism, unanimity condition, reasonable disagreement.

According to justificatory liberalism (JL)[1], legal coercion is legitimate if based on reasons that any reasonable person can accept. This is the basic idea of public justification, common property to John Rawls, Gerald Gaus, Jonathan Quong, and many others. Working in the social contract tradition, this basic idea is explicated in terms of an idealized procedure that culminates in unanimity. Taken at face value, the view implies that coercion based on reasons that only some accept and others reject is unjustified, and also that no coercion is justified in the absence of reasons that all reasonable persons can accept.

The strong claim that I will presently defend is that JL would make all uses of legal coercion illegitimate. JL theorists have already qualified their theory in an avowed attempt to avoid libertarian conclusions (Lister 2010, 154-55; Gaus 1996; Quong 2005; Schwartzman 2004; Nagel 1987), but, in fact, we should not expect even the night watchman state to pass muster. This implication would obviously conflict with the common belief that many real-world uses of legal coercion are indeed legitimate even amidst disagreement. JL theorists themselves believe this; they are not anarchists. Yet I maintain JL would actually de-legitimize all legal coercion. Why do I make this strong claim? Why would JL lead to this unacceptable consequence?

After a summary of JL, I launch straightaway into the heart of the argument, with the help of an objector inspired by Michael Bakunin. My argument is that the full breadth of political thought includes persons who, according to JL's own criteria of reasonable personhood, qualify as 'reasonable' and yet who would reject the very existence of a

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[1] This term originated with Gerald Gaus, though I use it more broadly than he. I follow Christopher Eberle in using it to refer to all theorists who endorse the basic idea of public justification, which I explain here (Gaus 1996; Eberle 2002). The acronym "JL" will variously stand for "justificatory liberalism" or "justificatory liberal" depending on context.

coercive state. I put forward a reconstructed Bakuninist as one such example. There is no use of legal coercion, therefore, that would pass JL's standard of legitimacy, involving as it does a unanimity condition. Having laid out the heart of the argument, I then unpack three factors that conspire to produce this result: first, JL's criteria for reasonable persons; second, the reasonable multi-interpretability of key political concepts, and; third, JL's unanimity condition. The lesson to be learned from my argument is that JL's criterion for legitimate coercion must be wrong, though I do not go so far as suggesting an alternative.

I. AN OVERVIEW OF JL

JL explains legitimate legal coercion in terms of reasons that all reasonable persons can accept. Such coercion is 'publicly justified'. JL distinguishes itself from other liberal political philosophies by its distinctive view concerning the appropriate mode of justifying liberal institutions. Rather than basing legitimate coercion on perfectionist values such as individuality or autonomy – as would the liberal accounts of, say, John Stuart Mill or Joseph Raz – JL bases legitimate coercion on reasons all can accept.

Let us have before us a few representative statements of the basic idea. In perhaps his simplest statement of the idea, Rawls, foremost among JL theorists, writes, "[...] our exercise of political power is proper only when we sincerely believe that the reasons we offer for our political action may reasonably be accepted by other citizens as a justification for those actions."[2] Elsewhere Rawls makes clear that it is to "all" other citizens that our reasons must be reasonably acceptable (2005a, 137). According to Jonathan Quong, a leading JL theorist and close follower of Rawls, the "basic project" of JL is "to show how liberal rights and institutions can be reasonably justified to all citizens in spite of the fact of reasonable pluralism" (2011, 316). Meanwhile Andrew Lister, who bases JL in civic friendship while being critical of other JL theorists[3], nonetheless summarizes JL as follows:

> The exercise of political power is justified only if it is justifiable *to* all those subject to it, that is, only if it is acceptable to all suitably rational and moral individuals without them having to give up the religious or philosophical doctrine they reasonably espouse. (2010, 151)

This basic idea that legitimate coercion is based on reasons all can accept is common property to JL theorists who otherwise specify the view in differing ways. They differ in what uses of political power must be publicly justified, and in what contexts and to what persons the view applies, among other ways. The most significant of these differences, though, is between "consensus" and "convergence" versions of JL (Vallier and D'Agostino 2012). According to the former, all must support coercion for similar, public reasons – that is, for reasons not unique to a particular religious or comprehensive view. According

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2] Rawls as quoted by Lister (2013, 7-8).

3] See Chapters 2 and 3 (Lister 2013). He argues that JL is based neither on freedom of conscience, democracy, anti-paternalism, equality, nor even on respect for persons, contrary to commonly received views.

to the latter, each citizen must simply have some reason for supporting coercion, even if the reason is religious or unique to his comprehensive view. This distinction parallels what Lister identifies as the difference between two ways of framing JL: consensus accounts frame JL in terms of reasons and convergence accounts in terms of decisions (Lister 2013). The former requires unanimity on reasons, the latter unanimity on decisions. Similarly, the consensus/convergence distinction also parallels the difference between accounts that require coercion to be publicly justified and those that simply require a framework for deliberation to be publicly justified. Despite the quotations above, theorists such as Rawls, Quong, and Lister make clear their accounts only require that coercion be justified by a certain type of general, non-sectarian reason to be publicly justified, even if citizens reasonably disagree over what coercive measures such reasons support (Quong 2011, 262-63).[4] In other words, they require that coercion be justified from within a deliberative framework that involves only 'public' reasons. The consensus/convergence, reasons/decisions, and coercion/framework distinctions are significant. JL theorists remain united, though, in their affirmation of the basic idea that legitimate coercion is based on reasons that all reasonable persons can accept.

For a clearer sense of JL's core principle and animating spirit, understand that JL is a concerted response to "the traditional liberal demand to justify the social world in a manner acceptable 'at the tribunal of each person's understanding.'"[5] JL essentially attempts to meet this demand by limiting legal coercion to that which is based on reasons all can accept. I will refer to this as JL's 'unanimity condition'[6], that is, the requirement that coercion pass "at the tribunal of *each* person's understanding" (emphasis mine). This would mean that any social arrangement not justified to each person's understanding both remains illegitimate and fails to satisfy this traditional liberal aim.

It is helpful to remember that JLs explicate the idea of public justification in terms of a hypothetical procedure (Quong 2011, 143-44, 241). The envisaged procedure is carried out in idealized circumstances that correct for deficits of character, rationality, and political equality such as are faced by real-world persons. Reasonable persons are represented by the parties to the hypothetical procedure. The reasons on which legitimate coercion is based are those which the idealized parties would find acceptable. Legitimate legal coercion is coercion all idealized parties would support as part of a social agreement.

In sum, the basic idea of JL is that legitimate coercion is based on reasons that all reasonable persons can accept, and it represents a contemporary attempt to realize the traditional liberal aim of justifying legal coercion to all affected persons. In what follows, I shall take this basic idea at face value. Although, as I have already noted, some JL theorists emphasize a deliberative framework more than coercion as an object of unanimous

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4] According to Lister it is "*principles*" that need be acceptable to all rather than "*laws and policies*" (Lister 2013, 83).

5] Rawls applies this apt phrase from Jeremy Waldron to his own JL account (Rawls 2005, 391 n. 28).

6] I believe I borrow this term from Lister.

agreement, I proceed on the assumption that JL requires that all find reasons for coercion acceptable and not merely that all be offered a certain type of reason. For one, this seems the most natural reading of JL's core principle and its plain meaning. Two, JL theorists such as Lister explicitly affirm that, "The exercise of political power is justified only if it is justifiable *to* all those subject to it..." (Lister 2010, 151). And three, interpreting JL in this way is most consonant with the animating spirit that underlies it, which is concerned with "each person's understanding". Later I return to this third point.

II. THE HEART OF THE ARGUMENT

My claim is that JL actually legitimizes no uses of coercive political power, a result that is clearly at odds with commonsense. My main reason for the claim is this: the real world contains persons who meet JL's own criteria of reasonable persons and yet who would reasonably reject the very existence of coercive states. Given JL's unanimity condition, such persons' reasonable rejection of proposed uses of legal coercion would render all such uses impermissible.

In other words, for even the night watchman state to meet the unanimity condition, no reasonable objections must exist to the effect that a stateless society is preferable to a society governed by a minimal state. But aren't there such objections in the offing? Let us consider one such objection, reconstructed from Michael Bakunin's compelling and influential anarchist writings.[7]

According to Bakunin, recognizing the freedom and equality of all prohibits the existence of a centralized coercive political state and requires instead "a free federation of communes" (Bakunin 1971, xx). In the state, Bakunin saw a grave threat to freedom and equality given that "social life could easily take on an authoritarian character through the concentration of power in a minority of specialists, scientists, officials, and administrators" (1971, 8). His solution was, "A vast network of free associations, federated at every level and preserving the maximum degree of local autonomy..."(1971, 7). Rather than dealing with the fact of reasonable pluralism by means of a centralized state, Bakunin argued that "a free society must be a pluralistic society in which the infinite needs of Man will be reflected in an adequate variety of organizations" (1971, 20). He puts the point with a flourish, "Every command slaps liberty in the face" (1971, 3).

The crucial point is that the Bakuninist objector should qualify as 'reasonable' according to JL's own criteria of reasonable persons. As I discuss below, these criteria are basically twofold. They are, first, that one is prepared to cooperate with others on fair

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7] Neither is this the only such objection that might compromise the night watchman state. For another example, I suspect a reasonable case for anarchism, expressible in 'public' terms, might be based on the ideal of the self-sufficient, pioneering individual present in American political culture. For such a rugged individualist, freedom consists in taking responsibility for one's own well-being, without interference from others who likewise are responsible for themselves and equally free in this sense.

terms of cooperation and, second, prepared to recognize the fact of reasonable pluralism.[8] Stated generally, the Bakuninist meets both these criteria. He recognizes others as free and equal persons with whom he is willing to cooperate; he also takes into consideration others' diverse conceptions of the good.

The real difference between the Bakuninist, on the one hand, and the hypothetical contractors of JL, on the other, is not that the former is 'unreasonable' according to JL's own criteria of reasonableness while the latter are not. As I say, both possess the requisite qualifications. Rather the difference is that the Bakuninist simply holds conceptions of freedom, equality, and fairness that are strikingly different from what JL theorists believe to be reasonable. The Bakuninist and the JL theorist agree on the importance of these general concepts; but they signally disagree on the conditions for experiencing these values and the operative threats to them.

For instance, consider how the Bakuninist's conceptions of freedom and equality differ from those typical of JL. For the Bakuninist, freedom is

> ...the absolute right of every adult man and woman to seek no other sanction for their acts than their own conscience and their own reason, being responsible first to themselves and then to the society which they have *voluntarily* accepted. (Bakunin 1971, 76)

At first glance, this conception may appear compatible with JL. In some sense the JL and Bakuninist alike affirm individual autonomy; for their part, JLs regard people as free in having the capacity and right to lead their lives by their own lights. But the differences between the Bakuninist's and JL's conception of autonomy are actually very significant. For one, the Bakuninist gives primacy to one's conscience in a way JLs seem not to. Freedom is primarily a response to one's conscience, living out the dictates of conscience unimpeded by others. By contrast, JL freedom is much more a response to social order. Given that one's life will be lived out in a social context governed by political coercion – a starting premise which the Bakuninist seems not to share – individual autonomy is adjusted to the demands of others. As such, JL freedom is reduced to little more than a way of reconciling oneself to the political order under which one lives (Rawls 2005a, 222), as opposed to the Bakuninist's more radical freedom which requires following one's conscience whether within society or not. So, for example, in a conflict between a religious community's conscientious beliefs and a social expectation of non-discriminatory hiring practices, the Bakuninist is much more likely than the JL to uphold the religious

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8] Quong adds the third condition that reasonable citizens give "deliberative priority" to considerations of justice. That is, they prioritize justice-related considerations over other considerations stemming from their full-blown comprehensive views should they conflict (Quong 2011, 233, 291). The problem with the Bakuninist, though, is not that that he fails to give deliberative priority to justice, but that he reasonably holds a different conception of justice. Rawls proceeds with only these two criteria for reasonable persons, and so do I.

community's freedom of conscience and prescribe withdrawal from wider social and political structures if conscience requires.[9]

Two, Bakuninist freedom can only be limited by social arrangements to which one actually and voluntarily consents in the real world. The JL simply does not see this as a practicable possibility. The JL assumes the existence of political coercion; the question becomes how to appropriately justify this coercion; and for that purpose counterfactual consent in idealized circumstances suffices.

Three, *"freedom for all"* – which is the aim of the social revolution Bakunin envisages – requires "the radical dissolution of the centralized, aggressive, authoritarian State, including its military, bureaucratic, governmental, administrative, judicial, and legislative institutions" (Bakunin 1971, 96). By contrast, JLs see in a modern, centralized state no threat to their conception of individual autonomy. To put the difference still more starkly, the JL sees the state as enabling citizens to lead their own lives, where doing so is understood to require social goods such as political standing and the "social bases of self-respect"[10] securable by the state. Conversely, the Bakuninist sees the state as threatening autonomy, given how the state's overwhelming power can impede individuals from living according to their own conscience.

As for Bakuninist equality,

> This is not the removal of natural individual differences, but *equality in the social rights of every individual from birth*; in particular, equal means of subsistence, support, education, and opportunity for every child, boy or girl, until maturity, and equal resources and facilities in adulthood to create his own well-being by his own labor. (Bakunin 1971, 97)

While here again there is much with which JLs would agree, there are also significant – and reasonable – points of difference. Bakunin's conception of equality clearly requires a rich list of positive rights. The Bakuninist and JL will find common ground on that point, albeit ground not shared by those toward the right end of the political spectrum. But Bakunin's conception of equality also regards these positive rights as oriented towards a particular goal, namely, each individual engaging in labour that is productive and dignifying – dignifying not in the sense of dignity-respecting, but dignity-bestowing. For all their differences, Bakunin shared with Marx Marx's thoroughly secular, materialist perspective in which the dignity of humans consists in their capacity for free, productive, self-expressive labour. It is here the JL and Bakuninist part ways in their respective understandings of equality. For the JL generally views people as equal in the sense that no-one has a natural right to exercise political power over others, while the Bakuninist views them as equal in their right to the conditions for dignifying labour. Now is the Bakuninist unreasonable in holding this more particular view or in relying on it while negotiating social arrangements? I think not. For the Bakuninist's belief that cooperative labour lies at

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9] I think this last example is borrowed in part from Cécile Laborde.

10] The most important of Rawls' primary goods.

the basis of society and is the source of "dignity" and "rights" (Bakunin, 1971, 92) strikes me as at least reasonable, even if not compelling. Moreover, the Bakuninist can hold and articulate this conception of equality even while bracketing his wider and reasonably contestable atheistic, materialistic beliefs.[11]

Moreover, the Bakuninist also seems to respect the Rawlsian requirement of reciprocity. For Rawls, fair cooperation not only involves respecting others as free and equal, but also reciprocity; this requires "that citizens believe in good faith that the fair terms of social cooperation that they propose and expect all to abide by are *reasonably acceptable to everyone* in their capacity as free and equal citizens, without their being dominated or manipulated, or under pressure because of an inferior social or political position" (Freeman 2007, 375). It is true that the Bakuninist's anarchist objections would deprive the least well-off of social programs which, as JLs see it, make only the redistributive state "reasonably acceptable to everyone". However, for the Bakuninist it is not the lack of such redistribution that poses the greatest threat to the least well-off. Rather, it is the state itself that poses the greatest threat, given the state's potential for centralizing power, resources, and expertise. Thus, given how he sees the operative threats to the sort of freedom he values, the Bakuninist can "in good faith" reject the state while fulfilling Rawls' reciprocity requirement.

Likewise, the Bakuninist offers a different interpretation of what the fact of reasonable pluralism means for social cooperation. Both the Bakuninist and JL accept it as a fact, and accept that it has implications for social cooperation. But they disagree over what its implications are. JLs believe pluralism implies their idea of public justification. Conversely, the Bakuninist believes it means that society ought be hospitable to diverse grassroots organizations that give expression to the full variety of comprehensive views that exist in a pluralistic society. To reiterate, "a free society must be a pluralistic society in which the infinite needs of Man will be reflected in *an adequate variety of organizations*" (Bakunin 1971, 20 [emphasis mine]). This diversification itself is fostered by rejecting a centralized state that tends toward monopolizing intellectual and material resources. For the JL, reasonable pluralism means that the power of the state must be publicly justified; for the Bakuninist, it instead requires extensive devolution of this power. Reasonable diversity is not expressed in the public justification of state power, but in the "variety of organizations" encouraged by devolving state power.

Whether or not anyone actually advocates these Bakuninist positions in a given time or place is immaterial to the present point. Simply the fact that one could plausibly interpret freedom, equality, fairness, and the implications of reasonable pluralism in these diverse ways should qualify the Bakuninist as 'reasonable' under JL's twofold criteria.

11] This is bracketing required by consensus, though not convergence, approaches. Reasons peculiar to one or another comprehensive view are not reasons that all can recognize as being reasonable grounds for accepting or rejecting a proposal. For their part, JLs would claim that their understanding of equality – no-one naturally being subject to another – is 'public' in just this sense, not peculiar to any one comprehensive view.

Of course, if these general criteria are specified in more particular ways, then the Bakuninist may fall beyond the pale of the reasonable. This may happen, for instance, if free-and-equal citizenship is stipulated so as to require the provision of a social minimum, or if it is stipulated (rather than argued) that the fact of reasonable pluralism implicitly requires JL public justification.

But there are at least three strong reasons why JLs cannot, and would not want to, load the deck in such ways.

First, JLs cannot specify reasonable personhood in a more particular way since doing so would beg the question in favour of the substantive conclusions at which JL theorists hope to arrive. A hypothetical procedure only involving persons who already hold the substantive conclusions at which the theorist wants to arrive has no genuine heuristic or constructivist value (Pettit 1993, 297-307). Second, doing so would also render JL a much less apt tool for dealing with the diversity that exists in real-world liberal democracies. No longer would the hypothetical contractors represent anything closely approximating the diversity that exists among real-world persons holding various comprehensive views. Instead, it would represent only a much more narrow range of diversity, tailored to achieve unanimity only on the conclusions that JL theorists prefer. Third, the more procedure-independent content with which JLs fix these concepts, the less can JL plausibly claim to instantiate a higher-order impartiality.[12] JL aspires to be an arbiter between comprehensive views, not an expression of one. Presuming, then, that JL theorists neither want to beg the question nor fail to address real-world pluralism nor become just one comprehensive view among others, their criteria of 'reasonable' persons will have to rest on general concepts of freedom, equality, fairness, and reasonable pluralism as opposed to specific conceptions thereof.

In short, all this means that it seems perfectly possible for a reasonable person to believe that the benefits of living in a stateless society would outweigh the costs – as our reconstructed Bakuninist does. I myself may judge the costs and benefits differently. Yet do I fail to see any plausible grounds for rejecting the night watchman state, and grounds that are perfectly expressible in terms of public reasons? I do not, and the existence of such objections means that even the minimal state fails at the bar of JL's unanimity condition; not all can accept it.

So JL faces an even bigger problem than libertarianism. JL would not just make many uses of political power illegitimate that we normally regard as legitimate. Taking into account the full range of political views held by suitably reasonable persons, JL would make all uses of political power illegitimate. If JLs have failed to see this, it is because they

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12] The idea of "higher-order impartiality" is from Nagel 1987, as is the contention that liberalism instantiates it.

have failed to appreciate how wide a diversity of views can be held by persons who qualify as 'reasonable' according to their own twofold criteria of reasonableness.

III. FACTORS IN THE ARGUMENT

Let me now break down this argument into three of its constituent elements. These factors conspire together to yield JL's unacceptable consequence of de-legitimizing all legal coercion. The first has already figured quite prominently in my presentation of the argument, but it is worth examining in greater detail as it offers a window into the internal logic of JL reasoning.

1. Reasonable Persons: Who's In? Who's Out?

To begin with, one must try and disambiguate who or what JL means to describe with the slippery term 'reasonable'. The term is used in what I take to be the basic idea of JL: legitimate laws are those based on reasons every 'reasonable' person can accept. Here it is persons who are reasonable or not. Sometimes it is an act that is counted reasonable or unreasonable, as when JLs speak of reasons all can 'reasonably' accept or of reasons no-one can 'reasonably' reject. At times Rawls also characterizes legitimate laws as those justified on grounds that citizens can reasonably expect one another to accept (2005b, 446-47). It is one's belief concerning the acceptability of a proposal to others that is judged reasonable or unreasonable. Finally, in addition to citizens being (un)reasonable and acts of accepting, rejecting, and expecting being (un)reasonable, JL also predicates (un)reasonableness of reasons.[13] Eberle has catalogued and critiqued various ways in which JLs have tried to capture the general nature of 'public', or 'reasonable', reasons (2002, 252-87).[14]

These many uses raise the question of the relationship between them. This is not an issue that JLs tend to clarify. While they do not, I think consistency demands that a certain order of priority exist among them with application of 'unreasonableness' to citizens being primary. I explain.

Given their proceduralist aspirations[15], JLs are committed to predicating (un)reasonableness of citizens primarily and of substantive reasons or policies only

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13] See Freeman for a comparable list of the many items of which Rawls predicates 'reasonableness' (2007, 296).

14] For instance, such reasons have been characterized as essentially intersubjective, replicable, or fallible in nature, among other proposals.

15] I speak of JLs as having "proceduralist aspirations" chiefly because of the internal logic of their constructivism, and only secondarily because of what they explicitly say. And, in fact, JLs sometimes explicitly say they do not intend to be thoroughgoing proceduralists; for instance, see Rawls' response to Habermas (Habermas 1995; Rawls 2005, 421ff.). However, even if JLs acknowledge that there are certain substantively just outcomes they seek to justify – as Rawls does in his response – their constructivism commits them to representing these outcomes as the result of an unconstrained proceduralism. That is,

secondarily. If social arrangements are to be understood as self-legislated by free citizens, citizens themselves must be understood as the arbiters of what count as reasonable reasons and reasonable social agreements. Reasonableness is primarily predicated of citizens, and the reasonableness of other phenomena downstream is determined by procedures in which qualified citizens participate.

Moreover, in addition to the logic of their constructivism, JL should primarily predicate (un)reasonableness of citizens insofar as they aim to meet the liberal demand that "the social order should in principle be capable of explaining itself at the tribunal of each person's understanding."[16] With this quote in mind, I have suggested the animating spirit of JL is the desire to make social arrangements justifiable to each and every citizen subject to them. Hence, this order of priority – predicating (un)reasonableness primarily of persons rather than of reasons or agreements – best reflects the spirit of JL, and also preserves its proceduralist designs.

As already mentioned JL gives basically two criteria for reasonable citizens (Rawls 2005a, 54; Rawls 2005b, 488). First, reasonable persons are willing to cooperate with others on fair terms. Reciprocity requires that we offer others terms that we expect they can reasonably accept, that will not impose unreasonable burdens on them no matter their place in the social order. Second, reasonable persons recognize the burdens of judgment and the fact of reasonable pluralism, and recognize them as having implications for social cooperation. So long as a citizen is willing to cooperate fairly and recognize reasonable pluralism, they qualify as 'reasonable'. These qualifications may seem sparse, but it is their very sparseness that makes them suitable for a constructivist, proceduralist account.

Who, then, counts as reasonable according to JL itself? It is not a matter of any particular reasons or social arrangements one must accept to qualify as reasonable. Rather, according to JL, reasonable citizens are simply those who meet two basic criteria. If JL stays true to its proceduralist aspirations, we should then look to the views of these reasonable citizens to give content to reasons and acts that are reasonable as well.

2. Multi-Interpretable Concepts: Why Disagreement Persists even in the Ideal

JLs evidently believe that the idealizations of the hypothetical contracting situation will substantially decrease the extent of political disagreement that exists among citizens of diverse viewpoints when compared with the real world. I am arguing, however, that even with such idealizations – moral, epistemic, material – we still should not expect the range of disagreement to so narrow that appreciable unanimity could be reached on

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the procedure they use to justify the substantive outcomes they prefer must not simply presuppose these outcomes by imposing them on the contractors as procedure-independent criteria of rightness. In short, JLs may have substantive commitments, but they are also committed to justifying these in proceduralist terms. In this way they have proceduralist aspirations.

