

Kant
The Metaphysics of Morals

Private right, Chapter I and introduction to Chapter II

6:245-60

The universal doctrine of right

Part I

Private right

Concerning what is externally mine or yours^k in general

Chapter I

How to have something external as one's own.

§ 1.

That is *rightfully mine* (*meum iuris*) with which I am so connected that another's use of it without my consent would wrong me. The subjective condition of any possible use is *possession*.

But something *external* would be mine only if I may assume that I could be wronged by another's use of a thing even though *I am not in possession of it*. – So it would be self-contradictory to say that I have something external as my own if the concept of possession could not have different meanings, namely *sensible* possession and *intelligible* possession, and by the former could be understood *physical* possession but by the latter a *merely rightful* possession of the same object.

But the expression “an object is *external to me*” can mean either that it is an object merely *distinct* from me (the subject) or else that it is also to be found in *another location* (*positus*) in space or time. Only if it is taken in the first sense can possession be thought of as rational possession; if taken in the second sense it would have to be called empirical possession. – *Intelligible* possession (if this is possible) is possession of an object *without holding it* (*detentio*). 6:246

§ 3.^l

6:247

Whoever wants to assert that he has a thing as his own must be in possession of an object, since otherwise he could not be wronged^m by

^k In the translation of the phrase *Mein und Dein* (*meum et tuum*), “and” has been changed to “or.”

^l § 2 is omitted here but replaces a portion of the text of § 6. See above, Translator’s Note.

^m lädiert. In 6:249 Kant gives *Abbruch an meiner Freiheit . . .* as a parenthetical explanation of *Lässion*.

IMMANUEL KANT

another's use of it without his consent. For if something outside this object which is not connected with it by rights affects it, it would not be able to affect himself (the subject) and do him any wrong.

§ 4. Exposition of the concept of external objects that are yours or mine.

There can be only *three* external objects of my choice: 1) a (corporeal) *thing* external to me; 2) another's *choice* to perform a specific deed (*praestatio*); 3) another's *status*ⁿ in relation to me. These are objects of my choice in terms of the categories of *substance*, *causality*, and *community* between myself and external objects in accordance with laws of freedom.

- 6:248
- a) I cannot call an object in *space* (a corporeal thing) mine unless, *even though I am not in physical possession of it*, I can still assert that I am actually in some other (hence not physical) possession of it. – So I shall not call an apple mine because I have it in my hand (possess it physically), but only if I can say that I possess it even though I have put it down, no matter where. In the same way, I shall not be able to say that the land on which I have lain down is mine because I am on it, but only if I can assert that it still remains in my possession even though I have left the place. For someone who tried in the first case (of empirical possession) to wrest the apple from my hand or to drag me away from my resting place would indeed wrong me with regard to what is *internally* mine (freedom); but he would not wrong me with regard to what is externally mine unless I could assert that I am in possession of the object even without holding it. I could not then call these objects (the apple and the resting place) mine.
 - b) I cannot call the *performance* of something by another's choice mine if all I can say is that it came into my possession *at the same time* that he promised it (*pactum re initum*),^o but only if I can assert that I am in possession of the other's choice (to determine him to perform it) even though the time for his performing it is still to come. The other's promise is therefore included in my belongings and goods (*obligatio activa*), and I can count it as mine not merely if (as in the first case) I already have *what was promised* in my possession, but even though I do not possess it yet. So I must be able to think that I am in possession of this object independently of being limited by temporal conditions, and so independently of empirical possession.
 - c) I cannot call a *wife*, a *child*, a *servant*, or, in general, another person mine because I am now in charge of them as members of my household or have them within my restraining walls and in my

ⁿ *Zustand*

^o having undertaken a compact regarding a thing

THE METAPHYSICS OF MORALS

control and possession, but only if, although they have withdrawn from such constraint and I do not possess them (empirically), I can still say that I possess them merely by my will, hence *merely rightfully*, as long as they exist somewhere or at some time. Only if and insofar as I can assert this are they included in my belongings.

§ 5. Definition of the concept of external objects that are mine or yours.

The *nominal definition*^b of what is externally mine – that which suffices only to distinguish the object from all others and arises from a complete and determinate *exposition* of the concept – would be: that outside me is externally mine which it could be a wrong (an infringement upon my freedom which can coexist with the freedom of everyone in accordance with a universal law) to prevent me from using as I please. – But the *real definition*^a of this concept – that which also suffices for the *deduction* of it (cognition of the possibility of the object) – goes like this: something external is mine if I would be wronged by being disturbed in my use of it even though I am not in possession of it (not holding the object). – I must be in some sort of possession of an external object if it is to be called *mine*, for otherwise someone who affected this object against my will would not also affect me and so would not wrong me. So, in consequence of 4, *intelligible possession (possessio noumenon)* must be assumed to be possible if something external is to be mine or yours. Empirical possession (holding) is then only possession in *appearance (possessio phaenomenon)*, although the *object* itself that I possess is not here treated, as it was in the Transcendental Analytic, as an appearance but as a thing in itself; for there reason was concerned with theoretical cognition of the nature of things and how far it could extend, but here it is concerned with the practical determination of choice in accordance with laws of *freedom*, whether the object can be cognized through the senses or through the pure understanding alone, and *right* is a pure practical *rational concept* of choice under laws of freedom.

6:249

For the same reason it is not appropriate to speak of possessing a right to this or that object but rather of possessing it *merely rightfully*; for a right is already an intellectual possession of an object and it would make no sense to speak of possessing a possession.

§ 6. Deduction of the concept of merely rightful possession of an external object (possessio noumenon).

The question: how is it possible for something external to be mine or yours? resolves itself into the question: how is *merely rightful* (intelligible) posses-

^b *Namenerklärung*

^a *Sacherklärung*

IMMANUEL KANT

sion possible? and this, in turn, into the third question: how is a *synthetic a priori* proposition about right possible?

6:250 All propositions about right¹⁷ are a priori propositions, since they are laws of reason (*dictamina rationis*). An a priori proposition about right with regard to *empirical possession* is *analytic*, for it says nothing more than what follows from empirical possession in accordance with the principle of contradiction, namely, that if I am holding a thing (and so physically connected with it), someone who affects it without my consent (e.g., snatches an apple from my hand) affects and diminishes what is internally mine (my freedom), so that his maxim is in direct contradiction with the axiom of right.¹⁷ So the proposition about empirical possession in conformity with rights does not go beyond the right of a person with regard to himself.

On the other hand, a proposition about the possibility of possessing a thing *external to myself*, which puts aside any conditions of empirical possession in space and time (and hence presupposes the possibility of *possessio noumenon*), goes beyond those limiting conditions; and since it affirms possession of something even without holding it, as necessary for the concept of something external that is mine or yours, it is *synthetic*. Reason has then the task of showing how such a proposition, which goes beyond the concept of empirical possession, is possible a priori.¹⁸

*Postulate of practical reason with regard to rights.*¹⁹ ²⁰

It is possible for me to have any external object of my choice as mine, that is, a maxim by which, if it were to become a law, an object of choice would

¹⁷ *Rechtssätze*

¹⁸ The next three paragraphs originally numbered § 2, replace the following passage from AK:

In this way, for example, taking possession of a separate piece of land is an act of private choice, without being *unsanctioned* [*ohne doch eigenmächtig zu sein*]. The possessor bases his act on an innate *possession in common* [*Gemeinbesitz*] of the surface of the earth and on a general will corresponding *a priori* to it, which permits *private possession* on it (otherwise, unoccupied things would in themselves and in accordance with a law be made things that belong to no one). By being the first to take possession he originally acquires a definite piece of land [*bestimmten Boden*] and resists with right (*iure*) anyone else who would prevent him from making private use of it. Yet since he is in a state of nature, he cannot do so by legal proceedings [*von rechtswegen*] (*de iure*) because there does not exist any public law in this state.

Even if a piece of land were considered or declared to be *free*, that is, open to anyone's use, one could still not say that it is free by nature or *originally* free, prior to any act establishing a right; for that would again be a relation to things, namely to the land, which would refuse possession of itself to anyone; instead one would say that this land is free because of a prohibition on everyone to make use of it, and for this, possession of it in common is required, which cannot take place without a contract. But land that can be free only in this way must really be in the possession of all those (joined together) who forbid or suspend one another's use of it.

THE METAPHYSICS OF MORALS

in itself (objectively) have to *belong to no one* (*res nullius*) is contrary to rights.¹⁸

For an object of my choice is something that I have the *physical* power to use. If it were nevertheless absolutely not within my *rightful* power to make use of it, that is, if the use of it could not coexist with the freedom of everyone in accordance with a universal law (would be wrong), then freedom would be depriving itself of the use of its choice with regard to an object of choice, by putting *usable* objects beyond any possibility of being *used*; in other words, it would annihilate them in a practical respect and make them into *res nullius*, even though in the use of things choice was formally consistent with everyone's outer freedom in accordance with universal laws. – But since pure practical reason lays down only formal laws as the basis for using choice and thus abstracts from its matter, that is, from other properties of the object *provided only that it is an object of choice*, it can contain no absolute prohibition against using such an object, since this would be a contradiction of outer freedom with itself. – But an object of my *choice* is that which I have the *physical capacity*^v to use as I please, that whose

This *original* community of land, and with it of things upon it (*communio fundi originaria*), is an idea that has objective (rightfully practical) reality. This kind of community must be sharply distinguished from a *private community* (*communio primaeva*), which is a fiction;¹⁹ for a primitive community would have to be one that was *instituted* and arose from a contract by which everyone gave up private possessions and, by uniting his possessions with those of everyone else, transformed them into a collective possession [*Gesammtbesitz*]; and history would have to give us proof of such a contract. But it is contradictory to claim that such a procedure is an *original* taking possession and that each human being could and should have based his separate possession upon it.

6:251

Residing [Sitz] on land (*sedes*) is to be distinguished from being in possession (*possessio*) of it, and *settling* or making a settlement [*Niederlassung, Ansiedelung*] (*incolatus*), which is a lasting private possession of a place dependent upon the presence of the subject on it, is to be distinguished from taking possession of land with the intention of some day acquiring it. I am not talking here about settling as a second act to establish a right, which can either follow upon taking possession or not take place at all; for settling of this kind would not be original possession but would be possession derived from others' consent.

Merely physical possession of land (holding it) is already a right to a thing, though certainly not of itself sufficient for regarding it as mine. Relative to others, since (as far as one knows) it is first possession, it is consistent with the principle of outer freedom and is also involved in original possession in common, which provides a priori the basis on which any private possession is possible. Accordingly, to interfere with the use of a piece of land by the first occupant of it is to wrong him. Taking first possession has therefore a rightful basis (*titulus possessionis*), which is original possession in common; and the saying "Happy are those who are in possession" (*beati possidentes*), because none is bound to certify his possession, is a basic principle of natural right, which lays down taking first possession as a rightful basis for acquisition on which every first possessor can rely.

¹⁸ *Rechtlches Postulat*. On the translation of *rechtlich*, see Translator's Introduction.

¹⁹ *rechtswidrig*. On the translation of *rechtswidrig* and its opposite, *rechtmässig*, see Translator's Introduction.

^v *Vermögen*

IMMANUEL KANT

use lies within my *power*^w (*potentia*). This must be distinguished from having the same object under my control^x (*in potestatem meam redactum*), which presupposes not merely a *capacity* but also an *act* of choice. But in order to *think of* something simply as an object of my choice it is sufficient for me to be conscious of having it within my power. – It is therefore an a priori presupposition of practical reason to regard and treat any object of my choice as something which could objectively be mine or yours.

6:247 This postulate can be called a permissive law (*lex permissiva*) of practical reason, which gives us an authorization that could not be got from mere concepts of right as such, namely to put all others under an obligation, which they would not otherwise have, to refrain from using certain objects of our choice because we have been the first to take them into our possession. Reason wills that this hold as a principle, and it does this as practical reason, which extends itself a priori by this postulate of reason.^y

6:251 In an a priori *theoretical* principle, namely, an a priori intuition would have to underlie the given concept (as was established in the *Critique of Pure Reason*); and so something would have to be added to the concept of possession of an object. But with this practical principle the opposite procedure is followed and all conditions of intuition which establish empirical possession must be removed (disregarded), in order to extend the concept of possession beyond empirical possession and to be able to say: it is possible for any external object of my choice to be reckoned as rightfully mine if I have control of it (and only insofar as I have control of it) without being in possession of it.

6:252 The possibility of this kind of possession, and so the deduction of the concept of nonempirical possession, is based on the postulate of practical reason with regard to rights: "that it is a duty of right to act towards others so that what is external (usable) could also become someone's," together with the exposition of the concept of an external object that belongs to someone, since that concept rests simply on that of *nonphysical* possession. There is, however, no way of proving of itself the possibility of nonphysical possession or of having any insight into it (just because it is a rational concept for which no corresponding intuition can be given); its possibility is instead an immediate consequence of the postulate referred to. For if it is necessary to act in accordance with that principle of right, its intelligible condition (a merely rightful possession) must then also be possible. – No one need be surprised that *theoretical* principles about external objects that are mine or yours get lost in the intelligible and represent no extension of cognition, since no theoretical deduction can be given for the possibility of the concept of freedom on which they are based. It can only be inferred

^w *in meiner Macht*

^x *in meiner Gewalt*

^y The text cited in note s replaces text originally found here.

THE METAPHYSICS OF MORALS

from the practical law of reason (the categorical imperative), as a fact of reason.

§ 7. Application to objects of experience of the principle that it is possible for something external to be mine or yours.

The concept of merely rightful possession is not an empirical concept (dependent upon conditions of space and time) and yet it has practical reality, that is, it must be applicable to objects of experience, cognition of which is dependent upon those conditions. – The way to proceed with the concept of a right with respect to such objects, so that they can be external objects which are mine or yours, is the following. Since the concept of a right is simply a rational concept, it cannot be applied directly to objects of experience and to the concept of empirical possession, but must first be applied to the understanding's pure concept of possession in general. So the concept to which the concept of a right is directly applied is not that of *holding* (*detentio*), which is an empirical way of thinking of possession, but rather the concept of *having*,²⁰ in which abstraction is made from all spatial and temporal conditions and the object is thought of only as *under my control* (*in potestate mea positum esse*). So too the expression *external* does not mean existing in a *place other* than where I am, or that my decision and acceptance are occurring at a different time from the making of the offer; it means only an object *distinct* from me. Now, practical reason requires me, by its law of right, to apply mine or yours to objects not in accordance with sensible conditions but in abstraction from them, since it has to do with a determination of choice in accordance with laws of freedom, and it also requires me to think of possession of them in this way, since only a *concept of the understanding* can be subsumed under concepts of right. I shall therefore say that I possess a field even though it is in a place quite different from where I actually am. For we are speaking here only of an intellectual relation to an object, insofar as I have it *under my control* (the understanding's concept of possession independent of spatial determinations), and the object is *mine* because my will to use it as I please does not conflict with the law of outer freedom. Here practical reason requires us to think of possession *apart from* possession of this object of my choice in appearance (holding it), to think of it not in terms of empirical concepts but of concepts of the understanding, those that can contain a priori conditions of empirical concepts. Upon this is based the validity of such a concept of possession (*possessio noumenon*), as a *giving of law* that holds for everyone; for such lawgiving is involved in the expression "this external object is *mine*," since by it an obligation is laid upon all others, which they would not otherwise have, to refrain from using the object.

So the way to have something external as what is mine consists in a merely rightful connection of the subject's will with that object in accor-

6:253

6:254

IMMANUEL KANT

dance with the concept of intelligible possession, independently of any relation to it in space and time. – It is not because I occupy a place on the earth with my body that this place is something external which is mine (for that concerns only my outer *freedom*, hence only possession of myself, not a thing external to me, so that it is only an internal right). It is mine if I still possess it even though I have left it for another place; only then is my external right involved. And anyone who wants to make my continuous occupation of this place by my person the condition of my having it as mine must either assert that it is not at all possible to have something external as mine (and this conflicts with the postulate 2) or else require that in order to have it as mine I be in two places at once. Since this amounts to saying that I am to be in a place and also not be in it, he contradicts himself.

This can also be applied to the case of my having accepted a promise. For my having and possession in what was promised is not annulled by the promisor's saying at one time "this thing is to be yours" and then at a later time saying of the same thing "I now will that it not be yours." For in such intellectual relations it is as if the promisor had said, without any time between the two declarations of his will, "this is to be yours" and also "this is not to be yours," which is self-contradictory.

The same holds of the concept of rightful possession of a person, as included in the subject's belongings (his wife, child, servant). This domestic community and the possession of their respective status *vis-à-vis* one another by all its members is not annulled by their being authorized to separate from one another and go to different *places*; for what connects them is a relation *in terms of rights*, and what is externally mine or yours here is based, as in the preceding cases, entirely on the assumption that purely rational possession without holding each other is possible.

Rightfully practical reason is forced into a critique of itself in the concept of something external which is mine or yours, and this by an antinomy of propositions concerning the possibility of such a concept; that is, only by an unavoidable dialectic in which both thesis and antithesis make equal claims to the validity of two conditions that are inconsistent with each other is reason forced, even in its practical use (having to do with rights), to make a distinction between possession as appearance and possession that is thinkable merely by the understanding.

The *thesis* says: *It is possible* to have something external as mine even though I am not in possession of it.

The *antithesis* says: *It is not possible* to have something external as mine unless I am in possession of it.

Solution: Both propositions are true, the first if I understand, by the word "possession", empirical possession (*possessio phaenomenon*), the second if I understand by it purely intelligible possession (*possessio*

THE METAPHYSICS OF MORALS

noumenon). – But we cannot see how intelligible possession is possible and so how it is possible for something external to be mine or yours, but must infer it from the postulate of practical reason. With regard to this postulate it is particularly noteworthy that practical reason *extends* itself without intuitions and without even needing any that are *a priori*, merely by *leaving out* empirical conditions, as it is justified in doing by the law of freedom. In this way it can lay down *synthetic* *a priori* propositions about right, the proof of which (as will soon be shown) can afterwards be adduced, in a practical respect, in an analytic way.

§ 8. It is possible to have something external as one's own only in a rightful condition, under an authority giving laws publicly, that is, in a civil condition.

When I declare (by word or deed), I will that something external is to be mine, I thereby declare that everyone else is under obligation to refrain from using that object of my choice, an obligation no one would have were it not for this act of mine to establish a right. This claim involves, however, acknowledging that I in turn am under obligation to every other to refrain from using what is externally his; for the obligation here arises from a universal rule having to do with external rightful relations. I am therefore not under obligation to leave external objects belonging to others untouched unless everyone else provides me assurance that he will behave in accordance with the same principle with regard to what is mine. This assurance does not require a special act to establish a right, but is already contained in the concept of an obligation corresponding to an external right, since the universality, and with it the reciprocity, of obligation arises from a universal rule. – Now, a unilateral will cannot serve as a coercive law for everyone with regard to possession that is external and therefore contingent, since that would infringe upon freedom in accordance with universal laws. So it is only a will putting everyone under obligation, hence only a collective general (common) and powerful will, that can provide everyone this assurance. – But the condition of being under a general external (i.e., public) lawgiving accompanied with power is the civil condition. So only in a civil condition can something external be mine or yours.

6:256

Corollary: If it must be possible, in terms of rights, to have an external object as one's own, the subject must also be permitted to constrain everyone else with whom he comes into conflict about whether an external object is his or another's to enter along with him into a civil constitution.

§ 9. In a state of nature something external can actually be mine or yours but only provisionally.

