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The hypocrisy of purely rational moralist political philosophy of state legitimacy

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The hypocrisy of purely rational moralist political philosophy of state legitimacy

Master Thesis

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1 Introduction

Probably the most direct way in which we as regular citizens of The Netherlands are occupied in politics is when we scratch the circle before the name of a politician; when we make our vote in support of a political party. In this instance, the citizen plays a direct part in deciding what types of rules will likely pass through parliament, and what rules will not. By means of voting one essentially helps decide who will rule the country for the coming four years. Politics, then, can be said to concern which party has the power to rule the country. Power, in this sense, means the monopoly to coercively force us as citizens of a territory to obey the state's dictates.

In contrast, the philosopher in its daily practice generally tries to avoid the partisan position of picking political sides, and tries to provide a logical argument for a necessary conclusion from clear principles. In other words, the philosopher generally tries to avoid political rhetoric that persuades its reader based on unclear foundations such as ideological considerations: they invite the reader to judge the validity and soundness of the argument by being as explicit as the applicable audience conventionally requires. The reader then, can do three things with the theory: disagree with the theory by disagreeing with its assumptions; agree on the assumptions but disagree about logical inconsistencies; or, accept both the foundations and its conclusions and expand upon what the theory implicates.

In short, whereas politics can be said to be concerned with a practical power to rule, philosophy is more or less concerned with its own aim proper. What distinguishes *political* philosophy from the previous description of philosophy's practice, is harder to define. Peter Laslett gave it a try in 1956 by describing political philosophers as those who "concern themselves with political and social relationships at the widest possible level of generality" - with which Laslett meant "political obligation", or its flip-side, *legitimate authority*. Though, curiously, in the same paragraph he declared the field of political philosophy as "dead". He pondered that maybe the problems of the times were "too serious to be left to philosophers", and that social scientists, for the time being, had taken over. However, he continued, these sociologists with their "continuing Oedipus relationship with the natural scientists" had no "philosophic interest" because their "attitude" was bound to dissolve their theories in "dogma" and "relativism" (Laslett, 1956/1975, pp. vii-ix) - proclaiming the future of political philosophy pessimistically uncertain.

Political philosophy's depression lasted fifteen years until its magnificent resurrection through John Rawls' land mark *A theory of justice* (1971). Its resurrection has been subscribed to Rawls because he showed

that it was possible to argue for principles that should structure civil society without the need for empirical study - it merely serving as metaphor or illustration to explain arguments - and he reoriented what the ideal was to strive for in political argument: justice. Since then, political philosophers have been aiming more or less for a certain sense of justice as fairness through arguments of a type of equality or freedom, or both, in their arguments for in what situation a state is morally authorized to impose itself.

As I mentioned, almost all later works in political philosophy of state legitimacy invoke Rawls to differing extents. One such later work that follows Rawls in the importance of justice, but appends it with the relevance of a separate notion of legitimacy through a distinct conception of autonomy, is the major work of Anna Stilz that I will cover for analysis in this paper. Namely, her recent work *Territorial Sovereignty* (2019) will serve two purposes in what follows. First, it serves as a demonstration as to how political philosophy of state legitimacy generally argues. Second, it will help to distill the type of moralist argument that political philosophy of state legitimacy generally applies, and that I argue should be resisted.

To qualify, other papers that offer critique to the kind of political philosophy of state legitimacy that I will discuss in this essay, have not discussed the argument of why I think it ought to be resisted. Therefore, I intend to thread carefully in my objection. Moreover, the type of critique that I intend to offer originates from the historian Reinhart Koselleck, who uses dense and particular language. And since the objection I make, if correct, implicates all purely rational moralist political philosophy of state legitimacy, it may be the case that we have to reinvolve Laslett's pessimism.

In any case, the structure of this essay is as follows. In the coming chapter I will elaborate on the recent account by Anna Stilz that argues for a Kantian moralist theory of territorial legitimacy which provides both a clearly structured argument for territorial legitimacy. Secondly, I elaborate on one specific objection to her account, then I offer another common objection that has been raised against moralism from the opposition, after which I argue that the purely rationalist moralist perspectives cannot be coherently maintained. Finally, I argue that an alternative strategy for political legitimacy that may be viable, namely, a theory of political legitimacy called *political realism* as argued by Bernard Williams, which places legitimacy of authority in the beliefs of the citizens.

2 A theory of territorial legitimacy

This chapter engages with a theory of political legitimacy by Anna Stilz that she argued for in her recent work *Territorial Sovereignty* (2019) that offers a theory on legitimate authority over both people and territory. In this theory, she claims that legitimacy - being "the state's possession of an exclusive moral right to make law and policy on behalf of a specific group and to use coercion or force to implement those laws and policies"¹(Stilz, 2019, p. 89) - is not reducible to the consideration whether a state's laws are just. In other words, she separates justice from legitimacy. Moreover, if a state is legitimate, then it is permitted to enact unjust laws as long as it does not infringe upon its legitimacy. In this sense, Stilz' theory is a non-ideal theory of legitimacy in the sense that, even though legitimacy is defined as a moral right to rule, its attainment is based on the satisfaction of necessary conditions *to a certain degree*. These conditions pertain a degree of *basic justice* but also a degree of *collective self-determination* (Stilz, 2019, p. 90), based on two logically prior assumptions: a "natural duty of justice to respect others' innate right to freedom as independence" (Stilz, 2019, pp. 95–6) based on the Kantian theory of rights that reasons for "a *natural duty of justice* to enter a juridical state" (Stilz, 2019, pp. 54–5); and a basic "preinstitutional" moral right of occupancy (Stilz, 2019, p. 10). Taken together, the theory has the capacity to be applied to different states over time, but retains strict moral obligations for a state's claim to authority to be legitimate.

