A Kantian Defense of the Right to Health Care
-Draft-

Luke J. Davies

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In Kantian political philosophy external freedom, understood as the ability to take up means toward the attainment of ends we have set for ourselves, is secured through the three branches of the republican state. Indeed, the state is necessary for the exercise of this freedom. However, in order to provide a condition consistent with the original contract, further institutions are required; in this paper, I argue that a health care system – understood minimally, to include only preventative and emergency care – is one of those institutions.

Now, defending a right to health care has fallen significantly out of favour in the last 20 or so years. Indeed, even those who once defended such a right – I am thinking, most notably, of Norman Daniels – have jettisoned their position. Other contractualist authors, like John Rawls and Henry Shue, never advocate a right to health care, but we – that is, those of us who believe that health a concern of some philosophical weight, have been able to extract from their views a position on the matter; usually in the affirmative, and almost inevitably stretched beyond all measure of philosophical rigour. I believe that this abnegation, or outright neglect, of the right to health care is a mistake. More than this, I maintain that Kant's political philosophy can be consistently extended to offer a competitive alternative to existing views about the entitlement to health care. In outlining this view, I hope to demonstrate both that it is not an *ad hoc* extension, and that it is more consistent with Kant's work than so-called "bioethical rights" discussed with reference to *The Groundwork.*

The paper will progress as follows: First, I will introduce the idea of the original contract and its relation to the distinction between the state in idea, and a rightful condition.[1] This, we will see, is important to understanding why

[1] I will use the terms "juridical state" and "rightful condition" interchangeably.

a citizen's right to health care is not accompanied by a title to coerce the state. Second, I will present an argument for preventative health care measures; put simply, I suggest that this is a straightforward exercise of the states obligation to protect our external freedom. That is, preventative health care is a necessary (though insufficient) condition for the protection of the means we already have. Following this I will offer an argument for emergency care, which, we will see, is more difficult to defend. This is because it contrasts, at least *prima facie*, with Kant's belief that the state is not concerned with extending our freedom. My response to this potential worry is two-fold: First, the state's obligation to maintain those citizens who cannot maintain themselves applies when a citizen requires emergency care. Second, the obligation of the state to maintain itself in perpetuity requires institutions that increase the freedom of its citizens. Finally, I will address an objection to the view I have presented.

1 The Idea of the Original Contract

Before we can understand the idea of the original contract, we must first understand Kant's distinction between a "rightful condition" and the "state in idea." Put simply, this distinction is one between a universal and particular: a concept and its instantiation. The importance of this distinction, both for generating a right to health care and understanding its limits, will become clear later.

A rightful condition is "that relation of human beings among one another that contains the conditions under which alone everyone is able to enjoy his rights."[2] Important to this definition is the fact that it requires an actual association. That is, the term "that relation" needs to be filled with a description of an existent juridical state. To phrase the point differently, discussion of the juridical state is discussion of "this" or "that" state, it is a discussion of particulars in the form of description of a concrete situation between human beings. As a corollary to this, all existing associations between people can be classified into those that are rightful, and those that are not. However, as elucidated in the *Anthropology*, the categories aren't quite this clear. Kant presents four different types of state: 1) An anarchical state, characterized by freedom and law but no force; 2) A despotic state, characterized by law and force, but no freedom; 3) a barbaric state, characterized by force, but no

[2]Immanuel Kant, *The Doctrine of Right* trans. Mary Gregor (Cambridge, Cambridge University Press, 1996), 6:306. All subsequent references will be to the Akademie pagination of Kant's works.

freedom or law; and, finally, 4) a republican state, characterized by force with freedom and law[3]. Only (2) and (4) are considered rightful for Kant.

