Fordham International Law Journal

Volume 22, *Issue* 3 1998 *Article* 9

International Order, Political Community, and the Search for a Eurpoean Public Philosophy

Ian Ward*

*

International Order, Political Community, and the Search for a Eurpoean Public Philosophy

Ian Ward

Abstract

The shaping of international order, and the place of concepts such as law and community within that order, has emerged as one of the most pressing issues in contemporary legal and political thought. This Essay examines three recent theses, each of which attempts to locate a public philosophy appropriate to the emerging new world order. Part I of this Essay takes a look at these theses: the orthodox Kantian theory of international relations, as recently articulated by Fernando Teson in A Philosophy of International Law, the liberal communitarian theory, which has been eloquently restated by Martha Nussbaum in Cultivating Humanity: A Classical Defense of Reform in Liberal Education, and the institutional rationalism of Jurgen Habermas, as described in Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy.' Part II of this Essay suggests that the disparity between these alternative theses can be situated within the post-Kantian attempt to determine the moral self within modern political communities. There are, in effect, two Kants: one, which we can term the formalist, and which has enjoyed dominion in Kantian theories of international law, and another, the communitarian, which has gained increasing currency in radical liberal political theory. The final part of this Essay then takes these theses and situates them within the specific context of the new European order.

INTERNATIONAL ORDER, POLITICAL COMMUNITY, AND THE SEARCH FOR A EUROPEAN PUBLIC PHILOSOPHY

*Ian Ward**

INTRODUCTION

The shaping of international order, and the place of concepts such as law and community within that order, has emerged as one of the most pressing issues in contemporary legal and political thought. This Essay examines three recent theses, each of which attempts to locate a public philosophy appropriate to the emerging new world order. Part I of this Essay takes a look at these theses: the orthodox Kantian theory of international relations, as recently articulated by Fernando Tesón in *A Philosophy of International Law*, the liberal communitarian theory, which has been eloquently restated by Martha Nussbaum in *Cultivating Humanity: A Classical Defense of Reform in Liberal Education*, and the institutional rationalism of Jürgen Habermas, as described in *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*.[1] Part II of this Essay suggests that the disparity between these alternative theses can be situated within the post-Kantian attempt to determine the moral self within modern political communities. There are, in effect, two Kants: one, which we can term the formalist, and which has enjoyed dominion in Kantian theories of international law, and another, the communitarian, which has gained increasing currency in radical liberal political theory. The final part of this Essay then takes these theses and situates them within the specific context of the new European order.

* Ian Ward, Professor of Law, University of Dundee, Scotland, U.K..

1. FERNANDO R. TESÓN, A PHILOSOPHY OF INTERNATIONAL LAW (1998); MARTHA NUSSBAUM, CULTIVATING HUMANITY: A CLASSICAL DEFENSE OF REFORM IN LIBERAL EDUCATION (1997); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., Mass. Inst. Tech. Press, 1996) (1992).

I. *THREE THESES*

A. *The Foundations of International Order*

Fernando Tesón sets out from the basic recommendation that Kant was the first modern philosopher to recognize that questions of domestic and international justice were "fundamentally connected." It is not, of course, an entirely original suggestion, having been recently articulated by the likes of Janna Thompson, and previously by a number of early twentieth-century Kantians, such as Ernst Cassirer and Gustav Radbruch. It is, however, valid.[2] The reason for the connection lies in the fundamental liberal acceptance of the "normative status of the individual." The idea of right is vested within the moral self, and not in the gift of the state, and so applies across the jurisprudential spectrum to both domestic and international law. In turn, the moral legitimacy of a political community, and any order between these communities, is founded upon a proper acknowledgement of the source of rights within the moral self.[3]

Kant's primary essay on international law, *Perpetual Peace*,[4] was, Tesón suggests, founded upon this basic premise. This premise, in terms of political philosophy, translated into the need for all modern states to enjoy the qualities of liberal democracy. These qualities are a respect for individual autonomy, the basic Kantian idea of the categorical imperative, legislative independence and commonalty, all legal acts derived from a single sovereign legislator, and a principle of equality or rule of law. A state that inheres these qualities enjoys, according to Tesón, "moral standing." At the same time, because of the inculcating of proper Kantian principles of respect for the autonomy of

---

2. *See* JANNA THOMPSON, JUSTICE AND WORLD ORDER: A PHILOSOPHICAL INQUIRY (1992). Though writing half a century ago, Gustav Radbruch's treatment of international order remains instructive, not least because he recognized the classic liberal difficulty of expressing tolerance of others' political philosophy, while wishing to condemn the emerging totalitarianism of Hitler and Mussolini. Thus, in terms of international law and order, he is keen to condemn Mussolini's Abyssinian adventure, and yet does so from the perspective of positive international law, rather than fundamental individual rights. *See* Gustav Radbruch, *Legal Philosophy*, *in* THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH AND DRABIN 49 (Edwin W. Patterson ed. & Kurt Wilk trans., Harvard Univ. Press, 1950) (3d ed. 1932). For Cassirer's provocative critique of the myth of the nation-state, and his perhaps prophetic suggestion that its end was in sight, see ERNST CASSIRER, THE MYTH OF THE STATE (1946).

3. TESÓN, *supra* note 1, at 1-3.

4. IMMANUEL KANT, PERPETUAL PEACE (1957).

others, such states will necessarily recognize that such a public philosophy defines a state of "perpetual peace," which is, after all, the purpose of international law and order. Respect for liberty, sovereignty, and equality is the only means by which modern states can remain both legitimate and settled.[5]

Relatedly, there are two arguments in support of the Kantian theory of international order: the empirical and the principled. Thus, while history evidences the relative peace and prosperity enjoyed by alliances of liberal communities, adherence to principles of immanent rationality preserves the integrity of any legal order. Significantly, Tesón suggests that the "success of the European Union" is perhaps the most striking example of the acuity of Kant's thesis. There has to be a deeper reason why liberal democracies tend towards peaceful relations, however, and that is, once again, a respect for the "pure concept of right" as defined by, and definitive of, the moral self.[6]

Having established his commitment to a classical Kantian thesis that is based on Kant's idea of the moral self, rather than his later adherence to the political community, Tesón proceeds to a series of critiques of alternative theories of international law. The first is the positivist conception that international law is defined in the relatively simple terms of dealings between states that enjoy sovereign authority. Such a thesis, as originally expounded by the likes of Grotius, defines the kind of orthodox international law that is described in terms of treaty commitments. Although Kant did presume to work in terms of nation-states, Tesón rightly notes that there is no such thing as discrete nation-state sovereignty in the post-modern world.[7] This absence is only of concern to confirmed positivists who need to be able to isolate sovereign authority within particular political institutions. If sovereignty vests in individuals, however, as it does in the Kantian idea of the moral self, then such jurisdictional arguments are redundant.[8] This argument is of interest to European lawyers, not least because the Union and Community tend to identify their constitutional legitimacy in terms of treaties be-

5. TESÓN, *supra* note 1, at 3-11.

6. *Id.* at 11-16.

7. This insight, as we shall see in the final part of this Essay, has gained currency in the particular area of European legal studies. See, most obviously perhaps, N. MacCormick, *Beyond the Sovereign State*, 56 MOD. L. REV. 1-19 (1993).

8. TESÓN, *supra* note 1, at 16-19, 39-44.

tween supposedly sovereign nation-states. A genuine community, founded on an idea of Kantian right, must treat such legalism as conceptually irrelevant.

A second thesis, the realist, is closely related to the positivist. A realist thesis suggests that international behavior can only be understood in terms of the aggressive self-interest of various communities, most commonly nation-states. Entirely descriptive rather than normative, such a thesis is, once again, dismissive of ideas of fundamental individual rights grounded in the moral self. The affinity between realism and utilitarianism is immediate—the legitimacy of political acts is founded upon their value to the political community or even to individual citizens.[9]

The dismissal of realist theories of international behavior carries an implicit critique of communitarian theses, which Tesón argues at some length in an ensuing discussion of John Rawls' recent writings on political liberalism and international order.[10] In an essay entitled *The Law of Peoples*, Rawls has taken his non-foundationalism political liberalism and applied it to the question of the moral status of non-liberal states.[11] The nature of Rawls' political liberalism remains a matter of considerable controversy. In his seminal work, *A Theory of Justice*, Rawls maintained the veracity of a comprehensive moral theory, founded securely on the twin Kantian principles of freedom and equality.[12] During the previous two decades, culminating in the publication of *Political Liberalism*, however, Rawls increasingly shied away from such a deep metaphysics, preferring to concentrate instead upon the possibility of a constructive rationality grounded only upon intensely contingent political "facts."[13]

In *The Law of Peoples*, Rawls does indeed abandon the automatic priority of classical liberalism. Presuming that international politics is founded in the relation between states, he suggests that there are three kinds of state: liberal, hierarchical,

9. *Id.* at 47-53.