In what follows, I will first elaborate on what Stilz means with basic justice. Secondly, the notion of collective self-determination will be explained. And finally, I show how legitimate *territorial* authority may be obtained, through elaborating on the third condition. In the next chapter, I discuss objections to this theory and offer responses.

2.1 Basic justice

Stilz distinguishes three conditions a state must satisfy in order for *basic justice* to obtain: (1) security and subsistence rights; (2) core personal autonomy rights; and, (3) the preconditions of collective self-determination (Stilz, 2019, p. 113). While these rights and conditions must be *protected* for the citizens of the state, they must only be *respected* for non-citizens outside of the state. This distinction matters because, while the state has a moral duty to provide this protection to its citizens as a necessary condition for legitimacy, it cannot fulfill the same obligation for non-citizens - though in recognizing its moral force, infringing upon the moral rights of non-citizens would still be considered morally wrong, and therefore the outsiders' rights must be

¹Which not necessarily includes a political obligation for citizens to obey the law.

respected (Stilz, 2019, p. 237). So in discussing the conditions for basic justice, then, I will use the term *protection* to denote citizens' rights but it can simultaneously be read as *respect* for non-citizens rights.

Security and subsistence rights concern protection from "threats to personal integrity" that permit citizens "a [necessary] minimum level of control" for "autonomous agency" (Stilz, 2019, pp. 113–4) that serves both a "stabilizer" of expectations and "impartial" arbitration for conflict resolution (Stilz, 2019, pp. 54–5). The state provides the means of survival for the worst off through economic favors such as in the case of a welfare state, while also providing protection from the most basic hazards such as violent criminals, or being subjected to slavery. Without these basic rights recognized, one will never be able to convincingly claim to live in a minimally just state.

Secondly, the state of basic justice must have institutions in place to protect the liberty of an individual in the sense of personal autonomy. This means that rights must be protected that are inherent or derived from freedom as personal autonomy, such as the ability to form one's own values without subjection to the will of someone else, the right to express these values, and the possibility of owning property (Stilz, 2019, p. 114). She defines autonomy first by splitting autonomy into a political and personal variant, redefining personal autonomy as a scalar value, and standing separate from a more or less collective political autonomy, which will be discussed in a later part of this chapter. Stilz' personal autonomy splits in two subdivisions: as self-directed agency, and as critical reflection. On the one hand, there's the active endorsement of one's own actions, and, on the other hand, the authenticity of this endorsement. In this instance, the latter ensures that types of manipulation that make one endorse one's own action do not count as personal autonomous action (Stilz, 2019, p. 105).

The third necessary condition that must be satisfied, is what Stilz calls *the preconditions of collective self-determination*, and these include "free expression, free association, and public political dissent". While these preconditions, like the right to personal autonomy, are not binary but scalar, a complete lack will make it impossible to achieve legitimacy. Collective self-determination provides citizens the "opportunity to form their own autonomous political judgments" (Stilz, 2019, p. 113), which is what forms the basis for the second condition for political legitimacy, namely, that what Stilz terms *political autonomy*.

The achievement of *basic justice* is essentially a modified version of *functionalism* she terms *threshold functionalism* (Stilz, 2019, p. 113). Stilz defines a *functionalist* state as a type of state that has a moral right to rule a territory "insofar as it *actually* rules an area and population, and its rule is sufficiently just" (Stilz, 2019, p. 25). In other words,

the moral status of the state's existence depends on its actual ability to achieve "essential moral functions" while ruling its territory and citizens (Mikalsen, 2020, p. 292). Only through basic justice could the state's public institutions provide its function as "a fair scheme of distributive justice" (Stilz, 2019, p. 93). Now, as we have seen, the property of being a *threshold* functionalist state, then, means that *basic justice* only has to obtain up to a *good enough* level of justification - which can be contrasted with a *maximizing* functionalist state that justifies its existence only if it is *best* at delivering certain types of "public goods" (Stilz, 2019, p. 93).

However, the start of the chapter mentioned that a threshold functionalist state is a necessary condition, but not a sufficient condition for achieving legitimacy. One reason Stilz gives for its lack of sufficiency, is that taking functionalism as a sufficient justification for legitimacy of state, in some cases, allows a kind of benign colonizing. A colonized country would be prohibited to morally reason itself out of the constraints of a colonizer by only holding on to functionalism - irrespective of its variant, because if a (benevolent) colonizer that passes the *basic justice* bar, with all its good intentions, annexes some territory that at that moment does not pass the *basic justice* requirement, then the colonizer would seem to be justified to interfere outside its boundaries on the functionalist account if it attains basic justice for the annexed country - while, according to Stilz, this is intuitively wrong (Stilz, 2019, pp. 91–92). Therefore, something more is needed in addition to the requirement of threshold functionalism.

If we assume basic justice to be achieved (so the preconditions for collective self-determination are also satisfied, and it is "minimally just" (Stilz, 2019, p. 113)), then citizens of a state have the tools in hand to critically examine whether their values and judgments align with the state under which they live through engagement in public deliberation and this is more or less what the necessary condition of *collective self-determination* is about.

2.2 Collective self-determination

So, what then is collective self-determination, and how does it fit with the state? Remember that when we have *basic justice* in our state, then we have guaranteed to a certain extent our rights to personal autonomy, subsistence and security, free association, free expression, and public political dissent. Summarily, whether the conditions of collective self-determination are sufficiently met, depends on a "causal relation of correspondence" (Stilz, 2019, p. 111) between a state's institutions and "the shared political will of a significant majority of cooperators among [its territorial] occupants" - that is, an "actual joint commitment to a

political endeavor, and to a set of procedures as to how that endeavor should be governed" (Stilz, 2019, p. 117). As this is probably the most intricate part of her theory, the next section surrounds unpacking this statement.

