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Deriving Morality from Politics: Rethinking the Formula of Humanity*

Japa Pallikkathayil

Kant's Formula of Humanity famously forbids treating others merely as a means. It is unclear, however, what exactly treating someone merely as a means comes to. This essay argues against an interpretation of this idea advanced by Christine Korsgaard and Onora O'Neill. The essay then develops a new interpretation that suggests an important connection between the Formula of Humanity and Kant's political philosophy: the content of many of our moral duties depends on the results of political philosophy and, indeed, on the results of actual political decision making.

Kant's Formula of Humanity famously forbids treating others merely as a means. It is unclear, however, what exactly treating someone merely as a means comes to.¹ In the first part of this article, I explore

* I am indebted to many people for helpful comments on earlier drafts of this essay: Kyla Ebels Duggan, Michael Joel Kessler, Niko Kolodny, Christine Korsgaard, T. M. Scanlon, and the members of the Harvard Workshop in Moral and Political Philosophy. I am also grateful for questions from audiences at these conferences: APA Central Division, the Northwestern University Society for Ethical Theory and Political Philosophy, the UK Kant Society Graduate Conference, the Graduate Philosophy Conference at the University of Illinois at Urbana-Champaign, and the Syracuse University Graduate Student Conference in Philosophy. Finally, I am grateful for questions from audiences at Boston University, Columbia University, New York University, University of Notre Dame, Stanford University, Syracuse University, Tufts University, the University of California at Berkeley, the University of California at Davis, the University of California at San Diego, and the University of Chicago.

1. Throughout this essay, I will be concerned with a fundamental category of wrongdoing that Kant identified. The idea of 'treating someone merely as a means', however, has taken on a life of its own. Insofar as this idea is now present in commonsense morality, it has come to represent a more specific kind of wrong, that is, that of 'using someone'. So, I do not claim that the category of wrongdoing that I will explicate on Kant's behalf is now most naturally described as treating someone merely as a means. For an apt description of the more specific kind of wrong, see T. M. Scanlon, "Means and Ends," in *Moral Dimensions: Permissibility, Meaning and Blame* (Cambridge, MA: Belknap, 2008).

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one prominent approach to explicating this idea, the “possible consent interpretation.” This approach, advanced by Christine Korsgaard and Onora O’Neill, suggests that one treats another merely as a means if one treats the other in a way the other could not possibly consent to being treated. I identify three problems with this view. First, this view faces difficulties as an interpretation of Kant. Second, this view involves some noteworthy counterintuitive implications. Third, once the motivation behind the possible consent interpretation has been made clear, it actually supports a different interpretation, one which has counterintuitive implications of its own. I conclude, therefore, that the possible consent interpretation is fundamentally flawed.

In the second part of this article, I develop a new interpretation of the Formula of Humanity. This interpretation suggests an important connection between the Formula of Humanity and Kant’s political philosophy: the content of many of our moral duties depends on the results of political philosophy and, indeed, on the results of actual political decision making. After developing this interpretation, I explain how it avoids the problems that plagued the possible consent interpretation. Finally, I briefly note the independent interest of both the political theory sketched in this essay and the relationship between moral and political philosophy that it entails.²

I. THE POSSIBLE CONSENT INTERPRETATION

A. *The Interpretation*

Kant’s Formula of Humanity version of the Categorical Imperative reads: “So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means.”³ By ‘humanity’, Kant here means rational nature, that is, the capacity to set and pursue ends.⁴ The prohibition on treating someone merely as a means thus constrains how one interacts with this capacity.

Some of Kant’s interpreters, Allen Wood, for example, suggest that applying the Formula of Humanity in moral deliberation always requires combining it with substantive claims about what constitutes

2. I abbreviate *Groundwork of the Metaphysics of Morals* as *G*, *The Metaphysics of Morals* as *MM*, *Critique of Practical Reason* as *C2*, “On the common saying: That may be correct in theory, but it is of no use in practice,” as *TP*, and “On a supposed right to lie from philanthropy” as *LP*. For all citations of Kant’s work, I give the page numbers of the relevant volumes of *Kants gesammelte Schriften* (published by the Preussische Akademie der Wissenschaften, Berlin), which appear in the margins of most translations. All quotations from Kant’s work are taken from Immanuel Kant, *Practical Philosophy*, ed. and trans. Mary J. Gregor (Cambridge: Cambridge University Press, 1996).

3. *G* 4:429.

4. See *G* 4:437 and *MM* 6:392. For a helpful discussion, see Christine M. Korsgaard, *Creating the Kingdom of Ends* (Cambridge: Cambridge University Press, 1996), 110–14.

proper respect for rational nature. There is no straightforward criterion for treating someone merely as a means that falls out of the Formula of Humanity itself.⁵ Others, like O'Neill and Korsgaard, are more optimistic about the prospects for such a criterion.⁶ Although O'Neill's and Korsgaard's views are very similar, I will focus on Korsgaard's view, since it is a bit more developed.

Drawing on Kant's treatment of the case of the lying promisor, Korsgaard suggests that "you treat someone as a mere means whenever you treat him in a way to which he could not possibly consent."⁷ The lying promisor purportedly does just this. If I ask you for a loan with no intention of repaying it, then when you hand over the money, you have not agreed to participate in bringing about the realization of my true end, namely, the permanent acquisition of your money. You think my end is something entirely different. So, you cannot agree to further my true end.

B. Assessing the Interpretation

There is something very intuitive about this characterization of treating someone merely as a means. If your actions are put in service of an end that it is impossible for you to agree to further, there seems to be a clear sense in which your agency has been co-opted. But when we consider the concrete implications of the possible consent criterion, problems begin to emerge. Korsgaard claims: "Kant's criterion most obviously rules out actions which depend on force, coercion or deception for their nature, for it is of the essence of such actions that they make it impossible for their victims to consent. If I am forced, I have no chance to consent. If I am deceived, I don't know what I am consenting to. If I am coerced, my consent itself is forced by means I would reject."⁸

The complete condemnation of these act types generates an interpretative and a substantive problem for the possible consent interpretation. The interpretive problem is that the complete condemnation of force is at odds with Kant's political philosophy, where he acknowledges that the use of force is sometimes permitted and perhaps even sometimes obligatory. This suggests that the possible con-

5. Allen Wood, *Kant's Ethical Thought* (Cambridge: Cambridge University Press, 1999), 150–55. Wood rejects the Korsgaardian interpretation I am about to consider on 153. John Rawls also seems skeptical of placing too much emphasis on consent in interpreting the Formula of Humanity. See John Rawls, *Lectures on the History of Moral Philosophy*, ed. Barbara Herman (Cambridge, MA: Harvard University Press, 2000), 190–91.

6. See Korsgaard, *Creating the Kingdom of Ends*, 106–32, 137–40, 295–96; and Onora O'Neill, "Between Consenting Adults," in *Constructions of Reason* (Cambridge: Cambridge University Press, 1989), 105–25.

7. Korsgaard, *Creating the Kingdom of Ends*, 295.

8. *Ibid.*

sent interpretation misrepresents Kant's own position. The substantive problem is that, intuitively, the use of force, coercion, and deception is not always impermissible. This suggests that the possible consent interpretation saddles Kant with an implausible view. I will begin by fleshing out the interpretive problem and then I will follow with some brief comments about the substantive problem.

The absolute condemnation of force generates an interpretive problem for the possible consent criterion, because Kant acknowledges at least four cases in which the use of force is permitted and, in the latter three cases, perhaps even obligatory. First, I may use force to defend myself and the objects in my possession in the state of nature if the establishment of a civil condition is not possible.⁹ Second, I may use force to compel others to leave the state of nature and enter the civil condition.¹⁰ Third, agents of the state may use force to enforce its laws, as when the police interfere in the commission of crimes.¹¹ Finally, agents of the state may use force to punish criminals.¹²

It is important not to be distracted by the role of the state in these cases (direct in the third and fourth cases, indirect in the second case, and, perhaps, still lurking somewhere in the first case). Since Kant is often included in the social contract tradition, it might be tempting to think that, insofar as the state is involved, Kant is committed to thinking that one can consent to the treatment one receives. At least with respect to the fourth category, Kant explicitly denies this—one cannot consent to being punished.¹³ Moreover, as I will argue later when I delve into Kant's political philosophy in more detail, despite the contractual language Kant employs in his work on political philosophy, the idea of consent is not doing any substantial justificatory work in his view. I will not attempt to work through these issues in this section, though. Even if one could defend the claim that one can consent to the treatment one receives from the state, that claim would not actually help the possible consent interpretation.

