

# Legitimacy as Public Willing: Kant on Freedom and the Law

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JAKOB HUBER ([j.huber@em.uni-frankfurt.de](mailto:j.huber@em.uni-frankfurt.de))

*Abstract:* Recent debates about the concept of legitimacy have centred around the question whether the state's right to rule should be understood as a kind of moral authority or rather a mere permission to coerce. The aim of this article is to come to terms with the puzzling observation that Kant seems to simultaneously affirm both positions. Highlighting his unorthodox conceptions of coercion and freedom, I reconstruct Kant's account of *legitimacy as public willing*, that is the power to impose obligations that are moral yet intrinsically coercible.

Governments affect their citizens' lives in significant ways and often against their will. They ask them to pay taxes, fight wars, keep agreements and much more. In short, they claim the right to change the normative situation of their subjects in many ways – most importantly, by creating obligations for them.<sup>1</sup> And as if telling them what to do were not enough, they even force them to do so. Legitimate political authority thus seems to require the possession of extensive normative powers, often summarised under the idea of a “right to rule” (e.g. Applbaum 2010, 216; Perry 2013, 2). Recent debates on the nature of this right have centred around two main positions: according to *authority-based* accounts, the state's right to rule amounts to a normative power to create and impose moral obligations on its citizens. Coercion is a useful, but secondary, sanctioning mechanism for achieving compliance with independently specified moral requirements. Defenders of the *coercion-based* view of legitimacy, by contrast, equate legitimate rule with having a particular kind of justification, or permission, for the state's exercise of coercion against

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<sup>1</sup> Throughout this article, I will use “duty” and “obligation” interchangeably.

its subjects. The aim of this article is to reconstruct a third view that I take from Immanuel Kant's political philosophy and call *legitimacy as public willing*.

Kant's position on the matter has for long puzzled interpreters and contemporary theorists alike. While he calls legitimate positive laws a species of "moral laws", they are also supposed to be "analytically" connected to the authorization to coercively enforce them. By coming to terms with this seemingly contradictory set of claims, I hope to show that we do find in Kant an account of the right to rule that is both coherent on its own terms and an intriguing alternative to the positions defended in current debates.

I start, in Section 1, by introducing *authority-based* and *coercion-based* views of legitimacy. Section 2 turns to Kant's *paradox of juridical laws*, which arises from the observation that he affirms that the law morally obligates its addressees while simultaneously equating the right to rule with a permission to coerce. In order to make this view intelligible, we must appreciate that Kant operates with fundamentally different conceptions of coercion (as a hindrance to our capacity for choice and action) and most importantly (Section 3), freedom (as law-governed action). This allows me, in Section 4, to reconstruct Kant's understanding of *legitimacy as public willing*, that is the power to impose an intrinsically coercible kind of moral obligation.

## **1. Conceptualising the Right to Rule**

The question why, and under which conditions, the law (or system of laws, or government) is justified in making the claims it makes against us has been at the heart modern political theory ever since. The (prior) question what *kind* of claims we are dealing with in the first place – what is at stake, morally speaking, in characterizing a state as legitimate

– has only recently gained increased attention.<sup>2</sup> Political and legal philosophers have started to think more systematically about the normative status of a political order described as legitimate and the norms it issues.<sup>3</sup>

Two positions dominate much of the literature. They propose fundamentally different ways of conceptualising the relation between the state’s imposition of legal directives on the one hand, and their coercive enforcement on the other. The first view identifies a tight conceptual connection between a state’s legitimacy and its authority. In other words, what it is for a state to be legitimate is to have moral authority over its subjects: the right to rule amounts to a normative power to create and impose *moral* obligations on its citizens. In current debates, this idea is most canonically embodied in a line of thinking that takes its cue from Joseph Raz’s (1986) work, according to whom political authority is just a special case of the more general phenomenon of (practical) authority. Authority, on his account, relates to the claim of a person or agency to morally obligate another. The very fact that a norm originates from a legitimate authority suffices to generate obligations on the addressee’s side that are (pro tanto) independent of the content of a specific norm.<sup>4</sup>

As the primary question is which demands (that is, which range of laws) a legitimate institution is entitled to make of its subjects, the

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<sup>2</sup> There is certainly a sense in which related issues have for long been discussed in jurisprudence with regard to the very nature of law.

<sup>3</sup> For a good overview, see Perry 2013.

