

SYMPOSIUM
PROBLEMS AND METHODS IN GLOBAL THINKING



LEAVING THE STATE OF NATURE

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Leaving the State of Nature

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K atrin Flikschuh *What is Orientation in Global Thinking?* provides a powerful argument that we do not (yet) know how to think globally. She offers incisive critiques of much of the globalist literature, in particular, contemporary forms of cosmopolitanism, which suppose that the relevant normative principles for a global order make no fundamental reference to political associations, but at most regard these as the empirical facts relevant to the implementation of a global distributive principle that applies universally. At the same time, she is no less forceful in her rejection of various statist accounts, such as that offered by Thomas Nagel, according to which modern state formations are the institutional setting within which claims of justice – as opposed to beneficence or other virtues – assert their claim. Indeed, the lack of orientation that is the organizing theme of Flikschuh’s book comes from treating either unbounded cosmopolitanism or modern statism as the only options. Flikschuh does not outline an alternative option, but rather holds out for a fundamental reorientation of global thought, drawing on three interrelated ideas: first, she argues that Kant’s political philosophy, although invoked in one way or

another by both sides in the (disoriented) contemporary philosophical discussion of global ordering, provides the resources for rethinking the very subject of global thinking, through the distinctive conception of what she calls ‘recursive’ justification. Second, she draws on Jonathan Lear’s discussion of conceptual loss, that is, the idea that a way of living – the way in which a group of human beings orient themselves towards their natural and social world – can disappear, and people can be fundamentally at a loss. This idea figures explicitly in her characterization of our current predicament in thinking globally – the situation in which we find ourselves makes concepts and principles through which our moral world seems familiar lack application to some of the cases in which we need them most. It also figures implicitly in Chapter 7 in the way in which she characterizes the difficulties of the state system for many people living in Africa. Third, she draws on David Velleman’s conception of moral relativism, the idea that reasons must be reasons for those to whom they apply.

In this brief comment, I focus only on the Kantian aspect of her account. Although I am sympathetic with the conclusion of her argument, I want to propose a different way of bringing Kant to bear on her questions. Before developing and deploying her conception of recursive justification, Flikschuh first engages in a pair of “ground-clearing” exercises, which aim to show that first, that Kant’s argument on the necessity of state entry is not unconditional, but rather depends on members of a group of human beings asserting proprietary claims as against each other, and second, that Kant’s discussion of what he calls the “innate right of humanity” in your own person should not be read in individualistic terms. The first, state entry argument, undermines the idea that claims of right only arise in the context of a state. The second, innate right argument, undermines the idea that there is a structure of right that applies to all human beings, simply as such, which is sufficient to generate concrete normative demands.

I want to put pressure on both of these ideas, first by asking about an apparent implication of their combination, and second, by asking whether Flikschuh needs to read Kant in this way in order to get to her conclusions about the need for reorientation. For reasons that will emerge, I propose to take them up in the opposite order than she does. On the issue of innate right, I will question Flikschuh's claim that it is, as she puts it "empirically non-instantiable." On the issue of state entry, I will question her reading of the Kantian argument on three different points, asking about what counts as making claims of acquired right as between human beings, what counts as having entered a rightful condition, and who has standing to enforce such determinations. My suggestion will be that Kant's juridical critique of colonialism, and his condemnation of forcing what he calls peoples "who depend for their sustenance on great open regions" (Kant 1797, 353) into a state does not depend on supposing they have not entered any semblance of a rightful condition, or on any claims about them lacking acquired rights, or having no duty of state entry. Instead, I will suggest that the problem is one of standing: people who are already members of some rightful condition who find themselves interacting with others where "neither nature nor chance but their own choice" (Kant 1797, 266) has put them in that situation, cannot take it upon themselves to force others to join.

Before developing my argument, I should apologize for engaging with such a deep and important book by what might seem to some readers to be little more than hair-splitting about how best to read Kantian texts. I do so both because that is the part of Flikschuh's argument that is closest to my areas of competence, but even more so because I share her view that Kant provides the resources for reorientation in global thinking. The most important of those resources is, as she notes, his Copernicanism: the thought that all rational inquiry must begin by taking account of the position of the one making the judgements.

