Silencing the Guns in Haiti

Elizabeth Mensch
University at Buffalo School of Law, mensch@buffalo.edu

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/buffalolawreview
Part of the Comparative and Foreign Law Commons, and the Law and Society Commons

Recommended Citation
Elizabeth Mensch, Silencing the Guns in Haiti, 47 Buff. L. Rev. 915 (1999).
Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol47/iss2/5

This Book Review is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.
BOOK REVIEWS

Silencing the Guns In Haiti

ELIZABETH MENSCH†

On the contrary, consider how in spite of centuries of sin and greed and lust and cruelty and hatred and avarice and oppression and injustice, spawned and bred by the free wills of men, the human race can still recover, each time, and can still produce men and women who overcome evil with good, hatred with love, greed with charity, lust and cruelty with sanctity. How could all this be possible...?

The history of pre-Aristide Haiti stands as a strangely haunting example of the evils which Merton so insistently lists. A lust for power and an insatiable, almost erotic attachment to violence have permeated elite Haitian culture since the days of the Slave Revolt. In those days successful revolutionary leaders apparently chose to adopt and refine, not repudiate, the worst sins of colonialism. Those sins have persistently remained at the core of the Haitian experience.

The question posed by Stotzky's book is the same question Merton asked: How can good eventually overcome a history of pervasive evil? While Merton placed his own

† * Professor of Law, University at Buffalo School of Law. Thanks to Markus Dubber, Jack Schlegel, and Bert Westbrook.


trust in divine grace, Stotzky looks instead to an eclectic (and concededly tentative) combination of sensible economic reform, participatory democracy, and deontological commitment to individual autonomy as protected by the rule of law. Recent discouraging news from Haiti suggests the fragility of the reforms Stotzky describes; it also suggests that waiting for divine grace to do its work in Haiti is depressingly like waiting for Godot. This review will suggest that Stotzky's analysis is nonetheless important for its relevance to our country as well as to Haiti; the review will also suggest that there may be more of a relationship between the Merton and the Stotzky approaches than one might first suppose.

Chief among Haiti's historical "sins," as described by Stotzky, is the systematic treatment of human beings as, in effect, a subhuman, expendable resource to be ruthlessly exploited or, where politically expedient, to be systematically slaughtered without qualm. Stotzky describes the pre-Aristide Haitian political order as "predatory" in an almost literal sense: its whole purpose was to allow the elites to feed off the lower classes. Taxes, never paid by the upper classes, were simply a mechanism for extracting wealth from the general population, and the state was designed chiefly to be an instrument of terror for perfecting the processes of exploitation. The open, unapologetic embrace of unspeakable cruelty has been so unabashed as to suggest cultural norms that simply lie outside our own modes of normative discourse. Haitian elites have treated as routine and morally unproblematic, practices that Americans would consider moral abominations. When two cultures lack even a shared sense of what constitutes abomination, we find ourselves in a state of true moral incommensurability, which Stotzky suggests may in fact be the case with Haiti.

3. See MERTON, supra note 1, at 128.
4. See Larry Rohter, Political Feuds Ravage Haiti: So Much for Its High Hopes, N.Y. TIMES, October 18, 1998, at Section 1, 3; Larry Rohter, Haiti Paralysis Brings a Boom in Drug Trade, N.Y. TIMES, October 27, 1998, at A2. One of the tragedies of Haiti is the impossibility of learning the truth of the situation from press reports.
5. See STOTZKY, supra note 2, at 24, 56-57, 87.
6. See id. at 19.
8. See STOTZKY, supra note 2 at 116.
Among Haitians, Stotzky reports, subtle and insidious cultural distinctions reinforce the acceptability of classifying other humans as objectified "other" rather than as fellow persons. Nuanced distinctions of appearance, including facial features as well as skin color, define complex categories of status. So too do language (only a privileged 8-10% of the population speak French, the official court and school language until Aristide's return) and religion (Catholic elites disdain Vodoun, even while secretly practicing it). Apparently these status categories have dominated social thought, seeming more "real" than the inclusive conception of "person"—a conception which does not obliterate other social distinctions, but at least renders them more contingent than essential.\(^9\)

In Haiti, status distinctions are reinforced through networks of influence and corruption that drain the nation's people and resources to the point of utterly defying our own concept of rational self-interest.\(^10\) The power gradations and dependencies of patronage and cronyism within the Haitian corporatist economic structure are more highly valued even than the pursuit of wealth, which a more efficient deployment of resources would surely facilitate.\(^11\)

Thus Haiti stands as a counter-model to our usual Enlightenment assumptions, not only about equality of rights, but also about the force of rational self-interest. The challenge of the Aristide (now post-Aristide) period has been to bring democracy to a culture deeply rooted in "avarice, oppression, and injustice," and Stotzky's question is Merton's: "How could this be possible?" As Stotzky recognizes, that "how" cannot be answered simply by discrete institutional reforms like fair election procedures, an

---


10. See Robert H. Bates, Rui J. P. de Figueiredo Jr. and Barry R. Weingast, The Politics of Interpretation: Rationality, Culture, and Transition, 26 POLITICS AND SOCIETY 603 (1998) (noting the possibility of incorporating the values and symbols of different cultures when employing a game theory analysis, as still essentially premised on self-interest).

