

---

## RIGHT AND GOODS: PROCEDURAL LIBERALISM AND EDUCATIONAL POLICY

James Scott Johnston

Faculty of Education  
Queen's University

---

**ABSTRACT.** In this essay, James Scott Johnston asks what sort of liberalism is best for the educational systems of early twenty-first century, late capitalistic democratic nations, looking at the *procedural* liberalism extant. Two major models are John Rawls's Justice as Fairness and Jürgen Habermas's Communicative Action. Both owe their foundational movements to Immanuel Kant in various respects, and Johnston therefore examines Kant in those areas both thinkers draw upon. Johnston then turns to Rawls and to Habermas, discussing what is central to their frameworks. Johnston finally claims that neither liberalism will work without due attention to issues critics have raised regarding the distinction between Right and Good and suggests an alternative Kantian model in the conclusion.

### INTRODUCTION

What sort of liberalism is best for the educational systems of early twenty-first century, late capitalist democratic nations? This question bedevils political theorists, philosophers, and educators alike. In order to begin an answer, one must unpack the question. What counts as liberalism? To which liberalism among the varied models under the umbrella term "liberal" are we referring? Given there are models that may "fit" better with the context that we find ourselves in, what are the challenges that one model or another faces? Where do these challenges come from? Can we adequately address these, to the satisfaction of all concerned? What sort of liberalisms do we traditionally see as advancing the various causes of our educational system? Myriad questions, in fact, follow from the first. Here I look at the strand of *procedural* liberalism. Two major models extant are Justice as Fairness and Communicative Action. The first belongs to John Rawls, developed by him and complemented by others writing in a similar vein.<sup>1</sup> The second belongs to Jürgen Habermas, which also has complementary contributions from

---

1. Many endorse broadly Rawls's particular "brand" of liberal political theory. Most notable are Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Massachusetts: Harvard University Press, 1978); and Will Kymlicka, *Liberalism, Community, and Culture* (Oxford: Oxford University Press, 1991). In education, especially notable are Eamonn Callan, *Creating Citizens: Political Education and Liberal Democracy* (Oxford: Oxford University Press, 1997); and Kenneth Strike, *Educational Policy and the Just Society* (Urbana: University of Illinois Press, 1982). Strike has since changed his mind about Rawls. He is doubtful that Rawls's proceduralisms (his overlapping consensus and publicity conditions; his original position and veil of ignorance) are broad enough to capture the pluralism of Western liberal democracies. See, for example, Kenneth Strike, "On the Construction of Public Speech: Pluralism and Public Reason," *Educational Theory* 44, no. 1 (1994): 1–26; "Socialization: The Congruence Argument," *Journal of the Philosophy of Education Society of Great Britain* (1998), 345–357; and "Three Models, and a Dilemma or Two," *Journal of the Philosophy of Education Society of Great Britain* (2000), 617–644.

like-minded scholars.<sup>2</sup> Both of these liberalisms owe their foundational movements to Immanuel Kant in various respects, and I shall therefore begin with Kant and with those areas in his work that both thinkers draw upon. I shall then turn to each of these thinkers and discuss what is central to their frameworks.

Despite being at the forefront of liberal theory, the Justice as Fairness and Communicative Action models have both received considerable criticism. For example, each of these models faces the criticism that procedures underdetermine the needs of voluntary associations, groups, and communities to maintain their social and cultural practices. Procedural liberalisms give no support to, and perhaps even thwart, communities of associated living. This is not simply a communitarian critique: many liberal theorists agree that the emphasis placed on procedural constraints and solutions gives short shrift to the lived experiences that take place in communities and cultures. In addition, procedural liberalism has little place for public decision making.<sup>3</sup> If decisions occur through procedural mechanisms, then how do decisions made by a public fare? Critics complain that procedural mechanisms bypass this deliberative decision making with the consequence that the public takes second place to the procedure. If this is so, the "public" in public education seems empty.

What does this have to do with educational policy? If we are to design policy through the mechanisms that Rawlsian or Habermasian procedures dictate, then the question of how they account for public participation comes to the fore. If these procedures are the ways in which we create policy, what recourse is there for those that beg to differ over the procedures? Certainly, these proceduralisms are in place with solid reasons behind them. Can we avoid the consequences of going without them if we choose to circumvent or abandon them? I cannot do justice to all of these concerns. However, I

---

2. Those (writing in English) that endorse a strong role for critical theory in liberal political theory include James Bohman, *Deliberative Democracy: Pluralism, Complexity, and Democracy* (Cambridge, Massachusetts: MIT Press, 1996); and Seyla Benhabib, *Critique, Norm, and Utopia: A Study of the Foundations of Critical Theory* (New York: Columbia University Press, 1986). Neither agrees entirely with Habermas's proceduralist accounting of discourse ethics, but both agree with the need for a critical, sociological understanding of democracy. For a recent and sympathetic reading of Habermas in education, see Marianna Papastephanou, "Discourse Theory and Its Implications for Philosophy of Education," *Journal of Philosophy of Education* 33, no. 3 (1999): 419–434. Her project differs from mine in that it does not address Habermas's reading of Rawls.

3. William Galston comes to mind as one that thinks modern liberal theory has shortchanged comprehensive doctrines of good. Galston sets his sights on Rawls's proceduralisms (the Original Position and the Veil of Ignorance). In Galston's estimation, these proceduralisms inhibit goods from playing the roles liberal societies need them to play. See William Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* (Cambridge: Cambridge University Press, 1991), 134–137. Certain other social liberals think proceduralisms are inhibitive of goods. See, for example, Ian Shapiro, *Democratic Justice* (New Haven: Yale University Press, 1999). In education, Walter Feinberg and Hanan Alexander are notable for their attempts to balance liberal procedure with community needs and desires. See, for example, Feinberg, *On Higher Ground: The Case of Affirmative Action* (New York: Teachers College Press, 1997); and Alexander, "Moral Education and Liberal Democracy: Spirituality, Community, and Character in an Open Society," *Educational Theory* 53, no. 4 (2003): 367–387.

---

JAMES SCOTT JOHNSTON is Assistant Professor in the Faculty of Education at Queen's University, A318 Duncan McArthur Hall, Kingston, ON, Canada K7L 3N6; e-mail <johnstos@educ.queensu.ca>. His primary areas of scholarship are philosophy of education, political theory (especially human rights and globalization), and John Dewey.

do want to see what happens when we take the criticisms of these procedural models seriously. The specific criticism I address is that of the priority of Right over conceptions of the Good. Right is the Kantian trunk common to both the Rawlsian and the Habermasian liberalisms under consideration here. Examining the position of these thinkers on the question of Right over Good forces us to go back to the trunk of procedural liberal theory. When we do this, we find that neither the Rawlsian nor the Habermasian model captures what is central: the purely political nature of Right.

