CHAPTER 5

Legal Coercion as a Moral Problem? Kant on the Enforcement of Rights and the Limits of Moral Personality

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The question of whether or not Kant's Philosophy of Right[1] can be understood as part of his critical moral[2] philosophy has always been disputed. One of the main arguments in favour of the independence of Right from morality relates to the coercive power that is, according to Kant, conceptually associated with Right: 'Right and authorization to use coercion [. . .] mean one and the same thing.'[3] Accordingly, proponents of the *independence thesis* hold that if Right and the power to coerce were analytically linked, then Right as the epitome of heteronomy (i.e. external lawgiving) could not possibly appeal to moral autonomy (or the categorical imperative) as its grounding principle.[4] However, does the authority to

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[1] I have opted to use the term 'Right', since the German 'Recht' and its cognates (such as 'rechtlich') have no exact English equivalent. Using 'Right' holds the merit of preserving some of this ambiguity in a way that 'law' does not.

[2] I use the term 'moral' as an attribute of laws in the Kantian sense, i.e. 'moral(s)' is the common generic term for 'Right'/'doctrine of right' (*Recht*, *Rechtslehre*) on the one hand and 'ethics'/'doctrine of virtue' (*Tugend*, *Ethik*, *Tugendlehre*) on the other. Where 'morality' does not refer to laws, but instead (as the opposite of 'legality') describes the specifically ethical relationship of actions to moral laws, I will indicate this.

[3] RL 6:232.

[4] This objection has been raised in particular by Markus Willaschek, 'Right and Coercion: Can Kant's Conception of Right be Derived from His Moral Theory?', *International Journal of Philosophical Studies*, 17/1 (2009), 49–70, at 59f.; Markus Willaschek, 'The Non-Derivability of Kantian Right from the Categorical Imperative: A Response to Nance', *International Journal of Philosophical Studies*, 20/4 (2012), 557–64, at 557. Also cf. Willaschek in this volume (Chapter 1). According to him, coercive power can neither be derived from the autonomy theorem nor from the categorical imperative (neither as per the Formula of Humanity nor as per the Formula of Universal Law). Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy*, Cambridge, MA: Harvard University Press, 2009, 355, 359, 388 voices similar doubts. In addition, this objection is at a minimum implicit in most independentist readings, cf. Allen W. Wood, 'The Final Form of Kant's Practical Philosophy', in Mark Timmons (ed.), *Kant's Metaphysics of Morals: Interpretative Essays*, Oxford: Oxford University Press, 2002, 1–21, at 5ff. or Thomas Pogge, 'Is Kant's *Rechtslehre* a

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coerce really call into question the dependence of Right on Kant's moral philosophy? In this chapter, I will propose the alternative, opposite view that – on Kantian grounds – coercion as a normative problem only becomes explicable *against* Kant's critical moral philosophy. For it is the moral personality of the coerced that calls for a normative justification of coercion in the first place (1). That said, coercion that does not violate one's moral personality becomes morally irrelevant since moral personality is conceptionally restricted. Thus, the very embedding of Right in Kant's critical moral philosophy provides a two-way solution: an explanation for why coercion is a normative problem in the first place; and a justification as to what extent coercion is legitimate. However, proponents of the *independence thesis* aim to explain coercion as an analytical implication of the notion of equal, relational freedom and thus miss this crucial dual dependence on Kant's critical moral philosophy. Consequently, they are neither able to offer a *Kantian* justification for the normative bindingness nor for the enforceability of Right. (2). Conversely, tracing coercion back to the limits of moral personality does not only explain why coercive force is grounded in moral personality (and autonomy as its constitutive principle). Even more importantly, it requires us to reconsider whether Kant is able to argue consistently against the external enforceability of internal perfect duties (e.g. the prohibition of suicide) (3).

5.1 Coercion as a Moral Problem and Unlawful Treatment as a Mere Means

Why is somebody legally entitled to coerce someone else? – Before explaining why this is fundamentally the wrong question, I would first like to clarify what I mean when I use the term *coercion* with reference to Kant. From Kant's perspective – echoed by contemporary legal theory – coercion can mean two things: first, physical coercion in the sense of *vis absoluta* (i.e. the factual restriction of action); and, second, psychological coercion in the sense of *vis compulsiva* (i.e. the pathological motivation by conflicting sensual inclinations, e.g. fear of punishment). When Kant analytically

"Comprehensive Liberalism"?', in Mark Timmons (ed.), *Kant's Metaphysics of Morals: Interpretative Essays*, Oxford: Oxford University Press, 2002, 133–58, at 141f. However, some proponents of a derivationist reading of Kant's legal philosophy also see a problem here, e.g. Wolfgang Kersting, *Wohlgeordnete Freiheit: Immanuel Kants Rechts- und Staatsphilosophie*, Berlin: De Gruyter, 1984, 29f. For a view questioning or at least problematizing the derivation of Right from the categorical imperative in view of legal coercion, cf. Paul Guyer, 'Kant's Deductions of the Principles of Right', in Mark Timmons (ed.), *Kant's Metaphysics of Morals: Interpretative Essays*, Oxford: Oxford University Press, 2002, 23–64, at 46ff. and Christoph Horn, *Nichtideale Normativität: Ein neuer Blick auf Kants politische Philosophie*, Berlin: Suhrkamp, 2014, 46ff.

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derives the authority to coerce from the concepts of *right* and *wrong* in § D of the Introduction into the Doctrine of Right, he speaks of coercion in the former sense:

> [C]oercion is a hindrance or resistance to freedom. Therefore, if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a *hindering of a hindrance to freedom*) is consistent with freedom in accordance with universal laws, that is, it is right.[5]

Since Kant is concerned with factual resistance to a wrongful act here, coercion under § D can be taken to mean only physical coercion in the sense of *vis absoluta*. This is to be distinguished from psychological coercion in the sense of *vis compulsiva*, which consists in the prospect of physical coercion in response to potential wrongdoing. In connection with a universal law, such psychological coercion can even be considered the epitome of external, juridical lawgiving as referred to by Kant in the Introduction into the Metaphysics of Morals.[6] To compel someone to do something in this latter sense means nothing other than to act as an external, juridical legislator – that is, as someone who declares the duty to the obligor and links it to a pathological incentive.[7] This chapter will focus on coercion in the sense of *vis absoluta* and disregard *vis compulsiva*.

