## 1AC

### Framework

#### One, I defend the resolution as a general principle.

#### Two, the phrase “is unjust” is present tense - the topic is about how things are not how they could be.

Collins ND

(The Collins English Dictionary is a printed and online dictionary of English. It is published by HarperCollins in Glasgow.) “Is” Collins English Dictionary, ND, NCS, DOA 3/19/22, https://www.collinsdictionary.com/us/dictionary/english/is

Is is the third person singular of the present tense of be1. Is is often added to other words and shortened to -'s.

#### Three, justice is distinct from morality.

Moorehouse 13

(Isaac Morehouse is the founder and CEO of Crash and the founder of Praxis.) “Justice and Morality”, Isaac Moorehouse, NCS, DOA 3/19/22, https://isaacmorehouse.com/2013/06/21/justice-and-morality/

It seems there’s a difference between justice and morality. I’ve never quite come to a comfortable conclusion about the nature of the two concepts and their relationship, but it’s worth exploring. Suppose you jump in someone else’s car parked in the valet entrance at a hotel and speed away to get your wife in for an emergency C-section. You’ve saved the baby and possibly the mother. It would be strange to call this immoral. In fact, it might be very moral, even heroic. But it also seems clear that the owner of the car has been wronged. She was unable to make her meeting in time, some of her gas was used up, and maybe you even got a few dings in the door. She has suffered an injustice. So even though you acted morally, it’s possible you acted unjustly. Let’s say you have a deep hatred for your neighbor. One day an envious rage takes over so you pick up a rock and throw it at his new car, hoping to shatter the window. You miss. No one sees the action, and the rock rolls harmlessly into the weeds. It seems likely you’ve acted immorally by trying to destroy his property. But it would be odd to say any injustice was done. Your neighbor hasn’t suffered a wit from your failed attempt at vandalism. Justice is about living with other people, while morality is about living with yourself. Justice is about right relation to others as measured against the mores of society, while morality is about right relation to right itself, as measured against your own beliefs. Whether or not justice exists objectively or is entirely a social construct, it has an unmistakable universality. The particulars, and the process of discovering and remedying injustice differ in each society, but the basic tenets are the same. No society has ever praised or rewarded breaking a promise, stealing, or murder. There are instances where such acts are called by other names or given a pass under special circumstances, but that’s just it; they always require justification. The default human position is that coercion is bad, and social systems evolve to mitigate it. What would justice demand from you in the car theft scenario? The nice thing is, we don’t have to decide in the abstract. Justice always takes place in a social context, and the process seems just as important as the outcome. For productive cooperation, the systems that determine and deal with injustice are best when they are transparent, stable yet flexible, knowable in advance, and not applied preemptively. Even though everyone may acknowledge that your theft of the car was unjust, if the process allows arbitrators to consider circumstances, they may let you off, or they may ask only that you pay the owner a small fee. These contexts are rich, and the owner has a lot to consider as well. Perhaps she hears your story and decides not to pursue any recompense. Maybe she is really ticked and wants to, but realizes the social approbation she’ll get for doing so isn’t worth it, even though she would win her case. Since justice exists only in a social context, and for the use and benefit of humans, even if it is violated, there needn’t be black and white, always-and-everywhere rules demanding uniform punishment. Though a uniform and recognizable process is needed, uniform outcomes don’t seem to be. This is why common law is so much more effective than legislation at maintaining peace. Morality is trickier. I might be using the term differently than most people in this post (I have often used it more loosely myself, many times on this blog…don’t hold it against me!), but I think morality is something that exists in all of our minds, whether or not it exists “out there” objectively. We have a conscience. We have beliefs about right and wrong that are distinct from our sense of justice. That’s why nearly everyone would agree that you acted immorally in story number two, even though justice demands nothing of you. Our sense of morality changes over time, and is very different from person to person. Part of life’s journey is discovering it and constantly adapting to it. I’ve known people who genuinely believed it was wrong to have a drop of alcohol. Whether or not I agree, it was clear that if they did, they would feel a lot of guilt. They would be violating what they know to be right. Some of those same people’s views changed over time, to where years later they no longer thought it wrong to drink, and they could do it with a clear conscience. Morality doesn’t seem to be about the acts themselves like justice does. It seems to be about whether or not a person is violating their own sense of right. Many spiritual traditions talk of being in unity with oneself, being of one mind, or having an undivided heart. It’s easy to conflate justice and morality, in part because we deliberately do so with children. It’s more convenient to wrap everything up into right and wrong, and train kids to do and don’t do based entirely on these words. I don’t think it’s helpful for kids in the long run, but it requires less work, so most adults do it. Kids are told to say hi when someone says hi to them for the same reasons they’re told not to take Johnny’s toys; because it’s the right thing to do. Yet the first is not unjust and probably not immoral, while the second is definitely unjust and probably immoral. Children are also trained to obey the law because it’s right to do so. They’re not often told that justice demands an abstention from coercion, even if the law doesn’t, or that the law may ask them to do something they feel is deeply immoral. This oversimplification and lumping everything into basic right/wrong categories has the potential to result in atrocity. Those who allow the law to be a shortcut for justice or morality, for example, can find themselves rounding the neighbors up and sending them off to prison, or worse.

#### The value is justice, which is giving each their due as “is unjust” is the evaluative phrase in the topic.

#### Justice is only possible under a unified rule of law

Waldron 96

Waldron, Jeremy [Professor of Law and Philosophy at the NYU School of Law]. “Kant’s Legal Positivism” Harvard Law Review, May, 1996, Vol. 109, No. 7 (May, 1996), pp. 1535-156

It is certainly not inappropriate to use force to achieve justice. But there is an affront to the idea of justice when force is used by opposing sides, confrontationally and contradictorily, in justice's name. The point of using force in the name of justice is to assure people of that to which they are entitled. But if force is being used to further contradictory ends, then its connection with assurance is ruptured. In such a situation, force is being used simply to represent the vehemence with which competing opinions about justice are held, and this use of force may well be worse than force not being put to the service of justice at all. Hence, there is the need for a single, determinate community position on the matter - one whose enforcement is consistent with the integrity and univocality of justice. Certainly, justice is affronted in another way if the position identified and enforced as that of the community (on, say, testamentary freedom) is morally wrong. But given the inevitable disagreement on that issue and given the symmetry, for all practical purposes, of the rival positions on the matter - each side is sincere, each side thinks that its view captures what is really just, each side believes that the other is objectively mistaken - there is no political way in which the prospect of this substantive affront can be precluded. All we can do, politically, for the sake of the integrity of justice is ensure that force is used to uphold one view and one view only - a view that anyone may readily identify as that of the community, whatever his substantive opinions on the matter. The integrity of justice, then, evokes the concept of positive law and the philosophical doctrine of legal positivism: law must be such that its content and validity can be determined without reproducing the disagreements about rights and justice that it is law's function to supersede.