#### THE KANTIAN TRUNK OF PROCEDURAL LIBERAL THEORY

Immanuel Kant was the foremost philosopher of the late Enlightenment. His philosophy is properly described as systematic, as it covers all the main branches of philosophy (metaphysics, ethics, aesthetics, political philosophy, and history) with the exception of logic. His primary motivation for this is to subject Reason in all of its manifestations to a critique. The purpose of this critique is to note the limits of Reason so that we may know what is and is not appropriate to claim with respect to science, ethics, and aesthetics. Kant's famous (or infamous, depending on one's predilection) contributions to the history of philosophy are Transcendental Idealism (the claim that space and time are forms of our intuition and that everything that can be known is "in" space and time) and the Categorical Imperative (that we can, with our common human reason, form a moral law that serves to legitimate our actions). Kant also had much to say about politics — our concern here. Political thought for Kant was not a matter of moral "ought"; rather, it was a matter of an entirely different order — that being *Right*.

For Kant, both Virtue (*Tugend*) and Right (*Recht*) fall under the aspect of a metaphysic of morals. Kant considered the Virtues — the duties to each and to others — as separate from Right. All Virtues and Right emanate from the Categorical Imperative. As is well known, the basic formula of the Categorical Imperative, the Formula of Universal Law (FUL), is "I ought never to act except in such a way that I could also will that my maxim should become a universal law."<sup>4</sup> Kant called this the "form" of the moral law. On this reading, the content of the moral law is the subjective maxim or particular case that one wishes to judge as to its moral worth. There are other formulae beyond the formal one: the Formula of Humanity and the Formula of the Realm of Ends are two notable examples. These other formulae are not derivations of the first. They differ as to their scope and role.<sup>5</sup> Specifically, the Formula of Humanity

4. Immanuel Kant, *Groundwork of the Metaphysics of Morals*, in *The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy*, ed. Mary Gregor (Cambridge: Cambridge University Press, 1996). This work will be cited as *GMM* in the text for all subsequent references.

5. There is disagreement regarding what role Kant assigned to the various formulae of the Categorical Imperative. Indeed, it is questionable whether we are to understand the *Groundwork* as suggesting we "test" our moral actions, particularly as this "procedure" is entirely absent from Kant's final statement on the subject, the *Metaphysics of Morals*. The reading of Kant as having us test our actions for moral worth has been challenged over the past thirty years — in no small part, I might add, by John Rawls and his students (Barbara Herman and Christine Korsgaard). The *Groundwork*, though, is peripheral to the concerns here: beyond Kant's identification of Right with the Formula of Humanity, the postulate of Right is well accounted for in conceptions of liberal theory during its "classical" phase.

properly considers our conduct toward one another while the Realm of Ends considers our conduct to all.

Of particular importance to Kant's political theory is the discussion of the Formula of Humanity. The Categorical Imperative, in its role as legislator of our conduct toward others, is the basis of the command, "So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means" (*GMM*, 4: 429). Kant said of this that it is a "practical imperative" (*GMM*, 4: 429). There is no distinction in kind between the Categorical Imperative (the Formula of Humanity) and the subsequent Right: the latter is the logical and practical political face of the former. For Kant, though, Right is juridical, not ethical. Right encompasses only our relations to others. It is a command with the force of the Categorical Imperative because it is the Categorical Imperative in its political deployment: "Any action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law."<sup>6</sup> Right only occurs in the context of a decision to form a moral society. Strictly speaking, Right does not and cannot take place for an individual or a society that does not see itself as desirous of freedom.<sup>7</sup> Though Kant quite rightly claimed that even a society of devils could profit from Right, a society in fact must choose to practice the freedom of all members.

How does this work? As Kant conceived the Categorical Imperative of Right as the *external complement* of the Formula of Humanity, Right issues no further commands. Rights — for example, the right to property — are merely derivations from this. To sum up, there is only one (innate) Right and that is freedom: "Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity" (*MM*, 6:237). Right is the external aspect of freedom, whereas Virtue is its internal aspect. As such, Right concerns only our reciprocal relations to others. Because of this, there can be no Right beyond that of freedom from constraint, for any Right beyond this would be a violation of one or another's freedom:

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.<sup>8</sup>

6. Immanuel Kant, "The Metaphysics of Morals," in *The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy*, ed. Gregor. This work will be cited as *MM* in the text for all subsequent references.

7. Kant's notion of natural right is different from that of Hobbes. For Kant, natural right is "that right which can be derived from a priori principles for a civil constitution" (*MM*, 6:256). Whereas Hobbes placed natural right in the state of nature of people, Kant placed it firmly in the context of a civil society with a constitution.

8. Immanuel Kant, "Towards Perpetual Peace," in *The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy*, ed. Gregor, 8:366.

Nevertheless, there are postulates that follow from this Right. Postulates are further deductions of the concept of Rights with regard, for example, to possession of external objects.

Thus the universal law of right, so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law, is indeed a law that lays an obligation on me, but it does not at all expect, far less demand, that I myself should limit my freedom to those conditions just for the sake of this obligation; instead, reason says only that freedom is limited to those conditions in conformity with the idea of it and that it may also be actively limited by others; and it says this as a postulate that is incapable of further proof. (*MM*, 6:231).

We are able, for example, to make claims against each other with respect to property. The same goes for service, for the development of a civil society, and for our relations with the sovereign, whether democratic or otherwise. Making a deduction from Right, though, is not the same as possessing “a right.” Right is not a tangible entity to be possessed. We do not have Right in the way that one has property. Right is not a predicate. Predication of freedom is manifestly self-contradictory. This is important to grasp: Right (negative freedom) cannot be an attribute of anyone or anything.<sup>9</sup> Right, rather, is the Law allowing each to possess with coercive force. One, according to Kant, possesses this or that object “merely rightfully,” that is, in a rightful manner (*MM*, 6:249). To deduce, for example, the concept of rightful possession, we must begin by first recognizing the concept’s intellectual origin and possibility. That is, if I have a concept of what it is to possess something rightfully, I have a place to begin to ascertain whether this particular act of possession is lawful. Empirically, we can make no claim here. Right hinges on the intellectual possibility of its own conception (*MM*, 6:249). The postulate here is “that it is a duty of right to act towards others so that what is external (usable) could also become someone’s” (*MM*, 6:252). As empirical proof of the possibility of nonphysical possession is absent, it is a postulate only.

To see whether a particular maxim meets the condition of Right (say, whether property belongs to me and I may legitimately defend it) is to bring a particular case under a general rule. The rule, of course, is Right. The close approximation of Kant’s Right with Law (*ius*) is noteworthy. It is Kant’s intention that Right have the outward form of Law because this relation makes clear that it is the responsibility of the sovereign to uphold it. Right arbitrates disputes about property, in this case, through a judgment. This requires procedures to be in place so that such judgments can take place. A formal mechanism must be in place to ensure that Rightful coercion occurs. This is the role of the sovereign. Whether the sovereign be a monarch, or representatives of a democratically elected republic, it is the responsibility of the sovereign to maintain Right through applying the coercion necessary to maintain Law and Freedom.