16] See n. 5 above.

any political measure, including the very existence of a coercive state. Why shouldn't we expect this?

My presentation of the argument implicitly depended upon and illustrated one reason why, but I should now draw out and set forth this reason more clearly: we cannot expect unanimity because of the reasonable multi-interpretability of general concepts that are centrally important to political debate. Such concepts are crucial to JL's criteria of reasonable persons. As a result, the range of persons who qualify as reasonable is broader than is typically conveyed by JL accounts; so, too, will the range of reasonable grounds for rejecting coercion.

For example, take the concept of freedom. What does it mean for citizens to be free? Does it mean that governments legitimately rule only by consent of the governed? If so, is it only by actual consent or also by tacit consent? And what might constitute tacit consent (Simmons 1979, 57-100)? Perhaps freedom speaks rather to certain basic negative liberties that everyone ought to enjoy.[17] Or does it also include a basic right to certain material goods (Rawls 2005a, 356-63)? Does our freedom consist in the political liberties, as the ancients thought? Or in basic civil liberties, as moderns are more inclined to think (Constant 1988, 307-28)? Are we free in some more abstract sense, maybe the Kantian understanding of ourselves as self-legislators of the ethical and political norms that govern us? Is freedom an essentially relational term, where free persons are those who stand in a relationship of non-domination to others (Pettit 1999)? Nor should we forget the Bakuninist's conception of freedom seen earlier that accords primacy to one's conscience.[18] Moreover, so far as I can see, all of these conceptions of freedom are compatible with the basic concept that JLs start with: individuals are free in that each has a capacity and right to lead their lives by their own lights. It is safe to assume there is some shared meaning between all these conceptions – some basic idea such as self-direction. But a vague concept like this is hardly sufficient for adjudicating any substantive political disputes.

Now consider equality in this same light. At the beginning of *Contemporary Political Philosophy*, Will Kymlicka posits that political theorists of our time have come to occupy in common an "egalitarian plateau" (Kymlicka 2002, 4-5). He then goes on to discuss each of several leading schools of contemporary political philosophy: utilitarianism, liberal equality, libertarianism, Marxism, communitarianism, and feminism. He suggests that each of these can be fruitfully understood as a different interpretation of the political value of equality! (And so, too, can anarchism, the Bakuninist will hasten to add.) For example,

> This more basic notion of equality is found in Nozick's libertarianism as much as in Marx's communism. While leftists believe that equality of income or wealth is a precondition for treating people as equals, those on the right believe that equal rights over one's labour and property are a precondition for treating people as equals. (Kymlicka 2002, 4)

17] See Berlin for the distinction between negative and positive liberties (Berlin 1958).

18] For a contemporary exponent of the view that freedom is primarily freedom of conscience, see Kukathas 2003.

It is evident, then, that even citizens who view one another as free and equal will experience great difficulty coming to unanimity given their differing interpretations of what it means to treat people "as equals."

And just as there are diverse interpretations of equality and freedom, there are also various reasonable interpretations of fairness. Do fair terms of cooperation require rendering to each according to desert, where desert is a function of one's virtue or vice? For much of Western history, justice and fairness were understood primarily in these terms, though now this understanding has been mostly – though not entirely[19] – abandoned by professional philosophers. Does fairness demand 'from each according to ability, to each according to need'? This was Marx's suggestion, and still resonates deeply. Does fairness demand rendering to each according to her actual contribution to society's economic production? A certain ethic of personal responsibility, held by libertarians and laissez-faire capitalists, would say it does. But this dimension of fairness also finds expression, albeit more modestly, in the writings of Rawls – who views persons "as capable of taking responsibility for their ends" (Rawls 2005a, 33-34) – and luck egalitarians – who aim to "eliminate involuntary disadvantage", though not voluntary disadvantage (Cohen 1989). Or does fairness demand distribution according to a system of natural rights, equally and inalienably held by all?[20] Or perhaps fairness demands distribution according to a hypothetical procedure of some sort, procedures which themselves try to embody one or more of the foregoing ideals of fairness in combination with each other. JL, for instance, incorporates both luck egalitarian elements – trying as it does to nullify characteristics that are "arbitrary from the moral point of view" (Rawls 1999) – and natural rights elements – taking each person as it does to be a "self-authenticating source of valid moral claims" (Rawls 2005a, 32).

Reflect upon this fact. The contemporary political philosophical world is characterized by diverse theorists who knowledgably and sympathetically articulate utilitarian, libertarian, Marxist, communitarian, and feminist views, as well as theories such as justice-as-fairness, justice-as-luck-egalitarian-equality, justice-as-rights, justice-as-entitlement, justice-as-desert, justice-as-impartiality, and so on. What makes possible their disagreement? In large part, their disagreement turns on the multi-interpretability of the key concepts under discussion. They agree that people are free and equal and should be treated fairly; they just disagree on the meaning and implications of these general ideas.

Their disagreement reinforces my argument in this essay. In light of the extant disagreement among political philosophers with which we are familiar, is it reasonable to expect that contractors – burdened by the same multi-interpretable concepts – will fare any better in reaching unanimity? As Waldron emphasizes with respect to Rawls' *Political Liberalism*, political disagreement exists "all the way down" (Waldron 1999, 295)[21], and we

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19] For an extensive recent discussion of desert, see Kagan 2012.

20] Think Locke here.

21] Chiding Rawls for wrongly supposing that diverse persons will unanimously support public

should not expect the situation to be significantly different even if we transpose real-world persons to the hypothetical conditions of JL.

3. JL's Unanimity Condition: Why Nothing Gets Justified

The reasonable multi-interpretability of key political concepts contributes to an explanation of why JL de-legitimizes all uses of legal coercion. The vagueness of these concepts, though, is something with which all political philosophers must reckon. More specifically, why is it that, in the context of JL, these vague concepts lead to the unacceptable consequence of de-legitimizing all legal coercion?

The culprit is the unanimity condition that is part of the JL thesis. JL requires that laws be based on reasons that all can accept; correlatively, it requires justifications that none can reasonably reject. Unanimity might seem possible given certain understandings of freedom and equality that are widely shared among contemporary liberal democratic citizens. However, JLs fail to appreciate the full breadth of viewpoints that qualify as reasonable by their own twofold criteria, a failure that I suspect is due to certain understandings being so hegemonic at present that they have become virtually transparent to us. This bias leads to marginalizing views such as the Bakuninist's, despite the fact that it is actually consistent with the general premises of fair cooperation between equals and reasonable pluralism. But it is the surprisingly wide range of persons that qualify that problematizes the JL standard, since any proposal must be non-rejectable by all of them.

To solve this problem, the unanimity condition cannot simply be removed from JL. It cannot since it is an essential part of JL given the problem to which JL is a response. The problem is how to vindicate the freedom and equality of real world democratic citizens who, on the basis of political views they do not share, are often coerced against their will. How can a person be free who is coerced by their fellows, having had his vote outweighed by the majority view? This was the essential problem Rousseau sought to redress with his notion of the general will. Notice this problem is only generated if we believe that every citizen is free and equal. If every citizen is not, then it seems unproblematic that certain citizens be coerced by others or their views dismissed by the majority; for it would make sense that those who have less status or freedom should be subject to coercion by those who have more status or freedom. But that is obviously not the premise from which JL begins nor the situation to which JL addresses itself. JL assumes that everyone is free and equal, and so long as even a single person stands to be coerced against her will Rousseau's conundrum remains as problematic as ever. The larger moral framework presumed by JL is certainly individualistic and Kantian, not aggregative and utilitarian. To remove the unanimity condition from JL, therefore, would be to gut JL of a key advantage over aggregative approaches as well as render it only a partial solution to the problem it is meant to solve.

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reason as a framework for resolving political disputes, Waldron elsewhere comments, "[w]e also have to deal with justice-pluralism and disagreement about rights" (Waldron 1999, 159).

Let me explain JL's unanimity condition in yet one more way, defending my construal of it against the charge that I've misinterpreted JL. It may seem I have misinterpreted JL as follows. I have presented JL's unanimity condition as requiring that reasons for coercion be accepted by all reasonable persons. What it actually requires, though, is simply that reasons for coercion be acceptable to all. It requires only that reasons are such that they could be accepted, not that they necessarily are accepted. In other words, the purpose of JL is not to resolve disagreements. Rather, it is simply to provide a framework for handling disagreements that is appropriate to free and equal citizens. It serves this latter purpose by the framework itself being accepted by all, even if the reasons given for particular measures within the framework are not accepted by all. JLs such as Rawls and Quong clearly want to allow for the legitimacy of coercive legislation amidst disagreement. They require only that legislation be justified by reasons that are related to the shared values of freedom, equality, and fairness and by reasons that are otherwise non-sectarian.

In light of this exegetically being the case, why do I characterize the unanimity condition as I do – as requiring that all reasonable persons find reasons for coercion acceptable, and not merely as requiring that they be offered a certain type of reason? And why do I insist that the unanimity condition, so characterized, is essential to JL?

I have already pointed out that mine is the more natural reading of JL's basic idea and that JLs can periodically be found explicitly saying that it is coercion and institutions that must be universally accepted (Quong 2011, 316); additionally, there is substantive philosophical reason to regard the unanimity condition so understood as essential to JL. As I say, JL distinguishes itself in part by being individualistic rather than aggregative and addresses itself to the same question addressed by Rousseau. My construal of JL's unanimity condition, as opposed to construing JL as merely requiring agreement on a framework for reasoning, is more consistent with these considerations. Similarly, by requiring only a framework for reasoning, JLs fail at the essential task of justifying coercion to all affected persons. Persons who are merely offered a certain type of reason rather than reasons they accept have hardly been offered reasons that are acceptable to them. Doing so hardly solves Rousseau's problematic. Hence, given JL's core principle, JL's unanimity condition is best interpreted as requiring unanimity on reasons for coercion as opposed to simply unanimity on a framework for reasoning.

Now the JL theorist might grant that JL cannot be gutted of its unanimity condition and that my characterization of the condition is appropriate. But, he will insist, JLs are not proposing to give every real-world person a veto. They are simply giving every person a veto insofar as their cognitive, economic, and moral deficiencies are corrected for. And then he may put to me the following question: among that idealized group of people, don't I think there would be many uses of legal coercion that no-one would veto?

To reiterate, no I do not. Certainly there are reasons offered in the real-world for rejecting a given policy that would not be offered by persons construed in this way. For instance, no person would object to climate change legislation on the basis of disreputable environmental science. Our contractors also would not have the lapses in moral judgment

that sometimes afflict otherwise egalitarian real-world citizens. Nor would anyone leverage their wealth for political advantage. So the cognitive, moral, and economic idealizations would, I expect, have the effect of narrowing the range of reasons that are offered for or against a proposal.

However, I also expect that these idealizations would not narrow the range of laws that satisfy JL's unanimity condition. That is because there are still several ways in which reasonable citizens, offering public and not comprehensive reasons, may conscientiously disagree with one another.[22] To name three sources of such disagreement: they may disagree on the interpretation of general concepts, as I have emphasized. As well, they may disagree on how various public reasons and values ought to be weighted.[23] They may also disagree on the correct analysis of empirical data – such as certain disagreements that attend climate change science (Budd 2015).[24]

Even if JL's idealizations narrow the range of reasons being offered, there are many reasonable, public objections that reasonable citizens can raise against coercive measures. Climate change legislation may not be rejected on the basis of bad science, but it may be rejected on the moral grounds that some other state priority is of greater urgency; or on the philosophical grounds that we cannot have obligations to future generations; or based on the belief that imminent technological advancements will be able to address future environmental challenges.[25] Group-differentiated legislation may not be supported on the basis of irrational prejudice, but may be defended in the name of rectifying historic or systemically entrenched injustices. Egalitarian schemes of property rights may be reasonably rejected on efficiency grounds; or in the name of certain inalienable rights which people plausibly possess – rights to their own bodies, labour, and fruits of their labour.[26]

In short, people would enter cooperative schemes with diverse views of public reasons and values even when they do their best to leave aside their comprehensive views and even when their moral, epistemic, and material shortcomings are corrected for in the hypothetical scenario envisaged by JL. There is no reason to suppose that widely differing political views and temperaments would not come into play in the making of the hypothetical agreement. We should expect that these differing views would deeply affect even idealized persons as they evaluate proposals. As a result, although certain kinds of particularly divisive reasons may be out of bounds, there are no uses of coercive political

22] In the comments to follow, I take my cue from Lister (2010, 154).

23] Cf. Eberle's comments on abortion (2002, 219).

24] For instance, despite widespread agreement on the basic fact of rising global temperatures caused by human activity, climate scientists disagree over why average global temperatures "barely rose" between 1998 and 2012.

25] I borrow the suggestion that future technologies might solve environmental challenges from a talk given by Jan Narveson at at the Canadian Political Science Association meeting in May 2011, at the University of Waterloo in Waterloo, Ontario, Canada.

26] I follow Nozick in distinguishing and isolating these rights.

power that we should expect all reasonable persons would agree with. Thus, applying JL's unanimity condition de-legitimizes all uses of legal coercion, even in JL's idealized circumstances. JLs have insufficiently explained why we should expect otherwise.[27]

IV. CONCLUSION

In sum, according to the basic idea of JL legal coercion is legitimate only when exercised for reasons that all reasonable persons can accept. That is, laws are legitimate only if they satisfy JL's unanimity condition. This entails that if no law can meet the unanimity condition, then no law is legitimate. Given the diversity of persons who meet JL's twofold criteria of 'reasonableness' – a diversity that encompasses such marginal views as the Bakuninist's – no law would be supported by all reasonable persons in JL's thought experiment, let alone in the real world. Therefore, JL would prohibit any use of legal coercion.

Nothing would be justified by JL. This result clearly conflicts with commonsense, which recognizes many instances of legal coercion as legitimate even amidst disagreement, and calls into question JL's plausibility.

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27] For reasons such as those summarized in this paragraph we should also expect disagreement over frameworks for deliberation and not just over coercive measures. If so, the foregoing analysis remains relevant even if we interpret JL as only requiring unanimity concerning frameworks.

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A Kantian Argument for Sovereignty Rights
of Indigenous Peoples

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Abstract: Kant's non-voluntarist conception of political obligation has led some philosophers to argue that he would reject self-government rights for indigenous peoples. Some recent scholarship suggests, however, that Kant's critique of colonialism provides an argument in favor of granting self-government rights. Here I argue for a stronger conclusion: Kantian political theory not only can but must include sovereignty for indigenous peoples. Normally these rights are considered redress for historic injustice. On a Kantian view, however, I argue that they are not remedial. Sovereignty rights are a necessary part of establishing perpetual peace. By failing to acknowledge the sovereignty of native groups, states once guilty of imperialism leave open the in principle possibility for future violence, even though no current conflict exists. Only in recognizing self-government rights can states truly commit to the cosmopolitan ideal.

Key words: Immanuel Kant, indigenous peoples, sovereignty, cosmopolitan right, perpetual peace.

Kant's cosmopolitan right has been used to explore modern questions of global politics, international relations, and multicultural identities.[1] Less attention has been paid to self-government rights for indigenous peoples, but they remain a point of dissention.[2] On one interpretation, it appears Kant would reject sovereignty rights for indigenous peoples because of his non-voluntarist conception of political obligation (Waldron 2000).[3] That is, since Kant holds that human beings wrong each other simply by being in proximity in the state of nature, they are bound to form a civil condition. As such, indigenous groups are likewise bound to join the societies that they neighbor. In response, however, Kant's critique of imperialism seems to suggest that he would allow native populations freedom from the control of the very states that have wronged them in the past (Niesen 2007, Waligore 2009). Here I argue self-government rights are not merely a possibility but a necessity in Kant's political theory. Contrary to contemporary understandings of the claims of indigenous peoples, I argue that sovereignty rights are not remedial on a Kantian view. That is, rights to self-government and to land are not reparations for the past injustices; they are rather requirements for progress toward perpetual peace. I argue that on a Kantian account self-government rights are necessary for lasting peace because states that fail to acknowledge the sovereignty of their indigenous populations keep open the in principle possibility that they will resume the conflicts of colonialism. Pleas for self-government are thus long-standing pleas for a peace agreement that should have taken

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1] For an example of this scholarship, see Bohman and Lutz-Bachmann 1997, Kleingeld 2012, Flikschuh and Ypi 2014.

2] By "self-government rights," I mean rights with which indigenous peoples can demand, in the words of Will Kymlicka, "some form of political autonomy or territorial jurisdiction." (Kymlicka 1995, 27)

3] I use the term "non-voluntarist" here as Helga Varden uses it (2008, 1).

place but never did. Only in recognizing the sovereignty of indigenous peoples can states that once engaged in imperialism commit to the cosmopolitan ideal.

Because Kant's remarks about native peoples and colonialism are found primarily in his writing on the cosmopolitan right, determining the implications of that right has been central to the current debate about indigenous peoples.[4] Kant describes the cosmopolitan right both in "Toward Perpetual Peace" and in the *Metaphysics of Morals*.[5] In "Toward Perpetual Peace," Kant explains that the cosmopolitan right is "the right of a foreigner not to be treated with hostility because he has arrived on the land of another" (8:357). The cosmopolitan right follows from the fact that all human beings share the earth's surface. Since that space is finite, humans will inevitably have to co-occupy certain areas and travel on each other's land (PP 8:358). If foreign travelers are welcome to visit other places, they can try to enter into commerce with the people there. Kant argues that by facilitating these kinds of relations, "distant parts of the world can enter peaceably into relations with one another, which can eventually become publicly lawful" (PP 8:358). If various parts of the world can relate peacefully to each other, the federation of nations will grow and the world will be one step closer to perpetual peace. In the *Metaphysics of Morals*, the cosmopolitan right reappears in the third section on public right. Here, Kant claims that this right is "the relation of each to all the others of *offering to engage in commerce* with any other" where the party being approached is not permitted to "behave toward [the offering party] as an enemy" (6:352, Kant's emphasis). Kant uses the same justification of shared space that appears in "Toward Perpetual Peace:" because all humans have a right to occupy their shared space they must be able to traverse that space without being subject to hostility (MM 6:352).

After introducing the cosmopolitan right, Kant turns to questions about making new settlements and it is in this context that the critique of colonialism appears. Although humans have the right to travel to other lands, Kant rebukes the behavior of foreign explorers as inhospitable, saying that, "the injustice they show in *visiting* foreign lands (which with them is tantamount to *conquering* them) goes to horrifying lengths" and that colonialism has spawned "the whole litany of troubles that oppress the human race" (PP 8:358, Kant's emphasis). Additionally while the cosmopolitan right permits visitors to offer to engage in commerce, Kant claims that permanent settlement requires the consent of the indigenous peoples. Settlements may be established without consent of the native peoples only if the new settlement does not encroach on their land (MM 6:353). But if the new settlers should encroach on occupied territory, Kant writes that, "this settlement may not take place by force but only by contract" (MM 6:353). So although the cosmopolitan right allows us to

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4] Muthu (2003), Neisen (2007), Waligore (2009), and Kleingeld (2012) all use the cosmopolitan right as the primary starting point for the discussion of Kant's critique of colonialism.

5] All references to Kant are from the Gregor Cambridge translations. Abbreviations are as follows: PP = "Toward Perpetual Peace," MM = Metaphysics of Morals.

travel to distant lands without being treated as an enemy, that right does not mean that we are permitted to settle on those lands if there are already people living there.

Because the critique of colonialism is paired with the cosmopolitan right, it seems that Kant believes the actions of the colonists to be violations of that right. But because the content of the cosmopolitan right is limited, teasing out the implications of this violation requires constructing a plausible position using related passages. The primary argument against self-government rights for native peoples relies on section 44 in the *Rechtslehre*. It is here that Kant claims that humanity exists in a state of conflict and that the civil condition is the only way to escape it. Kant writes:

> So, unless it [a people] wants to renounce any concepts of right, the first thing it has to resolve upon is the principle that it must leave the state of nature, in which each follows its own judgment, unites itself with all others (with which is cannot avoid interacting), subject itself to a public lawful external coercion, and so enter into a condition in which what is to be recognized as belonging to it is determined *by law* and is allotted to it by adequate power (not its own but an external power); that is, it ought above all else enter a civil condition. (MM 6:312, Kant's emphasis)

Jeremy Waldron contends that this famous passage encapsulates not only the heart of Kant's political theory, but also the true spirit of the cosmopolitan right (2000, 238). The cosmopolitan right rests on the same foundation as the impetus to leave the state of nature: because people are unavoidably side-by-side, we must find a way to live together that is lawful and not fraught with the potential for hostility. According to Waldron, this must include people with whom we share a geographic region despite the history of how we came to occupy the same space. Waldron writes that a long-established settlement-- even if it was settled wrongfully--has no choice but to come together in a civil condition: "[The descendants of the settlers] and the descendants of those whom their ancestors invaded and expropriated now have nothing to do but come to terms with one another… and establish a fair basis for sharing lands and resources that surround them" (2000, 239). In other words, Kant never claims that the obligation to enter the civil condition is contingent upon the circumstances that lead to the sharing of space. It is merely the fact of proximity--however it came to be--that necessitates leaving the state of nature. According to Waldron, we simply cannot pick and choose with whom we want to enter civil society and this mandate holds true even for groups that are radically different from one another (2000, 241). Since we move around the limited space of the world, "there is no telling who we will end up living alongside of, no telling who our neighbors might be" (Waldron 2000, 239). The spirit of the cosmopolitan right, for Waldron, means that we must find a way to live together under a common civil framework despite our differences and past histories.

Although Waldron's arguments appear consistent with one part of Kant's view, they seem to be inconsistent with other parts of Kant's view. As Timothy Waligore points out, the position seems to take too lightly the issue of past injustices (2009, 34). Despite

the right to travel freely, Kant's critique of colonialism is severe.[6] It is because of the past behavior of the colonists that Kant claims that some countries like China and Japan, who had in the past "given such guests a try" have "wisely" restricted their borders by allowing others "access but not entry" (PP 8:359). So although the cosmopolitan right gives everyone the right to travel, since the colonizers have abused that right with violence, nations appear to be permitted to restrict access to their land at least for a time (Waligore 2009, 39). Waligore argues that the spirit of the cosmopolitan right is about trust between nations. He writes: "Past injustice has undermined the conditions for trust and for the peaceable exchange of ideas" (2009, 34). Since Kant permits states that have experienced the violence of imperialism in the past to restrict access, Waligore claims that there is theoretical ground to accommodate sovereignty rights: self-government rights allow native peoples to limit their interaction with the states who wronged them. He concludes, "The spirit of the cosmopolitan right [...] permits, and even requires, protections for the cultural integrity and recognition of land claims stemming from historic injustice" (2009, 48).

Ultimately, I think neither of these accounts is satisfactory. While Waldron is correct that passage 44 of the *Rechtslehre* is one of the key components of Kantian political theory, Kant's remarks about imperialism suggest that it is a special case to be treated differently than a case where human beings simply find themselves in proximity with one another. In spite of his non-voluntarism, Kant never claims that the new settlers can force the native peoples to join them. In fact, he is critical of that reasoning precisely because it has been used to justify the violence of imperialism. Kant writes that imperialists have appealed to "specious reasons to justify the use of force are available: that it is to the world's advantage [...] because these crude peoples will be civilized [...]"(MM 6:353). Likewise, Kant rejects the idea that states have the right to form colonies so that they can "bring these human beings (savages) into a rightful condition [...]" (MM 6:266). The key difference is that colonial settlers are not merely a collection of individuals that happen to find themselves in a new land.[7] They are representatives of the colonizing state and they intend to gain more land for that state. Imperialism is a matter of land and power acquisition and not a matter of establishing another instance of the civil condition. So although Kant claims that individuals are permitted to use force to impel other individuals into the civil condition, a state cannot forcibly "civilize" an indigenous group. Waldron's reconstruction of the spirit of the cosmopolitan right cannot provide adequate grounds to reject sovereignty rights. Without passage 44 of the *Rechtslehre* to supplement the content of the cosmopolitan right, the right alone cannot show that Kant would prohibit indigenous sovereignty.

The trouble with Waligore's reconstruction, however, is that he frames contemporary claims of indigenous peoples as matters of restorative justice for past injustice (2009, 29).