For things to change politically, one has to start with an intention. Having the preconditions for developing cooperative intentions satisfied through basic justice, one may, from there develop judgments as to how an institution ought to behave. Surely, as it involves political engagement, it requires cooperation with others. Consequently, there is also a limit to the moral worth of a person's judgments that is delineated in the adherence to basic justice. If aspects of basic justice are flat-out rejected in one's judgment, and one intends to act on those ideas, then the state is at liberty to coerce the subject into obedience. In other words, those judgments may be overridden without "moral loss", because those judgments are not "worthy of respect" (Stilz, 2019, pp. 112–3, 115). So, in order to be minimally respected, one must cooperate to the point of basic justice.

It is likely that subjects will develop and share political judgments in a basically just civil society through "their own deliberative process" (Stilz, 2019, p. 109). So, if one shares cooperative intentions, then mutual commitments may rise to develop these intentions into what Stilz calls a "shared will": "an interlocking structure of cooperative intentions on the part of each participant, amid common knowledge on the part of all that those intentions obtain" (Stilz, 2019, p. 108), which is political when it is directed towards to the governmental institutions. If intentions develop into commitments based on basic justice, and committed independent deliberation develops these intentions into a shared will, then, through political action to achieve shared wills, correspondence can arise.

Correspondence between a state and its subjects describes the situation where a match occurs in the subject judgments as to how a state ought to behave, and whether the state actually behaves as such. This enables the subject to be still able to "experience autonomy" under sovereignty (Stilz, 2019, p. 107). However, this correspondence is not only experienced on a single level. For example, one may disagree with a particular decision that a state makes (such increasing *your* taxes), which could then undermine that sense of autonomy. In other words, one may reasonably disagree with certain specific decisions, even though one may still endorse the overall system of government. Therefore, Stilz argues, that if taxes are raised and you disagree based on your "first-order judgments", you may likely still feel a "shared commitment" to participate in a scheme of "cooperative political action" that still facilitates "correspondence" - which thereby retains your ability to experience

autonomy (Stilz, 2019, p. 108).

This, then is what is necessary for an *omnilateral will* to obtain. Policy, even though disagreed with, may still actually represent the will of the subjects in how one wants to be governed, maintaining correspondence between the subject and the government their respective judgments. So, besides the responsibility of the participants in the shared will to develop policy according to the established basic rights, responsibility is also demanded on the part of government to represent the shared will of the group.

Now, if all this holds, and if there is a "*significant majority* of cooperators" (Stilz, 2019, p. 94) in the "egalitarian political procedure" (Stilz, 2019, p. 99) of developing a system of laws, so that the shared political will of a significant majority at a certain moment is sufficiently represented, only then one may reasonably claim that the state has legitimate authority to legislate its subjects. Remember that Stilz defined legitimacy as "the state's possession of an exclusive moral right to make law and policy on behalf of a specific group and to use coercion or force to implement those laws and policies" (Stilz, 2019, p. 89). Consequently, having delineated when the moral right to legislate this specific group obtains, is then also not everyone included?

In other words, this leaves one final term to explain, namely the status of *peoplehood*. Having established through political engagement an omnilateral will so that the cooperators develop sufficiently overlapping judgments and values with their state, the subjects have one thing left to do: willingly participate in the demands that the state places on them. Only if, "upon reflection", the subject judges itself to endorse its own "intention" to obey the legal laws and obey the moral demands of cooperation, then the subject achieves the status of "peoplehood" (Stilz, 2019, p. 125). Three consequences are attached to this. First, "peoplehood" is only possible from within an already basically just state, and demands some type of participation in the shaping of public opinion, voting, and such. In other words, a state that started illegitimately, may, over time, achieve the basically just collective self-determining status that legitimacy necessitates, and thereby achieve legitimacy after all (Stilz, 2019, p. 126). Second, a *people* is mutable, which allows for the possibility of "renegotiation" of "institutional arrangements" as time goes on (Stilz, 2019, p. 127). And third, and perhaps most striking, this also implies the possibility of a "people to revoke authorization of their government" (Stilz, 2019, p. 130). If a group with separate values and judgments that do not cohere sufficiently with the current state, and they are a consistent minority group that does have the means to establish and sustain basic justice through separate institutions, then there seems to be no reason why they could not depart from the cur-

rent regime to start their own.

The final consequence of "peoplehood" may serve as a segue into the final section of this chapter. Because, doesn't a separate people with a separate state need their own territory? While this may or may not be the case, it raises the problem of territorial legitimacy. Historically, it has been assumed that the state's boundaries are more or less fixed according to the reigning sovereign. However, the question whether this can be legitimately and coherently justified has been raised relatively little. To change that, Stilz offers a theory of legitimate territorial authority which I will explain in the next section.

2.3 Rightful occupancy

Having explained how legitimate authority may obtain in relation to its subjects, the next order of business is to explain how, according to Stilz, a state may obtain legitimate *territorial* authority. Essentially, territory concerns the question of property. First questions of appropriation have been in our jurisprudential vocabulary for hundreds of years, and were often situated in natural rights which were legitimated through God's word². Its relevance is hard to overstate, as the problem of private property relates to the all-too-common problem that we still perceive today, namely its "inevitable consequence": inequality (Hont, 2005, p. 452). For Stilz, however, private property is too strong a term to be able to put into a moral right. She argues for a certain kind of moral right to occupancy that confers certain property rights that obtain, in a moral sense, prior to the legal institution. First, I explain what a moral right entails for Stilz, then I show how this relates to rightful occupancy.