In order to defend the possible consent interpretation from the

9. Kant writes: "If a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a *hindering of a hindrance to freedom*) is consistent with freedom in accordance with universal law" (*MM* 6:231). Kant uses the term 'coercion' (*der Zwang*) to include physical force. Kant indicates that interfering with another's body is inconsistent with freedom in accordance with universal laws (250). So, one is permitted to stop others from interfering with one's body. Kant also indicates that one may defend one's provisional property (265).

10. *Ibid.*, 312.

11. Kant does not say much about enforcement as opposed to punishment. But he acknowledges the need for a police force to provide for, among other things, security (*ibid.*, 325).

12. *Ibid.*, 331–37.

13. *Ibid.*, 335.

objection that Kant allows for cases of permissible force, one must deny either that in these cases the use of force really is permissible or that in these cases the use of force makes consent impossible. The first denial would involve abandoning all of Kant's political philosophy and result in an extraordinarily implausible view. The second denial seems clearly preferable. But this denial is a nonstarter given the conception of the possibility of consent we have been working with. The very nature of force, coercion and deception are supposed to make consent impossible because, at the time of the interaction, one has no real opportunity to consent. So, we would need another conception of when consent is possible in order to make the suggestion work.

There are two natural alternative conceptions of possible consent. First, one might say that although one cannot consent to being the subject of, say, force at the time one is forced, one can consent to it prior to the interaction.¹⁴ So, I might say to you, for example, "If it ever seems like I am going to hurt myself or others, restrain me." But, at most, prior consent seems like it does work only when consent is actual.¹⁵ If the mere possibility of this kind of consent is all that is needed to make uses of force permissible, the possible consent criterion will no longer condemn force at all because it is possible to allow any future use of force for any reason. Hence, no use of force you undertake would involve negating the possibility of my prior consent.

Perhaps, then, we might want to consider the possibility of rational consent. Here the idea is that one treats another merely as a means if one treats the other in a way she could not rationally consent to being treated. This interpretation moves quite a distance from the

14. Perhaps one might also wonder about a future-oriented consent principle. Such a principle would consider whether a person might in the future consent to a past action. It seems clear that interpreting the possibility of consent in terms of what a person might possibly consent to in the future would render the prohibition on treating others merely as a means articulated by the possible consent interpretation far too weak. For a helpful discussion of a future-oriented consent principle, see Gerald Dworkin, "Paternalism," *Monist* 56 (1972): 64–84. For problems with a future-oriented consent principle, see John D. Hodson, "The Principle of Paternalism," *American Philosophical Quarterly* 14 (1977): 61–69.

15. Actual prior consent can indeed change the permissions that others have. If I tell you that you may borrow my car, doing so is now permissible and would not have been otherwise (other things being equal). Notice, though, that an 'actual prior consent' criterion for all interactions would not work. How could I even begin interacting with you if I needed to get your permission to do so first? And even if we somehow get around that conceptual puzzle, an actual prior consent criterion still does not seem to give the right verdict on all uses of force. Self-defense and defense of others seems permissible even if the aggressor has never said, "If it ever seems like I am going to hurt myself or others, restrain me." On the plausibility of using tacit consent to resolve these problems, see Sec. I.C.

original possible consent interpretation. Here much of the work is done by the idea of rationality rather than by the idea of consent. Indeed, as we will see below, on the most plausible interpretation of the possible rational consent criterion, the idea of consent ceases to do any justificatory work at all.

Before examining this interpretation of the possible rational consent criterion, it is important to note a structural problem with employing the idea of rational consent in explicating the Formula of Humanity: this makes the Formula of Humanity at least partially circular. The Formula of Humanity is a principle of practical reason. So, we need to know how it governs our actions before we can determine what we could rationally consent to. But on this view, we need to know what we could rationally consent to in order to interpret the second half of the Formula of Humanity.¹⁶ Thus, we end up stuck.

So, in order to make the possible rational consent interpretation of what it is to treat someone merely as a means coherent, we need to identify some other rational norm that could be used to give the idea of rational consent content.¹⁷ This would be difficult to do within the Kantian framework. Kant identifies two kinds of norms of practical rationality: categorical imperatives, which apply to us unconditionally, and hypothetical imperatives, which apply to us in virtue of having adopted a certain end. As we will see, neither of these kinds of norms can be used to give content to the idea of rational consent in a way that would enable that idea to contribute to the interpretation of the Formula of Humanity.

Kant emphasizes the claim that there is only one categorical imperative. While he gives at least three formulations of the Categorical Imperative, and the relationship between the various formulations is not completely clear, he claims that these “three ways of representing

16. Consider a concrete example. Ashley wants to know whether she would be treating Theodore merely as a means if she pushed him out of her way. On the possible rational consent interpretation, in order to answer this question, she must establish whether Theodore could rationally consent to the treatment. But consenting is itself an action and in order to determine whether Theodore could rationally consent, we need to know whether he could consent without treating either Ashley or himself merely as a means. If we use the possible rational consent interpretation to think about ways of treating oneself, the way to determine whether Theodore would be treating himself merely as a means is to determine whether Theodore could rationally consent to the treatment. And that is just what we were trying to determine in the first place. Thus we end up stuck. If we consider whether consenting would involve treating Ashley merely as a means, we need to consider whether Ashley could rationally consent to being given consent. But it seems that whether Ashley could rationally consent to being given consent by Theodore depends on whether he could rationally consent to her consenting to his giving consent. And so on. Hence we end up stuck again.

17. I am indebted to Patrick Smith for pressing me on this point.

the principle of morality are at bottom only so many formulae of the very same law, and any one of them of itself unites the other two in it."¹⁸ For this reason, as an interpretative matter it would be difficult to treat another formulation of the Categorical Imperative, for example, the Formula of Universal Law, as a rational norm that is independent of the Formula of Humanity in the way needed to evade the circularity objection above. Substantively, this strategy would face questions regarding how to justify privileging one of the formulations in this way.

Consider, instead, the suggestion that we appeal to hypothetical imperatives in order to fill out the idea of rational consent. We must specify some set of ends in order for hypothetical imperatives to yield any results regarding what it would be rational for someone to do. If we consider the specific, contingent ends of any given person, this way of filling out the idea of rational consent will have problematic implications. It might not be possible for a murderer to rationally consent to being restrained given her particular set of ends. Yet it seems permissible to restrain her.

Kant attributes a special status to the end of happiness as an end that we all naturally pursue.¹⁹ So perhaps the advocate of the possible rational consent criterion might suggest explicating the rationality in rational consent in terms of the end of happiness rather than the merely contingent ends of agents. The trouble with this suggestion is that Kant seems to have had a desire-fulfillment conception of happiness.²⁰ Privileging happiness so understood leads to the same problems for the possible rational consent criterion as focusing on the specific, contingent ends of a person. It might not be rationally possible for a murderer to consent to being restrained, given the goal of promoting her own happiness.²¹

18. *G* 4:436.

19. Kant's views on happiness are rather slippery. A full discussion of those views goes beyond the scope of this article. Here it suffices to note that the problems I identify above for using the end of happiness to explicate rational consent would hold even if the end of happiness were a rationally required end rather than simply an end we all naturally have.

20. *C2* 5:124.

21. Perhaps instead of considering the end of happiness directly, we should take a step back from the specific, contingent ends of each person and consider instead the resources a person might need to achieve any of her ends. Perhaps there is some bundle of generic resources that each person is rationally committed to obtaining as the means to the pursuit of her happiness. If so, then, perhaps no agent could rationally consent to being deprived of these resources. So, on this interpretation of possible rational consent, perhaps one treats another merely as a means if one deprives the other of the bundle of generic resources she is rationally committed to obtaining as the means to her happiness.

Is there some bundle of generic resources that each person is rationally committed to obtaining as the means to the pursuit of her happiness? The plausibility of thinking that

Perhaps instead we should consider the ends or commitments that flow from the rational commitment to one's own autonomy.²²

there might be may stem from the loosely Rawlsian character of the suggestion. And so, in order to appreciate the difficulty this suggestion faces, it may be helpful to situate Rawls's project in this discussion. Rawls argues that, in the original position, rational persons concerned to advance their own interests would agree to his two principles of justice, principles that regulate the basic structure of society and thereby specify bundles of primary social goods to which each person has a claim. Although these parties are concerned to advance their own interests, they are not concerned to ensure that they obtain some specific bundle of primary goods. To the extent that Rawls's project suggests a rational commitment to obtaining some specific bundle of primary goods, this is an implication of the reasoning in the original position rather than an input into that reasoning. That is, the rational commitment to obtaining some bundle of primary goods stems from reasoning about how it is rational to structure our social interactions, not vice versa.

