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RELATING KANT'S THEORY OF REFLECTIVE JUDGMENT TO THE LAW

RUDOLF A. MAKKREEL*

One of the most pervasive themes in Kant's philosophy is that of legislation and law. Among the three cognitive faculties of understanding, reason, and judgment, the understanding takes pride of place in legislating. The understanding is the power that prescribes the general lawfulness of nature. It provides us with the a priori categories needed to structure and give meaning to the sensuous manifold of our phenomenal consciousness. Our experience can be objective and universally valid because we all apply the same categorial rules to the contents provided by the senses. The application of categorial rules allows us to understand nature as governed by laws.

Whereas the understanding is discursive and examines the world part by part, reason is holistic and aims at completeness. Theoretical reason tests the truth of each of our cognitive claims by determining how it fits into the overall system of what is known. Theoretical reason's task is not to legislate, but to determine whether the particular laws discovered in nature can be related to each other in an orderly way to constitute a coherent system. In doing so, reason begins to take on a judiciary role. It moves from the concept of natural law that the understanding uses to order the world to that of judicial law concerned with legitimation. This transition is captured by Kant's image of the tribunal of reason.

The laws of the understanding formally order our experience by means of an external mode of causation that allows no phenomenon to be self-caused. By contrast, the systematic order demanded by reason produces an internal connectedness and involves self-legitimation. We will consider how these expectations of reason carry over to the way Kant deals with questions of justice and human rights related to the legal sense of law.

Kant acknowledges his reluctance to let theoretical reason legislate when he contrasts it with practical reason. In the *Critique of Practical Reason*, he writes that "[t]he theoretical use of reason was concerned with objects" and has a tendency to "lose itself beyond its boundaries, among

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unattainable objects”¹ unless it is curbed. Practical reason, however, is allowed to legislate laws because these laws apply only to ourselves as rational beings. According to Kant, practical reason “can at least suffice to determine the will and always has objective reality insofar as volition alone is at issue.”²

He writes that these objective laws “must sufficiently determine the will as will even before I ask whether I have the ability required for a desired effect”³ Practical laws apply to us in so far as we are free rational beings capable of self-determination in deciding how to act. This is a formal determination. Regarding the subjective maxims we adopt relative to achieving desired effects, Kant expects us to evaluate their content in order to determine whether they can stand the test of universalization. This test requires a “rule of judgment under laws of pure practical reason[,]” which is to “ask yourself whether, if the action you propose were to take place by a law of the nature of which you were yourself a part, you could indeed regard it as possible through your will.”⁴ The rule is determinant because you must imagine yourself as both the legislator and subject of a law that permits no exceptions. As the legislator of moral laws, I am autonomous in two senses: First, I determine what the law should be. Second, I subject myself to it by considering myself as part of that universal domain that can be called the kingdom of ends.

When we reach the *Critique of the Power of Judgment* we find that judgment is legislative in a more restricted sense, namely, “with regard to the conditions of reflection *a priori*”⁵ Kant writes that judgment’s autonomy is not objectively valid “like that of the understanding, with regard to the theoretical laws of nature, or of reason, in the practical laws of freedom”⁶ The legislative power of judgment is merely subjectively valid and prescribes “solely to itself.”⁷ Its autonomy is really heautonomy: it is reflective rather than determinant. The lawfulness of reflective judgment applies only to our own thinking, and does not legislate to the world. Reflective judgment is merely self-legislative and

1. IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* 5:15, at 12 (Mary Gregor ed. & trans., 1997) (1788) [hereinafter KANT, PRACTICAL REASON] (page references, e.g., 5:15, to the *Akademie* edition).

2. *Id.*

3. *Id.* at 5:20, at 18.

4. *Id.* at 5:69, at 60.

5. IMMANUEL KANT, *CRITIQUE OF THE POWER OF JUDGMENT* 20:225, at 27 (Paul Guyer ed., Paul Guyer & Eric Matthews trans., 2000) [hereinafter KANT, POWER OF JUDGMENT] (page references, e.g., 20:225, to the *Akademie* edition).

6. *Id.*

7. *Id.* at 20:225, at 28.

any more general lawfulness that it can establish will have to be arrived at through a consensus within a more limited scope.

