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Does Kant's Rejection of the Right to Resist Make Him a Legal Rigorist? Instantiation and Interpretation in Kant's *Doctrine of Right*

(*Abstract*)

If the notion of instantiated right as applied to legal systems and persons shows that the imperfections of a system of right do not warrant active resistance, the institutionalized practice of legal interpretation is essential to maintaining unity in the exercise of sovereignty throughout any reform of the structure and functioning of government. Kant rejects the right to rebel only because the system of right as he devised it had most of the necessary inner resources to address the aspiration to political change of any would-be revolutionaries. Using these resources creatively falls short of both rebellion and acquiescence. Thus Kant's "technicalities" save him from the charge of legal rigorism. First, they reveal an intrinsic gradualism in Kant's legal philosophy that spans the dualisms of person and office, principle and instantiation, division of power and sovereignty. Second, they show that Kant's gradualism is not incompatible with some forms of political activism that entail neither active resistance nor mindless obedience.

It is generally acknowledged that Kant's political philosophy stands on a par with the great works of the Western liberal tradition. It is also a matter of agreement that the rational principles on which it rests represent an adequate philosophical expression of the progressive agenda that was inaugurated by the Enlightenment and fulfilled, with varying degrees of success, by the French Revolution. Yet Kant's philosophical position is ambiguous when it comes to evaluating that momentous event in modern history. We know, from anecdotal evidence, some surviving letters, several cryptic references in his published works, as well as a number of posthumously published reflections, that Kant was enthusiastic about and strongly approved of the changes that were taking place in France at the time.[1] He certainly condemned, in strong and unequivocal terms, the execution of Louis XVI. But this did not translate into a repudiation of

[1] See Manfred Buhr and Wilfried Lehrke, "Beziehungen der Philosophie Kants zur Französischen Revolution," *Deutsche Zeitschrift für Philosophie* 37 (1989), 628ff and Iring Fetscher, "Immanuel Kant und die Französische Revolution," in Zwi Batscha (ed.) *Materialien zu Kants Rechtsphilosophie* (Frankfurt/Main: Suhrkamp, 1976), 269ff.

his support for the revolution. And he seems to have found even in this case mitigating circumstances that explained the revolutionaries' decision to execute the monarch, thus in fact excusing their action. Moreover, he argued that all post-revolutionary governments ought to command the same kind of loyalty from their subjects as the ones they replaced, which appears to justify Kant's contention in the *Idea for a Universal History* that political violence can be a vehicle of progress. Furthermore, in the *Contest of Faculties* Kant went so far as to identify in the "spectators"' enthusiastic response to the French Revolution a clear sign of the moral disposition of humankind.[2] (CF 182/7:85)

Nevertheless, Kant's private approval of the revolution is not matched by a corresponding conceptual justification in his legal philosophy of the revolutionary principle as an instrument of social and political change. In the *Metaphysics of Morals* (*The Doctrine of Right*), the *Perpetual Peace*, as well as in *Theory and Practice*, he explicitly rejects the right to rebel even against a political regime that is not in conformity with the principle of right (*rechtsmässig*). For Kant, revolutions, rebellions, and other acts of active resistance are illegal means to effect transformations in the political organization of society, and this holds even under the most severe circumstances of political oppression. There is no recourse in Kant to substantive principles of justice capable of circumventing the strict procedural rules that qualify actions as rightful (*rechtlich*). Furthermore, the prohibition against active resistance covers all other extra-legal grounds of appeal, including moral norms or exceptions to such norms in cases of natural necessity, even though Kant is alleged by some to have derived the universal principle of right from the categorical imperative, which should allow such grounds at least in principle.

Some commentators solve the inconsistency between Kant's private attitude and his theoretical writings in favor of rebellion by arguing that he was probably forced to make concessions to the censor or that he tried to accommodate the political psychology of the common man.[3] Another popular view is that Kant prohibited all revolutionary movements, but made an exception for the French Revolution because the latter did not qualify as one. Critics of Kant's *arguments*, however, tend to allege two things: that Kant rejects all revolutions on either legal or moral grounds (or a combination thereof), and that Kant's belief in the gradual moral progress of humankind, of which he took the French Revolution to be an unmistakable sign, relies on a view of natural teleology and political history which is at odds with the formalism of his moral and legal philosophy. As a result, Kant's position is invaria-

[2] Works by Kant cited in this paper: "The Metaphysics of Morals," (MM) "The Doctrine of Right" (hereafter abridged RL), "Groundwork of the Metaphysics of Morals" (G), "On the Common Saying: That May Be Correct in Theory, But It Is of No Use in Practice" (TP), "Toward Perpetual Peace" (PP), "Critique of Practical Reason" (C2), all in I. Kant, *Practical Philosophy*, tr. Mary J. Gregor (Cambridge: Cambridge University Press, 1996); *The Critique of Judgment* (C3), tr. Werner S. Pluhar (Indianapolis: Hackett, 1987); "Idea for a Universal History with a Cosmopolitan Purpose" (IUH) and "The Contest of Faculties" (CF), both in I. Kant, *Political Writings*, tr. H. B. Nisbet [Cambridge: Cambridge University Press, 1991 (1971)]; "Reflexionen zur Rechtsphilosophie" (R), in *Gesammelte Schriften* (Akademie Ausgabe), Bd. XIX (Leipzig and Berlin: de Gruyter, 1904-). All references to the English translations are accompanied parenthetically by the pagination of the *Akademie* edition.

[3] For the first point, see Domenico Losurdo, *Autocensure et compromis dans la philosophie politique de Kant*, tr. J.-M. Buee (Lille: Presses Universitaires de Lille, 1993), 200ff. With respect to the latter, Heine claimed that Kant insisted on obedience in order to give poor Lampe a maxim that he could make his own!

bly judged as systematically untenable (as well as morally embarrassing).