9. Kant discussed “negative freedom” (or liberty) most fully in the *Groundwork*. Freedom is autonomy of the will — the supreme principle of Reason. Self-legislation — the capacity to form and to follow human rules — is freedom. Liberties that arise from freedom do so inasmuch as they are conclusions of acting in a noncontradictory manner. See also Isaiah Berlin, “Two Concepts of Liberty,” in *Four Essays on Liberty* (London: Oxford University Press, 1969), esp. 121–122. Berlin also renders liberty and freedom synonymous.

Properly speaking, the sovereign is agnostic with respect to what goods society privileges. This seems to set the stage for the claim that *any* goods are conceivably allowable, providing they do not directly infringe on the (external) freedoms of the individuals therein. I believe that the implications of this are profound, but I will follow this train of thinking to its conclusion only in the final section. Here, it is sufficient to note that if all goods that are not harmful to freedom are allowable, then it follows that any goods that do not hinder freedom may exist (or coexist) in society. This seems to suggest that the state remains indifferent to the variety and amount of social goods, including the ranking of these goods. Presumably, such ranking is the task of people holding these goods. Right has priority over goods, but only to the extent that goods traverse the bounds of Freedom. Otherwise, Right is agnostic regarding goods.

What of education in all of this? The question we need to ask is whether education counts as a derivation of a Right, in which case it can command, or as a good, in which case, left to its own devices, it may or may not flourish in the way a civil society desires. Kant discussed education under the terms of "The Right of Domestic Society." However, his explication is not helpful. While he asserted that parents have a right to educate as well as manage and develop a child (*MM*, 6:281), he did not say what this education should entail, how it is to be undertaken, under what circumstances it is to occur, or how far along a child is expected to proceed. Elsewhere, Kant discussed the importance of a moral education, but he was silent on the compulsoriness of education. If we take Kant's talk of education in the Doctrine of Right at face value, it can only be a *voluntary* education. It seems there can be *no state compulsion* to offer *this or that kind of education, including a manifestly moral one*.

Nor does it help that Kant was distrustful of direct democracy. For example, in "Toward Perpetual Peace," Kant worried that a society in which a great number of citizens wish to rule (for that is what a direct democracy entails) is self-contradictory. On his view, the smaller the number of representatives allowed to make political decisions, the better.<sup>10</sup> Furthermore, Kant insisted in several places that it is contradictory for a legislator to decree what the people cannot.<sup>11</sup> This insistence seems to remove any obligation the legislator might have to enact a public system of education. I will return to Kant, and specifically to the claims of Right regarding education, after discussing Rawls, Habermas, and the criticisms of Right over Good.

#### RAWLS ON THE PRIORITY OF THE RIGHT TO GOOD

John Rawls was perhaps the foremost political philosopher of the late twentieth century. Prior to writing what would become his most famous work, *A Theory of Justice*, Rawls was a little-known philosophy professor at Harvard University. He

10. Kant, "Towards Perpetual Peace," 8: 358–359.

11. Immanuel Kant, "On the Common Saying: 'That may be correct in theory, but it is of no use in practice,'" in *The Cambridge Edition of the Works of Immanuel Kant: Practical Philosophy*, ed. Gregor, 8: 304.

taught ethical and political theory, in particular, Kant's theories of morals and Right. Subsequent to *A Theory of Justice*, Rawls wrote *Political Liberalism*. The most notable difference between the two books concerns the role of autonomy. In *A Theory of Justice*, Rawls claimed that the point and purpose of the principles of justice are to safeguard people's primary goods, and he invoked autonomy (in the sense of a law that we choose for ourselves as well as in the more straightforward Kohlbergian sense of the moral actor making judgments that go beyond convention).<sup>12</sup> In "The Priority of Right and Ideas of the Good," Rawls downplayed autonomy in favor of an "overlapping consensus" where people's primary goods are allowable as long as they do not become "comprehensive" and trespass on others' goods.<sup>13</sup>

For Rawls the concept of Right is directly bound to the twin principles of Justice as Fairness. Indeed, Rawls's two principles of justice — equality of liberty and equality of opportunity (together with the difference principle) — are, strictly speaking, Right. Rawls wanted to make abundantly clear the notion that Right is neither teleological (that is, goods) nor utilitarian (that is, a means to maximize the interests of people). Right is, properly speaking, an end in itself that is distinct from goods.<sup>14</sup> Here I am most concerned with the way in which Rawls *defended* his priority of Right and why he thought it so important to prioritize Right over goods in the first place.

Given that his talk of Right is the core of Justice as Fairness, it should come as little surprise that he wished to give it priority over goods. What are these goods? These are, famously, rights, liberties and opportunities, income and wealth, and the social bases of self-respect.<sup>15</sup> It may strike one as odd that rights are primary goods. This is so because Rawls did not allow rights metaphysical grounding. They do not accord the priority of Right that the principles of Justice as Fairness do. They are (what amounts to much the same thing) moral notions that are the products of Western liberal democratic nations and not metaphysical Truths. These are goods because we value them, not because they are metaphysical. Indeed, Rawls claimed that we may add to the list of goods, if we should determine that other or greater goods are congruent with the needs of our respective citizenries.<sup>16</sup>

Rawls's defence of the priority of Right over Good is, then, a defence of the principles of Justice as Fairness over Western liberal democratic notions of what is valuable. This is a manifestly *political* Right: "in justice as fairness the priority of

12. John Rawls, *A Theory of Justice* (Cambridge, Massachusetts: Belknap Press, 1971). See also John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).

13. John Rawls, "The Priority of Right and Ideas of the Good," in *John Rawls: Collected Papers*, ed. Samuel Freeman (Cambridge, Massachusetts: Harvard University Press, 1999). This work will be cited as *PR* in the text for all subsequent references.

14. John Rawls, "Reply to Alexander and Musgrave," in *John Rawls: Collected Papers*, ed. Samuel Freeman (Cambridge, Massachusetts: Harvard University Press, 1999), 238. Rawls emphasizes the separation of Right from goods.

15. See Rawls, "The Priority of Right and Ideas of the Good," 260; and Rawls, *A Theory of Justice*.

16. John Rawls, "The Priority of Right and Ideas of the Good," in *John Rawls: Collected Papers*, ed. Samuel Freeman (Cambridge, Massachusetts: Harvard University Press, 1999), 454.

right implies that the principles of (political) justice set limits to permissible ways of life; hence the claims citizens make to pursue ends that transgress those limits have no weight (as judged by that political conception)' (*PR*, 449).