My main argument is that the coercive power of Right is less a problem than evidence for a derivational reading of Kant's legal philosophy. This is due to the fact that the authority to coerce does not need to be derived from the categorical imperative at all if one understands Right as an integral part of Kant's critical moral philosophy. While on the surface this might sound surprising, it becomes clear when we realize that Kant's actual issue is to demonstrate the inadmissibility of coercion. The central question for Kant is therefore not *Why and when may I coerce someone?*, but rather *Why and when may I* ***not*** *coerce someone?*.

[5] RL 6:231. [6] Cf. RL 6:218f.

[7] That coercion is part of every lawgiving (be it ethical or juridical) follows directly from Kant's concept of duty, to which every form of lawgiving refers: 'The very *concept of duty* is already the concept of a necessitation (constraint) of free choice through the law. This constraint may be an *external constraint* or a *self-constraint*' (TL 6:379). What makes this coercion entailed in the concept of duty an external constraint (i.e. *external lawgiving*), however, is that it is someone other than the obligor who 'is the *lawgiver* (*legislator*)' and 'commands (*imperans*) through a law. He is the author (*autor*) of the obligation in accordance with the law' (RL 6:227). What is more, if this external lawgiving does not make the 'duty the incentive' but draws the incentive 'from pathological determining grounds of choice' (RL 6:219), then it constitutes *juridical lawgiving*, which is nothing other than *vis compulsiva*. For more details on Kant's concept of *lawgiving* in this context, cf. Philipp-Alexander Hirsch, *Freiheit und Staatlichkeit bei Kant: Die autonomietheoretische Begründung von Recht und Staat und das Widerstandsproblem*, Berlin: De Gruyter, 2017, 123ff.

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Coercion (in the sense of using physical force) only becomes a normative problem when someone can legitimately claim not to be coerced. Therefore, use of force or coercion in any form towards stones, plants, or animals[8] is always normatively permissible. This is the case because, according to Kant, stones, plants, and animals lack moral personality, that is, they are not suitable subjects of moral (i.e. legal and ethical) entitlements and duties.[9] Coercion does not become a normative problem until a person is involved.[10] This is already implied in Kant's definition of the 'concept of right, insofar as it is related to an obligation corresponding to it (i.e., *the moral concept of right*)' in § B of the 'Introduction to the Doctrine of Right',[11] according to which Right concerns the intersubjective relationship of persons. Consequently, the question of the permissibility of legal coercion, which is raised in §§ C–E, arises only for them. Kant mapped this out clearly as early as 1784 in the Feyerabend lecture on natural law:

> *Res* is that in regard to which another's freedom can in no way be limited if it is used. The thing has no freedom, thus it can certainly not be wronged, thus it does not limit my freedom. But *persona*, a free being, limits my freedom. [. . .] A freedom is limited through itself. Things that have no freedom can thus not be limited in their freedom. In relation to beings who do have freedom the freedom of everyone else is limited. The latter is a person, the former a thing.[12]

Unlike things, persons enjoy the status of being subjects of rights and duties and as such cannot be coerced to do something or used by others

[8] While this might be a somewhat odd way of framing coercion and force, it enables me to illustrate the core of my argument.

[9] Animate and inanimate matter without pure practical reason is at most the object of rights and duties, but never the subject of them. Thus, in RL 6:241, Kant states that there is no 'relation in terms of rights of human beings toward beings that have neither rights nor duties [. . .] [f]or these are beings lacking reason, which can neither bind us nor by which we can be bound'. Animals also fall under this category. They are only being protected reflexively, insofar as cruelty to animals violates a duty of man against himself. Cf. TL 6:443.

[10] This is also pointed out by Bernd Ludwig, 'Sympathy for the Devil(s)? Personality and Legal Coercion in Kant's Doctrine of Law', *Jurisprudence* 6 (2015), 25–44, at 42: 'If the other rational being is a non-person, that is, a mere *thing* without any rights, then any kind of coercion is morally permissible under all possible circumstances.'

[11] Cf. RL 6:230.

[12] V-NR/Feyerabend 27:1335 (my translation; the translation by Rauscher and Westphal is not reliable here, nor in the other passages I have quoted from V-NR/Feyerabend as well as VARL and VATP). The restriction of freedom that Kant speaks of here is subsequently identified in the lecture as self-legislated, with which he refers to the autonomy theorem and the doctrine of transcendental freedom. For a more detailed account, cf. Philipp-Alexander Hirsch, *Kants Einleitung in die Rechtslehre von 1784: Immanuel Kants Rechtsbegriff in der Moralvorlesung 'Mrongovius II' und der Naturrechtsvorlesung 'Feyerabend' von 1784 sowie in der 'Metaphysik der Sitten' von 1797*, Göttingen: Universitätsverlag Göttingen, 2012, 90ff. and with the same reasoning, also cf. Kant's remarks in GMS 4:428ff.

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without further justification.[13] It follows that the plurality of persons generates the problem of legitimate coercion in the first place. Yet why should it be that a person has this special standing not to be coerced? As I will outline in this chapter, Kant sees the reason for this in the fact that a person is an autonomous being and as such an end in herself or himself. Or to put it differently: without presupposing Kant's critical moral philosophy and the autonomy theorem on which it is based, coercion – at least for Kant[14] – ceases to be a normative problem.[15] This raises two questions: what is the justificatory relationship between the doctrine of Right and Kant's critical moral philosophy? And how can legal coercion be explained with reference to this?

Let me start with the first question:[16] If we interpret Kant's legal philosophy against his critical moral philosophy, then someone only has rights because and to the extent that she is an end in herself. A violation of rights is nothing more than a treatment of that person as a mere means; and, although often incorrectly denied, any treatment of another person as a mere means constitutes a breach of a legal duty.[17] A legally valid contract, for example, requires that the other party not be treated merely as a means, that is, that his contractual interests are met. Likewise, to infringe upon

[13] This is most clearly stated by Kant in TL 6:462, where he says that the human being 'must always be used at the same time as an end. It is just in this that his dignity (personality) consists, by which he raises himself above all other beings in the world that are not human beings and yet can be used, and so over all things.'