6] Muthu (2003), Neisen (2007), and Kleingeld (2012) all give accounts of Kant's critique of colonialism, but they do not address the question of indigenous sovereignty rights.

7] Although there can in principle be new settlers that break away from their mother states, Kant's examples more closely resemble the intentional establishing of colonies, such as those of the first British Empire.

He argues that indigenous peoples have a claim to the "return of land," which is an appeal to redress for the theft of land that took place originally (2009, 48). In addition, he claims that reparations are owed to native peoples: "[A] society should begin by articulating an account […] of for how long reparations are owed, or a serious account for why they are not owed […]" (2009, 31). Such an appeal is conceptually problematic on a Kantian account for two reasons.[8] First, restorative justice is a judicial matter, yet Kant never explains whether violations of the cosmopolitan right are to be treated this way. Although Kant claims all humans have the cosmopolitan right, he never specifies how that right is enforced and by whom. The most Kant says about the status of the cosmopolitan right is the following:

> Since the […] community of the nations of the earth has now gone so far that a violation of right on one place of the earth is felt in all, the idea of a cosmopolitan right is no fantastic and exaggerated way of representing right; it is […] a supplement to the unwritten code of the right of a state and the right of nations necessary for the sake of any public rights of human beings […]. (PP 8:360)

Here Kant simply claims that the right is not a fiction and that it is a "supplement to the unwritten code" of the rights of states and nations. But such a claim still does not explain exactly how the right could be enforceable. In the context of the normal civil condition, when another citizen takes my land, I can appeal to the court for its return, but only because the same judiciary has authority over both of us. Not only is there is no corresponding judiciary in the case of the cosmopolitan right, Kant also rejects the idea that there ought to be some meta-state that presides over the collection of independent states (PP 8:355).[9] The second problem with treating the claims for self-government as matters of restorative justice is that the victim and aggressor nation exist in a state of nature together.[10] Claims to justice only make sense in the context of the civil condition, but since there is no meta-state, states do not have a civil condition. As Kant claims, "It is *pleonastic*, however, to speak of an unjust enemy in a state of nature; for a state of nature is itself a condition of injustice" (MM 6:349-50, Kant's emphasis). One cannot demand reparations for what happens in the state of nature because there is no such thing as injustice in the state of nature. Because there can be no justice claims at all, there is no claim that the native peoples can make to be compensated and no one to whom they can make it.[11] Asking for reparations from the state that took their land in the first place is the equivalent of asking that the thief return stolen property of his own volition. Additionally, even if the cosmopolitan right were in principle enforceable, there is no textual evidence to explain how a violation of that right ought to be redressed. Why should a violation of

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8] For arguments in favor of a Kantian account of restorative justice, see Niesen 2014.

9] For a detailed discussion of the literature on this claim, see Chapter 2 in Kleingeld 2012.

10] I will return to the question of whether indigenous peoples can be seen as a state in Kant's view.

11] For the argument for Kant's need for a public authority in order to establish a condition of justice, see Varden 2008.

the cosmopolitan right dictate the return of land at all? That the cosmopolitan right allows peoples to limit their interaction with aggressive nations simply is not enough to construct a restorative claim for return of land or self-government rights. It may provide theoretical space to make such a claim, but theoretical space is all it provides.

Both Waldron and Waligore must reconstruct a Kantian position on the rights of native peoples because the content of the cosmopolitan right is underdetermined. In order to do so, they both attempt to situate the cosmopolitan right into a larger discussion in Kant's political theory: Waldron uses the argument for the non-voluntarist conception of the state and Waligore uses Kant's critique of imperialism. Here I offer a third and, I argue, more compelling alternative: that in order to determine the status of self-government rights we must understand what role they play in establishing perpetual peace. Kant is clear that the point of the cosmopolitan right is so that people can travel freely and attempt to engage in commerce. But the purpose of that interaction is to foster peace among nations. As Kant writes, "In this way, distant parts of the world can enter peaceably into relations with one another, which can eventually become publicly lawful and so finally bring the human race ever closer to a cosmopolitan constitution" (PP 8:358). If peaceful travel were not possible, there is no way that states would be able to establish relations with one another. Perpetual peace is not the same thing as mere avoidance of all interaction; states can never form a cosmopolitan constitution if they never come into contact. So the cosmopolitan right functions as a precondition for the possibility of establishing lasting peace, which is why Kant refers to it as a "supplement to the unwritten code" of the rights of nations (PP 8:360). States that refuse to entertain visitors also refuse to entertain the possibility of peaceful relations. If the primary role of the cosmopolitan right is to foster perpetual peace, then violations of the cosmopolitan right are problematic because they disrupt or hinder the progress toward the cosmopolitan constitution. Under this description, if imperialism does damage to perpetual peace, then the wrongs done to native peoples during colonialism have to be understood as part of that damage. In what follows, I argue that thinking of the wrongs done to indigenous peoples this way is a faithful reconstruction of Kant's own view, and it provides the theoretical grounds for a Kantian argument in favor of self-government rights.

First, let me explain the textual evidence that supports the connection between imperialism and war. Kant seems to understand the wrongs done by imperialists as a violation of the cosmopolitan right, but one aspect of his critique has largely gone unnoticed: Kant claims that colonialism represents a commitment to continuing future war, both in terms of the motivation behind it and the way it is implemented.[12] Kant remarks that the colonies in the so-called Sugar Islands, for example, "serve only a mediate

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12] As Williams puts it, "For Kant colonialism helps fuel the flames of European wars and renders Africa, India and the Americas into the sites of endless indigenous wars which have their origins in the greed of the European traders" (2004, 169). Muthu's Chapter Five deals extensively with Kant's anti-imperialism (2003). Most recently, Ripstein argues that Kant's criticizes colonialism as "an illicit ground for going to war" and an "illicit mode of conduct after war" (2014, 146).

and indeed not very laudable purpose, namely, training sailors for warships, and so in turn, carrying on further wars in Europe [...]" (PP 8:359). Likewise, Kant claims that the colonizers want to increase their land so that they can "increase the number of their subjects, and so too the multitude of their instruments for more extensive wars [...]" (PP 8:355). Thus one motivation for founding new colonies is to gain more raw materials for war. The other is to amass more land and thus more power, which, as Kant points out, is already a wrong against less powerful states. The "*menacing* increase in another state's *power* (by its acquisition of territory)" wrongs less powerful states "by the *condition* of superior *power*, before any deed on its part [...]" (MM 6:346, Kant's emphasis). So in acquiring more territory, a powerful state creates conditions for war since the smaller states will feel threatened simply by the existence of a great imbalance of power. In undertaking colonization in the first place, a state thus demonstrates that it is committed to continuing war and not to lasting peace.

In addition, imperialism as it is carried out in practice violates Article Six of perpetual peace, namely that "No state at war with another shall allow itself such acts of hostility as would have to make mutual trust impossible during a future peace [...]" (PP 8:346). Kant specifically prohibits wars of extermination and wars of subjugation for this reason (PP 8:347 and MM 6:347). With regard to indigenous peoples, Kant specifically condemns the slavery of the colonies and claims that the behavior of the colonizers counts as "conquering" the native peoples (PP 8:359 and PP 8:358). Because imperialism enslaves and slaughters native peoples in forming new settlements, much like underhanded war tactics like spying and assassination, it makes the establishment of mutual trust between the parties engaged in hostility impossible once the violence has ended. Indeed, as Kant points out, the previous hostility that visitors directed toward China and Japan caused them to "wisely" restrict their borders (PP 8:359). Here Kant provides an example of the way that imperialism has undermined future trust between nations. The establishment of mutual trust is essential to lasting peace because states must be able to be a part of the international federation together. If one state attempts to subjugate another, peaceful cooperation will be unlikely or perhaps impossible. Imperialist states jeopardize any future relations they may with have the native peoples they enslave and slaughter.

One may object that even if Kant criticizes imperialism because it is a commitment to future war, it cannot matter in the discussion of native peoples. War, as this objection would go, takes place only between two established states and Kant does not classify native peoples as states.[13] It is true that Kant does not think all nations qualify as states. The fact that native peoples do not belong to a state is of course one of Kant's critiques. He claims that we "regard with profound contempt" the "attachment of savages to their lawless freedom" (PP 8:354). But the exact status of native peoples is ambiguous in the

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13] Kant does argue that only states can agree to go to war by means to the consent of their citizens (MM 6:345-6). But, just because only official states can consent to war, it does not mean that violence and conflict cannot take place between states and non-states. Kant's discussion of imperialism makes this clear: even though native peoples are not states, they can be conquered and invaded like states.

text. Indigenous peoples have what I will call *proto-state* status in at least three ways: (1) they can enter into contracts with states, (2) they have (at least) provisional ownership of their land, and (3) they are members of nations even though they are not states.[14] Let me explain how these components comprise proto-state status.

With regard to the restrictions on colonies, Kant claims that the state seeking new settlements must make a fair contract with the native peoples to share the land (MM 6:353). This claim implies that even though the indigenous group does not necessarily have a constitution, it is still capable of entering into formal agreements. If it can do so, Kant has to believe that the group has some level of political autonomy. Without at least some degree of group self-determination, the population could not come together enough to be a contracting party at all. Moreover, if the settlers must contract with the indigenous peoples to share the land, then they must have some legitimate claim to that land in the first place. Indeed Kant claims that native peoples have at least provisional ownership of their land: "All human beings are originally [...] in a possession of land that is in conformity with right, that is, they have a right to be wherever nature or chance [...] has placed them (MM 6:262). What is more, Kant makes allowances for a form of land possession that would be more prominent among indigenous groups, namely communal land ownership (MM 6:265). In other words, a native population where land is shared among all members still has a claim to that land even if it is not privately owned by individuals. But the right they have to their land is still a collective right. A land-sharing contract with a state would be between that state and the tribe, not between that state and each member of the tribe. Finally, although native peoples do not constitute states, they are members of nations along with states. Kant describes the relation between citizens and native peoples as constituting "one family" even though the citizens make a state and the native peoples comprise only a "tribe" (MM 6:343). Kant's distinction between states and nations is not a sharp line: in "Toward a Perpetual Peace," he seems to use the two interchangeably. What is important to note is that Kant makes the claim that native peoples are members of nations in Section II of the *Rechtslehre*, the same place where he discusses war. In this way, we can understand Section I as detailing the internal workings of a state while Section II is focused on relations between states. These relations include their "external relations" (MM 6:344). States are in external relations with one another because they exist in physical territories that neighbor each other. In this way, states and nations are co-spatial. If the state is invaded by a foreign enemy, the nation is by definition also invaded because the nation includes the land where the state exists. Moreover, if a state invades a land where there are only native peoples and no formal state, such an act would still count as the invasion of a nation. And since Kant claims that new settlers must establish a land-sharing contract with the native peoples, nations (even though they are not states) still have claims that their land not be invaded (MM 6:353). Thus Kant's definition of war cannot preclude native peoples simply because they are not official citizens. While

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14] Stilz argues that non-state peoples have "provisional rights" (2014).

indigenous peoples may not qualify as full-fledged states, we must understand them as having some kind of politically autonomous status in order for them to have the powers and attributes Kant describes.

If indigenous peoples have the status of proto-states, combining this claim with Kant's critique of colonialism as a means to future war allows a more faithful Kantian account for understanding the wrongs of imperialism. Traditionally, these wrongs have been understood as violations of the cosmopolitan right. As I pointed out, this conception is problematic in one way because of the issue of enforcement: there is no third party to ensure the right or to adjudicate violations of the right. But it is problematic for additional reasons. Calling imperialism a violation of the cosmopolitan right simply fails to adequately describe the actions of the colonizing state. The cosmopolitan right only establishes that human beings have the right to travel to foreign lands without being treated with immediate hostility. Although certainly the colonists treated the native peoples with hostility, the harm goes beyond mere hostility. Imperialism involved conquering, enslaving, and exterminating indigenous peoples as a way of amassing more land and gaining slave labor for gathering resources. The wrong done during colonization is closer to a war of extermination or subjugation than it is to treating a foreign visitor with hostility. As Kant describes it, wars of subjugation and extermination "would be the moral annihilation of a state (the people of which would either become merged in one mass with that of the conqueror or reduced to servitude)" (MM 6:347). Knowing the history of colonialism, it is hard to find a phrase more apt than "moral annihilation."

What is more, the cosmopolitan right is held by individuals. Although native peoples do not comprise a state, they are more than simply a collection of individuals. The colonialists did more than treat harshly the members of indigenous groups; they violated the autonomy of the indigenous peoples by invading their land and refusing to contract with them. Understanding the wrongs of imperialism as violations of the cosmopolitan right fails to acknowledge the way in which native peoples were wronged as a group. Even if native peoples are not states, they (as an autonomous people) still have claims not to be invaded, conquered, and exterminated. But if we think of imperialism as one state waging war on a proto-state, we are able to better explain how it is wrong. Although Kant maintains that nations can never completely leave the state of nature, forming the cosmopolitan constitution is the closest they can come to securing their freedom (PP 8:355-6). War makes that cosmopolitan ideal impossible and so does imperialism. Imperialism, like war, violates the sovereignty of the invaded nation, which threatens the security of all nations.

Understanding the wrongs done to indigenous peoples within the framework of war also cuts a clearer path to a Kantian position on how to remedy the wrong done. If imperialism is like war, then the remedies for the wrongs done will be analogous to establishing *jus post bello*. According to Kant, the first step after a war concludes is to undertake peace negotiations (MM 6:348). Peace negotiations aim at a peace treaty that can be upheld by both parties and that will contribute to perpetual peace. As Article One of perpetual peace states: "No treaty of peace shall be held to be such if it is made with a secret

reservation for material for a future war" (PP 8:343). Such a treaty would be, according to Kant, "a mere truce, a suspension of hostilities, not *peace* […]" and this holds true even if the causes for future war are "yet unrecognized by the contracting parties themselves […]" (PP 8:343, Kant's emphasis). So any treaty that ends immediate hostility but still contains the potential for future war is only a truce. If we examine the historical relations between states and their indigenous populations and think of them in the context of war, what we find is that peace negotiations either never took place or took place without earnest. Take for example the United States' history with the Native Americans. Prior to the Indian Removal Act of 1830, there were various peace treaties between the government and certain tribes. The 1785 Hopewell Treaty, for instance, aims to end conflict between the US and the Cherokee, Chickasaw, and Choctaw tribes. Included in the terms of the treaty is an express commitment to peace and friendship along with the establishment of territory boundaries.[15] While these treaties may have been good faith efforts at peace negotiations, on Kant's view no treaty signed after the 1830 could have been anything more than a truce.[16] The Indian Removal Act specifically aimed at amassing more land for the United States (Merijan 2010, 614-16). Kant already sees the expansion of territory as problematic precisely because of the threat it poses to less powerful states (MM 6:346).[17] Treaties of peace that are signed as a means to increase land would, according to Kant, contain the conditions for future war whether the contracting parties intend for it to do so. Because the contracts were drawn up with the hidden agenda of gaining more territory for the U.S., Kant would claim that they could only be considered a truce. For Kant, whatever agreement is reached between a state and the native peoples with which it has had past conflict, it must be an agreement that commits to lasting peace.

If the relation between a state and indigenous peoples is nothing more than a truce, then for Kant the potential for war still looms. Even though there are no current acts of violence, the suspension of hostilities is still suspect because of the very nature of imperialism: the violence of imperialism is almost entirely one-sided. That is, the colonizing state invades, enslaves, and kills the people of the native proto-state. Like wars of extermination or subjugation, the violence of imperialism only ends because the aggressor state decides to end it. The problem is that any peace treaty in the face of this kind of imbalance, for Kant, contains the potential for future conflict; the conflict only ended at the whim of the aggressor as such the aggressor can resume its campaign any time it wants. Given Kant's stipulation that peace treaties must not contain the potential for future war, I suggest that the recognition of self-government rights is the only way that

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15] For the text of the treaty, see http://digital.library.okstate.edu/kappler/vol2/treaties/che0008.htm.

16] There is, of course, the possibility that these treaties were not in fact undertaken in good faith, but for the sake of argument, they could at least in principle be sincere.

17] Additionally, although the United States engaged in the process of contract signing, it knew that the agreements were unfair and if tribes refused to sign, they were eventually bullied into doing so (Merijan 2010, 614, n. 20).

relations between the native population and the aggressor state can count as establishing lasting peace. Why must this be so?

Sovereignty rights ensure that the cessation of conflict is peace rather than merely a truce for two reasons. First, in acknowledging sovereignty of indigenous peoples, the aggressor state essentially sets up for itself obstacles to any future conflict. Since states are bound to uphold their own laws, legislation that establishes sovereignty for indigenous peoples binds the aggressor state to adopt a policy of non-interference and to engage in state-to-state negotiations. If the aggressor state is not by its own laws allowed to interfere with the affairs of the native population, then any future conflict will at least be harder to justify given its own legislation. If the aggressor nation is willing to erect barriers for itself to engage in future conflict, it demonstrates a substantive commitment to lasting peace.

Second, although there is no meta-state, the federation of nations can still play a role in these kinds of relations. According to Kant one of the hallmarks of a warring state is that it willingly engages in "violation of public contracts" (MM 6:349). A proper peace treaty between an imperialist nation and native peoples would be a public contract that the rest of the nations would witness. Should the aggressor nation resume the conflict, it would show itself willing to disregard peace treaties more generally. As Kant writes, "Since [the violation of a peace treaty] can be assumed to be a matter of concern to all nations whose freedom is threatened by it, they are called upon to unite against such misconduct […]" (MM 6:349). If the aggressor state is willing to breach the sovereignty rights of indigenous peoples, the rest of the league of nations would rightly feel threatened by its willingness to disrupt established peace. In other words, if an imperialist state is willing to break a peace treaty with a native population, in principle nothing rules out its willingness to break any peace treaty. In recognizing the self-government rights of native populations, the aggressor state thus opens itself up to criticism and sanction from the international federation. Again, though this action would not completely preclude future conflict with indigenous groups, it would make that conflict much harder to justify. Thus, given Kant's insistence on states' commitment to perpetual peace, sovereignty rights for native peoples are not just a possibility in Kantian political theory, but a necessity. On a Kantian account, sovereignty rights for indigenous peoples are not matters of restorative justice, but a necessary part of ending conflict in a substantive and lasting way.

Again, relations between the U.S. and the Native American tribes provide a clear case to apply the Kantian argument for sovereignty rights. After the policy of removal in the early-to-mid 1800s, U.S. expansion into the west gave rise to the need for more privately owned land (Merijan 2010, 614-5). As such, the U.S. passed the Indian Appropriation Act of 1871, which voided any previous treaties that the government had signed with the Native American tribes and wrote into law the denial of tribal sovereignty.[18] Thus, the

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18] U.S. Code Title 25: Indian Tribes 25 U.S.C. Section 71 Future Treaties with Indian Tribes: "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired."

U.S. unilaterally decided to legislate away the need for any kinds of negotiations precisely because it did not acknowledge the self-government of the tribes. This legislation paved the way for the Dawes Act and policies of allotment, which denied tribes their rights to any communal landownership (Merjian 2010, 615-18). Although the policies of allotment have been repealed and reservations have been established, Native American tribes are still considered dependent populations in need of management and protection rather than groups with whom the United States must negotiate (Merjian 2010, 612, n. 14 and D'Errico 1999, 10). It can thus now cherry pick when it interferes in Native American affairs and when it does not (D'Errico 1999, 10-12). In the words of the federal court (as quoted in D'Errico), "The blunt fact […] is that an Indian tribe is sovereign to the extent that the United States permits it to be sovereign -- neither more nor less" (D'Errico 1999, 10). Sovereignty that is contingent upon the policies and decisions of the aggressor state is not sovereignty at all. Because formal peace was never established and because the U.S. legislated away the negotiation process, the original campaign of violence can resume any time the U.S. chooses to resume it and the native peoples would have no recourse to resist. From a Kantian perspective, at best a truce exists between the U.S. and the Native American tribes and a truce can never establish lasting peace.

I want to close by answering a possible objection. Recognizing self-government rights would not entail that native populations become states. Indigenous peoples may indeed decide to continue to embrace their "lawless freedom" rather than form a republican constitution. One might argue that Kant would reject this outcome. After all, the league of nations is supposed to be a group of proper states, the acceptable form of which is a republic (PP 8:350-4). If native peoples establish a non-republican system of self-rule, would these rogue nations not threaten perpetual peace more than if they were to remain protected parts of a state with a proper civil condition? Moreover, Kant claims that each state "can and ought to require" other states to enter into the league of nations for the same reason that individual humans should enter a civil condition with each other: they wrong each other simply by being in the state of nature (PP 8:354). But only states with a civil constitution can enter the league of nations. If that is true, then would it not be better to demand that native peoples enter the civil condition of the aggressor state?

I think Kant would reject the idea that states can be forced to become republican. First, Kant insists that states are not permitted to interfere with the internal workings of an independent state (PP 8:346). We might think this holds true only of official states and not peoples, but Kant claims this is true even when one state "gives scandal" to another state, which Kant defines as being "the example of the great troubles a people has brought upon itself by its lawlessness" (PP 8:346). So even a state that is lawless, while it may be offensive to republican states, still has a claim to sovereignty. In fact, the only time interference is justified is when a state in the midst of a civil war tries to split in two and both attempt to claim the land as its own (PP 8:346). So even if indigenous peoples decide not to have republican government, it does not justify interference in their affairs. Second, unlike individuals who can force each other to enter a civil condition, nations cannot force other

nations to join the league. They can and ought to require states to join, but states cannot be forced to enter because, as Kant argues, the league of nations is not itself state (PP 8:354). If one state could force another to enter the league of nations, it would be requiring that state to relinquish its sovereignty, which would amount to dissolving the state itself. The league is only an "association" of states that "can be renounced at any time" (MM 6:344). Kant describes the league of nations this way:

> This league does not look to acquiring the 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). (PP 8:356, Kant's emphasis)

Kant is clear that states have no need to subject themselves to the rule of law as people do. The best we can hope for with the league of nations is to secure the freedom of all the states in the league by committing to perpetual peace. As such, the league is a "free federalism" that gradually gains more members over time when states realize that the league will help preserve their freedom (PP 8:356). States must come to freely join the league on their own. In this way, native peoples can maintain their sovereignty--even if it is "lawless"--and cannot be forced to become republican just to join the league of nations. It may be true that they have to have a republican constitution in order to formally join the league, but even then, Kant is flexible to a certain extent. Kant claims that the republican constitution is the best form of government because it is the government most likely to foster lasting peace. Because a republican constitution is representative, the citizens must consent to undertake war. Kant believes citizens will be naturally more hesitant to do so than their leaders, and so as a result republican governments will be less likely to start wars (PP 8:350). Thus, the hallmark of a republican constitution is that it is representative, but representative governments need not be homogenous in other respects. Indigenous peoples could very well join the federation of states if their rule of law was sufficiently representative. One could object that Kant allows for too minimal a conception of multiculturalism. While this objection is a substantive one, it does not lessen the status of self-government rights for indigenous peoples. Native populations may govern themselves as they wish even if they may not be permitted to join the league of nations. Their sovereignty still affords them claims to their land, claims to non-interference, and the right to engage in state-to-state negotiations.

I have argued that Kantian political theory not only can, but indeed must allow for the self-government rights of indigenous peoples. Sovereignty rights are necessary not as instances of restorative justice, but as parts of meaningful peace agreements that can curtail the possibility for future conflict. Only with sovereignty rights can indigenous peoples be assured that the aggressor nations will not arbitrarily resume violence against them. Aggressor nations must legislate self-government rights for native populations to show real commitment to establishing perpetual peace.

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Can Natural Law Provide an Adequate Account of Normativity?

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Abstract. For various centuries, the question of whether natural law is normative or not has been posed. In contemporary legal philosophy, the scholar who is considered to be the main defender of natural law is the Catholic philosopher John Finnis. Finnis contends that natural law can provide a good account of normativity. However, is Finnis right? In this article, I aim at answering this question and I contend that, in broad terms, Finnis is correct in affirming that natural law can provide a good account of normativity.

Key words: John Finnis, natural law, normativity, philosophy of law, ethics.