When people are under a civil constitution, the statutory laws obtaining in this condition cannot infringe upon *natural right*, (i.e., that right which can be derived from *a priori* principles for a civil constitution); and so the

6:257

rightful principle “whoever acts on a maxim by which it becomes impossible to have an object of my choice as mine wrongs me,” remains in force. For a civil constitution is just the rightful condition, by which what belongs to each is only secured, but not actually settled and determined.^z – Any guarantee, then, already presupposes what belongs to someone (to whom it secures it). Prior to a civil constitution (or in *abstraction* from it) external objects that are mine or yours must therefore be assumed to be possible, and with them a right to constrain everyone with whom we could have any dealings to enter with us into a constitution in which external objects can be secured as mine or yours. – Possession in anticipation of and preparation for the civil condition, which can be based only on a law of a common will, possession which therefore accords with the *possibility* of such a condition, is *provisionally rightful* possession, whereas possession found in an *actual* civil condition would be *conclusive* possession. – Prior to entering such a condition, a subject who is ready for it resists with right those who are not willing to submit to it and who want to interfere with his present possession; for the will of all others except for himself, which proposes to put him under obligation to give up a certain possession, is merely *unilateral*, and hence has as little lawful force in denying him possession as he has in asserting it (since this can be found only in a general will), whereas he at least has the advantage of being compatible with the introduction and establishment of a civil condition. – In summary, the way to have something external as one's own *in a state of nature* is physical possession which has in its favor the rightful *presumption* that it will be made into rightful possession through being united with the will of all in a public lawgiving, and in anticipation of this holds *comparatively* as rightful possession.

In accordance with the formula *Happy is he who is in possession (beati possedentes)*, this prerogative of right arising from empirical possession does not consist in its being unnecessary for the possessor, since he is presumed to be an *honest man*, to furnish proof that his possession is in conformity with right (for this holds only in disputes about rights). This prerogative arises, instead, from the capacity^a anyone has, by the postulate of practical reason, to have an external object of his choice as his own. Consequently, any holding of an external object is a condition whose conformity with right is based on that postulate by a previous act of will; and so long as this condition does not conflict with another's earlier possession of the same object he is provisionally justified, in accordance with the law of outer freedom, in preventing anyone who does not want to enter with him into a condition of public lawful

^z eigentlich aber nicht ausgemacht und bestimmt wird

^a Vermögen

THE METAPHYSICS OF MORALS

freedom from usurping the use of that object, in order to put to his own use, in conformity with the postulate of reason, a thing that would otherwise be annihilated practically.

Chapter II. How to acquire something external.

6:258

§ 10. General principle of external acquisition.

I acquire something when I bring it about (*efficio*) that it becomes *mine*. – Something external is originally mine which is mine without any act that establishes a right to it. But that *acquisition* is original which is not derived from what is another's.

Nothing external is originally mine, but it can indeed be *acquired* originally, that is, without being derived from what is another's. – A condition of community (*communio*) of what is mine and yours can never be thought to be original but must be acquired (by an act that establishes an external right), although possession of an external object can originally be only possession in common. Even if one thinks (problematically) of an *original* community (*communio mei et tui originaria*), it must still be distinguished from a *primitive* community (*communio primaeva*), which is supposed to have been instituted in the earliest *time* of relations of rights among human beings and cannot be based, like the former, on principles but only on history. Although primitive, it would always have to be thought to be acquired and derived (*communio derivata*).

The principle of external acquisition is as follows: that is mine which I bring under my *control* (in accordance with the law of outer *freedom*); which, as an object of my choice, is something that I have the capacity to use (in accordance with the postulate of practical reason); and which, finally, I *will* to be mine (in conformity with the idea of a possible united *will*).

The aspects,^b (*attendenda*) of *original* acquisition are therefore: 1) *Apprehension* of an object that belongs to no one; otherwise it would conflict with another's freedom in accordance with universal laws. This *apprehension* is taking possession of an object of choice in space and time, so that the possession in which I put myself is *possessio phaenomenon*. 2) *Giving a sign* (*declaratio*) of my possession of this object and of my act of choice to exclude everyone else from it. 3) *Appropriation* (*appropriatio*), as the act of a general will (in idea) giving an external law through which everyone is bound to agree with my choice. – The validity of this last aspect of acquisition, on which rests the conclusion “this external object is *mine*,” that is,

6:259

^b *Momente*

the conclusion that my possession holds as possession *merely by right* (*possessio noumenon*), is based on this: since all these acts *have to do with a right* and so proceed from practical reason, in the question of what is laid down as right abstraction can be made from the empirical conditions of possession, so that the conclusion, “the external object is mine,” is correctly drawn from sensible to intelligible possession.

Original acquisition of an external object of choice is called *taking control*^f of it (*occupatio*), and only corporeal things (substances) can be acquired originally. When it takes place, what it requires as the condition of empirical possession is priority in time to anyone else who wants to take control of the object (*qui prior tempore potior iure*).^d As original, it is only the result of a *unilateral* choice, for if it required a bilateral choice the acquisition would be derived from the contract of two (or more) persons and so from what is another's. – It is not easy to see how an act of choice of that kind could establish what belongs to someone. – However, if an acquisition is *first* it is not therefore *original*. For the acquisition of a public rightful condition by the union of the will of all for giving universal law would be an acquisition such that none could precede it, yet it would be derived from the particular wills of each and would be *omnilateral*, whereas original acquisition can proceed only from a unilateral will.

Division of the acquisition of something external that is mine or yours.

- 6:260
1. In terms of the *matter* (the object), I acquire either a corporeal *thing* (substance), or another's *performance* (causality), or another *person* himself, that is the status of that person, insofar as I get a right to make arrangements about him^e (deal with him).
 2. In terms of the *form* (the kind of acquisition), it is either a *right to a thing*^f (*ius reale*), or a *right against a person*^g (*ius personale*), or a *right to a person akin to a right to a thing*^h (*ius realiter personale*), that is, possession (though not use) of another person as a thing.
 3. In terms of the *basis* of the acquisition *in right*ⁱ (*titulus*), something external is acquired through the act of a *unilateral*, *bilateral* or *omnilateral* choice (*facto, pacto, lege*). Although this is not, strictly

^c *Bemächtigung*. In the case of land, “occupying it” would be the appropriate translation. However, Kant also uses *Bemächtigung* in the context of rights to things generally and of rights against persons akin to rights to things.

^d who is first in time has the stronger right

^e *über denselben zu verfügen*. *Verfügung* is used in 6:314, and the phrase *über . . . verfügen* is used in 6:313 and again in 6:330, where it is followed by (*disponieren*).

^f *Sachenrecht*

^g *persönliches Recht*

^h *dinglich-persönliches Recht*

ⁱ *Rechtsgrunde*

THE METAPHYSICS OF MORALS

speaking, a special member of the division of rights, it is still an aspect of the way acquisition is carried out.

SECTION I ON PROPERTY RIGHT.^j

§ 11. *What is a right to a thing?*^k

The usual exposition of a *right to a thing* (*ius reale, ius in re*), that “it is a right *against every possessor of it*,” is a correct nominal definition. – But what is it that enables me to recover an external object from anyone who is holding it and to constrain him (*per vindicationem*) to put me in possession of it again? Could this external rightful relation of my choice be a *direct* relation to a corporeal thing? Someone who thinks that his right is a direct relation to things rather than to persons would have to think (though only obscurely) that since there corresponds to a right on one side a duty on the other, an external thing always remains *under obligation* to the first possessor even though it has left his hands; that, because it is already under obligation to him, it rejects anyone else who pretends to be the possessor of it. So he would think of my right as if it were a *guardian spirit* accompanying the thing, always pointing me out to whoever else wanted to take possession of it and protecting it against any incursions by them. It is therefore absurd to think of an obligation of a person to things or the reverse, even though it may be permissible, if need be, to make this rightful relation perceptible by picturing it and expressing it in this way.

So the real definition would have to go like this: a *right to a thing* is a right to the private use of a thing of which I am in (original or instituted) possession in common^l with all others. For this possession in common is the only condition under which it is possible for me to exclude every other possessor from the private use of a thing (*ius contra quemlibet huius rei possessorem*)^m since, unless such a possession in common is assumed, it is inconceivable how I, who am not in possession of the thing, could still be wronged by others who are in possession of it and are using it. – By my unilateral choice I cannot bind another to refrain from using a thing, an obligation he would not otherwise have; hence I can do this only through the united choice of all who possess it in common. Otherwise I would have to think of a right to a thing as if the thing had an obligation to me, from which my right against every other possessor of it is then derived; and this is an absurd way of representing it.

6:261

^j *Sachenrecht*. Kant introduces the term “property” (*Eigentum, dominium*), a full right to a thing, in his concluding remark to this section, 6:270.

^k *Sachenrecht*

^l *Gesammtbesitz*

^m right against whoever is possessor of the thing

Kant

The Metaphysics of Morals

Private right, Chapter II, section III

6:276-84

IMMANUEL KANT

Before this possessory act all that has been acquired through the contract is therefore a right against a person, and the promisee can acquire an external thing only by its being delivered.

SECTION III. ON RIGHTS TO PERSONS A^bKIN TO RIGHTS TO THINGS.

§ 22.

This right is that of possession of an external object *as a thing* and use of it *as a person*. – What is mine or yours in terms of this right is what is mine or yours *domestically*, and the relation of persons in the domestic condition is that of a community of free beings who form a society of members of a whole called a *household* (of persons standing in *community* with one another) by their affecting one another in accordance with the principle of *outer freedom (causality)*. – Acquisition of this status, and within it, therefore takes place neither by a deed on one's own initiative (*facto*) nor by a contract (*pacto*) alone but by law (*lege*); for, since this kind of right is neither a right to a thing nor merely a right against a person but also possession of a person, it must be a right lying beyond any rights to things and any rights against persons. That is to say, it must be the right of humanity in our own person, from which there follows a natural permissive law, by the favor of which this sort of acquisition is possible for us.

6:277

§ 23.

In terms of the object, acquisition in accordance with this principle is of three kinds: a *man* acquires a *wife*,^c a *couple* acquires *children*; and a *family* acquires *servants*. – Whatever is acquired in this way is also inalienable and the right of possessors of these objects is the *most personal* of all rights.

On the right of domestic society

Title I: Marriage right.

§ 24.

Sexual union (commercium sexuale) is the reciprocal use that one human being makes of the sexual organs and capacities of another (*usus membrorum*

^b *Von dem dingliche Art persönlichen Recht.* As in Sections I and II, the heading here suggests “the sum of laws” having to do with such possession. However, this third member of the division of rights is an innovation on Kant's part, and there is no English term for it corresponding to “property” and “contract.” At the beginning and at the end of Section III, accordingly, I have sometimes used “rights” in contexts that would call for “right.”

^c *Weib*

THE METAPHYSICS OF MORALS

et facultatum sexualium alterius).^d This is either a *natural* use (by which procreation of a being of the same kind is possible) or an *unnatural* use, and unnatural use takes place either with a person of the same sex or with an animal of a nonhuman species. Since such transgressions of laws, called unnatural (*crimina carnis contra naturam*)^e or also unmentionable vices, do wrong to humanity in our own person, there are no limitations or exceptions whatsoever that can save them from being repudiated completely.

Natural sexual union takes place either in accordance with mere animal *nature* (*vaga libido, venus volgivaga, fornicatio*)^f or in accordance with *law*. — Sexual union in accordance with law is *marriage (matrimonium)*, that is, the union of two persons of different sexes for lifelong possession of each other's sexual attributes. — The end of begetting and bringing up children may be an end of nature, for which it implanted the inclinations of the sexes for each other; but it is not *requisite* for human beings who marry to make this their end in order for their union to be compatible with rights, for otherwise marriage would be dissolved when procreation ceases.

Even if it is supposed that their end is the pleasure of using each other's sexual attributes, the marriage contract is not up to their discretion but is a contract that is necessary by the law of humanity, that is, if a man and a woman want to enjoy each other's sexual attributes they *must* necessarily marry, and this is necessary in accordance with pure reason's laws of right.

6:278

§ 25.

For the natural use that one sex makes of the other's sexual organs is *enjoyment*, for which one gives itself up to the other. In this act a human being makes himself into a thing, which conflicts with the right of humanity in his own person. There is only one condition under which this is possible: that while one person is acquired by the other *as if it were a thing*, the one who is acquired acquires the other in turn; for in this way each reclaims itself and restores its personality. But acquiring a member of a human being is at the same time acquiring the whole person, since a person is an absolute unity. Hence it is not only admissible for the sexes to surrender to and accept each other for enjoyment under the condition of marriage, but it is possible for them to do so *only* under this condition. That this *right against a person* is also *akin to a right to a thing* rests on the fact that if one of the partners in a marriage has left or given itself into someone else's possession, the other partner is justified, always and without question, in bringing its partner back under its control, just as it is justified in retrieving a thing.

^d use of the sexual members and faculties of another

^e carnal crimes against nature

^f illicit sexual love, illicit sexual desire of the masses, fornication

§ 26.

For the same reasons, the relation of the partners in a marriage is a relation of *equality* of possession, equality both in their possession of each other as persons (hence only in *monogamy*, since in *polygamy* the person who surrenders herself gains only a part of the man who gets her completely, and therefore makes herself into a mere thing), and also equality in their possession of material goods. As for these, the partners are still authorized to forgo the use of a part, though only by a separate contract.

For this reason it follows that neither concubinage nor hiring a person for enjoyment on one occasion (*pactum fornicationis*)^g is a contract that could hold in right. As for the latter, everyone will admit that a person who has concluded such a contract could not rightfully be held to the fulfillment of her promise if she regrets it. So, with regard to the former, a contract to be a *concubine* (as *pactum turpe*)^h also comes to nothing; for this would be a contract to *let* and *hire* (*locatio-conductio*) a member for another's use, in which, because of the inseparable unity of members in a person, she would be surrendering herself as a thing to the other's choice. Accordingly, either party can cancel the contract with the other as soon as it pleases without the other having grounds for complaining about any infringement of its rights. – The same considerations also hold for a morganatic marriage, which takes advantage of the inequality of estate of the two parties to give one of them domination over the other; for in fact morganatic marriage is not different, in terms of natural right only, from concubinage and is no true marriage. – If the question is therefore posed, whether it is also in conflict with the equality of the partners for the law to say of the husband's relation to the wife, he is to be your master (he is the party to direct,ⁱ she to obey): this cannot be regarded as conflicting with the natural equality of a couple if this dominance is based only on the natural superiority of the husband to the wife in his capacity to promote the common interest of the household, and the right to direct that is based on this can be derived from the very duty of unity and equality with respect to the *end*.

§ 27.

A marriage contract is *consummated* only by *conjugal sexual intercourse* (*copula carnalis*). A contract made between two persons of opposite sex, either with a tacit understanding to refrain from sexual intercourse or with

^g pact of fornication

^h wrongful pact

ⁱ er der befehlende . . . Teil

THE METAPHYSICS OF MORALS

awareness that one or both are incapable of it, is a *simulated contract*, which institutes no marriage and can also be dissolved by either of them who pleases. But if incapacity appears only afterwards, that right cannot be forfeited through this accident for which no one is at fault.

Acquisition of a wife or of a husband therefore takes place neither *facto* (by intercourse) without a contract preceding it nor *pacto* (by a mere marriage contract without intercourse following it) but only *lege*, that is, as the rightful consequence of the obligation not to engage in sexual union except through *possession* of each other's person, which is realized only through the use of their sexual attributes by each other.

6:280

The right of domestic society

Title II: Parental right.

§ 28.

Just as there arose from one's duty to oneself, that is, to the humanity in one's own person, a right (*ius personale*) of both sexes to acquire each other as persons *in the manner of things* by marriage, so there follows from *procreation* in this community a duty to preserve and care for its *offspring*; that is, children, as persons, have by their procreation an original innate (not acquired) right to the care of their parents until they are able to look after themselves, and they have this right directly by law (*lege*), that is, without any special act being required to establish this right.

For the offspring is a *person*, and it is impossible to form a concept of the production of a being endowed with freedom through a physical operation.* So from a *practical point of view* it is a quite correct and even

* No concept can be formed of how it is possible for God to create free beings, for it seems as if all their future actions would have to be predetermined by that first act, included in the chain of natural necessity and therefore not free. But that such beings (we human beings) are still free the categorical imperative proves for morally practical purposes, as through an authoritative decision of reason without its being able to make this relation of cause to effect comprehensible for theoretical purposes, since both are supersensible. – All that one can require of reason here would be merely to prove that there is no contradiction in the concept of a *creation of free beings*, and it can do this if it shows that the contradiction arises only if, along with the category of causality, the *temporal condition*, which cannot be avoided in relation to sensible objects (namely, that the ground of an effect precedes it), is also introduced in the relation of supersensible beings. As for the supersensible, if the causal concept is to obtain objective reality for theoretical purposes, the temporal condition would have to be introduced here too. But the contradiction vanishes if the pure category (without a schema put under it) is used in the concept of creation with a morally practical and therefore nonsensible intent.

If the philosophic jurist reflects on the difficulty of the problem to be resolved and the necessity of solving it to satisfy principles of right in this matter, he will not hold this investigation, all the way back to the first elements of transcendental philosophy in a metaphysics of morals, to be unnecessary pondering that gets lost in pointless obscurity.

IMMANUEL KANT

necessary idea to regard the act of procreation as one by which we have brought a person into the world without his consent and on our own initiative, for which deed the parents incur an obligation to make the child content with his condition so far as they can. – They cannot destroy their child as if he were something they had *made* (since a being endowed with freedom cannot be a product of this kind) or as if he were their property, nor can they even just abandon him to chance, since they have brought not merely a worldly being but a citizen of the world into a condition which cannot now be indifferent to them even just according to concepts of right.

6:281

§ 29.

From this duty there must necessarily also arise the right of parents to *manage* and develop the child, as long as he has not yet mastered the use of his members or of his understanding: the right not only to feed and care for him but to educate him, to develop him both *pragmatically*, so that in the future he can look after himself and make his way in life, and *morally*, since otherwise the fault for having neglected him would fall on the parents. They have the right to do all this until the time of his emancipation (*emancipatio*), when they renounce their parental right to direct him as well as any claim to be compensated for their support and pains up till now. After they have completed his education, the only obligation (to his parents) with which they can charge him is a mere duty of virtue, namely the duty of gratitude.

6:282

From a child's personality it also follows that the right of parents is not just a right to a thing, since a child can never be considered as the property of his parents, so that their right is not alienable (*ius personalissimum*).^j But this right is also not just a right against a person, since a child still belongs to his parents as what is theirs (is still in their *possession* like a thing and can be brought back even against his will into his parents' possession from another's possession). It is, instead, a right to a person *akin to a right to a thing*.

From this it is evident that, in the doctrine of right, there must necessarily be added to the headings rights to things and rights against persons the heading *rights to persons akin to rights to things*; the division made up till now has not been complete. For when we speak of the rights of parents to children as part of their household, we are referring not merely to the children's duty to return when they have run away but to the parents' being justified in taking control of them and impounding them as things (like domestic animals that have gone astray).

^j most personal right

THE METAPHYSICS OF MORALS

On the right of domestic society

Title III: Right of a head of the household.^k

§ 30.

The children of a household, who together with their parents formed a *family*, reach their *majority* (*maiorennes*) without any contract to withdraw from their former dependence, merely by attaining the ability to support themselves (which happens partly as a natural coming of age in the general course of nature, partly in keeping with their particular natural qualities). In other words, they become their own masters (*sui iuris*) and acquire this right without any special act to establish it and so merely by law (*lege*). – Just as they are not in debt to their parents for their education, so the parents are released in the same way from their obligation to their children, and both children and parents acquire or reacquire their natural freedom. The domestic society that was necessary in accordance with law is not dissolved.

Both parties can now maintain what is actually the same household but with a different form of obligation, namely, as the connection of the head of the household with servants (male or female servants of the house). What they maintain is the same domestic society but it is now a society *under the head of the household* (*societas herelis*),^l formed by a contract through which the head of the household establishes a domestic society with the children who have not attained their majority or, if the family has no children, with other free persons (members of the household). This would be a society of unequal (one party *being in command* or being its head, the other *obeying*, i.e., serving) (*imperantis et subiecti domestici*).^m

Servants are included in what belongs to the head of a household and, as far as the form (the *way of his being in possession*)ⁿ is concerned, they are his by a right that is like a right to a thing; for if they run away from him he can bring them back in his control by his unilateral choice. But as far as the matter is concerned, that is, what *use* he can make of these members of his household, he can never behave as if he owned them (*dominus servi*); for it is only by a contract that he has brought them under his control, and a contract by which one party would completely renounce its freedom for the other's advantage would be self-contradictory, that is, null and void, since by it one party would cease to be a person and so would have no duty to keep the contract but would recognize only force. (The right of ownership with regard to someone who has forfeited his personality by a crime is not under consideration here.)