11. See STOTZKY, supra note 2 at 85. Stotzky also cites the disgust of some of the younger and more enlightened in Haiti who have been educated abroad and who report that the old, powerful elite would rather pay money in bribes than in the taxes which are much-needed for infrastructure, social services, etc. A huge black market and a powerful smuggling trade contribute to the role of corruption. Id. at 187, 189.
independent judiciary, and a reasonably fair and sensible system of taxation. However crucial those reforms might be, Stotzky insists that to be effective, they must reflect a deep cultural transformation, and should give effect to the moral justification for democracy itself. Because the normative and the practical are deeply interconnected, the pro-democracy forces in Haiti must be able convincingly to answer a basic and challenging normative question: Why is democracy "good"? What is its ultimate ethical justification?

Thus the tragic case of Haiti, in its strange and troubling particularity, raises the broadest possible theoretical questions about the meaning of democracy in relation to the dilemma of cultural relativism. By confronting Haiti, we confront moral difference at its starkest, and we ask why, exactly, that difference constitutes a "wrong" requiring change. As Stotzky points out, Haitian elites no doubt have their own language of justification and their own shared cultural norms by which their practices can seem principled and reasonable. Paradoxically, moreover, the questions raised by Haiti, even in its difference-to-the-point-of-incommensurability, are our questions as well. Haiti's history is intimately bound up with the history of United States policy (as with support for centralized power and for the Papa Doc regime, along with CIA involvement in Haitian politics) and its welfare depends in part on the future direction of United States and international policy choices.

The prologue to Stotzky's book, in fact, describes the high drama of Aristide's triumphant return to Haiti—on terms negotiated by the United States. Aristide is escorted to the airport by Warren Christopher and flown to Haiti aboard a U.S. Air Force plane, accompanied by U.S. officials. This drama takes place, however, against a backdrop of discriminatory U.S. treatment of Haitian immigrants, whose mass exodus from Haiti precipitated a U.S. political crisis and the Clinton administration's action. The drama also takes place in conjunction with the U.S. refusal to secure democracy by seizing hidden paramilitary arms caches and keeping paramilitary leaders in detention.

12. See id. at 55-63.
13. See id. at 116. On the complexity of some of these questions, see Makau Wa Mutua, The Ideology of Human Rights, 36 VA. J. INT'L. L. 589 (1996).
14. See STOTZKY, supra note 2 at 24-51, 205-07.
Ironically, but apparently inescapably, the future of Haitian "self-determination," as described by Stotzky, seems always to be, in no small measure, a function of United States decision-making.

True to his insistence that democracy requires both a theoretical and a practical, contextual foundation, Stotzky devotes Part One of his book, following the prologue, chiefly to Haitian history and to a description of conditions in Haiti upon Aristide's return; the analysis ranges from the origins of Haitian dictatorship to topographical barriers to economic development. Stotzky next shifts to a normative and theoretical level, describing his conception of deliberative, participatory democracy. Finally, he moves back to the particular context of Haiti, and its recent history under Aristide and Preval.

Perhaps the greatest strength of Stotzky's book lies in this determination to connect theory and context, a connection which requires a combination of approaches drawn from philosophy, political theory, history, sociology and economics. The result is pragmatic in the best ethical sense—serious, direct engagement with basic moral questions, without the pretense that those questions can yield timeless and universal answers. Stotzky's book is thus important not only as a study of Haiti, but also as an approach to the methodology of normatively-based political theory.

Stotzky argues that a successful transition to democracy in Haiti cannot come from trying simply to emulate the institutional structures of the developed nations, with their emphasis on separation of powers and their relatively low levels of political engagement in civil society. He suggests, instead, a model somewhere between a protectionist, nationalistic populism and strict economic neo-liberalism. That model would include a market economy but would also allow the conditions of social and economic life to be subject to the ongoing, vigorous democratic debate from which the habits of democracy are learned. His analysis has obvious relevance, not only to Haiti, but to other emerging democracies as well.