The development of civil/legal society is often explained in three stages. First is the state of nature, which is a fictitious vehicle for arguing towards a legal society. Second is the *societas*, the society that does not yet have formal legislative institutions. Third is the legal (or civil) society. Often, theories of legitimacy follow this path which explain certain characteristics of the state of nature, in order to explain why a certain type of state configuration would be legitimate. In any of these stages property may be introduced as a right. If a philosopher subscribes to the idea that property rights (or some of its weaker variants) become fixed at the moment of the state of nature, then Stilz calls these philosophers *preinstitutionalists*, if the society is the moment where these rights become fixed, then she calls these proponents (primarily featured by David Hume) *social institutionalists*, and on the instantiation of property rights only from the legal society onwards - of which Thomas

²For a concise history, see Hont, I. (2005). *Jealousy of trade: International competition and the nation-state in historical perspective*. Belknap Press of Harvard University Press, pp. 419–31.

Hobbes is the most famous proponent - she calls them (you guessed it), *legal institutionalists*.

The problem with the proponents of either the social and the civil variants, according to Stilz, is that they cannot explain *why* it is wrong for a group that does not have a legal institution on the lands they occupy, to be displaced by a standing army of a civil society - while we would instinctively consider it wrong. Specifically, the problem is that, while a legal or social institution may already recognize property rights either as law or convention, it is not clear that a neighbor, which does not share in the institution, ought to have its (weak) property rights respected. She calls this problem, the problem of *foundational title*: "What, if anything, gives a particular set of people a special claim to live in a given area, including the right to establish a state that governs and controls that space?" (Stilz, 2019, p. 33).

For the Hobbesian legal institution, it is rather clear why a claim to live in a given area of outsiders are not respected: in the Hobbesian state of nature, you are needy and unfree. Without a legal institution, there are no rights; it is a war of all against all. However, she also argues that the Humean social institution cannot explain why a claim to land of outsiders ought to be respected, even if the outsider also is a social institution. She claims that while a convention between members of a society obligate one another - as it is part of the convention, this does not hold for inter-society conventions, because there are none. Therefore, Stilz takes a "hybrid view" that argues a *preinstitutional* moral right, and allows the possibility for further specification of property rights later on (Stilz, 2019, pp. 37, 39).

The right she regards as morally binding and logically preinstitutional, is the right to occupancy. This right splits two ways: first, "it comprises a liberty[-right] to reside permanently in a particular space and to make use of that area for social, cultural, and economic practices"; second, it includes a claim-right to not be moved from the area of occupation, to be allowed to return it, and to not be interfered with while using it (Stilz, 2019, p. 35). Stilz argues that this right is morally binding because one has an interest in the "locational continuity" of one's "located life plans" (Stilz, 2019, pp. 50, 41) - though always with a "fair-use proviso" in place to leave "enough, and as good for others" (Stilz, 2019, p. 47). The problem is that without local continuity, one's ability to commit to, carry out, and control "comprehensive life projects" becomes severely limited which infringes both with one's interest to a "broad well-being", and one's ability to act autonomously - which, as we have seen, is one of the conditions for basic justice. Therefore, this constraint - which can be characterized more or less as a precondition for the basic subsistence and security rights in a basically just state - Stilz

argues, must logically give rise to a moral duty to respect one's moral right to occupancy. The moral determination of these rights stems, then, from the idea that we have a twofold "interest", both in our possibility for "well-being" through carrying out comprehensive life projects and in our "personal autonomy" to be respected - which aligns with an "interest-based theory of rights" that may bind individuals to a (qualified) moral duty to respect another's interests in recognition of their pertinence (Stilz, 2019, pp. 40–41).

Now, while these rights cannot be guaranteed in the preinstitution, since they do carry moral weight based on the interest-theory of rights and the precondition for independence - they are the *logical* law and judge that serve both as the moral justification for my residence and enables the attainment of the precondition of my natural duty of justice to form a state. Consequently, assuming that this is right - if one then also (1) adheres to this natural duty of justice, (2) spawns an institution that accords with the conditions of basic justice, and (3) organizes a group with one's fellow residents so that they become collectively self-determining through public deliberation and free association, and (4) find that they reflectively endorse judgments of their collectively self-determining group and (5) that they are expressed in the governing institutions, then we must see our reasonable judgments and values corresponding with the institution as if expressed through an omnilateral will, and the legislator may justifiably coerce us. In other words, the state, then, legitimately has a moral claim to territorial sovereignty.

3 Objections

As a general remark, I mentioned in the introduction a divergence between politics and political philosophy. One may now reasonably see why. Whereas, on the naive account of politics that I presented, we would likely judge our institutions more or less as vehicles of coercion - the rule of which we somewhat control through voting every four years. Political philosophy of political legitimacy, however, hardly speaks of power as it is, and more about how the exercise of power (through coercive force) may be morally justified - it is, then, more or less, an abstraction that argues for the conditions in which politics can justifiably take place. The second general remark I wish to make that I also mentioned in the introduction, is of how objections within philosophy generally occur: either through refuting its foundation, or through arguing for logical inconsistencies within the theory. In what follows, I will first criticize the necessity of the affirmation of the preinstitutional rights that Stilz maintains. Specifically, Stilz rejects *social institutionalism* because she argues that it cannot explain occupancy rights in between societies because it does not share a convention. However,

I think that Hume *can* explain occupancy rights through convention in between social institutions, and to understand why, I will demonstrate Hume's argument for justice and property. Secondly, I introduce a question that has been raised by multiple political realists which indirectly problematizes the foundations of moralist political legitimacy - namely, the question where this argument is supposed to meet with reality, if at all. And, finally, since posing the question is answering it, I offer an answer that shows - if one accepts my premises - that the place where this argument meets with reality shows the inherent hypocrisy of arguments from purely rational moralism about legitimate authority.