The above suggestion asks that we understand each person as having a rational commitment to obtaining some bundle of generic resources that could be used to ground the moral entitlement not to be deprived of those resources. The difficulty the suggestion faces is to argue for a specification of the bundle of resources one is supposed to be rationally committed to obtaining in the absence of some reasoning about how one's interest in the resources is to be reconciled with the interests of others. Here I am not attempting to argue that such a specification could not be given. I simply note that some such specification must be defended in order to make the above suggestion work.

There may be resources in Kant's view that one might draw on if one were pursuing the development of such a specification. See, for example, Rawls's discussion of Kant's references to 'true needs' (John Rawls, "Themes in Kant's Moral Philosophy," *Collected Papers* [Cambridge, MA: Harvard University Press, 1999], 497–528). Kant's references to true needs are rather cryptic and I am dubious that this approach will yield plausible results. Moreover, as I will argue in Sec. II.C, I think that Kant focuses on developing a different approach. Kant recognizes that people have a rational interest in the way that their interactions with other agents affect their access to the means to their ends. But he uses this to argue directly for norms governing our interactions with others rather than proceeding via reflections on what resources we could not rationally consent to being deprived of.

Setting aside the original suggestion, the discussion above might nonetheless lead one to wonder whether Rawls gives us an example of some other way in which the idea of rational consent can be used to ground foundational moral claims, i.e. the claims of justice. After all, the original position depicts rational deliberators as agreeing to the principles of justice. I think that it is nonetheless not obvious that the idea of rational consent plays a fundamental justificatory role in Rawls's account. The original position is a 'device of representation' showing us what follows from the idea of persons as free and equal and society and as a fair system of cooperation (John Rawls, *Political Liberalism* [New York: Columbia University Press, 2005], 24–27). But considering this matter in detail goes far beyond the scope of this paper. My claim here is that Kant's view is not best understood as making a foundational appeal to the idea of rational consent. As I go on to argue in Sec. II.D, to the extent that Kant invokes the idea of rational consent, this is best understood as a heuristic device that enables us to more vividly appreciate principles that are grounded independently of this idea. I am indebted to an anonymous reviewer from *Ethics* for prompting me to consider these issues.

22. I am indebted to an anonymous reviewer from *Ethics* for prompting me to consider this possibility.

Notice, however, that for Kant autonomy consists in following the Categorical Imperative. So, the rationally necessary ends and commitments of autonomous agents will be implications of the proper interpretation of the Categorical Imperative rather than inputs that can be used to interpret the Categorical Imperative. Thus, in identifying the implications of the Formula of Humanity properly interpreted, we may identify rationally necessary ends and commitments of autonomous agents. And it may make sense to interpret the Formula of Humanity as claiming that one treats another merely as a means if she treats the other in a way that is inconsistent with the pursuit of these ends or the upholding of these commitments. Nothing is added by claiming instead that one treats another merely as a means if one treats the other in a way that the other could not rationally consent to being treated given these ends/commitments.²³

So, given the resources of the Kantian view, there does not seem to be a way to explicate the idea of rational consent that would allow that concept to play a role in the interpretation of the Formula of Humanity.²⁴ Recall that the problem with the original possible consent interpretation was that it could not allow that one can sometimes consent to the use of force, a claim that is needed to make sense of Kant's political philosophy. We have therefore considered two alternative conceptions of the idea of possible consent. Neither the possible prior consent view nor the possible rational consent view can help with this problem. This leaves the possible consent interpretation with no way to make sense of Kant's political philosophy and thus undermines the plausibility of this interpretation.

Setting aside interpretive issues, the substantive problem with the possible consent interpretation is that the use of force, coercion, and deception is not always impermissible. Consider the infamous case of the murderer at the door. Someone has come looking for a friend who is in your home in order to murder him. You know what the would-be murderer is up to and you must decide whether or not to lie to him. Unlike his more moderate view on force, Kant's view on deception seems to be just as extreme as it has been made out to be.

23. In Sec. II.D, I make clear the way in which the idea of rational consent can at best be used as a heuristic device in expressing the implications of the Formula of Humanity on my proposed interpretation.

24. I have only argued against using the idea of rational consent in the formulation of foundational moral principles within the Kantian framework. For a general argument against the use of this idea in the formulation of foundational moral principles, see Japa Pallikkathayil, "Your Money or Your Life: Coercion in Personal and Political Contexts," (PhD diss., Harvard University, 2008), 96–112.

Kant claims that you must not lie, not even to the murderer at the door.²⁵ This, however, seems like the wrong conclusion.

Korsgaard attempts a complicated solution to this latter problem which involves a substantial revision of Kant's view.²⁶ I do not believe that this solution is successful. But, I will set aside that debate here.²⁷ What is important for our purposes is just to note that the possible consent interpretation involves serious drawbacks both as an interpretation of Kant and as a view on how we ought to treat one another. Before pursuing this view further, then, it is worth stepping back to consider what was initially plausible about it and whether that initial plausibility can be better captured in some other way. So, I will turn now to an examination of the motivation behind the possible consent interpretation.

C. An Ideal for Relationships

Korsgaard suggests that the possible consent interpretation of the Formula of Humanity articulates an attractive ideal for human relationships. We must reason together with anyone we want to play a role in our plans. In other words, our relationships should be cooperative rather than manipulative. I am going to argue, however, that this emphasis on cooperation suggests a different interpretation of the Formula of Humanity, one which has implausible implications of its own.

25. It is worth noting, however, that Kant frames his discussion of the murderer at the door in terms of political philosophy, rather than moral philosophy (*LP* 8:423–30). So, it is not clear that it is appropriate to understand his reasoning regarding that case directly through the lens of the Formula of Humanity. See Sec. II.E for a further discussion of this case.

26. Korsgaard, *Creating the Kingdom of Ends*, 133–58.

27. Here is a very brief outline of Korsgaard's view and my worries about it. Korsgaard's strategy essentially involves distinguishing between ideal and nonideal theory. She treats Kant's various formulations of the Categorical Imperative as having different statuses. The Formula of Universal Law governs all of our actions. The Formula of Humanity, however, articulates an ideal that it is sometimes impossible to realize. As we will see in Sec. I.C, Korsgaard maintains that this ideal is one of cooperation. You cannot cooperate with the murderer at the door because the murderer refuses to cooperate with you. This is thus a nonideal condition. Under nonideal conditions, we may be permitted and in fact obligated to act in ways that the Formula of Humanity forbids, for example, to lie to the murderer at the door. We nonetheless continue to be guided by the Formula of Humanity in that we must still regard cooperation as the ideal and work toward its restoration.

As I will argue in Sec. I.C, I do not think that we should read the ideal of cooperation into the Formula of Humanity. Beyond that, I worry that Korsgaard's strategy undermines the status of the Formula of Humanity as a principle of practical reason—it sometimes tells us to do the wrong thing and yet remains an authority for us in some more abstract sense. I find it difficult to understand how a principle of practical reason could operate in this way.

It is supposed to be important that our relationships be cooperative because each person should be the determiner of how his or her own agency is used. As Korsgaard puts it:

On Kant's view, the will is a kind of causality (*G* 446). A person, an end in itself, is a free cause, which is to say a first cause. By contrast a thing, a means, is a merely mediate cause, a link in the chain. A first cause is, obviously, the initiator of a causal chain, hence a real determiner of what will happen. The idea of deciding for yourself whether you will contribute to a given end can be represented as a decision whether to initiate that causal chain which constitutes your contribution. Any action which prevents or diverts you from making this initiating decision is one that treats you as a mediate rather than a first cause; hence as a mere means, a thing, a tool.²⁸

If you are a first cause, you decide for yourself whether you will contribute to a particular end. This seems to suggest that I treat you merely as a means unless you are aware that I am using you and have the option of refusing. This suggests a criterion that is a bit stronger than what we have had in mind. Force, coercion, and deception all supposedly require making consent impossible in order to be successful—the deceiver can successfully deceive only if the other party is unaware of what is going on and hence cannot consent. But now it seems that the reason for condemning such actions applies equally to cases in which consent is not, strictly speaking, impossible.

An example will make this clear. Maggie takes a stranger's picture as he is walking down the street in order to use that picture in a collage for a school project. Here she is using his action (walking down the street) to further her end (creating an image for her project). She makes no attempt to hide what she is doing and does nothing to prevent the stranger from telling her that it is okay for her to use the picture. But she neither asks the stranger's permission nor would she desist if he asked her not to use his image. (It is the perfect picture for her purposes.) Now, there is a sense in which Maggie has done nothing to make consent impossible. The stranger could inquire about her activities and respond very positively. Maggie, however, has made consent irrelevant. She is going to proceed whether he likes it or not. So, the stranger is not in control of whether his actions will further her ends. If he does not object, he is simply lucky that he happens to endorse the end that he is being used to further. But his endorsement in no way affects what will happen. Hence he is being treated simply as a mediate cause. If he objects, his attempt to direct

28. Korsgaard, *Creating the Kingdom of Ends*, 140–41.

his own contribution to what will happen is thwarted and he is again treated simply as a mediate cause.