One of the most ancient concepts of morality is the concept of *natural Law* – it is a concept with about 2,500 years of history (Freeman 2008). Since this date, natural law has been used in moral theories. To provide two historical examples, it was used in the medieval period by Thomas Aquinas and in the Enlightenment by John Locke (Freeman 2008). Today, natural law is still used in moral theories. Thus, due to its historical antiquity, the concept of 'natural law' has considerably changed. Nevertheless, the idea which remains today is that there are principles of natural law (Freeman 2008). A very common approach to natural law is that normative principles can be derived from facts. For instance, it could be contended that human beings are natural reproducers and then sexual relations ought to be performed only with the aim of reproduction. However, this inference from facts to norms has been contested (Hume 1739; Moore 1993). Critics argued that no "ought" can be derived from an "is." In other words, there is no valid logical inference from a fact to a norm. This invalid inference was referred by Moore (1993) as the "naturalistic fallacy." Facing this problem, some contemporary philosophers have taken a different approach to the problems of natural law. By way of illustration, Finnis (1980) rejects this approach, *i.e.,* his theory is not based on this invalid inference. Finnis (1980) considers that 'basic human goods' are self-evident. Thus, they are not and they cannot be derived from facts. This shift towards the principles of natural law avoids the naturalistic fallacy. In addition to the basic principles, Finnis selects principles of 'practical reasonableness." These principles should be used as a methodology to make moral decisions, *e.g.,* abortion or the death penalty.

This contemporary theory of natural law has been largely contested; nevertheless, it is still considered the most consistent contemporary theory of natural law (Freeman 2008). The purpose of this essay is to analyse whether natural law can give an adequate account of normativity. In other words, it will be assessed whether Finnis's account of natural law can be used as grounds for morality. Four criticisms against Finnis's theory will be assessed. First, Finnis's natural law is not only too abstract but also his methodology does not provide tools to answer difficult moral questions (Hittinger 1987; Nielsen 1991;

Weinreb 1987). In other words, the groundwork presented by Finnis is insufficient to enable individuals to make moral judgments, such as the morality of abortion. Second, it is implausible to assert that the human goods are self-evident (Hittinger 1987; Weinreb 1987). As a result, Finnis attempts to avoid the naturalistic fallacy which leads him to defend his theory on the grounds of an incoherent account of human goods, namely, self-evidence. Thus, if Finnis's theory is based on incoherence, it cannot be used as grounds to morality. Third, Finnis's approach cannot be supportive of natural law as groundwork for morality due to the fact that it is not a theory of natural law. This criticism results from the fact that Finnis considers the human goods self-evident (Hittinger 1987; Veatch 1981; Weinreb 1987). Consequently, if he rejects any connection with humans, then his theory is one of "natural law without nature" (Weinreb 1987). Fourth, Finnis's theory abstracts from human experience; subsequently, he excludes a basic good which is usually accepted as good, namely, pleasure (Smith 1997).

Taking this into consideration, this paper will be divided in two parts. First, Finnis's theory (1980) will be outlined. Second, the criticisms will be assessed. This paper will defend that Finnis's account of natural theory provides a consistent response to the criticisms. Hence, it can be contended that Finnis's theory is a consistent defence of natural law. In short, Finnis's account of natural law does provide an adequate account of normativity.

I. OUTLINE OF FINNIS'S ACCOUNT OF NATURAL LAW

Finnis's theory is considered the most consistent defence of the normativity of natural law (Freeman 2008). Finnis's aim is to provide ethical structure/moral standards for decisions of right and wrong (Finnis 1980; Wacks 2006). Hence, this ethical structure will enable individuals to make the right ethical choices. In other words, this ethical structure provides criteria in ordering human life, in the sense that it gives standards of conduct for individuals. Therefore, it can be contended that these moral standards for choosing well are located in the good of human persons (Boyle, Finnis & Grisez 1987a). Thus, Finnis's theory aims to elucidate what a worthwhile, valuable and desirable life consists of (Finnis 1980; Wacks 2006).

Bearing this in mind, Finnis presents two inventories, namely, **1)** basic human goods and **2)** the principles of practical reasonableness, which together, if correctly understood, provide the necessary and sufficient groundwork for making ethical decisions (Bix 1999; Finnis 1980). The same is to say that both together constitute morality (Finnis 1980).

The first inventory is constituted by seven basic human goods, namely, **a)** life (every aspect of vitality "[…] which puts a human being in good shape for self-determination" (Finnis 1980, 86); **b)** knowledge (the preference for truth rather than for falsity); **c)** play (engaging in performances that are good by themselves); **d)** aesthetic experience (the appreciation of beauty); **e)** sociability or friendship (acting so to promote ones friends well-

being); **f)** practical reasonableness (the ability to use ones own intelligence to practical problems in life) and **g)** religion (questioning about ultimate ends) (Finnis 1980).

Having claimed that these are basic human goods, Finnis asserts that they are what fulfil human life, they are equally valuable, none can be analytically reduced to the others and they are self-evident.

Basic goods are what fulfil human life because they are how human beings flourish. In other words, they are objects of human striving. Thus, as reasons for actions; they guide individuals to make choices (Finnis 1980). This position implies teleology but not in the sense that is usually used (Bix 2004). Finnis's theory is not teleological in the sense that there is one single human ideal for all humans to pursue; rather it is teleological in the sense that; "In volunteering acting for human goods and avoiding what is opposed to them, one ought to choose and otherwise will those and only those possibilities whose willing is compatible with the integral human fulfilment" (Finnis 1991, 45). In addition, these objects of human striving are valuable for their own sake and not merely for the achievement of some other goods. Nevertheless, there are many ways to pursue the basic goods. In other words, there are indefinite ways to participate and realise these basic goods. However, all these ways are subordinated to the seven basic goods; they are ways to realise or participate in the basic goods. The difference between the basic goods and the ways to realise or participate in the basic goods is that the former are goods in themselves and the latter are goods only due to the fact they participate or realise in the basic goods. By way of illustration, one may value health for its own sake, but medical treatment only as a means to health (Bix 1999). Hence, other values are means or combinations of ways of pursuing and realising one or a combination of the seven goods (Finnis 1980).

These seven goods are also equally valuable and are not analytically reducible to the others. They are equally valuable in the sense that there is no hierarchy among them, *i.e.*, all are equally important. Nevertheless, individuals may choose to fulfil their lives with one rather than with another (Finnis 1980). They are not analytically reducible to the others because they are independent values. For instance, friendship is neither an aspect of aesthetic experience, nor an instrument for pursuing a good aesthetic experience.

Finally, the basic goods are self-evident. This is a controversial feature of Finnis's theory and it will be discussed in the next section of this paper. The basic goods are self-evident in the sense that they are not derived from anything (facts, speculative knowledge (as psychology), metaphysical propositions about human nature or the nature of good or evil) (Finnis 1980; Wacks 2006). In short, they are not syllogistically demonstrable. However, the fact that they are self-evident and are not derived from facts does not mean that the principles are obvious or that they are not grounded within human nature. According to Finnis, being self-evident does not imply that that they will be given assent immediately. These basic goods are known by experiencing one's nature from the inside. In other words, "[p]eople of substantial experience, who are able and willing to inquire and reflect deeply, may be better able to discover the self-evident truth than would others."

(Bix 1999, 229) Moreover, not being derived from facts does not imply that they are not grounded in human nature; rather, basic goods are grounded in human nature indirectly, *i.e.*, "[…] the basic forms of good grasped by practical understanding are what is good for human beings with the nature they have" (Finnis 1980, 34). Considering that basic goods are self-evident avoids the naturalistic fallacy (Moore, 1993), namely, that an "ought" cannot be deduced from an "is."

However, it may be claimed that the basic goods are insufficient to guide individuals; the basic principles are too general (in some cases) to direct individuals to the right actions, *i.e.*, the difference between right and wrong cannot be accurately drawn with the basic goods (Bix 1999). In fact, if there are many ways to participate and realise the basic values, it is necessary to have a methodology that leads individuals to make the right choices. Taking this into consideration, Finnis provides the second inventory mentioned above, namely, the principles of practical reasonableness. The principles of practical reasonableness are: **a)** a coherent plan of life; **b)** accept no arbitrary preferences amongst the basic values, (*e.g.*, not taking into consideration one of the basic values in a decision if the value is relevant); **c)** adopt no arbitrary preferences amongst persons (*e.g.*, racism would be an arbitrary preference); **d)** preserve a certain detachment from particular projects**, e)** at the same time as not abandoning them carelessly; **f)** the limited relevance of consequences, *i.e.*, efficient means should be used and consequences have a limited role in making decisions; **g)** respect for every basic value in every act**; h)** favour the common good of the community and **i)** the following of one's conscience, *i.e.*, abstain from doing what one judges to be wrong. These nine principles of practical reasonableness are "[…] as each of the basic forms of good, […] fundamental, underived, irreducible […]." (Finnis 1980, 102)

This second inventory indicates how one ought to choose, *i.e.*, how to relate one's decisions with the basic values. In other words, these principles of practical reasonableness guide individuals from the basic goods to judgments of right and wrong in particular situations, *e.g.*, abortion. Thus, these principles of practical reasonableness structure the pursuit of the goods (Finnis, 1980).

Bearing these two inventories in mind, Finnis asserts that both together constitute the principles of natural law. Thus, natural law consists on "the set of principles of practical reasonableness in ordering human life and human community" (Finnis 1980, 280). Bearing these two inventories in mind, Finnis asserts that law is a mean of effecting the goods. Law is derived from Finnis's ethical code.

To sum up, Finnis's natural law theory is based on two inventories, namely, the basic goods and the principles of practical reasonableness. There are seven basic goods and they are forms in which humans flourish. In addition, there are nine principles of practical reasonableness which direct individuals to make the right choices, taking the basic goods into consideration. The result of these two inventories is morality.

II. CRITICISMS OF FINNIS'S NATURAL LAW THEORY

Having outlined Finnis's natural law theory, four criticisms will be analysed. First, Finnis's account of natural law is insufficient to make moral judgments (Hittinger 1987; Nielsen 1991; Weinreb 1987). Second, assuming that the basic human goods are self-evident is incoherent (Hittinger 1987; Weinreb 1987). Third, Finnis's theory is not one of natural law (Hittinger 1987; Veatch 1981; Weinreb 1987). Fourth, Finnis excludes pleasure from the basic goods (Smith 1991).

The first criticism concerns the generality of Finnis's list of basic goods and the methodology to assess the morality of difficult normative issues as abortion. More precisely, it is contented, first, that the basic goods and principles of practical reasonableness are too general to make moral judgments; consequently Finnis's theory is compatible with more than one moral code and does not give any guidance for practical decisions (Nielsen 1991). Second, Finnis assumes that the answer to normative problems, as to whether abortion is moral or not, is self-evident and this is implausible (Hittinger 1987; Weinreb 1987). These criticisms are connected but they are slightly different. What they have in common is that both criticise the fact that no consistent moral conduct can be derived from Finnis's theory. However, the former contests the generality of the basic goods and of the principles of practical reasonableness, while the latter challenges the assumption that normative issues are self-evident. These criticisms are both false and due to their slight difference, they shall be discussed separately.

Thus, according to the first criticism, the level of abstractness that natural law is formulated generates conclusions that are too vague to be a foundation of morality and to help to make moral decisions (Nielsen 1991). Consequently, Finnis's formulation of natural law (1980) is compatible with more than one moral code; therefore, conflicting moral positions can be derived from the same natural law (Nielsen 1991). By way of illustration, it can be contended that Finnis's practical reasonableness principle of "no arbitrary preferences amongst persons" taken on its own does not provide an argument against a Nazi who desires to exterminate Jews (Harris 1981; Nielsen 1991). In fact, a Nazi may affirm that his choice is not arbitrary and he is justified to exterminate Jews. The Nazi may contend that he has a criterion to exterminate Jews; for his preference is not arbitrary.

Nevertheless, this is a misunderstanding of Finnis's theory. It is not true that such a programme as Nazism is compatible with Finnis's theory (Finnis 1980; George 1994; Harris 1981). The reason why the argument above seems to demonstrate that there is a multiple compatibility with Finnis's theory is because the principle of "moral reasonableness" has "no arbitrary preferences amongst persons" which is taken on its own. Taking this single principle into account and ignoring the other principles leads to this conclusion (Finnis 1980; Harris 1981). In fact, one of the principles of practical reasonableness is "the respect of every basic value in every act." Thus, in order to evaluate whether a political programme such as Nazism is moral or not, one should also take into consideration other aspects of Finnis's theory. In this particular case, "friendship,"

practical reasonableness and the "common good of communities" would have to be taken into account (Finnis 1980; Harris 1981). This is due to the fact that if the 'common good of communities' is taken into account, every citizen would be able to participate or realise "friendship" and "practical reasonableness" (Harris 1981); hence, relations of friendship of individuals of different races, religions and so forth, have to be permitted. In addition, individuals should be given the ability to exercise "practical reasonableness" in planning their lives (Finnis 1980; Harris 1981). To sum up, the counter-example of Nazism is false because it does not take into account all the basic goods and principles of practical reasonableness. In order to make a fair judgment, all the requirements should be followed and the example provided does not follow all the requirements. Hence, it is not true that any moral code can be derived from Finnis's theory.

Moving now to the second part of the argument, it is contended that Finnis assumes that normative issues, such as abortion, are self-evident and that this viewpoint is implausible (Hittinger 1987; Weinreb 1987). In other words, these critics contend that Finnis's assumption that normative issues are self-evident is incoherent. Assuming that these issues are self-evident is an implausible explanation to argue that abortion is morally wrong (Hittinger 1987; Weinreb 1987).

Nevertheless, it is false that Finnis asserts that normative issues are self-evident (Finnis 1977, 1980; George 1988, 1994). From Finnis's viewpoint (1977, 1980), only the basic goods and the principles of practical reasonableness are self-evident. Accordingly, these reasons only provide the most basic premises for moral arguments and not the conclusions (Finnis 1980; George 1988, 1994). In contrast with basic values and principles of practical reason, normative problems are syllogistically demonstrable. Therefore, Finnis's account of normative issues is supported by an argument, not by self-evidence. Thus, arguing that Finnis contends that normative issues are self-evident is false.

Another criticism linked to self-evidence is that assuming that the basic goods are self-evident is unsatisfactory due to the fact that the only propositions for which there is evidence are the empirically observable aspects of the world. "Values and methodological requirements just cannot be objective because they are not objects, not part of the stuff of reality" (Harris 1981, 732). In addition, the evidence for these propositions has to rely on the data of the senses. Thus, according to this view, it is necessary to have these data from the senses to have evidence for something (Harris 1981). In fact, when a good is considered self-evident, there is no direct argument available to support it, because it is not derived from any premise; hence, this can be considered an implausible justification of the basic goods (Hittinger 1987; Weinreb 1987). Consequently, natural law cannot provide an adequate account of normativity because the argument is constructed on the grounds of an implausible assumption, namely, the self-evidence of basic goods; for if it is based on an implausible assumption; it cannot be used as guidance for action. In short, self-evidence is not a solid foundation for morals. Moreover, it can be challenged that if the basic goods are, in fact, basic (self-evident) there is no need to appeal to anthropological and psychological findings, as Finnis (1980) does. In other words, it may be contended that

the fact that Finnis appeals to speculative inquiry, as anthropological and psychological findings, demonstrates that Finnis understands that his theory is vulnerable to sceptics. Thus, from this viewpoint, the fact that Finnis supports his theory with speculative knowledge is a symptom of the weakness of his theory (Hittinger 1987).

In order to answer this criticism, three comments can be made. First, if one agrees with the methodology used and the content of the basic goods, then the problem whether the basic goods are self-evident or not is of little relevance to purposes of practical decision making (Harris 1981). In other words, if one agrees with the fact that Finnis's conception of practical reasonableness is one which is convincing and that his conception of basic goods is correct, then if one is to make practical decisions it does not matter whether it is objectively the case that the basic goods are self-evident or not (Harris 1981).

Second, the use of speculative knowledge by Finnis is not a symptom of weakness in his theory (George 1988, 1994; Boyle, Finnis & Grisez 1987b). Finnis uses findings because they can be effective in rebuttal. In other words, they help to remove any particular doubt that one may still have about the basic goods. For example, if some findings demonstrate that all societies have a form of friendship, this reinforces the idea that friendship is a basic good. If this was not the case, *i.e.*, if the findings found that friendship was unknown in many cultures, then it would be doubtful that friendship was self-evident and that it was a form of human fulfilment (George 1988; Boyle, Finnis & Grisez 1987b). Hence, the use of anthropological and psychological data does not establish self-evidence, but it removes questions that may remain about self-evidence. Therefore, as Finnis asserts his appeal to speculative knowledge is only "[…] an aid in answering our own present question […] an assemblage of reminders of the range of possibly worthwhile activities and orientations open to one" (Finnis 1980:82).

Third, using self-evidence as grounds to morality is not a less solid approach than using facts from the world, *i.e.*, empirical data. According to George (1994), if one cannot understand that, for example, pursuing knowledge is good for its own sake, one cannot be convinced by an argument based on natural facts that demonstrate that it is natural to human beings to pursue knowledge either. Furthermore, if it is the case that one cannot grasp the intelligible point that pursuing knowledge is a good by its own sake, one "[…] lacks the rational warrant for judging these goods to be reasons for action" (George 1994, 37).

Taking these three comments into consideration, it can be contended that the use of self-evidence by Finnis does not make his theory weaker. Self-evidence is not an implausible approach to human goods (George, 1994; Finnis, 1980). Consequently, Finnis's theory is solid and can be used as groundwork for morals.

However, self-evidence can also be criticised from another perspective. It can be contended that due to the fact that Finnis's theory is not based on facts of human nature, then his theory cannot support natural law either because it is not a natural law theory (Hittinger 1987; Veatch 1981; Weinreb 1987). In other words, basing the theory in self-evidence rather than in facts implies that there is no connection with human nature; consequently, if there is no connection with human nature, then it cannot be a natural

law theory (Hittinger 1987; Veatch 1981; Weinreb 1987). Thus, owing to the fact that Finnis's theory of natural law is "without nature", then natural law cannot be defended on the grounds of his theory. In short, Finnis's theory has an "[...] absolute independence of ethics [...] to a knowledge of nature [thus], the principles of morals are not thought of as being in any sense principles of being or nature at all" (Veatch 1981, 256).

Nevertheless, it is false that Finnis's theory is not based on human nature. The criticism just explained assumes that the fact that basic goods and moral norms are not inferred from human nature implies that Finnis's theory has no grounds on nature. However, the first premise does not necessarily imply the second one. As mentioned above, the basic goods are located in the good of human persons (Boyle, Finnis & Grisez 1987a). Hence, Finnis's theory is not detached from nature because a basic good can only be considered as such if it is human fulfilling, *i.e.*, if it can provide a reason for human action (Finnis 1980; George 1994). In fact, Finnis argues that if human nature was different, then also would be the basic goods. Thus, the seven basic goods are only basic goods because they are intrinsic aspects of human well-being. Therefore, the basic goods are not detached from nature because they are only so because they realise human fulfilment and well-being (Finnis, 1980, George 1994). Thus, Finnis's theory is supportive of natural law because it is not a theory of natural law "without nature."

Moving now to the final criticism, it is contended that there is a considerable gap between the basic goods that Finnis selects and what individuals usually consider to be goods (Smith 1997). As a consequence, Finnis's selection of human goods does not match with individuals' common considerations of what good is. In particular, individuals usually consider pleasure a good for its own sake and Finnis does not consider it a good. This gap may indicate that Finnis does not provide an accurate conception of goods for human persons. Moreover, it is incomprehensible that Finnis considers that individuals desire to experience various pleasures and at the same time excludes pleasure from the basic goods (Garet 1996). In short, there seems to be a gap between people's considerations about goodness and Finnis's list of basic goods. In particular, pleasure is usually considered to be a good and Finnis excludes it from basic goods (Smith 1997). Hence, the exclusion of a pleasure which is usually considered to be a good may indicate that Finnis's account of basic goods is an inaccurate conception of goods for human persons. As a result, if Finnis's account of natural law does not match with individuals' considerations, this may be a symptom that Finnis's theory does not provide an adequate account of normativity. This is due to the fact that if, as Finnis argues, the basic goods are located in human persons, and there is a mismatch between what good for human persons is and Finnis's theory, then his account of natural law cannot provide an adequate account of normativity.

Bearing this criticism in mind, as Smith (1997) only focuses on pleasure, the response to this criticism will also focus on pleasure. Thus, although it can be argued as a response that pleasure may seem, *prima facie*, a basic good, a careful analysis demonstrates that pleasure is not a good for its own sake (Nozick 1974). Nozick's thought experiment (1974) about an experience machine illustrates this point.

Suppose scientists made a machine that would give one any desired experience. During this experience one is floating in a tank, with electrodes attached to the brain. Suppose further that one after having the experience with this machine has the possibility to decide whether to be plugged to this machine or to live a real life. According to Nozick (1974), one would prefer the second option for three reasons. First, one does not want just to have the artificial experience of doing some things; rather one wants to, in fact, do them in reality. Second, one wants to be a certain kind of person, rather than an 'indeterminate blob' as one are when floating in the tank. Third, the experience with the machine is a man-made reality and there is no actual contact with the real world (although, one can experience as if it was a real world). Hence, due to the fact that one prefers to live a real life, in a real world with real pursuit of values rather than an artificial man-made reality in which there is no actual contact with deeper reality, one would prefer not to be plugged to the machine (Nozick, 1974).

Taking this into consideration, it can be contended that having the experiences is not everything that matters (Nozick 1974). Hence, pleasure cannot be something good for its own sake. For if it was, plugging to the machine would be more desirable than a real life. Therefore, despite the fact pleasure may seem, *prima facie*, a basic good, this idea is an illusion. Therefore, as Smith's claim (1997) is that the absence of pleasure indicates that Finnis's list of basic goods is not consistent with what individuals usually accept as a good and hence the list is inaccurate, it can be responded that the pleasure example is false and, thus, Finnis's list is not inaccurate.

III. CONCLUSION

Finnis's theory of natural law was discussed in this paper. More precisely, it was analysed whjether Finnis's account of natural law can provide an adequate account of normativity or not. Finnis's theory is based on two inventories, namely, seven self-evident human goods and nine principles of practical reasonableness. These two together constitute the principles of natural law and are a consistent groundwork to make moral judgments (Finnis 1980). Four criticisms to this account of natural law were assessed in this paper. First, law is not only too general but the methodology is not accurate (Hittinger 1987; Nielsem 1991; Weinreb 1987). It was argued that Finnis's theory does in fact provide a consistent groundwork to make ethical decisions, if the basic goods and principles of practical reasonableness are accurately understood (Finnis 1980; George 1994; Harris 1981). Second, self-evident principles are an implausible assumption about basic goods (Hittinger 1987, Weinreb, 1987). In response to this criticism, it was contended that 1) the self-evidence of the principles is irrelevant to purposes of practical decision, if one agrees with the content of the basic goods and the methodology used by Finnis (Harris 1981); 2); the fact that Finnis uses speculative knowledge to support his theory is not a sign of the weakness of his theory; the use of speculative findings is due to the fact that they are effective in rebuttal (George 1988; Boyle, Finnis & Grisez 1987b); 3) using self-evidence as

an argument is as consistent as using empirical data (George 1994). Third, Finnis's theory of natural law is not sufficient to demonstrate that natural law is a ground for morality because his theory is not about natural law (Hittinger 1987; Veatch 1981; Weinreb 1987). It was demonstrated that this argument is based on a false premise, namely, that Finnis's theory is not based on human nature. The fact that Finnis does not derive his basic goods from facts does not necessarily imply that his theory is not based in human nature. This is due to the fact that the basic goods are so because they are intrinsic aspects of human well-being. Fourth, Finnis fails to include one value that is usually accepted as good for its own sake, namely, pleasure (Smith 1991). In order to answer this question, Nozick's thought experiment was outlined. This thought experiment demonstrates that despite the fact that *prima facie*, pleasure seems to be a basic good, after a careful analysis, it is concluded that it cannot be a good for its own sake, *i.e.*, a basic good (Finnis 1980; Nozick 1974).

Taking this into consideration, it can be concluded that the criticisms raised against Finnis's natural law theory can be refuted. In contrast, it can be contended that Finnis's theory is a consistent defence of the normativity of natural law.