This list, with its characterization of rightful and non-rightful forms of association, is only possible through an appeal to the state in idea; which, as opposed to the juridical state, is the *norm* that governs our judgments concerning actual states.[4] In this regard it is the universal to the particular of the juridical state. As such, and this will be important later, it is *an unachievable ideal*.[5] (For Kant, this ideal is of the pure republican state, item (4) on the *Anthropology* list.) Just as a quick aside, this shouldn't be too unfamiliar for us. In the *Groundwork*, Kant appears to assert that because of our constitution (as embodied) we will never achieve the ideal set for us by practical reason (through the employment of the Categorical Imperative).[6] So too, all juridical states – as imperfect instances of the concept of the state in idea – will fail to live up to the standard that idea sets. Nevertheless, each existing state has an obligation to perfect itself.

This duty of constitutional self-perfection is generated through the idea of the original contract and mediates the relation between the state in idea and the juridical state. What, then, comprises this concept? Kant claims: "Properly speaking, the original contract is only the idea of this act, in terms of which alone we can think of the legitimacy of a state..."[7] That is, the state is legitimate only if it has as its mandate those actions that could have been agreed to by all in an original contract. However, as no such contract exists (and Kant expressly forbids looking into the history of a state with a mind to change the current regime based on such lack) the state is governed by the idea of that contract. By thinking of the obligations of the state in this way, the relation ceases to be that of a solitary superior ruling over all; it becomes the united will of all ruling over each individual. Kant emphasizes this point: "And one cannot say, the human being in a state has sacrificed a *part* of this innate outer freedom for the sake of an end, but rather, he has relinquished entirely his wild, lawless freedom in order to find his freedom as such undiminished, in a dependence upon laws..."[8] This passage is deceptive because,

[3] 7:330

[4] 6:313

[5] For an excellent discussion of this distinction, see: Sharon Byrd and Joachim Hruschka, Kants Doctrine of Right: A Commentary, Chapter 7. Cambridge: Cambridge University Press, 2010.

[6] 4:414-4:415

[7] 6:315

[8] 6:316. Emphasis is from the original.

for Kant, "wild, lawless freedom" is not freedom in a full sense at all; what we may think of as freedom in the state of nature is merely the form of freedom without the necessary institutions for its realization.[9] Wild, lawless freedom is merely freedom's empty hull – it is merely the form, not the substance. The reasons for this are familiar, and I won't go into them in detail. It is enough to say that the trinity of problems in the state of nature (acquisition, assurance, and indeterminacy) can only be solved through public, law-giving institutions. The legitimacy of these institutions – or more precisely, the legitimacy of the power these institutions exert – is possible only through the idea of the original contract.

Thus, it is not just that the idea of the original contract is employed to protect our freedom; freedom is only possible through it. The state, then, exists to protect our external freedom, which, recall, should be understood as the ability to take up means towards the attainment ends we have set for ourselves. Kant's characterization is that of being your own master – independent of the constraint of another's choice.[10] Thus, the mandate of the juridical state, along with the striving towards the ideal imposed by the state in idea, is to secure the freedom of its citizens.[11] The relationship between the state in idea, the juridical state and the the idea of the original contract should now be somewhat clearer, but let me make three points of clarification: 1) The state in idea gives form to the idea of the original contract. Given that Kant believes republicanism – which resembles what we are inclined to call representative democracy – is the only legitimate form of government; and that this form of government requires that the sovereign represent the general will of the people, the only way for the state to be legitimate is if we have all agreed to its rule, and the conditions of that rule. However, as I've already stated, there is no such contract; thus, the state must act *as if* there were. 2) The idea of the original contract legitimizes the power held by any juridical state. This should be clear from (1). Without the idea of the original contract,

[9]Here, we can see how Kant is distinct from other writers in the social contract tradition. For example, Hobbes and Locke believe that the state of nature is compatible with true freedom, and that the state imposes a restriction that freedom. The question for them, is: "How is the restriction imposed on citizens legitimate?" For Kant the question is different, namely: "How is outer freedom possible at all?" The answer, we already know, is: Only within a rightful condition where the three defects of the state of nature are assuaged by the three branches of republican government.