6:283

^k *Das Hausherren-Recht*

^l household society

^m domestic ruler and subject

ⁿ *Besitzstand*. See 6:306.

IMMANUEL KANT

The contract of the head of a household with servants can therefore not be such that his *use* of them would amount to using them up; and it is not for him alone to judge about this, but also for the servants (who, accordingly, can never be serfs); so the contract cannot be concluded for life but at most only for an unspecified time, within which one party may give the other notice. But children (even those of someone who has become a slave through his crime) are at all times free. For everyone is born free, since he has not yet committed a crime; and the cost of educating him until he comes of age cannot be accounted against him as a debt that he has to pay off. For the slave would have to educate his children if he could, without charging them with the cost of their education, and if he cannot the obligation devolves on his possessor.

- 6:284 So we see here again, as in the two preceding headings, that there is a right to persons akin to a right to things (of the head of the house over servants); for he can fetch servants back and demand them from anyone in possession of them, as what is externally his, even before the reasons that may have led them to run away and their rights have been investigated.

Dogmatic division of all rights that can be acquired by contract

§ 31.

A metaphysical doctrine of right can be required to enumerate a priori the members of a division (*divisio logica*) in a complete and determinate way, and to establish thereby a true *system* of them. Instead of providing a system, any *empirical division* is merely *fragmentary* (*partitio*), and leaves it uncertain whether there are not additional members that would be needed to fill out the entire sphere of the concept divided. – A division in accordance with an a priori principle (in contrast with empirical divisions) can be called *dogmatic*.

Every contract consists in itself, that is, considered *objectively*, of two acts that establish a right, a promise and its acceptance. Acquisition through acceptance is not a *part* of a contract (unless the contract is a *pactum re initum*, which requires delivery) but the rightfully necessary *result* of it. – But considered *subjectively* – that is, as to whether this rationally necessary result (the *acquisition* that *ought* to occur) will actually *result* (be the *natural* result) – accepting the promise still gives me no *guarantee* that it will actually result. Since this guarantee belongs externally to the modality of a contract, namely *certainty* of acquisition by means of a contract, it is an additional factor serving to complete the means for achieving the acquisition that is the purpose of a contract. – For this, three persons are involved: a *promisor*, an *acceptor*, and a *guarantor*. The acceptor, indeed, gains nothing more with regard to the object by means of the

Kant
The Metaphysics of Morals

Appendix, introduction and sections 1 through 3

6:356-61

IMMANUEL KANT

condition would be annihilated). But if it is attempted and carried out by gradual reform in accordance with firm principles, it can lead to continual approximation to the highest political good, perpetual peace.

Appendix
Explanatory remarks
on
The metaphysical first principles of the doctrine
of right

6:356

I take the occasion for these remarks chiefly from the review of this book in the *Göttingen Journal* (No. 28, 18 Feb. 1797).³⁷ In this review the book was examined with insight and rigor, but also with appreciation and “the hope that those first principles will be a lasting gain for the science.” I shall use this review as a guide for my criticism as well as for some elaboration of this system.

6:357

My astute critic takes exception to a definition at the very beginning of the *Introduction* to the *Doctrine of Right*. What is meant by the faculty of desire? It is, the text says, the capacity¹ to be by means of one’s representations the cause of the objects of these representations. – To this exposition he objects “that it comes to nothing as soon as one abstracts from the *external* conditions of the result of desire. – But the faculty of desire is something even for an idealist, even though the external world is nothing for him.” *I reply:* but are there not also intense but still consciously futile longings (e.g., Would to God that man were still alive!), which are *devoid of any deed* but not *devoid of any result*, since they still work powerfully within the subject himself (make him ill), though not on external things? A desire, as a *striving* (*nitus*) to be a *cause* by means of one’s representations, is still always causality, at least within the subject, even when he sees the inadequacy of his representations for the effect he envisages. – The misunderstanding here amounts to this: that since consciousness of one’s capacity *in general* is (in the case mentioned) also consciousness of one’s *incapacity*² with respect to the external world, the definition is not applicable to an idealist. Since, however, all that is in question here is the relation of a cause (a representation) to an effect (a feeling) in general, the causality of a representation (whether the causality is external or internal) with regard to its object must unavoidably be thought in the concept of the faculty of desire.

¹ *Vermögen*

² *seines Vermögen überhaupt . . . seines Unvermögens*

THE METAPHYSICS OF MORALS

I. LOGICAL PREPARATION FOR A RECENTLY PROPOSED CONCEPT OF A RIGHT.

If philosophers versed in right want to rise or venture all the way to metaphysical first principles of the doctrine of right (without which all their juridical science^v would be merely statutory), they cannot be indifferent to assurance of the completeness of their *division* of concepts of rights, since otherwise that science would not be a *rational system* but merely an aggregate hastily collected. – For the sake of the form of the system, the *topic* of principles must be complete, that is, the *place* for a concept (*locus communis*) must be indicated, the place that is left open for this concept by the synthetic form of the division. Afterwards one may also show that one or another concept which might be put in this place would be self-contradictory and falls from this place.

Up to now jurists have admitted two commonplaces: that of a right to *things* and that of a right against *persons*. By the mere form of joining these two concepts together into one, two more places are opened up for concepts, as members of an a priori division: that of a right to a thing akin to a right against a person and that of a right to a person akin to a right to a thing. It is therefore natural to ask whether we have to add some such new concept and whether we must come across it in the complete table of division, even if it is only problematic. There can be no doubt that this is the case. For a merely logical division (which abstracts from the content of cognition, from the object) is always a *dichotomy*, for example, any right is either a right to a thing or not a right to a thing. But the division in question here, namely the metaphysical division, might also be a fourfold division; for besides the two simple members of the division, two further relations might have to be added, namely those of the conditions limiting a right, under which one right enters into combination with the other. This possibility requires further investigation. – The concept of a *right to a thing akin to a right against a person* drops out without further ado, since no right of a *thing* against a *person* is conceivable. Now the question is whether the reverse of this relation is just as inconceivable or whether this concept, namely that of a *right to a person akin to a right to a thing*, is a concept that not only contains no self-contradiction but also belongs necessarily (as given a priori in reason) to the concept of what is externally mine or yours, that of not *treating* persons in a similar way to *things* in all

6:358

^v *Rechtswissenschaft*. See 6:229, where Kant seemed to say that only systematic knowledge of natural right is a true science. When coupled with that passage, his use here of *erhaben oder versteigen*, which I have translated as “rise or venture,” might be a suggestion that some philosophic jurists have got out of their element in attempting to discuss the issues at hand.

IMMANUEL KANT

respects, but still of possessing them as things and dealing with them as things in many relations.

2.

JUSTIFICATION OF THE CONCEPT OF A RIGHT
TO A PERSON AKIN TO A RIGHT TO A THING.

Put briefly and well, the definition of a right to a person akin to a right to a thing is this: "It is the right of a human being to have a *person* other than himself as *his own*."^{*} I take care to say "*a person*"; for while it is true that someone can have as his own another *human being* who by his crime has forfeited his personality (become a bondsman), this right to a thing is not what is in question here.

We must now examine whether this concept, this "new phenomenon in the juristic sky," is a *stella mirabilis*" (a phenomenon never seen before, growing into a star of the first magnitude but gradually disappearing again, perhaps to return at some time) or merely a *shooting star*.

3.
EXAMPLES.

To have something external as one's own means to possess it rightfully; but possessing something is the condition of its being possible to use it. If this condition is thought as merely physical, possession is called *holding*. — That I am legitimately holding something is not of itself sufficient for saying that the object is mine or for making it mine. But if I am authorized, for whatever reason, to insist upon holding an object that has escaped from my control or been torn from it, this concept of a right is a *sign* (as an effect is a sign of its cause) that I consider myself authorized to treat this object and to use it as *what is mine*, and consider myself as also in intelligible possession of it.

What is one's own here does not, indeed, mean what is one's own in the sense of property in the person of another (for a human being cannot have property in himself, much less in another person), but means what is one's own in the sense of usufruct (*ius utendi fruendi*),^x to make direct use

* I do not say here "to have a person as mine" (using the adjective), but "to have a person as *what is mine, to meum*," (using the substantive). For I can say "this is *my father*," and that signifies only my physical relation (of connection) to him in a general way, e.g., I *have* a father; but I cannot say "I have him as *what is mine*." However, if I say "my wife" this signifies a special, namely a rightful, relation of the possessor to an object as a *thing* (even though the object is also a person). Possession (*physical possession*), (*manipulatio*) something as a *thing*, even if this must, in another respect, be treated at the same time as a *person*.

^w wondrous star, or supernova

^x right of the use of the fruits

THE METAPHYSICS OF MORALS

of a person *as of* a thing, as a means to my end, but still without infringing upon his personality.

But this end, as the condition under which such use is legitimate, must be morally necessary. A man cannot desire a woman in order to *enjoy* her as a thing, that is, in order to take immediate satisfaction in merely animal intercourse with her, nor can a woman give herself to him for this without both renouncing their personalities (in carnal or bestial cohabitation), that is, this can be done only under the condition of *marriage*. Since marriage is a reciprocal giving of one's very person into the possession of the other, it must *first* be concluded, so that neither is dehumanized through the bodily use that one makes of the other.

Apart from this condition carnal enjoyment is *cannibalistic* in principle (even if not always in its effect). Whether something is consumed by mouth and teeth, or whether the woman is consumed by pregnancy and the perhaps fatal delivery resulting from it, or the man by exhaustion of his sexual capacity from the woman's frequent demands upon it, the difference is merely in the manner of enjoyment. In this sort of use by each of the sexual organs of the other, each is actually a *consumable* thing (*res fungibilis*)^y with respect to the other, so that if one were to make oneself such a thing by *contract*, the contract would be contrary to law (*pactum turpe*).^z

6:360

Similarly, a man and a woman cannot beget a child as their joint *work* (*res artificialis*) and without both of them incurring an obligation toward the child and toward each other to maintain it. This is, again, acquisition of a human being *as of* a thing, but only formally so (as befits a right to a person that is only akin to a right to a thing). Parents* have a right against every possessor (*ius in re*)^a of their child who has been removed from their control. Since they also have a right to constrain it to carry out and comply with any of their directions that are not contrary to a possible lawful freedom (*ius ad rem*),^b they also have a right against a person against the child.

Finally, when their duty to provide for their children comes to an end as they reach maturity, parents still have a right to use them as members of the household subject to their direction, for maintaining the household, until they leave. This is a duty of parents toward them which follows from the natural limitation of the parents' right. Up until this time children are indeed members of the household and belong to the *family*; but from now

* In written German *Ältern* means *Seniores* and *Eltern* means *Parentes*. Although the two words cannot be distinguished in speech, they are very different in meaning.

^y a thing on which a right to other things is based

^z wrongful compact

^a right in the thing

^b right to the thing

IMMANUEL KANT

on they belong to the *service* of the family (*famulatus*), so that the head of the house cannot add them to what is his (as his domestics) except by contract. – In the same way, the head of a house can also make the service of those *outside the family* his own in terms of a right to them akin to a right to a thing and acquire them as domestics (*famulatus domesticus*) by a contract. Such a contract is not just a contract to *let and hire* (*locatio conductio operaे*),^c but a giving up of their persons into the possession of the head of the house, a lease (*locatio conductio personae*).^d What distinguishes such a contract from letting and hiring is that the servant agrees to *do whatever is permissible* for the welfare of the household, instead of being commissioned for a specifically determined job, whereas someone who is hired for a specific job (an artisan or day laborer) does not give himself up as part of the other's belongings and so is not a member of the household. – Since he is not in the rightful possession of another who puts him under obligation to perform certain services, even if he lives in the other's house (*inquilinus*), the head of the house cannot *take possession* of him as a thing (*via facti*); he must instead insist upon the laborer's doing what he promised in terms of a right against a person, as something he can command by rightful proceedings (*via iuris*). – So much for the clarification and defense of a strange type of right which has recently been added to the doctrine of natural law, although it has always been tacitly in use.

4.
ON CONFUSING A RIGHT TO A THING WITH A
RIGHT AGAINST A PERSON.

I have also been censured for heterodoxy in natural private right for the proposition that *sale breaks a lease* (*The Doctrine of Right*, 31, p. 129 [AK. 6:290]).

It does seem at first glance to conflict with all rights arising from a contract that someone could give notice to someone leasing his house before the period of residence agreed upon is up and, so it seems, break his promise to the lessee, provided he grants him the time for vacating it that is customary by the civil laws where they live. – But if it can be proved that the lessee knew or must have known, when he contracted to lease it, that the promise made to him by the *lessor*, the owner, naturally (without its needing to be stated expressly in the contract) and therefore tacitly included the condition, *as long as the owner does not sell the house during this time* (or does not have to turn it over to his creditors if he should become bankrupt), then the lessor has not broken his promise, which was already a conditional one in terms of reason, and the lessee's

^c let and hire of a work

^d let and hire of a person

Ripstein
Force and Freedom

Chapter 3

Private Right I: Acquired Rights

AS A PRINCIPLE limiting the actions of separate persons, the Universal Principle of Right is silent on rights with regard to external objects of choice, that is, those things *other* than your own person that you can use in setting and pursuing your own purposes. Your right to your own person does not depend on any further rights you might have, whether to property, or to affirmative deeds, or to loyalty¹ on the part of others. Others would need to restrict their conduct in light of your right to independence even if no other things could be used to set and pursue purposes. Kant's point is not that these dimensions of private interaction are unrelated to your right to your own person. The normative basis of acquired rights depends on your right to your own person, but rights to external objects of choice are not reducible to your right to your own person.²

1. I use the term "loyalty" here as it is used in the law of fiduciary obligations, to characterize an affirmative obligation to act on behalf of another person.

2. In this respect, Kant's account contrasts in interesting ways with the otherwise very different theories of property found in Locke and Hegel. Both Locke and Hegel treat property as an extension of a person, and so treat initial acquisition as the normative basis for property. Kant's approach begins with an account of the rightfulness of *owning* property via the postulate, and treats acquisition as a secondary matter. Kant's differences from Locke parallel their differing approaches to perception: Locke treats sensory input as the basis and structure

Kant characterizes the principle of acquired rights as a “postulate.” It serves to extend the Universal Principle of Right in light of the possibility that there might be powers subject to a person’s choice—means through which a person can set and pursue purposes—that persons who occupy space do not have as part of their innate right of humanity, but must acquire through affirmative acts. The Universal Principle of Right would govern the legitimate exercise of freedom by persons even if they were incapable of setting and pursuing purposes with anything other than their own bodies. Whether and which things other than your person can be used to set and pursue purposes is, at least in part, contingent on the particular features of finite purposive beings. You can only have something subject to your choice if you are normally able to determine how it will be used. Purposive beings that were unable to manipulate or modify physical objects could not have property in them, because those objects would not be available to them as means. Such beings would still have a right to their own person. Once the possibility of rightful relations that can be created through affirmative acts is introduced—the possibility that there are things other than your own body through which you might set and pursue your own purposes—the Universal Principle of Right can only be consistently extended in a way that makes it an extension of freedom rather than a limitation on it. Any such extension must be organized around the concept of choice, so that the significance of what Kant calls “external objects of choice”—objects that can be owned as property, the deeds of others, and, in specific contexts, the person of others—can all be had in ways that makes one person’s having of them as his own consistent with the free purposiveness of others.

Kant characterizes it as a “postulate” because it specifies what must be presupposed if moral concepts are to be applied to a new class of objects in space and time. Neither the concept of right alone nor any set of facts about those objects is sufficient to prove it. But if proof is unavailable, the postulate can still be defended, by considering how to extend concepts of right to the case in which there are objects of choice “which could ob-

of thought; Kant conceptualizes them as input into the structure of thought that is normatively and conceptually antecedent to it.

jectively be mine or yours.”³ Kant’s focus on what can be mine and yours in general captures the distinctive feature of acquired rights: unlike your own body, the object of an acquired right could, in principle, belong as a matter of right to somebody else. This structure applies to each of the three types of external objects of choice that Kant considers: property, contract, and status. You could have bought this pair of shoes, but as it turns out, I am their owner, because I am the one who bought them. If you had acquired them instead, then you would have property in them—the same power to exclude others that I have with respect to them. You and I may have a contract that requires me to cut your lawn every Wednesday, but you could have hired someone else to do the same thing, or I could have entered into an agreement with someone else to cut her lawn on Wednesdays instead. Had either of us done these things, we would not have a contract with each other, but we would have parallel sets of rights and obligations, in relation to other persons. As a matter of right, you could have married someone other than your spouse, and, provided that neither of you was already married to somebody else, it would have been a binding marriage just the same. In each case, Kant provides a systematic account of the structure of the rightful relationship—which type of right you have—and shows how the question of *who* has the right can only be answered by reference to the affirmative act required to acquire that type of right. Answering the question of who has the right is not the same as determining what type of right it is, that is, how it constrains the choice of other persons. Kant’s strategy is to articulate the nature of acquired rights before turning to the manner in which they can be acquired.⁴

This “could be mine or yours” structure does not apply to the innate right of humanity in your own person. Your right to your own person—your right that your body be free from interference by others, and that you be the one who decides what to do with your body—could not, as a matter of right, belong to anyone other than you. As we saw in the last chapter, it follows from this understanding of your right to your own per-

3. 6:246. Gregor’s translation of Kant’s “*Mein und dein*” as “mine or yours” underscores the way in which a right to something that exists apart from me must also be a right to something that is only contingently connected to *me*.

4. 6:247–248.

son, first, that the right is innate, so that it does not require an affirmative act to establish it, and second, that it can pertain only to you. Acquired rights, by contrast, must be acquired: they must be established through an affirmative act, and nothing in the object of acquisition places any limits on who, in particular, might acquire them by performing the requisite act. So long as the object of the right is something that can be acquired rightfully, and it has not already been acquired by another, then the form of the right itself places no limits on who might acquire it.⁵

I. Acquired Rights and Novel Incompatibilities

The general principle of acquired rights is that a person can have a right to something apart from him in such a way that others do wrong by interfering with it. The introduction of external objects of choice creates new ways in which my choice and yours with respect to some object can be incompatible. The potential incompatibilities (and the constraints on conduct they generate) that are introduced by acquired rights function in addition to the constraints of innate right. Innate right requires that you and I do not interfere with each other's bodies, as delimited by the space that they currently occupy. Precisely because the object of an acquired right could in principle belong to someone else, any object of choice that is yours must be subject to your choice even when it is not either in your physical possession or subject to your factual control. So long as you are in physical possession of the object—you have your hand wrapped around an apple—I violate your innate right of humanity by interfering with your physical possession of it, simply because in so doing I interfere with your person.⁶ The postulate extends the principle of right to the case in which I can wrong you with respect to an object even if I am *not*

5. The formulation in the text deliberately oversimplifies what are, from the standpoint of the issue under consideration here, minor complications raised by Kant's discussion of marriage. Kant excludes morganatic marriages and marriages between persons of the same sex, and his remarks elsewhere make it clear that he would also exclude marriages between parents and their children. Even if we keep only the last of these exclusions, the "could be mine or yours" is not perfectly general in the case of marriage. However, even subject to these restrictions, marriage right is general in a way that innate right is not.

6. 6:250.

interfering with your person, thus setting up a potential *further* incompatibility between my deeds and your rights. In the same way, the postulate extends the principle of right to the case in which I have transferred my future conduct to you through a contract. Without the postulate, I would owe you no affirmative obligations of right; it makes such obligations possible by setting up an incompatibility between my nonperformance and your right.