[14] My aim here is to explain Kant's concept of things. However, whether we can substitute a different account of the value/moral worth of a person for Kant's account is another story. I do not think that it is impossible to build a Kantian philosophy of law and politics on a different foundation. However, this would require a more detailed elaboration, which lies outside the scope of this chapter.

[15] Here and in the following, I refer to a 'normative' problem or a 'normative' justification; for now, this leaves the question unanswered whether or not Kant endorses a separate, genuinely independent normativity of Right in addition to the normativity of morality. However, subsequent sections (cf. pp. 106ff.) will clarify that Kant does not acknowledge such normativity – making all normativity moral.

[16] For a detailed account of the relationship between law and morality according to Kant, cf. Hirsch, *Freiheit und Staatlichkeit bei Kant*, 67ff.

[17] As the focus of this chapter is legal coercion, I can only touch on this point: contrary to what some authors (e.g. Willaschek, 'Right and Coercion', 61) claim, Kant even considers promissory courtesies (e.g. the promise to help a friend move house) to represent enforceable legal obligations. Such a promissory courtesy also involves an agreement to transfer one's choice to another and, on Kantian principles (cf. RL 6:271ff.), in this respect establishes a personal right that is contractually binding and, if necessary, enforceable (also cf. Gerhard Seel, 'How Does Kant Justify the Universal Objective Validity of the Law of Right?', *International Journal of Philosophical Studies* 17 (2009), 71–94, at 78ff.). If this is to be avoided and the legal obligation is to lapse under certain circumstances (e.g. in the case of a family emergency or even if one suddenly regrets the promise made), this should – as Kant himself emphasizes (cf. ZeF 8:348, n. *; RL 6:298, 300) – be included in the contractual agreement as a reservation or resolving condition. For a detailed account, cf. Hirsch, *Freiheit und Staatlichkeit bei Kant*, 106ff.

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another's property for one's own enrichment without consent means to treat this person as a mere means. This justificatory nexus can be identified for the first time in Kant's *Feyerabend* lecture on natural law.[18] It also finds its way into the *Grundlegung* with Kant's analysis of perfect duties against others. In the case of fraud ('a false promise') and 'assaults on the freedom and property of others [. . .] he who transgresses the rights of human beings intends to make use of the person of others merely as means'.[19] Kant's examples show that legal duties – for here, without exception, we are dealing with perfect external duties – essentially consist in not using others merely as a means. He made this explicit in the *Vorarbeiten* on the *Doctrine of Right*:

> Outer *freedom* is the independence of a human being from the choice of others, so that he need not act solely in accordance with their ends but may, in doing so, also act in accordance with his own ends; that is, so that he *need* not serve *merely* as a means to any end of another (i.e. so that he cannot be compelled to do so).[20]

External freedom as Kant describes it here is obviously nothing other than the innate right to freedom presented in the *Doctrine of Right*: '*freedom*' as the 'independence from being constrained by another's choice'.[21] This is made even clearer in the *Vorarbeiten* for *Theory and Practice*, according to which '*freedom* as a *human being* according to the innate right [consists in] not being subject to the choice of others merely as a means'.[22]

This justificatory nexus of violating one's right by treating a person merely as a means highlights an important clarification of the concept of

[18] Cf. V-NR/Feyerabend 27:1319f. (my translation): 'The human being can, however, be used as a means by another rational being, but it is never a mere means, instead it is always an end at the same time, e.g.: if the mason serves me as a means of building a house, I serve him back as a means of obtaining money. [. . .] If I make a contract with my servant then he must also be an end just as I am, and not a mere means. [. . .] I cannot take something from another's field in order that it serves my own, for then the other would be a mere means.' These remarks in the *Feyerabend* lecture on natural law reflect a justificatory nexus between morality and law to which Kant subsequently essentially adhered and which thus ultimately also found its way into the *Doctrine of Right* of 1797. For more details, cf. Philipp-Alexander Hirsch, 'Kant über Recht, Autonomie und Selbstzweckhaf tigkeit: Naturrecht Feyerabend als Geburtsstunde Kants kritischer Rechtsbegründung?', in Dieter Hüning, Stefan Klingner, and Gianluca Sadun Bordoni (eds.), *Auf dem Weg zur kritischen Rechtslehre?*, Leiden: Brill, 2021, 197–228 and, for a critical assessment in this respect, Markus Willaschek, 'How Can Freedom Be a Law to Itself? The Concept of Autonomy in the "Introduction" to the Naturrecht Feyerabend Lecture Notes (1784)', in Stefano Bacin and Oliver Sensen (eds.), *The Emergence of Autonomy in Kant's Moral Philosophy*, Cambridge: Cambridge University Press, 2020, 141–57 and Günther Zöller, '"[O]hne Hoffnung und Furcht": Kants Naturrecht Feyerabend über den Grund der Verbindlichkeit zu einer Handlung', in Bernd Dörflinger *et al.* (eds.), *Kant's Lectures*, Berlin: De Gruyter, 2015, 197–210.

[19] Cf. GMS 4:429ff. [20] VARL 23:341 (my translation). [21] RL 6:237.

[22] VATP 23:136 (my translation).

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freedom in Kant's *Doctrine of Right*. External freedom is the 'object' protected by Right. It represents what the innate right consists in and what the legal duties corresponding to that innate right refer to. However, the legal validity, that is, the bindingness of legal obligations protecting this very freedom, depends on the obligee and the obligor both being ends in themselves and thus follows from their shared moral autonomy. It follows that external freedom is not a specifically human capacity (e.g. physical freedom of movement, or psychological freedom as in the ability to determine oneself according to one's purposes). Instead, external freedom is nothing other than 'freedom in the *external* use of choice [. . .] insofar as it [*sc.* choice] is determined by laws of reason'.[23] External freedom refers to human choice in external actions (i.e. the faculty to perform external actions as one pleases) insofar as one's choice is subject to autonomous laws of reason. In other words, the choice or the exercise of one's choice is morally indifferent if the choice is not subject to a moral law and is *therefore* not regulated in a certain way (e.g. restricted to a specific scope of action). Consequently, human choice is only free choice in that it can be determined by laws of reason, and it is precisely this determinability by the laws of reason in which moral autonomy finds its expression.