Now we are not to shun goods, as Rawls made clear. Indeed, the priority of the Right over goods, he argued, makes it possible for us to pay particular attention to the primary goods of people. In other words, the purpose of Right (that is, the principles of Justice as Fairness) is to secure the primary goods for any conception of social justice: "the priority of right does not mean that ideas of the good must be avoided; that is impossible. Rather, it means that the ideas used [in political institutions and discourses] must be political ideas: they must be tailored to meet the restrictions imposed by the political conception of justice and fit into the space it allows" (*PR*, 467). When we "use" ideas politically, we are to consider goods from the points of view of the principles of justice. These have priority over the goods in question. Therefore, to say that we are to use political ideas is to say that we are to give priority to Right.

Do we make claims against each other in Rawls's two principles of Justice as Fairness? The answer, it seems, is no. Rawls's two principles of justice do not seem to do what Kant's Categorical Imperative of Right does. That is to say, Rawls's two principles of justice do not seem to order the relations among people according to whether each has a claim on the other. Perhaps this is why Rawls saw little connection between Kant's "theory of justice" and his own. According to Rawls, Kant stressed freedom as autonomy — a metaphysical principle — as a basis of justice. Likewise, autonomy, or freedom of the will, is for Rawls a comprehensive good — that is, a metaphysical good that, if enacted universally, threatens to rob those that do not agree with this notion of their goods (*PR*, 464–465). Rawls therefore distanced himself from Kant's talk of autonomy of the will.

I do not wish to develop here the argument as to why Rawls was wrong to think this of Kant.<sup>17</sup> It is sufficient to note that Rawls did not think he was aligning his priority of Right over Good with Kant's notion of Right as coercive constraint. He was mistaken. Rawls's Right is *not* a neutral one. It is the priority of the principles of Justice as Fairness to (help) decide matters of distributive justice, and the principles of justice cannot be (and are not) agnostic about the varied goods that people have and practice. Some goods are antithetical to the practice of distributive justice and must be curtailed. Comprehensive religious goods that intrude upon the well-being of others, for example, are Rawls's main concern. However, this is extendable to any comprehensive good that threatens, in one way or another, the ability of all to partake of primary goods.

Rawls discussed education in his essay "The Priority of Right and Ideas of the Good," but only by way of example. Political liberalism, he said, has a responsibility to ensure that children's education

---

17. I have developed this argument elsewhere. See James Scott Johnston, "Rawls's Kantian Educational Theory," *Educational Theory* 55, no. 2 (2005): 201–218.

include such things as knowledge of their constitutional and civic rights, so that, for example, they know that liberty of conscience [a primary good] exists in their society and that apostasy is not a legal crime, all this to ensure that their continued membership in a religious sect when they come of age is not based simply on ignorance of their basic rights or fear of punishment for offenses that do not exist. Moreover, their education should also prepare them to be fully cooperating members of society and enable them to be self-supporting; it should also encourage the political virtues so that they want to honor the fair terms of social cooperation in their relations with the rest of society. (*PR*, 464)

Political liberalism claims that the aim of education is to develop citizens. Presumably, education is not to interfere in the cultivation of comprehensive doctrines of goods, or at least those that deviate from the primary goods. To do so would be manifestly self-contradictory. This is precisely the challenge to the prioritization of Right that Rawls's critics pose. Not only is a child required to obtain an (liberal democratic) education that makes opting out suspicious; if Right has priority, then comprehensive doctrines of goods in any context will be politically suspicious. The concern is that education — a social institution charged with the responsibility of ensuring the priority of Right in matters of children's future status as citizens — is duty-bound to interfere with the cultivation of any comprehensive doctrine of goods that does not fall into the (narrow) list of primary goods that Rawls laid out. Education, in short, must police the borders of goods.

If this is correct, not only is Rawls's theory of justice not neutral, it takes a side. Those theories of the good that are close in letter and spirit to Rawls's political liberalism are the ones that will take the day. Those that are not (say, fundamentalist Christian goods such as the right to evangelize; certain Catholic goods such as the priority of life in all contexts; Sikh rights such as the requirement to carry ceremonial knives in public spaces; Sharia law with its claims to educate children in manifestly nondemocratic, nonliberal, nontolerant schools) will lose out. This is unacceptable to the self-understanding of pluralist nations. Rawls of course had an answer to this: "justice as fairness does not seek to cultivate the distinctive virtues and values of the liberalisms of autonomy and individuality, or indeed of any other comprehensive doctrine. For in that case it would cease to be a form of political liberalism" (*PR*, 465).<sup>18</sup> However, this response does not seem to address the concern that comprehensive doctrines of the good that do not meet the "criteria" are imperilled. This is William Galston's concern.

#### HABERMAS AND DISCOURSE ETHICS

Jürgen Habermas is more properly considered a social philosopher (or even social theorist) than a political philosopher. He was a student of Max Horkheimer and (later) Theodor Adorno, both leading members of the Frankfurt School for Social Research. Through this association, Habermas developed skills in empirical research as well as a firm grasp of critical theory and the philosophy of social sciences. Habermas's career can be conveniently divided into two periods. The first was his empirical and critical-theoretical phase during which he analyzed the difficulties with the public, ideology, late capitalism, and social science. The second

18. He also addressed this criticism in part through his talk of "overlapping consensus," but further discussion of this would take us too far afield for the purposes of this essay.

period has been more positive: starting with the publication of *The Theory of Communicative Action* in 1981, Habermas began building a comprehensive model of sociopolitical action in and for Western liberal democratic societies.<sup>19</sup> This model includes consideration of social science and research, ethics, the law, and politics. We shall deal with his later period here and specifically with his statements on ethics and law.

Habermas addresses Rawls's work in several places. The two most notable instances are in his 1993 essay "Remarks on Discourse Ethics" and his 1996 book *Between Facts and Norms*.<sup>20</sup> I shall discuss the concerns Habermas lays out about Rawls in each of these works, and I will then delineate Habermas's unique contribution to the question of the priority of Right over Good in his "Discourse Ethics." Habermas is quite critical of Rawls, despite their mutual and self-identified allegiance to Kant. Habermas charges Rawls with having too close an affiliation with the contractualist tradition of liberal political theory. This contractualism, Habermas claims, causes trouble for Rawls because it prevents him from justifying his principles of justice on the basis of anything other than a constructivist account. This is primarily an epistemological criticism of Rawls's justification of the two principles. Faced with an inability to claim "truth" regarding the principles, Rawls turned to "the qualities of persons" to ground his claims regarding justice. The problem is that a person's moral intuitions "cannot be justified straightforwardly in anthropological terms."<sup>21</sup> This renders any justification dubious. Therefore, according to Habermas, Rawls had to turn to a political justification of ethics. This justification rests on "the self-understanding of a particular political tradition: the two-hundred-year-old American tradition of the constitutional state."<sup>22</sup>

Habermas is not wrong about Rawls's change in allegiance, but his criticism is obscure and requires unpacking. Habermas takes Rawls to task for not founding his principles in communicative reason — that is, the linguistic validity claims of the lifeworld of persons.<sup>23</sup> Because Rawls does not do so, he cannot claim a truth justification. Part of this criticism is that Rawls did not detach himself sufficiently from Kantian morality. The social contract model of construction forces those that use it to justify

19. Jürgen Habermas, *The Theory of Communicative Action*, 2 vols., trans. Thomas McCarthy (Cambridge: Polity Press, 1984–1987) [trans. from the original German: *Theorie des kommunikativen Handelns*, 2 vols. (Frankfurt am Main: Suhrkamp, 1981)].