So, when we consider the ideal that is motivating the possible consent criterion, we see that something a bit stronger than the possible consent criterion is implied. Consent must be not only possible but meaningful. That is, in order to avoid treating someone merely as a means, that person must be made aware that she is being used and have the option of refusing. Let us call the norm according to which consent must not only be possible but meaningful the 'meaningful consent criterion'.

It might perhaps seem that the meaningful consent criterion suggests the right result—that what Maggie is doing is objectionable, and it is objectionable precisely because of the way she is using the stranger. But regardless of what one says about this case, it is clear that one does not always wrong others by not giving them a veto over how one uses their actions. Suppose that you are trying to decide whether it is cold enough outside to wear a coat. You look outside your window to see whether people on the street are wearing coats. Here you use their actions (walking around with or without a coat) to further your end (determining what to wear). In this case, just as with Maggie, you need not do anything that prevents others from seeing what you are up to. Hence, some passerby might notice that you are looking out the window at the people on the street and attempt to signal you to stop. Unlike with Maggie's stranger, though, it seems much less intuitive to think that the passerby's wishes must be decisive. It seems as though one may look out one's window at the activities on the street even if some particular person on the street objects.

Both looking out the window and taking a picture of someone on the street seem to be activities that are governed by privacy norms. At least in contemporary American society, the latter seems more like a violation of privacy than the former. Could a defender of the meaningful consent criterion make use of this consideration to limit the applicability of the criterion in the window case? It seems not. One would need to show that the passerby is somehow consenting to participate in your plans despite his apparent objection—otherwise he is not being treated as a first cause but rather simply as a mediate cause.

At this point, one might suggest that the passerby tacitly consents to being observed. Although this suggestion is very natural, it does not work in the end. I take it that the talk of tacit consent is meant to signify that, just by acting in a certain way, one changes the permissions others have whether or not one wants those permissions to change and would refuse to endorse the change if asked. So, by walking down the street, a person makes it permissible for others to watch

him, whether or not that is something he would rather not have happen. On this suggestion, in describing this situation we can say that he tacitly consents to being observed.

My worry about this suggestion is about how we establish when it is appropriate to attribute tacit consent. Notice that having expectations about the way others are likely to act is not sufficient to ground the attribution of tacit consent. Suppose I live in a high crime area. I know that if I leave my bicycle chained to the bike rack outside my apartment, it is quite likely that it will be stolen. But this does not mean that I have tacitly consented to its theft. What I am doing is imprudent given what I know about what others are likely to do, but it does not change what others are entitled to do. So, if tacit consent were going to do any work, it would have to involve more than merely acting in light of expectations about how others will respond.

Attributing tacit consent makes sense only if there are justified conventions or practices that support norms specifying when certain actions change others' permissions. But now all the normative work is being done by these conventions and the norms they involve. So, we need to investigate when such conventions are justified. If we accept Korsgaard's account of the motivation behind the Formula of Humanity, how could there be justified conventions that allow us to treat one another in ways that bypass meaningful consent? Perhaps these conventions could be justified if the conventions themselves were subject to the meaningful consent of those who would be governed by them. But that is not how the conventions governing privacy work. People do not have the opportunity to opt out of these conventions if they do not want others to treat them in accordance with the norms specified by these conventions. So, although it is a very natural suggestion, I do not think that talk of tacit consent can help the meaningful consent criterion.

This suggests a serious problem with the meaningful consent criterion. The very idea of a public/private distinction rests on the thought that one is not always required to be sensitive to others' wishes about how and when they are observed. The meaningful consent criterion is committed to denying this—sensitivity is always required because our relationships should always be cooperative. There is much to be said about why we should affirm the need for a public/private distinction, which I will not be able to discuss here. Here I shall simply note that this distinction is a significant aspect of our commonsense view of the moral landscape. Hence denying it makes the ideal that motivates both the possible consent criterion and the meaningful consent criterion less plausible.

Why, then, did the emphasis on cooperative relationships seem attractive as an ideal? When cooperative relationships are contrasted

with manipulative ones, the former clearly seem better. But what we have just seen is that relationships can fail to be cooperative without being manipulative. When you observe people through your window, you are neither working together with them nor intervening in their activities to get them to do what you want. Instead, you are simply making use of what they are already doing. It is far from obvious that this way of interacting with another is always inappropriate. Indeed, the discussion of the public/private distinction above gives us reason to think that it is not. The emphasis on cooperative relationships thus seems plausible only when we think that the only alternative to a cooperative relationship is a manipulative one.

To summarize, then, the ideal that motivates the possible consent criterion actually implies the stronger meaningful consent criterion. Once we appreciate the full implications of the ideal, it seems much less plausible. It seems, then, that the possible consent criterion is an inadequate reflection of an implausible ideal.

II. AN ALTERNATIVE APPROACH

A. *An Outline*

In light of the deep problems with the possible consent interpretation and the motivation behind it, we should investigate other interpretations. Let me begin by outlining my approach to this project. Kant suggests that the sense in which another can be treated merely as a means is clearest in cases in which their freedom or property is assaulted. On the basis of this observation, Kant draws a close connection between the transgression of rights and treating another merely as a means.²⁹ These remarks indicate that when interpreting the Formula of Humanity, Kant's political philosophy should not be an afterthought but instead a starting place.

This is both a point about methodology and a point about the justificatory relationship between Kant's moral and political philosophies. The methodological point is simply that it makes sense to focus on the most vivid cases of treating someone merely as a means when attempting to articulate what treating someone merely as a means is. Kant's claim that rights violations are particularly vivid, then, gives us a good reason to focus on those cases.

29. Kant claims that when we reflect on the cases of assaults on freedom and property "it is obvious that he who transgresses the rights of human beings intends to make use of the person of others merely as a means" (*G* 4:430). I suggest that this passage pushes us in the direction of thinking that Kant viewed rights violations as paradigmatic cases of treating someone merely as a means. As I will argue, though, this view is still rather inchoate in the *Groundwork*, and the motivation behind it only becomes clear in the *Metaphysics of Morals*.

The justificatory suggestion is more complicated. Let me briefly outline what this involves before describing in more detail the issues I will be dealing with in the remainder of this essay. I suggest that we should think about the relationship between Kant's moral and political philosophies as having three stages: beginning in the moral, moving through the political and then returning to the moral. At the first stage, we begin with the Formula of Humanity.³⁰ The Formula of Humanity provides the justification for the foundational elements of Kant's political philosophy. The requirement of equal external freedom on which Kant relies is, I think, ultimately grounded in the value of humanity. At the second stage, when we use these foundational elements to do political philosophy, we discover something that I think is quite surprising. Kant argues that in the absence of political institutions our rights to our bodies and property are merely provisional. We need to establish political institutions in order to make these rights conclusive. In this way, a detour through political philosophy is required to establish basic elements of what is involved in treating someone not merely as a means. With this account in place, we can return, at the third stage, to moral philosophy in order to specify many parts of moral philosophy that are otherwise indeterminate: for example, what beneficence involves in light of what we owe others merely as a matter of justice.

So, that is the overall picture I am working with. Treating the second and third stages in depth would amount to giving an account of all of moral and political philosophy. That is, of course, beyond what I can accomplish in the remainder of this essay. Instead, my plan is to discuss the first two stages in some detail. I will then briefly discuss the relationship between the second and third stages, so as to make it clear why I think that we need the results of political philosophy and, indeed, the results of actual political decision making in

30. We could begin with any version of the Categorical Imperative and move through the same three stages. I take the Formula of Humanity as my starting point because it seems to me to connect in the most intuitive way with the claims in political philosophy that I am arguing are justified via the Categorical Imperative. Notice, though, that the Formula of Universal Law also has a natural correlate in the Doctrine of Right, that is, the Universal Principle of Right: "Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law" (*MM* 6: 230). And notice that Kant's representation of the Categorical Imperative in terms of a Kingdom of Ends in the *Groundwork* already at least evokes the idea of a political society. So, the focus on the Formula of Humanity in what follows is not meant to suggest that the Formula of Humanity has a privileged status among the versions of the Categorical Imperative or that the other versions are less significant. Thanks to an anonymous reviewer from *Ethics* for prompting me to consider these connections.

order to provide the foundation from which our other duties can be explicated.