I. THE COMMON TERRITORY OF AESTHETIC CONSENSUS

Section II of the Introduction to the *Critique of Judgment* provides us with an initial orientation that will help to specify what kind of scope or meaning reference a judgment can have. Kant states that when judgment refers a concept to an object, this object can at the same time be located as part of some context. This context can be either: (1) a field (*Feld*); (2) a territory (*Boden, territorium*); (3) a domain (*Gebiet, ditio*); or (4) a habitat (*Aufenthalt, domicilium*).

We find geographical terms like “field” and “territory” being used throughout Kant’s corpus, but he does not always distinguish clearly amongst them. These contextual spheres often seem to be used interchangeably. I think it is one of the defining features of reflective judgment to be able to specify these contextual spheres by differentiating their scope and nature. Thus, in addition to the well-known contrast between a determinant judgment proceeding deductively from universals to particulars and a reflective judgment proceeding inductively from a particular to an as yet unknown universal, we can say that reflective judgments can serve to differentiate the four kinds of contexts that were introduced in Section II. Analysis of how Kant explicates this distinction shows that a field provides the sphere of what is *logically* possible and a territory of what is *actually* experienceable. Domains introduce the modality of *necessity*, but will always leave us with habitats of *contingency* that our finite intellect has not been able to fully understand. These are local habitats of mere empirical familiarity.⁸

The beginning of the *Critique of Judgment* also provides a backward glance at the first two *Critiques*. Kant recounts that the legislative claims of the first were about the domain of natural necessity and those of the second were about the domain of moral freedom. In both cases it was possible to delimit the field of what is logically possible and arrive at determinant judgments that allow us to predict natural events on the one hand and prescribe moral duties on the other hand. To make room for reflective judgment in matters of aesthetic taste, Kant finds it necessary to be more explicit about the kind of contexts that judgment can open up. In Section III of the Introduction it is indicated that judgments of taste have

8. See Rudolf A. Makkreel, *Reflection, Reflective Judgment and Aesthetic Exemplarity*, in *AESTHETICS AND COGNITION IN KANT'S CRITICAL PHILOSOPHY* 223 (Rebecca Kukla ed., 2006).

as their scope neither the domain of nature nor that of freedom, but the actual territory of human experience that these domains have as their common base. The flower that we experience as beautiful does not add to our knowledge of nature nor does it make any moral demands on us. It gives us pleasure, which heightens our awareness of our own habitat. There is always something unexpected about aesthetic pleasure that links it to the contingency of our own habitat as the place where we happen to be. Yet, we find the pleasure expansive and impute it to all human beings. An aesthetic judgment is a kind of reflective judgment that has the capacity to relate the habitat of the individual subject to the territory of what is common to human subjects.

Because the pleasure in beauty that enlivens my own habitat cannot be communicated to others with available concepts, aesthetic judgment locates a more basic and formal mode of communicability in feeling itself. This means that the lawfulness associated with the aesthetic judgment is a lawfulness without a determinate law. It is the lawfulness of attaining a felt agreement between individual sense and common sense. In this paper, I will exploit this reflective relation between a local habitat and a broader territory of commonality for legal purposes as well. What I have characterized as the contextualized sense of lawfulness opened up by reflective judgment will now be considered for its legal import. Can reflective judgment be made useful, not just for the subjective territory of experience, but also for the political territory of a nation when new laws are needed? Whereas moral laws derive from reason and are universal, the legal systems of particular nation-states must also address specific conditions that change over time.

II. ATTAINING A LEGAL CONSENSUS

When we turn to Kant's *Metaphysics of Morals* we will be able to point to reflective or aesthetic analogies in Part Two on moral virtue. No such reflective analogies are found in Part One on judicial law. But our discussion about how reflective judgment can relate habitat and territory does become applicable to Part One once we reach Kant's treatment of property rights.