20. Jürgen Habermas, "Remarks on Discourse Ethics," in *Justification and Application: Remarks on Discourse Ethics* (Cambridge, Massachusetts: MIT Press, 1993), 19–112; and *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Massachusetts: MIT Press, 1996), 59.

21. Habermas, "Remarks on Discourse Ethics," 28.

22. *Ibid.*, 29.

23. Lifeworld, for Habermas, is the shared context of norms, values, beliefs, attitudes, perspectives, habits, and techniques, built up in and through the speech acts that rational actors participate in and to which all contribute. Habermas claims the lifeworld is "unshakably certain," and "constitutes a conservative counterweight against the risk of dissent inherent in processes of reaching understanding that works through validity claims" (Habermas, *The Theory of Communicative Action*, 326).

their contractual agreements from the moral point of view — and thus by recourse to the moral law — with the result that their reasons become independent of the egocentric perspectives of participants and are bound up with the discovery of norms that admit of general assent and the shared interests that underlie them.<sup>24</sup>

In Habermas's view, reliance on moral norms for political principles is troubling. If Habermas is right, then Rawls cannot disassociate himself from the very comprehensive doctrine of the good as he wishes to do. He cannot justify Justice as Fairness, according to Habermas, without recourse to a doctrine of the good.<sup>25</sup> Turning to a singularly political conception of Justice as Fairness does not help. The justification occurs at the level of moral theory, not politics, and this means that political liberalism yokes itself to a comprehensive doctrine of the good.

In *Between Facts and Norms*, Habermas sharpens his critique of the Rawlsian distinction between Right (norms) and good (facts). Habermas charges Rawls with committing what amounts to a circular argument: "The term 'reflective equilibrium' designates a method that is already supposed to work at the stage of theory construction."<sup>26</sup> Rawls, he further contends, did not deal with the issue of "how the normative concept of a well-ordered society [the society ordered under the two principles of justice] can be situated in the context of an existing political culture and public sphere in such a way that it will in fact meet with approval on the part of citizens willing to reach an understanding."<sup>27</sup> In fact, Rawls collapsed the distinction between the derivation of normative principles and their application in the contexts of particular communities. This led Rawls's theory of justice to

limit itself to the narrow circle of political-moral questions of principle for which an "overlapping consensus" may reasonably be expected, for these are precisely the questions that concern values included in each of the competing comprehensive doctrines. What one seeks are principles or norms that incorporate generalizable interests.<sup>28</sup>

Habermas concludes that

There is thus a problem with all universal liberalisms in the post-metaphysical age. As long as such an ethic makes substantive statements, its premises remain confined to the context in which particular historical or even personal interpretations of the self and the world arose. As soon as it is sufficiently formal, however, its substance at best consists in elucidating the procedure of ethical discourse aimed at reaching self-understanding...The resistant reality with which critical reason wants to keep in touch is not just, and not even primarily, made up of the pluralism of conflicting life ideals and value orientations, of competing comprehensive doctrines, but the harder material of institutions and action systems.<sup>29</sup>

24. Habermas, "Remarks on Discourse Ethics," 27–28.

25. I think Habermas is mistaken regarding his claim that Rawls's purely political conception of justice (in *Political Liberalism*) remains metaphysical. Habermas argues that Rawls begs the question of how a narrow political procedure can accommodate what are, in fact, value-laden social practices and this leads Rawls back to something like autonomy — a metaphysical claim regarding human nature and reason. I do not agree with this criticism. In my view, the problem is not metaphysical: it is purely political. Rawls's Justice as Fairness (as the priority of the Right over the Good) inhibits people's notions of the good to an unacceptable degree.

26. Habermas, *Between Facts and Norms*, 59.

27. *Ibid.*

28. *Ibid.*, 61.

29. *Ibid.*, 64.

This discussion allows Habermas to segue into his primary concern: the need for sociological analyses of law that combine with discourse ethics to bridge the gap between fact and norm. The important component of this analysis for the present discussion is that Habermas believes that the traditional liberal attempts at bridging the gap between normative theory and institutional practice fail.

Let us see what Habermas intends in developing his concept of discourse ethics. Habermas proclaims his discourse ethics a cognitivist ethics and, as such, it takes its bearings from Kantian ethical theory.<sup>30</sup> This is notable because Habermas explicitly attempts to distance himself from the “individualism” of Kantian ethical theory. Cognitivist ethics attempts to justify the validity claims inherent in discourse. Indeed, it is the possibility of validity claims that allows Habermas to proceed with the formation of a moral principle to command discourse ethics. Habermas’s talk of validity claims arises out of speech-act theory and the combined philosophical efforts of Charles Sanders Peirce, Ludwig Wittgenstein, and John Austin. They provide the possibility for universalism because they ensure that all can assent to the uses of validity claims of language. To say that someone assents to the uses of language is to say that there is shared rule use within a discursive practice. If we are using the same rules in our language, we already endorse these.

This moral principle is “so conceived as to exclude as invalid any norm that could not meet with the qualified assent of all who are or might be affected by it” (*DE*, 63). The intuition here, as Habermas puts it, is that “valid norms must deserve recognition by all concerned...True impartiality pertains only to that standpoint from which one can generalize precisely those norms that can count on universal assent because they perceptibly embody an interest common to all affected” (*DE*, 65). Reciprocity, a theme common to Kant, Rawls, and the classical liberal tradition, plays a central role here. Each of us is a participant in the give-and-take of needs and interests. Here Habermas draws on George Herbert Mead and a sociological understanding of the roles that actors play with respect to one another.

The greatest difference between Kant and Habermas is this: Kant, Habermas thinks, presents the moral agent as making moral choices in a vacuum through placing him- or herself in the position of an isolated individual constructing moral judgments. Habermas, by contrast, sees moral judgments as constructed in a discursive community, in the context of reciprocal relations with others. Habermas reformulates the Categorical Imperative as follows:

Rather than ascribing as valid to all others any maxim that I can will to be a universal law, I must submit my maxim to all others for purposes of discursively testing its claim to universality. The emphasis shifts from what each can will without contradiction to be a general law, to what all can will in agreement to be a universal norm. (*DE*, 65)

---

30. Jürgen Habermas, “Discourse Ethics,” in *Moral Consciousness and Communicative Action* (Cambridge, Massachusetts: MIT Press, 1990), 63. This work will be cited as *DE* in the text for all subsequent references.

