

## **Kant on Constitutional Rebellion and Conscientious Objection**

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### **Introduction**

Immanuel Kant was well-known by his contemporaries as a supporter of various revolutionary causes, ranging from the American and French revolutions to the efforts of the Irish to free themselves from English rule. While he later condemned some of the excesses of the Reign of Terror, he maintained a fondness for the spirit of the revolution.<sup>1</sup> Indeed, Kant's support private support for the French rebels was so adamant that it earned him the nickname "the old Jacobian" amongst his circle of friends and colleagues.<sup>2</sup> Judging from these correspondences and notes alone, one might conclude that Kant, following Locke, saw a right to revolution, in certain cases, as included in the original social compact.

This personal enthusiasm, however, did not translate into official, philosophical advocacy. Just as his peers had been surprised and alarmed by "the old Jacobian's" support for the American and French revolutions, so too were they relieved by the official stance he took when his essay "On the Common Saying: That may be correct in theory, but it is of no use in practice"<sup>3</sup> was published. Here, he made it clear that revolution was, without exception, impermissible and incoherent.<sup>4</sup> The strict, near-authoritarian reputation enjoyed by Kant's political philosophy is owed largely to this

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<sup>1</sup> Kant's affection goes as far as to describe the guiding principles of civil society as freedom, equality, and independence. Although the third principle is quite different, the resemblance to the French slogan *Liberté, Egalité, Fraternité* cannot be denied. See Kant (1996).

<sup>2</sup> See Christine Korsgaard, "Kant on the Right of Revolution" in *Reclaiming the History of Ethics: Essays for John Rawls* (Cambridge: Cambridge University Press, 1997), p. 300.

<sup>3</sup> Hereafter, "On the Common Saying."

<sup>4</sup> The editor of the journal that published "On the Common Saying" wrote to Kant in clear relief, saying of the essay: "To speak quite openly, it pleased me all the more since it refuted the rumor (which I had suspected from the start) that you had come out in favor of the ever increasingly repulsive French Revolution, in which the actual freedom of reason and morality and all wisdom in statecraft and legislation are being most shamefully trampled under foot." See Biester to Kant, Oct. 5, 1793; *Kants Gesammelte Schriften*, Prussian Academy edition, XI, 456; Kant's Philosophical Correspondence, trans. Arnulf Zweig (Chicago, 1966), 208-09.

early essay. While there are important differences between “On the Common Saying” and his later work in the *Metaphysics of Morals*, Kant never repudiated, abandoned, or even weakened his absolute, categorical rejection of a legal or moral right to revolution.

The striking contrast between Kant’s private optimism in the face of revolution and his published opposition to the very same has been extensively documented in recent years.<sup>5</sup> While many of these papers focus on rescuing Kant by demonstrating the underlying consistency of his simultaneous condemnation of rebellion and praise of its effects, I intend to take a different approach. Namely, my purpose here is to critically assess the consistency between his statements on rebellion and the fundamentals of his own underlying practical philosophy. In particular, there are two questions that I intend to investigate. First, do the more basic elements of Kant’s own position require him to adopt, as he does, the view that there can never be a constitutionally protected right for citizens to rebel against their government? Second, is his claim that engaging in such rebellion would invariably be morally impermissible consistent with his moral theory?

This pair of questions is inspired by the strength of Kant’s condemnation of any form of resistance or civil disobedience. In the “Doctrine of Right,” he definitively states “There is...no right to sedition, still less to rebellion, and least of all is there a right against the head of a state as an individual person, to attack his person or even his life on the pretext that he has abused his authority” (6:320).<sup>6</sup> The reason for his staunch denial of such rights is his commitment to the necessity of determinate answers in cases of conflict. The law exists, in part, due to the necessity of having some authority to settle matters of dispute between parties. In the state of nature,<sup>7</sup> there is no possible mechanism for placing others under an obligation to respect our use of external objects,

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<sup>5</sup> See Beck, Hill, Nicholson, and Reiss.

<sup>6</sup> All internal citations can be found in Kant (1996).

<sup>7</sup> NB: Kant does not believe the “state of nature” to be a historical state of human development. Rather, he envisions it merely as a hypothetical scenario, a useful tool for determining what kinds of institutions people would agree to.

and thus we will perpetually come into conflict with others with whom we come into contact. We need the law to solve this problem, and the law only functions when it can give determinate answers in all cases of dispute. As we will see, Kant envisions both the legislative and executive as protected by variations of this argument.

In assessing these claims, I will be relying on an interpretive strategy that strives to reconstruct Kant's position on revolution as 1) consistent with his most foundational philosophical commitments and 2) in concert with as many of his statements about revolution as possible, where this does not violate 1). This differs from the strategy of trying to achieve perfect consistency between all of Kant's statements, and as such I will be critical of some of Kant's claims. In these cases, my criticisms will all be grounded on Kant's failure to adhere to the most basic elements of his own practical philosophy.