As we saw in our discussion of innate right, as a general matter, others wrong you if they interfere with your person, but they do no wrong by changing the context in which you use your means to set and pursue purposes. To have an acquired external object as your own, as a matter of right, is to have something other than your own person, which others may not use or change without wronging you.

Given that external objects of choice introduce these new potential types of incompatibility, it might seem natural to conclude that people cannot have them after all. The postulate is “incapable of further proof” inasmuch as it claims that norms, understood as laws of freedom, apply to external objects. Like the claim that the Universal Principle of Right is a postulate incapable of further proof, the characterization of the postulate in those terms turns on issues to be considered in the appendix. The impossibility of further proof does not mean that Kant gives no argument for the postulate, or reduces it to a stipulation. The normative argument is supposed to show that acquired rights are the only possible extension of the Universal Principle of Right to the situation in which there are external things that can be used by free persons in setting and pursuing ends. If people are factually capable of using things other than their bodies to set and pursue purposes, the terms of their use of them must be consistent with right:

For an object of choice is something that I have the *physical* power to use. If it were nevertheless absolutely not within my *rightful* power to make use of it, that is, if the use of it could not coexist with the freedom of everyone in accordance with a universal law (would be wrong), then freedom would be depriving itself of the use of its choice with regard to an object of choice, by putting *usable* objects beyond any possibility of being used; in other words, it would annihilate them in a

practical respect and make them into *res nullius*, even though in the use of things choice was formally consistent with everyone's outer freedom in accordance with universal laws.⁷

The Universal Principle of Right does not presuppose the existence of “usable” things other than your own person that can be used for setting and pursuing purposes. If nothing other than each person's own bodily powers could be used to set and pursue purposes, free beings would remain in a condition only of innate right. Once the possibility of using usable things is introduced, however, the Universal Principle of Right must apply to the terms on which those things can be used. If persons can set and pursue purposes by using something other than their own bodies—if there are things that persons have the physical power to use—they must be entitled to do so, unless such an entitlement would restrict the freedom of others to use what is theirs to set and pursue their own purposes. Kant's argument shows, first, that the only way that a person could have an entitlement to an external object of choice is if that person had the entitlement formally, because having means subject to your choice is prior to using them for any particular purpose. Second, Kant argues that the exercise of acquired rights is consistent with the freedom of others, because it never deprives another person of something that person already has. So anything less than fully private rights of property, contract, and status would create a restriction on freedom that was illegitimate because based on something other than freedom. This argument focuses on having things as your own, rather than on acquiring them. Acquisition of property, in particular, raises further issues central to the argument for a rightful condition.

Consider first the formal nature of purposiveness and so of freedom. If Kant's argument depended on a premise about the benefits of having things subject to your choice, or about the need for having external objects to fully realize your purposiveness, it could not generate a constraint on the conduct of others. Others owe you no enforceable duty of right to see to it that you receive a benefit, or even that your purposive-

7. Ibid.

ness is realized.⁸ Right abstracts from both wish and need; if your need for my assistance in order to survive cannot generate a right that I provide it, your need for my forbearance in order that you realize yourself cannot generate a right to that either. Also, if the basis of property rests on the advantages to the owner's range of choices, the Coleridge/Maitland/Sidgwick line of objection would apply, since expanding one person's range of choices potentially restricts the freedom of others. By focusing on the formality of choice, Kant avoids this line of objection; he does not ask how much property people should have, or how it should be distributed, but only whether it is consistent with the purposiveness of others for one person to have an object subject to his or her choice.

The formal consistency of having things with the freedom of others turns on the nature of choice. To be entitled to set and pursue your own purposes is to be entitled to use the means that you have to set and pursue whatever purposes you see fit, restricted only by the entitlement of others to do the same with their means. External objects of choice can only be integrated into a system of freedom for everyone⁹ if they are integrated formally, as means subject to a person's choice for whatever uses that person wants to put them to, rather than depending on the particular purposes for which they are used. The only terms on which "usable objects" can be available for use must thus be as things that are subject to one person's choice, and so as constraints on the freedom of others. If people are physically capable of using external objects to set and pursue their purposes regardless of how they choose to use them, external objects can be incorporated into a formal system of equal freedom, in which each person's purposiveness is restricted only by the purposiveness of others. No other person is wronged by another's having an object subject to his or her choice. The freedom of others would only be compromised if one person's having a proprietary or contractual right deprived some other person of something he or she already had. From the standpoint of each person's right of humanity in his or her own person, the acquired rights

8. Something like this thought appears to underlie Hegel's claim that property is required for personality because a self must externalize itself in an object outside of it. See his *Philosophy of Right* (Oxford: Oxford University Press, 1967), 40 (§41).

9. Or, as Kant puts it, at 6:230, "in accordance with a universal law."

of others are just parts of the context within which they choose. So any restrictions on the possibility of a person having objects as her own would restrict one person's purposiveness for the sake of something other than freedom, and so interfere with each person's right to be *sui juris*, her own master. That is, they would limit freedom on the basis of something other than its own conditions.¹⁰

The same rightful power to use something for setting and pursuing purposes extends to the use of the thing when you are not in physical possession of it. This point is most obvious in relation to property: if something is subject to your choice, available for you to use for setting purposes with, you must be able to use it for *whatever* purposes you set, which is just to say that you must be able to put it down while using other means that you have. Your right must constrain others against interfering with your pan as you put it down while you mix the eggs for your omelet. This is not because making omelets is a fundamental exercise of freedom, or even because making complex plans is, but because your entitlement to use something cannot depend on the particular purpose you use it for.

The requirement that usable objects be available for use applies in the same way to contractual rights: if it is *physically* possible for one person to transfer property or perform a service for another, or for two people to do things together, then other people's powers are usable objects of choice. It would be an arbitrary restriction on freedom if a person could not make his person or powers available to others in cooperative activities. There are limits, both to the conditions under which consent is possible and to the interaction to which a person can consent, but it would be an arbitrary limit on independence if any third party were entitled to prohibit one person from doing something for another, or two persons from doing things together. The entitlement to do things for others cannot be limited to present performances, so people must be able to enter into binding bilateral arrangements. Just as I do you no wrong by cooperating with another person, (absent some prior arrangement between us), so, too, you and a third person do me no wrong by entering into a binding arrangement, because you do not thereby deprive me of anything I already had. The most such arrangements can do is change the context in which the

10. 6:231.

person not party to it acts. Thus if it is possible for people to do things for each other, it must be rightfully possible, and so it must be possible for one person to have a right to another's specific choice.

A parallel point applies to status relations: if one person is physically capable of making arrangements on behalf of another, consistent with their respective rights, it must be possible to do so rightfully, because they wrong no others simply in virtue of so doing. If others could prohibit such arrangements, they would thereby restrict the freedom of the parties to them. One person's power to act for another only arises in limited circumstances and restricted ways. Whether such circumstances will arise depends on particular features of the persons involved and on the ends they happen to have. If nobody ever wanted another person to manage part of his affairs while he attended to another part, or if people had such limited purposes that they could attend to all of their details at once, or if they were never children or asleep, perhaps nobody would ever enter into a relation of status. Those factors have no bearing on the rightfulness of the relation, however: free persons must be *entitled* to entrust their affairs to others, even if nobody ever does.

II. Three Kinds of Acquired Rights

Kant identifies three ways in which something can be “one's own,” that is, where it can operate as a constraint on the conduct of others. He remarks that acquired rights can be distinguished in three ways: by their matter, their form, and their mode of acquisition.¹¹ In explaining Kant's view, I will focus primarily on their form, referring only in passing to their matter, and defer to later chapters questions of their mode of acquisition.¹² To those familiar with Lockean theories of property, this may seem surprising. Locke famously locates the basis of private property in an account of its acquisition. Kant works in a different direction. Rightful ac-

11. 6:259–260.

12. Kant notes that the basis of acquisition in unilateral, bilateral, or omnilateral choice (*facto, pacto, lege*) “is not, strictly speaking, a special member of the division of rights” (6:260). Part of the difficulty is that unilateral choice also requires an omnilateral authorization, and so the division does not follow the division from Roman law of *facto, pacto, lege*, or of property, contract, and status.

quisition always changes the rights of other persons, but in order to understand how those rights are changed, the nature of the rights must first be grasped.

To claim something is yours is to draw a contrast: it is to say that it is yours, not mine, that is, that another wrongs you by interfering with your possession of it. There are three such ways in which something can be mine or yours: you can be entitled to an object, be entitled to the performance of a specific deed by another person, or have what Kant calls “a right to a person akin to a right to a thing.” Underlying these divisions is the intuitive idea that separate persons who are free to set their own purposes can interact in three basic ways. Sometimes they pursue their separate ends separately, which requires rights to person and property. Sometimes they pursue them interdependently. If the terms of their interdependent pursuit are set consensually, they give each other rights by contract. If they are set nonconsensually, their relationship is one of status.¹³

Property. In order to set an end for yourself, that is, to take it up as an end that you pursue, you must take yourself to have the power to achieve it. Your entitlement to set and pursue your own purposes parallels your ability to do so: you must be entitled to use the means that you suppose will enable you to achieve it. There are two ways in which you can be entitled to such powers. First, as we have seen, you have your own personal powers, which you have innately; that is, your right to them does not depend upon any act that you, or anyone else, have performed. The development of those powers may be the result of previous acts of yours or of others—you might have your exercise routine or your personal trainer to thank for your strength, for example. But your right to these powers, as against anyone else who might wish to use them, does not depend upon how you came to have them. Second, you might have powers that are external to you, as means at your disposal. Whether you can adopt a particular end will depend upon the powers and means you have at your disposal.

13. For a related, though distinct, explication of Kant’s division, see Ernest Weinrib, “The Juridical Classification of Obligations,” in Peter Birks, ed., *The Classification of Obligations* (Oxford: Oxford University Press, 1997), 37–56.

For Kant, property in an external thing—something other than your own person—is simply the right to have that thing at your disposal with which to set and pursue your own ends. Secure title in things is prerequisite to the capacity to use an object to set and pursue ends.¹⁴ Secure title has two parts to it, possession and use. You have rightful possession of a thing provided that you are entitled to control the thing and exclude others from it. Thus you are wronged if someone else damages your property, or trespasses against it.¹⁵ If your property is damaged, you are deprived of means you could have used to set and pursue ends. If your property is trespassed against, it is used in pursuit of ends that you have not set for yourself. Moreover, trespass or damage to it limits your freedom even if, as a matter of fact, you had no inclination (or even empirical ability at that moment) to pursue those particular ends, and even if you can think of no use to which you might put it. You are wronged because you are deprived of your ability to be the one who determines how the thing will be used. You have the right to use a thing if you are free to exploit it to pursue such ends as you might set, and do not require the consent of anyone else in order to do so.

Because of the connection between having things at your disposal and setting ends for yourself, Kant develops his conception of property as an account of its metaphysics, rather than as an account of its place in specifically human societies. In particular, Kant makes no reference to scarcity or need in developing his account. Although, for reasons that will become clear, the specific ways in which human societies protect property rights will depend in part on the particular circumstances, needs, and vulnerabilities of humans, the basic structure of property is a reflection of the connection between having means and setting ends.

If we think about property in the terms which Kant suggests, we come to a distinctive, and I think deeper, understanding of the relation between wrongdoing and human need and vulnerability. H. L. A. Hart once suggested that law and morality are likely to overlap in human societies, since

14. This does not rule out shared possession. If we own something in common, we have the right to exclude others, and determine its use together. But this must be a derivative case, because it presupposes the idea of exclusive ownership. See 6:251.

15. 6:248.

both are concerned, among other things, with avoiding injury to human beings in the ways in which they are most vulnerable.¹⁶ So, Hart suggests, if we had an invulnerable armored exterior, like giant land crabs, and were able to extract nutrition from the air, we would not have a law of battery, or of murder, or much of our law of property. But for Kant, law and morality demand prohibitions on trespass as well as injury, and would demand them even if trespasses were unusual, or injury unlikely, because Kant understands wrongdoing as the interference with freedom, not with the setting back of interests. Hart's giant land crabs might have little temptation to trespass on each other, but if they did so, they would do wrong, because they would use one another for ends they did not share. More vulnerable beings, such as humans, are perhaps more likely to be attacked, and to attack each other. But for Kant, the structural reason for protecting person and property is the same, that is, to protect independence.

Much of the structure of rights to property parallels my rights with respect to my own person, since it too is something which I can use to set and pursue ends—indeed, I could not set or pursue ends without it. I do not have property in my own person; I just am my own person. The fact that my own person lacks the “mine or yours” structure of property explains the inherent limits on my possessory rights, so that, for example, I may not alienate my own person. Despite these differences, I have rights in my person like those I have in external things. Like rights in property, those rights are rights that I have as against all other persons. And like rights in property, they extend to both possession and use.

Property is a kind of rightful relation. It is also definitive of a distinctive type of wrong, the wrong of interference. If you damage my property, you do not merely set back my interests. You wrongfully limit my external freedom because you limit the means I have with which to set and pursue my own ends. You thereby violate my entitlement to use my means as I see fit. If you trespass on my property—use it without my permission—you limit my ability to set the ends for which it will be used. You thereby violate my entitlement to possession, that is, to have the thing subject to my exclusive choice. Because rights to person and property protect per-

16. Hart, “Positivism and the Separation of Law and Morals,” *Harvard Law Review* 71 (1958): 622–623.

sons from others with whom they interact independently, the law of both persons and property consists in negative prohibitions: I am not allowed to injure or trespass against you or your goods. By contrast, contract and status create affirmative obligations, because they are cases in which separate persons interact interdependently.

Contract. Contract enables parties to modify their respective rights, so that one person is entitled to depend upon the specified deed of another. If you and I make a contract, each of us agrees to do something for the other, and each of us transfers the right to expect that deed to the other. We act interdependently and consensually. Through our agreement, I do not acquire an external thing, but your deed.¹⁷ People may rely upon the behavior of others in a variety of ways; contract is distinctive because it creates an entitlement: you can demand that I perform, and a remedy if I fail to, because I have failed to give you something to which you have a right. Without a contract, you have not been wronged if your expectations are frustrated. In the case of a contractual right against you, I do not possess you. I possess only your power to bring about a specified outcome in the manner specified by our agreement.

As a rightful relation, contract also makes a distinctive type of wrong possible. I wrong you if I deprive you of a means—my performance—to which I have given you a right. Put slightly differently, the wrong consists in my failure to advance your ends in a way that you have a right to have me advance them. That interferes with your external freedom, because I had given you a right to a means—my future performance—and deprived you of it. It is coercive for the same reason.

Because I acquire your deed, I have a right in contract only against you. So I have no right against a third person who does something that prevents you from performing your part of the contract. I have only recourse against you. (Though you may have recourse against that person.) Again, although third parties may benefit from our completion of the contract, they have no rights in virtue of it. Precisely because contract is a way in which two of us may give each other rights, it has no bearing on the

17. 6:248.

rights of anyone else; for the same reason, two persons may not enter into a contract to limit the rights of a third.

Status. The third category, which Kant calls “domestic right,” is made up of those relationships in which people interact interdependently but not fully consensually. The best way to think about this category is by considering the more general role of consent in private right. Consent is significant from the standpoint of external freedom because it can make otherwise wrongful acts rightful. But those acts can be wrongful in two very different ways. Sometimes consent makes an interaction rightful because one person permits another to do something that would otherwise be an interference with his or her person or property. I invite you to dinner at my home. Without my consent, you would be interfering with my property by dirtying my dishes or consuming my food. Having invited you, I render what would have been wrongful rightful. Our consensual interaction is bilateral: I invite, you accept. Having accepted my invitation, your use of my things and consumption of my food is an instance of my entitlement to determine how they will be used.

But consent does not only prevent the wrong of damaging or destroying another’s goods. The other type of wrong that it is able to right is the wrong of use, which, from the standpoint of external freedom, we can understand as forcing a person to act for an end that she does not share. If you permit me to use your dishes at the dinner party, my use of them to pursue my own ends is not wrongful, for, by consenting to that use, you have made my use of your things one of your ends. There is no interference with your external freedom. But if I use you to pursue my ends in other ways, without your consent, I thereby wrong you. Suppose that I break into your home and eat dinner at your table while you are out. (I bring my own food, and clean up after myself.) I do not harm you in any way, but I help myself to a benefit to which I am not entitled. I use your property in pursuit of one of my own ends, an end that you do not share. In so doing, I wrong you. Of course, if you consent, I do you no wrong. But the wrong in question—the wrong that consent serves to make right—is depriving you of your freedom to be the one who sets the ends that you will pursue, or that will be pursued with your goods. I enlist you or your means in support of ends you do not share.

I should perhaps pause at this point to remark that it is easy to be seduced by the idea of consent, and to suppose that it is a self-standing source of moral significance. This appears to be the view of some libertarians, for example. But consent does not work that way at all. We don't worry about the lack of consent except where we are concerned with an action that would be wrongful but for the presence of consent. So if you want to know what is wrong with exploitative relationships, say, it is not that they are nonconsensual. It is that they are exploitative. It is just that consent can sometimes make a relationship in which one person determines what ends another person's means will be used to pursue nonexploitative. If an act is not wrongful, no consent is required. A wrongdoer does not need to consent to the redress to which his victim is entitled. Nor do we determine the nature of that redress by asking what the parties would have agreed to in advance. Instead, we need to ask what would right the wrong.

There are three limits on the ways in which people may treat each other. First, one person may not interfere with another's person or property without the latter's consent. Second, where one has, through contract, transferred one's right to something to another, one must follow through on that transfer. Third, one person may not enlist another in pursuit of his own ends without the latter's consent. To violate any of these limits is to coerce the other person.

This now brings us to the category of status. There are some situations in which one person is unable to consent to certain kinds of use. Of the examples Kant discusses, the case of children is the clearest. Kant notes that parents bring children into the world of their own initiative and without the consent of the children.¹⁸ As a result, children are nonconsenting parties to a relationship in which they find themselves. Further, so long as they are children, they are not competent to consent. Nor are they competent to exit the relationship. Precisely because the children are nonconsenting parties, parents may not use their children in pursuit of their own ends. Instead, they are subject to a duty to act for the benefit of those children, where the benefit is understood in terms of enabling the children to become purposive beings. Parents have possession of their children, but

18. 6:280.

they do not have the right to use them.¹⁹ Falling under the duty to act for the benefit of the children is the right to “manage and develop them” so as to ensure that they become fully responsible persons. A child’s parent or other legal guardian can authorize things to be done to the child, such as medical treatment, so those acts are not wrongs against the child.

Relations of status enlarge the purposiveness of those in control of them by entitling them to make arrangements for others; because the power is nonconsensual, their purposiveness is restricted, so that they can only exercise that purposiveness on behalf of those in their charge. They also enlarge the purposiveness of those for whom others make arrangements. If I entrust you to manage my affairs while I am away, my purposiveness is secured because you make arrangements *for* me, in pursuit of my normal purposes. Your purposiveness is enlarged because you get to determine how my goods will be used, subject to the condition that they not be used for your benefit. Thus those who interfere with a status relationship wrong both parties to it. If someone takes it upon himself to see to your child’s religious education without consulting you, he wrongs you by depriving you of the power to “manage and develop” your child as you see fit. He also wrongs the child by depriving her of your management. The child is entitled to be in that relationship, with you in particular, even if it should turn out that some other person could do a better job of it.²⁰

The category of status is just the category of cases in which persons

19. 6:260. The difference between Kant’s account and the common law approach at that time is striking. At common law, a parent was entitled to the services of his minor children. See *Dean v. Peel* 1804 5 East 45.