My own argument against Kant's critics is the following: Given that Kant's moral philosophy makes provisions for some qualified acts of political resistance under specific circumstances, and considering that Kant's notion of political reform is sufficiently wide to encompass most of the other circumstances that were not covered by these provisions, his prohibition of revolutionary action is rather innocuous and thus hardly an example of the kind of legal rigorism and political conservatism commentators attribute him. In fact, Kant's rejection of the right to rebel is consistent with the demand of institutional stability and incremental change that forms the bedrock of modern constitutional jurisprudence. But this conclusion would not hold unless there were good reasons to suspect that Kant's theory of right already contains, *in nuce*, the necessary conceptual resources to support it. Before I move on with my argument, I shall briefly clarify what I think these resources are.

Legal rigorism and the right to resist

The charge that Kant was ultimately a conservative is based on the belief that his moral and political philosophy is rigoristic. I do not deny the first charge (although, for reasons that I cannot develop here, I find that applying this label to Kant is very misleading), but I cannot endorse its derivation from Kant's rigorism, either. And the reason for this is that Kant's legal philosophy is not rigoristic. There seem to be several misconceptions about Kant's doctrine of right that explain why the opposite belief gained so much traction. First, Kant's insistence on the architectonic unity of reason (A833/B861) is usually interpreted as providing evidence for the existence of a strictly hierarchical system of relations in the field of the practical between moral principles, legal principles, juridical norms, and political institutions and actions. Onora O'Neill, for instance, claims that Kant's legal philosophy is a special case of his moral theory based on the notion that the universal principle of right is just a "restricted version of the categorical imperative," which functions as the supreme principle of practical philosophy.[4] This top-down understanding of Kant's political philosophy, hotly contested by such supporters of the so-called independence thesis as Julius Ebbinghaus and Thomas Pogge,[5] indirectly fuels the suspicion that for Kant all matters of political deliberation and action are already decided in the higher spheres of practical reason. Hence his rigorism.

Second, this misunderstanding is further compounded by what I call a left-right version of Kant's supposed rigorism. Kant has a tendency of assimilating the contrary of a maxim to its contradictory.[6] When an entire field of possibilities is exhausted by the rule of two, mutually exclusive maxims, many kinds of permissible political action end up in a state of legal indeterminacy. As a result, there is no middle ground to be exploited by creative politicians, which

[4] Onora O'Neill, "Kant and the Social Contract Tradition," in François Duchesneau, Guy Lafrance, Claude Piché (eds.), *Kant actuel: hommage à Pierre Laberge* (Montréal and Paris: Bellarmin and Vrin, 2000), 197. For a more detailed discussion of the systematic context of Kant's derivation of right from morality also see Allen Wood, "The Final Form of Kant's Practical Philosophy," in Mark Timmons (ed.), *Kant's Metaphysics of Morals. Interpretative Essays* (Oxford and New York: Oxford University Press, 2002), 6ff.

[5] According to the independence thesis, legality is necessary for the realization of morality, but not the other way around.

[6] On Kant's tendency to misidentify the contrary of a maxim with its contradictory see R. F. Atkinson's "Kant's Moral and Political Rigorism," in Howard Lloyd Williams (ed.) *Essays on Kant's Political Philosophy* (Chicago: University of Chicago Press, 1992), 237.

further reinforces the suspicion that Kant's legal philosophy is governed by a set of rigid principles. As I show below, this tendency is painfully evident in some of Kant's arguments. However, such occasional errors in argumentation in the *Rechtslehre* reveal nothing more sinister than a loss in Kant's organizational powers, probably caused by his old age. If it weren't for the currency gained by the top-down version of Kant's alleged rigorism, the left-right version would hardly register with critics.

Neither of these two criticisms would withstand scrutiny were it not for another charge leveled against Kant's philosophy, this time from the quarters of epistemology. An excellent illustration of it comes from Robert Brandom, who argues that Kant, unlike Hegel, ignores the dialectical relationship between two fundamental operations of judging: institution and application. According to Brandom, the institution of a concept for Kant and its application are two discrete actions, where the latter is epistemically subordinated to the former. Once a concept is instituted, its application is preordained.[7] Application therefore has no constitutive impact upon concept formation, in the sense that the content of a concept is not altered by its application in a determined empirical context. (Followers of hermeneutical philosophy criticize Kant on similar grounds.)

Now, it is true that Brandom makes his point on the example of the constitution of empirical concepts. More specifically, he refers, somewhat surprisingly, to the activity of reflective judging. However, a similar argument could be made---and it is frequently made by Kant critics---against the univocal relationship that supposedly establishes between the institution of legal principles and norms and their application. Nowhere is this problem more visible than in Kant's rejection of the right to resist, which is justified by the constitutional contradictions to which tolerating acts of rebellion would inevitably lead. Kant's strict proceduralism is perceived in this case as providing the best possible evidence of his legal rigorism and political conservatism.

Against this claim, I argue that Brandom's criticism does not apply to Kant's rejection of active resistance in the *Rechtslehre*, and this for the following reason: The way in which Kant constructs the fundamental law of practical reason in the sphere of legal relations, or what he calls the universal principle of right, makes its institution coextensive with its application. As a result of Kant's formalistic conception of the principle of right, the content of the principle, or right itself, cannot be distinguished from its empirical instantiation in the various normative bodies and institutional set-ups that explicate its practical meaning. These form a system of right whose effectiveness is partly derived from the sovereign's authority to coerce. Such authority means that the sovereign must consistently enforce the law in accordance with what the principle of right commands him to do given that particular form of instantiated right. There can be as much variation as it is empirically possible among the different systems of right; but they would still be legitimate instantiations of right if the condition of enforceability were satisfied. Application of the principle of right within and through the extant system of right inevitably determines its content because the content varies with the application by design.