I contend that in following Hobbes and the traditional currents of political thought so closely, Kant makes the converse of the mistake he made with respect to punishment. As I argue in my dissertation, Kant's support for a retributive theory of punishment fails to offer any successful, justificatory arguments. In that case, his radical aspirations were foiled by the underlying conventional foundations of his political philosophy. The problem with Kant's absolute denial of the permissibility of civil disobedience, rebellion, or punishing previous rulers comes not from conventional underpinnings, but rather from his original moral philosophy; in this case, his conventional aspirations are foiled by the radical force exerted by his moral philosophy. Put plainly, while Kant can successfully argue against a legal, constitutional right to resistance or revolution, his efforts to show a moral obligation to refrain from such rebellious actions do not and cannot succeed. Rather, consistency with his own fundamental views requires acceptance of the moral permissibility of resistance in certain instances.

In making this argument, I will be defending an interpretation of Kant’s legal philosophy that could be described as “constrained positivism.” Like an orthodox positivist, Kant holds that the merits of a law are to be determined by their creation in a fixed legal procedure, rather than by an appeal to some external standard. Unlike a fully positivist legal theory, however, Kant takes there to be several strict limitations on what can become law. Significantly, if a proposed policy fails to satisfy the necessary requirements of law, this does not make it a bad law; instead, the policy *is and can be no law at all*. It is precisely this limitation that will enable a Kantian form of civil disobedience and active resistance to state power. While we are morally obligated to follow laws, we are permitted – and perhaps even required – to refuse and resist policies that cannot be legitimately legislated.

## I Legal Revolution

Before proceeding further, I should say a word about the form of republican separation of powers that Kant supports, as the appropriate response to executive and legislative abuses of power might potentially differ.<sup>8</sup> In some places, Kant provides passages that seem to blur the distinction between the various branches of government.<sup>9</sup> This could be due to simple error, to an accidental confusion over his own terminology, or to a desire to avoid again angering Frederick William II, who had already censured Kant’s writings on the subject of religion.<sup>10</sup>

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<sup>8</sup> Throughout this chapter, I will be addressing only the rights of citizens who live in a state that creates, previously created, or comes very close to creating a rightful condition. As a rightful condition can only be truly acquired and maintained under a republican government, my focus will be on citizens who live in republican states. The question of whether citizens in non-republican governments, living in a non-rightful condition, can morally rebel will have to be set aside at present.

<sup>9</sup> For a key example, see 6:321.

<sup>10</sup> Beck makes a compelling case against viewing any of Kant’s inconsistencies as strategically motivated. As he observes, “While it is not improbable that Kant was intimidated by the censor, I find it incredible, for Kant’s actual response to the censor in 1792 was silence, not deception. In 1766, he had written Moses Mendelssohn, “Although I am absolutely convinced of many things that I shall never have the courage to say, I shall never say anything I do not believe.” I think that was as true in the 1790’s as in the 1760’s; and therefore, I must try to find some other way to explain the apparent inconsistency in Kant’s attitudes” (Beck, p. 411).

Regardless of whether the occasional lack of clarity is due to error or self-preservation, it is clear from 6:313 in the Public Right section of the “Doctrine of Right” that he holds supreme sovereign authority to rest with the legislative branch of government. The legislature represents the united will of the people—the only possible source of political legitimacy. Legislative authority can rest with either a single law-giver or with a legislative body, such as a senate. These claims of legislative sovereignty are more or less in keeping with the post-Hobbesian social contract tradition, as well as the natural law tradition; in particular, the prioritizing of legislative power as an expression of the “general will” has a distinctively Rousseauian character to it.<sup>11</sup>

This generality is the first of two conditions for legitimacy of a law that Kant outlines in the *Metaphysics of Morals*. Laws that arise from the legislative branch must be general in two senses. First, a law must be general in its content (6:316-6:317). Only policies that refer to the whole people or some broad group of citizens – rather than to particular individuals – and that are intended to serve as fixed, exceptionless rules that do not conflict with other such rules can become laws. Second, laws must be general in the sense that they “involve the unity of and resolution of conflicts in accordance with universal laws.”<sup>12</sup> Only when a policy can satisfy the requirements of universal law can it become a civil law, and policies that spring from the particular wills of individuals cannot be guaranteed to reach this standard. It is this second kind of generality that grounds the first; the only kind of law that can result from the subsuming of individual wills under the dictates of universal law is that which has a general content.

The second condition for legitimacy is rational or hypothetical consent. Only those policies to which all citizens could possibly give their rational consent can be made into law. It is possible for a law to still be legitimate if one or more citizens do not, in fact, give their consent, if their refusal is

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<sup>11</sup> See 6:314: “Therefore only the concurring and united will of all, insofar as each decides the same thing for all and all for each, and so only the general united will of the people, can be legislative.”

<sup>12</sup> Mulholland, p. 301.

based on some irrational inclination. If even one citizen has a rational basis for rejecting a law, however, then this is sufficient to render the law illegitimate, and thus nullify it as a possible law. In “On the Common Saying,” he writes “What a people cannot decree for itself, a legislator cannot decree for a people” (8:304). The legislative does not merely act wrongly if it attempts to institute such a policy; it attempts that which it does not have the power to do. For an example of something that a person cannot will, we can look to the Doctrine of Right at 6:329-6:330 where Kant describes how a person cannot possibly will herself or himself into slavery. He writes, “Since we cannot admit that any human being would throw away his freedom, it is impossible the general will of the people to assent to such a groundless prerogative, and therefore for the sovereign to validate it” (6:329). Thus, any law that relegates a citizen to a position of servitude would fail the second test and thus be illegitimate and beyond the power of the government to legislate or enforce.

