

THE REASONABLE PERSON AS MACINTYREAN CHARACTER: STANDARDIZED MORAL COMPETENCE IN MODERNITY

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I. INTRODUCTION

Prevailing communitarian interpretations of modernity focus on the individual will as an appetitive organ. The orthodox Kantian view, however, is more complex. In Immanuel Kant's view it represents a convergence of certain anthropological, sociological, physical, and psychological facts.¹ That convergence is also captured normatively by reasonableness cognates in the American legal system. Benjamin C. Zipursky

¹ Valid willing forms "in accordance with the a priori idea of a natural end." STEPHEN ENGSTROM, *THE FORM OF PRACTICAL KNOWLEDGE* 140 (2009). Anthropologically, natural ends depend on "the empirically determined concept of human nature." *Id.* Sociologically, natural ends are contextualized "from person to human being to citizen." *Id.* Physically, they are contained by the "natural limit...of a natural system of human animal life." *Id.* at 78 n.10. Psychologically, they are rationally responsive to "the concrete in human practical cognition." *Id.* at 140.

shows, through private law, that Americans are bound to moderation-in-action and mutuality-in-personhood.² With that in view, the common law tracks Kant's requirements for validity in willing, supplying citizens a shared impersonal standard of conduct grounded in moral competence. The ethico-juridical embodiment of that standard—the reasonable person and their use of reasonable care—represents a challenge to the communitarian critique of modernity.³ It highlights the self-defeating nature

² See generally Benjamin C. Zipursky, *Reasonableness in and out of Negligence Law*, 163 U. PA. L. REV. 2131 (2015) [hereinafter Zipursky, *Reasonableness*].

³ Kant differentiates “ethical” duties in which the law is its own incentive, as in acting from the laws of rational nature, from “juridical” duties in which the law and the incentive(s) for obeying it is distinct. See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 46 / §219 (1991) [hereinafter Kant, *Doctrine of Right*]. Since the common law uses regulative ideals of judgment like reasonable prudence and ordinary care, acting on those laws for the sake of rapport with or responsiveness to the ideal is both ethical and, assuming one would also like to avoid liability, juridical. These principles are internally and externally juridical, or, as this Article also construes them, ethico-juridical. Note that “inner” and “outer” throughout this Article are not meant literally. See generally, e.g., Hao Tang, *Wittgenstein and the Dualism of the Inner and the Outer*, 191 SYNTHESE 3,173-3,194 (2014). The character of the Reasonable Person, as a regulative ideal of personality and a cognitive practice for juries and individuals, is, among other things, an ethico-juridical principle. The merely externally juridical will is the foundation of Economic Man, allegedly modernity’s lead character, who is not bound or encumbered by any standard he does not choose. “Freed from the

of communitarian attempts to restore moral standards by subverting the state. Insofar as the state secures the jurisdiction of private law, communitarian efforts to attack the state simultaneously undermine the standards communitarians wish to restore. This Article will illustrate this principle through the literary analytic of Alasdair MacIntyre by applying it to right-wing politics in America.

On January 6, 2021, insurgents in the United States stormed the Capitol Building in an expression of lawlessness that instantiates through right-wing nationalism, populism, and evangelism (i.e., the far right).⁴ A poll from the following day shows a

dictates of nature and the sanction of social roles, the human subject is installed as sovereign, cast as the author of the only moral meanings there are." See Michael J. Sandel, *The Procedural Republic and the Unencumbered Self*, 12 POL. THEORY 81, 87 (1984). This Article, however, posits that modernity casts the Reasonable Person and their use of contextually appropriate care as its ideal lead and characteristic representative of willing's internal logic. The Reasonable Person represents an a priori second-order social role and practice, and therefore a binding of self in rational nature, accessible through a proper second nature, rather than Sandel's first nature dictates.

⁴ "There seems to have been relatively little academic interest in this connection ... [P]opulists use of religion... is a tool to engage a society that is felt to have lost its moral centre." See Daniel

plurality of support from Republicans.⁵ The insurgency represents a protestant form of right-communitarianism, characterized simultaneously by two of Alasdair MacIntyre's archetypes: the Conservative Moralists⁶ and the Protester.⁷ Following the failure of the insurrection, some on the far right are undertaking to divorce the insurgents' violence from the presuppositions of its reactionary politics.⁸ This attempt at disassociation is not coherent. The reactionary philosophy behind the politics, and the character dynamic it creates, entails an allowance, if

Steinmetz-Jenkins and Anton Jager, *The Populist Right is Forming an Unholy Alliance with Religion*, THE GUARDIAN (June 11, 2019), <https://www.theguardian.com/commentisfree/2019/jun/11/populists-right-unholy-alliance-religion>. "Christian-right activists inside and outside of government promoted the election fraud lie and claimed God told them to 'let the church roar.'" See Sarah Posner, *How the Christian Right Helped Foment Insurrection*, ROLLING STONE (Jan. 30, 2021), <https://www.rollingstone.com/culture/culture-features/capitol-christian-right-trump-1121236/>.

⁵ Of Republicans, 45% supported the action, 43% opposed. See James Walker, *45 Percent of Republican Voters Support Storming of Capitol Building: Poll*, NEWSWEEK (Jan. 7, 2021), <https://www.newsweek.com/45-percent-republican-voters-support-storming-capitol-1559662>.

⁶ ALISDAIR MACINTYRE, *AFTER VIRTUE* xv (3rd ed. 2007) [hereinafter MACINTYRE, *VIRTUE*].

⁷ *Id.* at 256.

⁸ See generally Rod Dreher, *Democracy Betrayed: Lasch's Revolt of the Elites at 25*, LAW AND LIBERTY (Feb. 1, 2021), <https://lawliberty.org/forum/democracy-betrayed-laschs-revolt-of-the-elites-at-25/>.

not a commitment, to wholesale the legal system whenever it does not advance the agenda of right-communitarianism.

This Article locates the rationale for the insurrectionist strategy in a specific misunderstanding of the Enlightenment's chief philosophy and philosopher, and a misconstrual of the epoch's interpersonal correlates, like the emergence of social atomism,⁹ for its intellectual causations, like the negative light under which modernists tend to view ungrounded dogmatic systems of thought. This Article will examine a particular meta-moment in commentary on the history of philosophy, a mistaken reading of Kant's practical philosophy—originating in part in a popular-but-mistaken reading of Hegel's response¹⁰—propagated in and through a highly influential 1981 book by the man widely considered the father of right-wing communitarianism, Alasdair

⁹ See generally CHARLES TAYLOR, *THE ETHICS OF AUTHENTICITY* (1991).

¹⁰ See generally Songsuk Susan Hahn, *Logical Form and Ethical Content*, 32 *HEGEL BUL.* 143-162 (2011).

MacIntyre.¹¹ MacIntyre unfortunately conflates neo-“Kantianism” with orthodox Kantianism.¹² That mistake shapes a portion of contemporary political philosophy, but also plays a pivotal role in much anti-liberal, anti-state political theory many on the far right embrace, cynically or categorically, enabling a regression to unadulterated will to power whenever losing control of or in government. Then, to show the political theory shaping events and players, the Article will look briefly at a far right protagonist of the insurgency, his documented background in right-

¹¹ Though MacIntyre is proudly illiberal, he does dispute the label “communitarian.” For a full discussion of communitarianism versus individualism, *see generally* SHLOMO AVINERI & AVNER DE-SHALIT, COMMUNITARIANISM AND INDIVIDUALISM (1992).

¹² MacIntyre treats Kant as a neo-Kantian. Neo-Kantianism is the “view that we can hold to Kant’s moral theory [...] while rejecting the strange and wonderful metaphysics of reason which would permit us to make sense of it. The mark of such a theory is that, in its lyrical emphasis on the ‘autonomy’ of each moral agent in respect of the ‘moral law’ she is under, it compromises the real *identity* of the law to which each agent is thus autonomously related.” *See* Michael Thompson, *What is it to Wrong Someone? A Puzzle about Justice*, in REASON AND VALUE: THEMES FROM THE MORAL PHILOSOPHY OF JOSEPH RAZ, 333, 383-384 (R. Jay Wallace, Philip Pettit, Samuel Scheffler & Michael Smith eds., 2004). This Article attempts the following: reclaim the identity of the moral law for this particular socio-legal debate between communitarianism and individualism; connect it to modernity without relying on metaphysical assumptions; and, instead, use only legal philosophy and MacIntyre’s literary analysis.

communitarianism, and his role as a U.S. Senator in the attempted coup. This Article will address the relevant issues in moral and legal philosophy within cases like *Tarasoff v. Regents of the University of California*, paradigms of reasonable care predicated upon a mutualism that can transcend established professional ethics, thus connecting the standard of care to agent-neutrality.¹³ This standard overrides the narrowed vision of Economic Man—the ultimate-criterion-less character whose transactional (empty) calculus MacIntyre believes reigns over modernity¹⁴—providing a superior foothold for the non-instrumentalist manner one finds in ordinary care and the mutuality-based Reasonable Person from whom it flows.¹⁵ What this Article demonstrates through that is socio-legal space from which Kantian liberalism, properly understood, is immune to communitarian critiques from both left

¹³ *Tarasoff v. Regents of the University of California*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

¹⁴ MACINTYRE, VIRTUE *supra* at 18, 31, 33, 39, 45, 49, 202, 231 (describing the modern self as an emotivist that is unbound by natural ends).