10. *Id.* at 105-26.

11. *See* John Rawls, *The Law of Peoples*, 20 CRITICAL INQUIRY 36-68 (1993).

12. *See* JOHN RAWLS, A THEORY OF JUSTICE (1971).

13. *See* JOHN RAWLS, POLITICAL LIBERALISM (1993). For one of the most compelling discussions of the "new" Rawls, suggesting that the presentation of the non-foundational thesis represents a turn toward a "post-modern bourgeois liberalism," see RICHARD RORTY, OBJECTIVITY, RELATIVISM, AND TRUTH 175-202 (1991). For an overview of the Rawls-Rorty exchange, see Ian Ward, *Another Look at the New Rawls*, 24 ANGLO-AM. L. REV. 104-22 (1995).

and tyrannical. Although the latter can be treated as outside the generally-respected norms of international law, the hierarchical, while not necessarily respecting either fundamental freedom or equality, can be "decent." The aspiration of such communities is defined simply in terms of communal, rather than individual, goods.[14]

Tesón is fiercely critical of this concession, accusing Rawls of abandoning the core concept of "liberal individualism," namely fundamental "humanity." He is particularly critical of Rawls' proposal of "enabling" rights—rights granted to citizens in order to enable their participation in the political process but which require a reciprocal obligation.[15] A political philosophy, according to Tesón, cannot be founded on a "group," but only upon the individual. Groups are fluid entities, generally dependent upon perpetuating myths of some sort of common identity, whether historical, racial, ethnic, or nationalist. Aside from being essentially imaginary, such group identities are necessarily exclusionary. Rather than promoting international peace, such a politics depends upon creating conditions of contestation between groups.[16] Once again, as we shall see, such a thesis resonates strongly in the particular context of a Europe desperately striving to curtail state nationalism while at the same time promoting a sense of European affinity.

B. *Humanity and the Narrative Community*

It is precisely the idea of group identity and the sense of reciprocal obligations between community and citizen that attracts Martha Nussbaum. The founding ambition of *Cultivating Humanity* is to rethink the process of educating "world citizens." The aspiration of a liberal community should be one that seeks to liberate the "mind from the bondage of habit and custom," fashioning people "who can function with sensitivity and alert-

14. Rawls, *supra* note 11, at 37, 59, 66-67.

15. Rawls describes these kinds of rights as requiring that persons be "responsible and cooperating members of society who can recognize and act in accordance with their moral duties and obligations." *Id.* at 57. An interesting comparison can be made with Roberto Unger's critique of liberal rights. *See* ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986). Unger, too, sought to define a more positive conception of rights of access to political institutions, all of which were founded ultimately upon "solidarity" rights that provided legal authority for access rights within the community.

16. TESÓN, *supra* note 1, at 133-37.

ness as citizens of the whole world."[17] It is not expressly a study of international order, but the existence of a new world order is the essential dynamic of Nussbaum's book. Following the classical communitarian thesis, which can be traced right back to Aristotle's *Politics*, the idea of liberal community and the education of its members is founded upon a "particular norm of citizenship." In other words, the sense of affinity that every community needs is established by the inculcation of certain citizenship responsiblities. A sense of belonging comes from a nurtured sense of participation.

There is much in Nussbaum's thesis that can be situated within orthodox communitarianism. In his *Democracy's Discontent*, while addressing himself more immediately to the "search" for an American "public philosophy," Michael Sandel sought to reestablish an idea of participatory citizenship. Interestingly, in citing various polities around the world that showed signs of lacking a sense of affinity, Sandel alighted on the new Europe. What Sandel did not do, of course, was try to locate a sense of community that was common throughout the world, and that could then cut across positive state jurisdictions. The idea that "humanity" itself could serve to secure a modern public philosophy is, he suggests, "difficult to imagine." In reality, people live their "lives by smaller solidarities."[18]

The idea that individuals live in smaller communities, and share affinities with those communities, however, does not necessarily preclude a complementary sense of humanity.[19] It is the attempt to do precisely this, to reinvest a sense of humanity and world citizenship, that distinguishes Nussbaum's thesis. Nussbaum seeks to affirm that all political communities share certain constitutive aspects. Most importantly, all political communities seek to describe a mythical affinity based on commonly perceived cultural traditions—historical, literary, and aesthetic. She terms this perception the "narrative imagination."[20]

---

17. NUSSBAUM, *supra* note 1, at ix, 8.

18. MICHAEL SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 339-44 (1996).

19. Indeed, Sandel recognizes that, in a world where nation-states can no longer claim dominion over the affinities of their citizens, it is now necessary to talk in terms of cosmopolitan citizenship. He uses this recognition, however, to justify reconcentrating political power in small communities, rather than reinvesting a sense of universal humanity. *Id.* at 343-44.

20. The idea that communities are created, and maintained, by means of a polit-

The mechanics of Nussbaum's thesis lie most immediately in communication and its media. As she suggested in her earlier *Love's Knowledge*, it is literature that most effectively "speaks about us, about our lives and choices and emotions, about our social existence and the totality of our connections." We live our lives, and most importantly learn to live our lives, aesthetically, through conversation with both texts and fellow citizens, and any political community is "formed by" the relation between its "author and readers."[21] This manner of living is not something particular to any one community. Rather, it is the common experience of humanity. Because all localized political communities from parishes to nation-states are founded on this idea of a political and narrative imagination, then so might be a revitalized sense of world community.[22]

Accordingly, for Nussbaum, the new "world citizen" will be defined by an ability to relate to "stories of people's real diversity and complexity," to "think what it might be like to be in the shoes of a person different from oneself, to be an intelligent reader of that person's story, and to understand the emotions and wishes and desires that someone so placed might have." Moreover, it is only through the nurtured ability to "identify" with others that individuals can exercise an informed moral judgment. It is in this way that humanity is "cultivated" so that it can participate in the political community while recognizing the intrinsic and fundamental value of others as fellow moral selves. In such a way, a liberal education, respecting the Socratic ideal of critical moral inquiry, can reveal a "life that is open to the

---

ical and narrative imagination has become increasingly popular among a number of communitarians. For an original statement, see CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY (1989). For a discussion of the idea of narrative communitarianism and its potential value in legal studies, see Ian Ward, *Literature and the Legal Imagination*, N. IR. LEGAL Q. (forthcoming 1999).

21. MARTHA NUSSBAUM, LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE 3-7, 142-76 (1990).

22. There is much here that chimes with the conversationalism of such as Richard Rorty, for whom "[t]he world does not speak. Only we do." According to Rorty, to "see one's language, one's conscience, one's morality, and one's hopes as contingent products, as literalizations of what once were accidently produced metaphors, is to adopt a self-identity which suits one for citizenship in an ideally liberal state." *See* RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 5-6, 50-54, 60-61 (1989). There is also a certain concordance with Drucilla Cornell's attempt to define the "philosophy of the limit" in terms of dialogic enactment of "ethical relations," something that she readily cites as form of "Kantian constructivism." *See* DRUCILLA CORNELL, THE IMAGINARY DOMAIN: ABORTION, PORNOGRAPHY AND SEXUAL HARASSMENT 3-18 (1995).

whole world." This critical ability will show ultimately that there is "more joy in the kind of citizenship that questions than in the kind that simply applauds, more fascination in the study of human beings in all their real variety and complexity than in the zealous pursuit of superficial stereotypes, more genuine love and friendship in the life of questioning and self-government than in submission to authority." Ultimately, the "future of democracy" across the world depends upon cultivating both a sense of humanity and its defining characteristic: the ability to exercise informed moral judgment.[23]

Nussbaum's most immediate intellectual authority is Aristotle, whose political and ethical philosophy has consistently informed her writings. Yet, this influence does not preclude a Kantian affinity. As Hannah Arendt, one of Kant's most persuasive twentieth-century commentators, and one of Nussbaum's most obvious intellectual progenitors, argued, the Kantian moral self and the virtuous Aristotelian citizen can be, and in conceptual terms are, the same.[24] The moral self is the idea that founds any "metaphysics of morals"; the virtuous citizen is the political concept fashioned by their synthetic relation. The affirmation that the mature "world citizen" is one who is properly equipped with the ability to exercise moral judgment in terms of a respect for the fundamental humanity of both self and others is entirely Kantian in conception. We will return to this thesis shortly.