The executive branch, on the other hand, is responsible for the implementation and enforcement of laws, the execution of punishments for any violations of the laws, and all other institutions involved in the day-to-day operations of the state (e.g., the recording of contracts, deeds, etc.). The executive head of state, to whom Kant refers as the “ruler,” is the agent of the legislative; he or she has no authority except that which is derived from the power the legislative bestows upon him or her (6:316). The policies of the executive are “decrees,” not laws, and as such they can and must be particular. It is important to note, though, that the executive has wide latitude in determining the parameters of how laws will be enforced; while the letter of the law and even the specific punishment warranted by its violation are spelled out by the legislature, all decisions about how to enforce the laws are determined by the executive; the legislature lacks the ability to directly check individual measures of the executive. As such, the executive could enforce a perfectly

legitimate law in a way that violates the rights of the citizens.<sup>13</sup> The only power the legislative has to curtail the decrees of the executive is to pass a new law or replace the executive with a new agent.

Taken at face value, Kant's rejection of any right to resist that authority of the state does not seem to be in any way affected by this distinction between the sovereign, legislative power and the subsidiary, executive power. Although he recognizes the difference between these two branches, he holds that resistance to either one is strictly impermissible. Of the legislative's imperturbable supremacy, he writes:

The reason a people has a duty to put up with even what is held to be an unbearable abuse of supreme authority is that its resistance to the highest legislation can never be regarded as other than contrary to law, and indeed as abolishing the entire legal constitution. For a people to be authorized to resist, there would have to be a public law permitting it to resist, that is, the highest legislation would have to contain a provision that it is not the highest and that makes the people, as subject, by one and the same judgment sovereign over him to whom it is subject. This is self-contradictory, and the contradiction is evident as soon as one asks who is to be the judge in this dispute between people and sovereign. For it is then apparent that the people wants to be the judge in its own suit. (6:320)

This is the core of his objection to resisting state authority. In Kant's political philosophy, all rights are claims that citizens have against other citizens. These claims are guaranteed by the authority of the state. Put another way, if I violate another citizen's right, the citizen is entitled to the state's use of coercive force to recoup whatever losses were sustained as a result of my action. Given their connection to state enforcement, rights cannot exist outside of a rightful condition (6:311). While certain moral duties exist independently of a rightful or juridical state, these are exclusively the unenforceable duties of virtue that we all have as free, rational persons. Rights, on the other hand, can only exist in a civil society that enjoys both the rule of law and a determinate power who has the authority to enforce the law.

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<sup>13</sup> An example of such a scenario might be a law giving the police the power to search vehicles pulled over for routine traffic violations for illegal narcotics. While such a law might be legitimate, we could imagine a scenario in which the executive elects to only exercise such a power when dealing with certain racial minority groups. In such a scenario, we might think of the executive as enforcing a legitimate law in an illegitimate way.

In order for citizens to have any legal right to actively resist the implementation of a law, there must be another law that extends this freedom to them and guarantees their exercise of it; they must have a legal claim that can be enforced by the state's coercive power. Any law that extends to a people the right to disobey the law whenever they see fit is both highly impractical and, more importantly, contradictory. How could we make sense of a legal right that would require the state to defend, with force if necessary, a citizen's entitlement to resist the power of the state? If this were the case, each citizen would have the power to command the state to alter or fail to enforce any law at any time. No one could ever be punished for criminal misdeeds.

The legal contradiction that Kant sees as prohibiting any constitutionally recognized right to insurrection is also grounded on a moral contradiction. Recall that all legitimate laws must be passed by legislative action that occurs in accordance with the general, collective will. In light of this, Kant claims that all laws that are passed by the legislative are ones that each citizen has individually willed. The law that requires me to respect my neighbor's property is not an alien constraint, but rather one that originates within my own will. For me to break such a law clearly involves a contradiction, but to Kant's mind, so too does my resisting any law. In resisting, I claim that I simultaneously will a law and do not will the law.<sup>14</sup>

Of course, this presumes that I have or could have, in fact, willed the law in question. I might privately disagree with what I could rationally will, but I do not have legal standing to dispute this, as there is no one to adjudicate this dispute. Thus, my only recourse as a citizen is to express my opinion through the legitimate, legal channels and, in the meantime, accept whatever answer the legislative authority settles upon.

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<sup>14</sup> For a nice summary, see Williams, p. 200: "From a moral point of view the State represents the general will of the people, and the individual citizen must see himself as part of this general will which creates the law and brings into being the sovereign who it is his duty to obey. For the individual to rebel against the State is, therefore, from the moral viewpoint, for him to rebel against himself, and this, Kant argues, is impossible."