¹⁵ Zipursky, *Reasonableness*, *supra* at 2169.

and right, but especially the autocratic mode of expression from the far right. In particular, a congruence is shown between MacIntyre's "[s]ound practical reasoning and good motivation,"¹⁶ Kant's principle of prudence and the law of the will,¹⁷ and the common law's demand for ordinary care and a mutualist orientation.¹⁸ From this conceptual alignment one acutely senses moral horror at the goal behind the January 6, 2021 insurrection and ongoing terror in the punishment of those who speak against the election fraud lie that sparked it.¹⁹

II. SHARED IMPERSONAL STANDARDS

In the 2007 edition of *After Virtue*, MacIntyre claims the modern state is illegitimate and of natural rights that "belief in them is one with belief in

¹⁶ See ALASDAIR MACINTYRE, *DEPENDENT RATIONAL ANIMALS* 73 (2014) [hereinafter MACINTYRE, *ANIMALS*].

¹⁷ ENGSTROM *supra* at 141-145.

¹⁸ See generally Zipursky, *Reasonableness, supra*.

¹⁹ See generally David Smith, *Liz Cheney's Ousting Proves the 'Big Lie' is the Republican Party's Religion*, THE GUARDIAN (May 12, 2021), <https://www.theguardian.com/us-news/2021/may/12/liz-cheney-ousting-republican-party-trump-big-lie>.

witches and in unicorns.”²⁰ He bases his own role in the history of philosophy on the alleged failure of Kant’s attempt to ground morality in reason.²¹ The result, he argues, is that people no longer have access to a shared impersonal standard of conduct.²² This Article contends otherwise. Not only does Kant succeed in grounding morality in reason, but also that the common law represents to the people and holds the people to a standard of reasonableness in their conduct, one that Kant categorizes under “private Right,”²³ and one that implies agent-neutrality or profession-transcendent mutualism, as shown in *Tarasoff*.²⁴

MacIntyre’s ordinary (ancient) Athenians, unlike ordinary (contemporary) Americans, aim through citizenship at an explicit way of living characterized

²⁰ MACINTYRE, VIRTUE *supra* at 69. Cf. MACINTYRE, ANIMALS *supra* at 132 (conceding not on moral grounds, but, pragmatically, that public security is “a good without which none of us in our various local communities could achieve our common goods”).

²¹ *Id.* at 43 (arguing that Kant’s (alleged) failure enables Kierkegaard and Nietzsche to do away with the telos).

²² *Id.* at ix.

²³ See generally KANT, DOCTRINE OF RIGHT *supra*.

²⁴ *Tarasoff*, 17 Cal. 3d 425.

by doing what is fine and noble.²⁵ Contemporary Americans, by way of the restitutive and corrective institutions, are implicitly committed, and, in accordance with the regulative judgments of juries, explicitly bound to a specific kind and way of willing.²⁶ That criteria entails a sort of personhood, an habitual state of will,²⁷ which requires qualitatively more in terms of one's form of life than critics of modernity admit.²⁸ In Athens, the validity of one's character was determined by whether one met the internal standards of one's culturally

²⁵ See generally ARISTOTLE, *NICOMACHEAN ETHICS* (2019).

²⁶ Zipursky *supra*. For Kant, freedom is only accessible through respect for an interpersonal system of rights and duties. To will, in part, is to be bound in this sense to fellow members of our species. The form of the will then is shaped by an a priori reciprocity, limiting its action to a state of the will that presupposes some degree of respect and concern for all members of the relevant communities. See generally CHRISTINE KORSGAARD, *CREATING THE KINGDOM OF ENDS* (1996). A priori reciprocity is characterized in deontic terms by the correlativity of obligations between persons in the relevant communities. Under the common law, those relations are represented through the concept of liability and through the presuppositions of personality. See generally Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 *THEORETICAL INQ. L.* 107 (2001) [hereinafter Weinrib, *Correlativity*].

²⁷ Thompson *supra* at 350.

²⁸ The maintenance of a mentality of mutualism and the practices which flow from it are qualitatively more demanding than the constant variable of criterionless self-interest that MacIntyre finds in emotivism and Sandel points to in the unencumbered self.

predetermined personas, whether one embodied the qualities necessitated by each of the social roles.²⁹ In America, the validity of one's character is determined by whether one's personhood takes on a certain principle-based form, whether mutuality and moderation sufficiently shape the animating reason that organizes one's person,³⁰ one's habitual state of will, as manifested by and through its freely chosen social roles and through their integration. In other words, Kantian freedom prizes independence through interdependence, self-sufficiency through community.³¹ Right-communitarians are not known to have grappled with the socio-legal reality of this

²⁹ MACINTYRE, *VIRTUE supra* at Chapter 11.

³⁰ Zipursky, *Reasonableness, supra* (arguing that "reasonableness" is measured, at least in negligence law, in terms of mutuality which is normative for a "a kind of person" and that person's use of moderation which is normative for "ordinary care").

³¹ On Engstrom's account, interdependence is implied by independence in the case of humans. "As part of the generic conception of happiness, the original conception of self-sufficiency is itself generic and so distinct from any specific conception an individual person may develop. Self-sufficiency can take a collective form to the extent that persons join their wills, entering into communities and other cooperative engagements, and it will have an essentially collective dimension where, as in the human case, persons are naturally sociable and born into families." ENGSTROM *supra* at 89-90.

dynamic, let alone its ground in moral philosophy.³² Instead, a right-communitarian vision is trained on the individual's capacity to choose for oneself what sort of roles to fill.³³ Right-communitarians see in this choice-making:

(a) the false god of modernity: the sovereign will of desire,

(b) a social and governing order configured around it: consumerism and technocracy, and

³² This is evident in attacks on secularism and self-interest as representative standards of modernity rather than mutuality and ordinary care. MacIntyre, himself, warns in a later work that “necessary and important public goods [like protection from external aggression and from internal criminality] must not be confused with the type of common good for which communal recognition is required by the virtues of acknowledged dependence.” MACINTYRE, *ANIMALS*, 132-133. Yet, as explicated in this Article, a coherent system of right—a public good—is a macro-level structure that instantiates and reinforces mutualism-based practical rationality—an individual and common good—the practice of which flows from coordinate competence in both independence and acknowledged dependence.

³³ Right-communitarian obsessions with gender-identity, for instance, are best understood as based on emotional investment in preconfigured social roles and identification with the irreducibly particular standards in each. A general standard of reasonableness, inherent in the character of the reasonable person, self-instantiating (formally, at least) in all roles, is seen as a threat to a sacred social order and the dignity preserved by irreducible norms. This Article leaves it here unaddressed whether reasonableness (in personality and care) can ground norms across roles.

(c) a new form of warfare: commodification of the sacred.

Right-communitarians tend to believe that (a) justifies religious fundamentalism, (b) justifies overriding the legal system, and (c) justifies culture wars by all means of dissimulation. However, (b) and (c) do not get off the ground because (a) is incorrect. Choice-making, if it is to be free in the Kantian sense, must be guided ultimately by obligatory ends,³⁴ if not in content, then in the form of a natural system of sustainability.³⁵ The valid will, which Kant regards as a purpose of reason, act(ualize)s in characteristic ways, none of which derive from a lower conception

³⁴ See generally Henry Allison, *Kant's Doctrine of Obligatory Ends*, 1 ANNOTATED REVIEW OF LAW AND ETHICS 7-23 (1993).