#### This is a sequencing question- ensuring freedom comes prior to focusing on consequences. Otherwise, it justifies forcing people to act against their will

Ripstein, 9 -- Professor of Law and Philosophy and University Professor at the University of Toronto

[Arthur, "Force and Freedom: Kant’s Legal and Political Philosophy", Harvard University Press, 2009, accessed 1-14-22]

My aim in this chapter is to use the example of traffic laws to cast doubt on the very idea of balancing benefits and burdens, and to defend the idea that state power is only justified to create a system of equal freedom. I will not defend the implausible claim that speed limits or the timing and placement of traffic lights can be deduced from some index of freedom and appropriate facts. As I shall explain, the expectation that any alternative to balancing must aspire to some such claim is itself symptomatic of everything that is wrong with the balancing picture. Nor shall I join Michael Walzer in celebrating the claim that “the car is also the symbol of individual freedom.”11 Instead, I will argue that the state’s entitlement to make traffic rules is rooted in its obligation to provide the conditions of equal freedom.

On the view I will defend, the fundamental rationale for the exercise of the police power is to create a regime of equal private freedom. In order to do so, the state must create and sustain the systematic preconditions both of the exercise of private freedom and of the conditions of its ability to provide them. It can compel citizens to do their part in creating and sustaining a rightful condition. The provision of these conditions is a distinctive case of mandatory cooperation, which is subject to distinctive normative constraints. In providing roads, the state is entitled make people contribute, both positively and negatively, to their provision, and to regulate them based on a variety of considerations. None of this, I will argue, requires any assumptions about the state having any more general power to make life convenient, or to force people to contribute to cooperative arrangements on fair terms. Nor does it depend on the idea that, apart from the state, people have a basic obligation to participate in beneficial practices, or even those practices from which they benefit. I will argue instead that the state’s power reflects the fact that it is a public authority: its entitlement to obligate individual citizens reflects its obligation to act on behalf of the citizens as a collective body. The difficulties faced by the balancing picture are only compounded when it is joined to the common supposition that the state’s entitlement to bind its citizens must be aggregated out of obligations of individual citizens,12 by getting them to do things that they would have had fully formed and concrete obligation to do in the state’s absence.

Kant himself discusses neither one-way streets nor traffic lights, but he offers an account of the irreducibly public nature of mandatory forms of social cooperation, which follow from the role of the state as “supreme proprietor” of the land.13 Kant observes that the state, as supreme proprietor, is charged with the “division” of the land, rather than the “aggregation” of the state’s territory from antecedent private holdings.

I will argue that rather than being the main business of the state, limited only through important interests, questions about the allocation of benefits and burdens arise only within public provision of the preconditions of freedom. If a government must provide something, it must provide that thing fairly, which will normally mean equally. Governments do not have a general power to force people into forms of cooperation either by making some bear burdens for the benefit of others or by making people bear burdens because those same people have received benefits. Both of these ideas—the utilitarian idea that someone can be compelled to contribute whenever others will benefit, and the “principle of fair play” according to which people can be compelled to contribute to practices from which they benefit—are inconsistent with the idea that people are free to determine what their own purposes will be. Neither the benefit to others nor the fact that you yourself receive a benefit is sufficient to compel you to pursue an end that you do not share. However, public provision does not require any such principle.

#### Therefore, the criterion is respect for the rule of law. To clarify, I’m not saying that anything that follows from the rule of law is just. Instead, an action that fails to adhere to rule of law is unjust.

#### Prefer this criterion for 2 additional reasons.

#### First, rule of law is instrumentally necessary for a well-functioning society

Bingham 10

Baron Tom Bingham of Cornhill, KG, PC, FBA, was an eminent British judge who was successively Master of the Rolls, Lord Chief Justice and Senior Law Lord. He was described as the greatest lawyer of his generation, 2010, The Rule of Law, London: Allen Lane.

I think there are really three reasons. First, and most obviously, if you and I are liable to be prosecuted, fined and perhaps imprisoned for doing or failing to do something, we ought to be able, without undue difficulty, to find out what it is we must or must not do on pain of criminal penalty. This is not because bank robbers habitually consult their solicitors before robbing a branch of the NatWest, but because many crimes are a great deal less obvious than robbery, and most of us are keen to keep on the right side of the law if we can. One important function of the criminal law is to discourage criminal behaviour, and we cannot be discouraged if we do not know, and cannot reasonably easily discover, what it is we should not do. The second reason is rather similar, but not tied to the criminal law. If we are to claim the rights which the civil (that is, non-criminal) law gives us, or to perform the obligations which it imposes on us, it is important to know what our rights or obligations are. Otherwise we cannot claim the rights or perform the obligations. It is not much use being entitled to, for example, a winter fuel allowance if you cannot reasonably easily discover your entitlement, and how you set about claiming it. Equally, you can only perform a duty to recycle different kinds of rubbish in different bags if you know what you are meant to do. The third reason is rather less obvious, but extremely compelling. It is that the successful conduct of trade, investment and business generally is promoted by a body of accessible legal rules governing commercial rights and obligations. No one would choose to do business, perhaps involving large sums of money, in a country where the parties’ rights and obligations were vague or undecided. This was a point recognized by Lord Mansfield, generally regarded as the father of English commercial law, around 250 years ago when he said: ‘The daily negotiations and property of merchants ought not to depend upon subtleties and niceties; but upon rules easily learned and easily retained, because they are the dictates of common sense, drawn from the truth of the case.’ In the same vein he said: ‘In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators [meaning investors and businessmen] then know what ground to go upon.’ But this is not an old-fashioned and outdated notion. Alan Greenspan, the former chairman of the Federal Reserve Bank of the United States, when recently asked, informally, what he considered the single most important contributor to economic growth, gave as his considered answer: ‘The rule of law.’ Even more recently, The Economist published an article which said: ‘The rule of law is usually thought of as a political or legal matter ... But in the past ten years the rule of law has become important in economics too ... The rule of law is held to be not only good in itself, because it embodies and encourages a just society, but also as a cause of other good things, notably growth.’ The article went on to acknowledge some dispute among economists about the strength of the connection between the rule of law and economic growth, drawing attention to China as an exception, but did not suggest there was no connection. Given the importance of this principle, we cannot be surprised to find it clearly stated by courts all over the world. In the House of Lords in 1975 Lord Diplock said: ‘The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal principles which flow from it.’ He made much the same point a few years later: ‘Elementary justice or, to use the concept often cited by the European Court [the Court of Justice of the European Communities], the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly available.’ The European Court of Human Rights at Strasbourg has spoken to similar effect: [T]he law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case ... a norm cannot be regarded as a ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able — if need be with appropriate advice — to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail . So too the Chief Justice of Australia, listing the practical conclusions held by Australian courts to be required by the principle of the rule of law: ‘the content of the law should be accessible to the public’.