Kant's rejection of active resistance against the sovereign takes into account this mutual dependence between concept institution and application in the empirical

[7] Robert B. Brandom, "Some Pragmatist Themes in Hegel's Idealism. Negotiation and Administration in Hegel's Account of the Structure and Content of Conceptual Norms," *European Journal of Philosophy* 7:1 (1999), 166.

realization of the principle of right. Some instantiations of right---norms, institutions, or practices---may be perceived (rightly or wrongly) as ineffectual, or as more ineffectual than others in the realization of justice. Changing them for the better, or for what it is generally believed to be better, would also lead to modifications in the content of right. This shows that Kant is not a foe of reform, even if reform radically changed the shape of the existing system of right. What Kant opposes is only the right to suspend the sovereign's monopoly over coercion in order to implement such changes. But coercion adds nothing to the content of right. It only adds normative force to the normative validity of the system. Kant's proceduralism, therefore, cannot be rigoristic, because it does not deny the legitimacy or necessity of change in the content of right.

On the other hand, and in response to concerns typically raised by hermeneutical philosophy, the application of norms in the legal sphere, and therefore the very content of right, depends on interpretations of the concrete socio-political situation.[8] The importance of interpretation is confirmed by the principle of publicity that must accompany all political deliberations over the content of right. The only thing that is not up for interpretation is the necessity to maintain the monopoly of force, which provides guarantees of effective implementation for any system of right. Now, the diminished effectiveness of a system of right due to government dysfunctionality cannot be addressed by calling for the suspension of the sovereign function. However, changes can be made within government so that its effectiveness is restored without undermining the normative force of the rules and institutions that instantiate right. In the case of the right to rebel, this means that no particular instance of perceived injustice, either tolerated or actively promoted by the government, could justify suspension of the sovereign. Gradual constitutional reform within a system of right, or intervention by the legislative in the functioning of the executive office, provides the only acceptable venue for political change. And this requires careful legal interpretation of the extant normative and institutional context.

In light of these, one can argue that the meaning of Kant's rejection of rebellion is clarified by two important notions. First, the content of the concept of right varies by design with the norms and institutions in which right is instantiated. Second, any change in the system of right depends on legal interpretations that aim to secure the institutional monopoly of force in the state. In the remainder of this paper I develop these ideas as follows: In the next section I discuss Kant's legal arguments against the right to resist because they form the core of the charge of rigorism. Then I describe the structural features of Kant's theory of right that justify his argument against active resistance. In the third section of the paper I examine Kant's preference for political gradualism and reform, which reflects the methodological weight carried by the two notions introduced above.

The legal case against the right of resistance

Before examining Kant's explicit rejection of the right to resistance and its implications for his treatment of revolutionary action, it would be useful to notice that Kant's position on this matter changes at about the time he was writing *Theory and*

[8] This is a fundamental point in H.-G. Gadamer's hermeneutical theory. For clarifications, see his *Wahrheit und Methode. Gesammelte Schriften 1* (Tübingen: J. C. B. Mohr [Paul Siebeck] Verlag, 1990), 312-14. For a critical evaluation of this notion, see Richard Palmer, *Hermeneutics. Interpretation Theory in Schleiermacher, Dilthey, Heidegger, and Gadamer* (Evanston, Ill.: Northwestern University Press, 1969), 189.

Practice (published in 1793) and meditating on the political virtue of undivided sovereignty.[9] As we learn from a series of reflections probably dating from the years 1789-1795, Kant believed that there can be no unrest, and thus no presumption of anarchy, if resistance is lawful (R 8043); that the parliament, acting as the people's representative, may judge the executive ruler on charges of power abuse brought against him by his subjects (R 8044); that the latter have the right to protect their freedom by refusing to obey the king (R 8046); and also that the legislative has the authority to order the removal of the executive from office if he is found guilty of abusing his powers. (R 8051)

In spite of a lax language that sometimes misidentifies the executive ruler with the sovereign (the legislative branch of the government), these remarks reveal a conception of sovereignty that is divided according to the republican principle of the separation of powers. They also suggest an understanding of the social contract that licenses individuals to explicitly withdraw their consent to the actions of the executive, which places Kant within the framework of Rousseau's political philosophy. Revolutions could be regarded as lawful acts of resistance whereby the sovereign, that is, the legislative, reasserts its constitutional authority against the executive. And this interpretation is compatible with Kant's conception of natural teleology according to which nature, using as tool our "asocial sociability," may be seen as striving to bring about, in imperfect shapes and often by violent means, the legal framework of political autonomy that permits individuals to pursue their moral self-perfection. (IUH 50/8:27) Thus the notions of divided sovereignty through mixed constitution and political contract based on people's consent, on the one hand, and the notion of blind natural teleology promoting rational ends, on the other hand, support a conception of political change that is compatible with both the idea of revolutionary action against an illegitimate but entrenched executive as well as the belief that revolutions are empirically inevitable in the course of history.

But this view partially changes once Kant starts thinking through the problem of the division of powers in the state in *Theory and Practice* and after discovering the conceptual necessity of a united sovereignty.[10] Kant seems to believe now that revolutionary action does not mean change in the administration of the law by the government, but change of the constitution itself.[11] Contract no longer involves actual or, under some interpretations, even hypothetical consent, but the legal necessity of applying a practical idea of reason to state constitutions. This also impacts the republican principle. Thus Kant argues that justice need not be actualized in specific institutional arrangements that replicate the division of powers in the state as long as it is present in the sovereign's concrete legislation or executive action. There are no "inner rights" of the state and consequently the legislative cannot enforce the suspension of the executive. (RL 463/ 6:319) The notion that the general will is the only source of sovereign authority makes way for another standard, the ideal constitution of the state, which possesses the "internal normative structure of a state of justice."[12] Following these changes, Kant is forced to interpret revolutions as calling for the temporary suspension, on extra-legal grounds, of the principle of

[9] On this point, see Dieter Henrich's "Kant über die Revolution," in Batscha, 360-1.

[10] Idem.

[11] Simone Goyard-Fabre, "Kant et le droit d'opposition," in Duchesneau, Lafrance, Piché, 166-7.