[10]6:237

[11]These, while seemingly distinct, are but one principle of the state. Given that the purpose of the constitution of the state is to bring it more into conformity with to principles of right, which principles require that each be free as consistent with the same freedom for all, constitutional perfection is nothing but the state's securing the freedom of all.

and consequently not even the regulative ideal of self-rule, state power cannot be legitimate. This is precisely why a barbaric regime fails to count as a rightful condition. Even though there some social structure (or, even a quite complex social network), there is no freedom; and society without freedom – understood, recall, as the entitlement to *be your own master* – cannot be rightful as it fails to fix exactly those problems that make the state necessary. Finally, 3) as the norm for all rightful conditions, the state in idea sets upon each juridical state the duty of constitutional self-perfection. This, however, does not correspond to entitlement on the part of the citizen to a right to coerce the state if the ideal is not achieved. This is because, as unachievable, the coercion would contradict the purpose of the state's existence. It would become a condition in which the force of the citizen, as individual, was stronger than the whole. More concisely, it would be a state in which might equals right. There is an unsurprising similarity to Kant's claim that there is no right to revolution here. Just as a citizen is unable to use force overthrow a government, so too he or she cannot have a legal right to coerce the state.

2 Preventative Care: the Means We Already Have

So far, I've tried to demonstrate that the the state in idea and the juridical state are connected through the idea of the original contract, and that the primary purpose of the state, for Kant, is to protect our external freedom.[12] I've given two characterizations of this type of freedom: 1) That it is the ability to take up means towards the attainment of ends you have set for yourself; and, 2) That having this freedom is equivalent to having the capacity to be your own master. For the sake of brevity, I'm going to assert, rather than argue for the equivalence of these two characterizations. What is important for our purposes here is that entitlement to freedom on both of these characterizations doesn't entail an entitlement to get what you want. If you are entitled to freedom in sense (1), then you are entitled only to set your own ends. Similarly, if you are entitled to freedom in sense (2), then you are entitled to not be the subject of another's choice. The protection of freedom for Kant, then, must be the pro-

[12]The phrasing here appears to imply that the state is generated to provide some end, distinguishable from it. However, this isn't true for Kant. The question of external freedom for him is a question of social organization, which in turn is the question of the legitimacy of one person's rule over another. Thus, the state isn't here to protect something we can talk about without reference to it; rather it is here because that is the only way for external freedom to exist. Recall that the remain in the state of nature is to commit a wrong in the highest degree.

tection of the ability to take up the means you already have towards ends you have set for yourself; it is the protection of your capacity to choose for yourself.

My hope is that the argument for preventative health care should be predictable at this point. However, before setting it out, let me make an assumption explicit. Namely, let me state that I am not going to give an argument for the efficacy of preventative care. Not being a health care professional, or trained to assess empirical data in any way, I don't think that I could convince a sceptic in this regard. If I had to try, though, I would point to the significant drop in, let's say, polio or HepB since the vaccines for those conditions were invented; or, the benefit regular check-ups and cleanings at the dentist can accrue. The specification of which preventative measures actually work is the subject of another paper; what is important here is that some such measures are effective for the prevention of disease. If it should turn out that this were not the case, then I concede my argument would not go through. With this in mind, let's look at the argument:

1. The purpose of the state is to protect our external freedom.
2. This (i.e. the duty of the state) should be understood as a protection of the means we possess.
3. Preventative health care is a necessary (though insufficient) way of protecting our means.
4. Thus, the state ought to provide preventative health care.

There is a good cause to ask about the nature of the "ought" in the conclusion of the argument here; and if time and interest permit, I would like to discuss it later. For now, though, let me make a few general comments: First, the first premise should be understood descriptively. It is not that we create the state to secure a freedom we already have without it; rather, freedom exists only in a state. For Kant, the public, lawgiving institutions of the state are analytically necessary for the possibility of external freedom, not an effective though contingent means of bringing that freedom about. Second, I want to emphasize that the purpose of preventative care is not to improve the lot of whomever is receiving treatment. The focus of preventative care is healthy people; its goal: to keep them that way. In this regard, I maintain that it is straightforward example of protecting our purposiveness. Third, and finally, I want to attempt to assuage a potential concern with the relation between preventative care and freedom. It might be argued that preventative care does not sufficiently address the type of freedom Kant is discussing. However, even if I were to concede that preventing debilitative illness was not an effective method of protecting current means, there is still another point to be made;

one that connects to the argument for emergency care.