Habermas makes the construction of moral judgments contingent on the reciprocal interests and needs of other “stakeholders” and thus avoids the problem of the lone individual crafting moral decisions.

What of Right in this formulation? Habermas thinks that rights and duties are reciprocal. We owe to others what we, in turn, receive from them. This reciprocity thesis is found in both Kant and Rawls, as well as in the work of many others. Kant of course embedded it in the Formula of Humanity, where we are to treat each other as ends, never merely as a means. Rawls had his famous “reciprocity thesis,” whereby those in the original position are compelled to consider themselves as potential losers in the decisions of distributive justice — losers that, other things being equal, will want to avoid the potential risks of living without primary goods. Nevertheless, Habermas’s thinking on right is different from that of both Kant and Rawls. Rights are not congruent with the Categorical Imperative, as Right is said to be for Kant; nor do they exist as merely political devices, as Habermas claims they do for Rawls. Rights are mutually determined, reciprocally conditioned sets of obligatory actions (*DE*, 62–63). This has grave implications, Habermas says, for the traditional cleavage of Right and goods:

To the deontological distinction between the right and the good corresponds the distinction between normative judgments about what we ought to do and evaluative judgments about something in the world that is more or less good or bad for us. This distinction draws initial support from the fact that the grammar of commands is related internally to action, which is not the case with the grammar of evaluations. Normative judgments always relate to the choice between alternate possibilities of action; evaluations relate to objects or states of affairs independently of whether they are described as ends or goods from the perspective of a purposively acting subject...Murder and deceit are not wrong merely because they are not good for those whom they victimize. As norms of action they are wrong in general because they do not express a generalizable interest. Hence the unconditional or categorical character of normative validity would be compromised if the obligatoriness of impartially grounded actions and norms of action were not divorced from values and preferences that arise only from the evaluative perspective of particular persons or reference groups. In this respect, normative judgments are oriented to rules rather than ends. (*DE*, 62–63)

The separation of Right from Good is a requirement for individualistic, rule-bound conceptions of moral judgment. This dualism vanishes when a communicatively oriented discourse ethics involving the many rather than the one replaces the traditional understanding of moral judging.

What Habermas has done, in effect, is to broaden the nature of the Categorical Imperative from logical and practical self-contradiction as justification for moral judgments to the linguistically derived, actual consensus of those that have a stake in moral decision making. This is tantamount to broadening the scope of moral judgments from individual to community.

#### CONTRADICTIONS IN LIBERAL THEORY?

Here I again note that Habermas’s conception of Right is *not* isomorphic with the Rawlsian conception. Rawls’s conception of rights is akin to primary goods — the rights that all of us have by virtue of being in a twenty-first century Western liberal democratic nation. It is true that Rawls thinks Right emanates from the principles of Justice as Fairness and that an individual could conceivably put

him- or herself in the original position and spin out the two principles of justice. Rawls's description of this activity is Kantian: the moral agent puts him- or herself in a position to decide on principles.<sup>31</sup> In this respect, Habermas is correct: Rawls's decision-making model is individualistic. Furthermore, because of his individualistic moral decision-making theory, Rawls could not account for the gap between fact and norm — the primary goods and the principles of justice that ensure them. Habermas's ascriptions, though, fall short. Rawls did not evince a clear separation of Right and good because his prioritization of Right ensures the stability of Western liberal democratic primary goods that he feels are worth maintaining. Habermas's ascriptions fail particularly in the case of Kant. In the remainder of this essay I shall note where Habermas's claims miss their mark, discuss why this is so, and bring education back into the fold through a reconsideration of the Kantian contribution to the discussion of Right.

Habermas is correct regarding Kant's derivation of the innate Right of freedom from the Formula of Humanity. The innate Right of freedom is autonomy. To deduce the innate Right of freedom is possible for any rational individual, and so, once again, it *seems* as if Kant falls under the same criticism Habermas levels at Rawls. This is not the case, however. Kant's theory of Right is different from the theories of both Rawls and Habermas. We see that with Kant, Right has priority over goods but only to the extent that goods traverse the bounds of freedom. Otherwise, Right is agnostic regarding goods. This is neither the case with Rawls nor Habermas. According to Rawls, the two principles of justice directly affect primary goods, as we have demonstrated.<sup>32</sup> A political conception of liberalism does not mitigate this. Comprehensive doctrines of the good that do not meet the (admittedly rather loose) criteria of the prioritization of Right over goods are subject to curtailment. Thus Rawls's argument relies on the theory of goods regarding which it is supposedly agnostic.<sup>33</sup>

The claim is not that Rawls is right or wrong about the prioritization of the Right. The claim is rather that this prioritization *does* have an effect on the good. Habermas, too, though he self-consciously attempts to avoid this problem by collapsing the distinction between them, also gives priority to Right over good. While

---

31. Rawls, *A Theory of Justice*.

32. Though it does bring Rawls closer to Kant's political conception of Right. Rawls's conceptions of the overlapping consensus and Right are coercive to the extent that they limit the political force of comprehensive doctrines of goods.

33. A good example of Rawlsian thinking at the level of the Supreme Court of the United States is the case of *Mozert v. Hawkins County Tennessee Board of Education*. The dispute concerned the ostensible violation of the Establishment Clause of the First Amendment. Parents concerned with what they deemed the secular content of public school readers argued that these readers should be removed from the school so that they could educate their children in a Christian fundamentalist fashion. The Court's ruling that the use of the readers does not constitute a violation of the Establishment Clause meshes nicely with Rawls's prioritization thesis. See James C. Harkins IV, "Of Textbooks and Tenets: *Mozert v. Hawkins County Board of Education* and the Free Exercise of Religion," *American University Law Review* 37, no. 3 (1988): 985–1012. See also Colleen Vojak, "*Mozert v. Hawkins*: A Look at Self-Knowledge and the Best Interests of the Child," *Educational Theory* 53, no. 4 (2004): 401–419. See also Robert Reich, "Opting out of Education: *Yoder, Mozert*, and the Autonomy of Children," *Educational Theory* 52, no. 4 (2002): 445–461.

Habermas is keen to ensure that the lifeworld of communicants preserves itself in debate, he insists that validity claims in linguistic practices have the force of justification. Leaving aside the skepticism about language practices concealing power and obfuscating any smooth translation of meanings, the issue is that the validity claims built into our use of discursive practices are universal norms. That is to say, if one accepts the validity of linguistic practices, then one *must* accept that this *ought* to be the ground for all justification of communicative debate. Stakeholders — that is, those that have a stake in a particular debate — *will* obey the universal law of discourse ethics. There is more than just this, though. Each participant in the discursive debate must accept the force of non-self-contradictory arguments that are themselves grounded in validity claims. That is to say, participants must recognize the full force of the better argument.