Although he rules out any active resistance against the state, Kant does seem, at times, to allow for the citizens to passively refuse to comply with a law that would require them to engage in immoral behavior. He has been read this way by numerous interpreters,<sup>15</sup> and there is some evidence for such a reading; after all, Kant does describe a people that always complies with any command from the executive as “corrupt” (6:322). Such readings, however, overlook that in both “On the Common Saying” and the *Metaphysics of Morals*, Kant is specifically referring to a right that the legislators retain. The legislators are the ones who are meant to refuse immoral commands of the executive, and any right to resist that the people have is conducted through their legislative proxies. In other words, Kant specifies that such passive resistance is afforded only to the citizens who are members of parliament (8:297, 6:322). If this is the correct reading, then it is the legislative branch that can passively resist the power of the executive;<sup>16</sup> the people, in this case, have no legal right to resist the state’s authority. For individuals to do so would be for “each resistance [to] take place in conformity with a maxim that, made universal, would annihilate an civil constitution and eradicate the condition in which alone people can be in possession of rights generally” (8:299).

I think this is the correct way of understanding Kant’s position. Extending to the citizens a legal right to passively refuse to obey a law would result in the same problems Kant sees in recognizing a right to actively disobey or resist the law. As such, we ought to read Kant as prohibiting even a guaranteed right to civil disobedience.<sup>17</sup> Pointing out this issue, Kant interpreter Leslie Mulholland writes, “A right to do as conscience dictates would allow everyone to do as conscience dictates on all matters, including questions of conflict over rights, and even when the

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<sup>15</sup> For examples, see Reiss and Williams.

<sup>16</sup> For additional support for this view, see Guyer, p. 289.

<sup>17</sup> One might make an interesting case for the permissibility of civil disobedience in the same manner as Rawls does in his paper “The Justification for Civil Disobedience.” Rawls famously defends civil disobedience as an act of political speech, intended to address some injustice and bring about a change in policies or institutions (see Rawls, p. 181). Given Kant’s strong commitment to the importance of freedom of speech in a juridical state (see, for instance, 8:304), this might be an approach that could gain some traction with Kant’s underlying political philosophy.

objective judgment is mistaken. Indeed, it would allow coercion of the state whenever conscience dictated that this would be the right thing to do. But such a right would make a civil condition impossible.”<sup>18</sup> He goes on to assert that despite this lack of legal right, citizens should be morally entitled to a passive refusal to obey a law. I will return to this point a little later, arguing that the moral permissibility that Mulholland recognizes should extend considerably further than mere passive refusal.

The executive power, although merely an agent of the sovereign, is no less unassailable in its authority. Kant writes,

The sovereign has only rights against his subjects and no duties (that he can be coerced to fulfill). – Moreover, even if the organ of the sovereign, the *ruler*, proceeds contrary to law, for example, if he goes against the law of equality in assigning the burdens of the state in matters of taxation, recruiting, and so forth, subjects may indeed oppose this injustice by *complaints* but not by resistance. (6:319)

The executive, in other words, is also immune from opposition. Although the citizens have the right to work within the system to bring about changes in the executive’s leadership or policies, they cannot go beyond the established channels of registering their discontent. Despite the similarities, though, the reason for the executive’s irresistible power is slightly different from the reason why the legislative authority cannot be opposed. Instead of focusing on the contradiction that arises from allowing private wills to oppose the laws that are produced by the general will, Kant’s defense of executive irresistibility highlights the contradiction that arises from challenging the structure of legal right and coercion. He writes,

Even the constitution cannot contain any article that would make it possible for there to be some authority in a state to resist the supreme commander in case he should violate the law of the constitution, and so to limit him. For, someone who is to limit the authority in a state must have even more power than he whom he limits, or at least as much power as he has; and as a legitimate commander who directs the subjects to resist, he must also be able to *protect* them and to render a judgment having rightful force in any case that comes up; consequently he has to

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<sup>18</sup> Mulholland, p. 339.

be able to command resistance publicly. In that case, however, the supreme commander in a state is not the supreme commander; instead, it is the one who can resist him, and this is self-contradictory. (6:319)

As we can see, Kant thinks the executive must be obeyed because of its connection to external right. In order for there to be a sovereign, there must be a single, determinate individual or office that holds the power to execute the law, through the use of force, if necessary. If the citizens are capable of preventing the execution of particular laws, then each becomes sovereign in a very real sense. As Kant scholar Howard Williams observes,

A state which possessed a constitution which allowed the citizen always to criticize and overturn the acts of a sovereign would be thoroughly ungovernable. Depending on the way one wished to look upon it, it could either be said to possess two sovereigns or no one at all. Under such a constitution, both the ruler and the subject would be sovereign. This kind of constitution Kant describes as nonsense.<sup>19</sup>

While resisting the legislative branch would be disastrous in that it would eliminate the possibility of law, resisting the executive branch would also lead to the dissolution of the juridical state by making the enforcement of laws impossible. As both law and someone with the power to enforce it are necessary conditions of a rightful state, resistance of this sort would make a republican state unworkable.