C. *Law, Democracy, and Discourse Theory*

For a number of decades, Juergen Habermas has attempted to describe a radical theory of participatory democracy—a project largely driven by a perceived crisis of legitimacy in modern liberal states, including, more recently the European "state." At the root of this crisis, he suggests, is modernity's obsession with identity—the subjectivity of the self as co-determinative with the "other." The fragmentation of late twentieth-century societies militates against unitary identities and concomitant ideas of "sol-

23. NUSSBAUM, *supra* note 1, at 84-86, 94-97.

24. For Arendt's original statement of their affinity, see HANNAH ARENDT, THE HUMAN CONDITION (1958). Arendt returned to the theme toward the end of her career when thinking about the idea of moral judgment, and again sought to present a Kantianism that could complement the basic idea of political community of virtuous citizens. See HANNAH ARENDT, LECTURES ON KANT'S POLITICAL PHILOSOPHY (Ronald Beiner ed., 1982), for a collection of these thoughts.

idarity."[25] But whereas Tesón and Nussbaum, in their own different ways, attempt to reground the relation between self and community in some form of political morality, for Habermas the nature of a "post-metaphysical" world renders such solutions arcane. Instead, in *Between Facts and Norms*, he seeks to flesh out the implications of his theory of "communicative action" as a constituent of a community consciousness. Following Hegel and Arendt, he suggests that such a consciousness is created rather than discovered. There is a certain resemblance here with Nussbaum's communitarianism, but Habermas explicitly denies the universalist implications. Post-metaphysical political thought is precisely located between "facticity" and "normativity," between arrant contingency and totalizing foundationalism.[26]

Devoid of such foundationalism, the legitimacy of (post) modern states is entirely dependent upon the veracity of their democratic institutions. Whereas liberal legalism has deliberately restricted the capacity of individuals to participate actively in the "discourses" of government, Habermas's thesis is dedicated to reinvesting the "common practice of associated citizens."[27] The legitimacy of modern political communities is thus entirely consonant with the legitimacy of modern law, and the processes of its construction. Law "can be preserved as legitimate only if enfranchized citizens switch from the role of private legal subjects and take the perspective of participants who are engaged in the process of reaching understanding about the rules for their life in common."[28] It is for this reason that, whereas Tesón concentrates on ethical principle and Nussbaum on the narrative processes of community formation, Habermas turns most immediately to constitutional jurisprudence.

Legitimacy is the key concept in the crisis of modernity, and political legitimacy is wholly dependant upon the "interpenetration of the discourse principle and the legal form." A constitution must legitimate those rules and laws that "refer reflexively to the function of social integration." The rules of political and social behavior are only legitimate if they are constructed as a

25. This is a thesis that has found support among a number of contemporary social and political theorists. *See, e.g.*, ANTHONY GIDDENS, MODERNITY AND SELF-IDENTITY: SELF AND SOCIETY IN THE LATE MODERN AGE 2-9, 37-65, 109-11 (1991).

26. HABERMAS, *supra* note 1, at 1-41.

27. *Id.* at 321.

28. *Id.* at 461.

result of a broad "background consensus" fashioned by the discussion of all participant citizens. This construction is the principle of "democratic reciprocity," and all legitimate political institutions must be dedicated to its facility.[29] The practice of communicative action is engaged in the "spontaneous sources of autonomous public spheres"—the various "lifeworlds," from family to workplace to civic and national authorities, which ultimately constitute the political community. Conceived in this way, democratic politics is all-encompassing, for in "the vertigo of this freedom, there is no longer any fixed point outside that of democratic procedure itself." Accordingly, each of these "lifeworlds" must be democratized. The "success of a deliberative politics" depends upon "the institutionalization of the corresponding procedures and conditions of communication, as well as the interplay of institutionalized deliberative processes with informally developed public opinions."[30]

Only if laws are fashioned in such a way, through the media of properly open and democratic institutions, will they be legitimate because only in such a way will they be rational. Here, Habermas' idea of practical reason is strikingly reminiscent of Rawls's constructive rationality and explicitly Kantian in origin.[31] In terms of public political philosophy, this idea of reason necessitates a "dynamic understanding" of law and politics as forever incomplete and incompletable—a contingency defined by, and thus founded in, the very idea of a constructive rationality. The modern individual, Habermas concludes, identifies not with a comprehensive moral theory, either Kantian or communitarian, but with democratic procedures. It is only by addressing the politics of affinity in this way that the flagging sense of social "solidarity" in modern politics can be revived.

It is, ultimately, a matter of reinvesting a sense of participation in, legitimacy of, and thus affinity with, modern "administrative" states. In modern states, Habermas readily admits, government is both necessary and complex. At the same time, however, despite this complexity, there can be no justification either for a lack of transparency or for the minimalization of individual

29. *Id.* at 14-16, 80-81, 91, 121, 287-88.

30. *Id.* at 186, 298-99, 360-91.

31. For Rawls's theory of Kantian constructivism, see RAWLS, *supra* note 13, at 164-72.

rights—both negative rights of private space and positive rights of political participation. Once again, therefore, it is a fundamentally jurisprudential issue, for the proper institution of law and right becomes the "medium through which the structures of mutual recognition already familiar from simple interactions and quasi-natural solidarities can be transmitted, in an abstract but binding form, to the complex and increasingly anonymous spheres of a functionality differentiated society." In a "complex" and "differentiated" society, the laws described through legitimate democratic institutions are the guarantors of both individual liberty and social solidarity.[32]

II. *THE TWO KANTS*

In one sense, then, Tesón, Nussbaum, and Habermas all seem to have a common aspiration: rethinking public philosophy in a changing world order. But their solutions, at least at first glance, appear to be rather different. Using the formalist idea of Kantian right, Tesón adheres to the idea of fundamental humanity and the vesting of rights in moral selves. Nussbaum, while supporting the idea of fundamental humanity, sees it as something that shapes and is shaped by political communities, which are themselves narrative constructions, expressions of both individuality and commonality. For Habermas, however, the time for universal or comprehensive theories is past. The only concept that can found a political community is law. By that he means law that is the product of the constructive dialogic rationality of all its citizens. Whereas for Tesón and Nussbaum law is legitimated by its acknowledgement of fundamental humanity, for Habermas it is legitimated by the transparency and democratic facility of its political institutions.

Yet, these divergent views are in fact closely aligned, for they are all situated within, and represent, various derivatives of a Kantian public philosophy. In very basic terms, where Tesón and to a certain extent Nussbaum maintain a closer adherence to the idea of right, Habermas concentrates on describing the concept of law. The core principle of a Kantian political philosophy, as opposed to merely its legal theory, is the idea that there is a synthetic relation between the idea of right, derived from *a priori* principles and the concept of law, the evolving and relative

32. HABERMAS, *supra* note 1, at 318, 373.

product of *a posteriori* political experience. In this sense, then, there are two Kants: the ideal and the conceptual. But the two are part of a whole, and, as was most immediately emphasized in Kant's final unifying work, *The Metaphysics of Morals*,[33] are dedicated to the pressing issue of describing a public philosophy for an emerging modern world.[34]

The idea of the moral self, upon which advocates of a Kantian human rights, like Tesón, concentrate their attention, was present from the first of Kant's three *Critiques*. The central thesis of the *Critique of Pure Reason* was the idea that metaphysics is reconstituted through individual reason.[35] The moral self is described by this rational capacity, an idea of reason, and then it self-governs, self-determines, and self-creates by applying this reason in the *a posteriori* conditions of real political experience. The duality of reason and experience describes Kant's basic synthetic model: everything has an idea—a product of pure reason, and a concept—an experiential approximation of it. It was, of course, a model explicitly derived from the Aristotelian distinction between form and substance.[36]