In consequence, external freedom as the 'object' protected by law (i.e. independence from another's necessitating choice) is the normative demand that the laws of Right specify for the external use of choice *because* human beings are morally autonomous and thus necessarily ends in themselves.[24] A person exists '*as an end in itself* (which is the supreme limiting condition of the freedom of action of every human being)',[25] and 'hence so far limits all choice'[26]. This is why, for Kant, coercion by others is *prima facie* normatively problematic, as by coercing someone the coerced would 'serve *merely* as a means to any end of another'.[27] Thus, legal subjects being morally autonomous and therefore ends in themselves is not only crucial for the validity of Right, but also gives rise to legal coercion as a normative problem in the first place.[28]

[23] RL 6:214.

[24] Cf. J. P. Messina's essay in this volume (Chapter 12); Messina's reading also goes in this direction.

[25] GMS 4:430f. [26] GMS 4:428. [27] VARL 23:341 (my translation).

[28] It seems a bit premature when Willaschek, 'Right and Coercion', 60 objects: 'It [*sc.* the value of autonomy] resides entirely in its self-legislation and thus in its not being conditioned by anything empirical and contingent. [. . .] [T]he value of autonomy alone cannot be a reason for or against the legitimacy of coercion: it cannot be a reason against its legitimacy, because it is not affected by coercion; and it cannot be a reason for its legitimacy, because it cannot be promoted by coercive measures.' For Kant, however, physical body and moral personality form a unit, so that respect for personality and the preservation of one's physical integrity are closely connected: '[A]cquiring a

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Before turning to legal coercion in more detail, let me address – albeit briefly – three possible objections to this reading of Kant: first, one might object that Kant had abandoned this justificatory nexus in the *Doctrine of Right* since he does not explicitly refer to moral autonomy or the end-in-itself-formula of the categorical imperative in the Introduction to the Doctrine of Right. However, this objection overlooks the fact that stipulating legal subjects to be ends in themselves is implicit in Kant's notion of moral personality, which is – as shown above – central to the *Doctrine of Right*. This is most evident in Kant's treatment of criminal law when he states that 'a human being can never be treated merely as a means to the purposes of another or be put among the objects of rights to things: his innate personality protects him from this'.[29] A person is not a thing and therefore cannot be treated arbitrarily. This would disregard his or her moral 'personality, by which alone they are ends in themselves'.[30] Consequently, as Right refers to the 'practical relation of one person to another',[31] Kant implicitly traces legal freedom back to the legal subjects being ends in themselves and being morally autonomous.[32] This is the case as it follows from '*[m]oral* personality' 'that a person is subject to no other laws than those he gives to himself (either alone or at least along with others)'.[33]

A second objection might be rooted in the view that the moral value of being an end in itself is in fact normatively too ambitious and thus an ill-suited foundation for Right. This would be the case if one assumes the end-in-itself-formula of the categorical imperative ultimately to require us to treat everyone else as an end. However, Right is obviously not about promoting ends in themselves in this positive way. Instead, Right can be deduced analytically from the concept of freedom of choice in its external use. Therefore, rightful behaviour is possible without taking into account

member of a human being is at the same time acquiring the whole person, since a person is an absolute unity' (RL 6:278). In a similar vein, cf. V-Mo/Collins, 27:369 and Immanuel Kant, *Vorlesung zur Moralphilosophie*, ed. by Werner Stark, Berlin: De Gruyter, 2004, 216. According to Kant's (admittedly strong) claim, moral personality (at least of human beings) is thus always embodied. Consequently, coercion only poses a moral problem for autonomous beings and therefore beings that are ends in themselves. In this respect, personality or its moral value is – as I have tried to show – the only reason why coercion is *prima facie* illegitimate vis-à-vis autonomous rational beings and thus requires justification in the first place. For a similar take, cf. Bernd Ludwig, '"Positive und negative Freiheit" bei Kant? Wie begriffliche Konfusion auf philosophi(ehistori)sche Abwege führt', *Jahrbuch für Recht und Ethik* 21 (2013), 271–305, at 300ff.

[29] RL 6:331.

[30] KpV 5:87. likewise cf. KpV 5:131; GMS 4:428 and RL 6:359 and RL 6:423, 434ff.

[31] Cf. RL 6:230.

[32] On Kant's line of reasoning, also cf. Ludwig, 'Sympathy for the Devil(s)?', 34ff.

[33] RL 6:223.

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the special interests and wishes of others (as external duties of virtue-demand),[34] which is a prerequisite for treating them as an end. 'If I do not contribute to another's happiness, I do not infringe upon his freedom, but let him do what he wants.'[35] Thus, Right is only about the moral value of being an end in itself in the *negative* sense of not treating others as a mere means.

A third objection to the justificatory nexus outlined above could be that Right according to Kant abstracts from the ends the legal subjects are pursuing and thus cannot be derived from the categorical imperative (in whatever formula). While it would go beyond the scope of this article to discuss the complex question of the derivability of the general law of Right from the categorical imperative,[36] we can nevertheless point out that Right restricts legally legitimate actions to the extent that at least one permissible maxim can be found for them. This is the case despite the fact that Right does not specifically prescribe any maxims, this being the function of the doctrine of virtue. Thus, if at least one permissible maxim can be found for a rightful action, then that action does not amount to treating other legal subjects merely as means.[37] Irrespective of the disputed derivability of Right from the categorical imperative, Right hence reflects the fact that legal subjects are ends in themselves.

5.2 Coercing without Treating merely as a Means

How does all this help us to understand the legitimacy of legal coercion? As I have tried to show, Right protects our independence from someone else's necessitating choice, precisely because as persons we are ends in ourselves and may not be used merely as a means. And since applying coercive force is the paradigmatic case of using someone merely as a means,

[34] Cf. TL 6:385ff., 395, 448ff.

[35] V-NR/Feyerabend 27:1329. In a way, Right precedes virtue: the doctrine of virtue requires our use of choice to conform with the wishes and ends of others. However, the *conditio sine qua non* for this is always that our use of choice is compatible with the choice of others in the first place. Cf. V-NR/Feyerabend 27:1336 and V-MS/Vigilantius 27:669.

[36] For a detailed account, cf. Hirsch, *Freiheit und Staatlichkeit bei Kant*, 90–138 and the contribution by Bernd Ludwig in this volume (Chapter 2).