[12] Wolgang Kersting, "Kant's Concept of the State," in Williams, 148. The quoted article summarizes Kersting's argument from chapter 4 of his *Wohlgeordnete Freiheit. Immanuel Kants Rechts- und Staatsphilosophie* (Berlin: W. de Gruyter, 1984).

right that must govern all state constitutions. This, he argues, cannot be justified. There can be no "law of lawlessness" and no institutions to promote such law.[13]

According to Kant all forms of active resistance (rebellion, sedition, revolution, etc) are illegal for two main reasons: they involve the constitution of the state and its institutions in self-contradictions, and they cannot be publicized. With respect to the first issue, he argues that it would be self-defeating for a constitution to include among its provisions the right of the subjects to suspend it (contradiction *de jure* or in concept). (RL 506/6:372) Resisting the sovereign would amount to undermining the constitutional foundation of the state: "[A]ny resistance to the supreme legislative power, any incitement to have the subjects' dissatisfaction become active, any insurrection, that breaks out in rebellion, is the highest and most punishable crime within a commonwealth, because it destroys its foundation. And this prohibition is *unconditional*." (TP 298/8:299, Kant's emphasis; also see RL 463/6:320)

In the same logical category falls Kant's slightly different argument that the state's highest authority cannot enforce rights against itself. Given that juridical rights for Kant are rights that can be enforced, and since the only possible source of legal coercion is the sovereign, it follows that one cannot use force against his person, or else he would not be the head of state. (TP 292/8:291) The sovereign has rights but no duties, and therefore he can coerce but not be coerced. (RL 462/6:319) If force cannot be used against the sovereign, and since all legal rights must be enforced, it follows that there can be no right of active resistance.

Another version of the same argument concerns the legal decidability of claims against the sovereign. The question for Kant is, on what grounds should one adjudicate between the claims of the ruler and those of the subjects if the latter allege violations of right? Kant argues that there can be no objective grounds other than those derived from the authorization to legislate and administer, which is granted by the constitution. There can be no appeal to independent criteria of factual correctness or instrumental success, as these would have to be credentialed by an extra-legal instance of validation. (TP 299/8:300) Kant does not deny that unjustified institutional violence against the subjects may provide them with sufficient reasons to claim exemption from the rule of obedience to a juridical law. But the problem is that there can be no one with the legal authority, the only one that counts in such cases, to decide what "unjustified" means. As politics is not "the whole of practical wisdom," (PP 340/8:372) some subjects may have a superior knowledge of the administration or better insight into the practical effects of a specific legislative act. And Kant readily acknowledges that freedom of the pen and, implicitly, the right to criticize the acts of the government are essential to good governance, provided that this right is exercised in good faith and within "the limits of esteem and love for the constitution." (TP 302/8:304) He also concedes that it is important to draw the monarch's attention to laws contrary to the general will, for such laws could not have been issued by the monarch's "real will." (TP 303/8:305) What Kant rejects is just the notion that an independently acquired "knowledge of the facts" can provide a legally compelling reason to claim a coercive right against the sovereign. This echoes Kant's injunctions against questioning the origin of authority by "reason[ing] sub-

[13] Lewis White Beck, "Kant and the Right of Revolution," *Journal of the History of Ideas* XXXII (January-March 1971), 1, 414.

tly for the sake of [revolutionary] action" (RL 461/ 6:318) and assuming that the ruler wants to wrong his subjects. (TP 302/8:304) Infallibility for Kant represents the very essence of sovereignty, and the sovereign can only generate just laws.[14]

This notion helps clarify Kant's claim that there can be no institutional *tertium* to decide on the legitimacy of claims brought against the sovereign. The fact that there is no one authorized to make judgments pertaining to the legality of administrative measures other than the sovereign entails that there can be no institution in conformity with right that is entitled to mediate between the sovereign and any group of people: "[W]ho is to decide on which side the right is? [T]here would have to be another head above the head of state, that would decide between him and the people; and this is contradictory. [O]nly he who possesses the supreme administration of public right can do so, and that is precisely the head of state." (TP 299/8:300) And elsewhere: "[T]he highest legislation would have to contain a provision that it is not the highest. [This] contradiction is evident as soon as one asks who is to be the judge…." (RL 463/6:320) The consequence of this institutional monopoly over the claims to right is that "[E]ven if that power or its agent, the head of state, has gone so far as to violate the original contract and has thereby, *according to the subjects' concept*, forfeited the right to be legislator inasmuch as he has empowered the government to proceed quite violently (tyrannically), a subject is still not permitted any resistance by way of counteracting force." (TP 298/8:300, my emphasis)

Also deriving from Kant's strict legal proceduralism is the rejection of the natural right to resist, including resistance for reasons of necessity. The former, a familiar feature of natural law theories, is unacceptable for Kant because enforceable rights are possible only within the normative framework provided by the constitution of the state. (TP 301/8:303) To engage in revolutionary activities is to return to the state of nature, which we are duty-bound to leave. (TP 290/8:289) As for *ius in casu necessitatis*, Kant calls it an "absurd notion" (*ein Unding*). It can only excuse, but not justify, actions that are either wrong, but legally unimpeachable (because the punishment cannot exceed the penalty incurred by the agent for not acting), or immoral (and thus falling outside the jurisdiction of the courts). Moreover, the right of necessity cannot be invoked by citizens whose representation of their own suffering often conflicts with the interpretation of what is empirically binding on the power of choice. Furthermore, since confirming a right of necessity would involve arbitrating in a conflict of opinion between the sovereign and the subject, there would be no one entitled to judge except the sovereign himself, who may be persuaded, but not forced, to adopt the subject's "counterrepresentation." (TP 299/8:300)

The second argument against the right to resist is based on publicity. Kant regards publicity (*Öffentlichkeit)* as an a priori test of a maxim's legality. Publicity, he says, is the "transcendental formula of public law" according to which all political maxims must be openly acknowledged. (PP 347, 351/8:382, 386) Now, Kant believes that all revolutions must be prepared in secret, and for this reason the maxim that there be revolutionary change cannot be publicized: "[T]he maxim of rebellion, if one *publicly acknowledged it as* one's maxim, would make one's own purpose impossible. One would therefore have to keep it secret." (PP 348/8:382, Kant's emphasis; also RL 463/6:320) On this basis, Kant concludes that the violation of publicity

[14] Kersting, 157.

can only mean that there is no right to resist.