We should not conclude, though, that the above quotations imply that the executive's abuses must be tolerated by the legislative as well. While the people, as subjects, must respect and obey the executive's authority, the legislative sovereign still has the power to revoke the executive's power, remove her from office, and replace her with a new agent. It is worth noting, however, that Kant holds that even in the event that such a replacement of the executive is necessary, this does not entitle the state to punish the former ruler.

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<sup>19</sup> Williams, p. 201.

In the event that the executive refuses such an order, on the other hand, then he loses the authority to act as the state's ruler. Instead, the former executive would become an enemy of the state. The citizens would be entitled to resist the actions of such a rogue figure based on their right to self-defense. In all likelihood, the legislative would appoint a new executive figure, whose first order of business would be to subdue her predecessor. In such a case, it is possible that the citizens would be enlisted in the effort to pacify the former executive, but their actions would not be constrained as resistance or rebellion, as they would be acting in accordance with the decrees of the new head of state.

The case of the rogue executive gives us insight into the only possible case of acceptable resistance that Kant considers. Much has been made of Kant's historical support (at least, initially) for the American and French revolutions, offered in correspondences and his earlier work. In the *Metaphysics of Morals*, Kant suggests that the initial actions of the French rebels during the revolution of 1789 were potentially justified, not by legality or even morality, but by necessity. The state had devolved to such a condition that it no longer represented an actual civil society; the citizens had, at some point, ceased to be members of a people and had instead found themselves plunged back into the state of nature. In any situation where the legislative can no longer make the claim that it is representing the united will of a body of people, it no longer has rightful authority over them. Note that this situation does not give the former citizens legal or even moral title to oppose or overthrow those exercising coercive power over them (the former legislators), but merely a right of necessity. This is presumably the same kind of right of necessity at work when a survivor of a shipwreck forces another survivor off of the plank of wood that can only support a single individual. Unfortunately, Kant gives us no clear guidelines for determining at what point the state is so chaotic and divided so as to revert to a state of nature. We cannot be entirely sure what failures or tyrannical behavior on the part of the legislative it would take to remove their legitimate legal authority and open this right

of necessity to revolt. Also, given that one can act in accordance with a right of necessity and yet still be described as acting impermissibly, it seems prudent to keep our focus exclusively on the legal and moral arguments Kant offers against revolution.

We have reached a largely complete picture of Kant's position on the legality of resistance and rebellion. There can be no legal right of any kind to civil disobedience, resistance, or rebellion. As Thomas Hill sums it up, "Kant argues that trying to incorporate an alleged right to revolution into a constitution for a legal system would be incoherent because it would purport to be a legal authority to destroy the very source of legal authority. Someone cannot coherently claim legal authorization to overthrow the highest legal authority. This seems undeniable."<sup>20</sup> Without an authority to determine whether the citizens are appropriately exercising a right against the sovereign, no such right could be enshrined in the constitution.

I think that the legal prohibitions Kant establishes in the "Doctrine of Right" are fundamentally consistent and even necessary. His arguments against a legal right to resist the state or rebel are ultimately rooted deeply in his foundational political and legal philosophy. Given the ways he has defined "right," it would not be possible to speak of citizens as having a right that is, in practice and in principle, unenforceable. Active resistance against the state's authority and even a passive refusal to obey a law would both threaten the possibility of a juridical state. As far as a legal, constitutionally recognized right to resist the legislative authority itself, however, there is no way to make sense of how Kant could accommodate it.

## **II Moral Revolution**

While Kant's position on the legal right to revolution is consistent with, and required by, his more fundamental views and definitions, his claim that such action is, in all cases, morally

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<sup>20</sup> Hill, p. 189.

impermissible is more difficult to defend. He has two distinct arguments intended to demonstrate this moral impermissibility. The first argument originates in “On the Common Saying,” and it stems from a concern that all revolutions originate in impermissible motives. Despite being well-suited to his moral philosophy, this argument falls flat by oversimplifying the possible rationales for rebellion. Kant’s second argument essentially replaces his first by the time his *Metaphysics of Morals* was published. Here, he argues that engaging in any form of resistance violates our moral duty to obey the law (by contradicting our rational willing of the law) and threatens the existence of the juridical state to which we have an obligation to belong. I will address the first argument briefly before turning to a longer analysis of the second argument.

In “On the Common Saying,” Kant offers his first argument against revolution, which depends quite heavily on Kant’s anti-paternalism and the anti-consequentialist elements of his moral philosophy. Unfortunately, Kant’s interpreters have almost universally found this argument unsatisfying. Rather than the formal arguments about contradictions that Kant uses later, in “On the Common Saying” he defends his position by reference to the impermissibility of revolution motivated by a concern for happiness. He writes,

Thus if a people now subject to a certain actual legislation were to judge that in all probability this is detrimental to its happiness, what is to be done about it? Should the people not resist it? The answer can only be that, on the part of the people, there is nothing to be done about it but to obey. For what is under discussion here is not the happiness that a subject may expect from the institution or administration of a commonwealth but above all merely the right that is to be secured for each by means of it, which is the supreme principle for which all maxims having to do with a commonwealth must proceed and which is limited by no other principle. With respect to the former (happiness) no universally valid principle for laws can be given. (8:298)