[37] Ludwig, 'Sympathy for the Devil(s)?', 39 nicely puts it in a nutshell: 'Since by definition juridical lawgiving is indifferent to the motives for conformity with its laws, it cannot be concerned with the particular maxim of the *actor*. But if for a given *act* there is *no* morally possible maxim at all (e.g. arbitrarily killing innocent people), the maxim of the *actor*, whatever it may be, cannot be in conformity with the categorical imperative. And since freedom of *persons as persons* is *a priori* limited by the categorical imperative [. . .], their *external freedom* is thus *a priori* limited by the principle of right.'

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any form of coercion is *prima facie* impermissible. Right therefore generally prohibits any form of coercion, since it contradicts the claim of autonomous rational beings to be respected in their moral personality and not to be treated as a mere means.[38] Moral personality, however, does not amount to inviolability and does not render any coercion illegitimate. This is the case because the moral laws which govern personality, and which are an expression of persons being ends in themselves, also restrict moral personality. When it comes to the use of choice in external relations, these restrictions necessarily follow from the plurality of autonomous rational beings. Precisely because human beings form a community with other persons, their own use of choice is subject to the normative stipulation that it must be reconciled with the others being ends in themselves. The minimum conditions for this – that is, the necessary conditions under which beings that are ends in themselves can coexist according to a universal law – are formulated by Right. It guarantees each legal subject a use of choice according to a universal law. At the same time, Right restricts each legal subject's external freedom to this very use. Therefore, any use of choice beyond this restriction can no longer be understood as an expression of the moral personality of the legal subject. The legitimacy of legal coercion is just the flipside of this, as Kant nicely put it in the *Vorarbeiten* to the Metaphysics of Morals:

> Duties of right [. . .] are based solely on the necessary conformity with the law of freedom in relation to one's own person or to others [and are] hence proper laws, that is, strictly determining principles, and here these laws which restrict a human's own freedom due to his personality are a prerequisite of restricting the freedom of others.[39]

To the extent that Right restricts the use of choice according to a universal law, it only reflects that moral personality – and thus the scope or sphere in which persons are in fact ends in themselves that must not be treated merely as a means – is conceptually restricted. In § C of the Introduction of the Doctrine of Right, Kant puts this in a nutshell by saying that 'freedom *is* limited to those conditions [*sc.* the conditions according to the universal law of right] in conformity with the idea of it [*sc*. freedom] and that it may also be [in fact] actively limited by others'.[40] In other words, anyone who commits a violation of rights is *in this respect* (i.e.

[38] Both psychological coercion (*vis compulsiva*) and physical coercion (*vis absoluta*) prevent people from freely pursuing their self-chosen ends. The coerced person functions only as the means for another person and can no longer determine himself as he sees fit.

[39] VARL 23:392 (my translation). Also cf. VARL 23:383. [40] RL 6:232.

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insofar as he violates the rights of others) no longer a moral person worthy of protection from interference. Consequently, his or her moral personality, which is to be legally protected, is not affected by opposing coercive acts. As a corollary, the need to normatively justify the legitimacy of coercion never does arise in the first place.[41] Insofar as the concept of Right can be analytically derived from the concept of free external choice of moral persons according to universal laws, the permissibility of external coercion corresponds directly to this:

> The conformity of the action with the universal laws of freedom is thus the measure by which to determine whether anyone possesses a coercive right, and another one can be subject to him; and I can thus have authority to coerce the will of another person against his freedom only insofar as my freedom is at the same time in conformity with the general freedom according to universal laws. [. . .]. *From this it follows that I have a right to all actions that are not contrary to the other's right, i.e. contrary to his moral freedom; for to that extent I do not derogate his freedom, and he has no right to coerce me.* From this, it also follows that the right to coerce the other consists in resisting his use of freedom, insofar as it cannot coexist with universal freedom according to universal law; and this is the right of coercion.[42]

Just to reiterate: coercion or coercive force against non-persons (stones, plants, animals) is morally indifferent in relation to them;[43] this is the case because moral personality calls for a normative justification of coercion in the first place. However, moral personality is not unlimited but conceptually restricted due to the plurality of persons interacting with each other. It follows that this restriction marks the limit of morally permissible or impermissible coercion. For Kant, Right and coercive power both follow from the fact that moral personality – and thus the sphere within which interference with others amounts to treating them merely as a means – is

[41] Those who act wrongfully are in this respect no longer worthy of moral protection. Coercion against the wrongful act does not affect the moral personality of the coerced person. Contrary to Willaschek's assumption in 'Right and Coercion', 60ff. and 'The Non-Derivability of Kantian Right from the Categorical Imperative', 558ff. this is not a question of whether the coercion may be wanted as an end by the coerced person. The end-in-itself formula says nothing about this, since I do not have to include the coerced person – insofar as he acts unlawfully – in my moral deliberation. It follows that it cannot be deduced whom I have the authority to coerce from the end-in-itself formula. Rather, it can only be shown whom I may *not* coerce, i.e. treat merely as a means. For a similar criticism of Willaschek, cf. Ludwig, '"Positive und negative Freiheit" bei Kant?', 301 with n. 47.

[42] V-MS/Vigilantius 27:525f. (my translation and emphasis).

[43] This means that mistreating non-human animals (or other non-persons) does not violate any duty owed to them. For Kant, of course, mistreating them is not morally indifferent *tout court*, but still violates a duty that the agent owes to himself. Cf. TL 6:443.

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conceptually restricted. This could be called a scalable 'sphere of protection' that comes with being a moral person and that gives rise to legal duties which protect one's moral personality. Beyond this sphere of protection, coercion does not violate the 'moral freedom [of the other], for to that extent I do not derogate his freedom'.[44] This is how Kant can analytically equate Right and coercion in § E of the Introduction to the Doctrine of Right.[45] Thus, there is no need for a positive derivation of 'a legal entitlement to coerce' from the categorical imperative. On the contrary, the permissibility of coercion or use of coercive force is the default case since coercion is morally irrelevant if it does not violate one's moral personality. According to this view, coercion is always permissible as long as the legally protected freedom of the other – namely his or her moral personality in legal terms – is not impaired.