3 Emergency Care: the Longevity of the State

As I've already stated, I think that two arguments can be offered in favour of emergency care. The first appeals to Kant's claim that the state has an obligation to maintain those who cannot maintain themselves. The second that the state has an obligation to extend itself in perpetuity.

In order to understand the first argument, we must first look at Kant's discussion of the poor. He claims both that the rich have an obligation to the commonwealth, and can be taxed for its benefit;[13] and further that certain relations of dependance cannot be upheld in a rightful condition –[14] specifically, those relations in which one person is wholly subject to the choice of another.[15] This follows directly from the definition of freedom given above, as to be subject to the choice of another excludes the possibility of being your own master. Important for Kant is the fact that, without the appropriate institutional arrangements, the destitute in a society will be in exactly this form of relation. In societies where no government aid is given to the poor, that section of the population is dependent on the beneficence of those who are better off. However, the form of this dependence (as non-contractual and thus non-enforceable) means that the poor are subject to the choice of the rich; they are not their own masters. Due to this, Kant asserts that the rich should be taxed in order to provide for the poor. Now, from the *Groundwork* we know that there is an ethical duty to give to charity. However, and this will connect to the argument against the use of Kant's ethical writing to support legal rights, such a duty is both imperfect and non-enforceable. Thus, from the point of view of the state's obligations to the destitute within its borders, the existence of such a duty cannot be enough; institutional safeguards are also required.

I want to suggest that reliance on others when you are ill falls into a similar category (for the sake of ease of comparison, it is best to assume that neither the poverty-stricken nor the ill member of society has become that way due to some foreseeable error in judgment). Though the reasons are different, a

[13] 6:326

[14] 6:330

[15] This, of course, does not include the relation of dependence between a child and his or her parents.

person who is ill relies on the beneficence of others – others who must make someone else's ends their own. This reliance can be seen from a personal and an impersonal standpoint: First, those who are ill depend on their acquaintances; on those people who help them get better (or even employers who allow them time off.) Second, they rely on the general public to support public health institutions. I want to suggest that, just as institutions are necessary for the care of the poor, so too they are necessary for the care of the sick.

It is important to note here that only debilitative conditions will be covered by this argument. Conditions that couldn't possiblly alter a person's capacity to set ends wouldn't be appropriate targets of state funding – Kant's claim is that only those "who are unable to provide for even their most necessary natural needs"[16] ought to be taken care of. So, for example, treatment for alopecia – which is, recall, the partial or total loss of hair from where it normally grows (baldness) – would not be covered. It is for this reason that I have restricted the scope of my argument to cover only emergency care. This argument, then, is the following:

1. Debilitative conditions decrease the ability of the afflicted person to set their own ends.
2. People suffering from such conditions rely on others to incorporate their ends.
3. Such reliance, when not mediated through a public institution, makes the freedom of some contingent on the choice of others.
4. The form of relation mentioned in (4) cannot be upheld in a rightful condition.
5. Some people do suffer from debilitative illnesses.
6. Thus, the state ought to provide emergency health care to eliminate the wrongful dependence relation between citizens.

Again, I would like to make a few general comments at this point: First, that a health care institution is required because of the empirical fact that being sick diminishes your capacity for choice does not conflict with Kant's requirement that the obligations of the state be known *a priori*. That the state protects freedom is known; how it ought to protect that freedom will change depending on the particulars of the rightful condition. We can think of Rousseau's comments about the Legislator in a civil society from *The Social Contract*. For Rousseau, this figure designs laws that are both consistent with

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the general will of the people and fitted to that people's history, geographic location, and culture.[17] What is important is the fact that the general will stays the same; the principle that governs the association doesn't change even if the particulars of that association do. We can think of Kantian political philosophy in a similar manner. The principles of the state will remain the same, even if the institutions that develop in accordance with those principles change.

