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B. SHARON BYRD & JOACHIM HRUSCHKA, *KANT'S DOCTRINE OF RIGHT : A COMMENTARY*, CAMBRIDGE, CAMBRIDGE UNIVERSITY PRESS, 2010

*Elsa Acem**

The Doctrine of Right comprises the first volume of Kant's *Metaphysics of Morals*, published just seven years before his demise. Overlooked for a time¹ by scholars in favour of his *Critique of Pure Reason*, Byrd and Hruschka's analysis is an important addition to the present-day interest in Kant's writings towards the end of his life.² Both B. Sharon Byrd, from Friedrich Schiller University, and Joachim Hruschka, from the University of Erlangen, have published extensively on Kant's philosophy,³ and bring a detailed and comprehensive analysis to the Doctrine of Right, which sets their book apart from other scholarly inquiries of this text.

Byrd and Hruschka's analysis eschews focusing too heavily on secondary literature, and favors using detailed references to Kant's Doctrine of Right, as well as his previous works to elucidate his philosophy. Most of the references which lie outside of Kant's body of work are to authors who were contemporaries of Kant's, and that the authors consider influential in his work on the Doctrine of Right, the most prominent of these being Gottfried Achenwall.⁴ Byrd and Hruschka compare their methodology to Kant's own view of his work as approaching a form of Euclidean geometry,⁵ and their attention to interpreting and differentiating the different terms Kant uses does take on an almost mathematical, but not unwelcome, precision.

The focus of Byrd and Hruschka's book is on a precise exposition of the Doctrine of Right, rather than an in-depth analysis of how the latter may be viewed in

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¹ Byrd and Hruschka dedicate their book to Mary Gregor, who wrote one of the first English language works highlighting the importance of Kant's *Metaphysics of Morals*. See Mary Gregor, *Laws of Freedom: A Study of Kant's Method of Applying the Categorical Imperative in the Metaphysik Der Sitten* (Oxford: Blackwell, 1963).

² See e.g. Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge: Harvard University Press, 2009); Tatiana Patrone, *How Kant's Conception of Reason Implies a Liberal Politics: An Interpretation of the "Doctrine of Right" (Rechtslehre)* (Lewiston, NY: Edwin Mellen Press, 2008); Mark Timmons, ed, *Kant's Metaphysics of Morals: Interpretative Essays* (Oxford: Oxford University Press, 2002).

³ B Sharon Byrd & Joachim Hruschka, *Kant and Law* (Aldershot, UK: Ashgate, 2006); B Sharon Byrd & Joachim Hruschka, "The Natural Law Duty to Recognize Private Property Ownership: Kant's Theory of Property in His Doctrine of Right" (2006) 56:2 U of T LJ 217; B Sharon Byrd & Joachim Hruschka, "Aufsätze - Lex iusti, lex iuridica und lex iustitiae in Kants Rechtslehre" (2005) 91:4 Archiv für Rechts-und Sozialphilosophie 484; Joachim Hruschka, "The Permissive Law of Practical Reason in Kant's 'Metaphysics of Morals'" (2004) 23:1 Law and Philosophy 45.

⁴ Byrd & Hruschka also include discussions on the influence of Hobbes, Locke and Pufendorf, among others.

⁵ B Sharon Byrd & Joachim Hruschka, *Kant's Doctrine of Right: A Commentary* (Cambridge: Cambridge University Press, 2010) at 9 [Byrd & Hruschka, *Commentary*].

relation to the rest of Kant's philosophy. Gary Banham notes that Byrd and Hruschka fail to address the questions of whether the Doctrine of Right may be considered a "free-standing and autonomous legal and political philosophy", as well as "the relationship between the universal principle of right and the categorical imperative."⁶ In relation to the first question, Byrd and Hruschka limit themselves to presenting the Doctrine of Right as Kant's "most mature thoughts on the peace project",⁷ through the elaboration of a "single model designed to ensure peace on the national, international, and cosmopolitan levels".⁸ Though not explicitly discussed by the authors, their treatment of the Doctrine of Right, including such topics as property law, the idea of the state, contract law, criminal law, and international law, does suggest that the text may be considered as a complete, if not autonomous exposition of Kant's legal and political philosophy. Furthermore, Byrd and Hruschka repeatedly demonstrate how the Doctrine of Right allows for a more definitive interpretation of a number of concepts which Kant had evoked in his earlier works, and which have often given rise to conflicting interpretations.⁹

The authors examine the connection between the universal principle (or law) of right and the categorical imperative when they state that the former "follows" the latter:

[...] Kant defines what is right under law as "Every act is right if it or its maxim is compatible with everyone else's freedom of choice under a universal law." From this principle follows the "universal law of right": "Act externally so that the free use of your choice can coexist with everyone's freedom according to a universal law." Both of these ideas follow from the original right to external freedom [...]¹⁰

From the above excerpt it is clear that Byrd and Hruschka do not ignore the relationship between the universal law of right and the categorical imperative, however their emphasis lies more in developing Kant's idea of a right to external freedom. The latter right is inextricably linked to both the categorical imperative and the universal law of right, and the authors prefer to base their discussion of the Doctrine of Right upon this "axiom of external freedom".¹¹ This emphasis is key to the development of their thesis that Kant's Doctrine of Right flows from this concept.