#### Second, a shared intuition of moral theories reflect the idea that justice requires a sovereign

Nagel 5

(Thomas Nagel - University Professor of Philosophy and Law, Emeritus, at New York University, where he taught from 1980 to 2016. His main areas of philosophical interest are legal philosophy, political philosophy, and ethics). “The Problem of Global Justice”, Philosophy & Public Affairs Vol. 33, No. 2 (Spring, 2005), pp. 113-147 (35 pages) Published By: Wiley Philosophy & Public Affairs, NCS, DOA 1/15/22, <https://www.jstor.org/stable/3558011>

It seems to me very difficult to resist Hobbes’s claim about the relation between justice and sovereignty. There is much more to his political theory than this, of course. Among other things, he based political legitimacy and the principles of justice on collective self-interest, rather than on any irreducibly moral premises. And he defended absolute monarchy as the best form of sovereignty. But the relation between justice and sovereignty is a separable question, and Hobbes’s position can be defended in connection with theories of justice and moral evaluation very different from his. What creates the link between justice and sovereignty is something common to a wide range of conceptions of justice: they all depend on the coordinated conduct of large numbers of people, which cannot be achieved without law backed up by a monopoly of force. Hobbes construed the principles of justice, and more broadly the moral law, as a set of rules and practices that would serve everyone’s interest if everyone conformed to them. This collective self-interest cannot be realized by the independent motivation of self-interested individuals unless each of them has the assurance that others will conform if he does. That assurance requires the external incentive provided by the sovereign, who sees to it that individual and collective self-interest coincide. At least among sizable populations, it cannot be provided by voluntary conventions supported solely by the mutual recognition of a common interest. But the same need for assurance is present if one construes the principles of justice differently, and attributes to individuals a non–selfinterested motive that leads them to want to live on fair terms of some kind with other people. Even if justice is taken to include not only collective self-interest but also the elimination of morally arbitrary inequalities, or the protection of rights to liberty, the existence of a just order still depends on consistent patterns of conduct and persisting institutions that have a pervasive effect on the shape of people’s lives. Separate individuals, however attached to such an ideal, have no motive, or even opportunity, to conform to such patterns or institutions on their own, without the assurance that their conduct will in fact be part of a reliable and effective system. The only way to provide that assurance is through some form of law, with centralized authority to determine the rules and a centralized monopoly of the power of enforcement. This is needed even in a community most of whose members are attached to a common ideal of justice, both in order to provide terms of coordination and because it doesn’t take many defectors to make such a system unravel. The kind of all-encompassing collective practice or institution that is capable of being just in the primary sense can exist only under sovereign government. It is only the operation of such a system that one can judge to be just or unjust. According to Hobbes, in the absence of the enabling condition of sovereign power, individuals are famously thrown back on their own resources and led by the legitimate motive of self-preservation to a defensive, distrustful posture of war. They hope for the conditions of peace and justice and support their creation whenever it seems safe to do so, but they cannot pursue justice by themselves. I believe that the situation is structurally not very different for conceptions of justice that are based on much more other-regarding motives. Without the enabling condition of sovereignty to confer stability on just institutions, individuals however morally motivated can only fall back on a pure aspiration for justice that has no practical expression, apart from the willingness to support just institutions should they become possible. The other-regarding motives that support adherence to just institutions when they exist do not provide clear guidance where the enabling conditions for such institutions do not exist, as seems to be true for theworld as a whole. Those motives, even if they make us dissatisfied with our relations to other human beings, are baffled and left without an avenue of expression, except for the expression of moral frustration.

#### Thus, I affirm that the private appropriation of outer space is unjust because it does not respect the rule of law

### 1

#### The sole aff contention is arbitrariness

#### Any act of appropriation is indeterminate absent a common understanding of property found in law

Waldron 96

Waldron, Jeremy [Professor of Law and Philosophy at the NYU School of Law]. “Kant’s Legal Positivism” Harvard Law Review , May, 1996, Vol. 109, No. 7 (May, 1996), pp. 1535-156

The main subject matter of justice and right in Kant's political philosophy is property - the possession and use of external material resources. For Kant, the concept of property, and the allied concepts of empirical and intelligible possession, are amenable to philosophical exposition. (He expounds them in the first seventeen paragraphs of the Metaphysical First Principles of the Doctrine of Right.) I will not bore the reader with the details; it is enough to say that, although the exposition is terribly convoluted, Kant does not indicate that he thinks the complexities of these concepts are the source of the disagreements we are trying to explain. Kant makes pretty clear, however, that the concepts he develops are likely to involve considerable difficulty and controversy in their applications. In a state of nature, to have property along Lockean lines or anything like it, people's rightful holdings would have to be based on a principle such as first occupancy. But occupancy, which Kant interprets to mean "taking control," is quite indeterminate: how do we correlate one's acts of control with an exact extent of land controlled? Besides, the question of how much exactly one comes to own when one takes control of a piece of land will be bound up in part with one's sense of the effect of one's action on others' situations. But it may be unclear how many others there are, or it may be a matter of dispute how many of all the others there are (everywhere) one is supposed to take into account. Inevitably, disputes will also arise about who is (or who was) the first occupant of a piece of land. That prospect is more or less unavoidable, given Kant's account of appropriation. To appropriate X is not only to take X under one's physical control, but to do so in a way such that one's right in X will be violated if, subsequently, another person uses or encroaches upon X even while the initial appropriator is not actually in physical control of X. In the state of nature, however, if one appropriates a piece of land and then wanders off, how is another to know whether the land has already been appropriated or is still available for first occupancy? (This problem is particularly acute in a theory like Kant's that does not insist on any mark of occupancy, such as labor.) Notice that these difficulties of application are not matters on which reason offers no guidance or matters to be settled by arbitrary stipulation, like the rule about which side of the road to drive on. Surely, of two people wrestling for control of a piece of land, one or the other was in fact the first occupant; surely, there is a right answer to the question of whether someone, in violation of the Lockean proviso, has taken more than his share. Moreover, the fact that people think there is a right answer will likely inspire each party to struggle vehemently for his view of the matter; in contrast, nobody fights very hard over questions like which side of the road to drive on. The trouble with the application of acquisition principles is not that, in theory, no right answers exist, but that there is no basis common to the parties for determining which answers are right.