Whereas the ethical laws of morality bind us internally, judicial laws bind us externally and have a mere legal force. Judicial laws define what is right or just in a collective sense and are only derivatively about individual rights. Kant writes: "[r]ight [or justice (*Recht*)] is . . . the sum of the

conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom.”⁹ Morality is about our moral decisions and their universalizability. Right or justice goes further and considers the “external and indeed practical relation of one person to another, insofar as their actions (*Handlungen*), as deeds (*Facta*), can have . . . influence on each other.”¹⁰ An individual’s right to perform a deed must be curtailed if it encroaches on the life-sphere of others and interferes with their freedom. Kant’s worry about mutual infringement is so strong that he shifts from the language of moral constraint to that of judicial coercion. Judicial law is defined as the “law of reciprocal coercion” and must be constructed “with mathematical exactitude.”¹¹ Whereas the principles of morality can only be conceptually deduced, the principles of right or justice can be constructed intuitively.

Kant speaks of both innate and acquired right. There is only one innate right according to him, namely, “freedom . . . insofar as it can coexist with the freedom of every other in accordance with a universal law”¹² Acquired rights require further conditions for them to be established. We can illustrate this difference through his account of how the right of possession must be legitimated. Kant claims that all human beings originally possess the earth as a common territory. This amounts to the right of human beings “to be wherever nature or chance (apart from their will) has placed them.”¹³ The natural right to occupy a specific habitat in this earthly *territory* (*Boden*)¹⁴ does not however entail the further right to stay there and turn that contingent *habitat* (*Aufenthalt*) into one’s property (*Besitz*) or more lasting residence (*Sitz*).¹⁵ Similarly, the natural right to possess a corporeal thing in space is provisional and can only be transformed into an enduring individual right under certain normative conditions.

Here again contextual reflection takes on a fundamental significance. Kant notes that if the earth were an “unbounded plane, people could be so dispersed on it that they would not come into any community with one another”¹⁶ It is because the earth is a spherical surface that the

9. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 6:230, at 24 (Mary Gregor ed. & trans., 1996) (1797) [hereinafter KANT, *MORALS*] (page references, e.g., 6:230, to the original format).

10. *Id.*

11. *Id.* at 6:232–33, at 26.

12. *Id.* at 6:238, at 30.

13. *Id.* at 6:262, at 50.

14. *Id.*

15. *See id.*

16. *Id.*

problem of community must be confronted. The earth is a bounded territory that provides a supporting ground for all people. It is a common resource of limited extent and therefore the individual use of any part of it must be regulated by a community.

Rightful and lasting ownership of any part of this earth—whether this be land or the things it supports comes with the obligation to justify using it as one’s own without depriving others of their rights. The question that must be answered is whether the freedom of an individual to acquire something can legitimately coexist with the freedom of others. According to Kant, there are three moments in the process of legitimizing this kind of acquisition (*Erwerbung*) of property. They can be considered as reflective moments because they involve putting a claim in context. As we proceed through the three moments the scope of legitimacy will become comparatively greater.

The first moment of acquisitive legitimation is simply apprehending (*Apprehension*) “an object that belongs to no one” so that it does not “conflict with another’s freedom”¹⁷ Apprehending an object is a *unilateral* act of grasping something that no one else is holding. The basis for this claim is that no one else is presently making a similar claim. But this may only mean that from the limited perspective of my “habitat” I cannot see any counterclaim. It is a phenomenal claim in which apprehension (*Apprehension*) as physical grasping is just as limited in scope as a perspectival act of visual apprehension (*Auffassung*).

The second moment of taking ownership involves designating an object as mine by an “act of choice (*Willkür*) to exclude everyone else from it.”¹⁸ Since Kant calls this an act of *Bezeichnung*, phenomenal possession becomes a “designative possession” whereby I declare to any other self that what was originally apprehended, or taken control of, should stay mine—even if he or she will enter my habitat and would like to remain there. Designative possession can be seen as a *bilateral* declaration addressed to anyone who might subsequently be in a position to occupy and possess it. This second moment points to the realization that proper ownership is not merely a case of being able to *hold on to something* (*Inhabung*), but of *having* it (*Habens*) under my control (*Gewalt*)¹⁹ even when I am somewhere else and no longer able to physically hold on to it. To designate a plot of land as mine is to make it my maxim to continue to claim possession of it against any potential

17. *Id.* at 6:258, at 47.

18. *Id.* at 6:259, at 47–48.