Kant then developed this idea of the moral self further in the *Groundwork to a Metaphysics of Morals*, by prescribing a series of duties, themselves products of reason and experience. The duality was critical because it meant that morality and political behavior could not be distinguished from the basic synthetic model. Politics cannot be reduced to experience alone, but must be grounded within the rational dictates of the moral self. The categorical imperative was the singular recognition of this critical appreciation—a completely political idea derived from the autonomy of all rational selves interacting within a political community. At its simplest level, the imperative is a "universal"

---

33. IMMANUEL KANT, THE METAPHYSICS OF MORALS 63 (Mary Gregor trans., Cambridge Univ. Press, 1991) (1797).

34. Tesón suggestively acknowledges that there are two "Rawlses." TESÓN, *supra* note 1, at 121. He describes the two as the principled and the relativist. Indeed, the progression in Rawls' thought, from a theory of justice to a political liberalism, is strikingly reminiscent of Kant's switch from the metaphysics of pure reason to the metaphysics of right. The demarcation can be taken too far, however. It is primarily a distinction of utilitarian value, in that it provides a useful tool for analyzing the development of Kant's own thought. *Id.*

35. IMMANUEL KANT, CRITIQUE OF PURE REASON (Norman Kemp Smith trans., St. Martin's Press, 1929) (1787).

36. *See* IAN WARD, KANTIANISM, POSTMODERNISM AND CRITICAL LEGAL THOUGHT 6-9 (1997) (discussing this modelling).

rule for the mutual respect of all citizens within that community.[37]

The recognition that the synthetic quality of the imperative demanded a recognition of the conceptual reality of political communities is essential to a proper understanding of Kant's political philosophy—an understanding often underestimated by those who seek to locate a Kantian jurisprudence within the exposition of rights alone.[38] As Kant then went on to acknowledge, in the closing passages of the second *Critique of Practical Reason*, the final "end" of the moral self lies in rational participation within a political "community."[39] It is at this point that Kantians of a more formalist bent, such as Tesón, detach themselves, while narrative communitarians such as Nussbaum take the critique on to the conclusion admitted in Kant's later political writings.

The political implications of Kant's critique of reason were vividly drawn in the final of the *Critiques*, published in 1790, the *Critique of Judgement*. The pivotal idea behind the third *Critique* is contingency and how to account for it. Rather than concentrating on pure practical reason, Kant turned to an alternative "faculty" of judgment—an aesthetic faculty, and one that appreciates that, in matters of subjectivity, everything is judged on its particular merits. Politics, Kant emphasized, is constituted as an aesthetic as well as a moral idea.[40] Kant readily acknowledges that political communities are the products of aesthetic and historical developments. In other words, they are products of a narrative political imagination. But, again, as Nussbaum has more recently reaffirmed, this view does not necessitate the abandonment of universal principles of humanity. As Kant emphasizes, politics is about "thinking the particular," within political communities, while acknowledging that the universality of the rational moral self retains the critical capacity to ground applied

37. IMMANUEL KANT, GROUNDWORK TO A METAPHYSICS OF MORALS 70, 74-80 (1964). In GROUNDWORK, the imperative was formulated as "I ought never to act except in such a way that I can also will that my maxim should become a universal law." *Id.*

38. For a judicious discussion of the proper relation of idea and concept in Kantian legal thought, see Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949-1016 (1988).

39. IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON.

40. This particular idea has recently been subjected to a rigorous, and supportive, critique by Paul Crowther. *See* PAUL CROWTHER, THE KANTIAN SUBLIME: FROM MORALITY TO ART (1989); PAUL CROWTHER, CRITICAL AESTHETICS AND POSTMODERNISM (1993).

ideas of reason.[41] Humanity is contingently situated, and by exercising rational judgment, acknowledges this. In other words, all moral questions are applied moral questions.[42]

For the purposes of reconciling the classical and the communitarian Kants, the pivotal sections of the third *Critique* are numbers twenty-one and forty, in which he addresses the idea of communicative rationality, or, as he terms it, the "*sensus communis.*" This rationale is the reason constructed by the interaction of moral selves that make up a community—the "critical faculty which in its reflective act takes account of the mode of reflection of every one else."[43] In this way, though the human capacity of each moral self is defined by an immanent rationality, the political rationality will be fashioned within the particular circumstances of deliberation. This fundamental relation provided the metaphysical frame for the various political writings that occupied Kant during the final decade of his life. In an essay entitled *What is Orientation in Thinking?*, making specific recourse to Aristotle, Kant affirmed that the "highest good cannot be achieved merely by the exertions of the single individual toward his own moral perfection, but instead requires a union of such individuals into a whole working towards the same end." Indeed, the idea of "enlightenment," according to Kant, was defined by the aspiration of individuals to rationalize the common good within particular political communities. The entire critical project was, in this way, dedicated to the need to present a credible public philosophy.[44]

In the light of Kant's *sensus communis*, a proper treatment of Kantian jurisprudence articulated in the *Metaphysics of Morals* becomes rather more than a simple exposition on right. Published in 1797, the *Metaphysics* was Kant's final work and represented the culmination of an original ambition to present a comprehensive public philosophy founded on the principles of pure practical reason. The first part of the *Metaphysics* is, indeed, dedicated to an exposition on the "doctrine of right." As opposed to natural law theories of right, for Kant, of course, rights

41. IMMANUEL KANT, THE CRITIQUE OF JUDGEMENT 407 (Oxford Univ. Press, 1991) (1790).

42. *Id.* at 111.

43. *Id.* at 151.

44. KANT: POLITICAL WRITINGS, 237, 249 (Hans Reiss ed. & H. B. Nisbet trans., Cambridge Univ. Press, 1991).

were founded in the moral self. As an idea, right was founded on "innate" principles of freedom and equality, while the conceptual complements, or approximations, defined by the synthetic model, were all derived from the same two principles. Thus, for example, legal concepts have to be founded on freedom and equality: the applied political expression of the categorical imperative.[45] The idea of right is then conceptualized in terms of duties immanent to the moral self, meaning that it is rational and in the political situation will be an expression of practical reason. In this way, Kant can admit the practical reality of civil rights, while ensuring that such rights are legitimate only insofar as they are derived from the *a priori* principle of rights as an expression of fundamental humanity.[46]

The idea of right, both as founding principle and as a practical political concept, is thus central to a Kantian public philosophy. But it does not itself define the whole of that philosophy, for equally critical is the second part of the *Metaphysics*, the part too often ignored by Kantian formalists like Tesón. This part is the second "doctrine": "virtue."[47] Whereas the first doctrine seeks to extrapolate the founding rights that attach to moral selves, the second doctrine is premised upon the political reality of selves situated within political communities. The fact that moral selves conceptualize within political communities necessitates the admission of certain rules of positive morality and duty, aside from the merely negative duties defined by the basic categorical imperative.

In a number of contemporaneous essays, including *What is Orientation in Thinking?*, Kant makes explicit reference to Aristotle, for whom, of course, virtue defined the philosophy of law.[48] For Kant, however, virtue fulfils a more restricted function—devoted to the refinement of ethical matters, but conceptually distinct from matters of legal right. The maxims of virtue present guides to ethical behavior, necessary complements to right, which require positive application in order to secure the pursuit of the common good. In its simplest sense, being nice to one another is a virtue, a moral duty, necessary for this pursuit,

45. KANT, *supra* note 33.

46. *Id.* at 51, 189, 195-96.

47. For a more thorough exposition of the situation of the second doctrine within the METAPHYSICS, *supra* note 33, as a whole, see WARD, *supra* note 36, at 32-35.