#### Private appropriation is inconsistent with the established rule of law in space

Tronchetti 7

Fabio Tronchetti (International Institute of Air and Space Law, Leiden University, The Netherlands). “The Non-Appropriation Principle Under Attack: Using Article II of The Outer Space Treaty In Its Defence.” 50 PROC. L. OUTER SPACE 526, 530 (2007). JDN. <https://iislweb.org/docs/Diederiks2007.pdf>

However, it must be said, that nowadays there is a general consensus on the fact that both national appropriation and private property rights are denied under the Outer Space Treaty. Several ways of reasoning have been advanced to support this view. Sters and Tennen affirm that the argument that Article II does not apply to private entities since they are not expressly mentioned fails for the reason that they do not need to be explicitly listed in Article II to be fully subject to the non-appropriation principle8. Private entities are allowed to carry out space activities but, according to Article VI of the Outer Space Treaty, they must be authorized to conduct such activities by the appropriate State of nationality. But if the State is prohibited from engaging in certain conduct, then it lacks the authority to license its nationals or other entities subject to its jurisdiction to engage in that prohibited activity. Jenks argues that “States bear international responsibility for national activities in space; it follows that what is forbidden to a State is not permitted to a chartered company created by a State or to one of its nationals acting as a private adventurer”9. It has been also suggested that the prohibition of national appropriation implies prohibition of private appropriation because the latter cannot exist independently from the former10. In order to exist, indeed, private property requires a superior authority to enforce it, be in the form of a State or some other recognised entity. In outer space, however, this practice of State endorsement is forbidden. Should a State recognise or protect the territorial acquisitions of any of its subjects, this would constitute a form of national appropriation in violation of Article II. Moreover, it is possible to use some historical elements to support the argument that both the acquisition of State sovereignty and the creation of private property rights are forbidden by the words of Article II. During the negotiations of the Outer Space Treaty, the Delegate of Belgium affirmed that his delegation “had taken note of the interpretation of the non-appropriation advanced by several delegations-apparently without contradiction-as covering both the establishment of sovereignty and the creation of titles to property in private law”11. The French Delegate stated that: “…there was reason to be satisfied that three basic principles were affirmed, namely: the prohibition of any claim of sovereignty or property rights in space…”12. The fact that the accessions to the Outer Space Treaty were not accompanied by reservations or interpretations of the meaning of Article II, it is an evidence of the fact that this issue was considered to be settled during the negotiation phase. Thus, summing up, we may say that prohibition of appropriation of outer space and its parts is a rule which is valid for both private and public entity. The theory that private operators are not subject to this rule represents a myth that is not supported by any valid legal argument. Moreover, it can be also added that if any subject was allowed to appropriate parts of outer space, the basic aim of the drafters of the Treaty, namely to prevent a colonial competition in outer space 3 and to create the conditions and premises for an exploration and use of outer space carried out for the benefit of all States, would be betrayed. Therefore, the need to protect the non-appropriative nature of outer space emerges in all its relevance.

#### That links to the framework—ignoring the standing law would violate the rule of law

Waldron 96

Waldron, Jeremy [Professor of Law and Philosophy at the NYU School of Law]. “Kant’s Legal Positivism” Harvard Law Review , May, 1996, Vol. 109, No. 7 (May, 1996), pp. 1535-156

How we think about disagreement on matters of public concern will determine how we think about politics, and - because law is the offspring of politics - how we think about disagreement will determine, in some measure, how we think about law. For example, the members of a community may be divided on the question whether a testator should have the power to exclude a surviving child from the enjoyment of his estate. Imagine that some citizens, celebrating testamentary freedom, say that he should - it is, after all, his property that is passing by his will. Others say that he should not - once he is dead, the importance of respecting his arbitrary freedom diminishes in comparison to the importance of securing the welfare of his dependents. The issue is a political one not simply because the citizens disagree, for we disagree about all sorts of things - for instance, the virtues of the modern novel, the causes of the Punic Wars - on which no political decision is necessary. The issue of testamentary power is a political onebecause those who disagree on the merits nevertheless agree that the community needs to reach some determinate resolution. Testamentary freedom is not something on which we can agree to differ. Or, rather, we can agree to differ in our opinions, but it is necessary, all the same, that we arrive at some position on the issue to be upheld and enforced as the community's position on the testamentary powers of property owners. Because we disagree about which position should stand and be enforced in the name of the community, we need a process - a political process - to determine what that position should be. And we need a practice of recording, respecting, and implementing positions of this sort by individuals and agencies acting in the name of the community - a practice that is resilient in the face of disagreement with the community position on the part of those entrusted with its implementation. If we call the position that is identified as the community's position the law of that community, then the resilience of the practice to which I have just referred is what we mean by the rule of law. Understood in this way, the rule of law is not simply the principle that officials should apply the law even when it disserves their own interests. It is the principle that an official should enforce the law even when it is in his confident opinion unjust, morally wrong, or misguided as a matter of policy. The enactment of the law in question is evidence of the existence of a view different from his own concerning the law's justice, morality, or desirability. In other words, the law's existence, together with the official's own opinion, indicates moral disagreement in the community. The official's failure to implement the law because he believes that it is unjust, or his decision to do something other than what the law requires because he believes that action would be more just, is tantamount to abandoning the very idea of law - namely, the very idea of the community taking a position on an issue on which its members disagree. It is a reversion to the situation in which each person acts on his own judgment and does whatever seems right or just to him. Would this result be such a calamity? It may be, if people's moral judgments are irrational, ill-thought-through, uninformed, or biased. But even assuming that each person does his best to ascertain what is really right or really just, there will still be problems to the extent that different persons arrive (however scrupulously) at different conclusions.

#### Alternative theories of property cannot solve the problem of indeterminateness

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[Arthur, "Force and Freedom: Kant’s Legal and Political Philosophy", Harvard University Press, 2009, accessed 1-14-22]

Kant’s understanding of the basic range of public powers is austere in one sense, yet permissive in another. The only powers a state may exercise are ones that fall under various aspects of its duty to create, maintain, and improve a rightful condition, and it may only do so in ways consistent with each citizen’s innate right of humanity. Yet the range of powers that can actually be exercised under that duty seems capacious and openended. The constraint that all powers be derived from the duty to create a rightful condition—parallel to the way that the power of a parent to “manage and develop” the child is derived from the duty to raise the child into a responsible being—is a real constraint, but it does not preclude most of the familiar activities of modern states. Even substantial changes can be understood as falling under the duty: fundamental land reforms that abolish forms of slavery or serfdom are the creation of a rightful condition. Even things that seem less directly related seem easy to accommodate to the Kantian account. We shall see in Chapter 9 that preventing private dependence underwrites a variety of public activities, and also that nothing in Kant’s account precludes overinclusive implementation. Kant makes space for even more state activity when he includes the state’s right to “administer the state’s economy and finances,”67 and still more when he suggests in Theory and Practice that when the supreme power “gives laws that are directed chiefly to happiness (the prosperity of the citizens, increased population and the like), this is not done as the end for which a civil Constitution is established but merely as a means for securing a rightful condition, especially against a people’s external enemies.”68 The only thing that is ruled out is organizing the state around private purposes. The only test imposed by the idea of the original contract is that it be possible to give public grounds of justification for such activities, that is, to relate them to the maintenance of a rightful condition.