Second, I want to acknowledge the potential objection that this argument, as an argument for health care, protects the wrong thing. We might be inclined to think that health care is meant to relieve suffering, or provide palliative care for those who need it. In other words, we might think that it is meant to protect some form of well-being that has been diminished. The grounding of a right to emergency or preventative care in the protection of freedom would thus miss the point.[18] Possible Kantian responses to this problem might sound unsatisfactory. Recall that he states, "By the well-being of a state must not be understood the *welfare* of its citizens and their *happiness*."[19] The well-being of the state is measured by the extent to which it conforms to the ideal set by the idea of the original contract. This leaves no room at all for the use of happiness or comfort as the basis of a legal right. However, I don't think this is as concerning as it sounds at first.

I'm going to assume that we all agree that the state ought not to be responsible for providing everything its citizens desire – everything, that is, which would make them happy. Thus, if we think that *some* things would be worth protecting, a reason is required to defend that choice over others.[20] One method of decided what to protect has been to assert that it is needs, not desires, that ought to be guarded by the state – though there has been much debate concerning what this would actually entail. This makes sense if we are discussing health. We might think that the state has an obligation to to provide for at least basic needs, and that health needs are among the most important categories of need. There are a few concerns here, though: I have said nothing about the justification for needs over other considerations, or the

[17] See, *The Social Contract*, Book VII.

[18] I am grateful to Chad Horne for making me aware of this objection.

[19] 6:318. Emphasis if from the original.

[20] I want to avoid bringing up scarcity of resources, but that might be the easiest way of viewing this problem. Let's assume, first, that, given an endless number of resources, the state would be obliged to provide for every desire of the citizens. Now, because the state doesn't have endless resources, it needs to make a choice about the appropriate services to provide – the appropriate desires to fulfill. Thus, we would need an argument for the inclusion of some services (to the exclusion of others).

way in which we determine what needs to protect (or what counts as a need at all). Authors like Braybrooke and Daniels have sought to ground needs in an understanding of biological functioning, but this has its own problems.[21] For example, how do we either 1) separate the social aspects of human functioning from the biological, or 2) develop an appropriate socio-biological standard of need that is suitably impartial?

While appeal to need is only one of the ways in which people have sought to assert the state's obligation to care for its citizens, it is representative of many other possibilities. That is, the appeal to need must be grounded in something deeper – something more basic. I'm not going to offer an argument for freedom as the appropriate base principle here; I only want to stress that arguments in favour of health care cannot just rest on the improved (subjective) well-being of the sick. Thus, the objection that an argument in defence of health care that seeks to protect freedom targets the wrong level of concern does not go through.

I've now offered arguments for both preventative and emergency health care from a Kantian perspective. In short, the argument for preventative care was a simple extension of the state's obligation to protect the freedom of its citizens. The argument for emergency care, we have just seen, protects freedom by ensuring that the ill are not subject to the choice of the healthy. In what follows, I want to offer one final reason that health care ought to be offered by the state; one that relates to the Kant's claim that the state is to maintain itself in perpetuity.[22]

Taken at face value, this can be understood as asserting that, by forming a state, the citizens have submitted to the authority of the government, and relinquished the idea that might can make right. If the state were formed with the idea of its potential collapse in mind, this could not be the case. We might think that might does equal right, just not for now. This is paired with the prohibition on looking to the start of the state for the purposes of calling it illegitimate. We must think of the state as always having provided a rightful condition, and also of that condition being extended into the future indeterminately. But, rather than just imposing a negative constraint on the

[21] See: David Braybrooke, "Let Needs Diminish that Preferences May Prosper" in *Studies in Moral Philosophy* ed. Nicholas Rescher, (Oxford: Basil Blackwell, 1986) and Norman Daniels, *Just Health: Meeting Health Needs Fairly*, (Cambridge, Cambridge University Press, 2008).

