

A Critique of the Universalisability of Critical Human Rights Theory: The Displacement of Immanuel Kant

Mark F. N. Franke

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Abstract While the critically oriented writings of Immanuel Kant remain the key theoretical grounds from which universalists challenge reduction of international rights law and protection to the practical particularities of sovereign states, Kant's theory can be read as also a crucial argument for a human rights regime ordered around sovereign states and citizens. Consequently, universalists may be tempted to push Kant's thinking to greater critical examination of 'the human' and its properties. However, such a move to more theoretical rigour in critique only solidifies the subversive statism of Kant's apparent universalism, as long as it remains embedded in his prior theory of critical philosophy that privileges a singular form of reason. Universalist theories of human rights can break with this contradiction only insofar as they also displace the right to philosophy from the subject and site of 'civil' man to a politics of theory where no such subject or site is guaranteed.

Keywords Kant · Human rights · Universal · Freedom · Theory · Practice

The modern regime of international human rights is unable to achieve its most fundamental aim, a universalisable interest in claims to rights. International law, protection mechanisms, and the principles and discourses that sustain them are geopolitically oriented. Thus, the regime is hostile toward claims to human dignity and freedom made by persons without clear and equal standing in their home states or who are on the move and without territorial security (Franke 2008). The universal of human rights is regularly subordinated to renditions of humanity as states' citizens, permitting the reason of human rights to become parochial and discriminating in kind (Franke 2011). Yet, this reversal of logic is less shocking a revelation as some supporters of rights protection might expect. In large part, this would seem the practical arrangement. Those

M. F. N. Franke (✉)
Centre for Global Studies, Huron University College, 1349 Western Road, London, ON N6G 1H3,
Canada
e-mail: mfranke@huron.uwo.ca

M. F. N. Franke
Centre for the Study of Theory and Criticism, University of Western Ontario, London, ON, Canada

who view international affairs as necessarily anarchical and state-based in character already see the ideal of human rights as something that can be universalised in theory but never in practice. However, the commonality of this opinion does not mean that it is without serious counterpoint.

For those who are disappointed with this pragmatic approach, the writings of Immanuel Kant remain their champion. Kant (1996c) provides what is still a foundational argument for the moral position from which the universality of human rights may be thought. Moreover, he does so by directly challenging what he argues is the ignorance of a retreat to mere practicality in viewpoint, indicating that practical outcomes are limited by the principles that sound rational theory can first prove (Kant 1996d). Thus, in the key text on this point, *Conflict of the Faculties*, Kant (1979) argues that universalisable theory must gain a place of governance over the particular aims of social and political practices. Yet, the substance of his contentions is not purely philosophical. Rather, he understands the relationship between theory and practice itself to be practical and that, indeed, it is to be practiced in specific sites, namely the modern university.

Kant is concerned with how public knowledge of and policy over the rights and freedoms of individuals in a given society are shaped by the sciences and professional faculties at public institutions. It is crucial, for him, that philosophy, as a lower academic faculty, be given autonomy by universities and the states that charter them, so that they may always be in the position to freely, critically, and publicly evaluate and challenge the knowledge, ideals, and policies produced for the state by the practically oriented faculties. Kant's point is that the work of higher faculties is always vulnerable to the interests of the state, such that the practical knowledge and wisdom they produce cannot be trusted to venture beyond the impracticalities of mere state interest and ambition. He offers hope that in the supposedly politic-free theoretical work of philosophers the universalisable possibilities and limits of social practices may be outlined in ways that states themselves could will for the benefits of humans, universally. However, his approach provides far less of a remedy to the myopia and fragmentation of state geopolitics as one might think. Belief that Kant offers serious theoretical challenge to the practical self-interests of sovereign state rule overlooks the ways in which his universalising theory is consistent with the particular practices of state sovereignty and sovereign subjects.

Consequently, those still seeking an argument in support of respecting human rights claims universally over geopolitical interests may be tempted to push Kant's critical reflections a great deal further. However, re-theorising is not enough. To 'correct' Kant's complicity with the particularity of modern state politics, the entire Kantian project of critical theory must be re-worked. At stake is not simply the mustering of support for the practicality of universalisable theory. It is also the possibility of re-establishing the conditions under which the practicality of universalisable theory can be grounded in relation to the human, in the following two manners. First, it must be possible to think the practical limits of being human as not already or necessarily confined to those of emplaced citizens of states. Second, it must be possible to posit free reasoning as not the property of this singular position of supposed civility. Kant provides a theory in which a particular political geography allows for the possibility of respecting human freedoms and establishing appropriate laws of human rights that will permit this freedom to flourish. In critical response to

this position, I argue that a universalisable theory of human rights is practical only where it is grounded in the fundamental right to be political in contests over the what it means to be human.

Kant's Right to Philosophy as the Containment of Theory in Spaces of Sovereignty

Kant's globalising outlook on the work of philosophical reason may appear in fundamental conflict with analyses of global affairs that proffer the particularist reason of state sovereignty as a necessary political response to the lack of a global authority. However, the apparent distance between these positions is easily collapsed. First, Kant is not arguing that philosophy has universal authority but only that it can possibly identify universal conditions for human life and society. Philosophy has only the capacity to give universalisable principles within which practical choices made by states and their citizens may be determined. Second, to accept the thesis of global anarchy is still to approach international affairs from a universalised principle of state sovereignty. Somewhat paradoxically, this thesis takes state sovereignty as a universalisable guide to practical action regarding rights and freedoms in the international domain. Now, this apparent commonality of ideas does not imply necessary theoretical unity between the two views, but it does help us see that Kant's universalism is better read as an argument for the universalisation of the sovereign state and a common theory of anarchy that can account for their independence from one another. It demonstrates also that Kant is committed to a notion of human being that ought to be and is rightfully emplaced in the sovereign state. Thus, far from offering a challenge to the principle of sovereignty and, thereby, a view to human rights and freedoms not already subsumed to state interests, his analysis provides an even more forceful rationale in support of the practical subordination of claims to human rights to the particular limits and reason of states.