<sup>4</sup> Note that on the authority-based view, the state’s right to rule does not necessarily correlate directly with a general duty to obey the authority, i.e. the laws emanating from it. Instead of such a first-order “claim right”, some authors have suggested to conceptualise it as a second-order right (a Hohfeldian “power”) to alter the normative situation (the rights and obligations) of those subject to it (e.g. Perry 2013). On this view, the state’s normative power no longer correlates with a general duty to obey the authority itself, but with a *liability* to have moral duties imposed on one. These duties might either be owed to the authority itself (e.g. in the case of tax law), or third parties like one’s co-citizens (e.g. in the case of private law).

right to coercively enforce the obligations imposed recedes into the background conceptually speaking. The use of coercive power “provides secondary, reinforcing motivation when the political order fails in its primary normative technique of authoritative guidance” (Green 1988, 75; see also Raz 1986, 24). It is a useful sanctioning mechanism for achieving compliance with independently specified moral requirements. Hence, proponents of the authority-based account tend to conceptualise a systematic connection between authority and “reason-giving”. To be a practical authority means to have the normative power to generate particularly robust, “pre-emptive”, reasons on the side of the addressee to act in a certain way. That is to say, the law is conceived of as an institution that seeks to guide the behaviour of rational beings through rational means. Only if it fails to successfully bear upon the subjects’ practical deliberation (by changing their reasons for action) do coercive sanctions step in.

Against this account, a number of authors have suggested to separate the concept of legitimacy from those of authority and obligation (Appelbaum 2010; Wellman 2001; Ladenson 1980). Mostly driven by philosophical anarchist worries about the impossibility of vindicating a general obligation to obey the law, they suggest a normatively less ambitious understanding according to which a state does not need, in order to be justified in making and enforcing law, a specifically *moral* authority. Instead, the normative and conceptual core of the “right to rule” is equated with having a particular kind of permission – a “justification-right” – for the exercise of coercion. That is, political legitimacy entails only the moral liberty to create and enforce *legally* (not morally) binding rules, understood as justified threats. The idea is that an institution has legitimate authority over its subjects with respect to a certain set of issues if the institution is morally justified in coercing them to do what it wishes concerning those issues.

In Hohfeldian terms, legitimacy is thus perceived as a “privilege” to use coercion to enforce legal norms, which “implies

nothing about either the subject's duties of allegiance to the state (n) or of compliance with the law” (Ladenson 1980, 141). It neither includes a general obligation to obey the law, nor a moral duty to comply with specific directives issued by the political authority. On the first-order normative level, the privilege to coerce then tends to be justified on instrumental grounds with recourse to some benefit the state provides: for instance the capacity, due to its *de facto* power, to avoid mutually destructive conflict and enable individuals to lead a meaningful and rewarding human life by upholding a state of minimal security. Yet, the assumption is that “even if a state may permissibly coerce its citizens in order to provide benefits, a straightforward appeal to these benefits cannot explain an individual’s duty to obey the law because one person’s obedience or disobedience typically has no discernible effect upon the state’s ability to secure benefits” (Wellman 2001, 741).

The coercion-based view has been subject to fierce criticism by generations of legal philosophers from Hart to Raz and Dworkin. While the normative assessment of the two positions shall not be at the centre of my attention here, I want to briefly sketch the two central objections that proponents of the authority-based view have brought up against their opponents: first, they take the coercion-based view to be conceptually inaccurate, that is to wrongly characterise what the law in fact does (call this the *conceptual objection*). Drawing on Hart’s classic critique of Austin (Hart 1961, 18 ff.). they argue that the concept of a rule is prior to that of a sanction – we can distinguish a rule prohibiting or prescribing a certain behaviour from the sanction that kicks in when the rule is broken. In most cases, we think that justified coercion presupposes the prior violation of a norm, and some norms (e.g. not to commit murder) would be intelligible even without a sanction. Hence, as a matter of fact, political institutions do more than coerce and threaten – they always claim to bring about a change in their subjects’ normative situation, that is to have some kind of call on them that goes beyond the threat to coercively enforce laws. This is what distinguishes

a legitimate political institution from someone who threatens me with a gun: while the latter can also compel me to do as they see fit, they have no authority over me.

Second, the authority-based camp claims that an understanding of law as a coercively backed-up threat is normatively unappealing (call this the *normative objection*). For, a legal system that *would* perceive of its subjects as mere addressees of force, “does not engage [them] as moral persons; it merely attempts to administer the activities of persons so as to bring about, in a morally justified way, a desirable outcome” (Christiano 2008, 242). To respect individuals, the objection goes, means to address them as rational persons capable of acting according to moral reasons. With this brief overview of current debates on what it means to have a “right to rule” at hand, we can now turn to Kant and attempt to relate his view to the positions briefly outlined in this section.

## **2. Kant’s Paradox of Juridical Laws**

In the last section, I introduced the main positions characterising the debate about what it means to ascribe to a political institution the status of “legitimacy”. One view equates political authority with a form of moral authority. The opposing line of thought holds that *what we do* when we justify the state’s right to rule is justify its entitlement to coercively enforce its legal directives.