In Haiti this model would necessarily require the destruction of the old corporatist alliance which linked military power to wealth, to Catholic Church hierarchy, to political authority, and to dominant trade groups. The dissolution of corporatist power, Stotzky argues, would
allow the flourishing of vigorous local participatory groups which, even before Aristide, had started to play an active role in Haitian civil life. A full transition to democracy would also require the formation of political parties able to compete for power without chaos and violence; and it would require a functioning, independent legal system as protection against both corporatist corruption and military domination.

In light of these requirements, Stotzky then evaluates, not without criticism, Aristide’s initial proposals for reform and Haiti’s first steps toward democracy. He gives especially hopeful emphasis to human rights trials, and also to recent elections, but he describes as well how U.S. and Haitian policy has become embroiled in destructive Washington political maneuvering and CIA operations. While his conclusion is guardedly optimistic, he recognizes the fragility of democratic reform in light of Haiti’s deeply engrained habits of violence and domination.

Inevitably, Stotzky’s book poses, without pretending fully to answer, hard questions about similarity and difference. While at one level Haiti’s culture seems darkly and radically different from ours, Western democracies can hardly claim a history of innocence with respect to the “sins” that are part of Haitian life, such as the brutal treatment of others as an exploitable resource. Furthermore, of course, within Western nations where democracy is accepted as a virtually self-evident good, the justification and definition of that good is less than self-evident, and still subject to debate.

Stotzky’s own justification for democracy in Haiti is an eclectic combination of three normative goals and definitions: utilitarian, republican, and Kantian, in ascending order of priority. As for the first, Stotzky recognizes that democracy will have little chance of flourishing in an economy as wretched as Haiti’s. Haiti has been, and remains, the poorest country in the Western Hemisphere, with a per-capita income of $370 per year and malnutrition among 70% of the children, combined with environmental degradation and infrastructure dilapidation. Stotzky

15. See STOTZKY, supra note 2 at 62 (describing his method as a whole, combining a variety of academic disciplines, as “eclectic”). This insistence on combining rather than isolating disciplines, along with the insistence on relating theory and practice, is one of the great strengths of the book.

16. See STOTZKY, supra note 2 at 86.
sensibly recognizes that Haiti needs a functioning market economy in order to provide even a minimal level of welfare for Haiti's people. That means freeing the economy from corporatist political controls and opening it up for at least some competitive private investment. In turn, private investment requires a legal system that provides some reasonable measure of transparency and predictability. Indeed, one of Stotzky's arguments for the rule of law rests directly on the need for efficiency. As he effectively shows, Haiti is a stunning example of how, with bribery and corruption as the assumed norm, economic actors are caught up in various forms of "dumb anomie": Each actor keeps participating in the system of corruption even though the end result is disastrously inefficient for everyone. Haiti is so completely caught up in this vicious cycle of corruption that Stotzky pessimistically predicts the cycle may be ultimately unbreakable.

At one level, therefore, efficiency and democracy are closely linked. The same Haitian patterns of corruption which create disastrous inefficiencies also keep in place the corporatist alliance between wealth and state power which has simultaneously terrorized the population and blocked economic development. During periods of economic transition, however, the tidy link between efficiency and democracy does not always hold, and when it breaks down, difficult political and normative dilemmas emerge. For example, apparently the only way to break through Haiti's economic impasse and to encourage development is to seek foreign investment in combination with investment by domestic elites who still control the only available wealth in the otherwise capital-scarce country. Negotiations with the World Bank and the IMF have led to proposals for restructuring which require privatization and encourage joint ventures between domestic and foreign investors.

For a time the Aristide and Preval governments generally favored at least partial privatization as the only way to encourage development and break up the old corporatist alliances—as well as the only way to qualify for aid from the international community. Nevertheless, within the near future a genuinely competitive private market economy

17. See id. at 84.
18. See id. at 96-97.
19. See id. at 187.
within Haiti is probably impossible. Under privatization, the wealthy will regain their oligopolistic power and continue to dominate the economy; with domination of the economy will come, inevitably, a return to political influence. The only realistic source of serious market competition is from abroad, through lowered trade and investment restrictions; lower trade barriers would have the added benefit of reducing the incentive to deal in the corrupt contraband market. Invigorated trade, however, would also have the immediate effect of destroying those in Haiti who have been most supportive of democratic reform—small urban entrepreneurs, artisans and agricultural peasants. Meanwhile, those who would most benefit would be the elites who have long dominated the import/export business, and whose influence has been consistently antidemocratic. 20