Yes, Kant argues for the right of universalisable theory to gain governance over the particularist practices of individual states. However, the academic freedom of philosophy that he champions does not begin from claims regarding positive truths that philosophy may access in ways superior to any states' will to knowledge. Rather, his contention is grounded in the admission that reason lacks authoritative determinate knowledge about human beings, their societies, and how they may relate with one another. This is the cornerstone of his *Critique of Pure Reason* (1998). The only claim to certainty in philosophy for Kant is the observation that rational beings are capable of freely choosing their actions in the world (Kant 1996c: pp. 374–376 [6: pp. 213–214]), that they are capable of spontaneity (Kant 1998: p. 533 [A533/B561]). This does not mean that they are free but only that, theoretically, they are capable of freedom. Thus, for Kant, the question of being an active rational being in the world renders human being into a problem of morality (Louden 2011: pp. 49–104). This theoretical capacity for freedom shows him that we ought to be free, but, as becomes the subject of his *Critique of Practical Reason* (Kant 1996b), to actually be free is indeed a practical question (Kant 1996c: p. 376 [6: p. 221]). How should I choose to act—what principle should guide my choices—so that my choices may lead me to freedom and not obstacles or contradictions? The work of philosophy begins with the problem of identifying the universalisable theory that can serve as a guide for both reason and rational practice in the world, whereby

human beings may act morally, in honour of and as responsibility to the freedom of choice that is theirs.

Determination of this universal guide to reason and action, for Kant, is not a difficult step. This guide can “refer to no other property of choice (by which some purpose can be ascribed to it) than simply to its *freedom*” (Kant 1996c: p. 377 [6: p. 222]). It must be an imperative that is categorical (unconditional), rising from necessity internal to the human subject. Accordingly, the categorical imperative for moral action cannot hold for only one rational human but must hold for all possible such beings. It refers only to the fact of free choice:

The categorical imperative, which as such only affirms what obligation is, is: act upon a maxim that can also hold as a universal law. — You must therefore first consider your actions in terms of their subjective principles; but you can know whether this principle also holds objectively only in this way: that when your reason subjects it to the test of conceiving yourself as also giving universal law through it, it qualifies for such a giving of universal law (Kant 1996c: p. 379 [6:p. 225]).

One must theoretically limit one’s actions in such a way that all rational beings with freedom of choice in the world could act in the same way without taking away from each other’s practical freedom. However, the question that Kant then provokes is: how can this be done?

The answer for him, of course, is philosophy, but it cannot be philosophy in any random manner of thinking through the problem. Historically, there may be many different attempts at philosophy, but, for Kant (1996c: p. 366 [6: p. 207]), there can be only one true philosophical method, as human reason itself can be only one thing. Essential to philosophy, then, is the work of developing the appropriate method by which human reason (in the singular) can be practiced. And it is for this purpose that Kant is delighted by the fact that universities were created, announcing in back-handed fashion that “it was not a bad idea” to concentrate learning into such institutions of mass production (Kant 1979: p. 23). He certainly sees the value of universities for the development of methods, policies, and technologies for the function of the state in its particularity, via the higher faculties, but he is also quite pleased that philosophers could congregate in the same public institutions (Kant 1979: pp. 27–29). This gathering of philosophers together, where they may work in common, is of at least as great importance, if not a good deal more.

Kant understands that philosophy can be pursued idiosyncratically and in isolation, but he suggests that we cannot hope for philosophical accomplishment in these examples, given that they function without “public precepts or rules” (Kant 1979: p. 25). There is no categorical imperative at work limiting and guiding these attempts at reason. As “incorporated scholars” in universities, though, he sees the possibility of philosophers together being able to identify the limits of reason and, thus, the universal limits to the practical freedom of rational human beings. Kant sees great importance in the creation of universities where members of the lower faculty of philosophy may engage in the development of “right reason” pertaining to freedom (Kant 1996d: p. 290 [8: p. 290]) across academic scholarship. In this regard, he has in mind the possible determinations of rational limits whereby scholars from both the lower and higher faculties may engage in theory that respects “the conditions under which the choice of

one [human] can be united with the choice of another in accordance with a universal law of freedom" (Kant 1996c: p. 387 [6: p. 230]). And, insofar as they are impacted by the free critical work of philosophy, the higher faculties may outline policies and interests for the state that form for it a doctrine of positive right in the form of laws (Kant 1996c: p. 386 [6: p. 229]). Yet, the conditions under which the right reason of incorporated philosophy may do its work is the state itself, and necessarily so.

Given that, for Kant (1996a), philosophy as such can be practiced only where there is freedom to do so in public, he reasons that the project of philosophy requires the state (Kant 1996c: pp. 455–456 [6: p. 312]). He does not understand rational beings to simply be free things to which a state and its laws should conform. Rather, Kant's point is that the development of the liberal politics and law of modern sovereign states is required, as a matter of moral duty, for the practical pursuit of freedom experienced as a potentiality by rational beings (Beck 2006). The state is necessary to provide the public laws and mutual social coercion wherein universities are possible as public institutions with academic freedom. The state provides the possibility of public right, "the sum of laws which need to be promulgated generally in order to bring about a rightful condition" (Kant 1996c: p. 455 [6: p. 311]). Moreover, the state itself is a moral requirement, in that, in honour of their freedom of choice, human beings have a duty to themselves to create the social and political conditions where an adequate theory to practical freedom could be generated (Kant 1996d: pp. 290–296 [8: pp. 289–297]). The social, political, and legal aspects of the state are not determining of moral character in Kant's rational being, but they are crucial to the realisation of choices that follow the duty indicated in the moral character of such beings (Cohen 2009: p. 133). Thus, the sovereign state is not a question for philosophy so much as it is a condition of philosophy in its pursuit of right reason. As Szymkowiak (2009: pp. 594–595) argues, it is not rightful philosophy as such that leads us to the just state and its just manner of government. Rather, only the state, in some form, is required for the purpose of making the conditions under which the philosophy of right could be pursued. The state is not a site of transformation for the autonomous individual. Rather, it is a site in which it is possible for autonomous individuals may interact as such (Thorpe 2011).