³⁵ "Where the enjoyments of these agreeable objects are based in instinct we can discover through experience that they have a natural limit whereby they stand to one another in relations of mutual furtherance as elements of a natural system of human animal life (cf. *KU* 430). But not all enjoyments have this natural systematic connection, as is revealed by addictions, the appetite for luxuries, and especially by the passions (*Leidenschaften*), whose objects are always intrinsically bad and so cannot be included as elements in any system at all. Obviously an appreciation of this natural system and the capacity to distinguish between what does and what does not belong to it are among the chief requisites of the prudent exercise of the power of practical judgment (cf. *G* 395–396)." ENGSTROM *supra* at 78 n.10.

of desire.³⁶ Contrary to a central communitarian criticism, the will cannot be determined by desire in the sense of whim or appetite. The will is, as it were, a *technē* of the *telos*.³⁷

³⁶ Sensible desire is not absent from the will. It functions as its material cause. However, in the valid will, sensible desire registers as a proposal, not a determination. In order for a sensible desire to effectuate action rather than compulsion, it must be judged, on balance, that its object(ive)(s) is sustainable within a natural system of practical goods. In that way the more sustainable desires are acted upon and reinforce one another, making the valid will itself more sustainable. Kant refers to this configuration as “reason’s fortitude” and its ground the “*higher* power of desire.” IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* 37 / §25 (2002). *See also* KANT, *DOCTRINE OF RIGHT* *supra* at 41 / §231 (referring to its form as “sense-free inclination” or sense-free habitual desire). *See also* ENGSTROM *supra* at 94 (augmenting rational animality with “animate rationality”). MacIntyre also writes along these lines. “To have learned how to stand back in some measure from our present desires, so as to be able to evaluate them, is a necessary condition for engaging in sound reasoning about our reasons for action.” MACINTYRE, *ANIMALS* 72.

³⁷ In the *Groundwork* Kant says, “*Teleology* considers nature as a kingdom of ends, *morals* considers a possible kingdom of ends as a kingdom of nature.” IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS*, 4:437 n.* (2009) [hereinafter KANT, *GROUNDWORK*]. A label sometimes attached to this sort of second-nature framework is “naturalized platonism.” JOHN MCDOWELL, *MIND AND WORLD* 91 (1994). For a caution against taking second nature as the location of conceptual space, rather than as providing access to conceptual space, *see generally* Henry E. Allison, Professor, Univ. of Cal., San Diego, Presidential Address at the Pacific Division Meeting of The American Philosophical Association: We Can Only Act Under the Idea of Freedom (Mar. 28, 1997).

III. THE FORM OF THE WILL³⁸

The will must be understood at the intersection of the following:

- (1) Anthropological facts,
- (2) Sociological facts,
- (3) Physical facts, and
- (4) Psychological facts.³⁹

Respectively, the will is grounded in (1) humanity and (4) reciprocity,⁴⁰ but its exercise presupposes (2) contextuality and (3) practicality.⁴¹

For these reasons the will cannot even be represented

³⁸ “In identifying the will with practical reason, Kant reverses the order of concepts in the traditional Scholastic conception of the will as rational desire, reconceiving the will as desiderative reason.” See ENGSTROM, *supra* 25.

³⁹ ‘Psychological’ in this sense is “de-psychologized” in that it deals directly with the necessities of the practical world. See STANLEY CAVELL, *MUST WE MEAN WHAT WE SAY?* 91 (2002) (arguing that Wittgenstein is taking the psychologizing out of psychology in *Philosophical Investigations*, like Frege takes it out of logic and Kant takes it out of knowledge). See also generally Weinrib, *Correlativity*.

⁴⁰ The sense of ‘reciprocity’ here is not strategic, but a matter of inter-personality. See generally KORSGAARD *supra*.

⁴¹ In reading Kant, within “a system of duties of Right,” he likely would classify (1) and (4) as primarily relating to “internal duties” or “rightful honor,” (2) and (3) as primarily relating to “external duties” or not-wronging-anyone, and (5 (below)) as “the derivation of the latter from the principle of the former by subsumption.” KANT, *GROUNDWORK* at 62 / 236, 237. For a similar account see generally Ernest J. Weinrib, *Poverty and Property in Kant’s System of Rights*, 78 NOTRE DAME L. REV. 795 (2003) [hereinafter Weinrib, *Poverty*].

by an individual in isolation from: (1) the species-specific activities through which people flourish,⁴² or (4) the rightful intersubjective dynamic through which people grasp certain obligations that, in part, shape it.⁴³ The will cannot be instantiated by an individual in isolation from: (2) the social practices through which people engage in those activities, or (3) the causal laws through which people make empirical judgments of desirability (worthiness) based on how the object(ive) serves the sustainability of a flourishing state and its prerequisites.

Right-communitarian scholars like MacIntyre miss this dynamic, as do left-communitarian scholars like Michael Sandel. For instance, Sandel imagines the Kantian self as radically detached from community,⁴⁴ but this simply is not the case. If one cannot even operate one's will validly without integrating rightful intersubjectivity *per se* into one's

⁴² For a full account of Kantian flourishing, see Lara Denis, *A Kantian Conception of Human Flourishing*, in *PERFECTING VIRTUE: NEW ESSAYS ON KANTIAN ETHICS AND VIRTUE ETHICS* 164-193 (Lawrence Jost, Julian Wuerth, eds., 2011).

⁴³ See generally Weinrib, *Correlativity*.

⁴⁴ See generally MICHAEL SANDEL, *DEMOCRACY'S DISCONTENTS* (1996).

self and orientation to the practical world, then one is obviously bound in some sense to a community of some sort.⁴⁵ Likewise, MacIntyre writes that Kant thinks reason “discerns no essential natures and no teleological features in the objective universe available for study by physics.”⁴⁶ However, willing has a teleological form in the objective universe. That form is the purpose of natural justice. Respect for right implies a rightful condition in the objective universe. No representation of action can rightfully function until its (spatiotemporal) practicality is incorporated in the determination of its choiceworthiness.⁴⁷ What matters is not only

⁴⁵ “The formal *I* is ‘apperception as a capacity’ (A 117n) and as such is prior to every actual *I*, being the identical form of discursive knowledge, the common ground that unites all thinking subjects in an *original* community of knowers and makes possible their a priori recognition that thought and knowledge are universally communicable.” Stephen Engstrom, *Unity of Apperception*, 26 STUDY KANTIANI 53 (2013) [hereinafter Engstrom, *Unity*]. Minimally, then, one operates within the rights and obligations of the local members of the original community. Those obligations include, if it is not already in place, bringing about the civil condition, and, therefore, binding to the community of citizenship. See generally Weinrib, *Poverty*.

⁴⁶ MACINTYRE, VIRTUE *supra* at 54.

⁴⁷ “In [practical] judgment, therefore, the action is implicitly regarded as rationally supported, as falling under the heading ‘what ought to be.’” ENGSTROM at 50. To complete such action creates a unity

whether the representation of action, if effectuated, will produce the intended object(ive)—a matter for judgment through the sensible forms of space and time—but also, since one’s body is the immediate object,⁴⁸ whether one’s body itself is capable of performing the represented action in a sufficiently sustainable manner.⁴⁹ It matters, further, whether the end is jointly practical alongside other ends or whether it will detract from the system of mutually supporting worthwhile ends.⁵⁰ This finding will

between an object as one of practical judgment—what ought to be—and as one of theoretical judgment—what is—which belongs to the objective universe.

⁴⁸ “Kant broke new ground here...The subjective correlate of matter (or [law] since the two are the same) is the *understanding*...Consequently, all intuition is [also] intellectual...[Human] bodies are the *immediate objects* of the subject: they mediate the intuition of all other objects. The changes that every animal body experiences are cognized immediately, that is, they are sensed; and insofar as this [sensible receptivity] is referred back to its [operative determinant(s)], the intuition arises of this [law] as an *object*. This referring...is not voluntary...It is...the *pure understanding*.” See ARTHUR SCHOPENHAUER, *THE WORLD AS WILL AND REPRESENTATION* 32-33 (2010).

⁴⁹ The body’s activity is constrained by its natural limit. ENGSTROM *supra* 78 n.10.

⁵⁰ Sufficient sustainability in the practical object(ive)s that constitute one’s system of ends is often a matter of physics (as in the probability that an object of practical judgment becomes and remains an object of theoretical judgment). “I should be able to envisage both nearer and more distant futures and to attach probabilities, even if only in a rough and ready way, to the future results of acting in one way rather than another.” MACINTYRE, *ANIMALS supra* 75.

depend on the spatiotemporal properties of the object(ive), which will rely on judgments made of the object(ive) through the sensibilities of space and time.⁵¹ Contra MacIntyre's critique, Kant's reason

⁵¹ Kant shifts the burden back on empiricist accounts like MacIntyre's which he would accuse of circularity. HENRY ALLISON, KANT'S TRANSCENDENTAL IDEALISM 101 (2004).