Now, anyone approaching Kant’s *Doctrine of Right* with the intention to come to terms with his view on this matter will struggle. It looks as though we get arguments, at different points across the text, both for the authority-based and the coercion-based account. On the one hand, Kant tells us that legitimate authority is “by the principle of contradiction”, that is analytically, connected to coercion (Kant 1996,

6:231/2).<sup>5</sup> When we think of legal directives, that is to say, we at the same time think of their coercive enforcement. This statement has driven some Kant scholars to even exclude the sphere of “right”, or law and authority, from the moral domain altogether. According to Markus Willaschek and Allen Wood respectively, it is strictly speaking nonsensical to talk of anything like obligations in the sphere of law, except as a mere roundabout way of referring to a right to coerce. On their view, to my being under a juridical “obligation” to do something “there is nothing more (...) than the fact that some other agent has a right to coerce me to do X” (Willaschek 2002, 80; see also Wood 2014, 81/82).

Yet, we should not be too quick in ascribing the coercion-based view to Kant (e.g. Perry 2013, 6 fn.9). For, early on in the text (Kant 1996, 6:214), Kant also denominates juridical laws as a species of moral laws (which, together with ethical laws, are distinguished from laws of nature). Moreover, he repeatedly talks about the *moral* concept of “right” (or political authority) and of juridical laws as creating genuine *moral* obligations (Kant 1996, 6:222; 6:314; 6:318/9; 6:371). The inconclusive textual evidence gives rise to what I call the *paradox of juridical laws*: Kant seems to be both affirming the view of political authority as issuing moral laws that morally obligate its addressees, and at the same equating the right to rule with a mere license to coerce.

Even worse, insofar as we approach Kant’s view against the background of the contemporary debate about the concept of legitimacy, what is initially just an exegetical puzzle presents itself as a threat of plain incoherence. That is to say, *if* the views laid out by proponents of each side indeed turned out to be exhaustive, Kant could

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<sup>5</sup> All references to Kant refer to the volume and page number of the Prussian Academy edition of *Kant’s gesammelte Schriften*, published by Cambridge University Press under the general editorship of Paul Guyer and Allen Wood.

not plausibly affirm both the moral and the intrinsically coercive nature of the right to rule.

In making sense of Kant's position, I shall take my cue from the two traditional objections to the *coercion-based view* sketched above. Reconstructing how Kant gets around them (despite assigning such a central role to coercion) will allow us to carve out the space for a way of conceptualising the right to rule beyond the two predominant paradigms.

I shall save discussion of the *normative objection* for the subsequent section and start with the *conceptual objection*. The thought was, recall, that we can always distinguish a rule from its coercive enforcement, the first being (analytically) prior. Arthur Ripstein, who has put forward what is generally seen as the most influential recent treatment of Kant's political philosophy, has shown that this argument (and hence the force of the objection) presupposes a particular notion of "coercion" (Ripstein 2004, 3-6; 2009, 54 ff.): namely, as a sanction that steps in once independently specified moral requirements are not fulfilled. Given that, according to this "sanction model", coercion is extrinsic to the wrong it addresses, the primary question will of course pertain to the state's authority, i.e. the range of laws it is entitled to make (and subsequently back with threats). It would then be nonsensical to connect the state's right to rule *analytically* with the permission to coerce.

Kant however, Ripstein points out, operates with a different notion of coercion not as threat, but more broadly as a limitation on our capacity for choice and action (*Willkür*). On this view, any action that subjects one person to the choice of another is coercive. While coercion is thus always at stake when people interact, it is only legitimate if it restricts my choice to the same extent as that of everyone else.<sup>6</sup> As we

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<sup>6</sup> An anonymous referee has confronted this formulation with the (levelling-down) objection that a condition of universal slavery would similarly restrict everyone's choice to the same extent. For once, notice that, as a distinctly



will see in more detail shortly, this is just what public authorities do in making laws for all and in the name of all: they coercively uphold a system of reciprocal limits on each our capacity for choice and action.

The upshot is that, on Kant's view, it does not really make sense to distinguish the state's claim to authority from its claim to coerce – in fact, they coincide. The state *just is* coercive in what it does: constraining everyone's capacity for choice and action for the sake of everyone else's right to exercise this capacity to the same extent. In a nutshell, Kant's legal philosophy “does not talk about what people ought to do, and then asks what can be done to get them to do what they ought. It asks instead what people can be compelled to do, and provides an answer in terms of equal freedom” (Ripstein 2004, 32).