Thus, while it is possible to point to a theoretical interdependence between free markets and democracy, at the concrete, practical, contextual level that congruence is neither easy nor automatic. Of course, if the goal is improvement rather than (impossible) free market perfection, it might, for the sake of economic development, seem easy to settle even for extensive monopoly power on the market so long as that power does not mean direct access to terrorist police squads. Yet now, many pro-democratic political forces in Haiti so fear the continued domination of the elites that they are unwilling to relinquish state control over the economy. From their perspective, there must be only bitter irony in the international pressure toward privatization and joint-venture investment: Having finally wrested power from the upper class which once dominated the political/economic order, they are, in effect, immediately being asked to relinquish economic power right back to the same upper classes and/or to powerful foreign investors, and the domestic elite are eager to regain their control. 21 Nevertheless, despite continued democratic resistance to market reforms, the future of democracy in Haiti will ultimately depend upon the economic development that only private markets can bring. People are already apparently becoming so disillusioned and debilitated by

---

21. See id. at 188.
unrelenting poverty as to lose faith in democracy itself.\(^2\) Paradoxically, in other words, democracy requires the very reforms which democratic forces in Haiti with good reason oppose, and there seems no easy way to break the impasse.

When confronting this paradox, and the difficult choices that result, Stotzky insists upon the priority of democratic decision-making over long-term efficiency. Markets are not their own excuse for being, and the economy is properly subject to democratic control.\(^3\) What, then, is the special "good" of democracy itself?

Stotzky separates justificatory theories of democracy into two basic camps. The first, interest group pluralism, which he rejects, derives the moral value of democracy precisely from the relativity of values otherwise. Since no norms transcend individual preference, the virtue of democracy lies in the free play of subjective preference on the political as well as the economic market place. Like market economics itself, the underlying philosophy is utilitarian.\(^4\)

In contrast, Stotzky's own "epistemic" theory of democracy rejects the assumption that no norms transcend subjective preference. Stotzky argues that the process of democratic participation itself—conceived as reasoned dialogue—can yield access to moral values which have objective priority over aggregated self-interest. While those values may be neither self-evident nor logically demonstrable, they can be "known," at least tentatively, through the process of reasoned dialogue itself, as people, interacting with each other, learn to take account of the needs and views of each other. Protecting the integrity of this process is, for Stotzky, more important than, for example, insuring Assembly adoption of IMF-mandated privatization plans.\(^5\)

Stotzky assigns the highest moral value, not to representative democracy in the Assembly or to the popular election of the President—however important those may be—but rather to the experience of direct participatory democracy at the local level, an experience that has now become part of Haitian life. Stotzky's participatory theory of democracy has been influenced by the work of Carlos S.

\(^{22}\) See Rohter, supra note 4, at A2.
\(^{23}\) See STOTZKY, supra note 2 at 82.
\(^{24}\) See id. at 64-65.
\(^{25}\) See id. at 66-75.
Nino, a former adviser to the President of Argentina and author of *The Constitution of Deliberative Democracy*; Stotzky and Nino have collaborated on studies relating to democracy during transitional periods. It also reflects the influence of the whole republicanism debate which came to the forefront a few years ago in American legal scholarship.

Participatory theories of democracy are not, of course, without their own troubling features, which were explored at some length during the republican revival in legal thought. Republicanism's greatest scholar and interpreter, J.G.A. Pocock, showed that historically republicanism has tended toward either religious apocalypse or, in its more secular forms, toward self-determination and self-renewal through militarism. James Harrington, the English republican theorist whose work most directly and powerfully influenced the United States during the early days of the republic, avoided those two extremes only by explicitly basing his model of democracy on the example of ancient Israel, and by proposing constant renewal through rotating representation and periodic redistribution of land.

In this country the pure republican model was, of course, rejected by the Federalists as incompatible with a flourishing commercial life. Pure, localized popular

---

26. Id. at 62 and 247-48 at n.2.


sovereignty during the revolutionary period had often proved more chaotic than virtuous, and its practice in the colonies had left memories that were not altogether positive: Long town meetings could become so burdensome that "free" participation sometimes had to be coerced. At its very worst, participatory democracy can descend into something resembling Milton's famous parody of democracy as practiced among the fallen angels—manipulative eloquence in the service of ignoble ends, with the final vote serving only to ratify the preconceived goals of the powerful.

Stotzky's book is oddly short on social history, so we learn little about why democracy initially began to take hold among the Haitians at a local participatory level. Most Haitians are unlikely to have been directly influenced by James Harrington or by the U.S. legal academy—or even by Nino, although there the influence is more plausible. A more likely influence is the base community movement of Catholic liberation theology, which has been powerful and widespread in Latin America. Stotzky mentions briefly that some within the Catholic Church have helped to encourage participatory grass roots movements, despite the alliance between the Catholic hierarchy and the Haitian elite otherwise. For the most part, however, Stotzky leaves religion out of his account altogether, despite his emphasis on cultural transformation—an emphasis that constitutes one of central contributions of the book. If, as Stotzky suggests, democracy is in large measure a cultural form—and a reflection, therefore, of internalized cultural values and habitual modes of thought and practice—then the complex Haitian combination of Vodoun and Catholicism deserves more analysis. The success of democracy in Haiti will surely depend in part on its resonance with the people's religious life and modes of thinking, yet Stotzky does not consider democracy as a theological question.