3.1 Foundational title of social institutionalism

Unfortunately, to understand David Hume's concept of property, we have to start with understanding his concept of justice. It is a fairly complicated notion, but in order to understand how the convention of property between a social institution and the outside would have functioned, we have to understand his (1) conception of justice first, then we can understand (2) his concept of property, and finally (3) it can be related back to why the social institution *ought* to have recognized that it would be bad to displace groups outside the social institution that had no institution themselves. Therefore, to gently set the stage: if we think back of what justice entails for Stilz, then we saw that justice only means a *basic justice* of certain specific rights that must be satisfied for basic justice to obtain. Hume's concept of justice is completely different. Whereas Stilz accepts a natural duty to justice as true, for Hume, justice is an artificial virtue that only takes shape over time. What is just is more or less discovered for Hume through innate properties that all humans more or less have as a human faculty. Whereas Stilz' account of justice is moralist: actual justice is conditioned by prior moral rights; for Hume, justice is the result of more or less accumulated observations of utility - rights come *after*.

First, it ought to be recognized that, for Hume, justice can only emerge in situations of scarcity. Scarcity matters because in (hypothetical) situations of *extreme* abundance, in situations where one always gets what one wants, there would never be a *use* for justice, as there would be no use for a moral justification that necessitates redistribution. The next assumption, is that justice would also not emerge when everyone would have a natural tendency towards public benevolence, since, when everyone would be perfectly benevolent, then there would never be dispute over desert, and everyone would naturally balance self-interest with a love of mankind, and then there would be no use for justice (Hume, 1751, SBN 183-5). The backdrop for the cause of justice is then, necessarily, a state of relative scarcity, and a world with overarchingly self-interested persons.

Now, Hume recognizes justice as part of actions that are virtuous. These virtuous, just actions must be motivated by a duty. Both justice and duty, however, are famously considered artificial (Hume, 2007, 307 SB 477) - on which Hume elaborates on multiple occasions through his empirical account of morality. Actions can only be considered moral based on their underlying motive because one won't find morality of any sort in an action itself - the moral *virtue* of an action is therefore found in the moral *motive* of an action. Motives and virtues may be either *natural* or *artificial*. With *natural*, Hume means that these motives and virtues are (generally) present in all humans. The natural moral motives are called *passions*, or *sentiments*, and Hume calls the moral virtue that is natural *benevolence*³. The natural motives are the sentiments of *sympathy* and *self-interest*, of which sympathy has both a *private* and *public* version. The private version of this innate human passion encompasses feelings of sympathy with another specific person's feelings; a vicarious sentiment of happiness or sadness with another individual. The public version of sympathy is a natural sympathy for *public utility*, to which I will return shortly. On the flip side of the natural motive of sympathy is the corresponding natural moral virtue of benevolence, also with a private and public version. An action, therefore, is benevolent, or naturally morally virtuous, when its motive is either public or private sympathy. Finally, we have the natural passion of *self-interest* as motive. However, self-interest does not have a natural virtue attached because, as Hume says, that self-interest, "when it acts at its liberty, instead of engaging us to honest actions, is the source of all injustice and violence" (Hume, 2007, 309 SB 480).

Now, I return to the natural sympathy for public utility - and it is a curious sympathy, but it will guide our understanding of the artificiality of justice. For Hume, it is clear that neither instances of self-interest nor private benevolence can be generalized into rules of justice, since the amount of sympathy one has differs per person. Additionally, as attested, if we would all be publicly benevolent, or, in other words, if we would share the sentiments we have for our loved ones with everyone in the world, then there would be no need for humans to develop a sense of justice. So, all these natural sentiments that are present in humans and inform the natural moral status of actions, cannot in any way inform the rules of justice. Except, according to Hume, the natural motive of public sympathy or the sympathy for public utility, which is virtuous for its public benevolence.

Justice, for Hume, is split into rules of justice and a sense of justice. The rules of justice inform the artificial motive of a duty, about what one *ought* to do, while the artificial sense of justice is the virtue of the action

³Though he sometimes uses other terms such as generosity or humanity.

attached to the duty. Because the rules of justice (and consequently, also the sense of justice) cannot be found in the natural motives of persons, Hume has to explain the emergence of justice as an experimental development, for which he gives a wonderful analogy of "two men, who pull the oars of a boat", who will, through time, eventually find a way to make the best headway. "They have never given promises to each other", but it is their continued experience in rowing a boat, that will eventually synchronize the oars in a recognition of common interest (Hume, 2007, 315 SB 490).

In other words, first, there are accidentally - and between multiple parties concurrently - common interests found, as if trying to row a boat together. These concurrently discovered common interests lead, over time, to convention. This hypothetical first convention consequently leads to a whole swath of public interests, which, when put into action by individuals, invokes our appreciation of its virtue of public benevolence that is motivated by our natural sympathy for public utility. This consolidation of virtuous convention continues until the "is" becomes an "ought" (Hume, 2007, 302 SB 469-70). The "is" only becomes an "ought" because the origin story that gave rise to the convention is forgotten, but the recognition of the virtuosity of the action is kept, and is in that instance morphed into an act of justice. It is then part of the societal makeup of duties, because it is still recognized as just, and, for example, by itself transferred to the youth through education - who are oblivious of these earlier conventions of public utility. So now we have reached full circle. Hume's justice is convention, and in the same moment of the discovery of the convention, gives rise to the social institution, since "'tis impossible they shou'd maintain a society of any kind without justice" (Hume, 2007, 347 SB 541).