19. *See id.* at 6:253, at 42.

counterclaim by another self. The justification could be the maxim to use my controlling power to grow crops that can provide food for my family.

Although such a maxim is a product of free choice (*Willkür*), it does not have the necessity of law, which is a function of will (*Wille*). Thus lawful entitlement requires a third moment of “[a]ppropriation ([*Zueignung*=]*appropriatio*) as an act of a general will [*Willens*],”²⁰ that assures external consent. Only when my choice to acquire something can be normatively justified as compatible with the general will of the community can it truly be legitimate. This third or appropriative moment involves an *omnilateral* claim and amounts to what Kant calls an act of noumenal possession. To have an object legitimately as a “*possessio noumenon*”²¹ is to have individual ownership publicly endorsed as compatible with the freedom of all. But this public legitimation needs the consent of a civil constitution of a nation-state and the laws reflecting the general will of its people. The territorial possession of the earth in general—originally an abstract but universal natural right—has now been delimited as a concrete and legitimate individual right to a part of this earth granted by a civil territorial community. With the third moment of appropriation a private right gains the status of being part of a public right.

The initial phase of apprehending an object involves both cognizing it as a phenomenal object and grasping or treating it “as a material thing in itself (*Sache an sich selbst*).”²² The final phase of appropriating it is to make it an “intelligible thing in itself (*Ding an sich selbst*)” on the basis of a civil constitution.²³ Kant assigns a material object a “noumenal” status if its availability for the free use of a subject is authorized by a constitution as being compatible with the freedom of all other subjects in the civil condition. When we attain proper legal ownership of material objects then our relationship to them is noumenal in a normative rather than transcendent sense. The intelligibility of legitimately appropriated objects is thought to be derivable from an omnilateral insight into their proper use in a nation-state governed by laws. The possession of my habitat can only be legitimate if it is integrated into a territory that can function in a domain-like way and establish positive laws regulating competing empirical claims.

This ability to legitimate what is the case at the local level of a habitat in relation to a larger territorial perspective assumes the use of reflective

20. *Id.* at 6:259, at 47 (translation revised).

21. *Id.*

22. *Id.* at 6:249, at 39 (translation revised).

23. *Id.* at 6:371, at 137 (translation revised).

judgment even though its role is not mentioned. The precedent for this assumption lies in the fact that the reflective aesthetic judgment (*Urteil*) is also an evaluation (*Beurteilung*). This transformation is quite explicit in section nine of the *Critique of Judgment* where Kant differentiates the evaluative nature of aesthetic universality from theoretical universality. Kant writes:

[T]he aesthetic universality that is ascribed to a judgment must . . . be of a special kind, since the predicate of beauty is not connected with the concept of the object considered in its entire logical sphere [*Sphäre*] and yet it extends [the predicate] over the whole sphere of those who judge.²⁴

When we attribute beauty to an object, we do not assign it another determinate objective property such as color, size, or shape to distinguish it from other possible objects in our *field* of vision or the *domain* of scientific cognition. Instead, the predicate of beauty reflectively relates a work of art to the sphere of human beings who are able to evaluate it. A reflective judgment of taste requires a *contextual re-configuration* from objective to intersubjective universality.

A pure or proper judgment of taste must come through a social engagement with others. The aesthetic pleasure we gain from a thing of beauty should be a communicable sentiment rather than a private sensation. Accordingly, Kant asserts that it would be self-contradictory to assign the universal communicability of a felt aesthetic pleasure directly to “the representation through which [its] object is given.”²⁵ Instead, “it is the universal *communicability of the state of mind* in the given representation which, as the subjective condition of the judgment of taste, must serve as its ground and have the pleasure in the object as a consequence.”²⁶ The difference here concerns the way in which the object being judged is contextualized. The sensuous pleasure derivable from the directly represented object refers merely to the limited locale or habitat of my own inner sense. The aesthetically apprehended object is indicative of the larger territory of what can be humanly shared, and the resulting pleasure is reflective and follows from my consenting to be part of this territory.

Aesthetic pleasure is about what can be humanly shared about things without needing to possess them. It also stands as the counterpart to the

24. KANT, POWER OF JUDGMENT, *supra* note 5, at 5:215, at 100 (footnote omitted) (emphasis omitted).

25. *Id.* at 5:217, 102.