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Repulsive Virtues: Kant, Black Swans and
the Responsibilities of Friendship

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Abstract. Looking at two well-known discussions of Kant's discourse on friendship, namely, the second half of *Doctrine of Virtue* and his *Lecture on Friendship*, this paper traces the points of overlap and separation whereby, through the paradigm of friendship, the morals and politics of Kant's discourse are reconsidered. In what follows, I will show first, how Kant's theory of friendship plays a role in his conception of social relations and morality and second, how the nature of his concerns with friendship reveals both an insistence on moral duties and, in the spirit of Derrida, a difficult, if not paradoxical, politicization of these same duties. In doing so, I argue that Kant's ideas on friendship are part of a *necessary* yet irreconcilable tension between political and ethical obligations. Friendship is thought necessary for the well-being of political states at the same time that its instrumentalization undermines the heterogeneous nature of ethical responsibilities and the call to particularity which distinguishes it from other forms of associations (ethnicity, gender, nationality etc.). In the end, I argue that Kant's theory of friendship is characterized by a fundamental ambivalence whose contradictions do not pave the way for new possibilities for association, community, nationhood etc., but only highlight its aporetic underpinnings.

Key words: Kant, friendship, respect, Derrida, ethics, duty.

When we think about the canon of great thinkers on the concept of friendship in Western philosophy, typically, Immanuel Kant is not a name that instantly comes to mind. What is more, if we want to discuss friendship as a political concept, most tend not to find any explicit discussion points linking friendship, philosophy and politics together in Modern European philosophy (Michel Montaigne's "De L'Amitie" ["Of Friendship"] being the most notable point of reference) in comparison to the great discussions by the Ancients: Aristotle, Cicero and Seneca. Nonetheless, in Jacques Derrida's landmark work on the subject, *Politics of Friendship*, his re-reading of the history of the concept changes how we might come to think of the role of friendship in, not only, our private and public affairs, but also, as an idea of philosophical and political significance. Derrida perceptively points out that theories of friendship have always been characterized by a fundamental but often unacknowledged ambivalence. On one hand, there is a history of discourses on friendship which refer to its secret, private and so-called 'apolitical' character. On the other hand, there is a history of discourses on friendship which refer to its public, testimonial and political character. He argues that, historically speaking, with friendship there are two streams of discourse: "[S]chematically: on the one hand, the secret-private-invisible-illegible-apolitical, ultimately without concept; on the other, the manifest-public-testimonial-political, and homogenous to the concept." (Derrida 1997, 277) In what follows, I propose to pursue the implications of this ambivalence and show how it underscores friendship's place between the contradictory demands of ethics and politics by, in particular, looking at Kant's discussion on the subject.

While it should be made clear that friendship is not discussed as an *explicitly* political concept in Kant, (for example, compared to discussions of friendship found in Aristotle's *Nicomachean Ethics*) it nonetheless does play an important role in his discussions on respect, love, trust, personal intimacy, public and private relations and analogically, through his interesting discussion of socialization by way of the laws of physical attraction. In what follows, I will show the manner in which the question of friendship finds a place between Kant's concern for morality and politics, and question the compatibility of Kant's theory of politics with his claims on morality. To do this we will consider, first, how Kant's theory of friendship plays a role in his conception of social relations and morality and second, how the nature of his concerns with friendship reveals both an insistence on moral duties and, in the spirit of Derrida, a difficult, if not paradoxical, politicization of these same duties. In doing so, I argue that Kant's ideas on friendship are part of a *necessary* yet irreconcilable tension between political and ethical obligations. Friendship is thought necessary for the well-being of political states at the same time that its instrumentalization undermines the heterogeneous nature of ethical responsibilities and the call to particularity which distinguishes it from other forms of associations (ethnicity, gender, nationality etc.). Nonetheless, having said that, friendship remains a necessary adhesive for maintaining political commonalities and reimagining ethical responsibility that circumvents relations of use-value. I argue that Kant's theory of friendship is characterized by a fundamental ambivalence whose contradictions do not pave the way for new possibilities for association, community, nationhood etc., but only highlight its aporetic underpinnings.

To begin, let us start with his important discussion of the forces of attraction and repulsion from his *Doctrine of Virtue, Part II of the Metaphysics of Morals* where Kant underscores the duality of forces which comprise his understanding of socialization and further, positions friendship as the ambivalent mediating device between these tensions and demands.

I. ATTRACTION AND REPULSION

Kant characterizes what is called the social as the negotiation of duplicitous forces of attraction and repulsion. Offering a characterization of the social world that is modeled analogically on the forces of the physical world, Kant writes: "[W]hen we are speaking of laws of duty (not laws of nature) and, among these, of laws governing men's external relations with one another, we are considering a moral (intelligible world) where, by analogy with the physical world, *attraction* and *repulsion* bind together rational beings (on earth)." (1964, §24: 448) From here Kant goes on to couple the force of attraction with that of mutual love and respect with the force of repulsion: "[T]he principle of mutual love admonishes men constantly to come nearer to each other; that of respect which they owe each other, to keep themselves at a distance from one another." (1964, §24: 448) Kant characterizes the social as the site of conflicting forces, whose contrasting nature

cannot be reconciled. Attraction and repulsion paradoxically sustain the social insofar as the interplay of these forces remains irresolvable without necessarily destroying the very force field of the social. That is, its irreconcilable nature both *produces* and thus *contains* the social as it is. Without the interplay of these forces there would be no social bond.

Equating attraction with mutual love and repulsion with respect, friendship is thought to be the middle ground for the mutual concurrence of these forces. Kant discusses love as a necessary cause and effect of friendship but at the same time makes a crucial distinction between the two. This is because the wrong kind of love is thought to spoil friendship and the balance of respect and mutual accord integral to the social world. Love is positioned as a kind of social toxin disrupting the harmony of human relations. Yet Kant makes it clear that it is not love *as such* that is the problem. It is rather the unbalance that occurs when friendship as mutual love is confused with sensual love. Hostile to relations whose basis is sensual, friendship for him is always a question of duty and as a consequence, must be guided by principles not feelings. His mistrust of sensual love is similar to Aristotle insofar as loving the other must proceed from the right motive with the right ends in mind. For Kant, this means that loving another must *not* be predicated on emotions, feelings or pleasures but rather based in a "maxim of benevolence," which he writes in parenthesis to be *practical love,* insofar as its aim is the beneficence of others (1964, §25: 449).

The problem with love in Kant's discussion is that it does not necessarily follow from a shared and mutual confirmation. This is because the performative declaration of love can take place without trust and mutual self-disclosure. Love does not necessarily confer the capacity to share secrets with the other, or the possibility of sacrificing something for the other's sake like what Kant considers a sign of merit and exemplary friendship. Love sometimes appears as friendship but to have a trustworthy and principled relationship such as Kant describes would require what he calls an "identity of personality" (1963, §27: 54, n.1).[1] For him, love is unprincipled, or based in principles whose motives are the wrong things. While the concept of love figures into his discussion, it is nonetheless separated from friendship on the basis of trust and respect. Consequently, what differentiates friendship from love is the combination of upstanding principles whose basis is respect and a drive for equal and mutual regard.

Between attraction and repulsion Kant claims that the primary adhesive of sociality is a bind of non-sensual love. The non-sensual love whose basis is respect permits friendship because it is not motivated by feeling. In a practical sense, respect keeps in check our pride with regard to human affairs and never attempts to instrumentalize another in the name of our own ends, or detract "from the worth that the other, as a man, is entitled to posit in himself" (Kant 1964, §25: 449). Maintaining that we have a duty to actively participate

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[1] Similarly in *Politics of Friendship,* while Derrida does not discuss Kant's friendship as an identity of personality he suggests that Kant's discourse calls for a virile community of the congeneric. For Derrida, the fraternal bonds of friendship "remain linked to sensible or imaginal fraternity, to the *virility* of the *congeneric*" Derrida (1997).

in the fate of others, Kant insists that we measure our actions in relation to the rule of the moral law and not feeling (§27: 359). This means that thinking and acting are to proceed out of love and respect without feeling it. Intimacy is cautioned at the limit of respect because if the relation becomes too deep "it detracts from worth" (§27: 685).[2] While Kant will argue that friendship is never a safe relation, he suggests that it is especially in danger if it is allowed to rest on feelings as opposed to principles.[3] Because of what I will call the Kantian mean, the antagonistic forces of the social world find their harmony in the space between the attractive force of love and the repulsive force of respect which maintain the social bond.[4] Kant holds out against a politics of love or a politics based in affectionate ties. Instead, he opts for an intimate regard for others that is synonymous with an intimate regard for respecting others. Respect is to be respected insofar as it is a regard for the mean in human affairs whose basis is principles which are based in the right things. Hannah Arendt's conception of respect in politics confirms this position: "Respect, not unlike the Aristotelian *philia politikē,* is a kind of 'friendship' without intimacy and without closeness; it is a regard for the person from the distance which the space of the world puts between us, and this regard is independent of qualities which we may admire or of achievements which we may esteem." (1958, 243) If intimacy is to be thought of as a political concern, it must be aligned with respect rather than feelings.

In Derrida's reading of Kant, he rightly questions why Kant is suspicious of tenderness, gentleness and what are thought to be softer relations of sociality. For Derrida, the answer is clear: Love in its excess "separates, interrupts, and threatens the social bond" (1997, 256). An excess of love "*leads to rupture* where attraction becomes the quasi-symptom of repulsion" (256). According to Derrida, for Kant, love is to be held in check out of respect for the other, "[N]ot because love is the enemy, but because, in the excessive attraction unleashed by love, enmity and war are allowed to take place." (256) Rightly, he emphasizes that it would be a "principle of (non-natural) perversion at the heart of the natural law of attraction and repulsion" (256). Taking Kant's argument one step further he argues: "if this is indeed the case, friendship would then be at one and the same

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2] In addition it should be noted, it is not our duty to sympathize with others, since a community of sympathizers may give way to a community based in pity. Kant clearly states that this is an insulting kind of beneficence. For Kant, pity should not have a place in human affairs. This is because our concern ought to be man's practical affairs qua reason and virtuous. See also his discussion of pity in Kant, *The Doctrine of Virtue, Part II of the Metaphysics of Morals*, §46: 469.

3] "Yet friendship is something so delicate (*teneritas amicitiae*) that it is never for a moment safe from interruptions if is allowed to rest on feelings and if it this mutual sympathy and self-surrender are not subjected to principles or rules preventing excessive familiarity and limiting mutual love by the requirements of respect." Kant, *The Doctrine of Virtue, Part II of the Metaphysics of Morals*. §46:470.

4] Uncertain of how Kant can maintain the possibility of friendship between the forces of attraction and repulsion, Hent de Vries, suggests that the third person, in the spirit of a certain Levinasian trope, could prevent excessive familiarity from becoming a reality that would disrupt the balance of the political. For the entirety of his discussion of Kant and friendship in light of Derrida's analysis in *Politics of Friendship* see Vries 2001, 370-88.

time the sign, the symptom, the representative of this possible perversion, yet also what protects us from such perversion. The evil and the remedy for the evil." (256) Friendship would thus be a limit condition pulling the social bond in opposite directions. On one hand, that which preserves the social world and, on the other, that which prefigures and haunts the social as the sign of its possible undoing. As it were, friendship exists between attraction and repulsion, keeping in check the possibility of its becoming-excessive while nonetheless remaining the spectre looming over our social relations.

Similarly, on the question of love, Hannah Arendt argues that its excessiveness jeopardizes the socio-political bond. Excessive love is something that only survives in the realm of the private, for it "is killed or rather extinguished the moment it is displayed in public" (Arendt 1958, 51). For Arendt, love is an excessive force that "by its very nature, is unworldly, and it is for this reason rather than its rarity that it is not only apolitical but antipolitical, perhaps the most powerful of all antipolitical human forces" (1958, 243).[5] For her, both the publicization and hence, politicization of love allows for the perversion of its intimate and particular form, when it comes to be "used for political purposes such as the change or salvation of the world" (1997, 52). Consequently, she denies the compatibility of love and politics while nonetheless insisting that sociality is made possible by these very bonds of attraction. Instead, of calling upon the necessity of love in human affairs, Arendt discusses love as a force which threatens the social bond. Rather than enable a politics, the friendship found in excessive love complicates its possibility.

Friendship as a relation between incompatible tensions suggests, once again, the duplicity of the question of friendship and its negotiation with the socio-political realm. Kant's discussion of friendship remains clear inasmuch that its basis is not the fusion of each other's interests into a unified whole. However, this is not to say that the call for universality is the same as fusional unity. While Kant concurs, "it is sweet to feel a mutual possession that approximates to a fusion into one person," the "excessive familiarity" of mutual love must be held in check by our duty to respect the other (1964, §46: 470). Good friendship requires distance which means a proper spacing, since the "excessive familiarity" of the other is an immoral regard for the other and as a consequence threatens to undo the respect we ought to maintain towards others –lovers or strangers alike. The fear with an excess of love is a lessening of the respect, which, Kant says, is due to others. This leads him to ask: "[A]nd how can he be sure that if one of the friends is more ardent in his love he may not, just because of this, forfeit something of the other's respect?" (§46: 469). Kant's suspicions double when he asks if equality in friendship is indeed possible: "[D]oes not all this mean that love and respect on the part of both friends can hardly be brought subjectively into that balanced proportion which is yet necessary for friendship?"(§46: 469). Kant carefully heightens our suspicions of the grounds on which we can claim that equality, respect and mutuality can ever be known in our relations with

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5] See also Beardsworth 2006. For a discussion of a future politics made possible by love see Hardt and Negri 2004.

others. At the same time however, he insists that these concerns take precedence in our relations with others. Kant confirms this obstacle of friendship as that which makes it unattainable, since nothing can ensure equal giving and giving equal. Kant's conception of perfect friendship rests on a combination of reciprocity and equality. Yet, while such an experience lacks measurability, he insists that it still ought to orient the impossible test of the best friendships. As much as Kant calls for a friendship grounded in mutuality and equality (as the only true possibilities of friendship) he nonetheless stresses the inherent difficulty of arriving at such a state of mutually assured affairs.

Kant's social physics of attraction and repulsion find their fulcrum on the grounds of respect, thus leading the way to a spatial-temporal conception of Kant's ethics. As much as respect requires a proper distance -and thus in Kant's terms, a certain degree of repulsion-it also is something that happens over time. Here, I argue that where respect is a matter of space, trust is a matter of time. The test of friendship remains that the necessity of distance is doubled. On one hand, one needs to keep the distance between one and the other out of *respect* for the other, while, time itself, operating as a distancing effect, serves to judge the merit of such relations. Without distance in both senses, friendship can be undone. Distance is thus part of this duty.[6] Unlike what we might assume, a degree of repulsion in our relationships with others, in Kant's discourse, is a good thing. The harmony of the social world itself is dependent on balancing proximity and distance between oneself and others, subsequently reinforcing the stakes of Kant's theory of attraction and repulsion.

Consequently, friendship takes place between attraction and repulsion and owes its virtue to its principles of trust and respect. The interplay of attractive and repulsive forces serves as an analogy for the tension between friendship and politics and the impossibility of its reconciliation. Each finds their possibility -and the limit of these same possibilities-in the tension between these contrasting forces. Kant's characterization of friendship underscores that it is both productive of the social bond while also, potentially destructive in cases of excessiveness -whether it be a cases of love or hate. With this in mind, let us now turn to his discussion of friendship and the demands of duty in order to understand the tensions between morals and politics and what the stakes of these demands are.

II. FRIENDSHIP AND DUTY

It is not entirely clear that Kant's discourse on politics and friendship can be partitioned on the grounds of choice and duty. In fact, it will be shown that there are instances where this division cannot be maintained.[7] The distinctions between these

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6] Geoffrey Bennington suggests that there is a paradox of distance which sustains the best of friendships. Admittedly he discusses the friendship of Montaigne and Etienne de La Boétie as an example of this rather than Kant's theory of attraction and repulsion (Bennington 2000, 112-113).

7] H.J. Paton recognizes the differences of Kant's concern in each part of his *Metaphysics of Morals*. For Paton, the *Doctrine of Right* has more to do with "continental jurisprudence" (134). He writes: "It is concerned with the law of *external* freedom and so with legal obligation" whereas the *Doctrine of Virtue*, where

realms do permit overlap and do, I add, extend the problem of contradictory demands, (which until now I have discussed in relation to his theory of attraction and repulsion) onto the question of duty. In one sense, this is because there is a duty in friendship which one can never adequately grasp nor live up to.[8] In another sense, it is because Kant suggests duties towards others should be obligated but insists that they cannot be obligated by legal enforcement.[9] Consequently, what marks the separation as much as the inseparability of morals and politics is how to obligate a virtuous regard for others without seeking recourse to a system of law. That is, how to insist on duty while maintaining individual liberties.

Within Kantian scholarship, the debate remains as to what role morality plays in his system of politics and whether or not Kant's theory of politics is compatible with his moral theory.[10] For instance, Kant scholar Pierre Hassner argues that it is necessary to recognize the overlap between Kant's moral and political realm but also recognize the manner in which they are to be distinguished. He writes:

> The root of the question raised by Kant's political philosophy resides in the ambiguity of morality and politics, each in itself and the two in their mutual relation. That ambiguity makes Kant's own formula that a true politics is the application of his morality acceptable only with some refinement. The difficulty arises because it is true not only that Kant's politics must be understood on the basis of his morality but his morality may be understood on the basis of his politics. Moreover, his politics must also be understood independently of his morality, and his morality, ultimately, depends radically on conditions that lie beyond politics. This ambiguity or contradiction explains both Kant's division and reunion of law and morality and his strange hesitation on the threshold of philosophy of history while apparently according it a place both decisive and tangential. (Hassner 1987, 583)

Adding to Hassner's claims, Hans Reiss understands the distinction between Kant's morality and politics on the grounds of a metaphysics of law and the difference between duty and choice.[11] He defines Kant's theory of politics as an attempt at a public framework

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the question of friendship is discussed, "has more to do with the laws of internal freedom, which, as duties, have to be enforced by each man himself: they cannot be enforced by the physical power of the state" (135). Paton goes on to make the difference clear: "Ethical obligation is concerned, not simply with actions, but with their inner motive or maxim; and because of this there is in our moral choices a certain playroom or latitude, which, if extended to our legal obligations, would cause us trouble with the police. Different kinds of ethical duties are associated with different kinds of virtue and vice." (135) See (Paton 1993, 133-54).

8] Paul Guyer suggests that in friendship there is an irreconcilable tension between duty and feeling. In his discussion of friendship he subjects extreme case scenarios to the rigor of the law of moral duty in order to suggest that Kant's imperative cannot fully account for exceptional limit-situations (i.e. seeing one's wife and a stranger in equal life-threating danger). See Guyer 1993, 386-93).

9] Alasdair MacIntyre writes of Kantian duty: "The good will's only motive is to do its duty for the sake of doing its duty. Whatever it intends to do, it intends because it is its duty." See the entirety of his discussion of Kant (MacIntyre 1998, 183-91).

10] See Flikschuh 2000; Ellis 2005; Bohman and Lutz-Bachmann 1997, and Timmons 2002.

11] Reiss goes on to place Kant's thought on politics and morality within his work on history and nature. He writes: "Kant's political theory is thus closely bound up with his ethics, though this is not its only affinity; for it is also closely connected with his philosophy of history. On the one hand, ethics and politics

for legislating how to deal with public clashes of interest in a universal manner and Kant's morality as an attempt at a universal structure of principles whose basis are categorical imperatives (1993, §33: 425). On these grounds, there appears to be little difference between Kant's morality and politics. However, it is only when we look at the distinctions between duty and choice that important distinctions between morals and politics become necessary.

The tension between morality and politics stems from the problem of instrumentality and the conflicting nature of legal and virtuous duties. The universal nature of Kant's principles is enforced differently depending on its moral or political context. That is, in a political context the enforceability of one's actions is marked by an appeal to legal duties whereas in a moral context one's actions are marked by an appeal to virtue. Because of the difference between legal and virtuous duties and the problem of their enforcement the question of friendship comes to occupy concerns for both the moral and the political realm while nonetheless having separate and contradictory obligations.[12] Kant's conception of morality, while refusing to posit our actions towards others as merely the application of prescribed duties, derives its political status from its ability to apply itself to what some critics call normative rights of conduct.[13] The problem however is that this very conception of morality -as the application of a normative legal doctrine - troubles the sense in which moral duties towards others are cultivated independent of legal enforcement. Further, this conception of morality troubles the thinking of friendship as a choice-worthy and virtuous activity over and above the mere fulfillment of social duties. In this sense, the ends-based nature of his moral doctrine contrasts with its so-called instrumental application as the basis for political relations. This leaves Hassner to suggest that the distinction between the idea of a moral community and a political community is the result of Kant's differing conceptions of legal and virtuous duty.[14] While virtuous and legal duties appeal to universal frameworks, the key difference remains that Kant's

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overlap. On the other hand moral and political duties are clearly different." (Reiss 1970, 22)

12] Reiss (1970) affirms this view when he suggests a non-passage between Kant's moral principles and political framework. While his discussion is not framed as aporetic, he nonetheless contends that "a complete account of moral practise in all particular instances where the concept of morality can be applied is impossible. What Kant wishes to provide is an approximation to such a system, elaborating the relevant a priori principles" (19).

13] For a discussion of the normative nature of Kantian ethics that focuses on the question of beneficence see Hill 2006, 480-514.

14] "This primacy is made emphatic in the *Metaphysics of Morals*, where Kant distinguishes legal duties and the duties that virtue entails, assigning distinct priority to the legal duties. Legal duties apply to external acts, which are subject to the external constraints of legislation; the duties commanded by virtue apply to the maxims behind the actions, to the internal intentions which are directed toward some end that ought to be a duty but that cannot be constrained from without. Although the duties of legality deal only with the external acts, they take precedence over the duties of virtue, though these are linked to intention and good will, because the duties of legality are themselves of the essence of morality, defining as they do the reciprocity of rights and duties in demanding that every man respect the rights of man both in others and in himself." (Hassner 1987, 592-93)

virtues of friendship are not prescribed as legal duties but practises of good and choice-worthy character, and thus of a moral nature. Moral duties are commanded on the basis of one's respect for our fellow man rather than legalistic principles.[15] Duty in the moral realm is commanded on the basis of adherence to the moral law and not legality as such.[16] As Reiss's reading of Kant outlines: "Moral action can thus be commanded; legal actions, however can be enforced." (1970, 21)

Simon Critchley's discussion of Kant appeals to the same problem: Morality lacks an adequate foundation for motivating others to act without recourse to external authority (2000, 14). Consequently, in the absence of external enforcement or an appeal to reason the link between motivation and universal imperatives falls short of its aim. "The function of the fact of reason in Kant," Critchley suggests, "is to try to close the gap between justification and motivation" (2000, 30).

Kant's conception of duty necessitates a concern with internal freedom insofar as he suggests that what "the duties of virtue have in common is that for either practical or moral reasons they cannot be coercively enforced through a legal system of justice (1963, §6: 406-7).[17] The duties of virtue turn out to be simply all of our moral virtues that are not properly subject to coercive enforcement.[18] Kant suggests that because friendship falls within the providence of virtue it cannot be enforced by law, but only by duty. Again turning our attention to Kant's insistence on virtue, the duty of friendship is a duty of reason which also functions as a duty of honour: "It is a duty imposed by reason –not, indeed, an ordinary duty but a duty of honour," even though it is a "mere Idea which cannot be achieved in practice." (1963, 46: 469) While Kant suggests the impossibility of friendship coming to be in its perfection this does not forfeit his interest in the subject. Instead, he its impossible ideal is presented as a necessity. He insists that we act out of regard for the most complete kind of friendship imaginable. Subsequently, this leads to what I am calling an inadequation between the practical and the ideal possibilities of friendship or what is referred to as the distinction between perfect and imperfect duties.[19]

15] See Reiss's important point of distinction on the formal nature of Kant's moral duties. "Kant is again not concerned with delineating the content of relations between individuals (i.e. the ends which they desire or ought to desire), but only with the form. What matters is the arrangement which establishes that the free actions of one individual 'can be reconciled with the freedom of others in accordance with a universal law'." (Reiss 1970, 22).