However, one might think that the proponents of the independence thesis would come to similar conclusions, since they too hold the view that coercive power is nothing other than the flip side of relational freedom: '[T]he entitlement to coerce is simply the entitlement that others exercise their freedom consistent with your own.'[46] This reading of Kant, however, presupposes a concept of freedom as independence from being constrained by the choice of another person, without being able to explain the categorically binding nature of this idea. By invoking the independence of law from morality, proponents of the *independence thesis* cannot refer to the aforementioned notion of autonomy and persons being ends in themselves. They are left with having to resort to prudential reasons. It would go beyond the scope of this chapter to go into detail on this and outline the (in my view) shortcomings of the various independentist readings of Kant's legal philosophy and the justifications of legal coercion that go hand in hand with them.[47] However, the most common line of reasoning seems to be as follows: independentists understand freedom of choice pursuant to Kant as the ability to set and pursue one's own ends.

[44] V-MS/Vigilantius 27:526. It is therefore wrong to ask, as Willaschek does in 'The Non-Derivability of Kantian Right from the Categorical Imperative', 562, whether one is authorized 'to limit the freedom of *others*' or '[*sc.* to infringe] upon some other person's external freedom'. For unlawful acts are not subject to one's external freedom (understood as the 'object' protected by Right) in the first place. Consequently, coercion opposing the wrong does not pose a moral problem in the first place.

[45] RL 6:232. [46] Ripstein, *Force and Freedom*, 56.

[47] For a detailed account, cf. Hirsch, *Freiheit und Staatlichkeit bei Kant*, 147ff. A good, albeit a little outdated overview of the various positions represented in the debate is also provided by Willaschek, 'Right and Coercion', 49–54 and Seel, 'How Does Kant Justify the Universal Objective Validity of the Law of Right?'.

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This ability presupposes only practical freedom,[48] but not transcendental freedom. This is why Kant's doctrine of Right, which reconciles and guarantees freedom of choice according to a universal law, is said to be independent of Kant's critical moral philosophy.[49] Since every person naturally wants to realize his or her own ends, no person can 'reasonably' reject legal restrictions of freedom because Right defines the conditions that enable us to realize our own ends in accordance with everyone else.[50] As a corollary, legal coercive power just means exercising the freedom to which everyone is entitled who wants to freely realize his or her purposes.

However, on Kantian grounds this independentist argument is flawed in two ways: first conceptually, since it conceives of external freedom as some capacity, whereas it is actually – as shown above – the 'object' protected by Right.[51] Second, it is normatively flawed since the *categorical* bindingness of legal standards and restrictions on the legitimate use of coercive force cannot be explained in this way. This is the case because according to the independentist reading, compliance with legal standards is (if authors do not resort to postulating quasi-moral principles governing Right)[52] only

[48] Meaning 'praktische Freiheit' as Kant defines it in KrV, A798/B826. However, Kant abandoned the idea that this concept of freedom is sufficient for the justification of law and morality with the *Groundwork* and the *Second Critique*. In the latter work, he belittles this practical freedom (to which he adhered in the *First Critique*) as 'the freedom of a turnspit, which, when once it is wound up, also accomplishes its movements of itself' (KpV 5:97). In parts, Kant also refers to such a use of reason in contrast to a moral-practical use of reason (which freedom is about) as *technical-practical*, cf. e.g. KpV 5:26, n. *; KdU 6:172–5; VAZeF 23:163; V-MS/Vigilantius 27:577 and RL 6:217ff. On this also cf. the insightful remarks by Ludwig, '"Positive und negative Freiheit" bei Kant?' and Ludwig, 'Sympathy for the Devil(s)?', 27ff.

[49] Cf. Julius Ebbinghaus, 'Die Strafen für Tötung eines Menschen und Prinzipien einer Rechtsphilosophie der Freiheit', in *Gesammelte Schriften*, vol. 2: *Philosophie der Freiheit: Praktische Philosophie 1955–1972*, ed. by Georg Geismann and Hariolf Oberer, Bonn: Bouvier, 1988, 283–380, at 296ff. and following him Manfred Baum, 'Freiheit und Verbindlichkeit in Kants Moralphilosophie', *Jahrbuch für Recht und Ethik* 13 (2005), 31–43, at 37ff. and Georg Geismann, 'Recht und Moral in der Philosophie Kants', *Jahrbuch für Recht und Ethik* 14 (2006), 3–124, at 10ff., 66ff. In a similar vein, cf. also Wood, 'The Final Form of Kant's Practical Philosophy', 5ff.; Pogge, 'Is Kant's *Rechtslehre* a "Comprehensive Liberalism"?', 149; Arthur Ripstein, 'Authority and Coercion', *Philosophy and Public Affairs*, 32 (2004),), 2–35, at 8ff., as well as Ripstein, *Force and Freedom*, 355ff. and Horn, *Nichtideale Normativität*, 50ff., 171.

[50] Cf. Julius Ebbinghaus, 'Kant und das 20. Jahrhundert', in *Gesammelte Schriften*, vol. 3: *Interpretation und Kritik: Schriften zur Theoretischen Philosophie und zur P hilosophiegeschichte 1924–1972*, ed. by Georg Geismann and Hariolf Oberer, Bonn: Bouvier, 1990, 151–74, at 167; Pogge, 'Is Kant's Rechtslehre a "Comprehensive Liberalism"?', 146ff.; Geismann, 'Recht und Moral', 72ff. or Ripstein, *Force and Freedom*, 31ff.

[51] Cf. above, p. 100f. But also cf. J. P. Messina's contribution to this volume (Chapter 12), which identifies two different ways of speaking of 'external freedom' under Kant.

[52] Cf., for example, Flikschuh, 'Justice without Virtue', 51 ff., who defends a concept of Right as public morality and, as such, as systematically distinct from the personal morality of Kant's ethics. In a similar vein, cf. also Christoph Horn's contribution to this volume (Chapter 3). From my point

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hypothetically required, namely insofar as it is conducive to one's own interest in self-preservation. This is best illustrated by the example of the nation of devils which Kant refers to in *Towards Perpetual Peace* and which is, ironically, often cited by independence theorists in an attempt to defend their position.[53] The devils[54] are exactly the kind of beings that possess the qualities that are said to be necessary to be a suitable subject of rights and legal obligations: they are rational in the sense that they can set and pursue their own ends. However, they lack moral personality because they are not transcendentally free and thus not autonomous.[55] Such beings would certainly be able to act in accordance with the prescripts of Right. However, even if *legality* is achievable for a nation of devils, devils would never have a concept of legal *validity* or legal *obligation*:

> The problem of establishing a state, no matter how hard it may sound, is *soluble* even for a nation of devils (if only they have understanding) and goes like this: 'Given a multitude of rational beings all of whom need universal laws for their preservation but each of whom is inclined covertly to exempt himself from them, so to order this multitude and establish their constitution that, although in their private dispositions they strive against one another, these yet so check one another that in their public conduct the result is the same as if they had no such evil dispositions.'[56]

Devils can indeed be subjected to an external coercive mechanism that – despite egoistic self-interests – guarantees prudentially lawful behaviour. However, this is at best a legal order in the *technical* sense. It does not suffice for the *moral* concept of Right that Kant has in mind, in which Right corresponds to a moral *obligation*. This is what Kant himself says when he talks about the natural guarantee safeguarding perpetual peace. For, according to Kant, the natural guarantee merely answers the following question:

of view, Flikschuh and Horn are going in the right direction, but only halfway. This is the case because the *a priori* notion of the general united will (governing public morality) does not – as Flikschuh and Horn claim – replace the principle of autonomy as the basis of moral obligation, but only transfers it to external relations. For more details, cf. Hirsch, *Freiheit und Staatlichkeit bei Kant*, 201 ff.

[53] Cf., for example, Pogge, 'Is Kant's *Rechtslehre* a "Comprehensive Liberalism"?', 150.

[54] This refers to the devils that Kant has in mind in *Towards Perpetual Peace*, who only have technical-practical reason, but not to the evil devil of the *Religion*, who elevates 'resistance to the law [. . .] to [the] incentive' of his actions (RGV 6:35).

[55] Ludwig, 'Sympathy for the Devil(s)?', 41 also rightly points out that 'Kantian devils, in this passage at least, are mere *rational* and thoroughly *selfish* beings. As devils, they cannot be assumed to have a consciousness of the moral law. Kant explicitly attributes to them *only* "understanding", not "reason", and not at all "*pure* practical reason".'

[56] ZeF 8:366.

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> [w]hat nature does for this purpose with reference to the end that the human being's own reason makes a duty for him, hence to the favouring of his *moral purpose*, and how it affords the guarantee that what man *ought* to do in accordance with laws of freedom but does not do, it is assured he *will* do, without prejudice to this freedom, even by a constraint of nature [. . .]. When I say of nature, it *wills* that this or that happen, *this does not mean, it lays upon us a duty to do it (for only practical reason, without coercion, can do that) but rather that nature itself does it, whether we will it or not* (fata volentem ducunt, nolentem trahunt).[57]

Legality within a nation of devils merely proves that the prudent devils will opt for a legal order out of cleverly calculated self-interest. This is how 'nature comes to the aid of the general will grounded in reason [. . .] precisely through those self-seeking inclinations'.[58] Devils, however, have no concept of moral obligation because they are not persons. This lack of moral personality not only puts an end to any form of categorical moral obligation (be it ethical or legal), but also to the normative problem of justifying coercion.[59] A devil is not a person and therefore needs to be considered as a thing in moral terms. To force him to do something, to injure him, or even to kill him are simply normatively irrelevant acts. Or to put it differently: any independentist reading of Kant that seeks to justify the binding nature of Right independently of Kant's critical moral philosophy fails even to explain why coercion is a normative problem in the first place.[60] It may be unwise for a devil to coerce others unilaterally and without limits. However, this is neither categorically forbidden nor in need of normative justification.

5.3 With Kant beyond Kant, or: Are Internal Perfect Duties Externally Enforceable?

As we have seen, the permissibility of legal coercion is just the flipside of the moral personality being conceptually restricted: if you try to hit me and

[57] ZeF 8:365 (my emphasis). [58] TP 8:366.

[59] This is also the conclusion by Ludwig, 'Sympathy for the Devil(s)?', 42: 'For *non-persons, rational or not*, as beings incapable of imputation, there are no moral restrictions at all on their behaviour against others, *persons* and *non-persons* alike. As *rational* non-persons, they only have rules of *prudence*, and any talk about rights and duties is pointless.'

[60] With that in mind, the validity of Right remains entirely stipulative if, for example, Ripstein, *Force and Freedom*, 21 claims that Right is grounded in the 'simple but compelling normative idea that, as a matter of right, each person is entitled to be his or her own master'. As Ripstein aims to justify Right independently of Kant's critical moral philosophy, he fails to answer why persons have this special status and why it should – consequently – be normatively problematic to interfere with a person's 'purposiveness – [her] capacity to choose the ends [she] will use [her] means to pursue' (Ripstein, *Force and Freedom*, 34). For Kant, however, purposiveness has no moral value if it is not the purposiveness of a transcendentally free and autonomous subject.

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I violently push your arm away, I am not treating you merely as a means since your wrongful action is not an expression of your moral personality that I must respect. According to Kant, however, Right is restricted to intersubjective relations among persons, 'insofar as [. . .] actions [. . .] can have (direct or indirect) influence on each other'.[61] Consequently, coercive power also finds a corresponding limitation and depends on the injury of another person in this intersubjective relationship. Thus, Kant claims that only *external* legal obligations (i.e. legal obligations *towards* others) are coercively enforceable. But is this claim actually warranted?

If coercion is legitimate if and only if it does not amount to treating others merely as a means, then this seems to endorse more coercive action than Kant claims. For if coercive power ultimately results from the fact that moral personality is conceptually limited in a way that renders all coercive acts permissible that do not affect the moral personality of the coerced, then this also seems to hold true for the realm of perfect duties against oneself: the legal internal duty of *honeste vive* and the internal perfect duties presented in the *Doctrine of Virtue*.[62] These duties do not only reflect a conceptual restriction of our moral personality in a specifically legal sense, namely the 'right of humanity in our own person'.[63] They, too, are in principle externally enforceable insofar as they prohibit external actions.[64] This holds for internal legal duties (not to prostitute oneself, not to sell oneself into slavery, etc.) and the perfect duties against oneself in the *Doctrine of Virtue* (prohibition of suicide, prohibition of harming oneself, etc.).[65] If legitimate coercion represents the flipside of our moral personality being conceptually restricted, and if internal perfect duties reflect such a conceptual restriction, then these duties should also be enforceable.

Kant himself opposes a conceptual equation of perfect duties and enforceable duties, as it has been implemented in contemporary natural law philosophy. Rather, he sees a requirement to substantiate the authority

[61] Cf. RL 6:230.