The flexibility of the Kantian account on such issues reveals the underlying difference between it and both libertarian and utilitarian/egalitarian accounts. From Kant’s perspective, the apparently intractable disagreement between the two extremes has the classic structure of an antinomy: the disagreements reflect a premise that both sides presuppose. The premise in question is that the purpose of political and legal institutions is to approximate a moral result that is perfectly determinate, even if imperfectly known, independently of them. A version of the same antinomy lurks in disputes between libertarian and utilitarian/egalitarian theories of the morality of property. The Lockean libertarian supposes property rights to be morally complete and fully determinate without reference to political institutions, and regards the state as a remedy to disagreements that, at least in principle, have complete answers. The utilitarian or egalitarian rejects the idea that anyone could have a morally basic right to property, and thinks that rules governing the dominion of particular persons over particular objects can only be designed so as to bring about a morally desirable result that can be described without any reference to anything like rules. As we saw in our discussion of private right, Kant conceives of private rights fundamentally differently. Their structure can be articulated without reference to legal institutions, but they do not apply to particulars outside of a rightful condition. Outside of legal institutions, property cannot be acquired conclusively, property rights cannot be enforced coercively, and disputes about them have no resolution consistent with the equal freedom of the parties. Again, although it can be shown as a general principle of private right that a person who is not party to a contract is not entitled to sue on it, or that a person who was deprived of the use of something to which he or she has no proprietary or possessory right has no claim against the person who damages the thing, in most cases concepts alone will not decide a particular case. Both the Lockean libertarian and a utilitarian/egalitarian see legal rules as trying to match something that is completely determinate without any reference to legal institutions. The Kantian sees legal rules as making determinate something that is morally binding but by itself partially indeterminate.

In the case of public right, the parallel antinomy concerns the use of public power. Although the libertarian insists that public power can only be used in the minimal ways that citizens have actively authorized, and the utilitarian or egalitarian thinks that it can be used to bring about good results (perhaps subject to certain constraints), they share a premise according to which a public authority’s moral role is to bring about specific results that can be specified without any reference to a public authority. For the Lockean libertarian, the result is the protection of private rights to person and property, which are supposed to be fully determinate without reference to institutions charged with enforcing them. For the utilitarian or egalitarian, the morally relevant results are characterized differently and more broadly, whether in terms of welfare, prosperity, or a certain pattern of distribution. The structure of the account, however, is exactly the same: institutions are justified only insofar as they bring about results that can be specified without any reference to them.

The Kantian approach rejects the common premise, and understands public right as requiring institutions in order to give effect to the structural features of a rightful condition. The public purposes are contained in the idea of a rightful condition, but so, too, is the requirement that properly constituted public authorities determine how to implement them. In so doing, public officials have no alternative but to exercise judgment about the significance to attach to competing considerations, subject only to the constraint that they make only laws that the people could impose upon themselves.

### Underview

#### Even if perfect rule of law will never be achieved, it is a valuable ideal worth striving for. It is not uniquely Western and any alternative is net worse for oppressed people around the globe.

Jonathan **Rose ‘4** (Arizona State University College of Law). “The Rule of Law in the Western World: An Overview.” Journal of Social Philosophy, Vol. 35, 2004. JDN. <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1426343>

Perhaps. Thus, as many of the commentators suggest, adherence to the Rule of Law is a matter of degree, but certainly an aspirational democratic yardstick where the degree of consistency ought to be high and departures understood and justified. On balance, these questions may suggest that favoring the narrow, process oriented approach is preferable. It may be too difficult to incorporate content in a manner that is relatively clear and operationally satisfactory. A more limited role for the Rule of Law seems, on balance, a more useful approach. Developing a concept that guards against the arbitrary use of government authority, insures the protection of individual rights, and provides a mechanism for equitable dispute resolution is a laudable objective and no small accomplishment.

IV. Further Issues

Although the focus of the paper has been to explore the meaning of the Rule of Law and the differences between the two primary approaches, some further issues deserve mention. Apart from their inherent interest, some of these other issues have particular contemporary relevance.

A. Beyond Liberalism

This description and evaluation of the Rule of Law has been within the tradition of political liberalism. When one ventures outside that belief system, one encounters, not surprisingly, criticisms of a different kind. For example, civic republicans and communtarians have seen the Rule of Law’s association with rights-based liberalism as threatening or undermining communal values and elevating legalistic and individual values over community-based democracy. Such critics would reduce the Rule of Law to “ a much more humble position.”41 Post-modernists naturally view the Rule of Law at least with skepticism, if not outright hostility. One view asserts the need for an “internal” rather than an “external” view of the Rule of Law. It is connected to political action and must be experienced and lived.42 More radical post-modernists, members of the “Critical Legal Studies Movement such as Duncan Kennedy, Roberto Unger, and Morton Horwitz, reject rights based liberalism and the associated Rule of Law as “value laden” and “an ideological cloak,” an instrument to conceal hierarchies and implement exploitation.43

Interestingly some on the left, including Marxists, have taken a much more benign view, even lauding the Rule of Law. In a famous essay, Douglas Hay noted how in 18th century England, law had a become the dominant ideology, a secular religion displacing traditional religion, and that this ideology included the notion that the ruling classes were subject to the rule of law.44 Although he viewed “legal ideology” as a significant instrument of class domination, he also argued that general acceptance of the Rule of Law as an ideology required the ruling classes to accept a degree of self-limitation and to insure that both the ruling and working classes were subject to and acted in accordance with the Rule of Law.45 E.P. Thompson was more explicit and enthusiastic in his acceptance of the Rule of Law.

Although he said that law was “clearly an instrument of the de facto ruling class and that Rule of Law was “another mask for the rule of a class,” he believed that any complex society required law. Moreover, although he said it was necessary to “expose the shams and inequities” of law, he asserted that “the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power’s all-intrusive claims, seems to me to be an unqualified human good.”46 Thompson’s characterization of the Rule of Law as “an unqualified human good” caused Morton Horwitz, a prominent scholar in the post-modern Critical Legal Studies movement, to react strongly: “I do not see how a Man of the Left can describe the rule of law as “an unqualified human good ”! Horwitz went on to state that while the Rule of Law created formal equality, it promoted substantive inequality and enabled “the shrewd, the calculating, and the wealthy to manipulate its [procedural justice’s] forms to their advantage” and ratifie[d] and legitimate[d] an adversarial, competitive, and atomistic conception of human relations.”47