B. Background

The possible consent interpretation focuses heavily on Kant's discussion of the Formula of Humanity in the *Groundwork*. My interpretation, however, focuses on the description of our duties that Kant provides in the later work *The Metaphysics of Morals*, which is divided into "The Metaphysical First Principles of the Doctrine of Right" and "The Metaphysical First Principles of the Doctrine of Virtue." This division tracks Kant's distinction between what he calls duties of right and duties of virtue. Kant draws the distinction between these kinds of duties in a number of ways. We need not sort through these distinctions here. What is important for our purposes is that both kinds of duties are genuine moral duties. While the duties of virtue are straightforwardly moral duties, duties of right are, as I understand Kant, moral duties that are established through political philosophy.³¹ Unless we take seriously the claim that duties of right are genuine moral duties, the *Metaphysics of Morals's* account of our duties is seriously incomplete. A brief overview of the duties to others described in the Doctrine of Virtue will make this clear.

Kant divides the duties of virtue that we owe to others into what he calls duties of love and duties of respect.³² Duties of love are duties to treat humanity as an end in itself, and duties of respect are duties to avoid treating humanity merely as a means. Here the idea of treating humanity as an end itself seems to be cashed out in terms of treating the ends that others set as reason giving. This suggestion is, I think, confirmed by the particular duties of love that Kant describes: the duties of beneficence, gratitude, and sympathy.³³

With this conception of treating humanity as an end in itself in mind, we can turn to what is involved in treating humanity merely as a means. Under the heading of duties of respect, Kant only discusses duties against arrogance, defamation, and ridicule. Essentially, these are duties not to pose as morally superior to others by expressing that

31. *Ibid.*, 218–20.

32. *Ibid.*, 450.

33. When one is beneficent, one makes the happiness of others one's own end by taking their ends as one's own (*ibid.*, 452–54). When one is grateful, one recognizes another's beneficence (454–56). In that way, one takes seriously the fact that the other has taken up one's own happiness as an end. Finally, when one sympathizes with others, one takes an active interest in their joy or pain (456–57). In this way, one regards the success or failure of another in achieving her ends as a matter of practical significance. Hence all of the duties of love are tracking the status of others' ends as reason giving in one way or another.

another agent and/or her ends have lesser value. Given that these are the only duties that Kant describes under the heading of duties of respect, we are now faced with what might seem to be a puzzling set of omissions. Where are the familiar duties against force, theft, coercion, deception, and promise breaking? All of the duties to others that one might have regarded as most basic seem to have been left out of the account of what we owe others found in the Doctrine of Virtue.

These omissions, however, become at least somewhat less puzzling when we consider the duties Kant discusses in the Doctrine of Right and the justificatory strategy he uses to establish those duties. In the Doctrine of Right, Kant explicates and argues for a conception of our duties to others with respect to their bodies and property. Kant only briefly engages with the duties to keep promises and not to deceive others in the Doctrine of Right. But I think that Kant is best understood as holding that the existence and contours of these duties also depend in crucial ways on the results of political philosophy. So, we can see the motivation behind what I will call the “Three-Stage Account” beginning to take shape: a full understanding of Kant’s moral philosophy involves moving through the political.

As I develop the Three-Stage Account, I am going to offer a reconstruction of Kant’s political philosophy that resolves problems with Kant’s own arguments rather than giving a close reading of the Doctrine of Right. This reconstruction is faithful to the starting points and major conclusions of the Doctrine of Right, so it will suffice to show how the view developed in this work could play the justificatory role I am suggesting in my overall interpretation. With this in mind, let us turn to the first stage of the Three-Stage Account.

C. The First Stage

As I mentioned above, I claim that the foundational elements of Kant’s political philosophy are justified by the Formula of Humanity. In order to see how this is so, we need to spend a little more time considering what Kant has in mind when he refers to ‘humanity’. As we have already seen, by ‘humanity’, Kant means our capacity to set and pursue ends, that is, our capacity to act. Action is free when it is self-directed. Kant uses the distinction between ‘internal’ and ‘external’ freedom to capture two respects in which action can be self-directed. On the one hand, if your actions are simply the product of the push and pull of inclinations operating within you, your actions are directed by these forces rather than by you. Internal freedom consists in directing yourself rather than being directed by your inclinations. On the other hand, if your actions are simply the product

of other agents pushing you around, there is a different but equally real sense in which your actions are not self-directed. External freedom consists in directing yourself rather than being directed by other agents.

In his moral philosophy, one of the things that Kant is most concerned to argue is that internal freedom—that is, autonomy—is achieved through following the Categorical Imperative. In what follows, I am not concerned with that part of his project. We are simply going to take the Formula of Humanity as our starting point. The intuitive thought is that, if the value of humanity can be used to generate requirements on how one affects the external freedom of others, it will make sense to regard the violation of these requirements as treating someone merely as a means: violations will limit the ability of others to engage in self-directed action and, in that sense, will involve directing others rather than allowing them to direct themselves. And this seems to be a way of treating someone as on a par with a mere tool.

So, what I need to show is how the value of humanity can be used to ground requirements on how one affects the external freedom of others. The argument has two steps. First, notice that we need the concept of a right in order to explicate the idea of external freedom. There is a sense in which, no matter what I do, I affect the options that you have. By occupying some particular place or another, I make it the case that you do not have unfettered access to that very spot. But it would be a bizarre conception of self-directed action that requires that there only be one self anywhere in existence. So, we need a way of understanding one's relationship to others such that their mere existence need not pose a threat to one's ability to engage in self-directed action. If we think of each person as having rights to control certain features of the world, then each person has a sphere of discretionary space, that is, a domain within which she is entitled to control what happens. Within this sphere, one's choices could be insulated from the choices of others, and in that sense one would be able to engage in self-directed action.

With this understanding of external freedom as consisting in the space for self-directed action secured by a bundle of rights, we can turn to the second step in the argument. Here the value of humanity, that is, of each person's capacity for self-directed action, justifies the foundational claim of Kant's political philosophy. That claim is that each person is entitled to an equal sphere of discretionary space in virtue of her capacity for self-directed action. That is, each person has an innate right to equal external freedom in virtue of her humanity.

D. The Second Stage

Having seen how the value of humanity can be used to ground a requirement of equal external freedom, we can move to the second stage of the account and consider the reconstruction of Kant's political philosophy. What we need is to determine which specific rights people have. That is, we need an account of what the contours of each person's discretionary sphere are.

The first step toward a specification of rights involves observing a fundamental feature of having a right. Kant claims that having a right necessarily involves the authority to limit the freedom of others in defense of that right. The argument for this claim proceeds as follows. First, we suppose that we may identify some action or another as violating a right. Now we can ask what responses to an attempt at violating this right are consistent with the equal external freedom of all, that is, with maintaining the integrity of the would-be violator's discretionary sphere. In attempting to violate another's right, the violator attempts to take control of a feature of the world that another is entitled to control. In other words, the violator leaves her discretionary sphere and encroaches on the discretionary sphere of another. If the victim acts to thwart the violator's action, this only involves limiting her freedom to do something she has no claim to be permitted to do. In other words, actions needed to thwart a rights violation only prevent the would-be violator from performing an action that is not in her discretionary sphere. Hence such defensive actions are consistent with the violator's equal external freedom.

Consider the matter more concretely. Suppose you try to grab an apple from me that I have the right to be holding. If I push you away, I thwart your action. But I am not doing so in a way that is inconsistent with the equal freedom of all because, *ex hypothesi*, you had no claim to be able to grab the apple from my hand. So, I have only prevented you from making a choice you had no claim to be able to make. For this reason, the idea of having a right for Kant involves not just having a moral claim against others acting in certain ways but also having the authorization to compel others to refrain from these actions.

Notice that this authorization extends only to actions needed to thwart a rights violation. If pushing you away would keep you from my apple, I am not entitled to cut off your hand.³⁴ Actions that go beyond what is needed to thwart a rights violation essentially involve dragging the wrongdoer into your discretionary sphere rather than

34. This discussion does not engage the potentially difficult question of how to specify which actions are necessary in the relevant sense. Unfortunately, I do not have the space to adequately address this issue here.

forcing her out.³⁵ Although the wrongdoer has left her own discretionary sphere in attempting to violate another's right, the wrongdoer remains a being with the innate right to freedom, that is, a being who is entitled to have a discretionary sphere. So, although the wrongdoer has no rights-based grounds for complaint at being prevented from engaging in a rights violation, she has grounds for complaint against any further limitations on her freedom.³⁶

Furthermore, notice that this authorization to defend one's rights directly extends only to the person whose rights are in jeopardy. Suppose my friend sees you lunging for my apple. As I have noted, you have no claim against being prevented from grabbing the apple, since it is outside of your discretionary sphere. But the apple is also outside of my friend's discretionary sphere. Since the apple is in my discretionary sphere, what happens to it is up to me. I might, perhaps, prefer to let you get away with grabbing it rather than to involve my friend in an altercation. If this is the case, my friend would also be encroaching on my discretionary space by intervening, because she would be determining the fate of the apple rather than leaving that up to me. So, the authorization to defend one's rights that follows from having a right only indirectly extends to other individuals through one's consent.³⁷

With these structural claims regarding the nature of rights in

35. Consider a vivid example. Suppose Darryl is trying to steal Diane's car. Diane ties him up and keeps him tied up indefinitely in order to amuse herself by hurling insults at him whenever she walks by. Darryl might truthfully say, "I'll leave your car alone, just let me go." If Diane ignores this plea, she treats Darryl as if he were something she is entitled to control and hence a component of her discretionary sphere, like a plant or a piece of furniture. But that is not what Darryl is. Darryl remains a being with an innate right to freedom. So, although Darryl cannot complain at being prevented from stealing the car, he can complain at being prevented from returning to his discretionary sphere. In this way, actions that go beyond what is needed to thwart a rights violation are inconsistent with the innate right to freedom of the wrongdoer. So, returning to the case of our conflict over the apple, if I cut off your hand, you can complain that the force I used was greater than the force needed to prevent your rights violation and, to that extent, I treated you as an object that I am entitled to control rather than as a being with the innate right to freedom.