Remember that Stilz reason for the introduction of *foundational title* and her rejection of social institutionalism was that an account has to be able to explain the displacement of not-yet-legally-instituted peoples from the land they occupy and Hume's account could not, and therefore argued for a preinstitutional moral right to occupancy. However, for Hume, the duty to respect one's to property is *the first* convention to arise, because of its *utility*. As he says: "nothing but an encrease of riches and possessions cou'd oblige men to quit [the state of nature]" (Hume, 2007, 346 SB 541). After its observance, however, the problems arise of its instability, but he explicitly affirms that to "first possession, or to *occupation* [...] always engages the attention most" to avert "violence and disorder" (Hume, 2007, 324 SB 506). Consequently, as "the origin of justice explains that of property [...]" and "the stability of possession, is of all circumstances the most necessary to the establishment of human society" (Hume, 2007, 315 SB 491), by implication, the people in social institution of Hume, *ought* to have recognized the

duty to respect the property of the not-yet-legally-instituted peoples. Therefore, in my reading, the *social institutionalist* may be able to sufficiently explain foundational title.

3.2 "Neither history nor praxis"

I have shown that Stilz extracts two main assumptions unto which her theory of legitimacy is constructed. The first assumption is the natural duty to justice as derived from the Kantian *doctrine of rights* as precondition for legitimacy. And since justice cannot obtain in a state of nature, by implication, we have a moral duty to form a state (Stilz, 2019, p. 96). The second is the moral right to occupancy, which is derived from the assumption that a sufficiently demanding interest can spawn a claim-right with a correlative moral duty for others to adhere to. While Stilz does not further justify these moral duties, she does refer in the footnote to theories of natural right (Stilz, 2019, p. 40), from which I deduce that her moral theory is purely rational. And because, as Stilz affirms that these moral rights "constrain institutional schemes", I think that her account should be categorized as a purely rational *structural moralist* (PRSM) account of legitimate authority. Structural moralism, as defined by Bernard Williams, appoints "moral conditions of co-existence under power, conditions in which power can be justly exercised" and represents "the priority of the moral over the political" (Williams, 2005/2008, pp. 1–2).

Now, if look at it rationally, and see that Stilz is correct, so that her assumptions are true, that her argument is sound, and that we consequently must conclude that we currently live in an immoral and illegitimate state - albeit only already for our current political configuration having a more or less unilateral will pressed upon us - then we must rationally conclude that action is required. However, here is where a problem begins. How do we check to what extent this unilateral will actually holds at the moment? Or, maybe easier, to what extent the preconditions are upheld? In other words, Williams asks, where, if at all, "this interlocking set of aspirations is supposed to touch reality" (Williams, 2005/2008, p. 22). There is a problem of how to apply this system in reality, because the concepts, clear as they reasonably are, have difficulty to attach themselves to real instances. So a question is, where does a theory become 'political' in the ordinary use of the word, or can it only merely stay speculative fiction?

3.3 The hypocrisy of transcendental reasons

As I said in the introduction of this chapter, asking the question is answering it, and Reinhart Koselleck, in his book *Critique and Crisis* (1959/1998), forcefully answers the question that is left open in the previous objection - with the most serious claim, that PRSM that ar-

gues about legitimate authority is hypocritical⁴. However, I will not quote from his book for three reasons. First, he is a historian that makes an historical point regarding Kantian morality in the backdrop of an absolutist state's (il)legitimacy. Second, he uses rather colorful and opaque language mixed with extensive historical references⁵. Third, his argument goes further than the subject of this paper. However, if curious, one can read his argument most explicitly in the eighth chapter of *Critique and Crisis* called *The Process of Criticism*.

Now, to emphasize the Kantian perspective, it is bound up in pure rationality that, in order to act morally, one must be autonomous. This is also more or less the presupposition that Stilz works with in her argument for political legitimacy. This means that pure rationality determines the laws according to which one must act. As Immanuel Kant argues in his practical philosophy - specifically in the *Metaphysics of Morals* (1797) where he elaborates on his *doctrine of rights* - that freedom as "independence from being constrained by another's choice" is an innate right "insofar as it can coexist with the freedom of every other in accordance with a universal law" (Kant, 1996, p. 393). Freedom, in a positive sense, is "the ability of pure reason to be of itself practical" (Kant, 1996, p. 375). Pure reason dictates what grounds the universal moral law - namely the categorical⁶ imperative⁷ - that determine the grounds of actions. For a choice to be free, one judges its decision according to maxims that try to adhere to the purely rational laws. As pure reason determines the universal law, practical reason - which is the will that grounds choice to determine action - enables rational individuals to be moral through guiding one's actions through a maxim that if willed can become a universal law.

Raymond Geuss clarifies in *Outside ethics* (2005) that "Kant believed that there was nothing of relevance outside the competence of pure reason, that it was impossible to undermine reason itself by calling it into question" (Geuss, 2005, p. 155). And we see this expressed, as I've shown in the previous paragraph, by the universally legislative ability of reason to guide one's moral conduct. In Stilz we find an argument that adheres to this idea of pure rationality, given with coherent moral maxims to designate the moral limits of politics, and guide the free moral action of citizens. Geuss asks, "How can I escape the jurisdiction of such processes of justification, or assume a position outside or beyond this realm?" If we look at it purely rationally, then we must

⁴He goes as far as to claim *all* critique about political affairs hypocritical, but this is not the subject of my paper, and I do not see the reason to agree yet.

⁵Whether this vocabulary is added by the translator, or whether it is his, I have not checked.

⁶Categorical, for Kant, means "unconditional", in the sense that it formally serves no end but itself (Kant, 1996, p. 370).