26. *Id.* (translation revised).

legal ideal of sharing possessions needed for individual use through their fair distribution. For Kant, aesthetic communicability is premised on our ability to temporarily suspend our private interests and arrive at disinterested judgments. This suspension can only occur when we have the leisure to contemplate beautiful things. The corresponding problem of attaining legal consensus arises in the workaday world where most individual and communal practical interests cannot be suspended and need to be contextually reconciled. This difference will show itself in the ways aesthetic judgments and legal judgments *impute* agreement.

III. ASRIPTIVE AND ATTRIBUTIVE MODES OF IMPUTATION

According to Kant, a disinterested aesthetic judgment “does not *postulate* the accord of everyone (only a logically universal judge can do that, since it can adduce grounds); it only *imputes* (*sinnt an*) this agreement to everyone”²⁷ Because it cannot demonstrate its necessity conceptually, the aesthetic judgment merely imputes its universality in a formal *ascriptive* way. This ascriptive sense of imputation (*Ansinnung*) found in the *Critique of Judgment* reflects an anticipated consensus.²⁸ (But in *The Metaphysics of Morals*, Kant introduces stronger senses of imputation (*Zurechnung*) that point to what I will call “*attributive*” modes of imputation. These attributions indicate how we hold ourselves and others accountable for our practical decisions and deeds as human agents operating within the constraints of a community.)

The way Kant defines imputation in *The Metaphysics of Morals* opens up some of the possible permutations of attribution and is worth citing in its entirety:

*Imputation (imputatio) in the moral sense is the judgment by which someone is regarded as the author (causa libera) of an action, which is then called a deed (factum) and stands under laws. If the judgment also carries with it the [legal (rechtlichen)] consequences of this deed, it is an imputation having [a legal or] rightful force (imputatio iudiciaria s. valida); otherwise it is merely an imputation [evaluating] the deed (imputatio diiudicatoria)—The (natural or moral) person that is authorized to impute with rightful force is called a judge or a court (iudex s. forum).*²⁹

27. *Id.* at 5:216, at 101 (translation revised).

28. *See id.* at 5:214–16, at 99–102.

29. KANT, *MORALS*, *supra* note 9, at 6:227, at 19 (citation and footnotes omitted).

We have here a complex set of imputations that will repay further analysis. Kant's first sentence is about moral imputation. It assigns responsibility to someone for an action that is attributed to be a factual deed standing under moral laws. The second sentence goes beyond attributing formal responsibility by also considering the substantive consequences of the deed. If the judgment has rightful force (*rechtskräftig*), then it counts as a legal imputation that has judicial (*iudiciaria*) legitimacy; otherwise it is an evaluation that has a dijudicative (*diiudicatoria*) status. The third sentence goes on to locate the authority to impute with rightful force in a natural person (judge) or moral person (court). The courtroom judge can thus be said to have the right to adjudicate.

Kant does not specify what is involved in evaluative dijudication (*imputatio diiudicatoria*) and seems more interested in the judicial legitimacy of adjudication. But in the following paragraph, he launches a discussion of the merits and demerits of human deeds that can be seen as allowing for the application of evaluative dijudication. One of the meanings of the word "dijudicate" is to "decide between" or weigh alternatives. When the merits and demerits of a deed are being evaluated or dijudicated there are, for Kant, three relevant alternatives among which to decide: a person can (1) do exactly what the law requires; (2) do more than what the law expects of him, which is meritorious; or (3) to his demerit, do less than the law requires. If it is determined that the agent has fallen short, there is "culpability (*Verschuldung*)" and then a "judge (*Richter*)" must *adjudicate* or make the final decision to direct (*richten*) what is to be done to set things right.³⁰ The "courtroom (*Gerichtshof*)" establishes the authoritative context for rendering a determinant verdict concerning "the rightful consequences" of the deed.³¹

In the above sequence, dijudication was part of the legal process of correctly subsuming a deed under the law and arriving at a legitimate determinant judgment. But a few paragraphs later Kant begins to consider

30. *See id.*

31. *See id.* Onora O'Neill has claimed that determinant and reflective judgments are theoretical rather than practical. She argues that practical judgments are neither determinant nor reflective because they involve a decision about future action. When deciding what to do, there is not yet a given to the judge as in the case of standard determinant and reflective judgments. *See* Onora O'Neill, *Experts, Practitioners, and Practical Judgement*, 4 J. MORAL PHIL. 154, 154–66 (2007).