This circularity becomes evident when the empiricist account is framed consistently in spacial terms. For it is then apparent that the representation of space cannot be derived either from a prior awareness of things as outside me (my body) or from the perception of things as external to one another, because the thought of either relation presupposes the representation of space. In the case of time, the parallel claim is that the awareness of the relations of simultaneity and succession presuppose the representation of time (A30/B46). Accordingly, the attempt to account for the origin of our representations of space and time in these ways may be dismissed as inherently question begging. In endeavoring to describe the experience through which the mind acquires these representations, the empiricist tacitly assumes that the mind already has them. *Id.* Cf. Tim Maudlin, *Remarks on the Passing of Time*, 102 PROC. ARISTOTELIAN SOC. 259-274 (2002) (defending the common sense notion of the passage of time through an asymmetry between space and time, but granting, as Allison would suggest he must, that the very conception of time's rate is an a priori necessity of permanence). Cf. IMMANUEL KANT, CRITIQUE OF PURE REASON 149-150 (1922) (arguing that no change touches time, but that time can only be conceived in relation to permanence, that the concept of permanence "expresses time as the constant correlative of all existence of phenomena, of all change and concomitancy"). In addition to "time" in (3) the temporality sense, "time" in (2) the social practice sense is part of the determination of the valid exercise of the will. "How we structure our understanding of the future depends in part of course on the established uses of clocks, calendars, and modes of scheduling of the culture." MACINTYRE, ANIMALS *supra* at 74.

deals with configurations of the objective universe accessible to physics.⁵²

IV. PRIVATE RIGHT AND THE COMMON LAW

If any of the two factors that ground the will ((1) and (4)) or the two that determine its exercise ((2) and (3)) were absent, then we would not be able to access and act from our rational nature.⁵³ The tip of the communitarian's spear is the proposition that in modern times we are unnaturally detached from one another and from ourselves.⁵⁴ However, if we can locate institutions with the reach, the pull, and the intelligibility to bind us to one another in our rational nature, then living well in America is not an accident, but a formal standard socio-legally prescribed, the

⁵² MacIntyre relies on the two-world reading of Kant. For an account of the two-aspect reading as the correct reading, see ALLISON *supra* at 3-7, 16.

⁵³ Kant identifies the ground of the will—humanity (in one's person and others')—with rational nature. ENGSTROM *supra* at 93 n.23, 153. While respect for humanity in one's person and others' is sufficient for standing in rational nature, one cannot act from it without the ordinary care found in and through practices that honor the "natural limit...of a natural system of human animal life." *Id.* at 78 n.10.

⁵⁴ See generally Sandel *supra*.

content of which is left to the individual. Thankfully, Benjamin C. Zipursky uncovers in his analysis of ‘reasonableness’ cognates in the American legal system that our domain of private right implicates a principle that functions in just that way. It issues a demand for “a certain kind of person”⁵⁵ and the use of “moderate care.”⁵⁶

Understood through our framework here, private right necessitates a certain ground of the will and a certain manner of its exercise. One’s will must be grounded in mutuality and its exercise must be undertaken in moderation.⁵⁷ The grounding combines (1) and (4): anthropology regarding what people in fact do and psychology regarding the personality through which people in fact do it.⁵⁸ The manner of exercise combines (2) and (3): sociology regarding the social practices in which we in fact participate and physics regarding the spatiotemporal-format judgments people in fact make.⁵⁹ Grounding

⁵⁵ Zipursky, *Reasonableness*, *supra* at 2156, 2161, 2164, 2168.

⁵⁶ *Id.* at 2169.

⁵⁷ See ENGSTROM *supra* at 141-145.

⁵⁸ *Id.*

⁵⁹ *Id.*

factors (1) and (4) necessitate that the will can only be accessed through a state that respects rightful intersubjectivity.⁶⁰ Stephen Engstrom labels this ground of the will its “subjective universal validity.”⁶¹ Weinrib refers to its correlate in private law primarily as “bipolarity”⁶² and Zipursky calls it “mutuality.”⁶³ This Article splits the difference with rightful intersubjectivity.⁶⁴ Terminologically, then, a

⁶⁰ See generally ENGSTROM *supra*. See also generally Weinrib, *Correlativity*, *supra*.

⁶¹ See generally ENGSTROM *supra*.

⁶² See generally Weinrib, *Correlativity*, *supra*.

⁶³ See generally Zipursky *supra*.

⁶⁴ Habermas puts this dynamic in poignant terminology as the interpersonal relation between ego and alter where persons are engaged in non-strategic reciprocity. See generally JURGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* (1985). Liability can be understood as the whole-making process that results when defendant’s person is not oriented to the practical world in a way that overrides infantile desires which presuppose ego/other interpersonality and the behavior springing from the non-overriding orientation causes harm to plaintiff. “Here one danger is that those who have failed to become sufficiently detached from their own immediate desires, for whom desire for their and the good has not become to a sufficient degree overriding, are unlikely to recognize this fact about themselves.” See MACINTYRE, *ANIMALS supra* at 72. Note that ego/alter interpersonality is not a matter of psychological enmeshment or unhealthy boundaries but a re-cognition of the equal reality of all people and their membership in the original community of knowers. See generally Engstrom, *Unity*. The cause of the inability to differentiate enmeshment from recognition of the common epistemic ground “often enough is some unacknowledged form of infantile desire, a type of desire that has been protected from evaluative criticism.” See MACINTYRE, *ANIMALS supra* at 72-73.

“will” aimed at ends that only respect one’s own interests and not human dignity⁶⁵ is not a will at all, but instead a compulsion, a pathology.⁶⁶ The critique of modernity that its occupants worship the individual will is conceptually confused. It usually has roots in Nietzsche’s “will” to power,⁶⁷ but

⁶⁵ Nagel marks this difference as that between acting on what one wants and what anyone would want from that perspective were the person thinking rationally. *See generally* THOMAS NAGEL, *THE POSSIBILITY OF ALTRUISM* (1979). Dworkin accounts for it by unpacking self-respect as respect for the value of life which is a first-personal capacity viewable in third-personal space, simultaneously belonging to oneself and to everyone. Dignity is respect for life in its objectivity and authenticity. *See generally* DWORKIN *supra*. Kant grounds the strictly juridical obligation to be an honorable man in “the [ethico-juridical] Right of humanity in our own person.” *See* KANT, *DOCTRINE OF RIGHT supra* at 62 / 236. Something Zipursky and Weinrib pick up on is that because honorableness derives from the seed of humanity within the person, the common law distinguishes honorableness according to external standards and honorableness according to the intersubjective standard of humanity within the person. For a different account of honor *see, e.g.*, Zena Hitz, *Aristotle on Law and Moral Education*, in 42 *OXFORD STUDIES IN ANCIENT PHILOSOPHY*, 263-306 (Brad Inwood, ed., 2012).

⁶⁶ Much commentary on Kant draws a sharp distinction between inclination and duty, as if Kant thought inclination were bad. He actually thought it was problematic, which is different. In his conception of the highest good, disciplined reason inclines us to virtue and the rightful condition of our world rewards its actualization with an equal measure of happiness. This conception is certainly utopian, but the highest good of the individual is normative, not utopian. There the focal point is inclination determined by reason, the actualization of which will, by definition, be virtue and, *qua* inclination-satisfaction, result in happiness. For an explanation of the more nuanced line between inclination and duty *see* H. J. Patton, *Introduction to KANT, GROUNDWORK*.

⁶⁷ *See generally* FRIEDRICH NIETZSCHE, *THE WILL TO POWER* (1968).

insofar as that “will” is the same in content as Schopenhauer’s,⁶⁸ it is not a valid will at all.⁶⁹ It is pathological. So while (1) and (4)—rightful intersubjective human activity⁷⁰—ground the will, provide its final (human) and formal (interpersonal) settings, (2) and (3) effectuate the will, instantiate its material (social) and efficient (spatiotemporal) play or object(ive)(s). The validity of the content of (2) and (3) depends on the extent to which they sufficiently perpetuate (1) and (4).⁷¹ That is, the

⁶⁸ “The sincere man feels that his activity...can only be explained by the laws of a different and a higher life...[H]e will have a burning desire to become a ‘Schopenhauer man.’” Friedrich Nietzsche, *Schopenhauer as Educator*, Chapter 4 (1873).

⁶⁹ Schopenhauer’s world-will, which he sought to deny but Nietzsche elevates to a normative level, has no ground in Right as it does in Kant. In fact, it has no ground at all. “Everywhere, a ground can only be given for appearances as such, for particular things, never for the will itself or for the Idea in which it is adequately objectified.” *Id* at 187 (arguing that the will simply *is* in the same way electricity is). What Schopenhauer rejects and Nietzsche affirms, Kant coordinates with a ground in mutuality and a direction in prudence. See ENGSTROM *supra* 141-145. What burns in Schopenhauer and freezes in Nietzsche, flows in Kant.