34. See Stotzky, supra note 2, at 89.
35. For one account of liberation theology, see R. M. Brown, Liberation Theology: An Introductory Guide (1993). For emphasis on "habits" of
From a theological perspective, of course, participation, however much it is valued, is not its own excuse for being, any more than is efficiency, and Stotzky notably takes the same position. For Stotzky democracy is a means, not an end, and so far as can be discerned (the argument proceeds somewhat by indirection) the end to be achieved is essentially Kantian. Stotzky argues that people, when thinking and acting as individuals, will do very well in evaluating and representing their own interests but will not necessarily consider, or even notice, the impact of action on others; thus, in their decision-making, they will not properly take into account the welfare of others, who should be always regarded as equals in autonomy and personhood. In other words, people will not always recognize what duties are commanded by the categorical imperative. Participation in democracy is the social process by which people can do normative deliberation in a manner which forces them, in their collectivity, to take full and equal account of others.\[^{36}\]

While Stotzky's goal is the Kantian one of reasoned ethical norms, his confidence in reason itself is muted. In a time of epistemological uncertainty, he seems to suggest, the outcome of the deliberative process may be provisional and contextual rather than self-evidently objective and universal. Continuing participation becomes the process by which a people move toward norms which remain ever-elusive.\[^{37}\] It is therefore the inadequacy of individual reasoning of the provisionality of ethical norms (two assumptions not usually associated with Kant) which leads Stotzky to turn Kant's description of individual ethical reasoning into a political theory in justification of democracy.\[^{38}\]

However provisional the duty-defining results of the social decision-making process might be, Stotzky insists on one seemingly foundational, preconditional Kantian base-thinking in political change, see G. Wood, \textit{supra} note 31, at 1. That means, of course, that the habits of one culture are not easily transferred to another; and habits of democracy cannot be imposed without self-contradiction.

\[^{36}\] See STOTZKY, \textit{supra} note 2 at 68-70.
\[^{37}\] See id. at 69.
\[^{38}\] For the argument that Kant never meant the Second Critique to be the basis for political theory, see HANNAH ARENDT, \textit{LECTURES ON KANT'S POLITICAL PHILOSOPHY} 7-10 (Ronald Beines, ed. 1982). Of course, liberal theory has tended nevertheless to appropriate the Kantian model of autonomy as a basis for legal/political argument.
the treatment of individuals as ends rather than means, as autonomous persons whose rights are protected under law.  

This protection runs completely counter to the routine Haitian practices of "predation," and for that reason Stotzky finds the effort to vindicate human rights abuses through legal trials to be the single most important sign of hope for democracy in Haiti. The past practice in Haiti has been to warehouse prisoners in unthinkably deplorable conditions with no notice of the crime supposedly committed and certainly no procedural safeguards—a practice only barely preferable to simple slaughter, which is also routine. In sharp contrast, Stotzky envisions a criminal justice system in which punishment is an expression of solidarity with those whose rights have been violated and, even with respect to those guilty of past ruthless human rights abuses, also an expression of community respect for the autonomy of the one who is punished. The prisoner should understand the nature of the duty he or she has transgressed, and accept the justice of the punishment.

The contrast between this conception of criminal justice and Haitian norms is so startling that one might ask, quizzically, why invoke it? Even within the U.S. legal system, respect for the rights of both victims and prisoners as autonomous individuals seems squeezed between the drive for social control (leading, e.g., to a fourfold increase in incarceration rates since the early 1970s) and a wistful longing for the therapeutic possibility of rehabilitation—both, in different ways, essentially utilitarian goals. Even in relation to Haiti specifically, the U.S. has been less than eager to cooperate with the vindication of human rights abuses. More generally, the confident Kantian image of

39. See id. at 70.
40. See id. at 90-91.
41. See id. at 98, 114-16.
the autonomous individual exercising his/her reason to arrive at objective norms seems, itself, a passing intellectual construct and Stotzky's emphasis, therefore, an odd hold-over from Enlightenment theory. If, as Stotzky in effect concedes, confidence in the authority and self-sufficiency of reason has eroded, what is then left of the Kantian conception of autonomy? A conception of human rights derives ultimately from a conception of what it means to be human, which in Kantian terms is inextricably linked to the capacity to exercise reason. 4