This, I take it, allows Kant to get around the *conceptual objection*. We are then left, however, with the second and arguably harder question: what should we make of Kant's claim that the laws emanating from political institutions are not only intrinsically coercive, but also a species of moral laws that morally obligate their addressees? His emphasis on the law's coerciveness (notwithstanding his reinterpretation of what this amounts to) still makes it look as though he intends to vindicate a mere “justification right”. This would expose Kant to the *normative objection* that, recall, questioned the desirability of a society in which subjects are mere addressees of coercion, and hence treated as means to morally defensible purposes.<sup>7</sup> Such a society

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unequal relation (between slave-holder and slave), slavery understood as a social practice is ruled out already on a conceptual level as irreconcilable with a system of *equal* freedom. That, of course, does not get off the table the possibility of a despotic state that radically (but equally) enslaves its own citizens. In response, notice that a system of right restricts an agent's freedom (or as will later call it, capacity for choice) exclusively for the sake of other agents' freedom, such that the ensuing system automatically constitutes a system of equal *maximal* freedom.

<sup>7</sup> The fact that treating people as mere means for a higher purpose (e.g. security or stability) would go against his main *ethical* principle, the category imperative, gives reason for further suspicion against ascribing to him the coercion-based account.

that merely “pushes around” people, the objection holds, goes against the moral status of rational persons capable of acting according to moral reasons.

Let us see whether we can continue to take our cue from Ripstein’s interpretation. He adds that while it is essential for political institutions that they get people to do certain things, “one way of getting people to do things is by telling them to do those things, and so the state *has authority too*” (Ripstein 2004, 32, my emphasis). The thought seems to be that while a “right to rule” is *primarily* what justifies the state’s right to legitimately coerce its subjects, from this permission we can somehow infer a normative power to impose moral obligations on its subjects that makes essential reference to the prior right (see also Perry 2013, 2/3 fn.4). In other words, the state’s right to coerce is constitutive of its authority, not the other way around.

While I do not believe this claim to be mistaken, it risks begging the question unless we complement it with a further argument that lays out *how* this is the case: in what sense should we understand the state’s coercive activity to be moral? My claim in the subsequent section will be that answering this question – – and hence the *normative objection* – requires that we embrace Kant’s unorthodox conception of freedom; something even Ripstein is reluctant to do.

### **3. Freedom and the Law**

I ended the last section on the idea that, according to Ripstein’s interpretation of Kant, what we do when we justify a state’s claim to legitimacy is to justify its right to *make people do things*. Furthermore, this license also implies a moral authority to *tell people to do things*. As I will try to show in this section, such a construal of the right to rule as simultaneously both coercive and genuinely moral (that would allow us to solve the *paradox of juridical laws*) remains inconceivable unless we

come to terms with Kant's (admittedly counterintuitive) notion of freedom. However, many interpreters of Kant's political philosophy, including (with certain qualifications) Ripstein, miss just how different this notion is from the one that predominates debates about the right to rule.

In order to unwrap this point, let me distinguish two conceptions of freedom: freedom as self-directed action on the one hand, freedom as law-governed action on the other. The former notion, widely shared across the liberal tradition, equates freedom with autonomous or self-determined agency, i.e., the capability of establishing for oneself practical principles that govern one's conduct. A free agent controls her choice-making capacity in the sense that she is in a position to make and carry out practical decisions without unwanted interference from others, using her judgement to develop on her own a principle or plan and commit to it. She does not act simply because another has told her to do so but acts only when convinced that action is appropriate, for she takes herself as the ultimate authority on which ends to set for herself and how to pursue them.

What is crucial to see from our perspective is that this conception of freedom has as its corollary a particular conception of moral authority – briefly alluded to in the first section – as giving reasons for action.<sup>8</sup> If what it means to be free is to deliberate about action, to *respect* persons as free is to appropriately recognise the fact that they are, and address them qua, rational subjects capable of responding to reasons. Hence, on the authority-based view of the state's right to rule, the law's essential function is to make a difference to individuals' practical deliberation by means of providing (coercively backed up) guidance in the form of reasons that are supposed to replace any reasons they have to act otherwise. It addresses them qua rationally

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<sup>8</sup> This Hart-inspired model of "law as practical reasoning" can be regarded as orthodoxy in much of contemporary legal philosophy. See for instance Burton 1984.

deliberating subjects capable of responding to reasons, that is to “perceive and understand how things are, and what response is appropriate to them” (Raz 1999, 67). To say that a law morally obligates thus comes down to saying that its addressees have a conclusive reason to act as it demands. As Thomas Christiano puts it, a legitimate political authority “is predicated on the fact that citizens have moral reasons [...] to obey it”, such that “the right to rule engages citizens at a deep moral level” (Christiano 2008, 242).

Now, if moral obligation goes through my corresponding reasons for action, the act of issuing directives has to be analytically separated from their coercive enforcement and assigned normative priority vis-à-vis the latter. Coercion only steps in, that is to say, if I fail to internalise or “self-legislate” the relevant reasons in the sense of being guided by them – or, from the opposite perspective, if the law fails to bear upon its addressee’s practical deliberation. In other words, a model of political normativity that is built upon the moral value of individuals’ ends-setting capacity as its foundational value will *tell* them what to do before it *forces* them to do so – lest we want to liken the relation between a political institution and its subjects to that of one between man and machine rather than one between morally accountable agents. Recall that this was precisely the concern behind the *normative objection* to the coercion-based account. And it is the reason why, on the basis of a conception of freedom as self-directed action, the idea of an intrinsically coercive moral authority appears not only conceptually flawed but also undesirable. A solution to the *paradox of juridical laws* remains out of reach.