20. Kant writes that parents bring a child into the world “without his consent and on [their] own initiative” (6:280). The phrase “on [their] own initiative” might suggest that parents incur obligation because they cause the children, or that they voluntarily undertake the obligation, but neither can be quite what Kant means. Instead, the obligation is incurred simply because the parents take control of their children. If the parents die or abandon a child, then the person who takes the child in has taken control and is obligated to manage and develop the child. But an interloper cannot come along and seize the child upon its birth, because that would be a wrong against the mother, who takes rightful possession of a child simply by giving birth to it. Nonetheless, if the interloper does succeed in taking the child, then the interloper has obligations to the child structured by status, even though the mother has a right against the interloper to reclaim the child.

find themselves in a relationship in which one party is not in a position to consent either to the existence of that relationship or to modification of its terms. As a result, the other party is not allowed to enlist the nonconsenting party in the pursuit of his or her own ends. In this, the situation is no different from other cases of nonconsent. It is just a feature of the relationship that makes ordinary consent impossible, rather than, as in the ordinary case, consent simply being absent.

Many other examples fit this structure. The legal relation between a fiduciary and a beneficiary is one such case. Where the beneficiary is not in a position to consent or decline to consent, or the inherent inequality or vulnerability of the relationship makes consent necessarily problematic, the fiduciary must act exclusively for the benefit of the beneficiary. It is easier for the fiduciary to repudiate the entire relationship by resigning than for a parent to repudiate a relationship with a child. But from the point of view of external freedom the structure is exactly the same: one party may not enlist the other, or the other's assets, in support of ends that the other does not share.²¹ Third parties do wrong if they take over the fiduciary's role, even if they do a good job.

Again, consider a different example of a relationship subject to exploitation, namely that between teachers and students. Is it appropriate for a professor to have her graduate students help her move house, or to ask them to volunteer to work in her garden? The answer, I take it, depends upon whether we think of these kinds of interactions as fully voluntary. Insofar as we do, it is just one person doing another person a good turn at the latter's request, and merely a coincidence that the two persons also stand in another relationship. But where there is a lot turning on that other relationship, we may worry about the quality of the students' con-

21. The “acting for another” structure of fiduciary relationships explains what is wrong with insider trading. The difficulty is not that it harms the shareholders of the company. Indeed, many economists contend that it makes capital markets more efficient, and so in the long run redounds to their benefit. Instead, the problem is that it is an abuse of the office held by the insider. The knowledge that an officer of the company has in virtue of an office is available for purposes of managing the affairs of the company in the interests of its owners. To use the office for private gain is using the company, which belongs to other people, for private gain. By contrast, any person outside the company can use whatever information he legally acquires as he sees fit, though of course that person does so entirely at his own risk, since, as Kant puts it, it is up to that person whether to believe it or not.

sent. We worry about it, not because it necessarily harms the students to help, but because it exploits the students.²²

The problem illustrated by the teacher/student example is not that the transaction in question lies outside of the terms of the contract (implicit or explicit) between them. It is rather that the relationship of dependence in which the student has been placed (if it is one), albeit via contract,

22. Another example Kant gives of a status relationship is marriage. He represents it as a relationship structured by symmetrical asymmetry. Two persons each have possession of the other, and so neither may act for private (i.e., extramarital) purposes. This legal power is extraordinary because it includes the entitlement to engage in sexual relations. That poses a special problem because Kant argues for the conclusion, later endorsed by very different thinkers, such as Jean-Paul Sartre and Simone de Beauvoir, that human sexuality inevitably involves regarding a sexual partner as an object. (On this issue, see Barbara Herman, "Could It Be Worth Thinking about Kant on Sex and Marriage?" in Louise Antony and Charlotte Witt, eds., *A Mind of One's Own* [Boulder: Westview, 1994], 49–67.) Their arguments have typically focused on the purported phenomenology of sexuality. Kant makes no reference to such factors. Instead, his claim that sexuality involves one person treating another as an object reflects his more general view about sexuality as simply the form of human animality. He ordinarily conceives of humans as embodied purposive beings, capable of freely setting their own purposes. This characterization is in line with his characterization in the *Critique of Pure Reason* of the concept of a person (as of a rightful condition) as an "Idea of Reason," that is, a rational concept that we are required on moral grounds to apply to particular things encountered in experience. One of Kant's other examples of an idea of reason is the idea of a living thing with its characteristic life form. This, as he explains in the second part of the *Critique of Judgment*, is to be understood in terms of a principle of natural teleology (see *Critique of Judgment* [Indianapolis: Hackett, 1987], 377–384). Natural teleology is not an empirical principle, but rather a rational one through which we are able to find distinctive forms of order, through which the parts of an organism are subordinated to the organism as a whole. A human being is thus both a biological organism, a living thing that we can organize under ideas of teleology, and also, and at the same time, a rational being, which we have a moral obligation to regard as free and purposive, and which any other person has an obligation of right to treat as a person rather than as a mere object. These two ideas come together to generate what Kant regards as the distinctive problem about human sexuality: sexuality is just the form of human animality. The purposiveness displayed in animality is not the purposiveness of freedom. Instead, it is simply the "natural urge" which has its principle of unity in its own natural expression (see *Doctrine of Virtue*, 6:424). In this respect, it differs importantly from any choice made on grounds of freedom. The animal is attracted to its potential biological mate through a principle of natural teleology. But because teleological beings do not have free purposiveness, anything that is the teleological natural end of an animal is a physical object. Consent cannot serve to make this sort of interaction rightful, because the object of the desire falls under the idea of natural teleology rather than that of human freedom. Thus, when animals mate, it is their natural teleology working together, rather than the purposive agency of either.

makes the conferral of this sort of benefit an unacceptable term of the contract.

Kant's example of household servants has the same structure, as do cases of employment contracts more generally. An employee is required to advance the employer's purposes, and is not allowed to use the employer's premises or goods for outside purposes. Unlike someone con-

Kant's central claim, then, is not, as Allen Wood has suggested, that sexuality is typically exploitative in bourgeois society (Wood, *Kantian Ethics* [Cambridge: Cambridge University Press, 2008], 228–229, 235, and 238). Instead, the fundamental point is that sexuality is animality, and satisfying an animal, rather than free urge, involves treating the object of that urge as mere material, to be consumed. Other animal urges raise no parallel problems. The desire to eat, for example, takes food as its object, but food is merely a natural thing. Only animal teleology directed at a person generates the problem.

Kant's solution to this problem is marriage. An ordinary contract won't do, because if sexuality involves treating a person as a thing, it cannot be the subject matter of a binding arrangement between persons. Thus a prostitution contract is never enforceable. Since a binding contract must concern things the parties are entitled to do, sexuality cannot be made rightful by the mere agreement of the parties. Instead, a spouse can only be acquired by entering a form of relationship in which each spouse has possession of the other. Marriage is a more general unity of two persons, so that each spouse's purposes become the other's. Thus everything they do is an exercise of their joint corporate purposiveness. Even the “animal” urges to which they yield are subsumed within their broader relationship. The two basic wrongs against a marriage, adultery and abandonment, are violations of that possession; the possession is reciprocal because both spouses can be wronged in both ways. If that is what a marriage is, Kant has explained how sexuality within it could be rightful, since each spouse is entitled to make arrangements for the other. He has also explained how such a relation could be entered into consensually, because neither party consents to become a mere object. Finally, it shows why particular sexual interactions within a marriage must be consensual between the parties, as otherwise each spouse would not be making arrangements for the other.

There are a number of aspects of this account that might be thought to be suspect. Most significantly, it is not clear why the distinction between natural teleology and purposiveness belongs in a book called *The Metaphysics of Morals*, let alone how it can be applied so readily to particulars. Further, Kant's distinctions between “natural” and “unnatural” types of sexual activity reflect his conception of sexuality as animal teleology: the function of the sexual urge is the preservation of the species. Yet the *function* of an end could only be relevant to its matter rather than its form. Moreover, even if Kant's full characterization of sexuality is accepted, it does not establish that natural teleology cannot be rationalized by being taken up by a free person, and so turned into a form of reciprocal free purposiveness. A more Kantian alternative would be a sort of layering of rationality over animal teleology, as is suggested, for example, in Christine Korsgaard's *Self-Constitution* (Oxford: Oxford University Press, 2009). Perhaps the best way to read Kant's argument takes marriage to be the rational manner in which reproductive animality can be taken up.

tracted to perform a single task, an employee is subject to the employer's direction, and within that direction the employee's acts are imputable to the employer. That is why employers can be bound by contracts made by their employees, and can be held vicariously liable for the wrongs committed by them, but only insofar as the employee is acting within the terms of the employment relation. Although the arrangement is entered into contractually, its terms are given by the nature of the relationship itself, in which one person makes arrangements for another.²³

We are now in a position to triangulate the category of status in relation to property and contract. In property, I have both possession and use of the thing. In contract, I have a limited right to the use of your powers for my purposes, but I do not possess you. In the third category, I have possession of you but am not entitled to use you for my own purposes. Let me perform the same triangulation in terms of the wrongs in question. The wrong in property is that of interfering with another's ability to set and pursue such ends as he has set for himself. The wrong in contract is failing to use your means in a way that you have given your contracting partner a right to have them used. The wrong in status is using another person to advance your ends. In so doing, you deprive that person of the freedom to set his own ends.

Relations of status arise in situations where consent is absent, impossible, or insufficient. The terms of those relations are governed by the freedom of the parties to them. As Kant explains in his discussion of public right, any arrangements one person makes for another are only consistent with the freedom of the other if that person could have consented to the arrangements that are made. The test of possible consent does not suppose that a person could only agree to whatever is most advantageous to him or her, but only requires that the capacity for possible agreement is bounded by each person's rightful honor. You could not consent to be treated as an object available for others to use in whatever ends they saw fit. You could, by contrast, consent to have someone manage your affairs in ways consistent with your continued purposiveness—to administer

²³. On conceptual barriers to reducing fiduciary obligations to contractual ones, see Paul Miller, "The Fiduciary Obligation," doctoral dissertation, University of Toronto, 2007.

medical treatment to you while you are unconscious, to “manage and develop” you as a child, or to invest your retirement savings on your behalf.

Are wrongs against property, contract, and status the only possible types of wrongs against external freedom that one private person can commit against another? I believe that they are, and I will offer a brief and intuitive argument to show why. External freedom is a matter of being able to set and pursue your own ends. The only ways it can be interfered with is by interfering with either the capacity to set or the capacity to pursue those ends. As a private person, you can only interfere with another person’s capacity to *pursue* ends in two ways—either by wrongfully depriving someone of a means she already has, or by failing to provide her with a means to that pursuit to which you have given her a right. You violate a property right by using or destroying the means a person already has; you violate a contractual right by failing to provide her with means—your action—to which you have given her a right. If her means are intact, you can interfere with the capacity to *set* ends in only one way—by making someone pursue an end she has not set for herself, either by using her goods without her permission or by using a relationship you have with her for private purposes.²⁴

The argument that these three categories exhaust the possible interference with external freedom depends on the two premises which follow from the Universal Principle of Right but need to be made explicit. The first is that we are concerned here with the ways in which one private party may wrong another, not with whatever further powers a public authority can have to uphold a system of equal freedom.

The second is that harm, as such, is not a category of wrongdoing. In particular, interference with the successful attainment of a particular end is not an interference with external freedom. Harms and benefits—the advancing or setting back of the interests of a person—are only incidental to this analysis. Let me illustrate this with a pair of examples. Suppose that you and I are neighbors. You have a dilapidated garage on your land

²⁴. Many apparent counterexamples actually illustrate this division. For example, some have suggested that such practices as advertising and religious indoctrination (perhaps especially when aimed at young children) interfere with freedom. They are controversial because people disagree about whether they fall into our third category.

where our properties meet. I grow porcini mushrooms in the shadow of your garage. If you take down your garage, thereby depriving me of shade, you harm me, but you do not wrong me in the sense that is of interest to us here. Although you perform an affirmative act that worsens my situation—exposure to light destroys my mushrooms—I do not have a right, as against you, that what I have remains in a particular condition. Although I do have a right to my mushrooms, which prohibits you from doing such things as carelessly spilling fungicide on them, I do not have a right that you provide them with what they need to survive, or that you protect them from things that endanger them apart from your activities. Thus you do not need to protect them from light by erecting a barrier unless your use of the land is the source of that light. Nor do you need to continue to provide a barrier that has protected them in the past. The distinction between depriving me of what I already have as opposed to failing to provide me with what I need does not turn on the difference between action and inaction. If I grow sunflowers in my yard and you put up a garage on yours, thereby depriving me of light, you harm me but do not wrong me, because all you have done is fail to use your land in a way that provides me with something I need.

These examples assume, as Kant does, a specific way of thinking about property in land, according to which it is a right to a specific region of the Earth's surface. The most fundamental, though also extreme, implication of this is that your decision to occupy, or fail to occupy, any part of the space making up your land raises no issues of the rights of others. As a result, they have no grounds to complain if you build on your land in a way that blocks something from reaching it, because, absent some prior arrangement, they have no right to a path across your land. Nor can they complain if you do not use your land to block some unwelcome force from entering it. But the point is much more general: others not only have no right that you use what is yours in a way that best suits their preferred use of what is theirs, they have no right that you use what is yours to preserve what they have.²⁵ Your right to your property does not place others under an obligation to take steps to ensure that what you have remains in

²⁵. *Mayor, etc. of Bradford v. Pickles*, [1895] AC 587 (HL), and *Fountainbleau Hotel Corp v. Forty-Five Twenty-Five, Inc.* 114 So. 2d 357 (Fla. Dist. CA 1959).

its present condition. You only have a right that others not damage or destroy what is yours by using what is theirs in ways inconsistent with universal law. Your right to a thing must limit the ways in which others may interfere with what *you* own, but cannot extend to a right to require others to use what *they* own in ways that suit your particular purposes, and the preservation of what you own is just one of your purposes.²⁶

Conversely, I may benefit from your shade (or light), and I do not need to secure your consent in order to derive that benefit. I can just help myself to it. Nor can you demand payment as a condition of my reaping that benefit, except in the sense that you can threaten to exercise your right to withdraw it unless I agree to pay. But my liberty to use it is not a feature of your implicit consent. It is just my good fortune.

Focusing on wrongs also identifies the rights that are at issue. A right is a restraint on the conduct of others, which can be identified by the deeds it proscribes. A property right is a right to possession and use of an object, that is, a restriction on the entitlement of others to use the thing (possession) or make it unusable (use). A contract right is a right to a specific deed on the part of another person, that is, a restriction on the entitlement of that person to use his powers in a contrary way. A status right is a right to a person “akin to a right to a thing,” that is, a right to affect that person without his consent, and a corresponding obligation to avoid using the person. Relations of status are inherently asymmetrical,²⁷ and so can only be made rightful by restricting the freedom of the right holder to act for the purposes of the other person. Thus they generate interdependent rights and duties: the person who is entitled to make arrangements for another can constrain the conduct of anyone else who interferes with the possibility of doing so, and can be constrained to make those arrangements solely for the purposes of the other.²⁸

26. Kant makes the connection between property rights and the occupation of space explicit at 6:262 and 6:268. My property right in land is the right to exclude others from the physical space that makes it up, and so cannot extend to limit what you do with your space.

27. This applies even to the case of marriage: each spouse makes arrangements *for the other*, and must do so in a way that does not subordinate the second to the purposes of the first.

28. Kant makes the same point in terms of the categories of relation: substance, causality, and community. These govern the “matter” of rights to external objects of choice. A person

These three types of wrong are, I have suggested, exhaustive of wrongs that interfere with external freedom. They need not be mutually exclusive. For example, in cases of fraud, one person might violate the freedom of another in each of the three ways. If I fraudulently sell you an unprofitable business, and, not realizing your mistake, you throw good money after bad, trying to make it profitable, I interfere with your freedom, because I mislead you into squandering your resources. As between us, it is as though I had destroyed those resources. But in the same case, I also enter into and breach a contract with you, and you are entitled to complain that I have failed to do that which I undertook to do, namely sell you a valuable business. Again, on the same facts, I use you in a circumstance in which your consent is vitiated (because you are operating under a mis-

could have a right to a corporeal thing (substance), another's performance (causality), or another person by being entitled to make arrangements for them (6:260). In the *Critique of Pure Reason*, trans. and ed. Allen Wood and Paul Guyer (Cambridge: Cambridge University Press, 2007), Kant introduces the "Table of Judgments" as forms of judgment, noting that a categorical judgment joins two concepts, a hypothetical judgment joins two propositions, and a disjunctive judgment "contains the relations of two or more propositions to one another, though not the relation of sequence, but rather that of logical opposition, insofar as the sphere of one judgment excludes that of the other, yet at the same time the relation of community, insofar as the judgments together exhaust the sphere of cognition proper" (A73–74/B99). The table of judgments is then brought to bear on possible experience under the categories of relation, substance, causality, and community. Applied to rights to external objects, the same classification yields the division property/contract/status: rights to objects/performances/making arrangements for others. Considered in terms of the form of the right, a property right is a right to independent choice, to an object considered as substance, and is a right that persists though changes in the object; a contractual right is a right to dependent choice, in which one person's choice is subject to another's with respect to some particular deed, so that the former is constrained to bring about some result for the latter; a status right is a right to mutual determination in the sense that one person is entitled to choose for the other and thereby bound to choose *for* the other. In choosing for another, a person is thereby precluded from choosing for himself. Thus the exclusion of a person in a relationship of status from using possession of the other for his or her own purposes is an expression of the relation of mutual exclusion characteristic of disjunctive judgments and so of relations of community in the *Critique of Pure Reason*. Kant also characterizes the property/contract/status division as referring to "a right to a thing," "a right against a person," and "a right to a person akin to a right to a thing," remarking that the three categories are generated by applying the distinction between rights to something and rights against to the distinction between persons and things. Those paired distinctions yield a fourfold distinction, but as Kant notes, there could not be a right against a thing, because a thing is not free and so not subject to obligation (6:357).

take I have created) and you can rightfully demand that I be deemed to have been acting on your behalf, and so disgorge my gains to you on the grounds that they were your gains all along. Of course, on particular facts, perhaps only one description will actually fit. But the fact that I have interfered with your freedom in one way does not mean that I have not interfered in another.

III. Coercion

Because each of these three types of wrong interferes with the ability of the aggrieved party to set or pursue his or her own ends, each of these wrongs against external freedom is inherently coercive. Of course, that wrongs are inherently coercive does not show that the prohibition of wrongs—a set of reciprocal limits on freedom—is coercive. Indeed, if everyone acts within those limits, and no one commits a wrong of any of the three types, no coercion occurs. Coercion enters the account in a different way.

As we saw in Chapter 2, Kant explains the idea of coercive enforcement in terms of the hindering of a hindrance to freedom.²⁹ If each person is entitled to use his or her powers to set and pursue his or her own purposes, the only legitimate restrictions on that purposiveness are imposed by the purposiveness of others. This system of mutual restriction entails that each person's entitlement to use means is restricted by the entitlements of others, and so the restrictions are part of the same system of equal freedom. At the level of innate right, hindering a hindrance can mean nothing more than what Kant calls “protective justice,”³⁰ that is, defensive force to repel another who attempts to touch you without your authorization.

Once acquired rights are introduced, both this minimal protective form of hindrance and a further, remedial form of hindrance become possible. You can grab your coat to prevent me from taking it, even though in so doing you frustrate my pursuit of my ends. You can refuse to aid me when I enlist you in one of my projects, so, for example, you can lock

29. 6:232.

30. 6:306.

your doors to hinder me from taking my afternoon nap in your bed. And if I am about to abuse a relationship in ways to which you are incapable of consent, I can be removed from that relationship, even if I prefer to remain in it. In each case, the fact that I wish to persist in hindering your freedom—the fact that I do not consent to be hindered—does not matter, because in each case our reciprocal freedom is being protected. The fact that I object to it does not entitle me to complain, because, as we have seen, consent is only relevant where the conduct in question would otherwise be wrongful. In these examples, however, allowing me to persist would be wrongful; hindering my wrong would not, so consent is not required. In the first instance, then, the idea of a hindrance of a hindrance is just the idea that norms of external freedom are supposed to guide conduct, but, being norms of external freedom, they can guide it externally.