In this respect, Kant is a classic theorist of the social contract, but, as Katrin Flikschuh (2000) is right to emphasise, only in a formal sense. He understands that no state is perfect and many such states are harmful to the freedom of their citizens and subjects (Kant 1996e: p. 324 [8: p. 352]). Nevertheless, Kant (1979: pp. 167–169) sees value in any structure of sovereignty, in that it can routinise persons living under its authority to function in a public way and that it is inevitable that some states will come to see the value in encouraging liberalised public debate with respect to laws, policies, and institutions. He imagines the state itself as something relatively restrictive and unimaginative with respect to questions of justice, equality, and freedom but also as something that, through its restrictions, could provide the conditions under which the daring of human freedom could assert itself (Verhaegh 2006). The freedom permitted by the laws and policies of the state are not as important as the fact that the state provides a form of public life in which it is difficult to not assess one's maxims and actions in terms of their social impact. As Ido Geiger (2010: pp. 285–294) argues, this is the use of the categorical imperative itself, in that, testing one's maxims against it, the categorical imperative provides no knowledge of universally valid moral content but only a form of reasoning by which one could develop knowledge of what holds morally in the public

universe. Thus, institution of such debate in universities becomes a possibility. And with universities, as the primary sites of free critical debate over the ordering and actions of the state, a state that tends toward the formation of positive rights in accordance with the categorical imperative becomes all the more likely. In Kant's analysis, then, the freedom of philosophy and of human beings owe a fundamental debt to the sovereign state. Establishing the conditions under which human freedom is possible—wherein it becomes possible to determine the rights that humans may appropriately claim of one another in a truly universal form—means forming the state, regardless of its manner of rule (Kant 1996d: pp. 296–304 [8: pp. 297–307]). And the moral call to right reason asks that members of the state work as best they can, incessantly, to reform the state to the point where liberal debate, in the university, becomes state policy.

Having established the freedom of public debate in universities, though, it would seem that such state policy, ultimately, serves to undermine state sovereignty. For Kant, the critical work of philosophy is insufficient as long as it is isolated within the public of one state or even several states only. For a fully critical project that can indeed test maxims in relation to the categorical imperative, as a theoretical test of the practical freedom of all possible rational humans, this public debate must ultimately be opened globally (Kant 1996d: pp. 304–309 [8: pp. 307–313]). Kant indicates that for there to be public right of the state in a secured way, it is naturally theorised in terms of a “right of nations” (Kant 1996c: p. 455 [6: p. 311]). Thus, moral duty, in freely choosing to honour freedom of choice, is fulfilled in its largest way when the philosophers see that public right must be situated in a cosmopolitan right and when the critical work of philosophers succeeds in convincing state sovereigns to pursue policies that make cosmopolitan freedoms possible. He has in mind that right, generally, is served where states adopt policies and seek formation of international law that makes possible peaceful relations between one another, wherein the right thinking citizens of each state are able to engage in philosophy with one another (Kant 1996c: pp. 482–492 [6: pp. 343–355]). Consequently, it would seem as though Kant does finally offer a reading of the place of philosophy that gives it authority over state sovereignty, in that the public right is conditioned upon adoption of a globalised form of right reason that is universalist in outlook. However, it is not the universe of humanity that Kant puts over the sovereign state. Rather, the demands of human freedom, as he theorises it, compel him to situate humanity to the state the other way around.

While a global singularity in philosophy is of great importance to Kant, in the critical work of bringing about universal practical freedom for human beings, this is not for him a state of affairs at which one can finally arrive, historically. Cosmopolitan right does not replace the public right of the state. Cosmopolitan right is a practice toward freedom which always must rely on the work of states, as international persons, to freely will such a condition and work toward it (Kant 1996c: p. 491 [6: pp. 354–355]). Just as the state cannot engage in public right without the incessant work of philosophy within its public institutions, cosmopolitan right is not possible without the active and free choice of individual sovereign states working to establish laws and policies with one another by which such a global public right is possible (Apel 2007: pp. 57–60). While philosophy seeks critical leverage on, ultimately, global grounds, it can do so only from the autonomy and security that, ideally, it gains in the institution of universities in individual states. And the work of philosophy, as incorporated within the universities established by sovereign states, is without end.

Kant's Practical Displacement of Non-Citizens from the Right to Philosophy

In his key work on the matter, *The Metaphysics of Morals*, Kant (1996c: pp. 393–394 [6: pp. 237–238]) is explicit in identifying freedom as the inherent right of all human beings. In this regard, the ground of right, for Kant, is theoretical and imperfect. Perfect laws through which the practice of human freedom is attempted, on a universal basis, are to be worked out historically, through the development of public and, ultimately, cosmopolitan right (Kant 1996c: pp. 455–492 [6: pp. 311–355]; 1996d, 2007b). His universalist stance to human rights, then, is caught within the exact same problem that is produced in modern international law and state politics. While it is possible for philosophers in any state's universities to theorise all of humanity as rightfully claiming freedom, it is difficult to imagine how they could expect critical evaluation of what is recommended in scholarship of the higher faculties to result in anything resembling the practical freedom of all human beings beyond those securely emplaced in states. Critique cannot lead to the practical freedom of even all humans subject to state rule. As a statist project, Kant's philosophy is interested in the freedoms of only one specific kind of human being, and it expects all who do not fit its description, limits, and interests to either support the freedom of this being first or find some way of transforming themselves into it.

Kant's theory of right, as it pertains to what we now call human rights, is indeed grounded in the notion that all human beings hold what he calls “innate right.” It is a singular right to be free, which he takes to mean “independence from being constrained by another's choice” (Kant 1996c: p. 393 [6: p. 237]). Thus, for Kant, it is a right that must be respected universally in view of the categorical imperative. And, as corollaries, Kant (1996c: pp. 393–394 [6: pp. 237–238]) contends that all humans then have the right to equality, self-determination, and the authority to act in relation to their fellows in any way that does not diminish the humanity of others and their right to freedom. However, this inalienable innate right to make practical claims to freedom is not an inescapable or necessary fact of human society. Rather, it is something that can be known only theoretically, especially where the critical work that Kant sees possible in academic philosophy has been secured by states. Respect for and support of such freedom is made possible by what he calls “acquired rights,” the particular legal, political, and social acts that determine specific duties and freedoms in the state that, theoretically, could possibly allow for an approximation of what is called for by nature (Kant 1996c: p. 393 [6: p. 237]). Rational recognition of innate right can serve as a guide to the development of suitable acquired rights, but the development of these external rights must involve inter-human processes. The grounds of support for what Kant believes holds theoretically, and universally so, do not begin with universal freedom but inevitably require social, political, and legal relations through which one idea of freedom is given force and privilege over others.