[22] 6:326

citizens of the state, this also places a positive burden on the state. As we have already seen, the state has an obligation to bring itself into conformity with the idea of the original contract, but there is some question as to what this requirement actually entails. What does the state in idea look like? We know from the *Anthropology* list that the republican state is one in which there is force constrained by freedom and law. I believe that we should understand this combination as requiring the least amount of force to provide the highest amount of freedom and law. However, if this is a compelling reading of Kant's ideal state, then the state does have an interest in extending the freedom of its citizens. If we want to maximize the amount of freedom, then the state is, at least minimally, concerned with generating means. This, in terms of health care, might correspond to state funded research into, and treatment of, conditions that wouldn't count as preventative or emergency health concerns. For example, the means available to a person born without a limb can be significantly less than those available to others.[23] Indeed, disability is another case in which the likelihood of a persons choice being dependent on the will of another. (Think of accessibility transport, here)

I should mention a qualification before continuing. In order to reach the point at which it is possible to discuss extending means, the state must already have secured the basic freedom of its citizens. This, however, is no easy task. The brief discussion of poverty above should have been enough to indicate that there are still wrongful relations of dependence in even the most developed countries of the world. I believe that it would be a misuse of state power to consider extending the means of some to the expense of securing the freedom of others.

This final argument, then, rests on a very particular reading of the requirements of the state, as set out by the idea of the original contract. On this reading, a state that has secured the freedom of its citizens, then must also seek to increase their means. The freedom in question here changes its form – it becomes not merely relational, but also comparative. But, as I just mentioned, this cannot be the first goal of a state; rather, it is an ideal set out by the state in idea.

[23]Examples of people overcoming this sort of condition abound, but I don't believe it is the norm.

4 An Objection

Before finishing, I would like to address an objection; one that relates to the inclination of many to appeal to the *Groundwork* when discussing patient or other rights in bioethics. Put simply, this objection takes the form of the question: Why the Doctrine of Right?

4.1 Why the Doctrine of Right?

This question is particularly salient because it represents, what I believe to be, an error of interpretation that pervades the literature addressing Kantian moral philosophy. Many interpreters of Kant have read his legal philosophy as an application of his ethical philosophy.[24] This is easy to understand. Much of Kants ethical terminology appears in the Doctrine of Right. For example, just in the discussion of punishment, he asserts both that the law of punishment is a categorical imperative,[25] and that a sentence is matched to a criminal in proportion to his inner wickedness.[26] The former statement appears to assert that punishment is a duty required by the Categorical Imperative, the latter that punishment is concerned with the wrongness of the criminals *motivation*. However, despite these apparent similarities, ethics and the law are distinct for Kant. Each is determined by a different principle, and concerned with a different aspect of behaviour. Due to this, any attempt to base an interpretation of Kants legal philosophy on his ethical philosophy is bound to fail.

We can understand the difference between ethics and the law by the type of behaviour to which each applies. All that matters, in the eyes of the law, is external conformity to the law regardless of ones feelings towards it. This is not the case with ethics, which requires that the right action be done for the right reason. Ethics, therefore, is concerned only with the internal motivations for a person acting. The law, on the other hand, is concerned only with external behaviour. The difference between these two foci can be seen most clearly in the different principles Kant employs in his ethical and legal philosophy. The supreme principle of ethics, articulated in *Groundwork*, is

[24]For example, Thomas E. Hill, in his paper Kant on Punishment: A Coherent Mix of Deterrence and Retribution?, can be read as committing this type of error. While he presents what is properly a mixed-theory interpretation of Kants view of punishment, he believes that the overriding concern is ethical (see in terms of collective disapproval). (Thomas E. Hill Jr., Kant on Punishment: A Coherent Mix of Deterrence and Retribution?, Jahrbuch fr Recht und Ethik (Berlin: Duncker und Humblot, 1994))

[25]6:230

[26]6:333

the Categorical Imperative; the first formulation of which states: "Act only in accordance with that maxim through which you can at the same time will that it become a universal law."[27] This formulation clearly states that the Categorical Imperative is a test for the sufficiency of your motivations (or, reasons) for acting. Furthermore, only those actions that pass the test of universalization will be considered ethical. There is no consideration of external behaviour when considering the ethical worth of an action.