36. This formulation suggests that individuals are not permitted to punish those who transgress their rights. Kant treats punishment in his discussion of public right rather than in his discussion of private right. This, I suggest, indicates that Kant regards the state as the only entity that can properly punish those who violate rights. An examination of the grounds on which the state might be held to have the right to punish is beyond the scope of this article.

37. Here I am arguing that individuals can have only a derivative right to enforce the rights of others. I will go on to argue that the state can have a right to enforce the rights of citizens that does not depend on citizens consenting to the state's enforcement of these rights.

mind, we can now turn to considering which specific substantive rights we should regard as comprising each person's discretionary sphere. Notice that we are able to act only through the use of our bodies. If one person physically restrains another person, the subjected person is to that extent unable to act at all. Control over one's own body is thus a precondition for engaging in self-directed action, and hence any specification of the content of discretionary spheres must include the right to that control.

Moreover, notice that your right to your own body gives you a derivative right to any objects that cannot be moved without moving you. So, for example, if you are holding an apple, I may not come along and pry it out of your hand. Doing so would interfere with your use of your body and hence violate your right to your body. This, however, does not amount to a property right to the apple. A property right involves a claim against others even when one is not in physical possession of the object.

Why think that it is possible to acquire property rights? This is a difficult question, and Kant's answer is, I think, not as transparent as one might hope. But before we turn to reconstructing Kant's argument for this claim, it is important to be clear that the kind of rights Kant means to pick out when he refers to property rights are in a sense weaker than the kind of rights that commonly might be thought of as property rights. The claim against others involved in a property right for Kant just is a claim against others with respect to an object even when one is not in physical possession of the object. This understanding leaves it open what specific entitlements a property right involves. It is, for example, consistent with this conception of a property right that the right be limited in duration—say, a property right that only lasts ten years—or safeguard only a circumscribed set of uses—say, a property right that does not include the right to destroy the object or transfer ownership.

With this conception of a property right in mind, we can return to the question of why we should understand people's discretionary spheres as involving a right to acquire property. Why not instead regard people's discretionary spheres as encompassing only their bodies and whatever they can physically possess? The answer, I think, involves considering the possible grounds for drawing the boundaries of people's discretionary spheres in one way rather than another. The only reason for limiting a person's right to engage in a certain kind of activity is the need to preserve the equal external freedom of others. Kant's claim is that there is no reason based on equal external freedom for limiting rights to objects to those objects that one physically possesses. In order to see why, notice that uses of objects that require or are consistent with continuous physical possession do not exhaust

the ways in which an object might be used. The purpose of establishing equal discretionary spheres does not in itself provide reason for privileging the protection of one kind of use over others. In other words, limiting possible rights against others with respect to objects only to objects in one's physical possession would be arbitrary, on a par with a limitation of rights against others with respect to objects only to objects that one physically possesses while, say, one is whistling. It seems, then, that we should conclude that the right to acquire property is a component of each person's discretionary sphere.

Nonetheless, and perhaps surprisingly, including this right in each person's bundle of rights does not actually suffice to make it possible to acquire property. Anyone trying to acquire a property right faces three distinct indeterminacy problems. First, the mere idea that it must be possible to acquire a property right to an object does not settle how such acquisition is to be accomplished. Kant favors something like a "first come, first served" principle. But even if we granted that such a principle is suggested by the right to acquire a property right, more is needed to specify the procedure by which property rights are acquired. At the very least, when acquiring a property right to an object, one must somehow signal to others that this is what one is doing. What kind of signaling is sufficient is an open question. Is it, for example, enough to put up a sign next to territory that one is trying to claim? Would putting up a fence do? In this way, the procedure whereby property rights are acquired is indeterminate. And a straightforward consequence of the requirement of equal external freedom is that no person can have a unilateral right to resolve this indeterminacy, because such a right would make that person's discretionary sphere larger than everyone else's.

Second, as I noted above, the idea of property that Kant is working with is simply the idea of a claim against others with respect to an object that one does not physically possess. This description alone leaves unspecified the contours of such a claim. It might be clear that your right to the daffodils you are growing on your land gives you a claim against me reaching over the fence and plucking them out of the ground. But consider, for example, whether I have a right to set up a fan on my territory that will blow over your daffodils or to build a wall that will block their access to the sunlight. In this way, what exactly your property right to your daffodils entails is indeterminate. And just as before, the requirement of equal external freedom implies that no one can have a unilateral right to resolve this indeterminacy.

Finally, no matter how detailed the rules regarding the acquisition of property rights and defining the contours of those rights are, the possibility of reasonable disagreement regarding the interpretation of those rules remains. So, for example, even if it were established

that a sign must be posted next to territory that has been claimed, people might disagree about how large the sign must be and about what language the message must be written in. And once again, no one can have a unilateral right to settle disputes over interpretation.

Perhaps even more surprisingly, the latter two kinds of indeterminacy problems also seem to affect one's right to one's body.³⁸ As in the second problem, the mere idea that one must be able to control one's body might pick out a core of protections but leaves the precise contours of one's right to one's body indeterminate. So, for example, would playing my music in your vicinity so loudly that it gives you a headache count as violating your right to your body? And, as in the third problem, no matter how precisely rules are specified, the possibility of reasonable disagreement remains. Finally, one's right to one's body is also subject to a derivative indeterminacy problem stemming from the indeterminacy surrounding our property rights. Suppose that you and I are in the midst of a border dispute and I come over to what you regard as your land. If you have a property right to the land, you have the authorization to use force to defend your property right. But whether or not you have a property right is just what is in dispute, and hence your right to use force and my right to my body are similarly a matter of disagreement.

The solution to all of these indeterminacy problems lies in the establishment of an impartial decision procedure for adjudicating disputes over rights. Only this kind of decision procedure will be able to resolve disputes in a way that preserves our equal external freedom because only this kind of procedure can represent both of our claims to external freedom without deferring to either of our individual judgments about our respective rights.

Notice that although social practices can do some work establishing expectations in the state of nature such that the state of nature need not be a complete mess, these social practices are not sufficient to establish conclusive rights. As Kant puts it: "It is true that the state of nature need not, just because it is natural, be a state of *injustice* (*iniustus*), of dealing with one another only in terms of the degree of force each has. But it would still be a state *devoid of justice* (*status iustitia vacuus*) in which when rights are *in dispute* (*ius controversum*), there would be no judge competent to render a verdict having rightful force."³⁹

The trouble with mere social practices is that, although they may

38. Since there is indeterminacy in our rights to our bodies, Kant's argument for the necessity of establishing the state could work even if his argument for the necessity of property rights does not work.

39. *MM* 6:312.

establish expectations that prevent constant fighting, they lack the impartiality needed to establish a rightful condition. There is no mechanism for challenging informal social norms as inconsistent with equal external freedom or for challenging the view another person has about the proper application of a norm in a given case. Only an impartial decision-making procedure for settling disputes over rights can address these problems in a way that is consistent with equal external freedom.

Just what kind of decision procedure would suffice is, I think, a difficult question and one that goes beyond the scope of this essay. Kant himself held the position that, although institutions embodying a decision procedure can be more or less just, any such institution will do to solve the indeterminacy problem. I disagree. I think that the requirement of impartiality and the need to maintain equal discretionary spheres place constraints on the kind of institutions that will count as solving the indeterminacy problem. But as I said, I will not be able to pursue this issue further here.⁴⁰ Notice, though, that even robust standards for the structure of the political institutions in a just state would not resolve all of the indeterminacy problems. Actual political decision making will be needed to settle at least the fine-grained details of our rights. It is, for example, unlikely that the disputes described above about rights to one's daffodils would be settled by the constitution of a just state.