The particularist and exclusionary politics by which Kant expects innate right to be given respect through acquired rights are observable already in the most basic form of human freedom conceived by him for state society. With respect to persons who already do belong to state communities, Kant (1996c: p. 471 [6: p. 329]) contends that none of them “...can be without dignity, since he at least has the dignity of a citizen.” And it does follow, on his reasoning, that citizens are dignified in their humanity, in that they are involved in social processes that have the potential to

approximate practical freedom (Kant 2007b: pp. 111–113 [8: pp. 20–23]). However, it is not clear that all persons who form parts of such societies can enjoy citizenship and, thus, dignity as humans. There is considerable ambiguity in the extent to which Kant associates human dignity with mere membership in the human species (Pfordtend 2009). Besides, within Kant's analysis, the majority of persons who form parts of a state's society do not enjoy membership as "active citizens." Rather, at best, their lot is that of "passive citizenship" (Kant 1996c: pp. 457–458 [6: pp. 313–315]), which relegates them to a condition of being that is theoretically human, free, and bearing of innate right but which does not afford the acquisition of practical freedom except in a narrow and less-than-human form. As Richard Dean (2006) argues the point, it is ultimately unlikely that the majority of persons who belong to the species have full autonomous practical claim on the dignity of what Kant understands as full fledged humanity, and the universe of humans to which human rights could be applied individually is disturbingly small.

The most obvious case, in this regard, is the status of women in society. Kant tries to articulate an essential equality between men and women. He takes the position that both men and women are rational beings, fundamentally (Kant 2007a: p. 399 [7: p. 303]). However, he also assigns them essentially different social roles which impact their respective capacities to function rationally in social contexts. Kant accepts the notion that men have greater natural physical might, and, thus, he contends that the rational and, therefore, human equality that men and women enjoy theoretically is not a feature of natural practice. Rather, in conditions outside of civil society, he believes that women fall under the control of men, to the point of serving as a de-humanised "domestic animal" (Kant 2007a: p. 400 [7: p. 304]). Where society is conditioned by the rule of law, though, where contracts are possible, Kant argues that it is possible for women to establish equality with men in marriage. He interprets marriage as a social and legal condition in which a man and a woman give over to each other, mutually, a right to possess one another equally (Kant 1996c: p. 428 [6: p. 278]). Kant (1996c: pp. 426–427 [6: pp. 277–278] understands heterosexual marriage itself as a matter of right, a mutual union where sexual enjoyment between a woman and a man may be pursued without reduction of one or both persons to mere means to personal pleasure. He imagines that marriage is a condition in which men and women create unities, together, through mutual and reciprocal use of one another. However, he does not also have in mind that this supposedly equally and mutually formed union need be structured to permit equality in acquired rights. Rather, Kant (1996c: p. 428 [6: p. 279]) states that it is in accordance with right that the husband function as master and that the wife obeys, if such an arrangement "...is based only on the natural superiority of the husband to the wife in his capacity to promote the common interest of the household...." And, from this reasoning, he develops the sense that women's freedom, as humans, can still be realised, secondarily, within marriage, insofar as men are seen as better equipped to order the practical freedom of women for them.

Kant (2007a: p. 400 [7: pp. 303–304]) pays women a back-handed compliment, contending, against the opinions of "fools," that what we typically think of as "feminine traits" are not to be considered "weaknesses" but, rather, precision tools for the management of men. His view is that women gain conquest and dominance over men through their ability to cultivate a protective instinct in and practices from men. Kant (2007a: pp. 400–402 [7: pp. 304–306]) argues that women manipulate

men into giving them security and granting them freedom through passionate displays of “weakness” and offering the potential to satisfy men’s desires. Thus, he suggests that it may be best to understand that in marriage women reign, whereas men rule (Kant 2007a: p. 406 [7: pp. 309–310]). As Peter Fenves (2005: pp. 101–106) points out, while heterosexual marriage for Kant begins at a site of rightful use or mutual mastery of each other’s sexual properties, it is still within the purview of right that men seek mastery over marriage itself. Women drive the actions of men, but men provide the discipline and limits by which these actions may serve the aims of practical freedom dictated by right. In this relationship women’s freedom is reduced to the freedom to be ruled, as the conflict between the sexual and domestic aspects of marriage is tilted to favour the domestic by the state and those men seeking the right to philosophy. Women are dignified to the extent that they gain a role within the rule of right. And, as David Sussman (2008) explores, Kant can conceive of contexts in which women may legitimately strive to assert honour as humans while acting outside of duty. Yet, it is still the case that practical respect for women’s humanity is acquired by proxy, not in action.

In their ‘rightful’ position of subordination to men in marriage, women are indeed denied the human dignity of being citizens. Kant (1996c: p. 458 [6: p. 314]) states that “the only qualification for being a citizen is being fit to vote.” However, the notion of fitness here “...presupposes the independence of someone who, as one of the people, wants to be not just a part of the commonwealth but also a member of it, that is, a part of the commonwealth acting from his own choice in community with others” (Kant 1996c: p. 458 [6: p. 314]). For Kant, it is only the men who can represent what is right in marriage, as the rulers. As has already been documented by a wide range of feminist critics, for Kant, women cannot participate in the work of public reason (see: Grimshaw 1986; Mendus 1992; Okin 1982; Plumwood 1993; Rumsey 1997; and Schott 1997, 1998a, b). According to Kant (1960: pp. 76–96), the strength of women is not even to be found in rational faculties but, rather, in passions that can attract and secure the attentions and care of rationally active men. As a result, Kant’s sovereign state legitimately honours women only insofar as their freedom is a concern of right and the work of philosophy in public reason. However, they acquire no respect as humans who have a right to philosophy themselves. Their citizenship is indeed at best “passive” (1996c: p. 458 [6: p. 314]). The work of public right allows for no engagement with the critical perspectives that women may offer on the practicality of their own freedoms or the freedoms of any others.