This is a prioritization of Right over goods. The Right in question seems a negative one: not to allow coercion in a discursive community to thwart attempts at an equal debate. However, it implies that validity claims embedded in linguistic discourse regulate what counts as equal debate. It is not a case of whether one *would* accept this or not: one has no choice. If one wishes to participate, one *does* accept the force of these validity claims. Although it seems as if the universal norm is merely a negative freedom — a freedom not to coerce — it is in fact much more than that. Only those that can abide by the validity claims that justify the linguistic discourse (and are willing) may participate in discursive debate. Communities, for example, do not have an automatic “right” to self-determination in this scenario. Institutionalization of norms that occurs, for example, through state-wide legislation implicitly favors norms that have *already* obtained the consent of stakeholders. Those in a discursive context who are unable, using the justificatory power of existing validity claims, to make a convincing argument (the better argument) for their social or cultural practices, are unlikely to sway those who can. In theory, at least, it is possible to *reject* noncontradictory social practices if the force of argument is the central means of justification. The force of argument takes priority over social practices, and those actors defending social practices bear the weight of having to defend their case on justificatory grounds that are discursive and not necessarily practice-centered. In actuality, I doubt that Habermas wants this to happen. Nevertheless, it is a conclusion that follows from his theory of discourse ethics.

From here on, I shall concentrate on the Kantian approach to the questions raised. Kant’s theory of Right does *not* manifest this problem. His theory is largely negative — that is, it does not spin out particular obligations that the state must then meet. It assumes only a minimal coercive constraint. It cannot be the job of the state to ensure moral behavior — Kant was quite clear on this. Other social institutions can do this and the person is certainly entitled to bring him- or herself to these *voluntarily* and to submit to the commands of these:

In an already existing political community all the political citizens are, as such, still in the ethical state of nature, and have the right to remain in it; for it would be a contradiction...for the political community to compel its citizens to enter into an ethical community, since the latter

entails freedom from coercion in its very concept...The citizen of the political community therefore remains, so far as the latter's lawgiving authority is concerned, totally free...<sup>34</sup>

An ethical state of nature is one that manifests the Formula of Humanity — that one can only treat another as an end, not merely as a means. A political community takes place in an ethical state of nature and is the coercive capacity of the state, which is *always already* a manifestation of this ethical freedom. Right does indeed proceed from morals. Habermas is correct about this: Right for Kant depends on the normative moral status of the citizenry. This, however, does not change the fact that Right is merely negative. It has no corresponding duties beyond the state's reciprocally mediated coercive constraint of peoples. Right is a separate matter from ethics, and the fact that Right emanates from the Formula of Humanity is *not* to say that, therefore, Right is beholden to a metaphysics of morals. Duties are not required of people in a political regime, and, furthermore, the reciprocal nature of "do no harm" is well established in classical liberal theory.

Kant's conception of Right is more limited than that of Rawls and far less so than that of Habermas. To see why, let us look at the practical conclusions of each. For Rawls, as for Kant, Right acts as a coercive constraint. However, it does so in a different way, and with different aims, than the Right of Kant. In Rawls's formulation, Right is the law of the two principles of justice. These principles affect primary goods, and they do so in such a way that some goods will be constrained. For Habermas, Right is a universal norm that restricts debate to discourses justifiable by the validity claims already embedded in the practice of language. One must accept the force of the better argument, other things being equal, if one agrees to participate as a stakeholder in ethical decision making. Such a constraint will have an impact on the range of goods allowed. Kant's theory of Right has no such requirements. It consists only of coercive constraint and (again) is agnostic regarding good. Of course, this Right also lays constraints on what goods are allowable, but these restrictions tend to involve external possessions, formal requirements of citizenship, marriage, family relations, child rearing, and the like, but not "ways of life" unless these actively interfere with the external possessions and the "ways of life" of others. The state, the organ for administering coercive constraint, is generally silent on these ways of living and takes no particular interest in regulating specific social practices.

It may seem that the state allows some comprehensive theories of the Good to have their say to the detriment of others. Since the state is quiet on (most) comprehensive conceptions of the good and the ways of life of most citizens, the state potentially is in a position to do nothing regarding the abuses people having competing conceptions may wreak upon each other. Is this indeed the case? The fallacy of this argument lies in its acceptance of the very premise that is in dispute: that the state has a compelling interest in choosing among the varied conceptions of the Good that people hold and act upon. In examining this concern further, let us take the case of schools. Within the Kantian conception, schools may well fall under

---

34. Immanuel Kant, "Religion Within the Boundaries of Mere Reason," in *The Cambridge Edition of the Works of Immanuel Kant: Religion and Rational Theology*, ed. A. Wood and G. DiGiovanni (Cambridge: Cambridge University Press, 1996), 6: 95–96.

little or no state jurisdiction. The fear is that accountability and accessibility (for example) will be impossible to maintain under such conditions. Some children may receive substandard or even discriminatory education, while others (perhaps those from white, suburban, wealthy families) will do better. This may jeopardize equality of opportunity, to say nothing of equality of outcome. On the other hand, state involvement in education cannot but translate into the acceptance of one way of life over another.<sup>35</sup> Neither account seems acceptable. The former is unpalatable, given the possibility of rampant discriminatory practices in education. The latter does not allow for communities having vastly different social practices. How do we proceed?

Kant said that private institutions can be altered by the state, if necessary. If a private institution is “opposed to the preservation of the state and its progress toward the better” (*MM*, 6:369), then the state may intervene. Presumably, on this definition opposition means interference with the negative freedoms of all citizens therein and progress means progress of the state. This, we might say, is what counts as “harm.” This is admittedly a minimal concession. It does not answer the charge of the potentially discriminatory practices of powerful groups trumpeting their comprehensive doctrines of good. Kant’s response is that citizens, not the state, are responsible for sorting out these issues. Citizens do not have the force of the state, for better or worse, behind them. Put another way, each of us, including parents, has the faculty of his or her “private use of reason” to do with, and to obey, as we choose. We may choose to join (voluntary) organizations to persuade other citizens that our claims are going unheeded, our needs unmet, our practices placed in jeopardy. It cannot be the state’s responsibility to place itself in this capacity because it immediately indulges in a violation of people’s negative freedoms. State-regulated schools that do more than maintain the negative freedoms cross the line of legitimate constraint. Parents have the right to choose the institutions that educate their children. They also have the right to educate their children in contravention of social norms and practices (including practices based in autonomy), provided they do *no harm* to the child.