This first, prophylactic sense of hindering a hindrance does not exhaust the possibilities of coercion. In each of our examples, the hindrance frustrates my achievement of a particular aim, but does not interfere with my ability to set and pursue my own ends. That is, at least in part, an artifact of the particular examples. But at least some prophylactic hindrances do not hinder external freedom.

The idea of the hindrance of a hindrance has a second, retrospective aspect to it as well. What is hindered in this case is not wrongful action but its impact on the external freedom of others. In an ideal world, no person hinders the external freedom of another, either because such hindrance doesn't happen or because, if it does, it is hindered directly. But sometimes a wrong will be completed, and if it is, its *effects* must be hindered in order to maintain the external freedom of the aggrieved party. If one person acts coercively against another, the latter is entitled to redress. So, for example, if I injure you or damage your property, you are entitled to compensation. You must be made whole, so that the embodiments of your external freedom are as they would have been had I not wronged you. The same applies if I fail to honor a contract I have made with you. You are entitled to be put in the position you would have been in had my choice—itself an embodiment of *your* freedom because I transferred it to you—been exercised as I was obligated to do. Again, if I manage to enlist you in support of my projects without your consent, I must surrender to you any gains I make as a result. I must do so because the use I made of

your right to set your own ends must be treated as an embodiment of your freedom, and so given back to you. So, for example, if you invite tourists to explore the caves under your land, and lead them underground to the caves under mine, you must disgorge any gain you received from the use of my caves, even if I could not have capitalized on them on my own, and even if, had we entered into a contract, I likely would have agreed to let you use them on more favorable terms.³¹

Kant says that if another has wronged me and I have a right to receive compensation from the wrongdoer, “by this I will still only preserve what is mine undiminished.”³² In determining the appropriate remedy, right does not ask what parties would have agreed to, because they did not agree, and it would be inconsistent with the freedom of the aggrieved party to hold him or her to the terms of an agreement that was never entered into. Instead, right looks only to what the aggrieved party had prior to the wrong. Using another’s person or property without his or her permission is never consistent with freedom for all. Because the property exists for the benefit of its owner, the only way to redress another’s use of it is to treat that use as though it were done solely for that person’s benefit. Another way of making the same point is to say that I am entitled to the proceeds of my property, since it is a means toward the ends I chose to adopt. Should you use my property in pursuit of ends I do not share, I am entitled to the proceeds of that pursuit, as I would have been had it been done rightfully, that is, on my behalf. The fact that you wronged me by acting in ways to which I did not consent cannot be used as a basis for depriving me of my right to the proceeds of my property.

In each of these examples, the wrong is redressed coercively, in just the same sense in which, in our prophylactic examples, the wrong was hindered coercively. That is, the redress is coercive in the sense that the wrongdoer does not need to make its redress one of his ends. Instead, the aggrieved victim is entitled to reclaim what is rightly his, regardless of what the wrongdoer might think. So, for example, I can reclaim my property from you, even if you took it by mistake. Moreover, I can require that you return it in the condition in which you took it. That is because my

³¹ *Edwards v. Lee's Administrator* 96 S.W.2d 1028 (1936).

³² 6:271.

right to equal freedom just is my right to set and pursue my ends using the means to which I have a right, and keeping my property is a matter of being able to set and pursue my ends.

Because wrongdoing grounds redress, coercive enforcement of private remedies can also operate to deter wrongdoing, for deterrence is just the public manifestation of the prophylactic sense of coercion. If I am allowed to interfere with your freedom to protect my own—by locking my doors, or taking the bicycle you promised me—I am thereby allowed to operate on your capacity for choice indirectly. Other, less mechanical means can operate in the same prospective way. So if I honor my contracts, or keep my hands off your goods, because I fear that I will be made to disgorge my gains or repair your losses, your rights operate on my capacity for choice indirectly. Any indirect means of bringing my conduct into conformity with right will be acceptable, provided only that they be means that can apply to all, and do not interfere with freedom any more than they must to hinder the initial hindrance. That is just to say that the prospect of enforcing rights may be used to protect right.

If we think of the coercive rights inherent in the law in terms of restraint and redress, we have rejected the key elements of Mill's account of coercion as we considered it in Chapter 2. Recall that for the tradition for which I am treating Mill as spokesman, coercion has two key features. The first of these is that it interferes with a person's liberty, by imposing a cost on that person that he or she would not otherwise have borne. The second is that it is extrinsic to the wrong that it hopes to address.

We have rejected the first strand in Mill's account, which says coercion involves making a person bear a cost she would otherwise not have borne because we lack the relevant baseline. Against the background of norms of equal freedom, the person prevented from completing a wrong is not being made to bear a cost she otherwise would not have borne; she is just being made to respect the rights of others. The same point applies if the wrong is completed and the wrongdoer is made to pay damages or disgorge a wrongful gain. It is no doubt true that had we left the loss where it falls, or let her keep her gain, she would have kept something she must now give up, and so the enforcement of a right makes the wrongdoer bear a burden she would not have borne if the right had not been enforced. That is the wrong comparison. The appropriate baseline is not the having of the wrongful gain, but its lack. Again, the baseline is not the loss ly-

ing where it falls, but rather the loss lying where it belongs, that is, with the wrongdoer.

We have also rejected the second strand, which says that enforcement is extrinsic to the wrong. In cases of redress, the use of force restores a regime of equal freedom. Of course, it may also provide an incentive to the wrongdoer, or to other wrongdoers. From the point of view of equal external freedom it does not matter why people act in conformity with the demands of right, so long as they do so. Provided they do so, they do not interfere with the ability of others to set and pursue their own ends. But the point of coercive enforcement is not to provide such incentives, but rather, quite literally, to set things right. Perhaps the best way to see this is to think about the example where the wrong has occurred as a result of an honest mistake. I mistakenly take your coat, thinking it to be my own, having absentmindedly forgotten that I did not bring a coat this morning. You are entitled to reclaim your coat, even if I persist in my honest mistake. It would, I think, be peculiar to suppose that your right to forcibly reclaim your coat is to be understood in terms of its incentive effects. You are allowed to reclaim your coat, not because allowing you to do so will lead me or anyone else to be more careful in keeping track of whether he wore a coat in the morning, or even to be more careful in general in keeping track of his stuff. You get to reclaim your coat because it is your coat.

IV. Conclusion

The innate right of humanity does not presuppose the existence of means for setting and pursuing purposes other than each person's own body. Once the possibility that there are such external means is introduced, the Universal Principle of Right must be extended to make their use consistent with every person's freedom. That extension must be formal: if usable objects are to be used rightfully, people must have them available to use for whatever purposes they set, restricted only by the entitlement of others to use their external means as they see fit, rather than on the basis of the particular ends being pursued. Acquired rights require affirmative acts to establish them, but the form of the rights, including the ways in which they restrict the freedom of others, are conceptually prior to questions of their mode of acquisition.

Kant's *Metaphysics of Morals*

Interpretative Essays

EDITED BY
MARK TIMMONS

OXFORD
UNIVERSITY PRESS

2

Kant's Deductions of the Principles of Right

Paul Guyer

I. Are Kant's Principles of Right Derived from the Supreme Principle of Morality?

In the *Doctrine of Right*, Part I of his 1797 *Metaphysics of Morals*, Kant appears to derive his ‘universal principle of right’—‘Any action is *right* if it can coexist with everyone’s freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with a universal law’ (*RL*, Introduction, §C, 6:230)¹—from the fundamental principle of morality, which presents itself to us in the form of the Categorical Imperative. He appears simply to apply that fundamental principle’s requirement that we use our power of free choice and of action upon our choice in accordance with the condition that the maxims upon which we choose to act be universalizable (e.g. *G*. 4:402, 421) to the external use of our freedom—that is, to our physical actions in so far as they can affect other persons, in order to derive the rule that we act only in ways that leave others a freedom of action equal to our own, regardless of our purposes in and our motives for so acting, those being subjects for ethical but not legal rules. He then seems to derive further, more specific principles of right from the universal principle of right by

I would like to thank Bernd Ludwig, Mark Timmons, Kenneth Westphal, and Allen Wood for helpful comments on an earlier draft of this paper.

¹ In addition to the abbreviations established for this volume, I have included *RL* for the *Doctrine of Right* (*Rechtslehre*), Part I of *The Metaphysics of Morals*. Quotations from *The Metaphysics of Morals* as well as the *Groundwork*, *Critique of Practical Reason*, and ‘Theory and Practice’ follow the translation by Mary Gregor from Immanuel Kant, *Practical Philosophy*, ed. and trans. Mary Gregor (Cambridge: Cambridge University Press, 1996), with a few modifications; I also follow Gregor’s rather than the Academy’s numbering of sections in *The Metaphysics of Morals*. Translations from Vigilantius are from Immanuel Kant, *Lectures on Ethics*, ed. Peter Heath and J. B. Schneewind (Cambridge: Cambridge University Press, 1997). Translations from the *Critique of Pure Reason* are from Immanuel Kant, *Critique of Pure Reason*, ed. and trans. Paul Guyer and Allen W. Wood (Cambridge: Cambridge University Press, 1998). Translations from Kant’s preparatory notes for *The Metaphysics of Morals*, printed in volume 23 of the Academy edition, are my own.

additional arguments. In particular, he seems to derive the principle that violations of right may be prevented or punished by coercion through the supposition that the proposition that a hindrance to a hindrance of an effect itself promotes that effect is true by the law of non-contradiction, or is an analytic truth, in which case it follows that ‘Right and authorization to use coercion therefore mean one and the same thing’ (*RL*, Introduction, §E, 6:232). And he presents the central principle of ‘private right’—that is, the principle that it must be possible for persons to acquire property rights, including rights to land, to movable objects upon the land, to specific performances by others in the fulfilment of promises and contracts, and to the long-term services of others within the family and household—as a ‘postulate of practical reason with regard to rights’ that, although itself a ‘synthetic *a priori* proposition’, is also supposed to follow from the universal principle of right, ‘in a practical respect, in an analytic way’ (*RL*, §6, 6:250). Even more specific rights, such as the right to acquire property in land by ‘first appropriation’, are said to follow from the more general principles by a ‘deduction’ (*RL*, §17, 6:268). Kant seems to have promised such a derivation of the principles of right from the supreme principle of morality four years prior to *The Metaphysics of Morals*, in the 1793 essay ‘On the Common Saying: That May Be Correct in Theory, but It Is of No Use in Practice’, which had stated that ‘the concept of an external right as such proceeds [*geht ... hervor*] entirely from the concept of freedom in the external relationship of people to one another’ (GTP 8:289), and then to have confirmed his delivery on that promise in the *Doctrine of Right*, which states that ‘we can know our own freedom (from which all moral laws, and so all rights as well as duties proceed), only through the *moral imperative*, which is a proposition commanding duty, from which the capacity for putting others under obligation, that is, the concept of a right, can afterwards be developed [*entwickelt*]’ (*RL*, Introduction, ‘Division of the Metaphysics of Morals as a Whole’, 6:239).² Surely this means that the Categorical Imperative, the form in which the supreme principle of morality presents itself to creatures such as ourselves, whose power of choice can also be tempted by inclination, is both the means by which we know of our freedom and also the principle by means of which we must restrict our freedom in

² In his edition of *The Metaphysics of Morals*, Bernd Ludwig has suggested that this ‘Division’ belongs in the general introduction to *The Metaphysics of Morals*, following 6:221, rather than in the specific Introduction to the *Doctrine of Right*. See Immanuel Kant, *Metaphysische Anfangsgründe der Rechtslehre: Metaphysik der Sitten*, pt. I, ed. Bernd Ludwig (Hamburg: Felix Meiner, 1986), 31–4, also pp. xxxi–xxxii. The word *entwickelt*, which Gregor translated as ‘explicated’, is one of those words that makes Kant’s arguments in this late work so obscure. It is hardly clear from this term whether Kant thinks that rights and duties can be derived from the concept of freedom or from the Categorical Imperative by straightforward analysis or by some other method of argument.

order to determine both our legally enforceable rights against one another as well as our ethical duties to ourselves and to one another.

Several writers have recently challenged this natural interpretation and argued that Kant did not intend to derive the principles of right from the fundamental principle of morality at all but, instead, intended them to stand on their own as rational but not moral principles of human conduct. Allen Wood has argued that 'Kant very explicitly discredits the whole idea that the principle of right could be derived from the fundamental principle of morality',³ and Marcus Willaschek has argued that Kant supposes, at least part of the time, that 'the fundamental laws of the realm of right are expressions of human autonomy akin to, but independent from, the moral domain'.⁴ These authors have based their surprising conclusion precisely on what seems like part of the evidence for the ordinary view that Kant's philosophy of right is derived from his supreme principle of morality—namely, his claims that the connection of coercion to right is *analytic* and his designation of the principles of acquired right as a *postulate* of practical reason. Thus, Wood says that Kant discredits the idea of a derivation of the principles of right from morality simply 'by declaring that the principle of right, unlike the principle of morality, is *analytic*',⁵ and Willaschek seconds that claim, while adding that Kant's statement that 'the "universal law of right" is "a postulate that is incapable of further proof [*keines Beweises weiter fähig*]" (6:231) . . . would be astonishing if Kant held that this law was a special instance of a more general principle whose validity Kant, on his own account, had proven in the *Critique of Practical Reason*'.⁶ To reach their conclusion, both authors must assume that an analytic proposition, because it is true in virtue of the containment of its predicate in its subject concept and the law of non-contradiction, neither needs nor can receive any sort of justification beyond the analysis of the concepts that comprise it. Willaschek must also assume that anything Kant calls a postulate cannot have a foundation in any more fundamental principle, such as the supreme principle of morality.

Strictly construed, the claim that Kant's universal principle of right is not derived from the Categorical Imperative, understood as the requirement to act only on maxims that can also serve as universal law, is correct because the principle of right concerns only the compatibility of our actions with the freedom of others, and does not concern our maxims at all, a fortiori their universality.

³ Wood, this volume, 7.

⁴ Marcus Willaschek, 'Why the *Doctrine of Right* does not belong in the *Metaphysics of Morals*', *Jahrbuch für Recht und Ethik*, 5 (1997), 205–27, at 208.

⁵ Wood, this volume, 7.

⁶ Willaschek, 'Why the *Doctrine of Right* does not belong in the *Metaphysics of Morals*', 220.

However, any broader claim that the principle of right is not derived from the fundamental principle of morality, in the sense of the fundamental concept of morality, is surely implausible. The foundational assumption of Kantian morality is that human freedom has unconditional value, and both the Categorical Imperative and the universal principle of right flow directly from this fundamental normative claim: the Categorical Imperative tells us what form our maxims must take if they are always to be compatible with the fundamental value of freedom, and the universal principle of right tells us what form our actions must take if they are to be compatible with the universal value of freedom, regardless of our maxims and motivations. Thus the universal principle of right may not be derived from the Categorical Imperative, but it certainly is derived from the conception of freedom and its value that is the fundamental principle of Kantian morality.⁷

At the same time, Kant's suggestion that the universal principle of right flows directly from the concept of freedom should not be taken to suggest that this principle, the connection of coercion to right, or the postulate of right regarding property stand in no need of further justification or what Kant sometimes calls deduction. While the characterization of an analytic judgement as one that is true in virtue of its concepts and the laws of logic alone seems like a textbook definition of the analytic (see *KrV* A6–10/B10–14), Kant himself does not assume that the logical character of analytic judgements relieves us from all further obligation to justify them. On the contrary, both in the *Critique of Pure Reason* and in polemical writings from the beginning of the 1790s, closer to the period of *The Metaphysics of Morals*, Kant consistently maintains that even analytic judgements have no cognitive value without a

⁷ In maintaining that the universal principle of right is not derived from the Categorical Imperative but is derived from the concept of freedom as the fundamental principle of morality, I am differing from the position of Allen D. Rosen, *Kant's Theory of Justice* (Ithaca, NY: Cornell University Press, 1993), 50–5. I am also thereby suggesting that the structure of Kant's argument in the *Doctrine of Right* of *The Metaphysics of Morals* is similar to that of the *Doctrine of Virtue*. As Allen Wood has pointed out, in the latter part of the work Kant almost never derives the duties of virtue from the Categorical Imperative as the Formula of Universal Law, but almost always derives these duties directly from the concept of humanity, or our obligation to preserve and promote humanity as an end and never merely as a means; see Allen W. Wood, 'Humanity as an End in Itself', in Hoke Robinson (ed.), *Proceedings of the Eighth International Kant Congress*, vol. 1, pt. 1 (Milwaukee, WI: Marquette University Press, 1995), 301–19, repr. in Paul Guyer (ed.), *Kant's Ground-work of the Metaphysics of Morals: Critical Essays* (Lanham: Rowman & Littlefield, 1998), 165–87, and Allen Wood, *Kant's Ethical Thought* (Cambridge: Cambridge University Press, 1999), Conclusion, especially 325–33. If freedom—the freedom to set and pursue our own ends—is the defining characteristic of humanity (see e.g. the Introduction to the *Doctrine of Virtue*, 6:387), then the duties of right are simply the coercively enforceable subset of our duties to preserve humanity, while the duties of virtue include those duties to preserve humanity that are not coercively enforceable as well as all duties to promote humanity. See also Paul Guyer, 'Moral Worth, Virtue and Merit' in Guyer, *Kant on Freedom, Law, and Happiness* (Cambridge: Cambridge University Press, 2000), ch. 9.

proof of the ‘objective reality’ of the subject concepts on which they are based—that is, a proof that such concepts describe real objects or real possibilities for objects. And it is by no means obvious that by calling a principle a postulate Kant means to imply that it cannot be derived from a more fundamental principle. It certainly is his view that one synthetic a priori judgement can be derived from another, so by calling the principle of acquired right synthetic a priori Kant cannot mean to imply that it is not derivable from the general principle of right and through that from the supreme principle of morality. Moreover, those propositions that Kant most prominently labels postulates—the postulates of pure practical reason asserting the existence of freedom, God, and the immortality of the soul—are clearly subject to elaborate proofs. So, by calling a principle of right a postulate, Kant may mean to suggest something about *how* such a proposition must be proved, but not that it cannot be proved.

My plan for this chapter is the following. First, I examine some of Kant’s general claims about analytic judgements and postulates in order to show that Kant’s application of these concepts to principles of right does not by itself imply that those principles are independent from the fundamental concept of morality. Then I examine some of Kant’s specific claims about the principles of right in order to show that Kant by no means intends to imply that these principles can stand independently of the fundamental concept of morality, but rather that he intends to deduce them from that concept. I then discuss two of Kant’s central claims: the allegedly analytic proposition that right and the authorization to use coercion mean one and the same, and the postulate of practical reason with regard to the right to acquire property, showing that Kant attempts to establish the conditions of both the moral and theoretical possibility of these claims by arguments that can only be considered deductions. Whether Kant’s arguments fully satisfy his own expectations for deductions or ours is probably impossible to answer, given how many ways he used the term ‘deduction’ and the debates that have raged in recent years about the nature of transcendental arguments. So I will not attempt to answer such questions.

II. Analytic Judgements and their Justification

On Kant’s conception of analytic judgements, the claim that a principle of right is analytic is hardly incompatible with the assumption that it flows from the concept of freedom as the supreme principle of morality. Further, for Kant the truth of an analytic proposition depends upon the justification of the concept that it analyses; in the case of a principle of right, its truth thus depends upon the objective reality of the fundamental concept upon which the supreme

principle of morality depends, the concept of freedom. The present section comments on Kant's general concept of analyticity; more specific observations about just what propositions about right Kant claims to be analytic and what they presuppose will be offered later.