⁷⁰ “Such cooperative activities presuppose some degree of shared understanding of present and future possibilities.” See MACINTYRE, ANIMALS 74. For the difference between action and activity see ERIC MARCUS, RATIONAL CAUSATION Chapter 2 (2012).

⁷¹ In terms of property regimes, (1) and (4) represent the universal internal right of self-possession and its rightful sustainment through space and time which extends to objects one is using; and (2) and (3) concern the mediate extension of right to objects not under one’s

goodness of the play or object(ive)(s) is determined by how well it fixes the rightful intersubjectivity of human activity.

In line with Zipursky, we can see how moderation in the choice of one's conduct and the manner(s) of its instance(s) would be necessitated by the requirement to sustain a state of rightful intersubjectivity. If mutuality is to endure, if one is to will (validly), then one's play or object(ive) must be securely fastened within a system of what Engstrom calls "jointly practicable goods."⁷² Twenty-hour work-days for the sake of the common good might be endurable, but would hardly be sustainable. Conversely, sole ownership and physical control of a community's water supply might be sustainable, but if the water is not allowed to flow freely, the state of rightful intersubjectivity will not

immediate control. The former conceptually implies the latter, but must be limited to prevent wealth concentration that forecloses fair terms of extension from the former to the latter. This obligatory limitation is the conceptual cause of (5) public right. *See generally* Weinrib, *Poverty*. For a different view of Kant's theory of property *see generally* ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* (2009), *but see generally* Stephen Darwall, *Forcing Freedom*, 19 LEG. 89 (2013).

⁷² *See* ENGSTROM *supra* at 68.

endure.⁷³ Kant advises in his Lectures on Pedagogy that “*Sustine et abstine* [(to sustain and endure)] is the preparation for wise moderation.”⁷⁴ One might put it as the fundamental intention,⁷⁵ that to will validly and to live well, endure and

⁷³This principle is even apparent in the doctrine of right-libertarian, Robert Nozick—the Lockean Proviso—that property is constructively dispossessed when ownership cuts into the common good. See, ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 175 (1974). Left-libertarian, Roderick Long argues that Kant attempts a synthesis of Rousseauvian and Hobbesian political philosophy, but his Hobbesian conception of the state undermines the equal freedom of rightful intersubjectivity in that Kant allows the chief legal official to have more freedom than legal subjects. There are some legal systems in which that would surely be the case. Even in American Constitutional Law, under the “Unitary Executive” theory, the Commander-in-Chief embodies the totality of the executive. That theory is widely regarded as a myth, but it does bring a crucial distinction to the fore. While Kant does view the chief legal official as beyond private right, he does not view that official as necessarily beyond legal practice, just common law. In fact, in certain legal systems the chief officials are beyond private right precisely in the sense that they are held to a much *higher* standard of conduct and examined under much stricter scrutiny. In the American Constitutional system, the President can be impeached and removed (to the coordinate relation with legal subjects) by the (legislative) representative of the general united will for conduct that would not be actionable under private right. Note also that should the chiefs wish to exercise their will, rather than be driven thoughtlessly by compulsion, they must act *as if* they were in an ordinary state of rightful intersubjectivity with their subjects. See generally Roderick T. Long, *Kant’s Hobbesian Side*, CATO UNBOUND (Nov. 3, 2016), <https://www.cato-unbound.org/2016/11/03/roderick-t-long/kants-hobbesian-side>. See generally Cass R. Sunstein, *The Myth of the Unitary Executive*, 7 ADMIN. L. J. AM. U. 299 (1993).

⁷⁴IMMANUEL KANT, *ANTHROPOLOGY, HISTORY, AND EDUCATION*, Chapter 17 / 9:486 (2013) [hereinafter KANT, *ANTHROPOLOGY*].

⁷⁵For an account of maxims as fundamental intentions, see generally Onora O’Neill, *I. Kant After Virtue* 26 INQUIRY 387-405 (Aug. 29, 2008).

sustain rightful intersubjectivity through wise moderation.⁷⁶ With Zipursky's research into reasonableness cognates as background, this maxim is perpetually represented by private right, by the common law, and, through the modern state, which secures the equal enforcement of our liability regime, by public right.⁷⁷ All four presuppositions of the will are matters of private right. Thus, (1) and (4) refer to the private right of inner nature and (2) and (3) to the private right of outer nature. Those sets of facts should now be visible as normative⁷⁸ for generic access to and instantiation of public right and private law: (5) A public legal system through which a population becomes a generic State of intersubjectivity (to coordinate the

⁷⁶ Some kinds of moderation are on the negative side of reasonable prudence or ordinary care. "Positively, prudence enjoins one to make the will's conformity to theoretical cognizability complete and necessary, so far as is possible, through making it one's end to ensure that the totality of the contents of one's wishes as well as choices remain within the bounds of theoretical knowability." ENGSTROM at 144. Securing ongoing cognizability is accomplishable by moderating desire but also by the prudential development of natural capacities. In his lectures on education, Kant discusses "wise moderation." KANT, ANTHROPOLOGY *supra* at, 474 / 9:486. This Article's use of "moderation" leaves variable whether the moderation is negative, positive, and/or wise in a way that incorporates the prudential development of natural capacities. *Id.*

⁷⁷ See *supra* note 71.

⁷⁸ For a detailed account of how legal norms can derive solely from facts and independently of value, see generally Ram Neta, *On the Normative Significance of Brute Facts*, 10 LEG. 199 (2004).

coherence between both dimensions of private right).

One may leave aside pragmatic considerations about the benefits of a (third-personal) state of intersubjectivity (public right) within a (first- and second-personal) state of intersubjectivity⁷⁹ (private right). That is, whether a (third-personal) state is, in strictly consequentialist terms, the best configuration to reinforce the other (first- and second-personal) state.⁸⁰ The issue is rather, in deontic terms, whether a (third-personal) state is a legitimate configuration for the sake of the other (first- and second-personal) state.⁸¹ Kant argues that the two dimensions of

⁷⁹ See generally Stephen Darwall, *Law and the Second-Person Standpoint*, 40 LOY. L. A. L. REV. 891 (2007).

⁸⁰ For Darwall, in non-consequentialist terms, caring is a third-personal matter. One-caring, most interestingly, is third-personal intersubjective in that it pertains to how one rationally cares for someone, including oneself. See generally Stephen Darwall, *Empathy, Sympathy, Care*, PHIL. STUD. (1997). By implication it also pertains to how someone would care for themselves, according to variable standards of rationality. This principle, along with the right to coerce out of self-defense implied by private right, helps justify the distance between actual consent to a State and the often hypothetical consent used to justify a State. See also generally Sibyl A. Schwarzenbach, *On Civic Friendship*, 107 ETHICS 97-128 (1996).

⁸¹ The question is whether ensuring-that-inner-right-and-outer-right-cohere is a rational basis for a third-personal state to contain the acquisition of outer right when unfettered access cuts into the

private right (first-personal conduct and second-personal acquisition) imply “an authorization to use coercion.”⁸² Because the rightful condition confers equal freedom to everyone, people are bound to forestall the forestalling of equal freedom.⁸³ People are bound to bind the intersubjectivity implied by inner private right with the moderation of outer private right, not to control people, but to preempt the illegitimate exercise of control.⁸⁴ Therefore, the recognition, endurance, and sustainment of a (third-personal) state of intersubjectivity to endure and sustain (first- and second-personal) states is a duty within private right, one that gives rise to private law. Attempts to sever that duty from private right are often barbaric, whether done by storming the seat of democracy or voting (as a congressman on a bill or a citizen for a representative) in bad faith.⁸⁵

common good. For a similar discussion *see generally* Weinrib, *Poverty*.

⁸² KANT, *DOCTRINE OF RIGHT* *supra* at 57/231.

⁸³ Kant calls it “hindering a hindrance to freedom.” *Id.*

⁸⁴ *Id.*

⁸⁵ It may seem that this reasoning begs the question. What if the government itself is what chips away at the coherence between both dimensions of private right? It certainly depends on the situation, but

V. KANT AND ARISTOTLE

Kelvin Knight writes that MacIntyre was wrong in *After Virtue* to claim that Kant failed,⁸⁶ but only wrong on political grounds, not moral grounds. Knight corrects MacIntyre's disjunctive imperative that people choose "Nietzsche or Aristotle."⁸⁷ Knight argues that the choice is Aristotle or Kant.⁸⁸ However, not because Nietzsche never lays a glove on the profound nature of Kant's concept of the will, instead engaging it primarily through Schopenhauer, who he read "as Educator,"⁸⁹ but because Kantian freedom is the anthem of most democratic nation-states across the world.⁹⁰ Yet, for the Kantian will

as in the most relevant case when the very courts of private right rule that the government has properly upheld the coherence, violence against that government is violence against private right.