A central question which emerges from Stotzky's book, therefore, is whether the Enlightenment conception of autonomy can still sustain the weight Stotzky assumes that it can, as a foundational presupposition for a conception of democracy itself. The argument even for relevance may seem strained, both as to the tortured context of Haiti (which never really experienced the Western Enlightenment) and to the current intellectual climate generally. Stotzky never quite addresses that question directly, even though perhaps the most impressive aspect of Stotzky's book otherwise lies in its insistence on the necessary relation between the generality of normative theory and the particularity of social/historical context. It is at least worth noting, however, that other scholars have attempted to reread Kant through the lens, as it were, of both our own anti-foundationalist intellectual context and the religious context within which Kant himself wrote. 45

The result is a more contingent, historically constructed conception of autonomy which may more closely resonate with current thought and, more important with relation to Stotzky's work, with the Christianized version of direct democracy which has now become part of the Haitian experience.

Kant is often taken as almost defining what the Enlightenment came to represent: the dignity of a self-sufficient, autonomous human reason freed from the

44. There may be some ambiguity here. Stotzky calls for a social process of reasoned argument and deliberation, but he does not think individual reason alone capable of adequately discerning norms applicable interpersonally. See Stotzky, supra note 2, at 67-68.

external authority\footnote{46} of positivist (Protestant) divine command and from the authority of those laws ontologically rooted in the order of nature itself (more typical of Catholicism). Moreover, Kantian reason was also freed from the tyranny of desire—the hierarchical ordering of desire then typical of Christian traditionalism as well as the self-interested calculation of desire typical of utilitarianism.\footnote{47} The latter version (unlike, arguably, the Christian one) allowed for no escape from egoism. Stotzky’s rejection of market efficiency as the highest form of good is therefore utterly consistent with his appeal to Kantian ethics as directed toward transcending pure self-interest.

As against all of those oppressions, ranging from God’s command to self-interest, Kant posited the freedom of the individual, defining freedom as the freely-willed choice to act in accord with the dictates of human reason itself: dictates of internal consistency, principled universality, and utter impartiality.\footnote{48} Hence the “test” for any maxim of moral duty as framed by the categorical imperative: whether we can consistently will that “everyone should always act upon it.”\footnote{49} To act otherwise than in accord with duty so conceived is to be untrue to reason, and therefore to be inconsistent.

In effect, Stotzky locates this freedom within the dialogic process of democratic participation rather than solely within the individual. Participation provides a check to unprincipled partiality and the tendency to promote one’s own needs and desires, providing at least tentative access, therefore, to a “reasoned” definition of duty. Stotzky also assumes, however, that individual autonomy is a pre-condition for democracy. The result is conceptually a bit puzzling. Presumably, collective action which violates individual freedom (i.e., which is irrational) would be tyranny, which is why democracy is not “good” by definition. The source of norms, however, by which Stotzky would judge the outcomes of democratic decision-making remains somewhat

\footnote{47. See LOWE, supra note 44, at 104. Thus “obedience to moral law is an exercise of freedom,” and autonomy becomes, conversely, a “matter of obedience.” J. MILBANK, THEOLOGY AND SOCIAL THEORY: BEYOND SECULAR REASON (1990) at 62.}
\footnote{48. See TAYLOR, supra note 45, at 366.}
\footnote{49. MACINTYRE, supra note 45, at 45.
undefined, although clearly once source he draws upon is the Western historical tradition of human rights protection.50—suggesting a conception of autonomy that is more historically contingent than foundational and perhaps therefore more in accord with an historical understanding of autonomy itself, although also more difficult to apply to a nation which does not share the same history.

During Kant's time, the call to human freedom had been suspect because it seemed to undermine the authority of religion. More currently it seems suspect because reason itself is understood as a vocabulary of authority, as justification for coercion. To claim reason on one's side is to legitimate the exercise of power. In relation to the situation in Haiti, however, it may be worth recalling that in Kant's own historical context the emphasis on autonomous reason was in fact an emphasis on equality, not authority. In a context which accepted as natural and "given" an elaborate social system of fixed, essentialist hierarchical categories (a perverse version of which now exists in Haiti) Kant represented a determination to smash through hierarchy and to assert the fundamental human equality implicit in a shared capacity for moral understanding.51 No easily available alternative secular argument on behalf of equality provides the power of that great Enlightenment claim.