If the first set of arguments against the right of resistance reveals a real problem, the argument from publicity is relatively easy to dismiss. Kant seems to refer here to the *coup d'etat*, or the attempt to replace the physical person of the ruler. His target cannot be the revolution, which aims to operate fundamental changes in the constitution that only incidentally require the removal of such obstacles as the person of the ruler and/or the legislative.[15] It is uncontroversial that the preparation of a *coup d'etat* must be kept secret in order for it to succeed. The revolutionaries, however, are always forced to proclaim their goals publicly in order to persuade people that resistance to authority will result in a condition of increased justice. Therefore maxims of revolutionary action could not fail the test of publicity. And this conclusion would stand even if the above interpretation were empirically undetermined. To see this one should consider the logical status of Kant's claim that, unlike the maxim of revolutionary change, the maxim to repress a revolutionary movement does pass the publicity test, which makes it consistent with Kant's conception of sovereignty. Now, even if a policy of repression were politically legitimate because it can be publicized, this would not entail that all resistance to the executive authority is equally unjustified. Kant seems to believe that one of the several possible contraries to a policy of oppression, in this case revolutionary action, must be rejected as inconsistent with publicity on the ground that another of its contraries, the *coup d'etat*, fails the test. This belief however is unwarranted. The right to repress revolutionary movements is not synonymous with not having the right to rebel.

But even if the second set of arguments failed to support Kant's conclusion, the argument from self-contradiction alone would still secure the prohibition of active resistance. If so, what is the loyal citizen to do when faced with clear instances of state-sponsored injustice? As we learn from Kant's essay on the enlightenment: criticize respectfully, desist occasionally, but always obey the legal authorities. The only cases of legitimate resistance seem to be those involving conflicts between the perfect duties of legality and the perfect duties of morality. When the ruler forces his subjects to commit acts that are blatantly incompatible with morality or when he prevents the exercise of one's freedom of thought and belief, citizens may disobey. (TP 299n/8:300n, C2 163/5:30) In these cases, passive resistance is right and active resistance empirically unavoidable even though there is no right to resist.

Why there is no right of resistance: structural features of Kant's theory of right

Why does Kant assume that making provisions in the constitution for a right of resistance undermines its foundation? The tentative answer is that Kant's notion of justice, which is based on the analytic connection between claiming a right and using coercion to secure that claim, forces him to equate, correctly given the premises, the (constitution of the) state with the (legal person of the) sovereign. But Kant overextends his argument by narrowing the extension of the notion of sovereignty to the physical person of the sovereign, and possibly to the legal and even the physical person of the executive (in those cases when a

[15] Hannah Arendt, *Lectures on Kant's Political Philosophy*, ed. Ronald Beiner (Chicago: University of Chicago Press, 1982), 60. Yet Kant's view, although mistaken, is consistent with Robespierre's. See Jürgen Habermas, "Natural Law and Revolution," *Theory and Practice*, tr. John Viertel (Boston: Beacon Press, 1973), 86.

monarch cumulates the legislative and the executive functions).[16] This semantic shift is doubled by a corresponding restriction in the extension of the concept of force, which turns the authority to apply coercive measures into the exclusive prerogative of the executive. Consequently, any challenge to the executive authority becomes a challenge to the sovereign and, implicitly, to the constitution, which covers even those instances when an executive ruling is blatantly unconstitutional. (RL 462/6:319).[17]

How exactly does Kant end up equating the state with the sovereign? In standard contractualism, such as Rousseau's, the norrnative authority of the constitution is derived from the general will, and the exercise of sovereign power is always submitted to the test of conformity with the united will of the people. The principal defect of contract theory is that distinguishing the will of all from the general will makes the latter an inapplicable or ineffectual critical standard for ascertaining the justice of laws. In Hobbes' theory of sovereignty, on the other hand, applicability is not an issue. The exercise of the sovereign's will is unlimited and his judgment infallible. However, this is possible only at the expense of forfeiting any potential recourse to higher standards of political legitimacy and critique. Kant's theory of right falls somewhere in-between Hobbes and Rousseau, probably closer to the second.[18] The general will remains the source of all sovereign authority as in Rousseau, but the exercise of sovereign authority is monopolized by a person or group of persons, as in Hobbes. What is peculiar about this arrangement, however, is that Kant identifies the general will with practical reason itself or *Wille*, thereby altering the original meaning of the notion of social contract. The just state is now the direct expression of practical reason, and political legitimacy is exclusively derived from the authority to legislate, judge, and enforce laws, as stipulated by the constitution of the rational state. (RL 456/6:313)[19]

But what is the rational state and how can it replace the general will of standard contractualism? Kant claims that the universal principle of right (UPR) is the sole foundation of a state's constitution and therefore the only source of political legitimacy. And the "[S]tate in idea…serves as a norm for every actual union into a commonwealth (and hence as a norm for its internal constitution)." (RL 457/6:313) UPR defines autonomy as the freedom of choice of an agent, or what Kant calls *Willkür*, in a community of free agents who are in turn placed under the same normative requirement: "Any action is right if it can coexist with everyone's freedom in accordance with a universal law..." (RL 387/6:231) Political autonomy is thus

16 A good discussion of some of these failures can be found in Ernst-Jan C. Witt, "Kant and the Limits of Civil Obedience," *Kant-Studien* 90. Jahrgang (1999), 290-4.

17 The problem revealed by this restrictive move is compounded by the shifting references of some of Kant's concepts. Thus Kant frequently uses "sovereign," "head of state" or "supreme commander" interchangeably, in spite of the fact that in the *Rechtslehre* he assigns them different juridical meanings, corresponding to the specialized functions, legislative or executive, that they fulfill in the state. This, however, does not raise insurmountable difficulties of interpretation. On Kant's inconsistent terminology, see the translator's footnote 'h' in RL, 457.