Notice that resolving the indeterminacy problems only opens up the conceptual space needed to make self-directed action possible. Something more is needed for this possibility to be realized. Here is what I mean. The result of solving the indeterminacy problem is a way of carving up the world such that each person is entitled to an equal discretionary sphere. But the ability of each person to direct herself within her respective sphere still depends on the decision of others to respect the rights that constitute this sphere. For example, having a right to use land does not enable me to engage in self-

40. One promising direction for developing a more detailed account of the requirements for a just state lies in the suggestion that impartiality and equal spheres of discretionary space require equal rights to political participation. This suggestion requires much more elaboration and defense than I can provide here. But properly elaborated, this suggestion could support far-reaching criteria for a just state. Some kind of democratic structure along with constitutional protections might, for example, be needed to preserve equal rights to political participation.

It is worth noting that despite his insistence that all states are legitimate, Kant had quite a bit to say about what a just state should look like (*MM* 6:311–42). Some of Kant's claims are more plausible than others. Although he has views that pull in the opposite direction, his condemnation of hereditary rights seems to support the above suggestion about rights of political participation (*TP* 8:292, 297).

directed action if you trespass. What we need in order to establish equal external freedom is for each person's rights to be protected against transgression. Thus, in addition to the indeterminacy problems, we have a problem of enforcement.

The institutional apparatus that resolves the indeterminacy problem is both entitled and required to solve the enforcement problem.⁴¹ The argument for this claim is as follows. First, recall that having a right implies the authorization to compel others to respect that right. So, an institution with the right to determine the scope of the discretionary spheres of individuals has the right to compel individuals to respect that determination. Thus, in enforcing its right to determine the scope of discretionary spheres, the institution thereby also enforces the rights of individuals. Next, recall that the problem of enforcement is only solved when each person's rights are protected. Given the structural features of rights I discussed earlier, although each person has the right to enforce her own rights, she does not necessarily have the right to enforce others' rights. Only the aforementioned institution has the right to enforce everyone's rights because doing so amounts to enforcing its own right to determine the scope of rights. Hence only this institution could solve the enforcement problem. And since the resolution of this problem is needed for the establishment of equal external freedom, this institution is required to solve the enforcement problem.

What we end up with, then, in order to establish equal external freedom is an institution that defines the scope of our rights and enforces those rights. In other words, what we need is the establishment of the state. So, now we are in a position to appreciate the overall structure of Kant's political philosophy. Kant's argument is that the innate right to freedom requires that we have rights to our bodies and the possibility of acquiring property rights. But these rights are merely provisional in the state of nature. That is, although we can make claims on one another to abide by our respective rights, the definitive shape of these rights remains unsettled and the assurance that they will be respected is absent.

Provisional rights can therefore only be made conclusive through the establishment of the state. Hence each of us has the right to have our interactions with others governed by a state and, given the individual right of enforcement, each of us may therefore compel others to enter into a state.

41. Talking about an institution as a bearer of rights is shorthand for talking about the rights of individuals employing a decision-making procedure. The individuals are the bearers of the rights, but they bear these rights only insofar as they are acting in accordance with the procedure.

Although there is much more in Kant's political philosophy that is worth exploring, this much suffices to set up my conclusion regarding the relationship between Kant's moral and political philosophy. Before turning to that conclusion, however, I want to make good on a promissory note from Section I.A. There I indicated that, although Kant is regarded as working in the social contract tradition, I do not think that the idea of consent is playing a foundational role in his political philosophy. Now we are in a position to see this.

Moving from the state of nature into the state involves establishing an impartial decision procedure backed with the power to enforce its conclusions. And it is just at this point that one might think that the idea of consent is doing some work. Indeed Kant sometimes refers to the establishment of the state as taking place through an original contract.⁴² But in the account I just sketched, the legitimacy of the state stems directly from its ability to solve the indeterminacy problems and the enforcement problem. It needs no authorization from its citizens to do this. I suggest, then, that the idea of a contract is best understood not as a justificatory device but rather as a heuristic device that enables us to vividly appreciate the requirement of equal external freedom.

E. Moving from Stage Two to Stage Three

With the basic framework of Kant's political philosophy in mind, we can now turn to the transition from the second to the third stages in the account and thus consider the move from political philosophy back into moral philosophy. In this section, I am going to do three things. First, I will finally give the interpretation of idea of treating someone merely as a means that I think follows from the political theory I just sketched. Second, I will show how the contours of the duties of love I mentioned earlier depend on the results of political philosophy and actual political decision making. Third, I will show how Kant's brief comments on the duties against promise breaking and lying confirm my interpretation and might be developed into a fuller account of these duties.

The Formula of Humanity revisited.—To begin, I suggest that one treats another merely as a means if and only if one either (1) violates her rights or (2) expresses the denial of the claim that the person has equal practical standing in virtue of her humanity. My focus in this essay has been on the first prong. I will say just a little bit about the second prong before returning to the first. The second prong reflects the duties of respect against arrogance, defamation, and ridicule that Kant describes in the Doctrine of Virtue. The general idea

42. TP 8:297.

behind these duties seems to be that one ought not act as though one is morally superior to another, thereby expressing that the other's humanity is of no worth and hence that the other is a mere object. The characterization I gave above of this way of treating someone merely as a means is tentative. Much more work would need to be done to motivate and defend this characterization than I can do here. Here I will simply note the plausibility of the two-pronged approach. It seems possible to disrespect another's agency without limiting her ability to engage in self-directed action. The two-pronged approach captures this.

The general duty of respect not to pose as morally superior to others, which the duties against arrogance, defamation, and ridicule seem to reflect, does not depend on the results of political philosophy. Thus the second prong of the characterization of what it is to treat someone merely as a means may be developed entirely in the domain of ethics. The story is quite different when we return our attention to the first prong, that is, the claim that one treats another merely as a means if one violates the other's rights. The thought here is that one disregards the other's humanity by disregarding the significance of her external freedom, thereby interacting with the other as if she were merely an object. As I have argued above, the content of the prohibition on violating another's rights cannot be specified in the absence of political philosophy and actual political decision making. So, this way of treating someone merely as a means has a political character.

The duties of love.—With this characterization of what it is to treat someone merely as a means in mind, we can consider how our rights shape the contours of the duties of love. The content of these duties depend on varying degrees on the contours of our rights to our bodies and our property. Beneficence is the clearest example. How we ought to help others pursue their ends depends straightforwardly on the resources we are entitled to control. This is so in two ways. First, of course, I may not help you with resources that belong to someone else. Second, and perhaps less obviously, if I have a duty of right to give you assistance, this duty may preempt the duty of beneficence, making focusing on beneficence in this context in some sense misguided. This makes the resolution of certain questions in political philosophy crucial for understanding the appropriate place of the duty of beneficence in guiding our actions. If, for example, the state is required to ensure that everyone has the resources needed to subsist, as Kant claims in the further development of his view, the duty of beneficence in these cases may be preempted by the duty of right.⁴³

43. *MM* 6:326.

This may make a serious practical difference in how we ought to approach others' needs for resources. Thus we arrive at the conclusion that the results of political philosophy and actual political decision making determine the contours of many of our duties, both directly through establishing duties of right and indirectly through creating a just background within which our other duties can be situated.

This conclusion is confirmed when we consider the other duties of love Kant mentions: the duties of gratitude and sympathy. Kant casts gratitude as a response to beneficence.⁴⁴ One ought to express gratitude to one's benefactors. Therefore, as in the case of beneficence, the proper scope of the duty of gratitude depends on political philosophy and actual political decision making. For example, gratitude would be the wrong response to a gift of stolen goods.

When one sympathizes with others, one takes an active interest in their joy or pain.⁴⁵ But the proper scope of sympathy depends in part on the moral status of the ends of others and so in part on the results of political philosophy and actual political decision making.⁴⁶ For example, one ought not cheer for Jesse James when he evades the law.

The duties against promise breaking and lying.—Kant's treatment of the case of the lying promisor in the *Groundwork* is what motivates the possible consent interpretation. Since this case combines the duties against promise breaking and lying, it might be surprising that these duties do not take center stage in the *Metaphysics of Morals*. In fact, Kant has almost nothing to say about promises and only rather puzzling, seemingly incomplete discussions of lying. The reason for this, I suggest, is Kant's development of the distinction between internal and external freedom. The difficulty with both breaking promises and lying is that Kant has come to see the objection to these activities in terms of their effect on the external freedom of others. And, perhaps counterintuitively, that would make the duties against these activities duties of right and hence a part of political philosophy.

Consider first the case of promises. Kant at least in one place seems to treat promises as contracts.⁴⁷ And in his political philosophy, Kant argues that contractual rights are property rights in another's action.⁴⁸ As property rights, these rights are subject to the indeter-

44. *Ibid.*, 455–56.