Kant's conception of analyticity is not as simple as it may seem. Kant famously introduces his concept of analytic judgements by claiming that in such judgements 'the predicate *B* belongs to the subject *A* as something that is (covertly) contained in this concept *A'* and thus that they are judgements 'in which the connection of the predicate is thought through identity' (*KrV* A6–7/B10–11).⁸ This is usually interpreted to mean that an analytic judgement, or, as we would say, an analytic proposition, is one that is *true* in virtue of what is contained in its subject concept and the laws of logic alone. But Kant does not say anything about truth in this passage; he only says, vaguely, that in an analytic judgement the 'connection' between subject and predicate is 'thought' through a logical law. Whether this is supposed to be enough to explain or justify the truth of the proposition is far from obvious; it certainly leaves open the possibility that a full justification for belief in the truth of an analytic proposition may require some sort of justification for the subject concept itself. It is certainly not obvious that the subject concept of an analytic judgement cannot itself be derived from some more fundamental source, some more fundamental intuition, concept, or principle that would be part of the basis for the truth of the analytic judgement built upon that subject concept.

Following his introduction of the concept of an analytic judgement, Kant does make it clear that the fact that a proposition may be *proved* by means of an inference or chain of inferences proceeding strictly in accordance with laws of logic is *not* enough to show that the proposition—presumably, the truth of the proposition—is *known* by means of logic alone, or even that the proposition is actually analytic. He says that prior philosophers failed to recognize that 'Mathematical judgements are all synthetic':

For since one found that the inferences of the mathematicians all proceed in accordance with the principle of contradiction (which is required by the nature of any apodictic certainty), one was persuaded that the principles could also be cognized from the

⁸ It has sometimes been thought that Kant offers two different concepts of or criteria for analyticity, one in which a judgement is analytic if the predicate is contained in the subject concept and another in which it is analytic if it depends on the law of identity or some related principle of logic; see e.g. Lewis White Beck, 'Can Kant's Synthetic Judgments Be Made Analytic?', *Kant-Studien*, 67 (1955), 168–81; repr. in Beck, *Studies in the Philosophy of Kant* (Indianapolis: Bobbs-Merrill, 1965), 74–91 (see esp. 74–81). It is clear from Kant's text that he does not intend two different conceptions or criteria, but rather supposes that an analytical judgement can be 'thought' through the law of identity *because* its predicate is contained in its subject concept.

principle of contradiction, in which, however, they erred; for a synthetic proposition can of course be comprehended in accordance with the principle of contradiction, but only insofar as another synthetic proposition is presupposed from which it can be deduced, never in itself. (*KrV* B14)

This says that provability in accordance with the law of contradiction, and, presumably, by any other purely logical principle, such as the law of identity,⁹ is not enough by itself to establish analyticity. The status of a proposition ultimately depends upon the status of the premisses of its proof: if they are synthetic, then the conclusion is synthetic even though reached by purely logical inferences. If it always takes a synthetic proposition to establish the justifiability of any concept that could be used as a premiss in a logical inference, this would actually imply that all propositions that can be known to be true are really synthetic. Kant does not draw this conclusion in the first *Critique*, although, as we will see momentarily, that may be his ultimate position. But, even apart from that conclusion, the present argument is enough to establish that the mere fact that one proposition can be proven from another in accordance with the law of identity or contradiction is hardly enough to establish that the subject concept of a proposition and with it the truth of the proposition do not depend upon something more fundamental. Thus, even if Kant says that a principle of right is provable in accordance with the principle of identity or of contradiction, that by itself hardly implies that this principle can be known to be true without appeal to some more fundamental concept or principle, and may not even by itself actually imply that the principle is analytic.

Before leaving the first *Critique*, we should also look at Kant's introduction of the concept of a deduction. Kant introduces the concepts of deduction in general and of transcendental deduction in particular in the 'Transcendental Logic' in order to explain our knowledge of synthetic a priori cognitions that go beyond those explained solely by appeal to our a priori intuition of space and time; thus, a transcendental deduction is needed to explain our cognition of the universal principle of causation, for example, as contrasted to a mathematical theorem. But Kant does not say that only synthetic a priori propositions need a deduction; in fact, he says that *any* concept the use of which cannot be justified by an immediate appeal to experience needs a deduction.

⁹ In his earliest philosophical work, the *New Elucidation of the First Principles of Metaphysical Cognition* of 1755, Kant had argued that the principle that all identities are true and the principle that all contradictions are false are actually two separate logical principles (1:389; see David Walford (ed.), *Immanuel Kant: Theoretical Philosophy 1755–1770* (Cambridge: Cambridge University Press, 1992), 7). In the *Critique of Pure Reason*, Kant tends to treat the principles of identity and of contradiction interchangeably.

In fact, he introduces the concept of deduction by none other than the example of rights, arguing that claims of right always need a deduction:

Jurists, when they speak of entitlements and claims, distinguish in a legal matter between the question about what is lawful (*quid juris*) and that which concerns the fact (*quid facti*), and since they demand proof of both, they call the first, that which is to establish the entitlement of the legal claim, the **deduction**. We make use of a multitude of empirical concepts without objection from anyone . . . because we always have experience ready to hand to prove their objective reality. But there are also concepts that have been usurped, such as **fortune** and **fate** . . . and then there is not a little embarrassment about their deduction because one can adduce no clear legal ground for an entitlement to their use either from experience or from reason. (KrVA84/B116–17)¹⁰

This implies that any concept the ‘objective reality’ of which cannot be established by a straightforward appeal to experience of an object that satisfies it needs a deduction of some kind. And, as Kant’s example implies, claims of right, as opposed to mere descriptions of fact, can never establish their objective reality by a direct appeal to experience. While particular claims of right are not the same as principles of right, of course, surely this suggests that, if the principles of right are to be shown to have binding force for us, which can hardly be shown by an appeal to experience, the concepts on which they are based must have their objective reality established by some form of deduction. Thus, even if certain principles of right do have the logical structure of analytic judgements, it seems unlikely that Kant intended that the principles of right can be known to be valid by analysis of their concepts alone.

Kant further expounded his view about analyticity in a polemical exchange with the Halle Wolffian Johann August Eberhard, who in a series of publications from 1788 to 1792 attempted to show that Kant’s claim that mathematical propositions are synthetic a priori is false, and that, as he took Leibniz to have already shown, all mathematical results can be proven by purely logical inferences from appropriate definitions, such as definitions of number, and hence are analytic.¹¹ In response to this charge, Kant insisted upon the point already made in the first *Critique* that a proposition may have a strictly analytical *proof*, which proceeds by unpacking the predicates contained in a concept,

¹⁰ Dieter Henrich has emphasized the legal origins of Kant’s notion of deduction in a number of articles; see ‘Kant’s Notion of a Deduction and the Methodological Background of the first *Critique*’, in Eckart Förster, *Kant’s Transcendental Deductions: The Three ‘Critiques’ and the ‘Opus postumum’* (Stanford: Stanford University Press, 1989), 29–46.

¹¹ Eberhard’s articles were published in the first four volumes of the journal *Philosophisches Magazin*, edited by himself, J. G. Maaß, and J. E. Schwab. For a description of his attack, see Henry E. Allison, *The Kant–Eberhard Controversy* (Baltimore: Johns Hopkins University Press, 1973), 6–45.

but the objective reality of the concept, that is, its application to anything real, and thus the *truth* of everything that follows from it, even in the strictest accordance with the laws of logic, can never be established by analysis alone, but always needs to be established by some other, and thus synthetic method—this is what Kant had meant by his statement that analysis always presupposes synthesis (see *KrV* B130). Indeed, Kant argues, by suitable definitions *any* proposition might be given an analytical proof, but such a proof implies the truth of nothing unless the construction of the definition itself can be justified. Kant had already implied this in the first *Critique* when he stated that ‘Prior to all analysis of our representations these must first be given, and no concepts can arise analytically as far as the content is concerned. The synthesis of a manifold . . . first brings forth a cognition’ (*KrVA*77/B103). But the point is made even more clearly in the debate with Eberhard. In Kant’s main publication in the debate, *On a discovery according to which any new Critique of Pure Reason has been made superfluous by an earlier one*, Kant focuses on the case of mathematics, basing his argument on the insight that real progress in mathematics was made only when mathematicians realized that ‘the objective reality of [a] concept, i.e. the possibility of the existence of a thing with these properties, can be proven in no other way than by providing the corresponding intuition’;¹² that is, no matter what they could prove from the concept of an object, the mathematicians had first to prove that the object itself could exist in order to assign any truth to the results of their proofs. In a further reply to Eberhard, Kant’s disciple Johann Schultz stated the point more generally:

If one wishes to decide about a judgment, one must in each case know previously what should be thought under the subject as well as the predicate. . . . Let one place just so many marks in the concept of the subject that the predicate, which he wishes to prove of the subject, can be derived from its concept through the mere principle of contradiction. This trick does not help him at all. For the *Critique* grants him without dispute this kind of analytic judgment. Then, however, it takes the concept of the subject itself into consideration, and it asks: how did it come about that you have placed so many different marks in this concept that it already contains synthetic propositions? First prove the objective reality of your concept, i.e. first prove that any one of its marks really belongs to a possible object.¹³

¹² *On a Discovery*, 8:191; Allison, *Kant–Eberhard*, 110.

¹³ Schultz’s review of Maaß’s discussion of the analytic/synthetic distinction, 20:408–9; Allison, *Kant–Eberhard*, 175. This passage was famously cited by Lewis White Beck in his article showing that Kant had prefigured some of the objections of Willard Quine and Morton White to the logical positivist’s use of the analytic/synthetic distinction, in which he argued that the issue important to Kant survived their critique; see Beck, ‘Can Kant’s Synthetic Judgments Be Made Analytic?’.

No matter what you can prove from a definition, the reality of the object defined and the suitability of the definition to the object must first be proved if genuine knowledge is to result from the logical exercise of analysis.

Given Kant's statement in the first *Critique* that any proposition proved by logical methods is ultimately synthetic if the initial premisses of its proof are, his position in this debate with Eberhard may imply that there are, in the last analysis, no genuinely analytic judgements.¹⁴ But even if that conclusion is not drawn, the application to practical philosophy of the Kantian position in its most fundamental form, summed up in the axiom that analysis always presupposes synthesis, surely means that normative principles can never be established by an analysis of definitions that may turn out to be arbitrary inventions, but must be shown to have a foundation in something justifiable or even inescapable. The justification of practical propositions cannot, of course, take precisely the same form as that of theoretical propositions: practical propositions state what ought to be, not what is, so their concepts may not need objective reality in precisely the same sense as theoretical concepts do.¹⁵ But they clearly need a foundation in something real. For the principles of right, the only non-arbitrary foundation available is the concept of freedom, the proof of the objective reality of which is in turn the fundamental issue for Kant's practical philosophy, ultimately solved by the validation of our assumption of our freedom through our awareness of the binding force of the Categorical Imperative. The task for the philosophy of right must then be to show that principles of right have an indisputable foundation in the reality of freedom, and that the scope of these principles is precisely delimited by what is required for the preservation of freedom. Whatever may be analytically 'developed' out of the concept of right has no force unless the concept of right itself can be shown to be grounded in the nature and reality of freedom.

III. Postulates and Provability

Let us now consider possible implications of Kant's characterization of some or all of the principles of right as 'postulates'. In different passages, Kant suggests,

¹⁴ See Beck, 'Can Kant's Synthetic Judgments Be Made Analytic', 168–81. Essentially, Beck argues that, while Kant has room for purely analytic judgements in uninterpreted formal systems, on his account even those mathematical propositions that may be logically derived from adequate definitions are synthetic if interpreted as knowledge claims about objects.

¹⁵ See *KrV*A633/B661: 'theoretical cognition [is] that through which I cognize what exists, and practical cognition [is] that through which I represent what ought to exist'.

first, that *all* practical laws are or are like postulates; second, that the *general* principle of right is a postulate; and, third, that the particular principle of right that states that it must be right to acquire property is a postulate. It will be useful to have his statements before us.

First, on practical laws in general, Kant writes:

The simplicity of the [Categorical Imperative] in comparison with the great and various consequences that can be drawn from it must seem astonishing at first, as must also its authority to command without appearing to carry any incentive with it. But in wondering at an ability of our reason to determine choice by the mere idea that a maxim qualifies for the universality of a practical law, one learns that just these practical (moral) laws first make known a property of choice, namely its freedom, which speculative reason would never have arrived at, either on *a priori* grounds or through any experience whatever, and which, once reason has arrived at it, could in no way be shown theoretically to be possible, although these practical laws show uncontestedly that our choice has this property. It then seems less strange to find that these laws, like mathematical postulates, are *incapable of being proved* and yet *apodictic*, but at the same time to see a whole field of practical cognition open up before one, where reason in its theoretical use, with the same idea of freedom . . . must find everything closed tight against it. (MS, Introduction, III, 6:225)

Even without detailed analysis, two points are obvious in this passage. First, within two sentences Kant can say that practical laws are like mathematical postulates and yet are also consequences drawn from the Categorical Imperative, which Kant is here equating with the fundamental principle of morality; evidently, the way in which practical laws are like mathematical postulates does not preclude their being derived from a more fundamental principle of morality. Second, Kant's analogy between practical laws and mathematical postulates does not seem to mean that they are incapable of proof altogether, but rather that there is some sense in which these laws, or the fact of our freedom on which they depend and which they reveal, is a matter for *practical* rather than *theoretical* cognition. In other words, by calling practical principles postulates Kant apparently does not intend to imply that such laws admit of no proof at all, but rather to say something about the kind of proof of which they do admit.

Next, Kant calls the universal principle of right a postulate. This comes in the course of his comment that right requires only legality, not morality—that is, for purposes of right it is sufficient that we act in accordance with the universal principle of right even if we are not actually motivated by it as our maxim:

Thus the universal law of right, so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law, is indeed a law

that lays an obligation on me, but it does not at all expect, far less demand, that I *myself should* limit my freedom in these conditions just for the sake of this obligation; instead, reason says only that freedom *is* limited to these conditions in conformity with the idea of it and that it may also be actively limited by others; and it says this as a postulate that is incapable of further proof. (*RL*, Introduction, §C, 6:231)¹⁶

Here Kant states that the universal principle of right is a postulate incapable of further proof *while* stating that the principle expresses the restriction of the use of freedom to the condition of its consistency with a like use by others, and indeed perhaps he means that the principle of right is a postulate just *because* it expresses the restriction of the use of freedom to the condition of its consistency with a like use by others. Thus, Kant apparently does not mean that the principle of right is not derived from a more fundamental principle of the supreme moral value of freedom; rather, he seems to mean that the principle of right needs no *further* proof just *because* it is derived directly from the application of the most fundamental concept of morality to the case of external action—that is, the case in which one person's use of his freedom to act has the potential to limit or interfere with other persons' use of their freedom to act.

Finally, Kant calls the principle that 'It is possible for me to have any external object of choice as mine' a 'postulate of practical reason with regard to rights', or also, in the next paragraph, a 'presupposition of practical reason' (*RL*, §6, 6:250). Yet Kant immediately proceeds to supply an argument for this 'postulate', and this argument, in the form of a *reductio*, begins by asking what would follow 'If it were nevertheless not within my *rightful* power to make use of it, that is, if the use of it could not coexist with the freedom of everyone in accordance with a universal law.' In other words, the postulate of practical reason with regard to rights is to be *derived* from the universal principle of right by a proof that the acquisition of property is consistent with and indeed required by the general principle that each person's external use of freedom be consistent with everyone else's. So whatever Kant means by calling the principle of property a postulate, it *cannot* be that this principle is not derivable from

¹⁶ In correspondence, Allen Wood has objected that my account of the derivation of the principle of right from the fundamental concept of morality runs the risk of making individual motivation a fit subject for juridical legislation, a result that Kant surely and rightly wished to avoid. But this objectionable result certainly does not follow from my approach. As he does in section one of the *Groundwork*, Kant can use his account of the pure character of morally praiseworthy moral motivation to identify the necessarily formal character of the fundamental principle of morality (see esp. *G*. 4:402), yet that principle, once identified, can still require certain actions or omissions of us as obligations that must be fulfilled regardless of our motivation for doing so. The duties of right are precisely obligations that flow from the fundamental concept of morality that we must fulfil even if our motivation for so doing is not our respect for the fundamental principle of morality itself; that is just why there is typically nothing praiseworthy about fulfilling the obligations of right. Again, see Guyer, 'Moral Worth, Virtue and Merit'.

a more general principle of right, and thereby from the even more fundamental supreme principle of morality.

So what can Kant mean by calling moral laws in general, the universal principle of right, and the particular principle of right that licenses the acquisition of property—the ‘permissive law of practical reason’ (*RL*, §6, 6:257)—postulates? Here it may be helpful to recall that there are three other kinds of propositions that Kant calls postulates: the ‘postulates of empirical thinking in general’ in the ‘System of the Principles of Pure Understanding’; mathematical postulates, which he discusses in order to elucidate the postulates of empirical thinking in general; and the postulates of pure practical reason.

We can consider the first two sorts of postulates together, since Kant explains what he means by mathematical postulates in order to explain the ‘postulates of empirical thinking in general’. The latter are the principles governing the application of the modal categories of possibility, actuality, and necessity, which are derived from analysis of the logical functions of judgement, to the objects of human experience: thus, calling an object possible implies that its concept is consistent with the pure forms of human intuition and conceptualization; calling an object actual means that sensation, as the matter of intuition, provides evidence of the objective reality of its concept; and calling an object necessary means that it is subsumed under causal laws (see *KrV* A217–18/B265–6). Kant does not explain why he calls these principles or as he also says ‘definitions’ of the modal concepts ‘in their empirical use’ (*KrV* A219/B266) ‘postulates’ until the end of the section expounding them; but then what he says is that he calls them ‘postulates’ *not* because they are ‘propositions put forth as immediately certain without justification or proof’ (*KrV* A232/B285), but rather because, like postulates in mathematics, they do not add to the content of a concept but rather ‘assert . . . the action of the cognitive faculty through which [the concept] is generated’. ‘In mathematics a postulate is the practical proposition that contains nothing other than the synthesis through which we first give ourselves an object and generate its concept’ (*KrV* A234/B287). The postulate for a mathematical concept is thus the principle telling us how to construct an object that instantiates the concept in intuition, like the rule that a circle can be drawn by keeping a single curved line on a plane equidistant from a single centre point; a postulate for a modal concept is a principle telling us how to use such a concept, such as the rule that a concept may be called actual if the predicates included in its concept are not only consistent with our forms of intuition but are also instantiated in our sensation.

By calling such a principle a postulate Kant does not mean that it cannot be proved; on the contrary, he says explicitly that, if postulates ‘could claim unconditional acceptance without any deduction, merely on their own claim,

then all critique of understanding would be lost'. Thus for any postulate 'if not a proof then at least a deduction of the legitimacy of its assertion must unfailingly be supplied' (*KrV* A233/B285–6). Rather, what may not be subject to further proof, at least in the case of a mathematical postulate, is the possibility of the action *through which* the concept is provided with its construction, for it is the construction itself that is the proof of the possibility of the concept of a given figure. Kant's view thus seems to be that a postulate is the assertion of the possibility, actuality, or necessity of a concept, and that it *needs* to be proved, but that the proof can be given only through a construction, as in the case of a mathematical postulate, or something more like the description of the general conditions for a construction or verification, as in the case of the postulates of empirical thinking in general. But, whatever the details, Kant makes it plain that by calling a principle a postulate he hardly means to imply that it needs no proof or deduction; rather, by so doing he means to say something about the kind of proof that it permits.