My contention is that Kant operates with a different, less well-understood conception of freedom as law-governed action. The idea is that we are (“externally”) free only insofar as our actions are constrained by public juridical laws: the idea of law-governedness is

internal to the concept of freedom.<sup>9</sup> It is important to embed Kant's notion of freedom as law-governed action within his wider philosophical framework. For, his claim that we are free insofar as we act from a moral law has its origin already in the *Critique of Pure Reason's* famous treatment of the "free will" problem. The question there is whether, and how, the idea of nature as ordered by causal laws can be reconciled with that of a first cause: can we conceive of a being that is *transcendentally* free, that is, a "free cause" with the spontaneous power to begin a state (Kant 1999, A448/B476)? For humans, as finite rational beings, this purely metaphysical question regarding the power to begin a state directly relates to their agency: can the human will be *practically* free in the sense of being independent of determination through the causal laws that govern nature?<sup>10</sup>

Kant insists that this freedom cannot consist in freedom from determination *per se*, but only from determination of the wrong kind. For, he takes the idea of a free will that does not follow any laws to be an absurdity. Action that is entirely unconstrained is "wild" or arbitrary (Kant 1996, 6:316), but not free. To be a cause and to produce something according to a rule are, for Kant, equivalent.<sup>11</sup> Hence Kant's claim in the *Groundwork* that "a free will and a will under moral laws are one and the same" (Kant 2012, 4:447). Insofar as we think of freedom as a kind of causality, we must think of it as a law-governed kind of power.

Kant's notion of practical freedom can thus be described as having a negative and a positive dimension (Kant 2015, 5:28-9). The *negative* aspect tells us what the free will needs to be *not* determined

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<sup>9</sup> The idea that juridical laws are constitutive of external freedom has in similar ways been suggested for instance by Flikschuh 2017 and Zylberman 2016.

<sup>10</sup> Kant 1999, A534/B562. The relation between transcendental and practical freedom is itself highly contested among Kant scholars. Here I roughly follow the lines of Wood 1984.

<sup>11</sup> Kant 1999, A194/B238; see also Ludwig 2002, 166.

by: causally ordered nature.<sup>12</sup> Yet, I can only escape determination by the laws of nature if I see the world from a new perspective: the perspective of reason. The positive aspect of practical freedom, hence, describes what the will *does* need to be determined by in order to be free: moral laws, or laws of freedom, which tell us what our conduct should be. Practical freedom properly speaking consists of both aspects together: I am only free when I submit myself to these laws in virtue of acknowledging their binding force upon me. What we get is an interplay between dependence and independence (Byrd and Hruschka 2006, 237/8), where the free will is independent from causally ordered nature in virtue of being dependent on moral laws, which are laws of freedom.

It is important to notice that the idea of practical freedom as the capacity to act according to universal laws plays out differently in the two moral spheres that Kant distinguishes in the *Metaphysics of Morals*. Ethics, on the one hand, is the intra-personal domain of good willing or moral conscience; it is concerned with the maxims on which an action is done. The domain of right, by contrast, is distinctly inter-personal; it deals with the coexistence and coordination of different agents' choices in their external interactions (Kant 1996, 6:230).

Consequently, they two spheres are characterised by different hindrances that potentially impede agents' freedom. In the sphere of ethics, they are internal: we have to prevent our own sensible drives and desires from influencing reason's operation (Kant 1996, 6:380). A will that reacts to these influences is determined by the laws of causality that govern the sensible world and is thus not free but "heteronomous". The only way to act independently of our sensible inclinations (to be

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<sup>12</sup> Initially (in the first *Critique*), Kant (1999, A534/B562) defines this negative dimension of practical freedom more narrowly as "the will's independence of coercion through sensuous impulses". My construal anticipates his later, more encompassing notion of negative freedom as freedom from causally ordered nature in general (including other people's necessitating choices), which then yields the positive notion of freedom as the capacity for law-governed action.

negatively free) is to act from pure practical reason alone (thus being positively free).

In the ethical domain, this law of pure practical reason is the categorical imperative – “act according to only that maxim through which you can at the same time will that it become a universal law” (Kant 2012, 4:421). It simply asks us to bring our maxims in conformity with a possible universal law. Only if we determine ourselves that way are we moved not by desire or inclination, but by our free will conceived as a non-sensible kind of causal power. Positive freedom thus consists in autonomy, that is the “the will’s property of being a law to itself” (Kant 2012, 4:446-7). On this understanding, a free will is one that self-legislates maxims in accordance with the categorical imperative. To be practically free is to be bound by a law that one gives oneself.