⁷Imperative, for Kant, means "commands or prohibitions" (that make in itself contingent actions necessary) (Kant, 1996, p. 370).

conclude that we cannot.

However, there is a problem with this argument. Particularly at the moment when moralist pure reason applies itself to state legitimacy, then it risks becoming hypocritical. If as Geuss says, that it is "impossible to undermine reason [...] by calling it into question", as I've shown in the previous paragraph how morality is derived from pure reason - pure rationality itself is a sovereign authority. If we agree that PRSM assumes a separation from politics, a position outside of politics, to judge from a morally detached perspective how politics *ought* to function - and we agree that Stilz takes up a PRSM argument, then, Stilz, by arguing in a PRSM way, *subjects* her argument to the legislative sovereignty of pure reason to argue how our actual sovereign ought to be shaped. Now, additionally, if we assume that currently, our state - our real legislative sovereign - is not PRSM but something else that is not purely rational, then *in* arguing that a PRSM argument is how we may achieve a *morally legitimate* sovereign, it thereby implies that the sovereign that we ought to assume, is the one PRSM adheres to, namely, to the sovereignty of pure reason. In this movement, pure reason as sovereign legislator places itself on equal footing with our current sovereign, and the separation of morality and politics collapses. PRSM becomes political because it says that what we ought to regard as sovereign, is pure reason, while our current political system is not as such. The move PRSM makes *in* arguing a purely rational evaluation of some political question *is* political. So, where Stilz argues for *political* legitimacy, she then places pure reason in competition with our current sovereign, because a PRSM argument implies that we *ought* to assume a different legislator than our current one: *it is only rational*. In this instance, PRSM cannot maintain the detached moral standpoint it has previously assumed, and succumbs to hypocrisy.

4 Political realism

In light of the previously given objections about the nature of pure rationality applied to political legitimacy, it seems that if we want to consistently argue for what may constitute a legitimate authority, then we must step away from the supposition that we can do it from a moralist, purely rational stance. To be sure, as I will argue, criticism surely is valuable and worthwhile in political theory - however, if my previous objection holds, then it is Kantian critique that has become otiose when applied to political legitimacy. In other words, if we want to secularly ground legitimate authority, then we must take another approach and determine political legitimacy that does not assume certain moralized, logically prior concepts, such as *justice* or *fairness* to feature prominently in an account of legitimacy. In other words, legitimacy

might have to become realist.

Bernard Williams' *In the beginning was the deed* (2005/2008) develops such a realist account of legitimate authority where the status of legitimacy is derived from the beliefs of those already subject to power. In this account, legitimacy is a function that requires continued questioning of whether those who are governed believe the authority exercised over them, and whether this belief, more or less, makes sense. Now, it is not enough to equate legitimacy with whatever subjects happen to believe because this would allow, for example, for the possibility of beliefs in legitimacy to be manufactured by the very power they are supposed to legitimate - a problem exemplified by the "happy slaves" thought experiment:

If there were a group of happy slaves who believed that their master was legitimate *only because* the very same power of their master brought about this belief in them, we should rightly deny that the master's authority was legitimate (Sagar, 2018, p. 115).

Therefore, the realist account must be such that it at least accommodates this objection. Primarily, Williams argument rests on three distinct necessary conditions that, taken together, may be the sufficient conditions for a realist justification of legitimate political authority, namely: the *First Political Question* (FPQ), the *Basic Legitimation Demand* (BLD), and the *Critical Theory Principle* (CTP). First, I clarify the first two concepts and their relationship, which together, constitute the necessary conditions for a *political* society to come into existence. Then it will become clear that the realist conception can deflect the *happy slaves*-example. Finally, I show what the CTP entails, and show that genealogical critique may serve that purpose.

In order for a political society to come into existence, one must ask the first political question for which an "acceptable" answer is provided that meets a basic legitimation demand (Williams, 2005/2008, p. 4). Williams account, in contrast to that of Stilz, thus focuses attention primarily to the instance where a coercive power is instituted. The FPQ surrounds, in a similar vein of the subsistence- and security rights of Stilz: "the securing of order, protection, safety, trust, and the conditions of cooperation" (Williams, 2005/2008, p. 3). This must be the first political question, because it must be justified why one moves from a state of nature of arbitrary domination, to a state with coercive powers. If the state maintains the state of nature, where the risk of arbitrary domination has only been shifted from random people to the will of the state, then no political society can be said to have come into existence, and no improvement has been made on the previous situation. Consequently, the instituted power must be able to attempt an

answer as to what improvement has been made upon the previous situation. Now, the FPQ is not first in that it is asked first, to then move on to the next question. It has been repeatedly asked, because over time situations may change. It is only first as to be able to start a political process. The civil society, then, can properly be said to have started, when the state attempts to answer the basic legitimation demand. In other words, what the coercive power has to answer to in order for politics to start - by means of something else than its coercive power (Williams, 2005/2008, p. 5) - is a BLD. Meeting the BLD, then, is "a justification of its power *to each subject*" (Williams, 2013, p. 4), because "if the power of one lot of people over another is to represent a solution to the [FPQ], and not itself be part of the problem, *something* has to be said to explain [...] what the difference is between the solution and the problem, and that cannot simply be an account of successful domination" (Williams, 2005/2008, p. 5).

Though uninteresting, if we quickly return to the *happy slave*-example, then we see that the BLD cannot be met: "[the slaves] *themselves* would reject beliefs [of state legitimacy] if properly informed about how their situation serves to promote the interest of another group (or groups) at their expense and has no justification other than in relation to that other group's interests" (Sagar, 2018, p. 122).