16] See Marguerite La Caze 2007. La Caze suggests that the relation between virtue, right and duty offers grounds for separating Kant's politics from Kant's ethics. She writes: "For Kant virtue is that part of morality or ethics that cannot be enforced or made part of politics. Thus, the accusation that Kant thinks one can deduce politics from ethics, understood as politics deduced from virtue, is inaccurate. Kant did not think that virtue and right were necessarily co-implicated but instead had a hope that people would live according to the virtues of love and respect once right restrained politics." (794)

17] Kant, *The Doctrine of Virtue, Part II of the Metaphysics of Morals*, §6: 406-07.

18] For other discussions of Kant's distinctions between juridical and ethical duties see Gregor 1963 and Herman 1993.

19] See La Caze 2007.

Like Thomas McCarthy's reading of Kant, "nothing in experience can correspond to regulative ideas, they are not representable in and of themselves, but only in relation to the practises they regulate" (1988, 647). We are dutiful to 'friendship (in its perfection)' but our dutifulness is always inescapably and perhaps regrettably undutiful because there remain an inadequate relation between the duty of friendship and its ideal realization. What is interesting about this claim is that it does not bring about a nihilistic turn in Kant's work. Instead, it calls forth the necessity of negotiating between the virtuous and choice-worthy aims of friendship with the practical implications of our duty towards others. For Critchley, this tension is what marks his call for a "universal pragmatics" (2000, 24).

With that said it would be a mistake to disregard the political implications of Kant's conception of duty because the law does not prescribe it or because its perfection remains impossible. Kant insists that there remains a moral duty to have our actions "make the ends of other human beings our own" and thus act out of regard for universal moral imperatives (Tenenbaum 266).[20] On one hand, Kant brings together a theory of moral actions which consolidates the particular with the universal. On the other hand, commentators such as H.J. Paton (1993) and Paul Geyer (2006) argue that he remains unable to fuse the divide between a generalized framework and particular responsibility for the moral law. Similarly, Peter Fenves rightly suggests that Kant's insistence on moral duty is political insofar as "whatever hinders the execution of this duty is illegitimate," (1999, 138) and Susan Meld Shell calls attention to Kant's insistence that there is a moral duty as social beings not to isolate ourselves from the social world (1996, 160). While she does not draw attention to the aporetic structure of Kant's theory of moral and political duty, she does offer a way in which to see Kant's theory as negotiating a double-register of oneself and the whole for which one forms a part. She writes:

> Here, in public intercourse, is the appropriate setting for that "reciprocity" and "openness" to others, the cultivation of which is a duty. For here, the individual can be the 'fixed center' (*Mittelpunkt*) of his principles and yet regard this circle drawn around him as 'part of an all-inclusive circle' that constitutes the cosmopolitan mentality (*Gesinnung*). Such a community of agreeableness (*humanitas aesthetica et decorum*) is, it seems, the closest we can come 'without leaving the world' to being parts of a noncoercive whole while remaining whole ourselves." (160)

With Shell, we see that there is an integral link between the well-being of the social (political) world and its concern for friendship that must be addressed. In agreement with Fenves, there is no doubt that the bettering of the social realm goes hand in hand with a respect and encouragement of the virtues of friendship. However, as these commentators suggest, how to instrumentalize virtue as a public duty without legal enforcement remains the keystone question for Kant's ethical discussions.[21] Their failure to establish a

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20] Tenenbaum 2005, 266. This, of course, is also an allusion to Kant famous maxim: "Act in such a way that you treat humanity, whether in your own person or in the person of any other, always at the same time as an end and never merely as a means to an end." (Kant 1993, §31: 424-25)

21] For a discussion on the reconciliation of politics and ethics in Kant's *Perpetual Peace*, see Bennington 2011.

universal pragmatics for moral and political action does not allow our social duties as such to disappear. Rather, it suggests the irresolvable but on-going negotiation between morals and politics. The problem remains a question of balance between social responsibility and instilling a motivation for action independent of selfish pursuits. (Hassner 1987, 583)

Paul Guyer makes clear that what Kant calls the 'duties of love' are also duties to have specific feelings towards others, and act towards them in certain ways (2006, 255). Nonetheless, what must be maintained by our duties towards others is an economy of trust and respect as our essential bond. The duty of man in relation to each other is to maintain this respect entitled to man *qua* man, even in the name of the most inhuman of acts. For "I," Kant says, "cannot withdraw at least the respect that belongs to him in his quality as a man, even though by his deed he makes himself unworthy of his humanity" (1963, §39: 462). While he, the other *qua* bad (immoral), may turn his back on his singular and, at the same time, universal duty to love and respect others, each being *qua* man cannot turn away from my singular duty towards him. In one sense, this is an astonishing statement on the duty to forego vengeance on those whose actions have done harm to the social realm. Each man who participates in the realm of human affairs is obligated to act in the name of non-sensual love and respect, regardless of another perpetrating the greatest disrespect on humanity.[22] Regardless of the crime, Kant beseeches us not to turn our back on his fellow man in good or, especially, in bad times. Each man is obligated to respond in the way that one can and the way in which one's sees right in the face of injustice. Kant's ethical framework for acting with justice in mind is very similar to Aristotle's conception of acting just. Although I do not have room to go into a full discussion of Kant's ethical regard for the other, Kant asks: "How should one behave, for example, to men who are morally pure or depraved? To the cultivated or the crude?" (1963, §46: 469). Kant answers, both beautifully and simply: "These questions do not yield so many different kinds of ethical obligations (for there is only one kind - that of virtue as such), but only so many different ways of applying [the one principle of virtue] (corollaries)." (1963, §46: 469) Duty, it should be understood, is inseparable from a respect for principles.

What we see here is how Kant's conception of moral duty becomes an unconditional political duty towards others that cannot be circumvented. Kant commands a certain respect for respect that, in essence, emerges as a non-negotiable and unconditional duty. The duty to respect our fellow others cannot be compromised. This point reinforces the grounds in which the morals and politics of Kant's friendship permit separation

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22]As a subsidiary concern, it would be interesting to consider whether or not the dangers which correspond to excessive love are also dangers of excessive duty. That is, if duty is coupled with respect for Kant what would too much respect for the other mean? What are its consequences for the social? Does Kant's discussion of respect accommodate the possibility of excessive duty? These questions would be particularly interesting in relation to an examination of political and religious institutions and the question of faith and devotion. Here I can only suggest that Kant would caution excessive duty because of the toil it would take on the practise of critical reasoning as a result. See Guyer's discussion of Kant's duties of love and questions of respect for humanity. See Guyer 2006, 255-60.

and inseparability. Here, Kant says little of how such respect can be politically enforced other than to suggest that as citizens we have the duty to be dutiful; that is, the duty to respect *respect*. Without proper legal enforcement, respecting the other operates as a non-negotiable duty (which is thought *instrumental without being enforceable)* for the well-being of the socio-political bond. Its basis is moral because it lacks legal coercion, and I add, could never be made possible by legal enforcement without sacrificing individual freedoms.

III. BLACK SWANS AND PARTICULAR FRIENDSHIPS

Any discourse on friendship or community cannot overlook the basis of inclusion/ exclusion in friendship and our duties towards others. Nonetheless, what remains understated in his discourse are the contradictory demands that mark the universalizing of the moral law in relation to the demands of *particular* friendships. Yet his concern with the tension between particularity and generality in friendship calls for a reconsideration of the limits which are said to distinguish one from the other and the ethics of these distinctions. In particular, I would like to return to how Kant frames a concern for respect and responsibility in our relations with the other in order to understand how they "intersect in the ethics or the virtue of friendship" and suggest ways in which an ethics of a singular friendship can be coupled with an ethics of the universal.[23] In his *Lecture on Friendship* he writes:

> Friendship is not of heaven but of the earth, the complete moral perfection of heaven ought to be universal; but friendship is not universal; it is a peculiar association of specific persons, it is man's refuge in this world from his distrust of his fellows, in which he can reveal his dispositions to another and enter into communion with him. (Kant 1997, 206-7)

Here Kant argues that friendship is a particular concern thought in remove from the distrustful realm of political and economic relations. Where the world does not offer such trustworthy alliances, friendship offers a safe space to communicate one's thoughts without fear of reprimand. In reality, Kant's political subject cannot say whatever he wants to just anyone; "he cannot risk it: partly because the other person, while prudently keeping back his own judgments, might use this to harm him, and partly because, as regards disclosing his faults, the other person may conceal his own, so that he would lose something of this other's respect by presenting himself quite candidly to him." (1997, 138)

What remains understated in Kant's political writings is the link between duty and secrecy.[24] As Derrida suggests, the question of the secret secretly organizes the role and

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23]La Caze's work on Kant and Derrida is important in this context. Insisting on the difficulty of conceiving a model of ethical politics, she claims that Derrida does well to advance Kant's scholarship on the grounds of the question of virtue and respect. See La Caze 2007.

24]Here one should also recall how the question of secrecy figures into Michel Montaigne's discussion of friendship. Kant articulates the necessity of the secret in friendship much more forcefully than Montaigne because he emphasizes its political and moral tensions. See Pakaluk 1976.

place of friendship between morality and politics. He argues that "the political stakes of Kant's claims are obvious" (Derrida 1992, 257). In fact, for Derrida, "[A] reflection on the Kantian ethics and politics of friendship should in fact organize itself around the concept of secrecy. The concept seems to (secretly) dominate this *Conclusion of the Elements of Ethics*, and to mark problematically the ideal of friendship *qua* communication (*Mitteilung*) or egalitarian sharing." (257)[25] The desire for unreserved communication with others stands in direct relation to the need to be cautious in what we reveal to others. Like the balance between attraction and repulsion previously discussed, communication requires a balance between publicity and privacy. In this sense, what we can reveal to others is as much a question of freedom as trust. For Kant, one must have confidence that the other can be a confidante. The difficulty is that rarely is a person found that we can entrust with our secrets:

> The necessary combination of qualities is seldom found in one person especially since the closest friendship requires that this understanding and trusted friend be also bound not to share the secrets entrusted to him with anyone else, no matter how reliable he thinks him, without explicit permission to do so. (1963, §47: 471)

The question of secrecy is equated with the question of trust insofar as Kant desires the possibility to speak with others about political concerns without fear of punishment. In this sense, one *needs* friends, but more so, friends in which what you say cannot be of use by others against you. Consequently, such friendships have a *use* and an *advantage:* the conferral of one's opinions on social, political and philosophical matters without being judged adversely or having these opinions misused against oneself. On this point, he also makes a call to rarity. Such friendships, Kant adds, are a rare thing to find. He likens such a friend to that of a "black swan" arguing that "if he finds someone understanding – someone who, moreover, shares his general outlook on things– with whom he need not be anxious about this danger but can reveal himself with complete confidence, he can then air his views" (§47: 461). Uniting the practise of philosophy, politics and friendship within one constellation, Kant reasons that such a friendship allows him "not to be completely *alone* with his thoughts, as in a prison, but enjoy a freedom denied to him with rank and file, with whom he must shut himself up in himself" (§47: 461).

If it is not possible to be friends with everyone in the same way at the same time in the same place, consequently, the articulation of the universal must transpire within particular relations. The particular must double as the manifestation of the universal. Here I argue

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25] Likewise Allen W. Wood argues for the importance of mutual communication in the ethical thought of Kant. While Wood does not explicitly call Kant's conception of the social order aporetic, he ends his discussion of Kant noting a foundational blockage which defines human sociability: "Our sociability gives us a desperate need to be 'wholly in society; yet our unsociable nature frustrates this need in manifold ways. So in relation to others we must forever pretend to be the friend that both we and our friend know we can never be. Kant therefore finds the deepest trust about friendship in a saying sometimes attributed to Aristotle: 'My dear friends, there are no friends.'" Wood 1999, 276-82. See also Wood 1991 as well Baron 2002.

for an aporetic consideration of Kant's universal imperatives. His theory gives way to a paradoxical esteem of friendship; what I contend to be a *universal duty without universalism.* Kant writes:

> I can be a friend of mankind in general in the sense that I can bear good-will in my heart towards everyone, but to be a friend of everybody is impossible, for friendship is a particular relationship, and he who is a friend to everyone has no particular friend. And yet there are men of the world whose capacity to form friendships with anyone might well earn them the title of everybody's friends. Such citizens are rare. They are men of a kindly disposition, who are always prepared to look on the best side of things. The combination of such goodness of heart with taste and understanding characterizes the friend of all men, and in itself constitutes a high degree of perfection. But as a rule, men are inclined to form particular relations because this is a natural impulse and also because we all start with the particular and then proceed to the general. A man without a friend is isolated. Friendship develops the minor virtues of life. (1997, 209)

This claims echoes Kant's most famous claim about friendship in his analogy to its rarity in the figure of the *black swan*.[26] For him, the rarity of friendship based in principles and mutual respect and esteem does not mean it is impossible, just rare to encounter, let alone experience. Kant never discounts the possibilities of the two extreme poles of his discussion of friendship –on one hand, extreme singularity (i.e. the black swan) and on the other, extreme generality (i.e. the friend of man). Instead, he carefully distinguishes its conceptual from its practical possibilities. This means that for Kant, conceptually, the question of friendship is unlimited, while, in practise, it is subject to limitations.

We can see how this difference takes shape in his distinction between the 'friend of man' and the philanthropist (1963, §47: 471-72). Kant recognizes the rarity of both figures and the manner in which each attempt to reconcile friendship with universality. However, Kant is clear that the difference between the former and the latter finds its basis in the problem of equality. Whereas the friend of man sympathizes with the well-being of man, the philanthropist loves his fellow man, but in a way in which inequality remains the condition of his love.[27] For Kant, the essential distinction is that the friend of man

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26] Kant credits his use of this term to a passage in Juvenal's *Satires*: "a bird that is rare on earth, quite like a black swan." See Kant 1964 §6: 472.

27] Following a reading of Fenves on Kant, the difference between the brother and the father in Kant's account of universalism ought to be likened to the difference between the *Menschenfreund* and the philanthropist. Fenves writes: "According to Kant's account, the friend of the human being, unlike the philanthropist gives only to those whom he owes; more exactly, he gives only to those whom he feels 'in his heart' that he owes even though no explicit contract, agreement, or promise stipulates that he owes anything at all. Only a community whose members acknowledge a mutual and yet entirely implicit debt to one another is fraternal: a debt that amounts to a universally shared secret. Because the depth of the debt is limitless the friend can represent his fraternity as extending ad infinitum. The sister, the mother, and even perhaps the lone father –to name only these three –would presumably be figures for other economies." (1999, 137) For an important discussion of the linguistic history of *Menschenliebe* (love of human beings) in German literature and philosophy see Fenves 1999, 149n2, 152n15. See also Fenves 2003 for a similar discussion. In Kant's discussion of equality, love and rectitude he writes: "Equality means that the natural

considers himself on par with the whole whereas the philanthropist's regard is the result of an unequal regard for others.[28] The difference, I contend, is best understood in reference to his discussion of a universal brotherhood under one father.[29] For Kant, equality is analogous to the friend *qua* brother, but while his cosmopolitical impulse calls for a new political imaginary its exclusion of women, sisters and animals has left many to question the rationality that warrants such exclusion.[30] Taking great issue with his uncritical synonymy of friendship with fraternity, Fenves suggests that Kant's call to friendship is paradoxically double. Friendship, he remarks, is the paradoxical negotiation of "a small society of brethren who grow ever closer together and the demand to establish "a large community of brothers which extends itself beyond every established border" (Fenves 1999, 139).[31]

This is similar to Slavoj Žižek's reading (2008) that confirms the paradoxical lean of Kant's conception of the political as well. In his discussion of singularity and universality, Žižek argues that this divide admits paradoxical and irreducible overlaps. Drawing upon parallels with the public-private distinction in Kant's work, Žižek argues that Kant adheres to a logic of difference whereby the distinction between these two realms is not based in an essential identity or an essential common place, but the way in which the singular is necessarily always-already manifestly universal. Žižek's argues that for Kant "the public space of 'world-civil-society' designates the paradox of the universal singularity, of a singular subject, who in a kind of short-circuit, by-pass(es) the mediation of the particular [and] directly participates in the universal" (2008, 122). Purposefully complicating the distinctions between the private and the public, Žižek's reading of Kant is noteworthy because he reads the Kantian political subject as that which is at one and the same time both singular and universal while resisting the impulse to substantiate a political subject on either side of this same divide.[32] It leads us to understand the interrelation between

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man is equal to all others, and they to him, and since moral sympathy is imprinted on all, he has to put himself in the other's place and from this there follows living rectitude." Kant 1963)§27: 65

28] See Fenves' discussion of the relationship between observation and mastery in friendship and how this effects Kant's conception of fraternity. Fenves also calls into question Gregor's translation of *gemeistert* as *mastered* and suggests that Kant is rather discussing friendship in relation to testing (*gemustert*). See Fenves 1999, 137 n. 13; 136-38.

29] While a discussion of Freud's work on structures of fraternity and paternal power would be out of place here, I nonetheless encourage a consideration of the following: Freud 1989; 1985; 1959.

30] Derrida asks the following: "What relation does this domination maintain with the double-exclusion we see at work in all the great ethico-politico-philosophical discourses on friendship: on the other hand, the exclusion of friendship between women; on the other, the exclusion of friendship between a man and a woman? This double exclusion of the feminine in the philosophical paradigm would then confer on friendship the essential and essentially sublime figure of virile homosexuality." (1997, 278-9) For other interesting discussions that attempt to subvert fraternal models of political association see Bingham 2006; May 1997; Kofman 2007.

31] For an interesting study on the Christian call to 'brotherhood,' and in particular the idea of a universal sibilinghood see Marc Shell 1993.

32] In Žižek's reading of Kant's 'What is Enlightenment?' Kant, *Critique of Practical Reason, and Other*

the particular and the universal in a different way. More than just reversing the transition from the particular to the universal he suggests a coterminous relation whereby a non-instrumental and non-causal relation between the two emerges. He writes:

> The authentic moment of discovery, the breakthrough, occurs when a properly universal dimension explodes from within a particular context and becomes 'for-itself', and is directly experienced as universal. This universality for-itself is not simply external to or above its particular context: it is inscribed within it. It perturbs and affects it from within, so that the identity of the particular is split into its particular and its universal aspects. (129)

This is the manner in which I suggest it would be productive to read Kant's concerns with singularity and universality. That is, what I call for is neither a transition of the particular into the general or the reduction of the general into particularity but its doubling whereby the particular as such gives way to a double-occurrence of that which is irreducibly universal. The problem is not Kant's concern with duty, but the duplicitous and consequently aporetic structure of friendship as the foundation for each and every concern with commonality. Universal friendship is plausible *qua* idea but escapes practicality. The problem remains a question of motivation: How to fulfill such an ethical duty independent of coercion or personal gain? The catch remains as Žižek succinctly states it: "It is not only that every universality is haunted by a particular content that taints it; it is that every particular position is haunted by its implicit universality, which undermines it." (132) In the very least, we can say that the problem of exclusion in friendship is not something that one can get rid of simply by extending its boundaries with open arms.

IV. CONCLUSION

Until now, we have looked at Kant's discussion of attraction and repulsion as a metaphor for understanding social relations and the moral conflicts which accompany his thoughts on duty and virtue. What reoccurs throughout each of Kant's discussions are the tensions between choice and duty and the political implications of this distinction. These tensions mark the question of friendship with a fundamental ambivalence whose contradictions highlight its points of tension, undecidability and contradictory demands. However, this is not to disavow the significance of Kant's insights. More importantly, it demonstrates the necessity of giving greater complexity to how we come to discuss the relation between politics, friendship and morality in Kant's writings. The difficulty that remains is how to affirm these paradoxical registers while finding the proper grounds

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Writings in Moral Philosophy. Žižek argues: "The paradox of the underlying formula 'think freely, but obey!' (which, of course, poses a series of problems of its own, since it also relies on the distinction between the 'performative' level of social authority, and the level of free thinking where performativity is suspended) is thus that one participates in the universal dimension of the 'public' sphere precisely as a singular individual extracted from or even opposed to one's substantial communal identification –one is truly universal only when radically singular, in the interstices of communal identities." (Žižek 2008, 122)

for integrating the conflicts of duty and choice together without destroying what makes friendship such an important and fundamental part of our personal and social experience.

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Judge Posner on Dewey, Democracy and Knowledge:

A Critical Assessment

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Abstract: This paper provides a critique of one of the more pivotal aspects of Judge Richard Posner's legal pragmatism: his interpretation of John Dewey's account of the relationship between democracy and knowledge, what I call the democracy-knowledge relationship. For Dewey, knowledge and action, including political action, are part of the same continuous process. Posner argues Dewey fails to make a convincing argument on this point. According to Posner, Dewey offers an incoherent democratic theory that is fragmented into what he calls "epistemic" and "deliberative" democratic theories. I argue Posner is wrong in at least three ways: first, Posner exaggerates the extent to which Dewey believed his suggested reforms could actually be implemented; second, he misinterprets Dewey's understanding of knowledge, both its origin and its function; and finally, Posner commits a classic straw man fallacy in that he presents a distorted account of Dewey's democratic theory that is readily subject to his own criticisms.

Key words: law, democracy, Dewey, Posner, pragmatism.

In his book *Law, Democracy and Pragmatism* (2003), Judge Richard Posner develops and defends an elaborate, systematic and sophisticated account of the relationship between law, democracy and pragmatism, as he understands it. My criticism in this paper is of course not directed toward the whole of Posner's theory, but rather is directed toward one of the more pivotal aspects thereof: his interpretation of John Dewey's understanding of the relationship between democracy and knowledge, what I will call the democracy-knowledge relationship. For Dewey, knowledge and action (including political action) are part of the same continuous process. Posner argues Dewey fails to provide a satisfactory argument concerning the democracy-knowledge relationship, and that this results in problems for Dewey's democratic theory more generally. Specifically, Posner argues that Dewey's democratic theory is fragmented into what he calls "epistemic" and "deliberative" democracies, as opposed to being a democratic theory composed of intertwined political and epistemic elements. I will argue that Posner's argument on this point is flawed in at least three ways: first, Posner exaggerates the empirical nature of Dewey's political philosophy and reform in regards to actual implementation. Dewey's vehemence toward participatory and deliberative democracy does not equate to a claim by Dewey that these are feasible modes of democratic politics; second, Posner misinterprets Dewey's account of knowledge, both its origins and its social function; and finally, Posner commits a classic straw man fallacy in that he bifurcates Dewey's democratic theory in a way that allows him to present a supposed Dewey an deliberative democracy that is readily subject to his criticisms, which subsequently serve as support for his legal pragmatism. Posner's own democratic theory will not be discussed here.

This paper will proceed in the following way: first, I will provide a brief review of the aspects of Dewey's philosophy that emphasize his arguments concerning the relationship between democracy and knowledge; second, I will present Posner's interpretation of Dewey's account of the democracy-knowledge relationship and provide counterpoints to criticisms presented in his interpretation; third, I will offer a brief summation of where Posner goes wrong in his account and how he fails to provide a viable interpretation of Dewey's democratic theory. It being the case that Posner's criticisms of Dewey's account of democracy are essential to his legal pragmatism, it might also be the case that his broader theory is subject to similar criticisms; and finally, I conclude by summarizing my arguments and explaining the potential contributions of this research.

I. DEWEY'S DEMOCRACY-KNOWLEDGE RELATIONSHIP

To fully understand Dewey's democracy-knowledge relationship, it is helpful to understand the significant influence of Darwinian biology on his thought. This influence, among others, led Dewey to understand society as a kind "social organism" where citizens and institutional arrangements are adaptive to constantly changing social conditions (1916). One of several indications of this influence can be found in Dewey's writings on the contemporaneous developments in physiology and psychology, which explain the brain as evolutionary and organic: the brain is understood as an organ constantly responding to external, environmental stimuli. Based on this experience, the brain coordinates activity accordingly. To elucidate this idea, Dewey provides a specific example: that of the carpenter's craft. Upon observing the carpenter in action, one notices,

> While each motor response is adjusted to the state of affairs indicated through the sense organs, the motor response shapes the next sensory stimulus. Generalizing this illustration, the brain is the machinery for the constant reorganizing of activity so as to maintain continuity; that is to say, to make such modifications in future action as required by what has already been done. (1998, 209)

This, for Dewey, demonstrates how in everyday activity a person, or any organism for that matter, goes through a continuous process of engagement-stimulus-adjustment-reengagement. This in turn generates a practical knowledge that is of use in future experience. Dewey's understanding of a constant reciprocity between a given organism and its environment – which is the basis of his epistemology – carries over to his political philosophy (Hoy 1998).