But not all practical judgments are future directed. A legal verdict is a determinant judgment about a given deed that clearly has practical consequences. It seems equally true that certain reflective judgments about past human achievements can also have practical import.

“the degree to which an action *can be imputed*.”³² This calls for a different kind of evaluative judgment, one which seems to require reflective judgment. In considering the degree of merit or demerit to be imputed, judgment must use reflection to compare and contrast relevant factors, such as obstacles faced and sacrifices made by agents, as well as their subjective state of mind.

Such situational factors are not considered relevant in determining objective guilt, but they may be considered when deciding the appropriate punishment. Kant points our attention to this when he discusses the problem of how to punish the deed of killing someone in a duel. Since both parties consented to the duel to defend their honor, Kant claims that the one who kills his opponent cannot strictly be accused of murder. Here a court of law must either “declare by law that the concept of honor (which is here no illusion) counts for nothing and so punish with death, or else it must remove from the crime the capital punishment appropriate to it, and so be either cruel or indulgent.”³³ Kant describes this legal quandary as a problem of a “barbarous and undeveloped” penal code that results in a “discrepancy between the incentives of honor in the people (subjectively) and the measures that are (objectively) suitable for its purpose. [Accordingly,] the public justice arising from the state becomes an *injustice* from the perspective of the justice arising from the people.”³⁴ Even though it is in the interest of the state to punish the surviving duelist to discourage other duels, the subjective need that human individuals have for honor should temper the punishment.

Kant praises the man of honor as valuing something “even more highly than life”³⁵ He should therefore not be punished for the crime of killing someone in the same way that a scoundrel is punished. But Kant’s example of the duel does not confront all the complexities involved in arriving at an appropriate punishment. The duel represents a special situation or context that brackets out the world at large. Here we have a conflict between legal standards of justice and a social convention of honor that applies only to a certain class of people. But in evaluating human deeds there are many more competing influences that need to be diagnosed. Thus when Kant speaks of the degree of “merit or service the agent can be credited with (*zum Verdienst angerechnet werden kann*)”³⁶

32. KANT, MORALS, *supra* note 9, at 6:228, at 19.

33. *Id.* at 6:336, at 109.

34. *Id.* at 6:337, at 109.

35. *Id.* at 6:334, at 107.

36. *Id.* at 6:228, at 19–20 (translation revised).

the diagnostic use of reflective judgment becomes even more essential. In addition to the constraining normative conditions that regulate the performance of human tasks, there are also restraining contextual factors that need to be assessed to determine how much of an obstacle they have presented.

IV. DUTIES TO OTHER HUMAN BEINGS AND PEACEFUL COEXISTENCE

The import of the aesthetic and reflective aspects of judgment for morality becomes more evident when Kant moves from the “Doctrine of Right” to the “Doctrine of Virtue.” There he distinguishes between the direct moral duties previously discussed and the indirect duties associated with moral virtue. Most interesting in this regard is the section entitled “Aesthetic Preconceptions Concerning the Mind’s Receptivity to Concepts of Duty as Such.”³⁷ Kant refers us to certain aesthetic “predispositions . . . for being affected by concepts of duty” such as “moral feeling, conscience, love of one’s neighbor and respect for oneself . . .”³⁸ Here Kant again adjusts the scope of his concern to focus on the human element of practical reason. In fact, he goes so far as to claim that “a human being can . . . have no duty to any beings other than human beings; and if he thinks he has such duties, it is because of an *amphiboly* in his *concepts of reflection* . . .”³⁹ Here the reflective scope of moral judgment is limited to human persons. Any duties to a pure rational being such as God or an irrational animal are indirect. This reflective narrowing of contextual scope is at the same time a qualitative discernment about the kind of being that can be assigned virtue. The only beings that we can have moral duties to, and make moral demands of, are other human beings. It would be inappropriate to include God and animals in the human community of mutual expectations. It is presumptuous to make demands on God and moral standards clearly do not apply to irrational animals.