48. *See* ARISTOTLE, THE ETHICS (Penguin Books, 1976).

but not demanded by law or right. Even though such civility is not demanded by law, however, rights seek to complement and to approximate civil virtues and should thereby look to "perfect" both one's own "happiness" and that of "others." Law can, and should, encourage communal virtues, even if it is primarily dedicated to protecting individual rights.[49]

Although, as we noted, communitarians like Nussbaum tend to concentrate upon the original statement of these duties, in the classical tradition of Aristotle, their re-articulation in Kant's political writings is pivotal to their reception in modern liberal political thought. The potential implications for a Kantian political theory that addresses more than formal right have been noted by a number of twentieth-century commentators. The extent to which a mature theory of individual freedom must appreciate the inherent capacity of these positive duties within a discrete political philosophy was fully appreciated by Isaiah Berlin. The "ends of men," as Berlin emphasises, "are many," and a proper understanding of "liberty" must recognize that individuals are endowed, as an expression of their humanity, with the capacity and the right to determine their own political ends within their community. The "positive" conception of liberty is evidenced by the capacity to participate in the political processes of this determination.[50]

Aside from Berlin, the acknowledgement that duties are a necessary constitutent of an integral theory of right was the central thesis in Hannah Arendt's *Lectures on Kant's Political Philosophy*—a series dedicated to attempting to reconcile the two Kants, of moral reason and moral judgment—within the entire and discrete Kantian "architectonic." The overriding purpose of Arendt's *Lectures* is to read the *Metaphysics* in the context of the faculty of judgment as described in the third *Critique*: the accommodation of universal ideas of humanity with the relative politics constituted by individual communities. In rhetoric that strikingly anticipated that of Habermas, Arendt suggested that Kant recognized that modernity was defined by political difference, and that such difference was the central gear of "enlight-

49. KANT, *supra* note 33, at 190-97. For an intriguing and suggestive discussion of Aristotelian virtue, and particularly the function of friendship within modern political thought, see JACQUES DERRIDA, THE POLITICS OF FRIENDSHIP (1996).

50. *See* I. Berlin, *Two Concepts of Liberty*, *in* THE PROPER STUDY OF MANKIND 191-242 (1997).

enment" and progress. A Kantian public philosophy, accordingly, is about the ability to accommodate alternative political meanings and values, rather than imposing certain foundational truths. Moral judgment, while grounded by the idea of morality, becomes an immediate and political expression of communal values. It is in the light of this interpretation of Kant that Arendt can then place the second doctrine, of virtue, within an Aristotelian "politics of friendship." The *sensus communis*, as an articulation of moral judgment within the particular political situation, describes the essential "sociability" of humanity.[51]

A third example of invoking Kant in order to reinvest a politics of community with a founding principle of humanity is provided by Jean-Francois Lyotard. According to Lyotard, post-modernism describes an attempt to refound a Kantian public philosophy without the modern "metanarratives" of substantive moral principle. *The Differend* was dedicated to extracting the two Kants, the political and philosophical, and then unifying them again in Kant's appreciation of the narrative nature of political morality—an understanding that bears immediate comparison with Nussbaum's attempt to universalize the politics of community. The idea of difference, so central to post-modern jurisprudence, revisits the Kantian appreciation that the idea of justice enjoys a plurality of legal concepts—a difference that is itself defined by the idea of the individual as an end in itself. Seizing upon the idea of a *sensus communis*, Lyotard suggests that justice is defined, not in the classical liberal sense of negative rights, but in the positive sense of facilitating political participation—the "calling forth" of the "community of addressors and addressees."[52] In his final political writings, again shadowing Kant's own intellectual development, Lyotard suggested that a post-modern, or "post-humanist,"[53] politics must be "participatory," built upon

---

51. ARENDT, LECTURES ON KANT'S POLITICAL PHILOSOPHY, *supra* note 24, at 52-58, 61-64, 72-77; *see* Ronald Beiner, *Interpretive Essay*, *in* ARENDT, LECTURES ON KANT'S POLITICAL PHILOSOPHY, *supra*, at 89, 119-24 (discussing Arendt's use of Kant); Patrick Riley, *Hannah Arendt on Kant, Truth and Politics*, *in* ESSAYS ON KANT'S POLITICAL PHILOSOPHY (Howard Lloyd Williams ed., 1992) (emphasizing, in particular, the extent to which their shared use of Kant describes obvious intellectual affinity between Arendt and Habermas).

52. JEAN-FRANCOIS LYOTARD, THE DIFFEREND 118-23, 130-41, 155-58, 169 (1988); *see* GEOFFREY BENNINGTON, LYOTARD: WRITING THE EVENT 34-35, 114 (1988) (discussing Lyotard's underlying Kantian aspirations).

53. *See* JEAN-FRANCOIS LYOTARD, POLITICAL WRITINGS 108-11 (1993); BILL READINGS,

the "openness" of language. Starting from Nussbaum's central premise, that individual moral judgment is defined by the narrative community within which the moral self exercises that judgment, Lyotard progresses to prescribe the same political facility demanded by Habermas. For Lyotard, indeed, it serves to redefine what is meant by justice.

III. *EUROPE AND THE SEARCH FOR A PUBLIC PHILOSOPHY*

The search for a European public philosophy has taken on a particular urgency among contemporary scholars. It is common to talk of a pervasive "crisis in governance" in Europe.[54] It is, however, more than simply a question of governance. A public philosophy suggests something more: the detection and promotion of a political or constitutional morality. Ultimately, it suggests the need for a common good, one that, in the Platonic tradition, describes a congruence between self and community. Such an approach has attracted some critical attention. Along these lines, for example, Joseph Weiler has argued that the crisis of government betokens a deeper crisis of legitimacy, and moreover, that the issue is a constitutional and jurisprudential one. Although reluctant to adopt a communitarian analysis of the European "crisis of legitimacy," by concentrating on a need to rethink the consonance between constitutions and the political communities that they seek to describe, Weiler necessarily orients his theses towards the more particular kind of narrative humanism articulated by those such as Nussbaum. His resultant argument, that the issue of legitimacy can only be resolved in terms of democratic reform that can secure a "structured model of critical citizenship," effectively translates Nussbaum's analysis into Habermas' solution.[55] Moreover, his recent suggestion that

---

INTRODUCING LYOTARD: ART AND POLITICS 137-39 (1991) (discussing Lyotard's later political writings and their derivation in Kant).

54. *See* Juliet Lodge, *Towards a Political Union?*, *in* THE EUROPEAN UNION AND THE CHALLENGE OF THE FUTURE 383-85 (Juliet Lodge ed., 1993); Gráinne de Burca, *The Quest for Legitimacy in the European Union*, 59 MOD. L. REV. 349, 374-76 (1996) (providing more recent analysis of crisis, characterizing it as primarily one of government and institutionalism); *see also* D. CURTIN, POSTNATIONAL DEMOCRACY: THE EUROPEAN UNION IN SEARCH OF A POLITICAL PHILOSOPHY (1997) (offering more general discussion of the subject).

55. *See* J.H.H. Weiler, *European Neo-constitutionalism: In Search of Foundations for the European Constitutional Order*, *in* CONSTITUTIONAL TRANSFORMATION: EUROPEAN AND THEORETICAL PERSPECTIVES 105-21 (R. Bellamy & D. Castiglione eds., 1996).

Europe recognizes certain "transnational affinities to shared values" that are themselves the product of "reflective, deliberative rational choice" further serves to confirm the congruence between his thesis and that described within the Kantian tradition.[56]

At the same time, while the present crises of legitimacy and identity that afflict Europe are in some ways particular, the product of a modern history that is peculiarly described in terms of nation-statism, they are also part of a wider crisis in international order.[57] As Francis Fukuyama has suggested, it is a pervasive crisis bred of competing dynamics of fragmentation and integration—a world defined by forces that demand competition but seek to rediscover a sense of "trust."[58] The three theses introduced in the first part of this Essay all subscribe to this more general global analysis. Yet, while Tesón and Nussbaum restrict themselves to certain allusive comments on particular geo-political examples of this crisis, including Europe, Habermas has made a more concentrated study of the putative European order.[59] It is a study that, for obvious reasons, warrants our particular attention.

Habermas sees the "melancholic mood" that presently afflicts Europe as being reflective of a global lack of confidence.[60] In an increasingly competitive, fragmenting, and anxious world, Europe is merely the most competitive, fragmentary, and anxious of all. On one level, the most immediate need is to resist the challenge of unrestrained capital. Articulating a thesis not

---

56. *See* J.H.H. Weiler, *The Reformation of European Constitutionalism*, 35 J. COMMON MKT. STUD. 97-131 (1997); *Europe: The Case Against the Case for Statehood*, 4 EUR. L.J. 43-62 (1998) (offering another recent statement suggesting that the absence of an adequately determined sense of political morality militates against deeper political integration, at least in the sense of putative European statehood).