As these criticisms confirm, the Rule of Law has been closely identified with classic liberal theory and its focus on individual rights. But is it necessarily associated with only this political view? It would seem useful to think about how the Rule of Law might apply in other political systems. In doing so, however, it is important to be sensitive to the possibility that the cultural and ideological aspects of other political systems might make the Rule of Law inapposite. Initially, consideration should be given to the propriety of adopting at least the narrow version in socialist or theocratic political systems. Recent scholars have discussed applying the Rule of Law more broadly. One recent work has pursued the relation between civil society and social networks in China to develop alternatives models regarding the relation of the individual and the state.48 While one might think that this may only be an outsider’s perspective, such advocacy has come from within such countries. In a most interesting development, several Chinese legal scholars “have created a sensation in Chinese intellectual circles” with a proposal to enforce constitutionally guaranteed individual rights and to “steadily advance the rule of law” in place of the current mere governmental “homage” to it.49 Another scholar has noted that leaders and dissidents in both Western and non-Western countries have advocated the Rule of Law as a governmental aspiration.50 He noted that they have exhibited “an extraordinary degree of agreement about one prescription that would benefit all, that is: the rule of law”51 and that “the touting of the rule of law is not just a mantra of lecturing Western liberal democracies,”52 as the “testimonials . . . have come from governing officials of various kinds of economic, cultural, and political and religious systems and societies.”53 Although he identifies several concerns about broadly embracing the Rule of Law, he answers the question posed by his title, The Rule of Law for Everone? “in the affirmative, at least conditionally” and that Rule of Law is a realizable “universal human good.”54 In terms of expanding its use, another question is its relevance to international law. A feature of today’s world is the increasing attention to global issues and disputes. Many of these disputes involve adjudicating the rights of individuals and trial of war criminals. Human rights have become a frequent concern. In expanding the Rule of Law outside the political system of a single state, the narrow approach seems much more feasible and appropriate. Such an expansion of the broader Rule of Law would only seem to compound the difficulties of the substantive approach, noted above. Thus, novel and interesting questions also arise as to how to apply or use the Rule of Law in developing and multicultural and multiethnic states as well as in relations between states..

B. Departures From the Rule of Law

Another interesting question is what, if anything, justifies departures from the Rule of Law. It would seem that the various conceptions of the Rule of Law implicitly recognize that adherence is not always possible nor even desirable. Although some of the various commentators explicitly recognize this possibility, the surveyed scholars do not provide much detail on this issue. Moreover, it seems likely the problem is more interrelated with the narrower, process oriented approach than with the broader content inclusive one as it seems more likely that the former is likely to coexist with conditions justifying departure. For example, how should one deal with the civil disobedience such as that by racial equality advocates in the American South? Although the existing conditions may fail the substantive test, they might well, as discussed above, comply with the procedural version of the Rule of Law. Thus, one must come to grips with the issue of whether the intentional violation of the law is justified.55 Perhaps, one way to view the matter is asymmetrically. In other words, it is government (and its officials) who must adhere to the Rule of Law. It is not relevant to measure individual behavior. On the other hand, individual behavior can undermine the Rule of Law . But perhaps the answer is that regimes that do not embody the Rule of the Good Law must abide by the Rule of Law in dealing with protesters.

A more general question of departures is raised by wars and other emergencies. War time measures often use summary procedures that derogate civil liberties and that would seem to depart from the Rule of Law. Threats to national security or public order in case of non-war emergencies are advocated as justifications for swift and harsh government action. Federal appellate judge and University of Chicago law professor, Diane Wood said that the recent terrorist attacks and the resulting policies and attitudes “call into question the extent to which any society can adhere to the rule of law when it perceives itself to be threatened by hostile powers or groups.” She noted that such events produce very contrasting attitudinal responses, one viewing the Rule of law as a “luxury item” and the other viewing it as taking on “heightened importance.”56 A famous historical example involves the Civil War abolition of habeas corpus. An interesting lesser known example involves Mau-Mau violence in Africa. Brian Simpson’s has recently revealed that the eminent conservative jurist Lord Devlin believed that the British colonial government’s adoption in Africa of emergency measures to maintain law and order in the face uprisings and violence violated the Rule of Law.57 On this question of departure, it would seem that the analysis ought to begin with the process by which the alleged departure from the Rule of Law occurred. Legislative and executive branch decisions in such matters ought to have a presumption of validity. Unlike local police action, they occur through a recognized constitutional and political process. On other hand, that does not immunize such decisions from criticism and being viewed as unjustified departures from the Rule of Law.

C. Terrorism and Other Current Events

Related to both expanding the Rule of Law to the international arena and emergency justified departures from the Rule of Law are the actions of the United States and other governments and organizations to current terrorism and the accommodation and understanding of world political changes. Two major international developments seem to be the catalyst. One is terrorism and the post 9/11 events. The other is the less recent, but continuing, transition of former socialist political and economic systems. On both these issues, it is interesting to note the surge in scholarship invoking the Rule of Law that has been prompted by these two types of recent events. With regard to the current terrorism, the United States government has adopted several measures, some of them extreme, which raise serious questions of compliance with the Rule of Law relying on the War Powers Resolution and the Constitution.58 Judge Wood, after reviewing many of the post World War II developments concluding with the recent terrorist attacks, asked “Where, if at all, does the rule of law fit into such a dangerous world?” Her answer was clear: “the rule of law not only can, but must, continue to be the guiding star for the United States and all other freedom-loving countries.” After reviewing numerous judicial decisions and legal developments occurring during the Cold War and Vietnam War, she concluded that “the lesson one can take from this history is that American institutions, especially the courts . . . on balance stood firm.”60 With regard to the current situation, she identified a number of the United States’ responses to international terrorism and asserted that they “pose[d] a significant threat to continued observance of the rule of law,” evaluating the propositions asserted by the government by using Professor Fallon’s criteria.61 Nevertheless, she believes that the “rule of law can be upheld even during times of stress.”62 Yale law professor Peter Schuck has pointed to September 11 as event critical to the rule of law. Viewing war as “incompatible with the rule of law,” he saw the consequences of fight terrorism and invading Iraq as raising serious questions for American constitutional law and the international rule of law.63 Others have connected the Rule of Law to the operation of the United Nations. One commentator asserted that a “‘rule of law’ approach to force was required by the UN Charter and was the best long term strategy for assuring the security of the United States.64 Also, an United Nations official saw the Kosovo’s hopes for democracy dependent on the Rule of Law.65 Other commentators have focused on transitional economies. One has suggested increased interest as a result of the Supreme Court’s decision in Bush v. Gore, the emerging economies in Eastern Europe, and the needs of the developing countries of Latin America and Africa have enhanced the interest in the Rule of Law.66 Another one commentator has suggested the relevance of the Rule of Law in developing monetary policy for the transition economies of former socialist states as it is the vehicle for “the translation of legal independence into actual independence.67

V. Conclusion

As the scholarship identified above and this and other conferences68 indicate, the contemporary debate about the Rule of Law continues. Three reasons seem possible. First, despite its ambiguity and excess baggage, Rule of Law remains a critically and fundamentally important ideal and concept. The author and public intellectual, Paul Johnson, called the establishment of the Rule of Law “the most important political development of the second millenium.”69 He said that “its acceptance and enforcement in any society is far more vital to the happiness of the majority than is even democracy itself.” Moreover, Hutchinson and Monahan say that the rule of law “has been under mounting pressure in modern society.”70

#### Universalism is key—Kritiks of international rule of law net increase violence and rob us of tools to combat it

Ignatief 1

Michael Ignatief 1, Director of the Carr Center for Human Rights at the Kennedy School of Government at Harvard University, “The Attack on Human Rights”, Foreign Affairs, November/December