⁸⁶ "[Kant's] individualist ideal of a kingdom of ends actualized historically through the progressive and intentional institutionalization of law seems, after all, to have survived Nietzschean critique." See Kelvin Knight, "If my thesis is correct, Kant was right": Revisiting Kant's Role within MacIntyre's Critique of the Enlightenment Project, 16 DISPUTATIO PHILOSOPHICA 185 (2014).

⁸⁷ MACINTYRE, VIRTUE *supra* at Chapter 9.

⁸⁸ Knight *supra* at 185.

⁸⁹ "There could be no deeper furrow than that which [Schopenhauer] was ploughing in the ground of the modern world." See generally Friedrich Nietzsche, *Schopenhauer as Educator*, Chapter 3 (1874).

⁹⁰ See generally Knight *supra*.

even to be operable, it presupposes binding by anthropological and psychological facts that enable people to thrive (inner private right).⁹¹ That sets a high bar before one can even consider whether a will is “free[ly instantiable],” because the relevant kind of freedom is bound by social practices and spatiotemporal judgments of sustainability (outer private right). While Knight concedes that *After Virtue* is unfair to Kant,⁹² he asserts that “Kant or Aristotle” is the true disjunctive imperative, though as a matter of virtue ethics versus “states, their personnel, and lawyers.”⁹³ In effect, Knight partially corrects a mistake,⁹⁴ but qualifies the partial

⁹¹ See *supra* note 1.

⁹² *Id.*

⁹³ Knight considers the spread of Kantian freedom, instantiated through “individualism’s institutional universalization and globalization” (*id.*) to be a manifestation of “will”-to-power at an institutional level. That is a conceptual confusion. Kantian individuals are bound by rightful intersubjectivity through duty, not strategy. The accumulation of power is incidental to the object(ive)(s). The principle is that Right-makes-might, not vice versa.

⁹⁴ For a thorough account of how MacIntyre misunderstands the Categorical Imperative (CI), see generally O’Neill *supra*. O’Neill’s piece is constructive. A deconstructive take might be equally effective. MacIntyre believes he can craft maxims that show the ineptitude of the moral law. For instance, he says, “I can without any inconsistency whatsoever flout it: ‘Let everyone except me be treated

correction with another mistake. In truth, Kant and Aristotle is a live option.⁹⁵

The two dimensions of private right which comprise the presuppositions of valid willing are likewise presupposed by public right. To say that Kantian freedom is merely about States, their personnel, and lawyers is to miss that Kant's modern version of virtue ethics is grounded in both

as a means' may be immoral, but it is not inconsistent." MACINTYRE, *VIRTUE supra* at 46. He argues that this maxim fits the law because it can be willed consistently. However, it can only be behaved upon consistently in the same sense that plants behave in certain ways under certain conditions. The maxim's predicate regarding treatment cannot get off the ground since its subject denies rightful intersubjectivity. In the language of Engstrom's explication of the CI, MacIntyre may reach objective universal validity (though even that is doubtful since a universe of egoists is likely unsustainable), but he certainly does not achieve subjective universal validity since "everyone except me" does away with subjective universality. *Id.* The mere fact that each subject would say the same words to themselves is unimportant. The reference of those words would always contradict, doing away with the pretense to principle. MacIntyre's maxim that allows religious persecution violates private right. It is therefore a compulsive behavior, not a will. MacIntyre proposes an exception to promise-keeping. *Id.* However, that would also be a compulsive behavior since one cannot will "to miscommunicate one's will" without contradiction. *See* ENGSTROM *supra* at 201. Lastly, MacIntyre suggests a certain dish for dinner once a week as a maxim. *Id.* Maxims, though, are principles of action, not particulars. They attune one to a practico-cognitive radar. They do not set the coordinates.

⁹⁵ For an account of the convergence between Aristotelian living (well) and Kantian (good) willing, *see* JOHN MCDOWELL, *THE ENGAGED INTELLECT*, Chapter 3 (1996).

dimensions of private right.⁹⁶ Lawyers, in their purely juridical and ethico-juridical capacities,⁹⁷ can be simultaneously instruments for that ground and well-stationed, as ends in themselves, to respect right and realize virtue.⁹⁸ In the modern world, lawyers are to be professional endurers of intersubjectivity and sustainers of the wise moderation characteristic of the rightful condition through which virtue act(ualize)s.⁹⁹ Knight complains that States, their personnel, and lawyers are the “real enactors” of Kantian freedom.¹⁰⁰ However, it should be clear that (third-personal) states of intersubjectivity strengthen the bonds of private right so that ordinary (first- and

⁹⁶ “For Kant offers us primarily an ethic of virtue rather than of rules and he does not see human reason as merely calculative.” See O’Neill *supra* at 404 (arguing that Kant’s practical philosophy anticipates and overcomes the fragmentation brought about by the scientific revolution).

⁹⁷ See *supra* note 3.

⁹⁸ They may be well-stationed, if not always predisposed to it. “But this is not and never has been about whether it feels difficult or is difficult to be a lawyer. It is about whether it is coherent to [require lawyers *qua* lawyers show third-personal respect to bring about third party care].” See Benjamin C. Zipursky, *Loyalty and Disclosure in Legal Ethics*, 65 AM. J. JURIS. 83, 106 (2020).

⁹⁹ In the United States, this object is more attainable in the “five states—Hawaii, New Jersey, Vermont, Virginia, and Wisconsin—[which] actually do impose duties of [mutualism fully on lawyers *qua* lawyers].” *Id.* at 91.

¹⁰⁰ Knight *supra* at 185.

second-personal) states of rightful intersubjectivity can thrive.¹⁰¹ To say the former are the real enactors is like saying that traffic lights are the real drivers.

The common law does not necessitate full virtue; only the individual sets full virtue as a standard through conditioning the will to be fully responsive to the four kinds of normative fact. However, the common law can and does demand respect for right that, in its first aspect, is grounded in the human dignity in each person.¹⁰² As Zipursky explicates from statutes, rulings, and the Constitution, reasonableness is measured in the United States' legal system not only by technical conformity to juridical principles of outer private right (moderation), but also by ethico-juridical principles implied by inner private right (mutuality).¹⁰³ That is,

¹⁰¹ Lawyers *qua* gatekeepers and watchdogs sustain the state, which protects the coherence of the system of right in which they stand not *qua* lawyers but *qua* people. For an account of the gatekeeper / watchdog role and its conceptual relation to the common law *see generally* Zipursky *supra*. For a Kantian account of the state in its role as private right coherence-sustainer *see generally* Weinrib, *Poverty* (2003).

¹⁰² It follows, thus, "...the Right of humanity in our own person." *See* KANT, DOCTRINE OF RIGHT *supra* at 62.

¹⁰³ Zipursky, *Reasonableness*, *supra* at 2156, 2161, 2164, 2168 (unpacking the requirement for a kind of person).

the law is double-sided in that it appeals on the strictly juridical, spatiotemporal side to aversion, but, conceptually, the ethico-juridical ground it stands on in private right is an allurement.¹⁰⁴

The strictly (external) juridical aspect of private right requires a certain way of behaving—a way that mimics reasonable care. The ethico-juridical aspect, the ground of private right, requires a certain way of relating to the practical world—through a reasonable personality.¹⁰⁵ The implications of Zipursky’s research into reasonableness and specifically “moderation-and-mutuality” as “the watchword”¹⁰⁶ in tort law is to show that reasonable care is deontic rather than consequentialist, and that juries, without being instructed in those terms, detect the difference. Otherwise, the standard would have nothing to do with a “kind of person” or “a sense of mutuality.”¹⁰⁷

¹⁰⁴ Cf. KANT, DOCTRINE OF RIGHT *supra* at 46 (writing outside the common law, and so not regarding the aspect of allurement).

¹⁰⁵ See generally Zipursky, *Reasonableness*, *supra*.

¹⁰⁶ *Id.* at 2160-1, 2163-5, 2169.

¹⁰⁷ *Id.*

The foregoing suggests a conceptual cause¹⁰⁸ for the use of reasonableness in the common law. Zipursky's reasoning and findings are less a matter of historical development in the common law and more a matter of the conceptual necessity of combining the two dimensions of private right.¹⁰⁹ As Weinrib says, "Our legal discourse is the discourse of rights, and Kant is the first—perhaps the greatest—modern expositor of the concept of right. In this sense, we are all Kant's children."¹¹⁰

VI. MACINTYREAN CHARACTERS

For Kant, inner private right and outer private right *proceed to* public right as the enforcer of private

¹⁰⁸ See generally Ernest J. Weinrib, *Law as a Kantian Idea of Reason*, 87 COLUM. L. REV. 472 (1987).