In a broader social and political context, the acquisition of experience-based knowledge is a practical social endeavor; that is, knowledge is essential to a functional democracy and democracy is itself an education promoting social and political knowledge (McDermott 1973). As an example, Dewey argues the education of society's younger members prior to their entrance into social life must be of certain kind: it must be based in experience in the world and be able to impart knowledge, derived from that experience, that will in turn be useful in future experience. Knowledge "must begin in experience

and relate back to experience." (Sullivan 2007, 75) This prepares young citizens for life in society. Similarly, in the political sphere voluntary involvement in political action educates political agents for future political action. According to Dewey, an ideal democracy would be one in which such an understanding of the democracy-knowledge relationship is coextensive with the social body and put into practice, therefore providing governments with practical approaches to wide-ranging social problems through knowledge that is based in real-world, political experience.

It being the case that democratic societies are constituted by a plurality of groups with varying interests and proposed strategies for overcoming obstacles faced in political life, the transmission of ideas is of great import (Dewey 1916). Solutions will be those that are derived from different political experiences and their corresponding knowledge conveyed through free interaction and the sharing of ideas. This provides knowledge on which citizens and governments can depend when faced with constantly changing political phenomena. Social and political adaptation to environments is the engine of political development, and such adaptation is the experience that ensures the survival of a political community or society. This involves a publically active, rather than a passive, political community. For Dewey, a stagnant government and citizenry are not only incompatible with democracy, but in fact can help to set the stage for the imminent death or devolution of a democratic society.

To further argue this point, Dewey reiterates the import of the transmission of ideas to the democracy-knowledge relationship,

> Democracy is more than a form of government; it is primarily a mode of associated living, of conjoint communicated experience. The extension in space of the number of individuals who participate in an interest so that each has to refer his own action to that of others, and to consider the action of others to give point and direction to his own, is equivalent to the breaking down of those barriers of class, race, and national territory which kept men from perceiving the full import of their activity. (1916, 101)

Knowledge of democratic values, that is, is conveyed through the transmission of ideas, the primary vehicle of which is practical knowledge and subsequent communication, which is not only promoted through educational institutions, but is also a life-long process.

Alfonso Damico (1978) provides an interpretation of Dewey's democracy-knowledge relationship that helps to clarify what some consider Dewey's complicated account. He writes,

> Dewey's insistence that action and its consequences are critical to any valid theory of politics is important. A positive political philosophy for improving social life will not be discovered unless we learn to test our concepts, theories and judgments in terms that ultimately refer to the experience from which we learn how to solve problems. (1978, 123)

Damico's comment is a clear statement of the democracy-knowledge relationship. Intertwined in Dewey's democratic theory are both epistemic and political elements. Damico echoes Dewey on this point. Years before, responding to critics characterizing

his political philosophy as utopian and, as Posner later suggests, dependent on an over exaggerated role of intelligence, Dewey writes,

> What is the faith of democracy in the role of consultation, of conference, of persuasion, of discussion, in the formation of public opinion, which in the long run is self-corrective, except faith in the capacity of the intelligence of the common man to respond with commonsense to the free play of facts and ideas which are secured by effective guarantees of free inquiry, free assembly, and free communication. (1998, 342)

Dewey is arguing that the emphasis he places on knowledge and communication is quite consistent with democracy in practice. Faith in commonsense-based intelligence is so intrinsic to democracy that to subordinate it would be to miss the point of democratic governmental together. To put this another way,

> The foundation of democracy is faith in the capacities of human nature; faith in human intelligence, and in the power of pooled cooperative experience. It is not belief that these things are complete but that if given a show they will grow and be able to generate progressively the knowledge and wisdom needed to guide collective action. (1997, 219)

Democratic, political knowledge is practical and not of the kind Posner charges Dewey with advocating. It "nothing but commonsense sharpened." (Damico1978, 1)

To reiterate, political knowledge is the product of individuals and social institutions being adaptive to changing social conditions. This knowledge helps to overcome future challenges in political life. This process is best facilitated by a political-institutional arrangement that allows for the development of common hopes, values, and goals, of a political community via open and free communication. Since contemporary political life is constituted by a plurality of groups, the transmission of ideas is essential for coming to consensus or compromise. For Dewey, democratic government can only facilitate this since it allows for the transmission of such ideas – the transmission of practical political knowledge.

II. JUDGE POSNER ON DEWEY, DEMOCRACY AND KNOWLEDGE

Posner begins his book with one of several distinctions to follow: that between "philosophical" and "everyday" pragmatism. The former is meant to convey the manner in which "pragmatism" is discussed and treated in professional philosophy and in academic departments. The latter, on the other hand, is what is implied by the use of the term "pragmatism" in popular conversation: to take things as they come, not to be rash, to make informed and judicious decisions, and the like. This is the domain of Posner's legal pragmatism. Right away, then, Posner attempts to bring his pragmatism down even further from abstraction than Dewey does his own. Dewey of course takes issue with excessive abstraction, so Posner is setting the stage for an exceptionally strong critique of Dewey's philosophy, specifically the democracy-knowledge relationship.

Having made the distinction between so-called philosophical and everyday pragmatism, Posner turns to Dewey's work, which he believes suffers from certain defects that render Dewey's pragmatism at odds with everyday pragmatism, which Posner argues is the proper domain of politics and law. As mentioned, he takes aim at Dewey's conception of democracy and its important relationship to knowledge. Posner suggests that despite what might on a superficial level seem to be a coherent presentation of the democracy-knowledge relationship, upon further consideration the relationship is not so clear. If Posner is right, Dewey's democratic theory is fragmented: on the one hand, he argues, there are the epistemic aspects and on the other there are the political, deliberative aspects. According to Posner, this is problematic for Dewey's democratic theory because it severs the democracy-knowledge relationship on which the theory depends. This results in Dewey's democratic theory being less practical than he maintains. As a consequence, the proposed reforms derived from his democracy-knowledge relationship are unlikely to ever come to fruition.

However, Dewey never claimed to offer remedies to empirical issues as much as he seemed to be normatively reactive thereto. Much of his social and political philosophy is empirically diagnostic and normatively prescriptive. To be sure, there are suggestions for actual reform in Dewey's political philosophy, but the expectations of actual implementation are not to the extent to which Posner would have others believe, and it is certainly not the driving force behind his democratic theory. Dewey felt experience generates knowledge and that this could be a good thing for democracy, hence his focus at once on democracy and education. However, Dewey did have his doubts that his suggested reforms could actually be implemented.

Dewey especially thought America's increasing infatuation with industrialism and technological innovation served as an impediment to the kinds of reforms for which he argued. Technology and industry, although not antithetical to democratic reform, served as an impetus for a reconceptualization of politics that was more rigid than adaptive, while also promoting a kind of individualism adverse to Dewey's understanding of the individual as a social being, something he believed essential to a healthy democracy. Dewey saw technological and industrial advancement and its correspondence to the bureaucratization of politics as delimiting to the adaptive capacities of political systems. This caused Dewey to lament the direction in which he believed American politics was geared, which is indicative of his limited expectations concerning democratic reform (1999).

This is not to say that Dewey was not a steadfast advocate of deliberative and participatory democracy; but again, this is not Dewey suggesting these modes of democracy could actually be implemented. In fact, Dewey was observant of the ubiquitous conflict in American politics that often makes productive deliberative democracy unlikely. As William R. Caspary writes, "Dewey does not deny conflict" in democratic politics, "but instead stresses constructive conflict resolution" (2000, 9). The fact that Dewey believed conflict resolution was necessary in democratic government strongly suggests his awareness of political conflict as a hurdle to the kind of democracy he envisioned. It is true, as Caspary acknowledges, at different times in his sweeping political philosophy

Dewey neglects the obstructive role of conflict in democratic politics, but throughout the whole of his philosophy there are numerous references to democratic conflict.

Furthermore, in his middle period writings Dewey placed a great deal of emphasis on the development and dynamics of group morality. In these writings, Dewey explains communities of different sizes are most often dependent on tradition, informal norms, and social habits. Dewey explains that in communities, "there are approved ways of acting, common to the group, and handed down from generation to generation. Such approved ways of doing and acting are customs." (1972, 56) These customs influence and guide individual conduct: "they imply the judgment of the group that they are to be followed. The welfare of the group is regarded as somehow imbedded in them." (Dewey 1972, 54-55) This means humans are inherently social, something Dewey strongly believed, but this social nature carries with it a propensity to strongly adhere to practices rooted in tradition. This account of group dynamics is much more conservative than Dewey's democratic theory. Dewey's preferred form of democracy is radical in that existing institutions would have to be significantly altered and perhaps reinvented. This is something Dewey could not have anticipated given what he saw as the comparatively rigid, conservative nature of American political institutions. As such, Posner's attack on, and dismissal of, Dewey's democratic theory because of its being impractical is subject to criticism.

In looking deeper into the epistemic aspects of Dewey's theory of democracy, Posner rightly observes that for Dewey, "the best forms of inquiry and decision-making in general, not just political inquiry and decision-making, are democratic in character." (2003, 99) That is: Dewey, following Peirce, James and others, was skeptical of the emphasis on different modes of inquiry based on ideas of an immutable truth as well as the notion that an individual utilizes her rational capacities and arrives at conclusions in solitude. To the contrary, Dewey understood inquiry as cooperative and inherently democratic; Posner suggests that for Dewey it is "oriented toward a *cooperative* acquisition of *useful* knowledge" (2003, 101, emphasis in original). Dewey did not pursue an ultimate truth since he believed purely objective inquiry was impossible. Instead, what some would call "objective" is more of a set of criteria derived from compromise and eventual consensus. To put it differently, "progress is a social rather than an individual undertaking and achievement because people see things differently" (Posner 2003, 102). These differences help to guide inquiry.

Up to this point, Posner offers a viable and defendable interpretation of the epistemic aspects of Dewey's democratic theory: he rightly suggests Dewey's account of inquiry is inclusive to a significant degree. As Raymond Geuss (2001), anticipating Posner, explains:

> Democracy for Dewey is a good form of political organization because it is the appropriate political modeling of a more general form of human interaction which has epistemological and valuative advantages, and which finds its best realization in a free scientific community dedicated to experimental research. Just as such a community is trying to invent theories that will allow us to deal with our environment in a satisfactory way, so a good human society would be one that was a kind of experimental community devoted to trying to discover worthwhile and satisfying ways of living. (2001, 124-25)

Posner does recognize these aspects of Dewey's democratic theory in an appropriate manner. They are after all an important part of Dewey's democratic theory. However, Posner quickly turns to what he believes is the fragmented character of Dewey's democratic theory.

Posner posits, "no reason is given to suppose that the democratic character of knowledge is the only precondition of a successful a political democracy." (2003, 105) In fact, Posner believes it is not even a necessary precondition, at least not to the extent that Dewey believes. Dewey, though, never argues the former claim (that such is the only precondition for a well-functioning democracy), but would defend the latter claim (that it is necessary). For Posner, democracy requires something different: practical knowledge is of course of value, but it is one of several factors contributing to a well-functioning democracy. Advocating a form of rigidly representative democracy similar to that advocated by Joseph Schumpeter (1976), Posner juxtaposes it with Dewey's so-called deliberative democracy. Having teased out the epistemic elements of Dewey's democracy, Posner looks to what is left, which he suggests is not only flawed in theory but also impossible in practice.

To be sure, Dewey was fond of the increasing democratization in American government that occurred during the progressive era and the civil rights movement, but his dedication to American democracy was not aimed at directing the country toward a purely deliberative democracy, as Posner seems to think. Rather, it is derived from his robust belief that American democracy would do well to be as inclusive as possible. Indeed, he thought this was the only way American democracy could survive (Hoy 1998). Yet Posner's treatment unapologetically designates Dewey's democratic theory as a purely deliberative, which is generally considered a non-viable democratic arrangement in contemporary political life (Held 2006). This is where Posner quickly loses his traction.

For Posner, the weakness of Dewey's democratic theory is that it is incoherent and unrealistic in practice. Regarding the latter, he is right. As many scholars acknowledge, contemporary political life is not conducive to a purely deliberative democracy, nor was it during Dewey's long life. From this point on, Posner focuses on his account of Dewey's democracy as unrealistic. He argues given low IQ scores, voter-apathy, and general disenchantment with the political process, Dewey's deliberative democracy is not viable. But the point stands that Posner is addressing only one aspect of Dewey's democratic theory. He of course argues epistemic democracy is its own body of ideas, but he does not provide an adequate or satisfactory justification for his decision to jettison this aspect of Dewey's democratic theory.

In addition to what Posner sees as fragmentation in Dewey's democratic theory, he also argues Dewey commits the "intellectual's typical mistake of exaggerating the importance of intellect and of associated virtues such as commitment and disinterested inquiry" (2003, 108). Education, he suggests, does not necessarily improve character. This being the case, education – certainly a public good – does not significantly contribute to democracy in the manner in which Dewey claims. It is one among many variables that

converge to make possible a functional, well-ordered democracy. For Posner, the over exaggerated role of intelligence and knowledge removes Dewey's democratic theory from real-world politics and is therefore not productive in addressing real-world problems.

However, as demonstrated throughout this paper, Dewey's account of knowledge is derived from experience in the real world and is therefore practical in nature (think of the carpenter example, as well as Dewey's emphasis on the commonsense-based knowledge as essential to democracy). Dewey repeatedly refers to this throughout not only his democratic theory but also in his pragmatist philosophy more generally. It is difficult to imagine this is something that could be missed by such a sophisticated critic as Posner. Since Dewey's democratic theory is so dependent on his understanding that the most productive knowledge is a practical knowledge, to overlook this point is to miss the point Dewey is trying to make. It is of course one thing to disagree, but to suggest that Dewey's account of knowledge is excessively academic in nature requires a more robust and convincing critique.

As a further means to criticize Dewey's deliberative democracy, Posner returns to his notion that "everyday pragmatism" is the proper domain of law and politics. He provides the example of Franklyn Roosevelt, an American President who, according to Posner, was far less intelligent than Dewey, but much more practically minded. By Posner's account, in being a practical politician, but not engaging in excessive intellectual reasoning when it came to political matters, Roosevelt was better able to govern than the people. This, according to Posner, is demonstrative of why a more elitist (but pragmatic in the everyday sense) government employing officials with expertise in the matters with which governments deal is more desirable than Dewey's democracy. The general public, both historically and contemporaneously, are not to be trusted with certain issues of public policy. What is more, given the volatile nature of majoritarian politics, they *should* not be trusted, but rather tempered by a representative structure. Deliberative democracy is not only impractical but also undesirable. Elsewhere, (2013) I highlight how, in so arguing, Posner contradicts his earlier claims about "everyday pragmatism." Although this is an important point, it does not contribute significantly to the research presented here.

III. SUMMING UP HOW POSNER GOES WRONG

As mentioned above, Posner's interpretation of Dewey's democratic theory over emphasizes the role of its empirical nature in regard to implementation. Dewey was of course concerned with empirical issues, but not in the way or to the extent Posner describes. Rather, Dewey's democratic theory can be better characterized as critical of certain aspects of democratic politics and as suggesting reform. This is implied when Dewey writes: "We cannot set up, out of our heads, something we regard as an ideal society. We must base our conception upon societies which actually exist if we are to have any assurance our ideal is a practicable one" (1916, 96). The goal then becomes to "extract the desirable traits and suggest improvements" (96). Dewey did provide suggestions for

political reform, however there is little to suggest that he whole-heartedly believed his political ideals could come to fruition. His discussions about the increasing barriers to the transmission of ideas seem to suggest the same. Granted, he had faith in American democracy, and he had ideas about how it should operate, but to center one's argument, as Posner does, on the impractical nature of what is only really a part of Dewey's theory is at odds with a careful reading of Dewey.

Furthermore, Posner misrepresents Dewey's account of knowledge, both in regard to its origins and its social function. Posner claims that Dewey makes the academic mistake of over emphasizing knowledge. He argues further that the kind of knowledge Dewey advocates is not a necessary condition for democracy. That is: Dewey's democratic theory is in the realm of philosophical pragmatism, which is not the appropriate realm of politics. However, Dewey's political philosophy, and his pragmatist philosophy more generally, is replete with arguments concerning the import of practical knowledge; he of course places emphasis on knowledge, but this knowledge is derived from real-world experience, not from philosophical discourse in academic departments. As Susan Haack explains, Dewey "insists that knowing is not isolated from practice but is itself a kind practice – to be judged, like other practices, by it purposive success rather than by some accuracy of reflection of its objects" (1996, 652). A productive knowledge is not derived from abstract principles, but rather is generated through practice and everyday experience in the lived world.

Finally, and perhaps most penetrating, Posner can be interpreted as committing a classic straw man fallacy. As mentioned above, he does this by bifurcating Dewey's democratic theory in way that is not only at odds with Dewey's philosophy, but also misrepresents Dewey's account of democracy as purely deliberative, making it easy to attack and reject. Given that Posner dissects Dewey's theory along epistemic and deliberative lines, and given the fact that in Dewey's democratic theory such a demarcation is unclear if it exists at all, Posner's dismissal of the epistemic aspects of Dewey's democratic theory leaves only a shell of that theory. This is to say Posner presents a distorted form of Dewey's position. Posner formidably and successfully argues against this position, however the point remains that Posner spends a great deal of time and effort teasing out specific elements of Dewey's democratic theory, rejecting others, and putting what is left back together to form a democratic theory readily subject to his criticism. Thus a straw man fallacy is committed.

IV. CONCLUSION

I have argued that Judge Richard Posner's legal pragmatism is subject to criticism since he misrepresents Dewey's account of the democracy-knowledge relationship, an essential part of Dewey's democratic theory. I took issue with three specific aspects of Posner's account: the exaggerated extent to which he claims Dewey thought his ideas might be implemented, the misrepresentation of Dewey's account of knowledge, and

what I argued is Posner's straw man fallacy. In support of these claims, I provided aspects of Dewey's philosophy that I hope are demonstrative of his concern with the democracy-knowledge relationship, therefore at least casting a shadow of doubt on what Judge Posner seems to think is self-evident.

This research is important, if for no other reason, because many of Posner's weaknesses are concealed in the intricacy of the systematic presentation of his theory. To identify and criticize these weaknesses might contribute to other criticisms in that if this aspect of Posner's legal pragmatism is subject to such criticism, there might be implications for the whole of his theory. Moreover, Judge Posner claims a strong lineage with Dewey and other classical pragmatist. If this is so, Posner needs to account for this significant break. Finally, the research presented here can perhaps have implications in more than one area of philosophy: not only are there obvious implications for the pragmatist literature, but there might also be implications for political and legal philosophy more generally, as well as for epistemology and the history of philosophy.

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Analysing the Wrongness of Killing

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Abstract. This article provides an in-depth analysis of the wrongness of killing by comparing different versions of three influential views: the *traditional* view that killing is always wrong; the *liberal* view that killing is wrong if and only if the victim does not want to be killed; and Don Marquis' *future of value* account of the wrongness of killing. In particular, I illustrate the advantages that a basic version of the liberal view and a basic version of the future of value account have over competing alternatives. Still, ultimately none of the views analysed here are satisfactory; but the different reasons why those competing views fail provide important insights into the ethics of killing.

Key words: killing, wrongness of killing, future of value, ethics of killing, ethics.

Killing is, sometimes, wrong. That much we will assume here. Much more interesting than the question of whether killing is always wrong (the answer is no), is the question of what makes killing wrong in the cases in which killing is indeed wrong. One influential answer to this latter question has been delivered by Don Marquis: on his future of value account of the wrongness of killing, "what makes it wrong to kill those individuals we all believe it is wrong to kill, is that killing them deprives them of their future of value" (Marquis 2011, 384; see also Marquis 1989).

Carson Strong has presented a set of supposed counterexamples to the future of value account of the wrongness of killing, involving either a terminally ill patient or an individual severely and permanently cognitively impaired. Strong argues that it would be wrong to kill those individuals despite their not having a future of value like ours (on these counterexamples see: Strong 2008; Di Nucci 2009a; Strong 2009; Di Nucci 2009b; Marquis 2011; Strong 2012; and Di Nucci 2015).

I have suggested elsewhere (Di Nucci 2009a; Di Nucci 2009b; and Di Nucci 2015; see also Di Nucci 2013a) that the future of value account of the wrongness of killing ought to be interpreted broadly so as to include the futures of terminally ill patients and severely and permanently cognitively impaired individuals in our conception of futures of value. Such inclusiveness would not only deal with Strong's supposed counterexamples but also have two further advantages: such broad account would be neither discriminatory nor speciesist.

In the present article I want to distinguish the broad account of the wrongness of killing from the claim that killing is wrong if and only if the victim does not want to be killed. The latter account – which I will refer to as the *liberal* account of the wrongness of killing – is both simple and plausible; but, as we will see, the liberal account is false.

The idea that killing is wrong if and only if the victim does not want to be killed has the advantage that – again, on top of its great simplicity – it is very liberal in allowing for the killing of those who want to be killed. This is both the major difference and the

big advantage that such an account has over an otherwise similarly basic and intuitive account of the wrongness of killing: the historically popular idea that killing is wrong full-stop; namely, that the wrongness of killing is both general and universal. This I will refer to as the *traditional* account of the wrongness of killing.

There are at least two reasons to prefer the claim that killing is wrong if and only if the victim does not want to be killed to the claim that killing is wrong full-stop: as we anticipated, only the former allows for the killing of those who want to be killed or at least do not want not to be killed. Secondly, and perhaps more importantly, only the former offers an analysis of the wrongness of killing by providing an account inclusive of why killing is wrong – because the victim does not want to be killed. The traditional 'killing is wrong full-stop' is at the very least incomplete as an account of the wrongness of killing because it does not provide any reasons why killing is wrong. And here we see a similarity between the future of value account and the liberal account, which in this particular respect can be contrasted, together, with the traditional account. Even though the liberal account ought therefore to be preferred over the traditional account, the former shares some major disadvantages with the latter, namely being subject to countless counterexamples.

If killing is wrong if and only if the victim does not want to be killed, then we would almost never be allowed to kill during conflicts – because the enemy hardly ever lacks a preference against being killed; similarly, we would almost never be allowed to kill an aggressor in self-defence; and we would almost never be allowed to kill one to sacrifice many; here we could go on; but the general point is just that the liberal account shares some of the notorious plausibility weaknesses of the traditional account that killing is wrong full-stop; even though it is – in the one important respect that we have already emphasized – more liberal than the traditional account with respect to, say, euthanasia or assisted suicide.

Now one way to try to rescue the liberal account could consist in scaling it down from a set of necessary and sufficient conditions to a preference against being killed being either necessary or sufficient for the wrongness of killing. It is true that this way one would give up on the ambition of having a full-blow account, but after all the traditional account is also incomplete in its own way by failing to provide reasons for the wrongness of killing. So in terms of completeness we would have a draw that the scaled down liberal account could make up by winning in plausibility.

So what we need to look at now are two versions of the scaled down liberal account:

1. the claim that not wanting to be killed is necessary for the wrongness of killing; and

2. the claim that not wanting to be killed is sufficient for the wrongness of killing.

The latter shares all the implausibility of the traditional account; think, again, of all the traditional baddies mentioned above: none of them, normally, want to be killed; so scaling down the liberal account to a sufficient condition would be no improvement

because, again, killing all those baddies would be always wrong as long as they have a preference against being killed.

We are left with the scaled down liberal account according to which killing is wrong only if the victim does not want to be killed. This version does not suffer from all the classic counterexamples that burden both the traditional account and the full-blown liberal account, and on these grounds it ought to be preferred. Additionally, the idea that killing is wrong only if the victim does not want to be killed cannot be charged with incompleteness in comparing it with the future of value account, because after all the latter is also incomplete.