Things are different when it comes to the sphere of right. What potentially impinges upon our freedom in this domain is not our own internal desires and inclinations, but the external limitations that arise from *others’* equal capacity and claim to act in the world. Under conditions of unavoidable coexistence, the valid claims of each to use their power of choice and action are limited by the equally valid claims of everyone else. Without public laws binding everyone, in acting as they see fit people impose their unilateral wills upon each other analogously to bodies arbitrarily moving around in space (Kant 1996, 6:232).

Consequently, in order to be externally free, our interactions need to be structured by laws that transform a plurality of agents into constitutive members of a system of right. However, these laws cannot emanate from within ourselves, but need to be externally legislated and enforced by a third party. For, in contrast to ethical obligation, where I obligate *myself* to act in accordance with moral laws, the ground of my juridical obligation is *others’* equally valid claims. Given that each person’s freedom depends on the rightness of the actions of everyone

else, I am juridically obliged whether or not I acknowledge my obligation as an incentive for action. The third party, moreover, needs to be a distinctly public agent whose will is qualitatively different from that of private individual wills (who are incapable, due to their equal standing, of public law-making).

The laws that govern external freedom thus abstract from the categorical imperative's *willing requirement* (to act on a principle "which you can at the same time *will*"): we are merely required to *act* externally in a way that is universalizable; that is, the exercise of our power of choice needs to be consistent with others equally exercising their like power. This mere conformity, though, can be externally enforced. Consequently, what Kant calls the universal principle of right "does not at all expect, far less demand, that I myself should limit my freedom to those conditions just for the sake of this obligation" (Kant 1996, 6:231). Recall that in the pertinent moral domain it is not just my own, but *everyone's* freedom that depends on my (and everyone else's) action being rightful.

Thus, while ethical principles of autonomous action are self-legislated and self-enforced (my internal freedom depends on which maxims I decide to act upon, apart from what anyone else does), legitimate laws of external freedom are publicly legislated and enforced. They are laws that are both *coercive* and *moral*, authorising the lawmaker to enforce the freedom condition against everyone by compelling them to act in outward conformity with these laws even against their will. The legitimacy of coercion is grounded in everyone's equally valid claim to exercise their capacity for choice: the claims of each morally restrict the claims of everyone else.

The positive aspect of Kant's freedom conception – the idea of freedom as law-governed – is well understood in the context of his ethics. That this is less so the case when it comes to Kant's political thought is partly due to his own vagueness on the matter there (Byrd and Hruschka 2006, 236-241). A number of interpreters, particular



those who are happy to bracket Kant's wider philosophical commitments, have thus mistakenly ascribed to him the notion of freedom as self-directed action.<sup>13</sup> According to what might be described as an emerging interpretive orthodoxy, agents are externally free to the extent that they "determine their own purposes" (Weinrib 2014: 115) and "get to get to decide for themselves" (Hodgson 2012: 808). Freedom, that is to say, is the "ability to direct your movements without constraint by others" (Ebels-Duggan 2012: 897, see also Stilz 2010: 38). The law's function is to protect this essentially nonrelational form of individual agency by endowing each person with an "equal sphere of discretionary space" within which their choices are to be respected (Pallikkathayil 2010, 133).

Within recent Anglophone scholarship, Arthur Ripstein has most explicitly expressed concerns about this tendency to collapse Kantian freedom into a form of immunity from encroachment by others. As a number of critics have pointed out (e.g. Flikschuh 2010, 2017; Hasan 2018), however, Ripstein's own reconstruction of freedom as "independence from being constrained by the choice of another person" (2009, 13) is at least ambivalent between the two conceptions.

On the one hand, Ripstein's explication of independence in terms of a self-referential capacity for "purposiveness" (e.g. Ripstein 2009, 40; 77) seems to suggest that it pertains to something we each have individually, namely the power to set and pursue ends; you are free if it is you, not others, who decides which purposes you pursue and which means you take up in order to do so. On the other hand, this very idea of self-mastery can be explicated as a pairwise relation of nondomination, that is, as equivalent to your *lack* of authority over me (Ripstein 2009, 42-50). In response to critics, Ripstein (2010, 2017) thus has repeatedly insisted that he understands the independence

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<sup>13</sup> For similar diagnoses, see Zylberman 2016 and Hasan 2018.

requirement relationally (as specifying a moral relation of a particular kind between two agents) rather than attributively.