In Chapter 3 of *What Is Orientation in Global Thinking?*, Flikschuh offers what she describes as a non-foundationalist, and non-individualist understanding of Kant's brief discussion of innate right. She understands moral individualism as specifying "particular features or properties of persons of which it claims that they are the source of persons' ultimate moral value" (Flikschuh 2017, 70) She characterizes foundationalism in terms of "strategies of meta-ethical justification that appeal to highest-order values or principles in their justification of lower-order ones. The highest-order values are in turn thought of as in some sense self-justifying, or at any rate beyond possible further justification" (*ibid.*, 71) Although these are distinct issues, she also suggests that "meta-ethically, moral individualism thus tends towards foundationalism" (*ibid.*, 70). As I understand her argument, the point is that individualism and foundationalism tend to travel together, if only because the supreme moral importance of individuals is thought to provide the basis on which any other moral claims must rest. She seeks to avoid foundationalism because it is inconsistent with Kant's recursive conception of justification; she seeks to avoid individualism because it is insufficiently attentive to the social nature of reason. By rejecting them both, Flikschuh thereby aims to restrict the applicability of innate right to deciding any specific moral controversy. Where others have taken each person's innate right of humanity in his or her own person as a substantive right holding against others, and to already be instantiated in the right that each of us has to (at a minimum) bodily integrity and reputation, Flikschuh proposes to understand it instead in a much more restricted sense, as affirming "the equal right of each to being treated by others as a legally accountable person with in a system of positive lawmaking" (Flikschuh 2017, 86). So rather than saying that you are entitled to defend yourself when attacked because you have an innate right to bodily security, or that others who allege you have done wrong must establish their allegation or withdraw it

– where in each case that right is innate because no affirmative act is required in order to establish it – Flikschuh suggests that it simply provides the framework within which people are reciprocally entitled to make claims against each other within a system of positive law. As a framework right, it structures the justification of particular claims without giving rise to any; instead, the matter of those claims must come from elsewhere. Turning to Kant’s own distinction between innate and acquired rights, Flikschuh argues that the former is not on its own empirically instantiated, whereas the latter is fully instantiated through determinate human actions. The actions through which it is so instantiated are only intelligible within the context of a concrete and determinate set of social practices, that happen to exist for a specific group of human beings.

Kant proceeds systematically, drawing on received legal doctrine, distinguishing rights from duties and loosely relating them to each other. In a way, Kant is simply analysing the moral concept of right that he takes to be implicit in actual legal thought and practice. Second, when it is mentioned, the innate right is not assigned any priority in relation to acquired right – its chief distinguishing feature is simply that no act is required for its establishment (Flikschuh 2017, 86).

Later Flikschuh characterizes the right in terms of “a reciprocally valid claim to legal competence” (*ibid.*, 93). Her claim, then, will be that so understood, innate right is, as she puts it “incapable of empirical self-instantiation” (*ibid.*). Instead, its moral content is exhausted by the imperative to not make oneself a means to others’ ends. The only way in which it can be empirically instantiated is indirectly, through a system of acquired rights, which

are “established through an empirically manifest act of acquisition.”

If innate right cannot be instantiated, moral individualism appears to lose its grip. The first-person perspective of practical reasoning figures, but only as a perspective, rather than as anything like a value. Innate right is not a right based on the importance of the human capacity for choice, but rather the structure within which human beings faced with the question of what to do engage with others facing the same question.

Our rational agency as an object of moral value or concern is very different from the view of individuals as reflexively aware agents. The self as agent is arguably central to Kant’s practical philosophy; the self as an object of moral value is not. In my view, it is the standard reading’s failure to differentiate between the first-personal perspective of Kantian practical reasoning and the third-personal attribution of supreme moral values to persons, which may be responsible for the widespread perception of Kant as a moral individualist (Flikschuh 2017, 98).