As part of the section on duties owed to other human beings, Kant revisits the question of sympathy that he had discussed in the *Groundwork of the Metaphysics of Morals*. There he found sympathy an inadequate basis for making ethical decisions because it leads us to favor those that are familiar to us and similar to us. But in *The Metaphysics of Morals* he discusses it again as part of a larger examination about “shared feeling

37. *Id.* at 6:399, at 159 (translation revised).

38. *Id.* (emphasis omitted).

39. *Id.* at 6:442, at 192.

(*Mitgefühl*).⁴⁰ Nature has implanted in us a “receptivity (*Empfänglichkeit*)” for the feeling of sympathy as part of our disposition to humanity, but we can also cultivate this disposition as the “capacity (*Vermögen*)” and willingness to share in the feelings of others. To the extent that we are merely receptive to others we feel sympathy. The moral challenge is to develop a more active counterpart to sympathy, namely, “a participatory feeling (*theilnehmende Empfindung*)”⁴¹ like benevolence.

The German word for sympathy is *Mitleid* and means “suffering with.” Sympathy as a mode of suffering is unfree. The passive root of sympathy is objectionable to Kant and entails that there can be no duty to feel sympathy for others or act based on sympathy. The new expression “*theilnehmende Empfindung*” introduced in *The Metaphysics of Morals* is often translated as “sympathetic feeling,” but I think that this risks confusing it with the sympathy that he finds inadequate. I am translating it as “participatory feeling” to bring out its more active character. It is a free feeling that is not passively received, but a spontaneous expression of “practical humanity (*humanitas practica*).”⁴² Thus Kant goes on to claim that we should be involved in the fate of others through “an active moral participation (*thätige Theilnehmung*)”⁴³ and we can do so by means of an indirect duty to cultivate shared feelings that are initially aesthetic in nature. Their active cultivation is needed to assure their broadest possible application. But there is no determinantly prescribed formula about how far to translate benevolence into beneficent deeds. Here there is a certain amount of latitude that calls for reflective judgment.

I have focused on the role of participatory feelings in the pursuit of moral virtue because they can also contribute to the open interchange that Kant considers conducive to the public consensus needed to reform the existing laws of civic states. Moreover, this kind of public debate can prepare human beings to move toward a more cosmopolitan federation of states that will enhance the possibility of world peace. We started with the image of the critique of pure reason as a tribunal or court of justice. The task of this tribunal is ultimately self-directed and must include “judging [or evaluating (*beurteilen*)] what is lawful in reason in general”⁴⁴ Without this reflective self-scrutiny, reason would be in a warlike “state of

40. *Id.* at 6:456, at 204.

41. *Id.* (translation revised).

42. *Id.* (translation revised).

43. *Id.* at 6:457, at 205 (translation revised).

44. KANT, CRITIQUE OF PURE REASON A751/B779, at 649 trans. (Paul Guyer & Allen W. Wood eds. & trans., 1997) (page references, e.g., A751/B779, to the pagination of the first (A) and second (B) editions) (footnote omitted).

nature,” according to Kant. A judicious critique that “derives all decisions from the ground rules of its own institution” will make possible what Kant calls “the peace of a legal order.”⁴⁵ We saw that the state of nature can only offer us a temporary habitat that is under constant threat. A civil (*bürgerliche*) community can give us the right to a more lasting residence. Finally, a cosmopolitan (*weltbürgerliche*) legal federation of states is needed to assure the permanent peaceful coexistence with all humans.

The legislative sense of law that characterizes Kant’s first two *Critiques* shows what conditions must be met to assure that every constituent within an ideal context or domain will be treated equally. The evaluative and judicial sense of law that we have related to reflective judgment in the third *Critique* and carried forward to the philosophy of right has the more difficult task of reconciling the conflicting interests that manifest themselves in more confined regional contexts. The more limited the territorial resources of a civil nation-state are found to be, the more urgent the legal problem of fair distribution becomes.

45. *See id.* (translation revised).