Kant’s claim, then, is that revolution can never be justified because it is motivated by a desire to secure laws, authorities, or institutions more efficient at producing happiness for the populace, and such a concern for happiness is never sufficient grounds for disrupting the rightful condition of the state. As happiness is not the purpose or motivating principle of the state, but rather the creation

and protection of right, happiness cannot serve as the basis for social upheaval that would threaten right. This argument is clearly insufficient, however, as we need not endorse Kant's apparent claim that revolutions are always motivated by a concern for greater happiness. If the citizens are instead motivated by a concern to correct for unjust laws, this argument would do nothing to explain why they act wrongly.<sup>21</sup> Kant needs the formal arguments from the "Doctrine of Right" to explain why even citizens motivated by justice cannot rebel against the state. For the remainder of the chapter, I will be focusing on the arguments from this later work, setting aside the happiness-based arguments from "On the Common Saying."

Before outlining the argument Kant provides, it is worth considering the problem that makes these arguments necessary. Trying to ground moral obligations in legal reality is not an easy proposition for Kant; the *Metaphysics of Morals* goes to great lengths to divide ethical duties from juridical duties, and thus he needs further argumentation to bridge the gap between the two kinds of obligation.<sup>22</sup> While consistency entitles and even requires Kant to argue against a legal right to resist if there is no authority that can decide in one's favor, we need no such arbitration in order to consider an action morally permissible. After all, my actions can be moral or immoral prior to or outside of civil society, where no talk of "rights" makes sense. If Kant wants to show that we have a moral obligation to obey the law – that resistance and rebellion are morally impermissible – then he must give us some reason beyond their mere illegality. Failing to do so is a clear conflation of legal and moral obligation.

To this objection, a defender of Kantian orthodoxy might respond that the failure to preserve a distinction between legal and moral obligation is no failure at all. Kant clearly holds that the law creates a moral duty where none existed before (6:313-6:314). The reason for this has to do with the origin of the law as a product of the general will. By giving our rational consent to whatever

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<sup>21</sup> See Guyer, p. 285, Williams p. 205.

<sup>22</sup> Hill, p. 290-291.

the legislative branch legislates, we essentially give the law to ourselves. In doing so, we place ourselves under an obligation to follow the law, no matter what our feelings about it might be. This obligation is legal, but it is also moral; any legal duty to obey the law would entail a moral duty to do the same.

Such a response, however, cannot truly answer the objection for one important reason: although any law does create a moral obligation, policies that require immoral action or to which citizens cannot rationally consent *cannot be laws*. Recall that this is one of the two limitations that Kant imposes on the legislative's ability to create laws. If the state attempted to pass a law instituting slavery, it would be one to which the citizens could not consent. As such, it could not be a product of their collective wills. Positing a moral obligation for the citizens to obey such a policy would entail creating a moral obligation for citizens to act contrary to what they or others could accept as moral agents. In effect, we would be morally required to act immorally. Even the authority of the sovereign cannot be sufficient to morally obligate an immoral action. This would be truly contradictory, and we would be left with no rational way to decide which obligation to obey. Given Kant's denial of the possibility of conflict between perfect duties, the law cannot create an obligation in these kinds of cases.

This way of thinking runs counter to the view of Kant as a legal positivist that is defended by Jeremy Waldron. He argues that Kant should be understood as staking out a positivistic legal theory, where the legitimacy of the law is derived from the procedure by which it is produced, rather than some external moral standard.<sup>23</sup> He views Kant as refraining from basing the legitimacy of the law on some other, normative standard of evaluation in light of the fact of moral disagreement and the potential "calamity" caused by such disagreement. Waldron explains that although Kant might be a moral objectivist, this does not rule out the possibility of individual's experiencing strong

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<sup>23</sup> Waldron, p. 1541.



disagreements about morality and how to effectively secure happiness.<sup>24</sup> Furthermore, if steps are not taken to prevent this disagreement from occurring, the resulting disharmony can threaten the state itself, and thus destroy the rightful condition (and along with it, the possibility of property ownership). To negate this danger, Waldron sees Kant as resorting to a version of legal positivism. He describes his understanding of positivism as

the principle that an official should enforce the law even when it is in his confident opinion unjust, morally wrong, or misguided as a matter of policy. The enactment of the law in question is evidence of the existence of a view different from his own concerning the law's justice, morality, or desirability. In other words, the law's existence, together with the official's own opinion, indicates moral disagreement in the community. The official's failure to implement the law because he believes that it is unjust, or his decision to do something other than what the law requires because he believes that action would be more just, is tantamount to abandoning the very idea of law.<sup>25</sup>

It is fairly clear how Waldron sees this description as applying to Kant's legal philosophy. The law is meant to take precedence over personal opinion, just as the moral law should trump our personal inclinations. This is a plausible account of how Kant envisions the interaction between the law and our own moral beliefs.