The point of reframing Kant in this way is to take from him the “potential of enabling us to see the world from a very different perspective than the one that is ‘intuitive’ to us through sheer force of habit” (*ibid.*, 99). The conceptual and normative payoff for this comes in the form of the claim that acquired rights are not directly traceable to innate right. Instead, property becomes a way in which innate right can be instantiated – one (but not the only) concrete way of instantiating “the equal right of each to being treated by others as a legally accountable person with in a system of positive lawmaking” (*ibid.*, 86). Given the argument, to be discussed below, about the dependence of the duty of state entry on the existence of property, this way of understanding of innate right is significant,

because an alternative instantiation of innate right could, in principle, lead to a different form of juridical order, one in which the equal right of each to being treated by others as a legally accountable person within a system of positive lawmaking could be instantiated differently, in particular without any reference to any European idea of a state.

In the interests of full disclosure, I note that I am among those whose reading of Kant Flikschuh has characterized as foundationalist and individualist in the past. I resist the characterization, but it is not my aim to do so here. Instead, I want to pick up on Flikschuh's idea of recursive justification, and suggest that Kant must be understood to be doing more than analysing what is implicit in actual legal thought and practice. By the time he gets to the right of nations and cosmopolitan right, he seems to be repudiating that practice, and that repudiation seems to be taking place from a moral standpoint that is structured by the same set of ideas that are already present in his discussion of innate right. More than that, a merely reconstructive reading seems to fall into a form of foundationalism of its own, albeit perhaps in an empiricist rather than the rationalist form that Flikschuh successfully criticizes. I suspect that Flikschuh is drawn to the reconstructive reading because that makes room for more pluralism, including the kind of relativism (within the limits of mere reason) that Velleman advocates.

I want to suggest, however, that there is more Kantian alternative to both reconstructive readings and foundationalist/individualist ones. Those readings force a choice between first-personal inquiries (what am I committed to in virtue of making this claim?) and third-personal ones (what is the source of value?). Given the choice, I certainly agree with Flikschuh that the first-personal is more satisfactory and more Copernican than the third-person option, because the starting point for Kantian

philosophy is always the thought that reason answers to itself, rather than to objective features of a world that radically transcends it. I nonetheless want to resist the choice between first- and third-person perspectives, because the organizing idea of right is second-personal: Kant's preoccupation in the *Doctrine of Right* is with how things stand between a plurality of separate human beings. The idea of right is fundamentally relational; right is the form of external freedom, and for Kant externality is itself relational. Indeed, the first step in his Copernican revolution is the argument, in the Transcendental Aesthetic of the *Critique of Pure Reason*, showing that the concept of space cannot be derived from experience because it is a pure relation. No operations on passively given material could generate the concept of relation. That same concept of relation figures in Kant's characterization of the innate right to freedom understood as "independence from being constrained by another's choice" (Kant 1797, 237). The reference to *another* is ineliminable; it is implicit in positive law, but we only find it there because we put it there; it is the fundamental juridical idea. It is not individualistic in the sense of individualism to which Flikschuh objects, but it is individualistic in the sense that every human being has a distinctive kind of standing in relation to every other, standing that must be instantiated through juridical institutions. It gives each person a claim against others in advance of those institutions. The claim is second- rather than first personal because it expressly contemplates others; it is second- rather than third-personal because it is a claim, rather than a source of value to which others must respond.

The second-personality of the claim that we have against each other also stands in important contrast with Flikschuh's proposal that innate right be limited to "the equal right of each to being treated by others as a legally accountable person within a system of positive lawmaking." The idea of an equal right admits of two interpretations. The first is the relational one, the thought that no

person is the superior (and so none the subordinate) of another. There are no superiors except in relation to subordinates, and no subordinates in relation to superiors. Only choosing beings can be subordinated by others, (and thus be entitled not to be) and only choosing beings can subordinate others (and so be prohibited from doing so). The same structure shows up with respect to acquired rights: my taking of your property and your having your property taken from you for the same act; misappropriation is thought for two.

The second interpretation of equal right incorporates a comparative idea of equality, according to which people are treated as equals provided that there is some dimension on which they are all treated alike. The idea that everyone be treated as legally accountable, without reference to the specific norms under which they are so treated – and in particular, without the constraints of those norms be specifically norms of right, that is, relating one person's choice to another, or the choice of a plurality of human beings, considered as a unity, to each of its members – makes innate right far more open ended, and demands of law only positivity and uniform application.