57. For the classic statement of this historical tension, see JACQUES DERRIDA, THE OTHER HEADING: REFLECTIONS ON TODAY'S EUROPE (1992).

58. *See* FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY (1995).

59. Aside from allusive treatment in BETWEEN FACTS AND NORMS, *supra* note 1, particularly at pages 428-46, for Habermas's more immediate application of his thesis to contemporary Europe, see Jürgen Habermas, *Citizenship and National Identity: Some Reflections on the Future of Europe*, 12 PRAXIS INT'L 1, 1-19 (1992) [hereinafter Habermas, *Citizenship and National Identity*]; Jürgen Habermas, *The European Nation-State. Its Achievements and Its Limitations. On the Past and Future of Sovereignty and Citizenship*, 9 RATIO JURIS 125, 125-37 (1996) [hereinafter Habermas, *The European Nation-State*].

60. *See* William Rehg, *Introduction* to HABERMAS, *supra* note 1, at xxxix (discussing this aspect of Habermas' ideas).

dissimilar from that found in the recent writings of market communitarians such as Fukuyama and John Kenneth Galbraith,[61] Habermas suggests that, while a regulated market can be the guarantor of liberal democracy, an unrestrained market is its greatest threat. Contemporary Europe graphically describes a world of alienated, disorientated consumers devoid of any remembrance of community or social solidarity, distanced from the possibilities of political participation, any democratic aspirations deflected by a consciously nurtured ethic of self-interest.[62] The critical debilitating flaw in the new European order is the absence of democratic control of administrative and market governance—an argument that enjoys a familar resonance with the much-debated "democratic deficit" in the Union. The most "disturbing" characteristic of contemporary Europe, Habermas concludes, is the "lack of constitutional controls of administrative activity."[63]

Bureaucracy, at a Community and Union level, has systematically replaced facilities for participation at national and sub-national levels, and the result, according to Habermas, is a destructive fragmentation into competitive national and ethnic groupings that will ultimately detonate the idea of a "community of Europeans." In these circumstances, it is not surprising that Europe's "citizens" do not identify with the Community, or at least not primarily. In order to address this related crisis of identity and legitimacy, there will need to be a revised "shared political culture," one ultimately facilitated by the institution of proper mechanisms of democratic governance. There is much truth in Habermas' analysis of the European demise and much value in his suggested resolution. The new European may indeed wish to be prosperous, but he or she does not wish only to be prosperous.[64]

---

61. *See* FUKUYAMA, *supra* note 58 (providing Fukuyama's most recent statement); JOHN KENNETH GALBRAITH, THE GOOD SOCIETY: THE HUMANE AGENDA (1996) (offering a more polemical variant).

62. For a similar thesis, argued from a more empirical standpoint, see C. Hadjimichalis & D. Sadler, *Open Questions: Piecing Together the New European Mosaic, in* EUROPE AT THE MARGINS: NEW MOSAICS OF INEQUALITY 238 (C. Hadjimichalis & D. Sadler eds., 1995) (emphasizing that no amount of legalistic integration can make up for ever-increasing polarization of wealth and resultant economic fragmentation).

63. HABERMAS, *supra* note 1, at 428-31.

64. Even Adam Smith recognized that human beings, defined by a shared "moral sentiment," were never solely driven by arguments of self-interest—a critical concession

The new European also wants to determine him or herself in a multitude of other ways, politically, socially, culturally, and so on. This understanding, that political identity is polyvalent, should serve to distinguish all modern political orders, Europe included. But the history of European political and legal integration suggests a resistance to this truth. While recognizing the demise of liberal constitutionalism, a demise immediately consonant with that of sovereign nation-states, Europe has consistently failed to embrace alternative ideas of democratic participation. Thus, as Habermas concludes, what Europe now needs is not a free market, but relief for an "exhausted" and "disintegrating" sense of social solidarity, and such relief will only come by means of radical institutional and constitutional reform.[65]

As Habermas further notes, the critical challenge facing the post-metaphysical world, Europe included, is to work out mechanisms of affinity and "solidarity between strangers." This observation, once again, is certainly accurate. But, at the same time, it is arguable whether the problem can be readily resolved merely in terms of restructuring political institutions. There will, in short, need to be something more than that which is offered by a theory of revised institutional democracy. Nation-states can adequately—some would say more efficiently—effect institutional democracy.[66] The need to address the problem of "solidarity between strangers" acknowledges something deeper—a fundamental sense of humanity—and it is here that the theses articulated by Tesón and particularly by Nussbaum can add a further dimension to the analysis. The community "consciousness" that Habermas seeks will be so much stronger and more durable if there is a genuine sense in Europe of both humanity and community. Moreover, for reasons that we have already explored in the second part of this Essay, the appreciation of this belief is what distinguishes an integral Kantian public philosophy.

---

that has consistently served to undermine various arguments for a systematic economic analysis of legal orders. For a commentary, specifically invoking Smith's "theory of moral sentiments" against Richard Posner's economic analysis, see Robin Paul Malloy, *Invisible Hand or Sleight of Hand? Adam Smith, Richard Posner and the Philosophy of Law and Economics*, 35 U. KAN. L. REV. 209 (1988).

65. *See* HABERMAS, *supra* note 1, at 445; Habermas, *Citizenship and National Identity*, *supra* note 59, at 2, 8-9; Habermas, *The European Nation-State*, *supra* note 59, at 125-37.

66. For a discussion of the relative merits of the nation-state as the most appropriate cite of democracy, see Alan Dashwood, *States in the European Union*, 23 EUR. L. REV. 201-16 (1998).

The new Europe, of course, has long identified with the rhetoric of community. The European Community, mutating from its earlier form as a specifically Economic Community, has evolved further and is now governed by a supervening Union of member states and "peoples." But the "Community" remains the legal and economic centrepiece. But what precisely is a European "community"? Before contemplating what it might become, or what sort of public philosophy might enrich the concept of a European community, it is instructive to consider what the Community thinks that it is. There is, notoriously, plenty of rhetoric, various expressions scattered around various Treaty articles, and in a number of European Court judgments: references to rights to this and that, statements about the importance of democracy, freedom, even equality. None are, of course, defined. This absence of a precise definition is not itself unusual. Constitutions frequently make reference to certain constitutional aspirations, but rarely flesh them out. Moreover, as Ronald Dworkin has suggested, this absence is a good thing, for constitutional documents are not the place in which to establish firm rules for the immediate resolution of real political or ethical issues. Instead, the inquiring citizen must look to the political morality within which the various constitutional statements are made. This inquiry, after all, is what real judges in real courts do.[67]

It is for this reason, of course, that we need to be able to detect a European public philosophy. Otherwise, there will be no way of ascertaining precisely what the rhetoric means in real political situations. The particular rhetoric of a European public philosophy can be detected in various Treaty articles, of which two might repay special attention. Article 2 of the Treaty establishing the European Community ("EC Treaty") suggests that the Community should seek to promote a "solidarity among member states,"[68] while Article 6 of the Consolidated Treaty on

67. For Dworkin's most substantive treatment of the jurisprudence of constitutional morality, see RONALD DWORKIN, LAW'S EMPIRE (1986); for a more recent application of the thesis to the actual practice of judicial interpretation and adjudication, see RONALD DWORKIN, FREEDOM'S LAW (1997).

68. Treaty establishing the European Community, Feb. 7, 1992, art. 2, O.J. 224/1, at 8 (1992), [1992] 1 C.M.L.R. 573, 588 [hereinafter EC Treaty], *incorporating changes made by* Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719 [hereinafter TEU]. The Treaty on European Union ("TEU") amended the Treaty establishing the European Economic Community, Mar. 25, 1957, 298

European Union ("Consolidated TEU"), as introduced by the Treaty of Amsterdam, in turn, suggests that the "Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law."[69] These are principles that are, apparently, "common to the Member States." Taken together, therefore, how does this rhetoric play out within the political morality of Europe?