After an introduction to Kant's conception of private law in the state of nature, and the necessity of a juridical state and public law in civil society, Byrd and Hruschka differentiate the three *leges*, that of *lex iusti* (natural and positive law), *lex iuridica* (human actions which the *lex iusti* applies to), and *lex iustitiae* (the judicial system).¹² The authors also succinctly explain Kant's Ulpian formulae, using, as is

⁶ See Gary Banham, "New Work on Kant's Doctrine of Right" (2011) 19:3 *British Journal for the History of Philosophy* 549 at 550-551.

⁷ Byrd & Hruschka, *Commentary*, *supra* note 5 at 1.

⁸ *Ibid.*

⁹ See for instance Byrd & Hruschka's discussion of Kant's statement that "the criminal law is a categorical imperative" at 267 ff.

¹⁰ Byrd & Hruschka, *Commentary*, *supra* note 5 at 79.

¹¹ *Ibid* at 10.

¹² *Ibid* at 61.

done throughout their book, the original Latin phrases, which in this case are *honest vive* (“be a juridical person”), *neminem laede* (“do no one wrong”) and *suum cuique tribue* (“enter a society with others in which everyone’s own can be maintained”).¹³ These two initial chapters in Byrd and Hruschka’s *Doctrine of Right, A Commentary* are followed by an interesting appendix in which the influence of Hobbes’ ideas on commutative and distributive justice in Kant’s philosophy are examined.

The third chapter delves into the authors’ thesis that the axiom of freedom underpins Kant’s entire judicial and political system in the Doctrine of Right. Byrd and Hruschka examine the negative and positive aspects of Kant’s conception of both internal and external freedom. Especially compelling is their argument that the positive aspect of external freedom is what motivates the transition from a state of nature to a civil or juridical state, concomitantly giving rise to the necessity of public law.¹⁴ Byrd and Hruschka also interpret Kant’s position against the idea of revolution in all but extreme cases of oppression, as well as the substance of the original contract in reference to the positive aspect of external freedom. Similarly, this concept is the starting point for their subsequent discussion of the notion of “permissive law”.¹⁵

In the fourth chapter the authors lay rest to the conventional interpretation of the permissive law as exclusively being a “justification to commit an otherwise prohibited act”,¹⁶ as found in Kant’s *Perpetual Peace*. Byrd and Hruschka explain how Kant’s Doctrine of Right relies on another definition of the permissive law found in the *Introduction to the Metaphysics of Morals*. The new concept is that of “merely permitted”, which means that “someone is free to do or not to [perform an action] according to his own desire” because the act in question is “morally indifferent”.¹⁷ From this clarification of the permissive law as a “power-conferring norm”, Byrd and Hruschka expose all of Kant’s political and legal theory in the Doctrine of Right, covering private property rights¹⁸, contract law, criminal law,¹⁹ and international law.

Kant’s Doctrine of Right, A Commentary, ends with a thought-provoking discussion of the human being in both the state of nature (*homo phaenomenon*), and the juridical society (*homo noumenon*), with the latter possessing the right to freedom by virtue of having recognized the Categorical Imperative. This discussion ends with a paragraph briefly exposing Kant’s view that every human being, which includes the

¹³ *Ibid* at 62.

¹⁴ *Ibid* at 77.

¹⁵ See Brian J Shaw, “Rawls, Kant’s Doctrine of Right, and Global Distributive Justice” (2005) 67:1 *The Journal of Politics* 220, for a discussion on the use of Kant’s permissive law in the articulation of distributive justice.

¹⁶ Byrd & Hruschka, *Commentary*, *supra* note 5 at 94.

¹⁷ *Ibid* at 98-99.

¹⁸ For a discussion of whether Kant’s conception of property rights could be extended in such a way as to justify the welfare State, see EJ Weinrib, “Poverty and Property Rights in Kant’s System of Rights” (2003) 78 *Notre Dame Law Review* 795; James Penner, “The State Duty to Support the Poor in Kant’s Doctrine of Right” (2010) 12:1 *The British Journal of Politics & International Relations* 88.

¹⁹ See also David Sussman, “Shame and Punishment in Kant’s Doctrine of Right” (2008) 58:231 *The Philosophical Quarterly* 299, for a discussion on Kant’s view of retribution for murders committed to avenge a humiliation or disgrace.

human embryo, is a “*homo noumenon* and thus a bearer of rights”.²⁰ This subject is introduced rather abruptly and would have benefitted from a longer exposition and analysis, possibly much earlier in the book when the right to freedom, as well as the transition from the state of nature to the juridical state are first presented. Byrd and Hruschka do however include two appendices to this last chapter discussing the idea of “‘ought’ implies ‘can’”, as well as the “system of rules of imputation”. Overall, the authors have produced an important contribution to the literature on Kant’s legal and judicial philosophy; it is a clear and comprehensive exposition of Kant’s Doctrine of Right, and this book would be particularly useful in both introductory and advanced jurisprudence courses.

²⁰ Byrd & Hruschka, *Commentary*, *supra* note 5 at 293.