18 Witt, 289. Also see Thomas E. Hill, Jr., "A Kantian Perspective On Political Violence," *The Journal of Ethics* 1 (1997), 114. For the similarities and differences between Kant's and Hobbes' theory of justice, see Sarah Williams Holtman, "Revolution, Contradictions, and Kantian Citizenship," in Timmons, 210-18.

19 On this point also see Christine Korsgaard, "Taking the Law into Our Own Hands," in Andrews Reath, Barbara Herman, and Christine Korsgaard (eds.) *Reclaiming the History of Ethics. Essays for John Rawls* (New York: Cambridge University Press, 1997), 299ff.

the *analogon* in the external sphere of legality of the formal condition of morality in the internal sphere of ethics, as stipulated by the categorical imperative. The fundamental difference is the absence of any reference to the quality of motivation of those placed under its incidence. UPR only explicates how political freedom is possible. A legal person is not expected to limit her freedom out of duty. Rather, it is a postulate of reason that freedom be "limited…in conformity with the idea of it." (RL388/6:231) And the principle is supposed to make possible a priori the association of people and cooperative behavior, without however specifying the content of people's choice or the end of their actions. A just constitution therefore has its sole basis in the formal principle of right, which is then instantiated in the "sum of the conditions" under which the coexistence of choice is empirically possible under a universal law of freedom. (RL 387/6:231)

Because of this direct connection between UPR and the constitution of the state, the social contract, or the original contract, as Kant calls it, cannot be a voluntary act of association, either actual (as in a concrete, historically identifiable political agreement or covenant) or hypothetical (implied consent by existing practice). (RL 459/6:316) The contract only expresses the state of legal necessity of a rational constitution that is engendered by UPR, which is subject to no requirement other than accord with reason itself. This is why Kant says that the state is grounded in an "idea of reason." A rational constitution need not, therefore, be the product of political agreement. And if there is no social contract based on the actual or hypothetical consent of the subjects, the latter cannot invoke it in order to de-legitimize the power of any existing sovereign authority, whose only frame of reference must be conformity with UPR. The only venue for political change must be reform by the sovereign itself.

If there is no socially contracted will to confer validity on norms of action, what does? The answer lies in the mutual dependence of right and force, which according to Kant is revealed by the mere analysis of the rational concept of political (limited) freedom. (RL 388/6:231) Claiming a right (to objects of provisional possession, for instance) is tantamount to having the ability to demand compliance from others in the exercise of this right: "Right and authorization to use coercion therefore mean one and the same thing." (RL 389/6:232) But compliance is possible only when there is an external authority to enforce this claim on behalf of the claimant and determine the conditions under which obligating others to acknowledge a claim of right is possible. (RL 456/6:312) This is what Kant calls the "civil condition," or the institutional framework within which right is articulated and whose main function is the administration of coercive measures in accordance with UPR. From the very beginning, then, Kant presumes the condition of right to be synonymous with the existence of an effective system of claims enforcement. Unlike the moral law, which is inherently prescriptive, the very notion of a juridical norm presupposes the external enforcement of an obligation.[20] This function can only be exercised by the state, or "the whole of individuals in a rightful condition, in relation to its own members." (RL 455/6:311) Thus Kant's concept of the state, which is immediately derived from the formal principle of right,

[20] On the non-prescriptive character of legal norms see Marcus Willascheck's extensive discussion of the relationship between normativity and externality in Kant's philosophy of right in "Which Imperatives for Right? On the Non-Prescriptive Character of Juridical Laws in Kant's Metaphysics of Morals," in Timmons, 65-87.

designates the authority to ascertain the validity of the specific legal claims that are raised by its members and enforce them according to the law. The system of right for Kant is also the system of just coercion within a state.[21]

In light of these, Kant's view of resistance must be as follows: sovereignty entails that the state have the authority to enforce claims in accordance with laws derived from UPR. Any coercive action undertaken in the name of the sovereign is by definition one that expresses UPR. No action against a sovereign command could possibly conform to UPR. Therefore there is no right of active resistance in the state. But there seem to be at least two problems with this view. First, there are many particular claims to right, especially those pertaining to economic equality, which cannot possibly be seen as satisfying the test of conformity with UPR in its standard formulation. Yet under Kant's procedural conception of justice these claims may nonetheless be deemed to be just, or at least legal (*rechtlich*), provided that they receive endorsement from the state authority. Now, if the state is not bound to always act in conformity with UPR, why should citizens be obliged to accept Kant's strict, yet asymmetrical, legal proceduralism?

Second, if the principle of right applies with necessity to any existing socio-economic setup, force comes into being independently, through the agency of individuals and groups that may not legislate and enforce laws in a principled manner. This reveals that all sovereign states have in fact two distinct foundations. One is the rational source of political legitimacy, or UPR; the other is the empirical condition of authority, or the coincidence of office and actual power. And it appears that in existing sovereign states the latter is prior to the former. Force can gradually become legitimate, but rational ideas cannot come into being without support from an antecedently constituted political force. (PP 339/8:371) It is of no legal consequence for Kant if power came first and law afterwards or the other way around as long as the two coalesce in a lawful state. (RL 462/6:319) But Kant explicitly says that the exercise of power should be considered legal and thus uncontestable even if the state's actions were not in conformity with right. (TP 298/8:300)[22] Now, shouldn't political resistance be required in such cases in order to restore justice?

Active resistance *versus* political reform

Instantiated right: legal systems

Answering questions such as the above requires that we take another look at the many shapes and facets of Kant's political gradualism. As Thomas W. Pogge correctly observes, right for Kant does not apply, universally and discretely, to each individual's choice. Rather, right refers to the individuals' combined domain of interaction in the form of establishing restrictions within that domain.[23] Consequently, when Kant says that right refers to the "sum of the conditions," he cannot mean

[21] Bernd Ludwig, "Whence Public Right?", in Timmons, 172.