I agree with some of Waldron's points. Contrary to some interpretations,<sup>26</sup> Kant is not a natural law theorist. He clearly recognizes that the legitimacy of law as arising from way in which it was produced, rather than on its conformity with an independent standard of evaluation. Although he does confirm that our juridical duties are ethical, this should not be read as a claim that we have underlying moral reasons prior to the institution of the law. Rather, it is the fact of a positive law that gives us a corresponding ethical obligation. In Kant's eyes, any number of different laws, policies, and institutions can be legitimate, even though some of these might be far less efficient, stable, or fairly-balanced than others. Although Kant does have a progressive view of civil society

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<sup>24</sup> Ibid., p. 1552.

<sup>25</sup> Ibid., p. 1539.

<sup>26</sup> See Mulholland, p. 12-14; Reiss, p. 181

(indicating an interest in seeing less-desirable laws be replaced by better laws), the inferior laws are still legitimate, provided they arise in the right way.

This last condition, however, is stronger than Waldron seems to acknowledge. The fact that a large range of policies are not appropriate subjects for law strikes me as a large difference from a purely positivistic picture. This limitation is based on Kant’s underlying moral philosophy; the state cannot pass laws to which even one citizen could not rationally consent, for to do so would be to violate the respect owed to this individual as a free moral being. It is for this reason that I claim Kant ought to be considered a “constrained positivist.” While all laws that can exist are justified in positivistic ways, there are a wide range of policies that cannot be made into law for moral reasons. Returning to Kant’s example of slavery, given that individual citizens cannot will themselves to be made into slaves, and the legislative authority of a state derives its power to create laws from the collective will of the citizens, it also lacks the power to will a law that reduces any citizen to a condition of servitude. Although the state might attempt to pass such a law and even enforce its execution, the state would be defending an illegitimate policy, rather than a law.<sup>27</sup>

If this is correct and such immoral policies do not acquire the status of law, then citizens are under no moral obligation to obey them. They cannot gain moral authority via the legal authority of the state, the way that other laws do. They cannot gain moral authority through the citizens’ own hypothetical consent, as the citizens are unable to give such consent to these policies. For the remainder of the paper, I will consider what the implications for Kant’s stance on the moral permissibility of resistance and revolution are, given this conclusion.

First, we should note that the existence of policies that do not have legal or moral standing does not automatically extend to citizens a legal right to actively resist the state’s power, much less

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<sup>27</sup> NB: This does not mean, however, that the citizens are legally permitted to rebel against such a policy. Although it might, in fact, not be a law, there would be no one with the authority to make such a determination. As such, all the problems that prevent a legal right to rebellion would still apply.

rebel against the state itself with the intention of removing or replacing the sovereign authorities. After all, the state might still be broadly maintaining a rightful condition, despite attempting to institute a policy that cannot, for the reasons discussed above, become law. To rebel against such a state would be to violate the duty that all persons have to belong to and promote juridical states. All it shows is that such policies or decrees fail to morally obligate citizens. As a citizen, I can passively refuse to obey such a policy without doing moral wrong. I am not morally authorized to resist the state power in other ways, however, as this would involve violating the duty to obey other, legitimate laws. If the state illegitimately attempts to create a law instituting slavery, I could refuse to comply with such a law, but I could not, for example, sabotage the mail system in my efforts to bring about a change in the state's policies.

For similar reasons, my limited moral entitlement to civil disobedience must not include any resistance to the state's efforts to punish me for my transgressions. This point seems strikingly counter-intuitive; how can my violation of an immoral policy that cannot, by definition, become law make me deserving of punishment? Why is it permissible to violate a "law," but impermissible for me to refuse to be punished for this violation? The answer to these questions lies in Kant's specific understanding of right and the executive's role within the state. Given Kant's concern for providing determinate answers, we must bow to the executive's decisions about legal right and wrong. By definition, the executive has final say over these matters. Although we might disagree with the policy, and even though we might be morally correct in our disagreement, the policies adopted by the state must still be given presumptive deference. If moral disagreement were sufficient to exempt one from punishment, the entire institution would be threatened, for there is no one who can assess claims about the moral status of laws. Furthermore, resisting punishment would pose a risk to the authority and stability of the state; as discussed above, this would be morally unacceptable in situations in which the state still largely adheres to the principles that give rise to a rightful condition.

There might, however, be a way to extend the moral authorization to resist further. If the state goes beyond merely attempting to pass and enforce a policy that cannot be law, for instance by enacting a wide-range of illegitimate policies or radically expanding its own power, then the citizens might be morally permitted to engaging in a more general strategy of resistance to the state's power. An example of such a case might be a government that attempts to legislate a broad apartheid system that has far-reaching ramifications for many citizens in every area of public and private life. Given the extensive nature of the policies, it might not be possible to signal the moral impermissibility of such "laws" without taking a stand against the state itself. This form of civil disobedience might involve violating laws beyond merely the ones that are morally unwillable. Even in these cases, however, the citizens must be prepared to submit to punishment by the executive; failing to do so would still be a legal and moral failure.