Yet, that Ripstein ultimately does not go far enough in distancing his reading of Kant from the idea of freedom as self-directed action comes to the surface when he describes the aim of public law-making as securing a regime of “equal private freedom” (Ripstein 2009, 238). In other words, political authority (while embodying an ideal of “equal” or “universal freedom”, e.g. Ripstein 2009, 9) is external to freedom rather than constitutive of it; it simply makes freedom mutually consistent for all rational agents who affect one another in some relevant sense. As I have tried to show in this section, this is precisely the freedom conception we need to leave behind (for the sake of Kant’s admittedly counterintuitive notion of freedom as law-governed action) in order to get around the *normative objection* and, ultimately, to resolve the *paradox of juridical laws*. This is what I set out to do in the subsequent section.

#### **4. Legitimacy as Public Willing**

In the preceding two sections, I pointed out that Kant conceptualises coercion and freedom in ways that importantly differ from their employment in current disputes about legitimacy and the right to rule. As to the former, Kant defines coercion not as a sanction for achieving compliance with independently specified moral requirements but as a limitation on choice in general. As to the latter, we are free (in the relevant sense) not merely by virtue of setting and pursuing our own ends, but how in so doing we relate to others. Freedom consists in a reciprocal standing towards others that only coercive public law affords.

I now want to bring these insights together in order to sketch what I take to be Kant’s conception of *legitimacy as public willing*. I

will do so by helping myself to Kant's distinction between *Wille* and *Willkür* as two complementary components of the human faculty of volition. This requires some ground-clearing with regard to the nature of Kantian "willing" first. In his late work, Kant describes *Wille* and *Willkür* as two complementary components of volition: *Wille* is the legislative aspect of the will and thus the fundamental faculty of practical reason itself (Kant 1996, 6:213). In prescribing universal rational norms of conduct, it is the determining ground of free action and the source of moral obligation. *Willkür* describes our power of choice or the will in its "executive function", by which we adopt our maxims and choose our particular actions. The idea is that *Wille* makes a norm and *Willkür* chooses a maxim of action in light of this norm.

This distinction is usually invoked as Kant's potential answer to the question of the imputability of immoral action (White Beck 1961, 176-208). The problem here is that as Kant's ethics equates freedom with autonomy and autonomy with morality, there seems to be no such thing as a free immoral action. And if immoral action is not free, the objection goes, we cannot hold people responsible for their immoral actions. The distinction between *Wille* and *Willkür* might be taken to resolve this problem: *Wille*, as practical reason, prescribes a law as objective necessity; the agent's *Willkür* can make that law the subjective determining ground of action – or fail to do so, as it is always (pathologically) affected by inclinations and sensuous motives. Immoral action can thus be seen as a failure of *Willkür* 'to do its job', or a failure of the person to let *Willkür* perform its proper function. Hence, immoral action is still freely chosen, for what makes us free is the very *capacity* to have our *Willkür* determined by the laws given by *Wille*. "Freedom", Kant explains, "is the *ability* of pure reason to be of itself practical" (Kant 1996, 6:213, my emphasis).

With the insight gained over the preceding sections, it becomes possible to develop a specifically political interpretation of the *Wille-Willkür* distinction. Following Katrin Flikschuh (2009, 138), we can

illustrate the contrast between the spheres of ethics and right by how the two dimensions of the “will” are related. On the one hand, we can think of the sphere of ethics as dealing with an agent-*internal* relation between *Willkür* and *Wille*: one is autonomous in virtue of “determining oneself to act through the thought of law” (Kant 1996, 6:404). This requires that one’s power of choice be ruled by one’s rational will, thereby “subduing one’s affects and governing one’s passions” in the fulfilment of one’s duty (ibid.). Moral autonomy, that is to say, describes the free subjection of *Willkür* under *Wille*: we make the maxim presented as objectively valid by practical reason our subjective principle of acting.

Now, while in Kant’s ethics *Wille* and *Willkür* are unified in the same person (or not even conceptually separated yet), this changes in the political philosophy. For, as we have seen before, external freedom is concerned with the coexistence of different agents’ capacities for choice and action (their respective *Willküren*) in their external actions (Kant 1996, 6:230). Given the innate equality of everyone’s claims to exercise this capacity, we cannot just impose, or legislate, the relevant laws unilaterally. A private, or unilateral, will cannot serve as a “coercive law for everyone” (Kant 1996, 6:256). Hence, we need a *public will* that, in virtue of being omnilateral, has authority to issue coercive public laws valid for all. In the sphere of right or politics, therefore, *Wille* and *Willkür* are not located in the same agent – the *willing* component is, in fact, “externalised” to the *general united will* that is represented by the legislator. While Kant never explicitly spells this idea out, at one point he briefly envisions the possibility when he argues that

“the concept of duty stands in immediate relation to a law [...] ethics adds only that this principle is to be thought as the law of your *own* will in general, which could also be the will *of others*; in the latter case the law would provide a duty of right, which lies outside the sphere of ethics”. (Kant 1996, 6:389, my emphasis)