I have belabored this point of Kant interpretation because I think that Kant's conception of right, including the innate right of humanity in our own person, has important implications for global thinking. Once we get beyond the idea of objective value or of each person needing to figure out on their own what to do, the basic structuring idea of Kantian right is rather one of standing. Each of us is entitled to be independent of another's determining choice; so, too, each of us has the right to be presumed to have done no wrong. I will suggest below that this is enough to explain why it is wrongful to show up somewhere and take it upon yourself to force others into a rightful condition. Before doing that, however, I want

to first say something more about Kant's treatment of the duty of state entry.

Flikschuh emphasizes the role of property in Kant's official argument for the duty to enter a rightful condition. Although some writers have proposed accounts on which the Kantian duty to enter a legal order is more general, I put those thoughts to one side here. Flikschuh's aim is to show that those she calls "nomads" are under no duty of state entry because they do not make property claims against each other. This argument enters as an explanation of Kant's opposition to colonialism, and reappears implicitly in her Chapter 7 discussion of "The State as a Failed Universal." The thought is that a different form of ordering could be consistent with everyone's standing as a juridical equal.

With that in mind, I want to question Flikschuh's claim that pastoral peoples do not have acquired rights in Kant's sense.

The puzzle about property to which the Kantian argument for state entry is supposed to be a solution concerns the fact that it has an acquired authority structure. If something belongs to you, I am under an obligation. Nobody has property by birth, they can only acquire it through some procedure. Kant's example of a procedure the very 18th-century procedure of original acquisition, the transition from a situation in which people can deal with things as they see fit to one in which there are restrictions on the ways in which they may do so. Property is a question for political philosophy because it is a system of authority, one that allows some to determine how others may act, where that authority arises through the owner's own act. The question of acquisition is morally pressing because it appears to be a case in which one person (the owner) gets to make decisions about others in a way that those others do not get to make decisions about the owner.

This way of conceptualizing private property contrasts with, but in another way subsumes, a type of argument often made by writers who see themselves as critics of private property, on which property is a matter of some kind of “decision” that we “as a society” have made about how to allocate things. And, so the criticism continues, different people might have done it differently, and indeed, at other stages in human history different people have done it differently. If this is true, it reinforces Kant’s point, rather than refuting it. Kant’s point is that going from a situation in which everyone can use objects as they see fit to one in which someone has authority over the use of a object by others to a situation in which one person, on his or her own initiative, places others under new obligations. If this transition is the problem, unilateral public authorization could potentially solve it. But if property is just a social norm that human societies happen to have accepted, then (as Kant points out in his criticism of Grotius) rather than asking how the individual got the authority to do so, we have to ask instead how the society did. To assume that a group of people has a kind of authority over its members is not to provide an alternative to Kant’s account, it is rather to simply adopt his conclusion without carefully working through how that conclusion could be consistent with the freedom of everyone.

Kant uses concepts and examples drawn from Western legal systems in order to make this point, and he plainly supposes that the pure case of property is a formal right to exclude, because the pure case of any rational concept would have to be the formal one, that is, one that most completely abstracted from the matter of choice. So for Kant, ideas of usufruct need to be understood as derivative, rather than the basic case from which the concept of property is to be developed. All of this is consistent with the problem of one person placing another under an obligation being much more general.

Indeed, towards the end of the discussion of private right, before introducing the postulate of public right, Kant refers to societies that he describes as “compatible with rights (e.g. conjugal, paternal, domestic societies in general, as well as many others)” (Kant 1797, 306). But those societies could only be compatible with rights if there were at least some claims between their members. So, too, in introducing the concept of property, Kant gives the example of Mongolia, where, so he supposes, the people collectively own the land, and so anyone can “leave his pack lying on or recover possession of his horse if it runs away, since it is his” (Kant 1797, 265). This example suggests that some version of ownership is already in place; the possessives with respect to the pack and horse suggest ownership of chattel; and the reference to the “all the land belongs to the people” (*ibid.*, 266) suggests that there is some conceptual structure that is like ownership here. If that is the structure, then it seems that something like property claims are already being made, and so must be made binding in the right way.