Kant did not spell out the implications of this caveat. Presumably, though, the state would have to develop consistent criteria as to what counts as harm to a child and what is to be done about it. Harm, to give one example, might include poverty — that is, the lack of adequate food, shelter, clothing, transportation, health care — together with the availability of funds sufficient to prevent this harm. Harm, then, could be considered broadly to include (not surprisingly) the lack of basic goods, though with the criteria for state intrusion limited to what counts as harm rather than the absence of specific goods. Another example of harm might be the

---

35. William Galston charges Kant with being unable to avoid a “tutelary liberal state,” one in which the state commands consent from the citizens on social and economic matters. I think that Galston is wrong about this. Though I cannot explore this issue in detail here, I contend that his argument that because “entrance into civil society is not a deduction from self-interest but, rather, a direct duty” is not enough to commit Kant to claiming that citizens must dutifully obey their sovereign on matters of moral education (Galston, *Liberal Purposes*, 85). While it is true that citizens must obey their sovereign, Kant maintained, nevertheless, that the sovereign is acting against freedom if it implements duties contrary to the universal law. Here, Galston conflates the two realms of Virtue and Right. A sovereign, properly speaking, is to remain agnostic concerning how a citizen obtains a moral education. Kant was quite clear on this.

deprivation of a legitimate education for each child. In this case, what counts as legitimate rests on the criteria for what counts as harm: presumably, harm *could* range from the denial of a specific curriculum necessary for entrance to higher education to exposure to actively racist, sexist, and homophobic (in other words, hateful) pronouncements. What counts as harm, again, will depend on the criteria used to discern that harm has occurred or is occurring: *harm will have to be shown to result from the denial of negative freedoms inherent in the act in question*. The state may have a compelling interest in ensuring that all children are minimally educated, but it does *not* have the right to dictate who determines that education or when, where, or how it takes place. This is the proper responsibility of the parent (and, perhaps, if the parent and older child consent, the community of the parent's choice). More than a mere choice about whether to give weight to negative or positive freedom is involved in the claim that any compelling interest of the state in social institutions that goes beyond maintaining the coercive constraint of negative freedom is a performative self-contradiction. For Kant, the state was to play a very limited role in these debates, leaving the citizens of a civil society to work out these matters among themselves. The proceduralisms involved in a Kantian doctrine of Right do not interfere with the decisions of various civil parties, unless these threaten negative freedoms and thus cause harm. Only then does the state have a compelling interest in constraining a comprehensive doctrine of Good. This is what I mean by a purely political notion of Right: one that neither Rawls nor Habermas manifests.

Citizenship, as conceived by Kant, is a product of *negative* liberty and freedom. State-sponsored social institutions may play only a limited role in the development of persons.<sup>36</sup> As late-eighteenth-century Prussia and twenty-first-century Western nations differ greatly, it is difficult to prophesy what Kant would suggest in the way of state involvement for today. He might agree to make public schools available to children who cannot afford private or church-run ones. This would certainly be in keeping with his talk of duties to others, as found, for example, in the "Doctrine of Virtue," although state action is a political rather than an ethical (virtue) concern. Nevertheless, I do not think he would relinquish his claim that parents, with the aid of the communities to which they belong, should choose the schools. Nor do I think he would relinquish the claim that the state has no compelling interest in regulating schools that fall outside its immediate purview — for example, schools not established by the state for those unable to find other means of educating their children.<sup>37</sup> It is, in general, the responsibility of the citizenry to construct and maintain these schools, and the responsibility of parents to decide to

---

36. Is this not a recipe for privatization? Privatization, wherein income dictates access to institutions such as schools, and market forces determine the range of institutions available, cannot be the model for schools. The state may justifiably interfere to ensure that children receive an education, though not through mandating state schools for all. A system of private education with no recourse for those that cannot contract an education for their child (for whatever reason) will result in harm. How much education is necessary depends on how the criteria for harm are formed and what these criteria consist of.

37. It may just be that the state has minimal requirements for its own schools. This is not an issue I can pursue here. Nevertheless, it would be manifestly self-contradictory from the perspective of negative freedom to admit to state schools children that cannot afford private education and subject them to a battery of rules and regulations that private education can disregard, if harm is induced as a result.

which schools they will send their children. To do anything beyond this is to violate the logic of negative liberty that grounds much of liberal theory.

#### CONCLUSION

The Kantian trunk of procedural liberalism, then, is a manifestly coercive, constraining conception of the state that premises itself on a notion of negative freedom. Both branches (Rawlsian and Habermasian) of the trunk manifest positive freedoms, Habermas more so than Rawls. To the extent that negative freedom is operative, social institutions such as education receive less rather than more state involvement. To the extent that positive freedom is operative, education receives more rather than less state involvement. What is important to note is the theoretical trade-off between Right and goods. Nevertheless, on this point, there should be no mistake: negative freedoms, those freedoms necessary for the very possibility of the practice of comprehensive doctrines of the Good to thrive in civil societies, depend upon the state playing *as minimal a role as possible* in matters of procedural Right. The Kantian theory of Right posits a minimalist role for the liberal state to play in patrolling comprehensive conceptions of good while allowing nonpolitical institutions a much larger role in this process.

A key implication here is that Kant's theory of Right makes fewer political demands on communities than the theories of Rawls or Habermas do. Although Kant certainly would (and did) want people to abide by Virtue, he did not maintain that the role of the state is to police this; instead, he accorded responsibility for carrying out this task to communities, groups, and individuals. When Kant was developing his theory, the church was the social institution largely responsible for maintaining Virtues, and Kant, like so many other thinkers of his time, thought it was the proper institution for this task. Virtue was an affair of private, not public, reason. Many of us no longer think this. Nevertheless, we do want some social institutions to safeguard Virtue, whether these are voluntary organizations, the mass media, private schools, our families and friends, or the material we choose to read. I want to gesture toward a possibility that would probably not occur to very many of us on reading Kant. I want to suggest that we can build a deliberative democracy in the space between the public (the state) and the private lives of peoples. This is a communicative democracy, though *not* state-supported (or state-prohibited), and it rests on the problems, needs, and desires of the communities that come together in communication with each other. This would be a voluntary, democratic movement of people. The role of the state in it would be to ensure coercive constraint — that is, a reciprocally agreed upon constraining of individuals such that each person's freedom holds. Beyond this, people can form groups according to their needs and wants in a manner akin to John Dewey's model of the public or James Bohman's model of democratic pluralism.<sup>38</sup>

38. Obviously, much more needs to be said regarding this, and I can only offer a promissory note at this time. This is particularly so in the case of Bohman, who sees Kantianism as the problem with extant models of deliberative democracy. For me to include Bohman, for example, I would have to show that he is mistaken about the Kantian element in deliberative democracy and why Kantian moral theory actually allows for the latitude Bohman thinks necessary in forming plural publics. See, for example, James Bohman, *Public Deliberation: Pluralism, Complexity, and Democracy* (Cambridge, Massachusetts: MIT Press, 1996). This is a task for a future essay.

The point is that there is room for such a voluntary, needs-based, community-driven citizenship theory within the space that Kant's theory of Right leaves open. Much more thought about this needs to take place; nevertheless, I offer the possibility of new thinking about the tension between procedural liberalism, on the one hand, and communicative democracy, on the other.