¹⁰⁹ The "legislative mandates" he advocates are conceptual consequences of the built-in requirement to keep outer private right in synch with inner private right. See Zipursky, *Loyalty*, *supra* at 107 (concluding that while it may be "tempting to downplay the possibility of correcting dysfunctionalities in our legal system by legislative or regulatory action[.]" reliance on common law concepts "must not be blind").

¹¹⁰ *Id.* at 472.

right's jurisdiction.¹¹¹ For Kant, only in public right does private right confer upon its principles the status of true law.¹¹² Here we can see that in modernity public right plays a role precisely in enduring and sustaining the representation of reasonableness in personhood and reasonableness in care.¹¹³ The State

¹¹¹ A libertarian complaint about Kant's concept of law is that he does not recognize it in private form. He recognizes private right but not private law apart from public right. However, the second aspect of private right concerns the acquisition of external objects, as opposed, as it were, to the internal object of volition, instantiated as the body (the concern of the first aspect of private right). For one's right to specific performance in contract right to be coherent, and for all external objects of volition both to be objects of efficient cause and to be respected as ends in themselves, or as agents that represent what Michael Thompson calls "monadic...laws," one must presuppose the place of a third-personal State within first- and second-personal states of rightful intersubjectivity. See THOMPSON *supra* at 342. This dynamic amounts to what Kant calls "distributive justice." See KANT, DOCTRINE OF RIGHT *supra* at Chapter 3. For Kant, the way to bond the second aspect of private right to the first is to conceive it and public right through the first aspect (inner private right). Kant says we are to derive external duties of private and public right from internal duties of right. For this reason, this Article represents the State as a third-personal form of rightful intersubjectivity. Kant's position is that private right entails public right within it, which entails private law within it. Whether they are instantiated practically, they are all bound by conceptual causation: inner private right needs outer private right which needs to be balanced by public right, which takes the system of private rights out of the state of nature and into law. KANT, DOCTRINE OF RIGHT *supra* at 120-121. See also generally Weinrib, *Poverty*.

¹¹² *Id.*

¹¹³ This does not detract from the role of intermediate institutions in developing moral competence and virtue. It holds those institutions together through the concept of reasonableness as moderation-and-

solidifies the standards; it makes the character of the reasonable person real and lasting.¹¹⁴ The notion of a character is central to this line of thinking:

[Characters] are, so to speak, the moral representatives of their culture and they are so because of the way in which moral and metaphysical ideas and theories assume through them an embodied existence in the social world. *Characters* are the masks worn by moral philosophies. Such theories, such philosophies, do of course enter into social life in numerous ways: most obviously perhaps as explicit ideas in books or sermons or conversations, or as symbolic themes in paintings or plays or dreams. But the distinctive way in which

mutuality. For an account of private right that gives less weight to its normativity for public right, see generally Adam J. MacLeod, *The Possibility of Private Rights and Duties*, 6 FAULKNER L. REV. 65 (2014).

¹¹⁴ The routine use of the reasonable person standard as a regulative ideal over time is solidified to the point of a virtual necessity by public right (not a necessity in that one lacks choice, but a modal necessity, as if an omnilateral agreement, in how one judges conduct and personhood). Private right cannot guarantee its continuity over time with nearly the same strength as public right. In his work on practical knowledge, Engstrom writes, “This aspect of judgments’ self-sustaining nature is everywhere apparent and informs the practices and procedures that mark cognitive activity wherever it becomes scientific or methodical in character; it can be seen, for instance ... in politics and the law it is reflected in the publicity of deliberations in the framing of statutes and in the convention of precedent in their interpretation.” See ENGSTROM *supra* at 112-113.

they inform the lives of *characters* can be illuminated by considering how *characters* merge what usually is thought to belong to the individual man or woman and what is usually thought to belong to social roles. Both individuals and roles can, and do, like *characters*, embody moral beliefs, doctrines and theories, but each does so in its own way.¹¹⁵

For MacIntyre, the standard characters of advanced modernity are *manipulators*: they are the Manager, the Therapist, the Aesthete, the Protester,¹¹⁶ and the Conservative Moralist.¹¹⁷ None operate, according to MacIntyre, in their professional capacity in a way that can properly engage the inherent dignity in each human being.¹¹⁸ None in their professional capacity fully relate to people as ends in themselves, but rather as means to another

¹¹⁵ MACINTYRE, VIRTUE *supra* at 28.

¹¹⁶ MACINTYRE, VIRTUE *supra* at 256.

¹¹⁷ In the prologue to the 2007 edition he adds the Conservative Moralist. See MacIntyre *supra* at xv.

¹¹⁸ For MacIntyre, these characters represent “the obliteration of the distinction between manipulative and nonmanipulative social relations...and] in the sphere of personal life.” MACINTYRE, VIRTUE *supra* at 30.

end.¹¹⁹ The Manager manipulates people in their professional lives to use better technique in their work.¹²⁰ The Therapist manipulates people in their personal lives to use better technique in directing their energy.¹²¹ The Aesthete, the Protester, and Conservative Moralist view and “consume” people as props, as part of their own technique for whatever end.¹²² The use of reasonable care in the strictly juridical sense, consequentialist care, is a matter of technique. However, reasonable care in the ethico-juridical sense, the sense Zipursky shows it is in fact used, deontic care,¹²³ is more than a matter of

¹¹⁹ For an account that defends these features of modernity as inevitable, see generally Barbara Herrnstein Smith, *Judgment after the Fall*, 11 CARDOZO L. REV. 1291 (1990). The Reasonable Person meets her demand for “a closed and static system” without the community itself becoming totally homogenous. *Id.* at 1306. If correct, the Reasonable Person as second-order-character-that-can-organize-the-first-order, through its being static, enables the maximum amount of cultural diversity without the breakdown of rightful intersubjectivity.

¹²⁰ “The manager treats ends as given, as outside his scope.” MACINTYRE *supra*.

¹²¹ “The therapist also treats ends as given, as outside his scope.” *Id.*

¹²² MACINTYRE, VIRTUE *supra* at 24.

¹²³ Use of “deontic care” to refer to a manner of activity or conduct rooted in the conceptual atmosphere of properly bipolar deonticity, rather than that of merely monadic deonticity, which as in this case is only principled in terms of an individual following the counsel of prudence for themselves alone, is consequentialist when seen from

technique. It is a means of sustaining the type of personhood juries look to when determining justification, excuse, or blame. MacIntyre, once more:

In the case of a *character* role and personality fuse in a more specific way than in general; in the case of a *character* the possibilities of action are defined in a more limited way than in general. One of the key differences between cultures is in the extent to which roles are *characters*; but what is specific to each culture is in large and central part what is specific to its stock of *characters*.¹²⁴

The role of the Reasonable Person is not to determine virtue or even the best course of action in a given circumstance, but, like the role of validity in

the rightful intersubjectivity of proper bipolarity. *See generally* Michael Thompson *supra* (arguing Hohfeldian “correlativity” presupposes bipolarity, making correlativity improper grammar since it could equally reference the correlate rights and obligations of monadic logic, suggesting instead that Hohfeldians use Russel’s ‘logical converse’). *Id.* It is worth noting that in *After Virtue* MacIntyre himself, ironically, operates only in monadic deonticity in terms of prudence. For an excellent discussion of how MacIntyre’s practical reason is detached from coherence *see* Onora O’Neill *supra* at 389: “This commits MacIntyre to an open-ended, almost procedural vision of the human telos: ‘the good life for man is the life spent in seeking for the good life for man.’” *Id.*

¹²⁴ MACINTYRE, VIRTUE *supra* at 28.

willing, to lay out the range of sufficiently responsible moves on offer from a practical situation. While that does not itself generate virtue, it does provide a practical radar that keeps virtue in view and only reveals what is consistent with right. It supplies juries with a framework for moral competence agency and the outlines of reasonable prudence or ordinary care.

VII. CHARACTERS WITHIN CHARACTERS

Subversive action taken in the name of right-communitarianism to restore a standard of morality to “the decadent time”¹²⁵ is, for the foregoing reasons, superfluous and even self-defeating. This is not the case, however, where the end is not human excellence but power.^{126, 127} Missouri Senator Josh

¹²⁵ See generally Rod Dreher, *Redeeming the Decadent Time*, LAW AND LIBERTY (Feb. 26, 2021) <https://lawliberty.org/forum/redeeming-the-decadent-time/>.