Without doubt, then, Kant is sexist in his theory, and his universalism fails on that count alone. And those who are still inspired by his attempt at a universalist theory of right would gladly liberate a Kantian approach from his strongly articulated discriminative views on women. Unfortunately, though, the principle of theory at work in Kant’s thinking that allows for such a discrimination is not dispensable to his thought. The need to discriminate, socially and legally, is crucial for the political development that Kant argues is required in the cultivation of a state capable of producing right rule and what he envisions as a universalisable respect for innate right. His theoretical approach cannot be fixed by simply rejecting his discrimination of women and including them as fully active human beings. The need for political discrimination of some sort still exists, and if it is not directed toward women, it must be directed to other sizeable groups. Key to these observations is the fact that Kant has chosen to validate the treating of at least most women

as if they were children. The importance of this move is not the diminishing of women as such but, rather, the classification of a group of humans that could be recognised by his readers as immature. His analysis of rational subjectivity is built around the idea that the rational individual could, in public context, reach philosophical and, thus, moral maturity (Kant 1996a). This is the hope that he places in the work of philosophy in state-sponsored universities. Consequently, theoretically and practically, it is necessary for Kant and Kantians to be able to discriminate between individuals engaged in significant processes of maturation and those who are not. It must be possible to distinguish between those helping to cultivate a society based on respect for innate right versus those individuals whose rational development is best understood as less capable of public critique and more appropriately subordinate to the familial and political leadership of the former.

His theory not only permits but requires the devaluing of the political and legal equality of many persons in any given social context in relation to what Kant terms their acquired rights. The goal of universal respect for innate human right is approached through the de-universalising of acquired rights, so that those deserving of the right to philosophy may enjoy the privilege over others. He is explicit on this point, arguing that the equality of subjects in a state that follows from innate right is not in contradiction with but is in harmony with social and political inequalities established by discriminatory allotment of acquired rights in relation to perceived physical and rational differences:

But this thoroughgoing equality of individuals within a state, as its subjects, i[s] quite consistent with the greatest inequality in terms of the quantity and degree of their possessions, whether in physical or mental superiority over others or in external goods and in rights generally (of which there can be many) relatively to others; thus the welfare of one is very much dependent upon the will of another (that of the poor on the rich); thus one must obey (as a child its elders or a wife her husband) and the other directs; thus one serves (a day laborer) and the other pays him, and so forth. But *in terms of right* (which, as the expression of the general will, can be only one and which concerns the form of what is laid down as right not the matter or the object in which I have a right), they are nevertheless all equal to one another as subjects; for, no one of them can coerce any other except through public law (and its executor, the head of state), through which every other also resists him in like measure... (Kant 1996d: p. 292 [8: pp. 291–292]).

And we can see how this principle of discrimination, on the basis of gradations in the process of rational and moral maturation, is played out amongst several other social groups throughout the Kantian model.

The rights of women, then, really are not much different from those Kant accords to children, all of whom, while born free (Kant 1996c: p. 431 [6: p. 282]), also enjoy only a passive civil freedom under right rule. He acknowledges that children have the fundamental innate right, as human beings in their minority, to care from their parents. In this respect, Kant understands children to be persons and citizens of the human world, demanding, in theory, respect as such. However, the duty of care at issue here has to do with the management and moral disciplining of children, within the context of a family, so that they may function well and autonomously within the discipline and laws of state society (Kant 2007c). The children's freedom has little to do with their own experiences or concerns as children but, rather, has everything to do

with routinising their behaviours in relation to the public right of the state. And, in the case where they may rebel and reject parental authority, Kant sees nothing wrong in parents "...taking control of them and impounding them as things (like domestic animals that have gone astray)" (Kant 1996c: pp. 429–430 [6: pp. 280–282]). Children are deemed to have nothing to contribute to public reason until reaching the age of majority, at which point Kant would hope that they think within the reason of state sovereignty.

Kant makes the same point regarding servants who have followed a will other than their employers, stating that the head of a household "...can bring them back in his control by unilateral choice" (Kant 1996c: p. 431 [6: p. 283]). While appreciating that a head of household cannot own a servant in any absolute sense, given their innate right, his reasoning is that servants do willingly give themselves over, temporarily, to the disciplining authority of their employers. During this time, the head of household has the duty to train the servant how to behave, and the head of household then is to reason on his servants' behalf in public. There is a pedagogical relation, where the head of household enjoys a right of privilege in his supposed maturity over what is constituted as the lesser maturity of those who are economically dependent on him. And, there is little difference, for Kant, if those from whom the citizen obtains goods and services are not under his direct employ. He lists a great number of tradespersons and merchants, along with women and children, as lacking in civil personality on the reasoning that their "...preservation in existence (his being fed and protected) depends not on his management of his own business but on arrangements made by another (except the state)" (Kant 1996c: p. 458 [6: p. 314]). All humans who fall into these categories have a natural demand of citizens that their freedoms as humans be respected, but they enjoy no active part in either pursuing right reason in philosophy or forming perfect laws, in the form of acquired rights, in relation to civil life.