But at the same time. Western defenders of human rights have traded too much away. In the desire to find common ground with Islamic and Asian positions and to purge their own discourse of the imperial legacies uncovered by the postmodernist critique, Western defenders of human rights norms risk compromising the very universality they ought to be defending. They also risk rewriting their own history. Many traditions, not just Western ones, were represented au inc drafting of the Universal Declaration of Human Rights—for example, the Chinese, Middle Eastern Christian, Marxist, Hindu, Latin American, and Islamic. The members of the drafting committee saw their task not as a simple ratification of Western convictions but as an attempt to delimit a range of moral universals from within their very different religious, political, ethnic, and philosophical backgrounds. This fact helps to explain why the document makes no reference to God in its preamble. The communist delegations would have vetoed any such reference, and the competing religious traditions could not have agreed on words that would make human rights derive from human beings' common existence as Gods creatures. Hence the secular ground of the document is not a sign of European cultural domination so much as a pragmatic common denominator designed to make agreement possible across a range of divergent cultural and political viewpoints. It remains true, of course, that Western inspirations—and Western drafters—played the predominant role in the drafting of the document. Even so, the drafters' mood in 1947 was anything but triumphalist. They were aware, first of all, that the age of colonial emancipation was at hand: Indian independence was proclaimed while the language of the declaration was being finalized. Although the declaration does not specifically endorse self-determination, its drafters clearly foresaw the coming tide of struggles for national independence. Because it does proclaim the right of people to selfgovernment and freedom of speech and religion, it also concedes the right of colonial peoples to construe moral universals in a language rooted in their own traditions. Whatever failings the drafters of the declaration may be accused of, unexamined Western triumphalism is not one of them. Key drafters such as Rene Cassin of France and John Humphrey of Canada knew the knell had sounded on two centuries of Western colonialism. They also knew that the declaration was not so much a proclamation of the superiority of European civilization as an attempt to salvage the remains of its Enlightenment heritage from the barbarism of a world war just concluded. The declaration was written in full awareness of Auschwitz and dawning awareness of Kolyma. A consciousness of European savagery is built into the very language of the declarations preamble; "Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind ..." The declaration may still be a child of the Enlightenment, but it was written when faith in the Enlightenment faced its deepest crisis. In this sense, human rights norms are not so much a declaration of the superiority of European civilization as a warning by Europeans that the rest of the world should not reproduce their mistakes. The chief of these was the idolatry of the nation-state, causing individuals to forget the higher law commanding them to disobey unjust orders. The abandonment of this moral heritage of natural law and the surrender of individualism to collectivism, the drafters believed, led to the catastrophes of Nazi and Stalinist oppression. Unless the disastrous heritage of European collectivism is kept in mind as the framing experience in the drafting of the declaration, its individualism will appear to be nothing more than the ratification of Western bourgeois capitalist prejudice. In 'act, it was much more: a studied attempt to reinvent the European natural law tradition in order to safeguard individual agency against the totalitarian state. IT REMAINS TRUE, therefore, that the core of the declaration is the moral individualism for which it is so reproached by non-Western societies. It is this individualism for which Western activists have become most apologetic, believing that it should be tempered by greater emphasis on social duties and responsibilities to the community. Human rights, it is argued, can recover universal appeal only if they soften their individualistic bias and put greater emphasis on the communitarian parts of the declaration, especially Article 29, which says that "everyone has duties to the community in which alone the free and full development of his personality is possible." This desire to water down the individualism of rights discourse is driven by a desire both to make human rights more palatable to less individualistic cultures in the non-Western world and also to respond to disquiet among Western communitarians at the supposedly corrosive impact of individualistic values on Western social cohesion. But this tack mistakes what rights actually are and misunderstands why they have proven attractive to millions of people raised in non-Western traditions. Rights are meaningful only if they confer entitlements and immunities on individuals; they are worth having only if they can be enforced against institutions such as the family, the state, and the church. This remains true even when the rights in question are collective or group rights. Some of these group rights such as the right to speak your own language or practice your own religion-are essential preconditions for the exercise of individual rights. The right to speak a language of your choice will not mean very much if the language has died out. For this reason, group rights are needed to protect individual rights. But the ultimate purpose and justification of group rights is not the protection of the group as such but the protection of the individuals who compose it. Group rights to language, for example, must not be used to prevent an individual from learning a second language. Group rights to practice religion should not cancel the right of individuals to leave a religious community if they choose. Rights are inescapably political because they tacitly imply a conflict between a rights holder and a rights "withholder," some authority against which the rights holder can make justified claims. To confuse rights with aspirations, and rights conventions with syncretic syntheses of world values, is to wish away the conflicts that define the very content of rights. Individuals and groups will always be in conflict, and rights exist to protect individuals. Rights language cannot be parsed or translated into a non-individualistic, communitarian framework; it presumes moral individualism and is nonsensical outside that assumption. Moreover, it is precisely this individualism that renders human rights attractive to non-Western peoples and explains why the fight for those rights has become a global movement. The language of human rights is the only universally available moral vernacular that validates the claims of women and children against the oppression they experience in patriarchal and tribal societies; it is the only vernacular that enables dependent persons to perceive themselves as moral agents and to act against practices- arranged marriages, purdah, civic disenfranchisement, genital mutilation, domestic slavery, and so on-that are ratified by the weight and authority of their cultures. These agents seek out human rights protection precisely because it legitimizes their protests against oppression.” If this is so, then it is necessary to rethink what it means when one says that rights are universal. Rights doctrines arouse powerful opposition because they challenge powerful religions, family structures, authoritarian states, and tribes. It would be a hopeless task to attempt to persuade these holders of power of the universal validity of rights doctrines, since if these doctrines prevailed, their exercise of authority would necessarily be abridged and constrained. Thus universality cannot imply universal assent, since in a world of unequal power, the only propositions that the powerful and powerless would agree on would be entirely toothless and anodyne. Rights are universal because they define the universal interests of the powerless-namely, that power be exercised over them in ways that respect their autonomy as agents. In this sense, human rights represent a revolutionary creed, since they make a radical demand of all human groups that they serve the interests of the individuals who compose them. This, then, implies that human groups should be, insofar as possible, consensual, or at least that they should respect an individual's right to exit when the constraints of the group become unbearable. The idea that groups should respect an individual's right of exit is not easy to reconcile with what groups actually are. Most human groups-the family, for example-are blood groups, based on inherited kinship or ethnic ties, People do not choose to be born into them and do not leave them easily, since these collectivities provide the frame of meaning within which individual life makes sense. This is as true in modern secular societies as it is in religious or traditional ones. Group rights doctrines exist to safeguard the collective rights-for example, to language-that make individual agency meaningful and valuable. But individual and group interests inevitably conflict. Human rights exist to adjudicate these conflicts, to define the irreducible minimum beyond which group and collective claims must not go in constraining the lives of individuals. CULTURE SHOCK ADOPTING THE VALUES of individual agency does not necessarily entail adopting Western ways of life. Believing in your right not to be tortured or abused need not mean adopting Western dress, speaking Western languages, or approving of the Western lifestyle. To seek human rights protection is not to change your civilization; it is merely to avail vourself of the protections of what the philosopher Isaiah Berlin called "negative liberty": to be free from oppression, bondage, and gross physical harm. Human rights do not, and should not, delegitimize traditional culture as a whole. The women in Kabul who come to human rights agencies seeking protection from the Taliban do not want to cease being Muslim wives and mothers; they want to combine their traditions with education and professional health care provided by a woman. And they hope the agencies will defend them against being beaten and persecuted for claiming such rights. The legitimacy of such claims is reinforced by the fact that the people who make them are not foreign human rights activists or employees of international organizations but the victims themselves. In Pakistan, for example, it is poor rural women who are criticizing the grotesque distortion of Islamic teaching that claims to justify "honor killings"-in which women are burned alive when they disobey their husbands. Human rights have gone global by going local, empowering the powerless, giving voice to the voiceless. It is simply not the case, as Islamic and Asian critics contend, that human rights force the Western way of life on their societies. For all its individualism, human rights rhetoric does not require adherents to jettison their other cultural attachments. As the philosopher Jack Donnelly argues, Human rights should human rights assume "that people probably are best suited, and in any case are entitled, not delegitimize to choose the good life for themselves."