[22] Thomas Seebohm argues that actual states are just attempts to leave the state of nature, and not perfect state constitutions, which would imply that reversing such efforts, as in the case of despotic regimes, could not command the absolute loyalty of their subjects. By this argument, however, revolutions would fall in the same category as despotism, which suggests that all actual states, imperfect as they are, have already left the state of nature. Thus legal obedience in imperfect states remains unconditional. (TP 300/8:302) Thomas Seebohm, "Kant's Theory of Revolution," *Social Research* 48 (1981), 585.

[23] Thomas W. Pogge, "Is Kant's *Rechtslehre* a Comprehensive Liberalism?", in Timmons, 137ff.

that there is only one rightful condition (*rechtlicher Zustand*) with its unique characteristics and corresponding institutional set-up. There can be many empirical instantiations of the juridical condition through norms that form distinct "bodies of law," as Pogge calls them. And there can be a variety of institutions corresponding to each juridical instantiation. This entails that instantiated justice is always a perfectible condition of right, which further means that the system of right can evolve and develop in time, based on its ability to address claims of justice against the background formed by the permanently changing context of human interaction. Right is therefore both a process as well as a state of affairs that admits of many empirical varieties. Of these, Kant would certainly prefer that juridical condition which conforms to UPR in the highest degree. But just because it leaves room for improvement does not mean that a lesser version of it is contrary to right (*rechtswidrig*). All that matters for a condition to qualify as rightful is that freedom be restricted for each in the same, predictable way. Kant's belief that any lawful condition, "even if it is to a small degree in conformity with right, is better than none at all" (PP 341/8:374n) seems to support such an interpretation.

With respect to the right of resistance, this shows that the subjects' dissatisfaction with a particular instantiation of right does not make it, on either procedural or substantive grounds, unlawful (*rechtswidrig*), even though it may not always be in conformity to the principle of right (*rechtsmässig*). Excessive and/ or progressive taxation, the unequal distribution of economic goods, forced requisitions, cruel punishments for a particular category of crimes, etc are not necessarily unjust (*unrecht*) if they apply restrictions on political freedom in a consistent manner. (RL 462/6:319, TP 297n/8:298n)

But this only addresses the issue of the legality of norms that affect all in the same, negative way, or of norms of non-interference with economic systems that generate inequality. What about explicit remedial measures that only affect some, thereby failing to enforce similar restrictions on all? UPR forbids legislation on substantive principles of justice, such as subjective conceptions of the good, maxims of personal happiness or prudence, or utilitarian calculations. However, legislation on these grounds is permitted if its avowed goal is "securing a rightful condition against… external enemies." (TP 298/8:288) Addressing extreme poverty through redistribution of economic goods is one such example: "For reasons of [maintaining the] state the government is therefore authorized [entitled, *berechtigt*] to constrain the wealthy to provide the means of sustenance to those who are unable to provide for even their most necessary natural needs." (RL 468/6:326) The state is entitled to do it even if it is not clear that this action, although lawful (*rechtlich*) because authorized (*berechtigt*) for state reasons, would be in conformity with right (*rechtsmässig*). Affirmative action or other forms of compensatory right would fall in the same category of rightful measures, appearance of injustice to some notwithstanding. At the same time, tolerating deep economic inequalities, to the point where some people in subordinate economic positions lose the civic independence that makes them full citizens, would also be right, under the same proceduralist interpretation, and sometimes out of the same concern for the maintenance of the commonwealth.[24] (TP 292/8:291-2) These

[24] On this and related points see Joseph Grcic, "Kant on Revolution and Economic Inequality," *Kant-Studien* 77 (1986), 455-6.

examples suggest that there is at least one type of sovereign duty, whose fulfillment gives the state sufficient administrative discretion, that does not fall under the direct jurisdiction of UPR: the duty to maintain the empirical framework within which the exercise of procedural justice (or coercion) is possible in conformity with UPR.[25]

Kant allows state measures based on substantive principles of justice that otherwise would be excluded. The only explanation for the state's monopoly over such exceptional measures is that it serves the maintenance of the state's other monopoly, force. Each instantiation of right admits of only one, undivided authority that is entitled to enforce the law, and this is the constituted state power. One may publicly disagree with what the government says is right and with its use of coercion, one may take steps to privately remedy or mitigate the consequences of state action as long as such actions are not illegal, but one cannot actively resist the state's authority. It is implicit in Kant's view of instantiated right that the premise of political progress is gradual reform. But the only realm in which the impetus for reform can acquire normative validity is the public sphere of debate and intellectual persuasion. Validity, however, does not entail enforceability.

Instantiated right: legal persons

This brings us to the second objection, which has two aspects. One pertains to the dualism of person and function in the sovereign or the executive, which Kant appears to ignore.[26] Had Kant made this distinction, the argument goes, he would have been forced to agree that active resistance only aims to remove the physical person of the dysfunctional sovereign, thereby leaving the constitution intact. But this distinction is highly suspicious. For, just as the instantiation of right entails the possibility of empirical variation, so the incorporation of the sovereign function in an empirical body admits of degrees of legal expressivity. Moreover, office and person in the sovereign cannot be separated so easily, just as an empirical constitution cannot be normatively conceived apart from its idea, no matter how badly it approximates it in appearance. (RL 505-6/371-2) Furthermore, the very notion of sovereignty includes, in addition to the legal authority to legislate or rule, the inbuilt feature of practical rationality, or the capacity to act on other objects of nature according to one's own purposes. (RL 506/6:372) And this capacity only belongs to physical persons. Only when the ability to act rationally is lost (through death, madness, or debilitating disease) can one make such distinctions, for the distinction is made by nature itself. Patience therefore is the only answer to diminished human rationality. Legislators who are weak-minded or weak-willed are unfortunate. But as long as they are not evil, that is, systematically using legal procedures to invert maxims of morality, they can always benefit from the presumption of perfectibility. And since, according to Kant, there can be no specific contract outlining the sovereign's duties, obligations, or the terms of its legislative performance, the effects of bad governance do not constitute a sufficient ground to forcefully liberate the function from the "crooked timber" of its em-

[25] Interestingly, K.-O. Apel allows for a functionally similar non-deontological provision aiming to establish and maintain the empirical conditions under which morally justified action would be universally possible. See his "Auflösung der Diskursethik? Zur Architektonik der Diskursdifferenzierung in Habermas' *Faktizität und Geltung*," *Diskurs und Verantwortung* (Frankfurt/ Main: Suhkramp, 1998), 754.