[62] Cf. RL 6:236 and TL 6:421ff. In the lecture on Metaphysics of Morals *Vigilantius*, however, all these duties belong to a unified category (cf. V-MS/Vigilantius, 27:581ff.). Only in the *Metaphysics of Morals* did Kant divide the perfect duties against oneself into inner duties of right (*honeste vive*) and inner perfect duties of virtue. On this and on the question whether this division is consistent, cf. Philipp-Alexander Hirsch, 'Von Rechtspflichten zu vollkommenen Tugendpflichten? Kants ungelöstes Problem der Pflichtensystematik', in Beatrix Himmelmann, Camilla Serck-Hanssen (eds.), *The Court of Reason*, Berlin: De Gruyter, 2021, 1457–66, at 1457ff.

[63] Cf. RL 6:240.

[64] External actions are in principle enforceable because they take place in space *and* time. Inner actions (like setting an end), in contrast, take only place in time and thus cannot be externally enforced, cf. RL 6:239.

[65] On this, also cf. Hirsch, *Freiheit und Staatlichkeit bei Kant*, 194ff.

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to coerce based on the concept of law. In the lecture on Metaphysics of Morals *Vigilantius*, Kant complains that until his time it had been

> [. . .] an unproved assumption of right, to consider the authority to coerce as a legal axiom. [. . .] But since nobody can exercise a right to coerce, who has not obtained a right thereto from a higher ground, which consists, however, in one's own freedom and its conformity with the freedom of everyone according to universal law, it is clear that the authority to coerce can only be derived from the idea of right itself.[66]

If we take Kant at his word, any restriction of the authority to coerce would depend on whether such a restriction can be derived from the idea of Right that 'the choice of one can be united with the choice of another in accordance with a universal law of freedom'.[67] In the case of perfect duties towards oneself, however, such a restriction seems questionable for two reasons.

First, as shown above, Right and coercive power according to Kant both follow from the fact that by virtue of being persons, our choice in external actions is subject to moral laws. By designating certain acts as impermissible, Right also describes morally permissible coercive acts, for those who commit a legal wrong are not affected in their moral personality by opposing coercive acts. However, this line of reasoning applies quite generally to perfect duties, be they external or internal: self-harming actions that violate perfect duties against oneself are just as little an expression of one's own moral freedom in the external use of choice as actions that harm others and violate external legal duties. In either case, the moral personality is unaffected by the opposing coercive actions. The 'right of humanity in one's own person', which is the basis of all perfect duties against oneself,[68] sets the morally permissible external use of choice apart from the morally impermissible external use of choice. By recognizing perfect duties against oneself, Kant thus identifies certain forms of behaviour or actions as not morally worthy of protection and thus as potentially subject to coercion – regardless of whether someone else is harmed by them or not.

Second, restricting legitimate coercion to the fulfilment of external duties (and exempting perfect internal duties) would be self-contradictory.

[66] V-MS/Vigilantius 27:526. Also cf. V-NR/Feyerabend 27:1335. Kant thus opposes a conceptual equation of perfect duties and coercive duties, as it has been implemented in the contemporary natural law philosophy, cf. for instance Georg Achenwall and Johann S. Pütter, *Anfangsgründe des Naturrechts (Elementa Iuris Naturae)* (1750), Frankfurt am Main: Insel, 1995, § 185.

[67] Cf. RL 6:230. [68] As Kant states in RL 6:240.

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For if the right of humanity in our own person prohibits certain behaviour, it cannot at the same time designate it as legally worthy of protection vis-à-vis other persons. If it did, then this would mean that I would be allowed to commit an act that is at the same time forbidden. This can be illustrated by the example of the prohibition of suicide: if I prevent a suicidal person from killing himself by coercion (e.g. by grabbing his arm), then he would not have the right to resist my intervention. He would only have this right if he could claim that he had been wronged by my intervention. However, the suicidal person neither has a right nor any other moral entitlement to kill himself; otherwise we could not say that he has a perfect duty not to commit suicide. It follows that my use of coercive force in this scenario is not wrong. This follows trivially from the principle of contradiction to which Kant refers in § C of the Introduction into the Doctrine of Right: a legal wrong is committed by me only where the other person has a legal right. *Tertium non datur*.

One can go even further in this respect: according to Kant's concept of Right, I even have a right to prevent the other person from committing suicide, since my choice is compatible with the choice of the suicidal person according to a universal law of freedom. This is the case because this very law of freedom prohibits suicide. However, it would be wrong to justify my coercive power by saying that the suicidal person legally has an obligation *towards me to preserve* his moral personality. He certainly does not. Yet the suicidal person does have an obligation *towards me to tolerate* the intervention. For my conduct is in complete harmony with the Universal Principle of Right[69] and is in this respect an expression of my innate right to freedom.[70] This seemingly odd conclusion becomes clear by focusing on the *debitum* and distinguishing *what* is owed to whom: in the case of perfect duties against oneself, there is no external legislation because the obligor owes the fulfilment of the duty only to himself. Thus, in the example previously outlined, the suicidal person owes the preservation of his life to himself, but not to me. Consequently, I have no moral authority to oblige him to stay alive under the threat of coercion, that is, to bind him by means of external legislation. Or to put it differently: with regard to the *debitum* 'preservation of his life', I have no moral standing and therefore no entitlement to enforce this duty. However, since the prohibition of suicide is a perfect duty, it simultaneously defines the scope of my innate right and thus also of the corresponding duty of *neminem laede*. With regard to the latter *debitum* 'respect for my innate right', the

[69] RL 6:231. [70] RL 6:237ff.

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suicidal person does indeed owe it to me to tolerate my physical intervention. The reason for this obligation does not lie in the perfect duty against oneself (prohibition of suicide), but in the fact that resistance to my intervention would violate my innate right.

Seen in this way, the morally owed behaviour (*debitum*) and the normative reason for morally legitimate coercive actions (physical coercion) diverge when viewed against perfect duties to oneself. Kant certainly did not aim to argue for a prohibition of suicide that could be enforced by others. But if for Kant the power to coerce begins where moral personality ends, then it cannot be limited to external legal obligations. Instead, use of coercive force in accordance with internal perfect duties is also legitimate, even though – strictly speaking – it is not the internal duty that is being enforced, but the innate right of the coercer.

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