#### Formalism is key to ethical action. Abstracting from one’s own circumstance is key to mutual recognition of the agency of others.

Farr 2

Arnold Farr (prof of phil @ UKentucky, focusing on German idealism, philosophy of race, postmodernism, psychoanalysis, and liberation philosophy). “Can a Philosophy of Race Afford to Abandon the Kantian Categorical Imperative?” JOURNAL of SOCIAL PHILOSOPHY, Vol. 33 No. 1, Spring 2002, 17–32.

One of the most popular criticisms of Kant’s moral philosophy is that it is too formalistic.13 That is, the universal nature of the categorical imperative leaves it devoid of content. Such a principle is useless since moral decisions are made by concrete individuals in a concrete, historical, and social situation. This type of criticism lies behind Lewis Gordon’s rejection of any attempt to ground an antiracist position on Kantian principles. The rejection of universal principles for the sake of emphasizing the historical embeddedness of the human agent is widespread in recent philosophy and social theory. I will argue here on Kantian grounds that although a distinction between the universal and the concrete is a valid distinction, the unity of the two is required for an understanding of human agency. The attack on Kantian formalism began with Hegel’s criticism of the Kantian philosophy.14 The list of contemporary theorists who follow Hegel’s line of criticism is far too long to deal with in the scope of this paper. Although these theorists may approach the problem of Kantian formalism from a variety of angles, the spirit of their criticism is basically the same: The universality of the categorical imperative is an abstraction from one’s empirical conditions. Kant is often accused of making the moral agent an abstract, empty, noumenal subject. Nothing could be further from the truth. The Kantian subject is an embodied, empirical, concrete subject. However, this concrete subject has a dual nature. Kant claims in the Critique of Pure Reason as well as in the Grounding that human beings have an intelligible and empirical character.15 It is impossible to understand and do justice to Kant’s moral theory without taking seriously the relation between these two characters. The very concept of morality is impossible without the tension between the two. By “empirical character” Kant simply means that we have a sensual nature. We are physical creatures with physical drives or desires. The very fact that I cannot simply satisfy my desires without considering the rightness or wrongness of my actions suggests that my empirical character must be held in check by something, or else I behave like a Freudian id. My empirical character must be held in check by my intelligible character, which is the legislative activity of practical reason. It is through our intelligible character that we formulate principles that keep our empirical impulses in check. The categorical imperative is the supreme principle of morality that is constructed by the moral agent in his/her moment of self-transcendence. What I have called self-transcendence may be best explained in the following passage by Onora O’Neill: In restricting our maxims to those that meet the test of the categorical imperative we refuse to base our lives on maxims that necessarily make our own case an exception. The reason why a universilizability criterion is morally signiﬁcant is that it makes our own case no special exception (G, IV, 404). In accepting the Categorical Imperative we accept the moral reality of other selves, and hence the possibility (not, note, the reality) of a moral community. The Formula of Universal Law enjoins no more than that we act only on maxims that are open to others also.16 O’Neill’s description of the universalizability criterion includes the notion of self-transcendence that I am working to explicate here to the extent that like self-transcendence, universalizable moral principles require that the individual think beyond his or her own particular desires. The individual is not allowed to exclude others as rational moral agents who have the right to act as he acts in a given situation. For example, if I decide to use another person merely as a means for my own end I must recognize the other person’s right to do the same to me. I cannot consistently will that I use another as a means only and will that I not be used in the same manner by another. Hence, the universalizability criterion is a principle of consistency and a principle of inclusion. That is, in choosing my maxims I attempt to include the perspective of other moral agents.

## 1ar

**Turn - Their use of educational spaces as a site of empowerment places the judge into the role of the authoritarian adjudicator who molds students in accordance to a particular political end. This kills any conception of ideology kritik and turns their case.**

**Rickert 1** Rickert, Thomas. ""Hands Up, You're Free": Composition in a Post-Oedipal World." JacOnline Journal

“**An example of the connection between violence and pedagogy is implicit in the notion of being "schooled" as it has been conceptualized by Giroux** and Peter Mclaren. They explain, "**Fundamental to the principles that inform critical pedagogy is the conviction that schooling for** self- and social **empowerment is ethically prior to questions of epistemology or** to a mastery of technical or social **skills** that are primarily tied to the logic of the marketplace" (153-54). **A presumption here is that it** is **the teacher who knows (best**), and this orientation gives the concept of schooling a particular bite: **though it presents itself as oppositional to the state and the dominant forms of pedagogy that serve the state and its capitalist interests, it nevertheless reinscribes an authoritarian model that is congruent with any number of oedipalizing pedagogies that "school" the student in proper behavior**. As Diane Davis notes, **radical, feminist, and liberatory pedagogies "often camouflage pedagogical violence in their move from one mode of 'normalization' to another" and "function within a disciplinary matrix of power, a covert carceral system, that aims to create useful subjects for particular political agendas**" (212). **Such** oedipalizing **pedagogies are less effective in practice than what the claims for them assert**; indeed, **the attempt to "school" students in the manner called for by Giroux** and McLaren **is complicitous with the malaise of postmodern cynicism**. **Students will dutifully go through their liberatory motions**, producing the proper assignments, **but it remains an open question whether they carry an oppositional politics with them. The "critical distance" supposedly created with liberatory pedagogy also opens up a cynical distance toward the writing produced in class**.” (299-300)

**Turns their impacts, even if debate should be empowering, their method inherently disempowers students by placing the judge as an authoritarian figure. Their call for recognition as minority puts the judge into a position where they must either grant or deny recognition, which is a terrible model for debate**