In regions of the planet where persons have not formed state sovereignty, Kant still sees populations of human beings with innate right, but he sees nothing for philosophy to learn in engagement with them. Being outside of the specific public freedom afforded by the state that interests Kant, his point is that they could not be expected to philosophise in the singular sense. Prior to the state, they cannot be a part of what Kant has in mind in terms of cosmopolitan right. In this regard, he refers to what he sees as the lazy and merely pleasure-seeking minds of many non-Europeans, especially in the Americas and Africa, lacking in the industry necessary for formation of the state and lacking in the forethought through which moral discipline is made possible (Kant 2007a: pp. 294–295, 336n [7: p. 186, 233]; 1996c: p. 483, 489–492 [6: pp. 344–345, 352–355]). Kant accepts that humans in "the state of nature" still enjoy innate right to self-mastery and that there is no moral basis on which they may be subjected by sovereign states or disposed of their lands (Kant 1996c: p. 490 [6: p. 353]). In this regard, there is a form of permissive right at play, prior to what he would recognise as civil society (Szymkowiak 2009: pp. 591–594). However, he also sees it as historically inevitable that such persons will be pushed, through social conflict and territorial competition with others in the state of nature, to try to establish social means of security that lead, ultimately, to the state. For Kant (2007a: p. 420 [7: pp. 324–325]), this is the natural destiny of all human beings. And with acts of mutual civilization, it is at least possible that all persons may be brought under the order of sovereign states who, in turn, enjoy the historical possibility of working together, through cosmopolitan right, toward the fulfillment of practical freedom for all human

beings. Until this happens, though, he sees no reason for philosophy to consider the experiences of those outside the state, except as potential civil persons, theoretically.

Kant too has no room in his theory of right for persons on the move internationally who do not move in accordance with the cosmopolitan rights set out for citizens between states. He admits that strangers always have a natural right to resort in lands foreign to them, given the way in which Kant imagines the entire globe to be naturally held in common. He finds no argument, though, for strangers' claims upon their hosts for civil treatment and respect beyond that. Kant (1996e: pp. 328–331 [8: pp. 357–360]) submits that the right to civil respect is something negotiated in cosmopolitical relations between sovereigns for their citizens. The person who has no civil standing in a state does not enjoy even the status accorded to passive citizens. Her or his rights are purely theoretical, and her or his movements are necessarily subject to curtailment for the security of the acquired rights and freedoms of both passive and active citizens. As a result, even Kant has no adequate response to the rights of refugee claimants or displaced persons generally.

The fundamental contract between Kant's support for right to philosophy and the reason of state is, then, all the more clear. This right to philosophy, which, ideally, is to bring the work of the higher faculties under the discipline of what must follow from the categorical imperative, is not an attempt at human liberation. For Kant, it makes little sense to speak of human freedom, practically, without the systems of governance, security, law, and public morality that would actually permit it, in the realm of acquired rights. His arguments for human freedom are not directed to the freedom of individual human beings as such first. Rather, his objective is to strive toward the autonomy of human reason, collected within the form of law, so that it may be possible that humans enjoy freedom, as individuals, under its guidance (Jackson 2007). So, the fundamental human right at issue in his thinking is the right to philosophy itself. And, as a consequence, Kant offers a series of arguments that rationalise the subordination of women, children, servants, and trades persons within the state, along with the public exclusion from the state of those populations of persons who do not live under any kind of sovereign authority, as the cost of allowing some men the right to do philosophy freely and without encumbrance. Kant's argument for the universalising of the freedom of philosophy, as a critical theoretical activity to "control" the higher faculties (Kant Kant 1979: p. 45), relies on the most conservative and conventional of thinking familiar to the reason of state. Moreover, as Helga Varden (2006) argues, it invokes a state with the legitimate purview to intervene within and order the relations between citizens and subjected persons alike in accordance with what the public reason promoted in its universities would recommend for the purpose of right. For, ultimately, what is at stake for Kant is not mere equality or mere equality in freedoms of citizens and/or hypothetical citizens but, rather, the achievement of civil autonomy (Beiner 2011), which can only be accomplished in the freeing of philosophers.

The Need to Unlock Theory from the Order of Universals and Particulars

The way in which Kant grounds his theory of universalisable right for humanity within a highly excluding ideal of privileged citizenries in a global system of republics invites

challenge to how humanity itself is to be theorised and provokes recognition of the multiplicity that such a term must ultimately embrace. For the purpose of overcoming the discriminatory necessities of Kant's theory of right, we may be tempted to think much more deeply over human subjectivity and how it is that dignity may function, without recourse to presumed common social/political containers. However, it is difficult to see how this right to re-theorise the human and human freedom outside the limits of the reason of state could function effectively without also giving challenge to the right to philosophy as theorised by Kant. The move to critically engage the rights of humans beyond the pragmatics suggested by conventional formulations of international politics is still normally expressed as a right to do critical philosophy in contest of the outlooks afforded by the more dogmatic statist interests that Kant would normally associate with the higher faculties. If this move to critical philosophy remains modeled in the rights borne by the human being in which Kant sees reason centred, though, it is difficult to produce theory that does not lead back to a world politics dominated by state sovereignty and the privileges of excluding state citizenship. Critical theory of the human and human rights capable of displacing the state and citizen as its core must involve also the displacement of the free rational individual as the secure core of the lower faculty as well as the guide for theory itself.

It is not from a point of ideology that Kant's argument for the right to philosophy is rendered consistent with a statist outlook. Rather, he supports that politics, given his understanding of what it is to be human in the world, ontologically. Kant orders his sense of human being, along with all natural being, as a matter of particulars within universals. The grounding of his thinking, on this register, is not political per se but, rather, fundamentally metaphysical in orientation (Flikschuh 2000: pp. 179–205). And this vision matches exactly the conventions of the politics of state sovereignty, where the sovereign state is recognised as a universal inevitability, given the common limits supposedly faced by the global population of essentially equal human individuals who are thought to confront each other's wills personally and nationally. Kant's philosophy is an argument for a universe of sovereign states because he theorises free rational being as something that could exist only in a globe of sovereign states. However, his theory on these points is insufficiently critical and vulnerable to challenge, in such a way that it becomes difficult to imagine free rational being as something that could ever be located in a single kind of being at all.