¹²⁶ Though in Kantian terms, “will”-to-power is always self-defeating since it is not the self that acts, but a physiological compulsion that cancels out the self. “Will”-to-power is self-abandonment.

¹²⁷ Even Ayn Rand, the most fervent of anti-Kantians, regarded this kind of orientation as that of the tribal lone wolf. See generally Ayn Rand, *Selfishness Without a Self*, THE AYN RAND LETTER (June 1973) <https://courses.aynrand.org/works/selfishness-without-a-self/>.

Hawley's provision of frivolous legal cover to the U.S. insurgents in the days leading up to the attempted coup¹²⁸ meant "blood on his hands" in the words of his hometown paper.¹²⁹ On January 6, 2021, photographer Francis Chung captured Hawley with a raised fist in solidarity with the insurgents,¹³⁰ hundreds of whom have been arrested by the Federal Bureau of Investigation.¹³¹ This photograph shows Hawley occupied by the characters of the Protester and the Conservative Moralizer. Interviews with his professors and peers at Stanford University depict a laser-focused mind without use for much

¹²⁸ Philip Bump, *Josh Hawley, Who Tried to Derail Biden's Presidency, Now Champions "Rule of the People,"* WASHINGTON POST, (Feb. 26, 2021)

<https://www.washingtonpost.com/politics/2021/02/26/josh-hawley-who-tried-derail-bidens-presidency-now-champions-rule-people/>.

¹²⁹ Steve Gorman, *Missouri Senator's Home-State Paper: Hawley Has Blood on His Hands,* REUTERS (Jan. 6, 2021)

<https://www.reuters.com/article/us-usa-election-hawley/missouri-senators-home-state-paper-hawley-has-blood-on-his-hands-idUSKBN29C0IU>.

¹³⁰ Katie Bernard, *A Photographer and Fist Pump. The Story Behind the Image That Will Haunt Josh Hawley,* KANSAS CITY STAR (Jan. 7, 2021) <https://www.kansascity.com/news/politics-government/article248354085.html>.

¹³¹ U.S. Attorneys, *Capitol Breach Cases,* United States Department of Justice (last viewed Mar. 16, 2021) <https://www.justice.gov/usao-dc/capitol-breach-cases>.

bandwidth.¹³² He entered as a right-communitarian with big political ambitions and exited unbudged.¹³³ If MacIntyre's estimation of the function of character and its particular stock in modernity is correct, then the fact that Hawley, as a far-right protagonist, and the insurgency as a whole, embody two often opposed characters may account for the reported mental stagnation.¹³⁴

Occupying, or being occupied by, two characters is not a problem so long as one of the characters is the sound practical reasoning in the mutualism-based second-order Reasonable Person. Further, it is normative for modernity to be occupied by the Reasonable Person, especially if one is to be occupied already by a first-order character like Therapist or Manager. In fact, case law reflects

¹³² Ruairí Arrieta-Kenna and Emily Cadei, *The Education of Josh Hawley*, POLITICO MAGAZINE (Jan. 19, 2021)

<https://www.politico.com/news/magazine/2021/01/19/josh-hawley-senator-stanford-history-capitol-insurrection-ambition-460481>.

¹³³ "Another classmate recalls Hawley, who today loudly decries America's increasing ungodliness, talking about a 'communitarian brand of social conservatism'...More recently, the senator has gone on...incorporating anti-secularism into his communitarian politics." *Id.*

¹³⁴ *Id.*

exactly that principle in *Tarasoff v. Regents of the University of California*¹³⁵ and the nation-wide rulings that follow suit. “The majority of American jurisdictions that have considered the *Tarasoff* question as it relates to psychotherapists have ruled similarly, and indeed psychiatrists are taught about their *Tarasoff* in training.”¹³⁶ Tatiana Tarasoff was a young woman and folk dance classmate of the defendant, Prosenjit Poddar, a foreign graduate student who misinterpreted a New Year’s kiss with Tarasoff to signify a romantic commitment.¹³⁷ Poddar, who suffered from paranoid schizoidphrenia, vocalized his intent to murder Tarasoff to his therapist, who had Poddar detained.¹³⁸ Upon seeming rational Poddar was released.¹³⁹ A couple of months later, he carried out the murder of Tarasoff.¹⁴⁰ To that point in time, no court in the United States had held therapists responsible for the

¹³⁵ *Tarasoff supra*.

¹³⁶ Zipursky, *Loyalty, supra* at 96.

¹³⁷ *People v. Prosenjit Poddar*, 16 C. 3d 750, 111 Cal. Rptr. 910, 518 P. 2d 342 (1974).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

protection of third parties.¹⁴¹ The professional ethics of client confidentiality were felt to be legally sufficient. The *Tarassof* Court, however, “was adopting the view that the law of negligence imposes a general and universal duty of care, and it was adopting this view in part because it embraced the existence of such duties from a moral point of view.”¹⁴² The therapists were held liable in spite of their use of consequentialist care which followed industry standards sufficiently. The more fundamental standard of the Reasonable Person’s ordinary care, however, generated a higher duty that supersedes the industry standards.¹⁴³ Self-interested prudence proves defeasible. Mutualist prudence does not.

¹⁴¹ Benjamin A. Swerdlow, *Tracing the Evolution of the Tarassoff Duty in California*, 45 J. SOC. & SOC. WELFARE 27 (2018).

¹⁴² Zipursky, *Loyalty*, *supra* at 96.

¹⁴³ The gold standard for what this Article calls “consequentialist care” in Section IV is the Hand Formula which, according to Zipursky, “has led many scholars and some judges to miss the core idea that negligence aims to capture a rather modest moral principle that each of us owes a duty of ordinary care *to others*.” [emphasis added] See Zipursky, *Reasonableness* 2169 (2015).

VIII. CONCLUSION

This Article began with the assertion that whenever the latest iteration of right-communitarianism—the protestant form, characterized simultaneously by the Protester and the Conservative Moralist—begins to lose, or has lost power, it will wholesale the American legal system. That is, it will disregard and attempt to thwart the role public right plays in coordinating the relation between both dimensions of private right, and therefore will undermine mutualist practical reason and its socio-legal (re)presentation in the second-order character of the Reasonable Person. Barbarism takes root when and where the relationship between the second aspect of private right (ordinary care ((2) and (3))) is disoriented from its ground in the first aspect of private right (rightful intersubjectivity ((1) and (4))). Without the infrastructure of public right, private right is easily subject to disorientation. Violence is what unfolds, even though care or moderation in those instances can be seemingly maintained through non-mutualist self-interest.

Those who would release Poddar on the basis of his rationality, without regard for whether that rationality was grounded in mutuality, can be seen as analogues to far-right representatives who enabled the storming of the Capitol—if the officials had told Poddar that Tarasoff was stealing his honor.

January 6, 2021 continues in that protestant right-communitarians in government chip away at public right.¹⁴⁴ To do otherwise would be out-of-character(s). Since protestant right-communitarianism embodies two conflicting first-order stock characters, the Protester and the Conservative Moralizer, it cannot intelligibly afford to undermine mutualism-based practical rationality. However, if MacIntyre is right, that is exactly what it does and will do.¹⁴⁵ Right-communitarian distrust

¹⁴⁴ See generally Sam Levine, *US Democracy on the Brink: Republicans Wage 'Coordinated Onslaught' on Voting Rights*, THE GUARDIAN (Mar. 28, 2021), <https://www.theguardian.com/us-news/2021/mar/24/democracy-under-attack-america-us-voting-rights-republicans>.

¹⁴⁵ Since first-order characters merge with one's personality, and instantiate only instrumental reason, deliberating about and reasoning through natural ends is further impeded by more first-order characters, forestalling occupation by, or rapport with, the Reasonable Person, which simply amounts to moderation-through-

and protest of expertise as elitist shoves modernity's most unifying character from view. MacIntyre says that modernity lacks a shared impersonal standard. The Reasonable Person is obviously not a person, but it is a real configuration, a socio-legal (re)presentation of practically rational mutualism. It is the standard of reasonableness characteristic of The Noumenal Republic.¹⁴⁶

rightful-intersubjectivity, but first-order characters *qua* characters are not capable of such moderation.

¹⁴⁶ “[T]he normative idea of a republic is not just a utopian dream; it is the *explicit* political implementation of those normative principles that *implicitly* have always provided the basis of the legitimacy of the state.” HEINER BIELEFELDT, SYMBOLIC REPRESENTATION IN KANT’S PRACTICAL PHILOSOPHY 145 (2003).