First, it can be reasonably concluded that there is no tradition, historical or ethical, that assumes fundamental human rights. Examples of human rights compromised in order to facilitate certain principles of market action are legion. Even in cases that are supposed to define the Community's commitment to human rights, such as *Wachauf*, the Court of Justice still took care to emphasize that such rights were never "absolute," but dependent upon the wider interests of the Community. Such a resolution, articulated also in cases such as *Grogan*, has attracted a considerable critical literature, which has sought to question whether the European Court "takes rights seriously."[70] Of course, such cases are, by definition, "hard cases," involving alternative visions of fundamental humanity. What was so striking about the resolution of cases like *Grogan*, however, is the fact that the Court remains stoically impervious to the idea that the question of humanity is necessarilly relevant to the politics of operating a free market. The fiction of the rational economic actor dispelled the essential humanity of the individual.[71]

U.N.T.S. 11 [hereinafter EEC Treaty], *as amended by* Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA].

69. Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Oct. 2, 1997, art. 1(8), O.J. C 340/1, at 8 (1997) (not yet ratified) [hereinafter Treaty of Amsterdam] (replacing Article F(1) of TEU); Consolidated version of the Treaty on European Union, art. 6, O.J. C 340/2, at 153 (1997), 37 I.L.M. 67, 69 (not yet ratified) [hereinafter Consolidated TEU] (ex Article F(1)), *incorporating changes made by* Treaty of Amsterdam, *supra*. By virtue of the Treaty of Amsterdam, articles of the TEU will be renumbered in the Consolidated version of the Treaty on European Union. Treaty of Amsterdam, *supra*, art. 12, O.J. C 340/1, at 78-79 (1997).

70. Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft, Case 5/88 [1989] E.C.R. 2609, [1991] 1 C.M.L.R. 328; Society for the Protection of Unborn Children Ireland Ltd. v. Stephen Grogan and Others, Case C-159/90, [1991] E.C.R. I-4685, [1991] 3 C.M.L.R. 849.

71. For a discussion of morality of the *Grogan* case, see Diarmuid Rossa Phelan, *Right to Life of the Unborn v. Promotion of Trade in Services: The European Court of Justice and the Normative Shaping of the European Union*, 55 MOD. L. REV. 670-89 (1992). For a challenging critique of the European Court's approach to human rights, see Jason Coppel

Moreover, the extent to which the Union discriminates between those rights enjoyed by European citizens and those enjoyed by others further militates against any principled understanding of rights. Once again, the extent to which the Schengen arrangements breach the rights recognized in the Geneva and European Conventions is well documented.[72] And there is a particular irony here, for Article 6.2, suggestively, affirms a "respect" for those rights guaranteed by the European Convention of Human Rights and Fundamental Freedoms.[73] Yet it only vests legal authority insofar as these rights chime with "general principles of Community law."[74] Here, of course, the argument completes a circle: human rights are derived from general legal principles, which are themselves derived from a respect for human rights. The idea and the concept are entirely confused. It can only be concuded that so-called "human" rights in the European Union are exclusively derivative, for there is no understanding that they are definitive of humanity understood in terms of autonomous moral selves.

In the absence of human rights derived from an appreciation of humanity, there can only be free-standing civil rights, founded on nothing more than political chance—rights that may be constructively rational, but only insofar as that rationality is procedural, rather than principled. Yet, even here, the Community seems unable, or unwilling, to grasp the basic foundations for a public philosophy: civil rights protected by the rule of law. The rule of European law is severely restricted to the government of the common market, together with a series of collateral areas of social policy. Similarly, as we have noted, the "rule of law" is one of the "principles" common to the Member States. But there is little point in having a European "rule of law" if all the civil rights of the citizen remain derived from those Member

& Aidan O'Neill, *The European Court of Justice: Taking Rights Seriously?*, 12 LEGAL STUD. 227-45 (1992). For a recent review of the critique, see J.H.H. Weiler & Nicolas J.S. Lockhart, *"Taking Rights Seriously" Seriously: The European Court and Its Fundamental Rights Jurisprudence*, 32 COMMON MKT. L. REV. 51-94, 579-627 (1995).

72. The potential breaches were outlined in the Meijers Commission. For a general overview of these procedures and the extent to which European law consistently deprives thousands of his "residents" of their human rights, see M. SPENCER, STATES OF INJUSTICE (1995).

73. TEU, *supra* note 68, art. F(2), O.J. C 224/1, at 6 (1992), [1992] 1 C.M.L.R. at 728.

74. *Id.*

States. Union citizenship remains contingent upon prior citizenship of a Member State. Much commentary prior to the Amsterdam Treaty[75] suggested the need to address this particular anomaly. Nothing was done.[76]

Accordingly, Union citizenship vests no civil rights that are effective under the jurisdiction of Community institutions, most obviously the European Court. If the citizens of Europe are subject to a rule of law, in the jurisdictional sense, then it is a rule determined at a national level. Article 177, dedicated to maintaining the national authority of national courts, is eloqent testimony to this legal fiction.[77] Moreover, Community civil rights, such as they are, remain derived from nation-states. The rhetoric of solidarity remains couched in terms of solidarity "between" nation-states, and not between people. All in all, the "rule of law" in the Community sense is restricted to a limited area of law, and a limited number of citizens as determined by the nation-states—an absurdly vacuous conception entirely detached from ethical or political principle.

From a rather different perspective, if the rhetorical notions of "solidarity" or the "rule of law" are defined in the Kantian sense, of fundamental equality, an approach adopted by such as Nussbaum or Rawls, then there is a further failing. There is little evidence of a genuine sense of social or legal equality in the European Union. Taking one obvious example, much is made of gender equality in European law. Yet, the evidence of European law, of the concept as opposed to the principle of equality, suggests that substantial inequalities remain. While the various directives that seek to establish gender equality in the workplace aspire to "equal treatment" or "equal pay for equal work," their legal and political interpretation falls a long way short of genuine equality.

Only if law, and the idea of the "rule of law," is understood in its most rigorously positivistic sense, can simple formal equality suffice to satisfy even the most basic ideas of fundamental equality. In substantive terms, women in the European work-

---

75. Treaty of Amsterdam, *supra* note 69.

76. For a recent overview of the inadequacies of the Union conception of citizenship, see J. Shaw, *The Interpretation of European Union Citizenship*, 61 MOD. L. REV. 293-317 (1998).

77. EC Treaty, *supra* note 68, art. 177, O.J. C 224/1, at 63 (1992), [1992] 1 C.M.L.R. at 689.

place, or indeed in the European family, do not enjoy equality; and by definition, given that the equality is supposed to be secured by law, such inequalities are constructively perpetuated by European jurisprudence. Following the Kantian analysis, the difference between formal equality and substantive inequality is once again derived from a fundamental dissonance between the idea of equality and its proper translation into a legal and political concept.[78] Equality is derived from a sense of humanity. It is a human right. In Europe, it is a purely civil right, of application in certain restricted circumstances, and always subject to a political morality that triumphs alternative market values.

So much for principle. As a matter of politics, it cannot be denied that the Union is still governed by its nation-states.[79] The principle of subsidiarity, as worked out following the Maastricht Treaty[80] and now entrenched in the Amsterdam Treaty,[81] provides further evidence that the nation-states retain their ultimate political authority.[82] It is a sense enhanced too by the inclusion at Amsterdam of the much vaunted principle of "flexibility," a concept that has been rightly dismissed as "plastic"—an impoverished and even more ill-defined variant of the already confused notion of subsidiarity.[83] In this sense, therefore, the idea of a European political community remains essentially aspirational. At the same time, the necessary conditions for the formation of a narrative sense of community remain largely absent, and so long as the weight of governmental and cultural authority remains located in the nation-states, then it will continue to be absent.

Yet, perhaps the most critical absence, in the sense of forging some sort of community identity, is the lack of a "common good." Communities need a common good, which is more than a simple common purpose. Europe seems to have a common

78. For a compelling analysis of the distinction between ideas of formal and substantive equality, see Helen Fenwick & Tamara K. Hervey, *Sex Equality in the Single Market: New Directions for the European Court of Justice*, 32 COMMON MKT. L. REV. 443-70 (1995).

79. *See* Dashwood, *supra* note 66, at 201-16.

80. TEU, *supra* note 68.

81. Treaty of Amsterdam, *supra* note 69.

82. For a discussion emphasizing the extent to which subsidiarity should be seen as a mechanism for enhancing the concentration of power at the nation-state level, see A. Teasdale, *Subsidiarity in Post-Maastricht Europe*, 64 POL. Q. 187-97 (1993).