One might be tempted to try to push further and suggest that if a government proves to be unmoved by measures of this kind, open rebellion might be morally justified. This is difficult terrain, however, for at some point the line is crossed beyond which the state is no longer even close to maintaining a rightful condition. After this, the general obligation that citizens have to follow the law might be eroded to the point that the state is propped up by powers to which the people could never rationally consent. Kant does give some consideration to the subject of tyranny,<sup>28</sup> but he seems to assume that our obligation to remain members of states is strong enough to apply even in cases of tyranny.

I think there is a good case to be made, however, for thinking that there might be a Kantian moral obligation to engage in either the passive, civil disobedience-style resistance described above or more active resistance, as the situation demands of us. We might consider the duty that all people have to contribute to the progress of humankind. Part of this progress is the development,

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<sup>28</sup> See, for example, the lengthy footnote at 6:320.

maintenance, and protection of rightful conditions. If citizens belong to the kind of abusive state we have been considering, then might not revolution prove the appropriate way to contribute? Lewis White Beck warns against this line of thinking: our duty to promote the progress of humankind is an imperfect duty, and is therefore secondary to the perfect duty that all citizens have to obey the law.<sup>29</sup>

While Beck is right to suggest that our imperfect duty to promote the progress of mankind cannot trump a perfect duty to obey the law, this still assumes that the policies in question are, in fact, laws. As I have argued throughout, such policies cannot meet the requirements Kant imposes on law; they cannot truly be passed by a legislature. As such, we can have no moral obligation to obey. We might, in fact, be obligated to resist either the particular law or even the state's authority on the grounds of our imperfect obligation.

Could this duty to resist a state's slide toward tyranny go so far as a moral authorization or requirement to revolution? Kant takes a hard line against this possibility, arguing that revolution necessarily results in anarchy. As Guyer describes his thinking, "The overthrow of an existing state, even if in the hope of greater justice and not merely greater happiness, can never be an immediate transition to a better-constituted state, but is always a reversion to a condition of lawlessness. From such anarchy a better state *might* arise, but then again it might not."<sup>30</sup> It would be contradictory, then, for us to revert to lawlessness under the motivation of our duty to promote juridical states.

This line of thinking only seems to work when we consider a state that is still functioning in a quasi-rightful manner, albeit badly. If we imagine that the state has descended to the point of actively violating the rights of the people with great regularity and efficiency, there may be good reason to think that whatever state arises from the anarchy will be better than the one we inhabit. Although we could never be truly certain about this, the worse our present state is, the more likely it becomes that whatever comes next will be better. Whatever obligation we have to the state would

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<sup>29</sup> Beck, p. 420.

<sup>30</sup> Guyer, p. 287.

have eroded long ago, and at this point the state's authorities would maintain their power through the sheer use of force, unconnected with any authorization arising from the general will. Although there could still be no legal right to rebel against a state, there could be a moral one if all other avenues of reform had been exhausted.

## **Conclusion**

In his supportive correspondences on the revolutions in America and France, Kant was thinking not as a jurist or even a moralist, but as a humanist. He saw events that, though condemnable in certain respects, held in his eyes the promise to bring about a new kind of state. A true republic could create the kind of rightful condition that Kant would support in several works toward the end of his life. To his mind, the age of revolutions was evidence of progress toward the day when the highest good – the conjunction of human virtue with human happiness – would be enjoyed by all free, rational beings.

Kant is famous, however, for his opposition to judging actions based on their consequences. As exciting as the prospect of revolutions and the subsequent republics might be, they were legally problematic to Kant as a political theorist. The fact that these very revolutionaries echoed the claims of Locke and Burlamaqui – that citizens retained the right to rebel against unjust authority – demonstrated their adherence to a legal and political conception of constitutionality that Kant found incoherent. How could a constitution possibly include such a right? Who could fairly judge a dispute between the sovereign and one or more citizens? In light of these legal arguments, Kant is compelled to also morally prohibit resistance to the state, both passive and active, on the grounds that any such resistance ignores the moral obligations that are created by the law.

Given the way Kant makes these arguments, it is not surprising that Waldron would interpret his position as positivistic. After all, Waldron's central claim – that Kant is motivated by a

desire to establish a legitimate authority that can settle disputes amongst parties with differing normative conceptions – is essentially correct. This positivistic reading, however, misses an important element of Kant’s legal theorizing: the constraint that the legislative sovereign of a state is only capable of creating laws that are rationally acceptable to all citizens.

This detail does nothing to undermine the claims Kant makes with respect to a legal right to revolution. Even if the sovereign institutes and the ruler enforces some policy that cannot be made into law, this still does not extend to the citizens any legal claim against the legislative or executive branch. In order to accommodate such a right, Kant would need to reject his most basic definitions and principles.

Kant goes too far, however, in stating that the citizens of a state are morally obligated to follow every policy of the state. They cannot be bound by policies that cannot become law; while their resistance to such policies cannot be designed or intended to threaten the state itself, and they must submit to punishment for their refusals, they do no moral wrong in such cases. Indeed, they might even be duty-bound to engage in such behavior. This conclusion manages to preserve the characteristic elements of Kant’s political philosophy, while also recognizing the important and distinct role that his moral philosophy plays in the lives of individual members of states.

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