To the contrary, the principle of Kants legal philosophy, the Universal Principle of Right, states: Any action is right if it can coexist with everyones freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyones freedom in accordance with universal law.[28] While I maintain that the characterization of the law given in the Universal Principle of Right bars considerations of internal motivation, there is still a worry here. Both the Categorical Imperative and the Universal Principle of Right are concerned with universality in relation to freedom. This appears to weigh strongly in favour of those who understand Kants legal philosophy as an application of his ethical philosophy. There are, however, two considerations that assuage the concern generated by this similarity. The first concerns the type of freedom in question, the second Kants division of laws in the Introduction to the Metaphysics of Morals.

First, it is important to note that "it cannot be required that I make [the Universal Principle of Right] the maxim of my action; for anyone can be [externally] free so long as I do not impair his freedom by my external action, even though I am quite indifferent to his freedom or would like in my heart to infringe upon it."[29] That is, we cannot force people to act from the right motivation, but we can coerce them to act in accordance with external freedom of others. A legal right cannot be grounded in the Categorical Imperative because it cannot be employed to evaluate the appropriate behaviour. Similarly, it is very difficult to see how enforcement could be justified by the Categorical Imperative. This is because enforcement must be justified by appeal to external behaviour, but the Categorical Imperative makes no such appeal. Thus, the freedom referred to by the Universal Principle of Right is external freedom, while the freedom referred to by the Categorical Imperative is solely internal. Furthermore, as external freedom is not reducible to internal freedom, so too Kants legal philosophy is not reducible to his ethical philosophy.

[27] 4:421
[28] 6:230
[29] 6:231

Second, the distinction between ethics and right is supported by the division of laws that Kant presents in the Introduction to the Metaphysics of Morals. He states: "In contrast to laws of nature, these laws of freedom are called moral laws. As directed merely to external actions and their conformity to law they are called juridical laws; but if they also require that they (the laws) themselves be the determining grounds of actions, they are ethical laws."[30] Thus, the morality of a given action contains both the ethical and legal status of that action. Morals is the genus under which the distinct species ethics and law are found. As moral laws are the broadest category of laws of freedom – or, to continue with my characterization, they are the highest in the taxonomic order – it is not difficult to see why each principle found in a division of morals will also concern itself with some form of freedom. Important for us here is the fact that the forms of freedom can, and do, differ.

There is one more challenge that must be considered in order to bar appeals to the *Groundwork* when discussing bioethical rights. Namely, that to sever right and ethics seems to conflict with the assertion that to stay in the state of nature is "wrong in the highest degree."[31] This is because, in making this claim, Kant appears to state that we have an ethical justification for leaving the state of nature. However, given what I have already mentioned, I think this cannot be a correct interpretation. The justification is not ethical but moral. By remaining in the state of nature – a state in which "human beings do one another no wrong at all when they feud among themselves[32] – we act in such a way that denies the importance, even the existence, of one aspect of freedom internal to morals. Kant states: "They [– those who choose to remain in the state of nature –] take away any validity from the concept of right itself and hand everything over to savage violence."[33] That is, we act in such a way that denies the possibility of any assurance that our external rights (our right to our bodies, and our property) will be met. The wrong cannot be legal, because there is no external law that binds us in the state of nature. It also cannot be ethical, because our external action is taken into consideration. The wrong, therefore, must be moral. It is wrong in the highest degree because neither division of morals is sufficient to explain its significance; we must look to the highest taxonomic order of the Metaphysics of Morals to understand the nature of the wrong. Thus, both the type of freedom referred to and the

[30] 6:220
[31] 6:308
[32] 6:307
[33] 6:308

division of morals supports the distinction between ethics and the law in Kants philosophy. Any attempt to ground legal rights in ethical philosophy is thus bound to fail.

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