83. *See* J. Shaw, *The Treaty of Amsterdam: Challenges of Flexibility and Legitimacy*, 4 EUR. L.J. 63-86 (1998) (perceptively aligning the ill-determination of flexibility with pervasive and unresolved problems of political and constitutional legitimacy).

purpose, the making of money. But this purpose is, to return to Kantian parlance, a means. It is not an end. Not only is there no substantive sense of either human or civil rights, founded on an appreciation of essential humanity, but also there is no sense of virtue. What makes a good European citizen, even for those who are fortunate enough to be granted that status? Presumably, it is the capacity to make a profit, to fulfill the fantasies of the rational economic actor. It cannot be to create solidarity amongst the citizenry because the solidarity to which Europe aspires is one between Member States.

Of course, the residual authority of nation-states may be a good thing. In the absence of a common good, or an appreciation of a proper sense of humanity, or even a recognition of the need for proper democratic institutions, it may be that authority should remain vested in nation-states.[84] As we have already noted, the inadequacies of representative democracy in the new Europe are well documented. Moreover, as with all the other gaping constitutional and institutional inadequacies that have been identified over the past decades, the "democratic deficit" remains as great in the wake of Amsterdam as it did after Maastrictht.[85] Indeed, it can be suggested that the experience of Europe identifies the essential fictions of modernist ideas of representative democracy. The periodic voting for pre-selected candidates is not what democracy is about.

Democracy must come to mean more. This argument, as we have seen, is at the heart of both Nussbaum's and Habermas' critiques. Democracy means the ability to participate in the decisions that shape the communities within which moral selves live. It is a matter of self-definition that, as Kant noted, is a human right—a right derived from an appreciation of fundamental humanity. Accordingly, within the particular context of the European Union, the market must be democratized, and the same could apply to the workplace, and indeed all areas of social and

84. This is certainly Dashwood's argument. *See* Dashwood, *supra* note 66, at 213, 216.

85. For a discussion of the continuing inadequacies, see Amaryllis Verhoeven, *How Democratic Need European Members Be? Some Thoughts After Amsterdam*, 23 EUR. L. REV. 217-34 (1998). For a post-Maastricht analysis, see Philip Raworth, *A Timid Step Forwards: Maastricht and the Democratisation of the European Community*, 19 EUR. L. REV. 16-33 (1994).

industrial policy.[86] Yet, once again, the possibility of enjoying such an empowering sense of democracy in Europe is entirely absent—an absence that only serves to compound the impoverished and inadequate forms of representative democracy presently employed.

CONCLUDING OBSERVATIONS

It can only be concluded that the stated principles of Article 2 of the EC Treaty and Article 6 of the TEU remain wholly rhetorical. There is no constitutional morality that can be used in order to furnish either meaning or legitimacy. There is no foundational or narrative sense of fundamental rights, of freedom, of democracy, of the rule of law, or of solidarity. In turn, it must be recognized that the related crises of governance, of legitimacy and identity, will remain unresolved until this absence is redressed. The ultimate purpose of this Essay is to suggest that a coherent and mature public philosophy for any modern political community requires treatment of principles described in each of the three theses reviewed: those articulated by Tesón, Nussbaum, and Habermas. The three, as has been consistently noted, constitute parts of a whole—variants of a Kantian description of humanity and its situation in modern political society.

Certainly, as Tesón suggests, the emergence of new world orders, and an international law that attempts to define and to regularize such orders, must be founded upon a fundamental recognition of the sanctity of the moral self—a sanctity that finds its conceptual expression in the idea of fundamental human rights. At the same time, however, there must be an equal acknowledgment that moral selves operate, and exercise their political judgment and make their political decisions, within the historical and narrative framework described by the communities that they in turn describe. This acknowledgment is the critical edge of Nussbaum's thesis. Individuals identify with communities, and politics has no meaning outside such communities. It was a thesis repeatedly confirmed in Kant's later political writings. It was also confirmed time and again by Hannah Arendt, who also noted with perception that individuals only identify

86. For a recent discussion of the possibilities within these particular areas, see L. Betten, *The Democratic Deficit of Participatory Democracy in Community Social Policy*, 23 EUR. L. REV. 20-36 (1998).

fully, and constructively, with communities within which they feel the continuing capacity to participate.[87] It is this insight that is reinforced by Habermas. If the ethical legitimacy of a political community is founded on a respect for the fundamental integrity of the moral self, then the political legitimacy is dependent upon facilitating the expression and empowerment of the practical reason that defines those selves.

If we accept the Kantian foundation for a public philosophy in the new Europe, then there are three concomitant solutions, suggested in turn by the three theses discussed in the first part of this article. First, an acknowledgment of the fundamental dignity of the moral self demands a proper appreciation of the centrality of human rights in any just society. A political community can, and indeed must, respect and secure human rights. But such rights are not derived from the community. Civil rights are derived from the political community, and their legitimacy is entirely dependent upon their proper foundation upon an appreciation of essential humanity. In short, it does not matter whether that human is a European citizen or a citizen of a constituent nation-state. It is enough that he or she is human.

Second, an acknowledgment that moral selves are dedicated to the pursuit of common goods, a dedication itself defined by the Kantian idea of constructive practical reason, requires that the so-called European "community" strive to be precisely what it claims to be: a community. The rhetoric of Article 2 of the EC Treaty must come to mean something. Solidarity between member states must be transformed into solidarity between the "peoples of Europe." This aspiration cannot, of course, be readily distinguished from the need to entrench certain fundamental human rights properly. In traditional jurisprudential parlance, such rights must be translated into effective civil rights, and within the particular jurisprudence of European law, such a translation requires a more thorough investment of social rights. The pertinent example here, once again, is the right of gender equality. Such rights, while expressed as civil or social rights, must be understood as being grounded in fundamental human rights of freedom and equality. Such is the insight of a discrete Kantian theory of rights.

Citizenship, the proud constitutional boast of the Maas-

87. *See* ARENDT, THE HUMAN CONDITION, *supra* note 24.

tricht Treaty, must also come to mean something. Civil rights must be understood in terms of citizenship, and in the Aristotelian tradition this means that such rights carry consonant responsibilities to an identifiable common good. Thus, to continue the particular example of rights of gender equality, the rights that attach to women in the workplace—such as rights to equal pay for equal work—must be understood as being derived not from government but from the fundamental humanity of each and every citizen within the community. A Kantian understanding of the idea of virtue requires each citizen to recognize the fundamental equality of other citizens within the community. Such rights, in short, may be expressed in civil constitutions, but they are founded on a public philosophy that appreciates the fundamental humanity of its constituent citizenry.

Third, following Habermas' analysis of the demise of liberal legalism and the need to reinvest democratic institutions, it is incumbent upon future European intergovernmental conferences and Treaty reformers to address the continuing, and gaping, failures of democracy, accountability, and transparency. Again, tracing the genesis of Habermas' critique back to its Kantian roots, it can be appreciated that democracy is not the particular reserve of certain civil constitutions, but an immediate expression of, and facility for, human rights. Citizens, in a political community founded on principles of practical reason, have a political right to participate in government. As Kant affirmed, the ability to self-govern is the determining characteristic of the rational moral self, and thus, political institutions must accordingly be dedicated to facilitating the actual expression of this ability.

Ultimately, each of the three critiques express various and related attempts to redress a pervasive problem—that of legitimacy. Legitimacy, as we noted before, is intimately related to the equally pervasive problem of identity. It is only when a polity can evidence its legitimacy that it can then hope to secure the degree of affinity that it needs to flourish. A citizenry needs that common good, even if it is, in the final analysis, a product of the political or narrative imagination. Legitimacy depends upon the determination of a common good within a political community—one that complements and promotes, rather than challenges, the fundamental rights of the moral selves that constitute that community. Democratic reform of institutions is a neces-

sary procedural mechanism, a first step towards acknowledging the veracity of this analysis. But, as we have already noted, though necessary, it is not itself enough. Legitimacy aspires to a deeper sense of affinity—an affinity that can only be secured by a proper enactment of civil rights founded on an appreciation of fundamental humanity.