The future of value account, when properly spelled out, cannot consist of both necessary and sufficient conditions for the wrongness of killing; because if it aimed at providing sufficient conditions, it would again run in the sort of trouble that both the traditional account and the full-blown liberal account have to deal with: many baddies will have a future of value whether or not you interpret that as narrowly as Marquis and Strong or as broadly as myself – but that ought not to make their killing always wrong. So, the future of value account, both in its narrow version and in its broad version, is really just offering necessary conditions for the wrongness of killing: killing is wrong only if the victim is deprived of a future of value – call this the 'basic future of value account'. That can indeed be compared with the claim that killing is wrong only if the victim does not want to be killed – call this the "basic liberal account."

One may even suggest that, really, the claim that killing is wrong only if the victim does not want to be killed amounts to the subjective version of the claim that killing is wrong only if the victim is deprived of a future of value – namely that, just as with the debate that we described at the outset, the whole issue really turns on the definition of 'future of value'. Whether or not this is the case, it is certainly true that one account appeals to a subjective attitude – whether or not one does not want to be killed – while the other account appeals to something that can at least be interpreted as an objective attitude – namely whether or not one has a future of value (here see again Di Nucci 2013a).

Something else that needs to be said about the basic future of value account and the basic liberal account is that not only can they both be distinguished from their full-blown versions and from the traditional account; they ought to be distinguished – and that is certainly the historical importance of Marquis' work – from a close relative of the traditional account which appeals to the metaphysical status of the victim, as, say, being a person; or having a soul/mind, etc.

The basic future of value account and the basic liberal account, let us be clear, deliver different outcomes about when killing is wrong; which is important because otherwise one would have to worry about whether they could actually just be two only superficially different versions of the same view. Take abortion and embryo destruction: if those entities are taken to have a future of value, then killing them fulfils the necessary condition for the wrongness of killing in the basic future of value account. But foetuses and embryos lack

any kind of attitude against being killed, so that killing them does not fulfil the necessary condition for the wrongness of killing in the basic liberal account.

But what about adult humans who lack an attitude against being killed due to, say, their cognitive capacities or their current state? I am thinking of the severely mentally disabled, the comatose, those suffering from neurodegenerative diseases at advanced stages, and maybe even newborns (some non-human animals may, on the other hand, be an easier case in terms of claiming that they have an attitude against being killed). Here it is tricky to just say that the preference against being killed should be understood counterfactually: namely that it is also wrong to kill those that would have such a preference if they just had the relevant cognitive abilities. Because then one would need an argument for allowing this in the case of, say, the adult mentally disabled but not foetuses or embryos.1

Here let me note that even though I have introduced quite a few different theories and versions thereof, we are still moving ourselves within very traditional territory in terms of the wrongness of killing: so that we are now faced with the typical liberal difficulty of allowing for embryo destruction and abortion without opening the floodgates to the killing of newborns, the severely mentally disabled and the severely demented. Nothing new, really – it could be objected. So let me say something which I think may bring the debate forward.

The liberal account, both in its full-blown version and in its basic version, is empty. That's because even though it provides a reason why killing is wrong, the reason that the liberal account provides for the wrongness of killing does not have anything to do with killing – or with death, for that matter. Think about it: the liberal account claims that killing is wrong only if the victim does not want to be killed. Whether or not this is true, its supposed truth is not very meaningful. Saying that killing is wrong only if the victim does not want to be killed is just like saying that interrupting is wrong only if the speaker does not want to be interrupted. The two claims have the same structure: doing A to S is wrong only if S does not want A to be done to her. We can generate countless cases that have this structure, because it is the basic structure of autonomy and consent.

I am not saying that autonomy and consent are not important: I am rather claiming that if all we can say about the wrongness of killing is that it has to do with an autonomy violation, killing is just as wrong as interrupting. Admittedly, one can rank preferences and the preference against being killed will certainly – for most people – rank much higher than the preference against being interrupted. Still, the wrongness of killing would be of the same kind as the wrongness of interrupting.

This is, then, what distinguishes the basic future of value account from the basic liberal account: the latter is, in an important way, not specifically about the wrongness of killing or death but about the wrongness of autonomy violations more in general. The former, on the other hand, focuses much more closely on what it is that we lose if we are killed: namely a

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1] Here I cannot do justice to debates about abortion and embryos but I have written about this extensively elsewhere. Please see: Di Nucci 2013b, Di Nucci 2013c, Di Nucci 2014a, and Di Nucci 2014b.

future. So the basic future of value account of the wrongness of killing is much more specific than the basic liberal account of the wrongness of killing: only the former says something which applies specifically to being killed, namely being deprived of our future.

Let us take stock. I have been comparing different accounts of the wrongness of killing: the traditional account; the liberal account; and the future of value account. I have found that the most plausible candidates are the so-called basic liberal account and basic future of value account; and that, in choosing between those two, the basic future of value account has the advantage of saying something specific about being killed – that it deprives us of our future – while the basic liberal account just appeals to a general principle against autonomy violation which applies to being killed as much as to being interrupted. Should we then just embrace the basic future of value account, preferably in my broad version (Di Nucci 2015) rather than in Marquis' narrow version (Marquis 2011)?

This is not the place for an all-out evaluation of the basic future of value account – my aim here was just to compare it with some significant alternatives. But let me say, very briefly, two things: first, I doubt that even the basic future of value account can work without appeal to the victim's preferences; if the victim does not have a preference for not being killed over being killed, then killing is not wrong, whatever the quality of the victim's future.

Admittedly, this point may be made in terms similar to those of the broad version of the future of value account which I have suggested in the past (Di Nucci 2009a, Di Nucci 2009b, Di Nucci 2015): if the victim does not value her future and therefore does not have a preference against being killed, then killing is not wrong. So this points to a possible combination of the basic future of value account with the basic liberal account.

Secondly, my reservations about the basic future of value account – once it has been integrated with some autonomy clause – have less to do with its merits and more to do with its scope of application. Namely, the pro-life suggestion of using the future of value account to argue against the killing of embryos and foetuses.

Briefly, I think that the problem with this suggestion is not that it appeals to the deprivation of our future: the problem is finding plausible criteria for the attribution of a future to things. For example: the same future that one can attribute to an embryo can also be attributed to the parental project from which that embryo resulted. Indeed, when a parental project becomes an embryo which then becomes an adult human being, that future as an adult human being is shared by both the parental project and the embryo.

This is not the place for a full-blown argument about abortion, so let me just say this: I am happy to admit that what happens to parental projects can be morally relevant; just in the same way in which I am happy to admit that what happens to embryos can be morally relevant. But, at the same time, I would argue that abandoning a parental project cannot be compared to killing a fellow human being: and on just those lines I would also argue that destroying an embryo and aborting an early foetus cannot be compared to killing an adult human being.

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Book Reviews

In *Global Justice and Development*, Julian Culp's goal is to formulate a novel discourse-theoretic approach to problems of basic justice and development.[1] To achieve this goal, Culp divides the book in two parts. The first part is dedicated to global justice. Here, Culp analyzes the main conceptions in the current academic debate, and points out their merits and difficulties. He eventually rejects all of the existing conceptions in favor of his own, which he articulates in the last chapter of this first part. The second part is dedicated to global development, and applies his previously developed conception of global justice to issues such as how to understand development from a normative point of view and which forms of international development assistance are justifiable.

Following the Introduction, in Chapter 2 Culp analyzes the so-called "globalist" or "cosmopolitan" theories of global justice which defend the adoption of an egalitarian standard of distributive justice to each and every human being on the planet. Since such theories have special prominence in the current academic debate, they will be examined very closely here. Culp separates them in two groups: practice-independent theories, on the one hand, try to derive their normative injunctions from considerations about the moral nature of human beings, or from abstract moral considerations. Their argument is that the existence of some normatively relevant features of human beings would already be enough to vindicate the right of every inhabitant on earth to an equal amount of some justice-relevant resource. For the justification of such a right it is unnecessary to analyze current practices of global political or economic relations. Culp, however, rejects such approaches by criticizing practice-independent theorizing about justice, on the ground that it violates Rawls's method of reflective equilibrium. For Culp, one of the most attractive features of this method is the fact that it demands us to test the theoretically justified principles in light of their predictable practical consequences so that we can validate their justification. This, however, is something that practice-independent approaches refuse to do. Due to that, their adoption could predictably lead to catastrophic consequences, but that would not be relevant for the theory. In fact, theorizing about justice in this fashion seems to consider as irrelevant to the justification of principles of justice any considerations about the predictable consequences of such principles.

Although I consider Culp's rationale sound, I wonder whether the logical step at which he stops is a compelling one in order to reject the practice-independent position. After all, a practice-independent cosmopolitan or globalist could argue that abstract considerations about justice play such an important role in the justification of principles of justice that they by themselves would already be enough for such a justification. That is, they could maintain that the particular use of the method of reflective equilibrium that Culp suggests is unnecessary. Thus Culp would have to make an additional argumentative move in order to reply to such an objection. This move would have to

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involve asking, firstly, "But what if the adoption of the principles predictably leads to greater injustices than the ones it is meant to correct?" and, secondly, "How could that be regarded as totally irrelevant for their justification?"

The second group of globalist theories is related to practice-dependent theories. Such theories argue that if one holds that at the domestic level non-voluntarily imposed cooperative practices give rise the validity of egalitarian principles of justice, then such principles must necessarily be extended to the global level. For the institutions and organizations that regulate international economic cooperation are framed in a way that, in practice, it is impossible for any country not to take part in them. Although Culp complements the theorists of this second group for employing a practice-dependent form of theorizing justice that is compatible with the method of reflective equilibrium, he ultimately also rejects them by using the following ingenious argument.

Culp argues – correctly, from my point of view – that the lexical priority of Rawls's principles of justice renders implausible the adoption of the difference principle at a global scale. In fact, for Rawls, the difference principle can only be adopted after the complete adoption of the first principle and the first part of the second one, which grant to persons the fair exercise of their basic liberties and ensures the establishment of fair equality of opportunity. However, Culp argues, it is impossible to grant this fair value of basic liberties for every person in the world, since laws in each country differ radically. Some are more restrictive (although they are still reasonable), while others are more liberal. Due to that, so as to guarantee the adoption of the first principle the only logical possibilities would be to argue for a coercive form of global legislation when it comes to basic liberties (which would be fatal for states' self-determination) or, more radically, for a world state. Yet in the pertinent literature the latter possibility has consensually been rejected as deeply problematic, because a world state would entail the danger of global despotism and would not be capable of preventing civil wars.

Notably, however, this argument seems to work only for those cosmopolitan theorists that employ Rawls's theory. Yet despite the fact that Rawlsian theorists like Charles Beitz, Darrel Moellendorf and Thomas Pogge are the major players in current debates, the Rawlsian framework does not exhaust the conceptual possibilities for the vindication of cosmopolitan theories of justice.

Chapter 3 is dedicated to the so-called "statist" position, which argues that the only social relation coercive enough to give rise to justice claims is the one between citizens of a state. From this it follows either that no considerations of justice may be applied globally – which is the "strong statist" position defended by Thomas Nagel – or that only some minimal humanitarian obligations apply beyond the state – which is the "weak statist" position defended by Michael Blake. However, Culp rejects both of them.

Strong statism is rejected for being empirically false. In fact, in the past and present international and transnational structures such as the system of trade and colonialism have forced and continue to force states to globally interact with each other so that one cannot seriously claim that such cooperation is voluntary. And the fact that the rules of such cooperation are often established by and for superpowers and disfavor poor countries indeed validates certain global claims of distributive justice (even if not Rawlsian egalitarian principles of justice worldwide, since they already have been rejected in Chapter 2).

Besides being exposed to this objection, weak statism must also face two difficulties. Even though it acknowledges the existence of humanitarian obligations world-

wide, it cannot distinguish between situations in which the persons to be helped experience an intolerable standard of living due to forces that are beyond the capacities of the parties involved (natural disasters, for instance) from those situations in which the intolerable standard of living has been caused by human institutional design (like past colonial exploitation or an unfavorable WTO treaty). Moreover, such a position justifies only the right of certain persons to receive help, but it does not justify the duties of those who are supposed to help and leaves open who it is that is supposed to help. This renders the position useless in practice.

Chapter 4 deals with theories that Culp names "transnationalist" conceptions of global justice, and which include the theories of Richard Miller, Nancy Fraser and Rainer Forst. Those theories have in common that they try to deal with the problem of global justice by acknowledging a multitude of normative contexts. Due to lack of space and the importance that Forst's theory assumes for Culp's approach, I will deal only with Culp's discussion of Forst's conception of transnational justice.

Forst grounds his conception on the basis of an individual right to justification, which manifests itself within four different normative contexts: the *ethical* context in which the individual and the surrounding community answer to questions about the good for themselves; the *legal* context in which the individual is considered as a person who is subject to a law that protects her ethical identity from unjust interference, at the same time as it limits it so as to protect the ethical identity of the other; the *political* context, in which the individual is seen as a co-author of law within a self-ruling community of citizens; and, finally, the *moral* context in which the person is seen as a human being, understood here as a rational, justificatory being, that is, a being that is able to provide, to demand and to answer to justifications to and from other persons, but is also vulnerable to their actions. Such a right is understood as a qualified veto right against false or distorted justifications. It is regulated by two criteria: reciprocity and generality, which are redeemed in discursive practice by persons themselves.

Culp criticizes Forst's and other transnationalist approaches, however, based on two arguments. The first one is that, by establishing a multitude of normative contexts, each one regulated by its own principles of justice, transnationalism becomes highly fragmented, and that prevents persons to verify whether other persons in their different contexts of interaction and the institutions that regulate these contexts satisfy such principles. That leads transnationalism to violate what Rawls called the *publicity condition*, since it renders it unable to vindicate a publicly agreed upon global conception of justice. Besides, the second argument states that by recognizing multiple contexts of justice, transnationalism cannot provide a holistic justice-based moral target, and cannot determine how such a moral target should be reached. That is an especially serious problem at the global level, as it is at this level that the fragmentation of normative contexts reaches its peak.

I was not fully convinced of the force of these two arguments. When it comes to the first one, it seems to me that if the publicity condition would demand that persons know that principles of justice that rule social cooperation at all levels (both domestic and global) are respected by most persons and institutions worldwide, then no conception of global justice could satisfy this condition except, perhaps, one that would defend, but implausibly so, the existence of a global state. If that is true, then claiming that the satisfaction of the publicity condition is necessary for a theory of global justice seems too demanding.

When it comes to the second argument, it seems that Forst's approach of the contexts of justice could deny that it is over-fragmented. Forst could argue that in spite of being applied to different contexts his theory is in fact based on a single moral principle (the individual right to justification), and that the fact that his theory is a procedural one renders it simple enough to avoid over-fragmentation.

In Chapter 5 Culp exposes his own approach, which he dubs "democratic" or "discourse-theoretic internationalism". At its core, it also contains a discourse-theoretic approach that is grounded in the right to justification and the two criteria of reciprocity and generality. Following Habermas, Culp distinguishes between ethical and moral contexts of justification. He uses this distinction to specify further the intuitive idea that every human being has an equal moral status that must be respected by everyone, in such a way that equal moral respect, which is a right of every person and a duty of every person vis-à-vis all other persons, is now understood as the individual right to justification, understood as described above.

That idea is the first of three basic ideas of Culp's discourse-theoretic conception of global justice. More specifically, this first idea states that all persons posses an equal moral status and an equal moral dignity as reason-exchanging beings, which automatically give rise to the duty for other persons to respect their moral status and dignity, expressing such respect by providing them adequate justifications.

The second one infers from the first one the demand for the establishment of social and political institutions grounded on principles of justice that publicly express the first idea. That is, social and political institutions must be justifiable according to the criteria of reciprocity and generality, allowing those under their rule to conceive of themselves as their authors. Even if not everyone has the same justificatory power to influence the selection of public decisions and their underlying principles, it is important that everyone can find the publicly agreed principles of justice acceptable (that is, that their justifications satisfy the two criteria), and that a door is kept open to everyone to contest distorted or false justifications.

The third idea builds on the second one and demands the establishment of certain deliberative democratic arrangements, conceived as basic structures of justification, as described by the first idea. Only in this way, Culp argues, is it possible to achieve socio-political orders that are fundamentally just, and which satisfy the minimal procedural demands that render the result of their deliberative processes just.

With these three basic ideas of his approach set in place, Culp goes on to lay out two practical consequences of its adoption. The first one is that given the undesirability of a global state, *at the international level*, representatives of all fundamentally just states (that is, the ones which satisfy the three basic ideias of Culp's approach) must be granted a sufficient amount of justificatory power in processes of opinion and will formation that affect the lives of their members. Although such an approach is a procedural account that abstains from arguing for substantive principles of justice, it has, according to Culp, some interesting substantive consequences. First, its realization needs particular kinds of present and future institutions that would satisfy its prescriptions. Moreover, when it comes to distributive justice, although it does not argue for a specific distributive standard, it prescribes that the level of inequality between countries must not reach a point where the justificatory power of the poorer ones is excessively compromised. This, in turn, provides an instrumental argument for the limitation of

inequality between states. Thus, since the current global distributive situation is not in line with the theory's prescriptions, it vindicates an obligation of rich countries to help the poorer ones in order to reduce international inequality.

The second consequence is that, at *the intranational level*, the theory argues for properly arranged domestic basic structures of justification that afford each citizen of all states sufficient justificatory power. This is necessary, Culp argues, in order to ensure that the principles agreed at the international level are indeed justifiable to the citizens of each state. More importantly, Culp claims that the legitimacy of intranational and international socio-political arrangements is mutually dependent on each other. On the one hand, internationally agreed principles of justice are not legitimate if the basic structure of each state (that ultimately chooses and informs their representatives at the international arena) is not justifiable to their citizens. On the other hand, no domestic structure may claim legitimacy until the resources with which it implements its policies are not defined as legitimately belonging to it by principles of distributive justice publicly agreed at the international level.

Although this is an interesting idea, it is difficult to understand how Culp can logically derive this internationalist position from the right to justification. If such a right is understood as an individual right, it seems that the direct subjects of a theory of global justice must be persons themselves, not their representatives at the international level. In fact, once Culp acknowledges the existence of more than one normative context, it seems that the logical conclusion of his considerations points to transnationalism and not to internationalism. Doing so, however, would expose him to the criticisms that he has formulated in the previous chapter, which is something that he wishes to avoid. In fact, the transnationalist position seems to be inescapable to every discourse-theoretic approach, or at least to every approach of this kind that – like Culp's – acknowledges the existence of different normative contexts of justification.

Besides, Culp's position that only fundamentally just states may agree to principles of justice to be adopted at the global level seems problematic in two respects. The first one is that citizens of countries that are not fundamentally just according to Culp's criteria have no voice at all in the formulation of such principles. But are not they (those, that is, who have their "equal moral status" violated every day) precisely the ones that the international community must hear most urgently? Culp may reply that his theory prescribes that the domestic structures of those countries must change so as to satisfy the conditions it demands. But in the meanwhile, how can the international community take into account the voices of those persons? Since Culp's theory focuses on person's representatives and not on persons themselves as parts of a global process of justification of principles of justice, it seems to be unable to provide a satisfactory answer to this problem.

The second problem is that it is not always easy to determine whether a country is fundamentally just or not. Consider Latin-American countries, for instance. Many of them are young democracies that have been able to gradually improve the quality of their democratic institutions and their socio-political structure. Many of them have open and fair elections, a free press and a declaration of inalienable individual rights in their democratically enacted constitutions. At the same time, however, in many of them illiteracy rates are both quantitatively and qualitatively so high that they compromise the capabilities of persons for citizenship, and income inequality is high to the point of excluding most of the population from participation in public life and from access to

the court system, among other severe problems. This situation seems to put Culp's approach into a dilemma. After all, is it possible to say that such countries are fundamentally just? If Culp answers "yes," his conception of justice seems unable to identify situations of severe disrespect of individuals' right to justification. If he answers "no," then his approach becomes highly exclusionary, since then only the so-called "developed countries" are fundamentally just, and thus only their representatives may take part in international processes of opinion and will formation so as to agree on principles of global distributive justice.

The book then enters its second part, in which the focus of the discussion is global development. Curiously enough, Culp argues, scholars of global justice and global development seldom interact, and an explicit goal of the book is to bridge this gap. As part of such an objective, Chapter 6 starts with a critical analysis of current conceptions of global development. The most influential development conception among economists is that which conceives development as economic growth. Following several other thinkers, Culp rejects this conception for failing to realize that such growth has only an instrumental value. It is not an end in itself, since the real goal of development is to develop persons, not an economy. That leads Culp to analyze the capabilities approach to human development pioneered by Amartya Sen and Martha Nussbaum.

The capabilities approach basically conceives human development as a function of the set of things persons can be or do (that is, the set of their capabilities). By this standard, their adherents argue, one has a more complete and better way of measuring human development. More specifically this standard says that development must be measured relative to the possibilities really available to persons' lives (capabilities) and the ones that are effectively carried out by them over the course of their lives (functionings).

Here, however, Sen and Nussbaum take separate ways. Sen conceives the capabilities approach as a way of comparatively measuring human development according to the possibilities available to persons' lives – which is why he endorses a conception of *development as freedom*. Sen hesitates to determine a basic set of capabilities as the target of a conception of development. Nussbaum, by contrast, elects explicitly ten basic capabilities as fundamental requirements of justice and development. Her goal is to create a minimal consensus on the conditions under which human life ceases to be "dignified" or "truly human", and which may be the object of an "overlapping consensus" as a "political" conception of justice (in Rawls' terminology).

Culp, however, rejects both conceptions. For him, Sen's hesitation to provide a list of central capabilities renders his conception too indeterminate to be used as a practical standard for development. Moreover, his focus on individual freedom is, for Culp, a sign that Sen grounds his conception in a comprehensive view (in Rawls' sense) about the good that values freedom and individual autonomy. Nussbaum's account, on the other hand, is rejected for underestimating the role democratic deliberation plays (and should play) in the development process. By formulating a substantive conception of justice to be applied to human societies, her purely outcome-oriented theory considers democratic societies as mere executors of previously formulated principles of justice (or, at most, as their interpreters), but not as their authors. In doing so, she disregards the importance of democratic processes for the formulation and justification of principles of justice.

Let me state briefly why I disagree with Culp's interpretation. From my point of view, Sen does not praise freedom because he relies on an underlying comprehensive

view of the good. He does so because he holds that persons are entitled to the opportunity to choose (to put it somewhat poetically) the paths of their lives (or, in the discourse-theoretic terminology, to exercise their ethical autonomy) by choosing which capabilities will be effectively exercised in their lives. That is precisely why Sen refuses to provide a list of basic capabilities: because he thinks it is up to persons (and not to him) to decide what is central in their lives. Nussbaum's account, by contrast, is the very opposite: by providing a conception of what is a "dignified" (good?) human life, she ends up articulating a substantive conception of the good. And that, in my view, is the real reason why her approach must be rejected according to Culp's argument.

After rejecting both conceptions of the capabilities approach, Culp employs his own conception of global justice as a guide to global development, conceiving it as "the gradual achievement and eventual maintenance of a fundamentally just social and political process" (151). That does not mean that capabilities cannot play a role in his theory since, in the name of persons' equal moral status, his conception would argue for the realization of those capabilities that allow democratic procedures to occur as a fundamental demand of socio-political justice.

The last chapter discusses acceptable forms of international development practice and replies to some objections. Culp argues that some forms of international development practice are morally valid and may be good instruments for development, and not mere forms of domination of poor countries by the rich ones. Such forms, however, must not be understood as help for humanitarian reasons (what implicitly admits that the current global distributive scheme is just, what it clearly false) but as duties of *justice*. According to this moral rationale, international development practice must contribute to the establishment of certain socio-political domestic structures that are demanded by global discursive justice. That is, international development practices should help satisfying the intranational conditions of a fundamentally just global basic structure.

After a brief reply to some potential objections to this argument by postcolonial theorists like Arturo Escobar and Vandana Shiva, the book comes to an end. As we have seen, Culp's work is not free from difficulties – be they conceptual or practical in nature. However, such difficulties do not nullify the fact that it is an original contribution to contemporary debates about global justice and global development, and that it is most likely to become a relevant position in the field during the following years.

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