The second thought is that even if those peoples had a duty to set up a legal order, it would not follow that settlers encountering them would be entitled to compel them to enter a legal order. Flikschuh draws attention to various passages in which Kant says that there is no right to settle, and in which, more generally, he resists the earlier European ideas about cosmopolitan right, which were said to include not only the right to settle but also the right to engage in trade, proselytize, and so on. Indeed, Kant refers to each of these in his description of the limits of cosmopolitan right. But if you cannot seize lands, and you cannot force people to trade with you, and, more generally, you cannot trick others into entering into agreements, it seems to me that all of these prohibitions also carry with them the thought that you cannot force those others to enter into a rightful condition with you. Indeed, in his discussion of the initial acquisition of property, Kant takes up the question of

individual possessory claims by people who are not members of European states, when he writes:

lastly it can be consistent asked whether, when neither nature nor chance but just our own will brings us into the neighbourhood of a people that holds out no prospect of a civil union with that, should we not be authorized to found colonies, by force if need be, in order to establish a civil union with them and bring these human beings (savages) into a rightful condition (as with the American Indians, the Hottentots and the inhabitants of new Holland) or (which is not much better) the found colonies by fraudulent purchase of their land and so become owners of their land making use of our superiority without regard to their first possession. Should we not be authorized to do this, especially since nature itself (which abhors a vacuum) seems to demand it, a great expanses of land in other parts of the world, which are now splendidly populated what otherwise remained uninhabited by civilized people or indeed would have to remain forever uninhabited, so that the end of creation would have been frustrated? (Kant 1797, 266).

Kant repudiates this idea, writing that it is “easy to see through this veil of injustice (Jesuitism) which would sanction any means to good ends. Such a way of acquiring land is therefore to be repudiated.” Kant here supposes that they do indeed have some form of claim, hence his reference to “without regard to their first possession,” which seems to suggest that they have some kind of possessory right, a right, as against others, that those others not interfere with their determination about how the land will be used. Yet the framing of the question suggests that the repudiation of the wrongful means – force or fraud – is what matters here. Even if sharing a rightful condition with them would be morally appropriate, it is just that there is no rightful way to get to it.

I want to bring this idea back to the relational understanding of innate right, including with that the right to be beyond reproach. If you find yourself interacting with people through your own choice, and you do not believe them to be in a rightful condition, you lack the license to act on that belief, even if that belief is true, putting aside genuine questions about how you might actually establish it. In such a situation, they have a right to be beyond reproach, that is, to be assumed to have done no wrong, including not to have done the wrong of remaining in a lawless condition. That is why the colonists and missionaries must not interfere with the modes of ordering they encounter. As travellers, they come as members of some rightful condition, and must treat any group of people they encounter as another rightful condition, in which they have the right to visit, but not to settle.

I have raised three questions about the duty of state entry: first, are there groups of human beings that do not assert claims of acquired rights against each other? Even a nomadic society in which norms govern the ways in which resources are divided appears to have a lot of things, which may or may not count as property in any robust sense, but nonetheless participates in the formal structure in which a person has a claim, as against other people, with respect to an object of which they are not in immediate physical possession. Kant introduces the contrast between a property right and the internal mine and thine precisely through this contrast: the person who drags me from my resting place or grabs an apple out of my hand, “diminishes what is internally mine (my freedom), so his maxim is in direct contradiction with the axiom of right. So the proposition about empirical possession in conformity with rights does not go beyond the right of a person with regard to himself” (Kant 1797, 250) Possession of something external to myself “affirms possession of something without even holding it” (*ibid.*, 250) This contrast applies because of the possibility of wrongdoing, the possibility of

inconsistency, with respect to objects while someone is not in immediate physical contact with them.

Yet that possibility seems to be in place whenever people assert claims to things in relation to each other, even if it is a claim to some share of the fruits of something acquired or held collectively by some group, a society consistent with rights. Indeed, Kant's remark about Grotius seems to apply here: the central claim is that rights as against others require some form of shared, that is, public, authority structure.