One problem that remains, however, is when an answer can be regarded as acceptable. Williams, for this reason, introduces the critical theory principle, which states that "the acceptance of a justification does not count if the acceptance itself is produced by the coercive power which is supposedly being justified" (Williams, 2005/2008, p. 6). This indicates, that instead of being a situation - such as in the case of Stilz - where certain necessary conditions are met to sufficiently be able to argue that legitimacy obtains. To contrast with Stilz, it is not only basic justice that becomes scalar, but legitimacy itself as well. In other words, instead of legitimacy being completely present or absent, it is often a case of more-or-less-legitimacy, a nuance of multiple problems and sets of beliefs. Acceptability, and, as its consequence, legitimacy, obtain if the CTP generally obtains to the dominated party. As Paul Sagar explains, for the CTP to obtain, the disadvantaged party must, *in general*, accept both "the content of a causal claim", and, when applicable, "the critical force" of a subsequent explanation (Sagar, 2018, p. 119). Where the former is best described as the results of comparative probability, such as outcomes of empirical studies; the latter can be determined, Bernard Williams claims, by asking oneself: "If [a disadvantaged group] were to understand properly how they came to hold this belief, would they give it up?"

One type of critique that would probably fit this CTP well is the ge-

neological critique that has been developed by Foucault. To contrast critique with other usages (such as the Kantian), Raymond Geuss, in *Outside ethics* (2005), explains that there are three usages of the concept of critique: the naive usage, the Kantian usage, and the genealogical usage. The naive usage is the one we mean when we discuss criticism in daily life, and is the type of critique that stands in opposition to justification. As Geuss explains, justification and critique are "as it were, mirror images of each other". On the one hand, there is justification as the positing presentation of "grounds and reasons", a *yes*-saying; and on the other hand, there is criticism that essentially presents the negation of a justification, a *no*-saying (Geuss, 2005, p. 153). Critique is, in this sense, an objection, or opposition. Secondly, as we have seen, is exercise of Kantian critique, where, in Geuss' words, criticism means being a judge of "universal and absolute validity and binding force"; to self-legitimate (Geuss, 2005, pp. 154–5). Finally, there is the third sense of critique, which is the one developed by Foucault. Instead of condemning (as naive critique) or arguing from pure reason (as the Kantians), it starts from ourselves as "subjects of what we are doing, thinking, saying" that tries to analyze concepts and events based on "historical investigation" in order to discover patterns "that have led us to constitute ourselves" as we find ourselves (Foucault & Rabinow, 1991, p. 50) - which Geuss simply characterizes as "a way of putting into question or problematizing something" (Geuss, 2005, p. 157). It seems like this last method could allow us to keep judging our status as citizen, and the legitimacy of our state.

Alternatively, however, Williams offers a sketch himself of what this critical theory test would look like. He calls his sketch an "artificial rationalization" which itself breaks up in roughly three questions: (1) to what extent has the group's belief been formed by illegitimate power? (2) to what extent does the subjugated group have an interest in being enlightened about its true condition? (3) to what extent is coming to know [1] and [2] emancipatory in its motivational tendency to want change to occur? (Sagar, 2018, p. 120)

Finally, it may be demonstrated, as Williams does, that it seems that our liberal democracy is particularly well adjusted to answer the BLD for two reasons. The first is, liberalism has a high chance of legitimacy because the chances of "systematic domination" in comparison to other configurations seem relatively smaller than alternative state configurations. And, secondly, Williams suggests that, "one of liberalism's most powerful weapons" is not that it is favorable in comparison with other types of state configurations but that it allows for distinct sets of values to have their own place in determining what problems to address, therefore it essentially applies the CTP itself through its political process (Sagar, 2018, p. 126). In other words, "insofar as truth and

truthfulness are connected to a reduction in domination and cruelty, and liberalism is connected to the promotion of truth and truthfulness, then liberalism turns out to have a special connection to legitimacy" (Sagar, 2018, p. 126).

5 Conclusion

I have shown an argument of legitimate authority by Anna Stilz that argued from a foundation that is informed by a purely rational moralism. This account, I have argued, succumbs to hypocrisy when it engages with politics because it cannot maintain the detached moral standpoint it assumes. As no solution can be presented from within accounts of pure reason, I have argued for another account of legitimate authority that does not try to argue for legitimacy from a purely rational moralism.

If Stilz drops the moralist assumptions, then maybe it is a theory that could work. As I argued through the realist account of Williams, it seems to be the case that Stilz shares multiple features with him. And additionally, belief looks a lot like endorsed reflective judgment. In any case, I have tried to argue for an account of legitimate authority that functions not necessarily as an account of legitimate authority over territory, but it may work as an account of legitimate authority over people. One may wonder whether an account of territorial legitimacy is needed if we consider a Humean account or a historical understanding of the origins of centralized coercive force. And though this essay does not provide an answer how territorial authority is to be justified, it does offer an account of legitimate authority that diverges from the standard account, that is argued from the position of untenability of theories of legitimate authority on moralist purely rational theories. In effect, if legitimate authority over people turns out to be a function of the beliefs of its subjects, there is a possibility that territorial legitimacy can be argued in a similar fashion.

In the introduction, I said that probably the most direct way in which we as regular citizens of The Netherlands are occupied in politics is when we make our vote in support of a political party. If we accept the realist account of legitimate authority, then we must recognize that legitimacy never is simply true or false, but the result of the proposed answers to a host of questions. What may serve as an additional support of the realist account, is that it comes much closer to the naive account of politics. However, whether it is a realist account that ultimately ought to structure legitimacy, or that there is reason to support another historically informed notion, is a question that only time will answer. However, if we see that real politics is not guided by pure reason, then it seems to be the case that the account that ultimately informs what

legitimizes our state, will not be a purely rational moralist account.

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