Despite being the champion of incessant critique, Kant theorises rational beings' right to philosophy as already contained within a determinate globe of practical experience and, thus, theoretical possibilities. As Béatrice Longuenesse (2005) explores, his theory of experience presupposes a practical whole. Thus, it is indeed the case that there can be only one philosophy, to which rational beings have a right (Kant 1996c: p. 366 [6: p. 207]), because Kant depends on the idea that all the rational beings to which the right to philosophy would be of concern live within the exact same sphere, and because he locates reason itself as the property of a set of individuals for whom living in this sphere is a universal experience. This is not to say that he purports to know the world in itself, as, for him, it cannot be an object of possible experience (Kant 1998: p. 507, 518, 527–528 [A483/B511, A505/B533, A522/B550–A523/B551]). Kant holds only to the idea that it is reasonable to assume global unity, as a theory (Kant 1998: p. 465, 513–514, 517–519 [A418/B446, A495/B523–A496/B524, A504/B532–A507/B535]). However, he takes the idea of a singular shared world as the theoretical universe within which

humans must conceive the full possibilities of human experience (Kant 1996c: p. 489 [6: pp. 352–353]). And he understands this to be a point made manifest in any rational being's spatial experience, as external sense, given the circularity of the horizon and the experience that the surface of the earth arcs away from one at all points in one's travels (Kant 1998: p. 653 [A759/B787]). Relying on geometry as a priori valid, Kant (1998: pp. 143–144, 175, 221, 288 [B14, A25/B40, A87/B120, A163/B204]) determines that the outer world of sense is inescapably a sphere.

Kant's attraction to this idea of global geography is that it matches his views on human reason itself (Franke 2001: pp. 111–154). He seeks congruence between reason and the practical world, and such unity could not enjoy greater success and be so obvious in its purpose if reason were not of the same shape as the geography in which humans must think themselves. As it so happens, Kant (1998: pp. 652–653 [A758/B787–A759–B788]) understands human reason to also be a sphere, in that, while its limits can be known in only a general manner, it is possible to determine its radius, volume, and limits, via the curvature of the arc of its surface, the nature of its synthetic a priori propositions. He knows that reason can think beyond possible experience but that, for that reason, the practical freedom of reason must have its limits and be disciplined as a whole that coincides with the empirical sphere (Kant 1998: p. 654 [A760/B788]). Kant's only challenge, then, is to devise the critical method by which the rational and empirical spheres may be brought into coherence.

Kant seeks the accomplishment of this coherence not through a process of bringing a singular human reason into line with possible experience of the singular globe, as if it were merely a matter of bringing one existent sphere into line with the other. Given even only the few human differences that Kant himself describes, along lines of sex, age, class, ethnicity, nationality, geography, and history, it is clear that neither sphere is a given. As Lisa Shabel (2004) argues, Kant may be right that geometrical cognition of the world may be intuited a priori, but this does not mean that what a rational being may intuit about the geometry of the world is either necessary or universalisable. The multiple historical occurrences of all those persons Kant would accept, at least theoretically, as human produce multiple spaces of experience and, thus, multiple practical questions of freedom that do not likely provide any obvious basis for coherence or singularity. As a result, Kant produces both theoretical and political arguments for the formation of the spheres of singular reason and global limits to experience so that coherence between reason and world is thinkable and, finally, practicable. He justifies the subordination and rendering passive of all persons within the state who cannot cohere with a very specific class of thinkers who may enjoy singular 'human' identity with one another as free citizens. And the work that he has in mind for philosophy in the lower faculty of universities, as a human right, functions as an ordering mechanism through which proper subjectification of these citizens into, ideally, individual subjects may be encouraged via the laws, policies, and mechanisms recommended to the state via the higher faculties. Insofar as the reason of state and right to philosophy are brought into league with one another, under sovereign authority, it becomes possible for both philosopher and state politician to think away differences and different worlds that confront them outside the state as anthropological curiosities than may be and ought to be, historically, brought within the project of right rule and cosmopolitan right, as evidenced in Kant's *Anthropology* (2007a). The categorical imperative that, for Kant, guides us to forming the sovereign

state does not offer mere epistemological awareness for all possible human beings but, rather, is constitutive of an ontological awareness of what it is to be human (Satkunanandan 2011). It allows for a point of discrimination between those who accept the supposed duty of honouring the freedom in being at issue for Kant and those others who find their experiences outside of the privileges of citizenship. While Hans Feger (2007: pp. 852–853) would have us recall, quite correctly, that right rule for Kant allows for a gradualism in politics, in which the critical work of public philosophy works continuously, as an eternal beginning, to identify ways in which the perfect laws of the state may be revised to better recognise and accommodate the freedom of all human beings, it is important to recognise also that this gradual work of critique is always reserved for a privileged citizenry who work from a core sense of imperfect inalienable right that is divisive and discriminating from the beginning.

Brought about in this way, though, the free rational being that is at the centre of philosophy and state sovereignty is shown to be a non-universalisable position. It is an abstraction of oneself, where one may attempt to live a subjunctive form of being (Clarke 2011: p. 202). It is not revealed in philosophy; it is made possible in the politics of philosophy, via its privilege over others in the right to philosophy for which Kant argues in *Conflict of the Faculties*. The free rational being who has a right to philosophy in the state is not only set against and sets itself against other humans, the rationality of this being is shown to not be possessed in itself. Rather, it is made possible in the acts of exclusion and subordination. The ground of freedom is not the experience of a universal freedom of choice but, rather, the rendering of such freedom of choice as universalisable for those who wish to claim it. Contrary, then, to the analysis of Edward Demenchonok (2009), Kant really has no grounds on which to identify his notion of right as something inalienable to human beings, and it can provide no singular grounds from which the politics and laws of any one state may be subject to critique. This notion of right is already contained within the logic of states. Thus, while we can agree with Richard McCarty (2010: p. 129) that the premises of Kant's critical philosophy allow him to derive the conclusion that we can know a priori that human actions must, as a matter of duty, conform to universal laws of freedom, we must recognise that the rational being with the freedom of choice inherent to these premises is just one manner of being human that can be imagined, and not a premise that one must accept. The right to philosophy he claims for humans, as exercised in the lower faculty, then, is not the right of the human per se, as this human per se does not exist. Rather, it is a right at stake in the claims to humanity, and claims to humanity are themselves involved in a contest without end, without necessary players, and without necessary location.