45. *Ibid.*, 456–57.

46. Kant acknowledges the sensitivity to the moral status of others' ends in the general gloss of the idea of a duty of love: "The duty of love for one's neighbor can, accordingly, also be expressed as the duty to make others' ends my own (provided only that these are not immoral)" (*ibid.*, 450).

47. *Ibid.*, 220.

48. *Ibid.*, 273–74.

minacy problem and the enforcement problem. Hence, these rights are conclusive only in light of the establishment of the state. This understanding of promising thus makes the duty against promise breaking a duty of right and involves situating this component of what we owe to others within political philosophy.

It may seem, however, that although my interpretation helps us make sense of Kant's brief comments on the duty against promise breaking, it saddles Kant with an implausible account of that duty. According to this objection, surely there are at least some promises that need not and should not be enforced by the state. I am not going to take a stand on the merit of this objection. Here it will suffice to note that the account has room to accommodate this objection if it needs to. Recall that the duty of beneficence requires us to respond to the value of others' ends. Although the duty of beneficence generally gives one some latitude in deciding which actions to undertake to further others' ends, sometimes it seems to decisively suggest one course of action. These are cases in which one must act in a specific way in order to count as valuing another agent's ends at all, for example, throwing a life preserver to a drowning man. Perhaps there are ways of inviting others to rely on one's actions without going as far as giving them ownership of one's action. If so, perhaps there are circumstances in which proper regard for the ends of others requires one to make good on these invitations. Hence even on this account it might be possible to make sense of some promissory obligations as duties of virtue rather than duties of right and thus as not enforceable by the state. Notice, though, that even on this suggestion, promissory obligations are shaped by our rights. With more familiar instances of the duty of beneficence, what we may do for others is constrained by the resources we have the right to control. Here, what we may promise others is constrained by the resources we have the right to control.

The case of lying is similar, though a bit more muddled. In the Doctrine of Right, Kant seems to take a 'buyer beware' attitude toward communication, suggesting that an immediate implication of the innate right to freedom is the right to tell others something regardless of its truth or falsity, because "it is entirely up to them whether they want to believe it or not."⁴⁹ The only exceptions to this claim are lies bearing directly on matters of right, for example, a lie about the terms of a contract.

In contrast to the radically permissive view on lying in the Doctrine of Right, Kant argues for an absolute prohibition on lying in the Doctrine of Virtue. However, surprisingly, he argues for this as a duty to oneself. Consider the following passage: "Lying (in the ethical

49. *Ibid.*, 238.

sense of the word), intentional untruth as such, need not be *harmful* to others in order to be repudiated; for it would then be a violation of the rights of others. It may be done merely out of frivolity or even good nature; the speaker may even intend to achieve a really good end by it. But his way of pursuing this end is, by its mere form, a crime of a human being against his own person and a worthlessness that must make him contemptible in his own eyes.⁵⁰

An adequate discussion of duties to oneself goes beyond what I can undertake here. Notice, though, that this passage together with the absence of any further discussion of the duty against lying in the Doctrine of Virtue seems to suggest that, by the time he wrote of the *Metaphysics of Morals*, Kant had come to believe that if the duty against lying were a duty to others, it would be a duty of right.

The *Metaphysics of Morals* thus seems to leave us with a highly permissive understanding of the duty against lying insofar as it is a duty to others: we are obligated to others not to lie only when the subject of the lie is a matter of right. Kant, however, seems to have been torn between a highly permissive and a highly prohibitive conception of the duty of right against lying. When we finally get to the infamous murderer at the door in an essay published after the *Metaphysics of Morals*, Kant does an about face regarding duties of right not to lie, suggesting that all lies undermine the possibility of rightful relations and going so far as to suggest that any bad consequences that might follow from lying to the murderer at the door may be legally imputed to the liar.⁵¹ The highly prohibitive account of the duty of right against lying is quite implausible. But at least as an interpretative matter, Kant's discussion of the duty against lying confirms that he regarded the Doctrine of Right as crucial in understanding this duty.

While the highly prohibitive account of the duty of right against lying leads to a counterintuitive result in the case of the murderer at the door, the more permissive view might be made to work. This limited duty of right against lying might be combined with something like the account I sketched above that placed the duty against promise breaking under the heading of duties of beneficence. Valuing the ends of others might require honest interactions with them. Notice that this suggestion would give a more plausible verdict in the case of the murderer. The murderer's ends are contrary to his duties and hence we have no duty to value them. So, on this suggestion one may lie to the murderer at the door precisely because of his immoral ends. This understanding of the duty against lying would still involve a serious detour through political philosophy: sometimes the duty against

50. *Ibid.*, 553.

51. *LP* 8:426–27.

lying is itself a duty of right and, even when it is not, the permissibility of lying depends at least in part on whether the person being lied to is acting rightfully. This suggestion is thus able to explain the difference between lying to the murderer and lying to an officer of a just state who has come to the door to execute a lawful arrest warrant.⁵²

A great deal more would need to be done to develop and defend the suggested accounts of both the duty against promise breaking and the duty against lying. Here I have only aimed to show how Kant's own discussions of these duties confirm my overall interpretation and to indicate a way in which his views might potentially be improved that is still consistent with my interpretation. This, together with the discussion of the duties of love above, provides ample support for the claim that, for Kant, many of our most fundamental moral duties depend on and are shaped by political philosophy and actual political decision making.

III. COMPARISON WITH THE POSSIBLE CONSENT INTERPRETATION

With the interpretation of what it is to treat someone merely as a means supplied by the Three-Stage Account in hand, we are now in a position to compare this interpretation with the possible consent interpretation. Recall that there are three problems with the possible consent interpretation. First, it involves attributing to Kant a view with a serious internal tension because it cannot be reconciled with his political philosophy. My proposed interpretation is developed explicitly in light of Kant's political philosophy and thus avoids this inconsistency.

Second, the possible consent interpretation involves attributing to Kant an implausible view because it rules out the use of force, coercion, and deception across the board. My interpretation does not saddle Kant with these consequences. But, admittedly, much more work needs to be done to develop Kant's political philosophy and to give an account of our duties against lying and promise breaking before we can assess the overall plausibility of this account.

Finally, let us consider the motivation behind the two interpretations. In a way, both interpretations take the idea of self-direction as a starting point. But the possible consent interpretation understands self-direction in terms of giving people discretion over all the ends they contribute to. This, as we have seen, amounts to a requirement that all interactions be cooperative. My interpretation understands self-direction in terms of leaving each person the same discre-

52. This account would still need to be reconciled with Kant's discussion of the duty to oneself against lying. As I noted above, a full discussion of duties to the self is beyond the scope of this article.

tionary space. Here the emphasis is on observing people's rights rather than cooperating with them. This allows us to acknowledge the possibility that one might interact with others in a way that involves neither manipulating nor cooperating with them. In this way, the conception of self-direction that my interpretation employs is able to avoid the false dichotomy that gets the possible consent interpretation into trouble.

IV. MERITS OF THE THEORY

I think, then, that there is good reason to regard the interpretation that the Three-Stage Account yields as an improvement over the possible consent interpretation. To conclude I want to just briefly note why I think that both the political theory I have described and the conception of the relationship between moral and political philosophy this suggests are compelling.

First, the idea that we have provisional rights in the state of nature attributes to us moral claims on one another that seem to be of just the right strength to avoid the pitfalls of the two prominent alternative views in the social contract tradition. One way of characterizing a persistent worry about a certain kind of Hobbesian political theory is that, if we begin with no moral claims on one another, it is unclear how we can ever end up with such claims. That is, we never actually get rights to our bodies and property in any strong moral sense of 'rights'. One lingering problem with a Lockean political theory is that, if we begin with a conception of individuals as having full-blown rights to their bodies and property in the state of nature, it is unclear how to understand the exit from the state of nature without relying on an untenable conception of tacit consent. That is, we end up trapped in the state of nature. The idea of provisional rights, that is, the idea of a moral claim on others to leave the state of nature in the case of a dispute over rights, is not so weak as to make it mysterious how we could arrive at conclusive rights and not so strong as to make it mysterious how we could end up in the state.

Second, whatever else one thinks about the details of the political theory I have sketched, the various indeterminacy problems I have explicated seem to provide compelling reason to conclude that property rights are, at least in some ways, conventional. This consideration alone is enough to suggest that we should think about moral norms as both contributing to and being shaped by political philosophy: the conventions governing property rights should be subject to moral norms and the contours of the resulting conventions shape our other duties. The account I have sketched gives us a way of understanding moral and political philosophy as related in this way while still regarding these two domains as involving distinct justificatory tasks. But alas, considering these issues in detail is a task for another day.