Moreover, that claim was not, in context, necessarily the proud secular boast it is often taken to have been. Kant's perspective was in part scientific and in part theological. This combination led him to appreciate both the vastness of the universe and its relativizing effect on all human and natural hierarchy. Kant's own early scientific work had described a universe which was far more limitless than even the one Newton had conceived. Nevertheless, Kant pointed out that from the perspective of God (for Kant, a somewhat abstract construct), even the whole vastness of the universe, with its spatial and temporal infinity, where "millions and whole myriads of millions of centuries will flow on, during which always new worlds and new systems of world will be formed,"52 was no greater and no less perishable than the smallest particle. The whole universe was reducible to a "mere point."53 In other words, from the

50. See STOTZKY, supra note 2 at 57.
51. See SCHNEEWIND, supra note 44, at 490, 515.
52. LOWE, supra note 44 at 92.
53. Id. at 93.
perspective of a transcendent God, outside human time and space, “the great and small are small alike,” so that all human claims based on differences and apparent superiorities are reduced to triviality—very much in the anti-hierarchical spirit of the Catholic liberation theologians.

When Kant in the Second Critique famously compares the reasoned, human moral law “within” to the vast starry heavens above, that seemingly boastful passage must be read in light of the assumption of radical relativity. The human always remained human, which meant utterly perishable, and, in fact, marked by brokenness and disjuncture, not perfection. Epistemologically, as Kant argued in the Critique of Pure Reason, the mind’s very creativity, which seemed to make it god-like, introduced an element of uncertainty and indeterminacy into our knowledge of external reality and into our knowledge even of ourselves. We may not be, Kant says, in a position to distinguish what we directly experience from what our mind adds to that experience. The world is not fully present to the experiencing subject, nor is the subject fully present even to itself.

54. Id. at 89.

55. See id. at 76. At the same time, however, Kant does insist that the human reason upon which he bases his argument for human dignity and autonomy is a non-contingent capacity that lifts human beings out of their otherwise limited and animal existence. See id. at 78. This claim can best be understood in relation to a theological debate that, at the time of Kant, was inseparable from moral theory. During that period, disputes still raged between volunteerists and antivolunteerists, disputes that had become tiresome and seemed without resolution. An “objective” moral law, rooted in God’s reason and reflected in nature, bound even God himself, in seeming contradiction to God’s freedom and transcendence; yet a positivist moral law whose only basis lay in God’s unfettered will, with no relation to an objectively conceived justice, appeared arbitrary and capricious, demanding servile obedience rather than true accord. Kant brilliantly thought his way through that problem in moral theory by positing a conception of duty that, was objective but also rooted solely in human reason. Liberated from the externally based objective necessity of natural law, the Kantian conception of duty was capable of summoning our accord without violating either God’s freedom or ours. See SCHNEEWEND, supra note 44 at 508-13.

56. See LOWE, supra note 44, at 94-8. By way of contrast, Kant posited the (again, abstractly conceived) counter example of God as one who experiences no difference between pure intuition (receptivity) and (creative) thought. For God alone is there no disjunction between the inviting subject and the object in its full presence, because for God, knowing and creating are one. For humans, by contrast, the creativity of the mind is a problem. We long for unmediated
This problem of disjuncture within human reasons does not disappear when we move to the realm of ethical reason, despite Kant's emphasis on objectivity. Kant is well known for the distinction between pragmatic reason and categorical reason. The first is a calculation of means and ends, not qualitatively different from a calculation of cause and effect. The only relevant question is how to reach the desired object, and the human subject, even while "reasoning," remains enslaved by desire, as well as plagued by epistemological uncertainty.

It is in contrast to means/ends reasoning that Kant posited the purely formal character of ethical reasoning as such, characterized by the consistency and universality demanded by reason's own requirements. This formality may well require that we act contrary to our own desires; it may also require that we do violence even to the welfare of others, as with Kant's famous example of the formal obligation not to lie, even when to tell the truth means to surrender friends to enemy soldiers. The oft-cited coldness and rigor of this demand for formal consistency may appear so at odds with our current understanding and experience as to seem actually unethical. Moreover, current critical thought has become so adept at reducing supposedly neutral, universal, reasoned principles to inconsistency and self-contradiction that full confidence in any supposedly universal norm would be difficult to recover. Hence Stotzky's concession that ethical norms are necessarily provisional in nature, which is a reason for locating them in the outcome of participatory democracy.

At another level, however, Kant's emphasis on the distinctive character of categorical reasoning can itself be taken as a statement about the self-divided nature of human reason itself. The categorical conception of duty points to a formal reality which, while seemingly outside of ourselves, actually resides solely within and asks for our assent only to internal norms which can offer no external validation. Moreover, Kant never denied the true

experience yet are cut off from knowledge even of ourselves. See id. at 98-101, drawing on the analysis of John Sallis.

57. For criticism on this Kantian position on grounds that it fails to take account of the real ambiguity of human experience, see "What is Meant by "Telling the Truth"" in DIETRICH BONHOEFFER, ETHICS 326-34 (1955).