In the sphere of politics, *Wille* is located in the legitimate authority that makes and enforces public laws in accordance with the idea of the *general united* (or public) *will*; *Willkür* is the power of choice of each individual agent to whom *Wille* legislates the laws as determining ground of action. Now, I shall help myself to this “public” interpretation of the *Wille-Willkür* distinction with a different intention in mind than Flikschuh herself. Her aim is to carve out a specific understanding of the “general united will” as *irreducible* to citizens’ private wills (see also Flikschuh 2012). In contrast to modern (republican) conceptions of popular sovereignty and collective will formation, Kant’s general will does not emerge from an aggregate of individual wills but represents a plurality of individual wills *unified* under a sovereign head.<sup>14</sup> According to Flikschuh, the fact that laws of external freedom require legislation through a public as opposed to a private will is crucial to properly understand the distinctly public morality of right.

My own intention, by contrast, is to employ the distinction between *Wille* and *Willkür*, in its political interpretation, to come to terms with the *paradox of juridical laws*. We saw that, in the sphere of politics, *Wille* is embodied in the sovereign lawmaker who makes coercive law in the name of all; *Willkür* is the power of choice of each individual agent to whom *Wille* legislates the laws as determining ground of action. While, in acting (directing our power of choice) according to publicly willed directives, we do not act autonomously (we have not autonomously given the law to ourselves), we are nevertheless free: for *Wille*, as practical reason, issues laws of freedom. That is to

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<sup>14</sup> The ensuing contrast between a law-giving sovereign and law-receiving citizens – Kant is in fact saying that relations of political equality among citizens presuppose a relation of subordination between commander and their subjects – raises important questions about Kant’s authoritarianism. These questions, however, pertain to the (first-order) issue of what makes the exercise of political authority legitimate, not (our second-order question) what legitimate rule implies normatively in the first place.

say that we are externally free by virtue of our ability to act as we see fit within the constraints of public laws of external freedom. These laws restrict our capacity for choice, but not our freedom. To the contrary, they *make us free*. External freedom consists in nothing more than our capacity to act in conformity with universal laws in our relations to others, that is in accordance with an omnilateral or public will that makes coercive laws for everyone.

We are now in a position to resolve the *paradox of juridical laws* by making good on Kant's claim that political authority is both moral and coercive. On the one hand, public juridical laws are moral laws qua laws of freedom: they bestow on citizens a standing in relation to one another that makes them "externally" free. They do so precisely by coercively upholding a system of reciprocal limits on each our capacity for choice and action. Given that the ground of the juridical obligation of each lies in the valid rights claims of others, the "freedom condition" is not made contingent upon individuals' acknowledgement of their obligation, but legitimately enforced against everyone. It is through inherently coercive laws (rather than reason-giving backed by sanctions) that we can exchange our dependency on the will of each other for dependency on laws issued by a public will.

## **Conclusion**

My aim in this paper was to address a question that has puzzled readers of Kant's political philosophers for long: how Kant can consistently describe the state's authority as simultaneously moral and intrinsically coercive. Recent debates about the right to rule in contemporary political and legal philosophy accentuate this tension. For proponents of both major positions agree that the normative power we ascribe to legitimate states is *either* a species of moral authority *or* a license to coerce. My aim in this paper was to question this dichotomy by solving

Kant's *paradox of juridical laws*. In order to do so, I pointed out that the two main conceptual pillars of Kant's framework – his conceptions of coercion and freedom – diverge from contemporary (and, arguably, intuitive) usage. Most importantly, Kant construes an internal relation between public laws and freedom, such that the state can be characterised as constituting a specific kind of *moral* relation by virtue of issuing *coercive* laws.

Nothing I have said vindicates this way of thinking about the normative powers of political authority, as opposed to its two rivals introduced earlier, and to do so would exceed the scope of this paper. But even if readers remain unconvinced by the conception of *legitimacy as public willing*, they will hopefully acknowledge that it represents a distinctive account worth articulating. Moreover, it could constitute a conceptual cornerstone of a more comprehensive vision of political morality that takes us beyond the current dichotomy between those that view political philosophy as mere applied moral philosophy, and their opponents that defend its status as a genuinely autonomous domain of human activity concerned with the distinctive problems of political life like disagreement, conflict and coercive power.<sup>15</sup> For Kant, the necessity for coercive political institutions arises from the very fact that individuals who coexist within limited space each (legitimately) raise claims to exercise their capacity for choice and action against one another, but who lack the authority to privately enforce these claims. While this means that the principles regulating this domain will thus be of a specific kind (foremost, public and coercive), it does *not* entail that the domain itself is in any way non-moral.

*Centre for Advanced Studies Justitia Amplificata  
Goethe University Frankfurt  
60629 Frankfurt am Main  
Germany*

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<sup>15</sup> The first position is paradigmatically embodied in Cohen (2008), the second in Williams (2007).

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