Second, just as I suggested that claims to acquired rights (and so the pressure to enter a rightful condition) are more open-ended than claims to full liberal property, I wonder whether the idea of a rightful condition is also more open-ended than Flikschuh assumes in assimilating Kant's argument for entry into a rightful condition to entry into a European-style state. I do not merely mean to draw attention to the substantial evidence that the indigenous peoples of Africa and the Americas had far more juridical structure than the travellers on whose reports, which he acknowledged to be unreliable, Kant relied in his characterizations of those places. I also wonder whether having institutions with generality would qualify as already being in a rightful condition. The point of the transition from a Kantian state of nature to a rightful condition is to replace unilateral choice with omnilateral lawgiving. This transition is, as Kant emphasizes, to be understood as an idea of reason. As such, it is an ideal case, to which no empirical instantiation can be entirely adequate. Its pure case is a Republican system of government, which has a strict separation between legislature, executive, and judiciary. But again, Kant's emphasis on this separation should not be read as a reconstruction of what was implicit in the (European) legal systems of his time, because no such separation was acknowledged. But if it is a formal idea, then its empirical instantiation could only be found in a group of human

beings that give laws to themselves. Kant's examples of pastoral peoples requiring large amounts of land to sustain themselves are not examples of dissociated individuals in a state of nature, who do not encounter each other and so make no proprietary claims against each other. They are instead peoples. "People" is a defined term for Kant, "a multitude of human beings" (Kant 1797, 311). Understanding such peoples and nations as already in a rightful condition also identifies the distinctive wrong of colonial conquest. It is not merely forcing people into a form of social ordering in which they do not feel at home; it is, further, depriving them of something like their sovereignty.¹

Third, given that a rightful condition is itself an idea of reason, there is yet another question about who, exactly, has standing to determine whether this or that group of human beings is in a rightful condition. And here Kant's relational conception of right, and of innate right in particular, seems to be decisive: a people, considered as a collective body, and its members, considered individually, have the right to be beyond reproach. This is an original right in the sense that it does not require an affirmative act to establish it. So even if you were to encounter someone and did not know whether they were in a rightful condition, you would have to presume that they were, particularly where your interaction

¹ In a forthcoming article, Douglas Sanderson argues that the indigenous peoples of Turtle Island wrongfully deprived of sovereignty through European conquest, noting that they had systems of self-rule in which powers were understood to be exercised in trust for those living under them, both current and future generations – that is, on a model that fits the abstract structure of the duties of a state in Kantian right. Based on Sanderson's analysis, the wrong of colonialism is not just wrong visited against the individual human beings who were colonized; it is also more wrong against the subject peoples. This is a very kind of wrong the repair of which cannot be put off "indefinitely" (Kant 1795, 348).

with them was done at your own initiative, as was the case with European travellers in the colonial period. This, indeed, seems to be just how Kant frames the issue when he writes, “If these people are shepherds or hunters (like the Hottentots, the Tungusi or most of the American Indian nations) who depend for their sustenance on great open regions” then they must be assumed to already be in a rightful condition – as is suggested by Kant’s choice of the word “Nations” (*Nationen*)² to characterize what he describes as the American Indians. Given that they must be presumed to be in rightful condition, no one can take it upon themselves to force them into another one. Indeed, the representative of the colonial power who does so does wrong.

I now want to return to the broader theme of orientation in global thinking: I find Flikschuh’s conclusions about the possibility of non-state forms of political association, and her engagement with proposals to develop some such forms for Africa intriguing. Whatever such forms might emerge it seems to me can be brought more readily within the structure of Kantian right by understanding them as internally constituted as however they will be, while, at the same time, externally standing as states in relation to other states, which is to say that others must not intervene in them. This idea can be perspicuously stated in the vocabulary of recursive justification: the question about how to orient oneself to a disorienting global system is a question about how people who are at home in their own legal orders, should orient themselves towards different peoples with different ways of doing things. The

² The same word that he uses to describe the wrongful colonial relation between Great Britain and the Irish nation in condemning the exclusion of Catholics from the civil service in Ireland (Kant 1797: 368). Elsewhere he uses “Volk” and its cognates – the same word he uses for European nations – to refer to them. By contrast, in discussing the wrong of colonial conquest in the context of original acquisition of property, he seems to be concerned with the possessory claims of individuals.

heart of any answer to this question must be that one must not set oneself up as the colonial or neo-colonial master of those others, but rather must respect their independence as peoples. But I also think that the requirements of right, including each person's innate right of humanity in their own person constrains the ways in which any such non-state forms might be rendered consistent with the right of human beings as such, that is, the right to be in a rightful condition.

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