58. For one recent account, see DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (1997).
“rationality” or value of prudential reason, upon which human survival depends. While seeming to suppose the existence of neatly separated faculties within the mind for each type of reason, Kant did not postulate some internal guide confidently assigning appropriate tasks for each. Instead, humans exist in a state of ambiguity, facing a material world of confusing particularity in a state of epistemological uncertainty, and drawn toward conflicting demands lodged even within themselves.

Not surprisingly, therefore, a starkly Augustinian tone emerges from Kant’s description of the brokenness of human will. Only a being (i.e., God) who does not have to struggle to mediate between conflicting aspects of the self is completely free from that brokenness. For the rest of us, that “internal difference is irreducible” and the fact that we can name the possibility of its transcendence does not change its irreducibility.

It is at least worth noting in passing that American law, too, seems to find itself in its own state of indeterminacy in the face of seemingly irreducible difference as it answers to the conflicting claims of categorical and consequentialist reasoning without being able to transcend their difference. Haiti, meanwhile, is in a more desperate state of turmoil, a turmoil which might be described almost as a tortured enactment of the same dilemma. Preval is caught between former, disaffected Aristide supporters in the Assembly (which he suspended) and Aristide loyalists who want to regain control in the name of greater moral/democratic purity. Conditions worsen: Haiti not only remains the poorest nation in the hemisphere, with the highest illiteracy and worst infant mortality rate; it has, since Aristide’s return, also moved rapidly from 124th to 159th in the international scale of economic development. While

59. This problem was only taken up later in life by Kant, in CRITIQUE OF JUDGEMENT, where he proposes aesthetic judgement as such a guide. See ARENDT, supra n. 38 at 10-16, 51-85.
60. See TAYLOR, supra note 45 at 366.
61. Id. at 366.
62. Therefore, for the sake of explaining the human situation, Kant postulates, by way of contrast, a Holy Will within which to will is the same as to accomplish, so that the material is, so to speak, absorbed within the formal. See LOWE, supra note 44 at 117, 125-26.
63. One might read Richard Epstein’s casebook on Torts (R. Epstein, Cases and Materials on Torts, 1995) as an extended meditation on that theme.
64. See Router, supra note 4, at 3.
Aristide no longer holds office, he uses his influence, some charge, to engage on a mission of messianic obstructionism. Stotzky describes Aristide as a leader determined to remain in solidarity with those whose personhood rights have been violated by a history of cruel abuse. From that perspective, it is tempting to cheer on his refusal to compromise a (categorical) conception of duty for the (consequentialist) sake of economic well-being or political stability. Meanwhile, however, even the human rights trials, a core symbol of the (Kantian) vindication of human rights in Haiti, are grinding to a halt for want of financing as Haiti finds itself caught in moral paradox: Needed market reforms threaten to undercut the moral foundation of the new democracy, yet that same moral foundation depends on the economic well-being that only successful market reforms can bring.

In this real world of paradox and ambiguity, a world shaped by the always messy and often grim particularities of history, not the tidy abstractions of pure theory, perhaps the very "best" ethical choices are in fact the very worst: Pure adherence to duty (if that in fact is what Aristide represents) may impose a cost so grave as to be itself unethical, in the precise sense of using the utterly predictable suffering of others as a means toward an external end. In such a situation it may be useful to invoke the more theological take on Kantian ethics, as described above, and recall how indeterminate our human situation really is. How so ever much the Kantian tradition has emphasized the distinction between consequentialist and ethical reasoning, Kant himself never suggested that ethical reasoning was other than human reasoning. On the flip side of the arrogance with which he separated autonomous human categorical reasoning from God's command, one sees revealed as well a hearty dose of humility. Unaided human reason is both unaided and human, which means it is exercised by material creatures, alone in a universe of "myriads and whole myriads of millions" of worlds and dependent for their very survival on also being able, albeit imperfectly, to weigh costs and predict consequences.

Moreover, nothing makes the inherent ambiguity and

65. Id.
66. Id.
internal division of the human condition more evident than the very fact of those dualistic categories Kant constructed for us, by which we find ourselves experiencing, as it were, our own experience. In that sense we might see in the divisions that now plague Haiti, not only exotic incommensurability but also, simultaneously, our own mirror image. Kant himself held open the hope that the separation between duty and desire might eventually be closed, thereby posing the possibility of a unity which the pietists responsible for Kant's earliest training would, unhesitatingly, have labeled grace. Merton, too, suggested the same possibility in relation to history, thereby holding out the hope that even centuries of evil could be replaced, if only fleetingly, by love, charity, and sanctity. For the patient people of Haiti that hope must seem an empty one.