The Fundamental and Universal Right to Be Political

Demonstrated in the politics of Kant's own theory of philosophy, as a statist enterprise, is the fact that the possibility of universalising a principle of human right requires not a theory of human freedom as an imperfect guide to human rights laws and mechanisms of protection. Instead, it demands an openness to the human as contested and contestable ground of rights, where the human is something formed in the claims to rights and not something that already exists to whom rights are simply proper. Thus, the possibility of

establishing respect for and recognition of human rights on a universal basis rests not on the development of cosmopolitan outlooks in the laws and courts of states, as argued for by James Bohman (2009), where legal status to even non-citizens is granted by the citizenry. Such a move retains the privilege of states' citizens to recognise the personhood of non-citizens and to still describe a human universe that is limited (Franke 2011). Rather, this possibility rests on the ability to recognise claims to humanity as always political, instead of merely legal and discernable in terms of properties. If there could ever be something that we could legitimately support as a fundamental universal human right it would have to be the right to contest what it is to be human.

What we may learn from the critical reading of Kant's theory offered here is that we can no longer think the human as an individual agent who must realise freedom amongst other identical or like beings within a singular sphere. The question of freedom for human beings can no longer be a matter of establishing geometrically coded principles through which they may avoid bumping into one another in manners that lack civility. This reading, then, also does not support the very thoughtful analysis ultimately offered by Pauline Kleingeld (2012: p. 200) wherein Kant's vision is anchored in the notion that human beings confront one another with multiple spheres or universes that must either find harmony or rest with one another for the possibility of the freedom of their inhabitants. Contrary to what William W. Sokoloff (2001: p. 777) contends, the conservative politics of Kant's theory are not saved by affirming, paradoxically, the universal and particular in the same stroke. The debate at issue here is not one of a singular universe of humanity versus a universe of human diversity. Rather, the whole notion of humanity as a set of agents trying to assert freedom in possible conflict or concert with one another, either in spheres of commonality or difference, becomes unsupportable. In its stead, we are faced with the challenge to consider how the experience of the freedom of choice arises in our experiences and encounters with one another, in our efforts to achieve, inescapably with one another, the right to rights as something we call the human.

Kant's characterisation of the experience of freedom is rendered as if it were a solitary moment and somehow fixed in the subject itself, as if it were not simply the experience of the freedom to choose but also the freedom to choose or to not. For the Kantian subject to enjoy right as a free subject, this subject must come to the point of choosing to be self-legislating in such a way that his choices are consistent with what may be realised theoretically as right. In this regard, Kant distinguishes between the freedom of choosing versus inclinations, actions, and decisions made on bases of mere appetite and desire. However, if we dispense with the singular readings of both human reason and the site of being human, we must give up on the notion that the free legislation of self is something that we can chose or chose not to prepare ahead of time, hypothetically, for all circumstances that we might wish to engage. Rather, we must confront the fact that the freedom of choice is something that we experience, inescapably, in the face of a choice.

Whereas Kant's imagined human subject is able to think his freedom and to develop maxims regarding choice in terms of the orientation that he may know, *a priori*, that he always has with all other human beings in the world that is always there, the critique of Kant's theory of right carried out above implies the fact that one's orientation to others is always something that must be chosen in the experiences that one has with them. As Jean-Luc Nancy (1993: pp. 66–80) argues in his critical

reading of Kant's practical philosophy, yes, one has experience of the freedom to chose spontaneously and to engage in self-legislation of one's maxims, but one's freedom in these regards is not a matter of choice. As we confront one another in the claims that we make for ourselves and the claims made by others, we are free to choose how we understand the claims to stand with respect to one another, but we must choose. The question, then, to reverse the Kantian quest for an imperative, is to consider how I may choose to orient myself to this other or these others such that my freedom to make that sort of choice may be justified.

The question of freedom of choice confronts us, as subjects, where either our own movements bring about problems of change or difference or, more importantly, where our movements with one another change the conditions under which we know ourselves and others. It is in these cases that we experience the freedom of having to choose how we are going to know and respond to change, and it is in these moments that we do indeed exercise the freedom, even if it is a conservative move. To legitimate the maxims and actions taken up in such moments, we validate Kant's argument that theory must come before practice. One must think ahead of how it is that one's maxims allow for defensible position, in one's standing with respect to others. However, with the loss of Kant's stock human subject, the theory to which practice ought to conform must be built in terms of the challenge of theorising not universalisable principles but, rather, theorising with respect to the universality of movement and the ways in which we always face change and difference with respect to one another that cannot be contained theoretically or practically. Freedom cannot and does not wait for a politics; freedom cannot be finished (Nancy 1993: p. 80). The challenge is to think one's freedom with respect to the fact that we always renew the problem of choice with one another by the fact that we may and do move and effect change in our relations. It is not a problem for which there is a final solution to rights.

Since the experience of the freedom of choice is formed, in an ongoing manner, by the fact that one's practical experience, particularly with others, is one of change and movement—where one's world and social world is experienced as a condition of change and difference—one can justify one's free responses only in terms of how well these responses are supportable in conditions where there is no guide for judgment. One's responses could approach a sense of right only insofar as they become tenable in one's engagements with others in the changes and differences that we bring one another. They must be supportable in relation to the responses and free choices willed by others in the same conditions. Thus, their validity as rights could be established only in the political engagements we have with one another, where we do indeed give free hearing to one another's choices, as Kant would have us do, but in ways that are not already limited in sites of debate and procedures of judgment preserved by these sites. Rather, as political engagements, responses could affirm their rightfulness—their rightful response to change and differences—only insofar as they are accepting of change and the movements that bring them about, only insofar as they are accepting of the need to make judgments in contexts of change.

What is universalisable as rights, then, are not actions and choices that conform to a new theory of human freedoms and the change it brings about. Rather, the only actions and choices that can be rightful are those driven by theory that accepts movement and change as exceeding principle. What is shown in the experience of freedom, as something experienced with the movement and change of others, is that it

is rightful and necessary for all to respond to change and to make free choices with respect to change without recourse to principles. It is right to be political in our engagement with one another, and it is this right to be political that may be universalised as something human.

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