[26] See Witt, loc. cit.

bodiment.[27] On the other hand, given that any function is inextricably bound to the physical vehicle that makes its exercise possible, distinguishing too strictly between the legal and the physical aspects of sovereignty may plausibly lead to a regressive chain of other possible criteria of differentiation between kinds of physical person and office, which would make the distinction between function and person even less relevant.

Government reform and legal interpretation

However, there is another aspect to the second objection that needs discussion. Kant's argument against rebellion seems to be empirically distorted by a deficient understanding of the relationship between constitutional republicanism and united sovereignty, two principles Kant endorses with equal enthusiasm even though they do not seem fully compatible with one another.[28] Officially, Kant distinguishes between the legislative as the seat of sovereignty and the ruler or the head of state, where the latter is duty-bound to obey the legislative authority and enforce its laws. (RL 457/6:313) Yet this distinction collapses when Kant debates the actual right of resistance. In fact, Kant seems to oscillate, sometimes within the same paragraph, between an interpretation of the division of powers that would allow for parliamentary resistance against the executive; another interpretation, according to which the physical person of a sovereign ruler encompasses both the legislative and the executive functions, which would make the right of resistance impossible on empirical grounds; and a third, more troubling view, according to which the legislative is entitled to remove the executive, but cannot do so by means of physical force. (The reason for this restriction is that the executive provides the only legal conduit for the exercise of power.)

The difficulties revealed by these problematic cases of the relationship between united sovereignty and republicanism can be solved in a satisfying manner only through the careful interpretation of the legal context of government reform. For instance, the problems raised by the second of these interpretations seem to be addressed by Kant's so-called technical account of the French Revolution (which is in fact a justification), according to which this event was not so much a revolution as a succession of reforms. Kant's analysis is accepted without much questioning or interest by German commentators such as Henrich and Spaemann,[29] but dismissed as legalistic and thus unconvincing by American critics like Beck and Reiss.[30] However, as Alain Renaut persuasively argues, Kant's "technical" explanation is particularly helpful in clarifying the issue of the non-coercive transfer of sovereign authority in those cases when the physical person of the sovereign is overwhelmed by the weight of the office.[31] Kant argued that Louis XVI inadvertently undermined his own sovereign power by convoking the General Estates and making its representatives the *de facto* sovereign. (R 8018, 8048, 8055) Acknowledged incompetence and administrative failure thus automatically authorized the transfer of sovereign power, which was duly assumed

[27] This seems to have been the argument against rebellion developed by some of Kant's students and followers such as Gentz, Heydenreich, and Jakobs. For details see Alexander Gurwitsch, "Immanuel Kant und die Aufklärung," in Batscha (ed.), 338-42.

[28] On this point, see Allen D. Rosen, *Kant's Theory of Justice* (Ithaca, NY: Cornell University Press, 1993), 143.

[29] Henrich, 363-4; Robert Spaemann, "Kants Kritik des Widerstandsrechts," in Batscha, 350.

[30] Beck, 412; H. S. Reiss, "Kant and the Right of Rebellion," *Journal of the History of Ideas* 17 (1950), 184.

[31] Alain Renaut, *Kant aujourd'hui* (Paris: Aubier, 1997) 437-41.

by the Estates. But in this case only the institutional *locus* of power in the state was physically transferred. There were no gaps in the exercise of the state's sovereign authority. The subsequent changes in the constitution, including setting up new institutions, only reflected the legal will of the new sovereign, and therefore constituted acts of reform.

The problems raised by the other two interpretations of the division of powers are of a different kind. The first claims that the executive ruler is "put under obligation through law" by a sovereign who can "take the ruler's authority away form him, depose him, or reform his administration…but not punish him, for punishment is an act of the executive authority." (RL 460/6:317) The legislative may use coercion against a non-compliant executive, but it cannot do so punitively, or at least not as punishment for his previous administration. This is still consistent with the principle of reform in administration. The third interpretation, however, alleges that, because the three powers in the state are also subordinated to one another with respect to their function, they cannot usurp each other's attributions. Thus the legislative cannot coerce the executive. As Kant says, the legislator is by definition "irreproachable," whereas the executive is "irresistible." (RL 459/6:316)

The way to sidestep this difficulty in a "mixed constitution" like England is to threaten the king with physical removal and hope that the latter leave office voluntarily. Technically, this would not count as using force against the executive. (TP 301/8:303) According to yet another scenario, the legislative could take away the executive's authority by law and appoint another ruler, who would then have the authority to use coercion against the former executive and his underlings. In this case, the restriction on the use of power by the legislative would no longer apply because it would be the new ruler who used force. Now it is true that Kant argues that the former sovereign has the right to reclaim his power. (RL 465/6:323) But this only applies to former sovereigns, not to executives, and only if they lost power "unjustly," presumably after an insurrection or *coup d'etat*. Furthermore, this does not entitle the former sovereign to use foreign armies to regain his seat, and under no circumstances does it authorize the citizens of the state to support his actions.

Conclusion

If the notion of instantiated right as applied to legal systems and persons shows that the imperfections of a system of right do not warrant active resistance, the institutionalized practice of legal interpretation is essential to maintaining unity in the exercise of sovereignty throughout any reform of the structure and functioning of government. Kant rejects the right to rebel only because the system of right as he devised it had most of the necessary inner resources to address the aspiration to political change of any would-be revolutionaries. Using these resources creatively falls short of both rebellion and acquiescence. Thus Kant's "technicalities" save him from the charge of legal rigorism. First, they reveal an intrinsic gradualism in Kant's legal philosophy that spans the dualisms of person and office, principle and instantiation, division of power and sovereignty. Second, they show that Kant's gradualism is not incompatible with some forms of political activism that entail neither active resistance nor mindless obedience.