The third and most prominent context in which Kant ordinarily uses the term 'postulate' is, of course, that of the postulates of pure practical reason. In his most extensive treatment of the postulates of pure practical reason, Kant introduces two such postulates—namely, those of the immortality of the soul and of the existence of God (*KpV* 5:122–3, 124–32) (although often he also speaks of the existence of freedom as a postulate of pure practical reason, and thus proceeds as if there are three such postulates). In introducing the postulates of immortality and the existence of God, Kant states that a postulate of pure practical reason is '*a theoretical* proposition, though one not demonstrable as such, insofar as it is attached inseparably to an *a priori* unconditionally valid *practical* law' (*KpV* 5:122). On this definition, a postulate of practical reason is not a moral law or command itself, but an existential proposition, thus a proposition with the form of a theoretical proposition although not demonstrable as such, that is connected with a moral law or command. Kant does not make clear in this definition what sort of 'connection' he has in mind. But his very first mention of the doctrine of the postulates of pure practical reason, which was in fact already introduced in the first *Critique*, does spell out what connection he has in mind:

Now if it is indubitably certain, but only conditionally, that something either is or that it should happen, then either a certain determinate condition can be absolutely necessary for it, or it can be presupposed as only optional and contingent. In the first case the condition is postulated (*per thesin*), in the second it is supposed (*per hypothesin*). Since there are practical laws that are absolutely necessary (the moral laws), then if these necessarily presuppose any existence as the condition of their **binding** force, this

existence has to be **postulated**, because the condition from which the inference to this determinate condition proceeds is itself cognized *a priori* as absolutely necessary. (*KrVA*633–4/B661–2)

This makes clear that a postulate is a theoretical proposition asserting the existence of an object or state of affairs that is a condition of the possibility of the binding force of a moral command. The binding force of a moral command depends upon the possibility of carrying it out; so the theoretical condition of the possibility of the binding force of a moral command is whatever entity or state of affairs must exist in order to explain how what the moral law commands can be carried out.

As is well known, Kant then reaches the postulates of immortality and the existence of God as the conditions of the possibility of the moral law through the concept of the highest good, and this is in fact why Kant does not initially treat the existence of our own freedom as a postulate of pure practical reason, although later he often lumps freedom in with the other two: immortality and the existence of God are necessary not in order to explain the binding force of the moral law as such—for that, the presupposition of our freedom suffices—but in order to explain the possibility of the attainment of the *object* of the moral law—that is, the state of affairs that the moral law commands us to realize. This is what Kant calls the ‘highest good’, or the attainment of the greatest happiness possible consistent with the conscientious observation of the moral law. There are different interpretations of the meaning of Kant’s concept of the highest good: many interpret him to assume that the pursuit of happiness is a natural tendency of human beings that has no foundation in the moral law and simply has to be constrained by it; I believe that Kant’s view is not so dualistic, but is rather that the fundamental principle of morality itself, by commanding us always to preserve and promote human freedom, and thereby to treat ourselves and others always as ends and never merely as means, actually requires us to promote the realization of the ends of all humans in so far as they are consistent with each other, and that such a realization would be precisely the realization of the greatest happiness consistent with the observation of the moral law.¹⁷ But the details of how Kant introduces the highest good as the object of morality need not concern us here; what interests us is the connection between the highest good and the postulates of immortality and the existence of God. Briefly, Kant’s argument is this: the realization of both virtue and happiness requires the perfection of our moral disposition, or virtue, on the one hand, and the maximal fulfilment of lawful human ends, or happiness, on the other.

¹⁷ See Guyer, ‘From a Practical Point of View’, in Guyer, *Kant on Freedom, Law, and Happiness*, ch. 10.

The perfection of the human moral disposition, Kant supposes, would require an indefinitely long lifespan, or immortality, in order to overcome the propensity to evil that is otherwise natural to human beings. The maximal fulfilment of human ends, however, is something that can happen only in nature (because it is only in nature that the human desires that may be transformed into legitimate ends can be fulfilled), but we can have reason to believe that nature is suitable for the fulfilment of human purposes only if we believe that the laws of nature have been written to be compatible with the moral law—something we cannot ascribe to our own power but only to that of God as the author of nature. As Kant puts it,

Therefore the supreme cause of nature, insofar as it must be presupposed for the highest good, is a being that is the cause of nature by *understanding* and *will* (hence its author), that is, **God**. Consequently, the postulate of the possibility of the *highest derived good* (the best world) is likewise the postulate of the reality of a *highest original good*, namely of the existence of God. (*KpV*5:125)¹⁸

Kant's reasoning is thus as follows. The moral law commands the realization of the highest good (literally, the 'highest derived good'), so, since the binding force of an obligation depends upon the possibility of its realization ('ought implies can'), for the moral law even to have binding force requires that the realization of the highest good be *possible*. But for the highest good to be possible, we must suppose that both immortality and the existence of God (the 'highest original good') are *actual*. The possibility of the binding force of the supreme principle of morality, as a moral command, thus requires us to believe in the truth of certain theoretical propositions, that is, assertions of the existence of some object or state of affairs, even though these theoretical propositions can have no theoretical proof. Purely theoretical consideration can and indeed must be able to show them to be free of inconsistency, thus to possess what Kant calls 'logical possibility'; but only moral considerations can give us reason to believe that the concepts employed in these theoretical propositions have any objective reality, or what Kant also calls 'real possibility'.

Besides containing a clear statement of what Kant means by a postulate of pure practical reason, the first *Critique* also contains a clear statement of what he means by his claim that such a postulate is theoretically indemonstrable but practically certain. Kant says:

Of course, no one will be able to boast that he **knows** that there is a God and a future life; for if he knows that then he is precisely the man I have long sought. . . . No, the

¹⁸ Kant uses the same formula at *KrVA*811/B839.

conviction is not logical but moral certainty; and, since it depends on subjective grounds (of moral disposition), I must not even say 'It is morally certain that there is a God', etc., but rather 'I am morally certain', etc. That is, the belief in a God and another world is so interwoven with my moral disposition that I am in as little danger of ever surrendering the former as I am worried that the latter can ever be torn away from me. (*KrVA*828–9/B857–8)

There can be no theoretical proof of the existence of such things as immortality and God, Kant has argued throughout the first *Critique*, because such objects could not be presented within the limits of human intuition. But it is nevertheless necessary for us to believe in the existence of these objects because it would be incoherent for us to attempt to fulfil the command of morality to bring about the highest good without also believing in these objects—even the possibility of realizing the highest good depends on their actuality. Thus our belief in the existence of these objects has the same grip upon us as the moral law itself.

One last point should be noted. In the last passage cited from the *Critique of Practical Reason* (5:125) Kant used the word 'postulate' not once but twice: he said that the postulate of the possibility of the highest derived good, the highest good in its ordinary sense, is 'likewise' the postulate of the reality of the highest original good, the existence of God. Both of the postulates referred to here could be understood as theoretical propositions affirmed on practical grounds: the real possibility of the highest good could be understood as the condition of the possibility of the binding force of the moral law, and the actuality of God in turn as the condition of the real possibility of the highest good. Earlier on that page, however, Kant employed a twofold use of the term that might be taken differently. Here he wrote:

There is not the least ground in the moral law for a necessary connection between the morality and the proportionate happiness of a being belonging to the world as part of it. . . . Nevertheless, in the practical task of pure reason, that is, in the necessary pursuit of the highest good, such a connection is postulated as necessary: we *ought* to strive to promote the highest good (which must therefore be postulated). Accordingly, the existence of a cause of all nature, distinct from nature, which contains the ground of this connection, namely of the exact correspondence of happiness with morality, is also *postulated*. (*KpV*5:125)

In the last sentence of this quotation, Kant clearly means to use the term 'postulate' to characterize the affirmation on moral grounds of the theoretical proposition asserting the existence of God as the cause of nature. In what precedes, however, he uses the term to characterize the assertion of the *necessity*

rather than the *possibility* of the highest (derived) good itself. But since Kant never supposes that the *existence* of the highest good is necessary, but only that it is possible, he must here be suggesting that the postulate of the highest good is necessary as a practical *command* following from the moral law rather than a theoretical *condition* of the possibility of the binding force of that law. In other words, in this instance Kant may be using the term ‘postulate’ to characterize the status of one moral command, the command that we seek to realize the highest good, as depending upon a more fundamental moral command—namely, the supreme principle of morality itself. In this sense, of course, a practical postulate could not be a practical principle that is independent of the fundamental principle of morality; on the contrary, such a postulate would be so called precisely because of its dependence on the most fundamental moral principle.

Three conclusions follow from this discussion. First, as far as theoretical postulates are concerned, mathematical postulates are so designated simply because the objective validity of their concepts must be established by a construction in pure intuition, or depends upon the possibility of an action of construction. It may seem natural to suppose that mathematical postulates are also fundamental in the sense of not being derivable from any more fundamental propositions—that they are not theorems that are proven, but axioms from which theorems are proven; but Kant does not actually say that. In turn, the more general postulates of empirical thinking are so called solely in virtue of one point of analogy with mathematical postulates: as mathematical postulates depend upon construction in pure intuition for demonstration of the objective reality of their concepts, so the postulates of empirical thought in general describe the kinds of constructions in or relations to pure and empirical intuition that can verify the objective possibility, actuality, or necessity of concepts of objects. Kant never says that these postulates themselves cannot be derived from anything more fundamental; on the contrary, he says they do need a deduction, and they receive that deduction precisely by being derived from the application of certain of the functions of judgement to the forms of human intuition.

Secondly, in its most usual sense a postulate of pure practical reason is not a moral command at all, let alone an underivable or primitive one, but a theoretical proposition asserting the existence of the conditions necessary for the possibility of fulfilling a moral command, our confidence in which, however, is based not on any theoretical proof but solely on our confidence in the binding force of the moral command itself. If there are postulates of pure practical reason with regard to rights in this sense, it would be natural to think of such postulates as concerning the conditions of the possibility of the binding force of

those principles of right: a postulate of practical reason regarding a right would then be the assertion that the conditions for the realization of that right obtain. Pursuing the analogy with mathematical postulates further, Kant might even mean that a postulate of practical reason with regard to a right is the construction of the conditions under which the right may be realized. Such a construction might be practical rather than theoretical in virtue of demonstrating that there is a consistent idea of the use of freedom that would realize such a right rather than proving that such a use of freedom ever has been, is currently, or will in the future be realized. But the key idea would be not that the principle of right cannot itself be derived from a more fundamental moral principle, but rather that the conditions of its realizability must be shown to be possible.

Finally, if in the context of principles of right Kant uses the term 'postulate' in the last of the senses we have considered, he might not mean by a postulate of practical reason with regard to a right a proposition asserting the possibility of the realization of the right, but the principle or command of right itself; but, even so, if his usage in this case is to be analogous to that in the *Critique of Practical Reason*, by calling such a principle a postulate he would not mean that it is not derivable from a more fundamental moral law, but precisely that it is, just as the postulate of moral necessity of the highest derived good is derived by the application of the supreme principle of morality to the human pursuit of ends. Such a principle could still be called a postulate because the principle from which it is derived is not provable by theoretical means, but only practically. In this sense, a principle of right might be derivable from the fundamental principle of morality yet still be called a postulate.

I now turn directly to what Kant says about the principles of right themselves in order to argue that, while Kant has certain reasons for calling them analytic and postulates—where he does—he still intends them to 'proceed from' or be deduced from the supreme principle of morality.

IV. Are All Principles of Right Analytic?

To begin, we must be careful in drawing inferences from Kant's statements about the analyticity of principles of right, because Kant in fact applies the analytic/synthetic distinction to principles of right in a number of different ways, and the same principle may be analytic by one criterion but synthetic by another.¹⁹ And, if this is so, then, even apart from Kant's general argument that

¹⁹ This point is noted in passing by Leslie Mulholland; see Mulholland, *Kant's System of Rights* (New York: Columbia University Press, 1990), 243.

the objective reality of the subject concept analysed in an analytic judgement itself needs a deduction, there can still be something about a principle of right that obviously needs a deduction—namely, whatever it is that makes it synthetic on one way of drawing the analytic/synthetic distinction—even if there is something else that may not need proof—namely, what makes it analytic on another way of drawing the distinction.

Specifically, Kant sometimes says that all principles of right are analytic, in contrast to principles of ethics—that is, principles commanding duties of virtue—which are all synthetic; yet he also says that it is only the principle of the innate right to freedom—that is, freedom of the person—which is analytic, while all principles of acquired right—that is, all principles of property rights—are synthetic. And even when he says the former, what Kant means is that principles of right flow directly from the fundamental moral requirement that we use our freedom only in universally acceptable ways, whereas principles of ethics depend upon the additional assumption that we necessarily will certain ends. We find Kant saying this several times in his preparatory notes for *The Metaphysics of Morals*. In one passage, he writes that ‘All laws of right (concerning what is mine and yours) are analytic (on account of freedom)—all laws of ends are synthetic. . . . The duties of right follow from external freedom analytically; duties of virtue follow from internal freedom synthetically’ (*Loses Blatt Erdmann*, C1, 23:246). In another note, Kant expands upon this cryptic comment:

The doctrine of right is that which contains what is consistent with the freedom of the power of choice in accordance with universal laws [*was mit der Freyheit der Willkür nach allgemeinen Gesetzen bestehen kann*].

The doctrine of virtue is that which contains what is consistent with the necessary ends of the power of choice in accordance with a universal law of reason.

The former are negative and analytic in their internal and external relationship and contain the internal as well as the external conditions of possible external laws.

The second are affirmative and synthetic in the inner and outer relationship, and no determinate law can be given for them.

The first duties are *officia necessitatis* and the second are *officia charitatis*. (*Loses Blatt Erdmann*, 50, 23:306–7)

On this account, principles of right are analytic because they simply state the conditions under which freedom can be used in accordance with universal law—that is, the conditions under which multiple persons can exercise their individual freedom of choice consistently with each other—while principles of

ethics are synthetic because they assume that human beings have necessary ends and state the conditions under which the use of our power of choice is consistent with the realization of those ends. The proof of a principle of ethics must therefore appeal beyond the concept of freedom itself to a necessary end of mankind, while the proof of a principle of right need demonstrate only that a relationship among persons is one that is consistent with the concept of freedom itself. Of course, to say the latter is to say precisely that a principle of right *is* derived from the concept of freedom and expresses the conditions necessary for the instantiation of the concept of freedom in relations among persons. Thus Kant's claim that principles of right are analytic is itself a claim that such principles 'proceed from' and therefore can be proven by appeal to the concept of freedom.

Kant makes the same point in the 1793–4 lectures on the metaphysics of morals transcribed by Johann Friedrich Vigilantius by using his ever-handy distinction between the formal and the material rather than the distinction between the analytic and the synthetic. Here he says that we arrive at duties of right by considering merely the formal consistency of our use of freedom, while we arrive at ethical duties by considering the consistency of the object, purposiveness, or 'matter' of our actions with the formal requirement of freedom. In his words:

If we consider the use of our freedom merely under a formal condition, the action is lacking in a determinate object that might essentially contribute a determination thereto, or we abstract from all objects. The determinate form points to a limitation of freedom, namely to the universal legitimacy of the action. . . . For this formal condition has reference to strict right, or duty of right. . . .

If, on the other hand, we consider duties and their grounds of determination in regard to matter, then the action has need of an object to which it is related. This object, or the matter in this determination of duty, is the end of the action . . . there is an end that we *ought* to have in view when performing our duties, and which must thus be so constituted that the condition of universal rectitude can coexist with it. So in this principle also, right and obligation are present, but if the action is judged solely according to the material principle, the latter stands *in oppositio* to strict right in the purposiveness of the action. Apart from the freedom of the action, there is thus another principle present, which in itself is enlarging [*erweiternd*], in that, while freedom is restricted by the determination according to law, it is here, on the contrary, enlarged by the matter or end thereof, and something is present that has to be acquired. (Vig. 27:542–3)

Kant's use of the term 'enlarging' (*erweiternd*) indicates that this is another way of saying that the principles of right are analytic and the principles of ethics or duties of virtue synthetic, because a synthetic judgement is one that enlarges or amplifies its subject concept while an analytic judgement merely clarifies its

subject concept (see *KrV* A7/B11). Again, Kant's point is that principles of right are derived by the limitation of freedom to the conditions of the universal consistency of its use, whereas principles of ethics state how certain ends may be pursued consistently with the universal realization of freedom. But again, for Kant to make this contrast is also for him to state that the principles of right are derived from the fundamental moral concept of freedom by considering how it must be limited or restricted among any population of interacting persons not in order to pursue any particular ends but simply for the sake of its own universalization. The *formality* of principles of right does not suggest the independence of the principles of right from the fundamental principle of morality, but their direct dependence upon it.²⁰

While Kant thus uses the analytic/synthetic distinction to contrast duties of right and ethical duties, he also uses it to draw a contrast *within* the domain of principles of right. This is the contrast between the innate right to freedom of the person and acquired rights to property. Kant makes this contrast in the *Doctrine of Right* by using his contrast between 'empirical possession', or physical detention of an object—holding it in one's hands or sitting on it—and 'intelligible' or 'noumenal possession', a right to control its use and disposition that does not depend upon current physical detention of it, but instead ultimately consists in an agreement among possible users of the object concerning who will have the right to it. Kant's argument is that one (ordinarily) has the right to control one's own body without any special consent from others, thus that forcible removal of an object from one's bodily grasp or of one's body from an object on which it currently sits would be interference with a right to freedom that does not depend upon the concurrence of others; but that the removal of an object from one's intelligible but not physical possession can only be a wrong if there is a prior agreement that one has a right to it. In Kant's words:

All propositions about right are *a priori* propositions. . . . An *a priori* proposition about right with regard to *empirical possession* is *analytic*, for it says nothing more than what follows from empirical possession in accordance with the principle of contradiction,

²⁰ Kant's use of the analytic/synthetic distinction to draw the distinction between duties of right and ethical duties is clearly connected to his contrast between the Categorical Imperative as testing for contradictions in the *conception* of the universalization of maxims and contradictions in *willing* the universalization of maxims in the *Groundwork* (G. 4:424). However, this distinction in the *Groundwork* is equated with the distinction between perfect and imperfect duties, and that then raises the question of why Kant does not include all the perfect duties, the duties that arise from the Contradiction in Conception test, among the duties of right, which include none of the perfect duties to oneself and only some of the perfect duties to others. The substantive reason for this is that only some duties to others are morally appropriate candidates for coercive enforcement; Kant struggles for the right way to say this in the Vigilantius lectures, but explicitly draws a contrast between coercive and non-coercive strict duties at least once (Vig. 27:581–2). For further discussion of this issue, see Guyer, 'Moral Worth, Virtue and Merit'.

namely that if I am holding a thing (and so am physically connected with it), someone who affects it without my consent (e.g., snatches an apple from my hand) affects and diminishes what is internally mine (my freedom). . . .

On the other hand, a proposition about the possibility of possessing a thing *external to myself*. . . goes beyond those limiting conditions; and since it affirms possession of something even without holding it, as necessary for the concept of something external that is mine or yours, *it is synthetic*. Reason then has the task of showing how such a proposition, which goes beyond the concept of empirical possession, is possible *a priori*. (*RL*, §6, 6:250)

On this account, the innate right to freedom of the person is analytic precisely because it flows from the concept of freedom itself, while the possibility of acquired rights needs a deduction—which will presumably consist in showing the compatibility of possession without detention with the concept of freedom, or even the necessitation of the possibility of such a form of possession by the concept of freedom.

What will be involved in the latter deduction is suggested in one of Kant's notes for *The Metaphysics of Morals*, which even bears the contrasting propositions that 'The principle of all propositions of innate right is analytic' and 'The principle of an acquired right is synthetic' as its title. Here Kant argues that to establish the right to freedom of the person—that is, the right to maintain or change one's own body or mind as one pleases as long as so doing does not impinge upon others—one does not have to go beyond the concept of freedom itself, whereas to explain the possibility of a right in something other than one's own body and mind one has to bring in further factors, in particular, the nature of the *other thing* that one proposes to control and the will of *other persons* who might also control that other thing:

For in the case of propositions of the first sort we do not proceed beyond the conditions of freedom (we do not supply the power of choice with any further object), the condition, namely, that the power of choice must be consistent with the freedom of everyone in accordance with a universal law. . . .

In the case of propositions of the second kind I supplement the power of choice with an external *object* which by nature belongs to no one, i.e., which is not innate and therefore cannot be deduced [*gefolgert*] analytically from freedom as the object of the power of choice.

The synthetic *a priori* principle of acquired right . . . is the correspondence of the power of choice with the idea of the united will of those who are restricted by that right. For since all right that is not innate is an obligation (to do or refrain from doing something) on another on whom it is not laid innately, but this cannot be done by

another person alone, since that would be opposed to the innate freedom, and thus it can only happen in so far as his will is in agreement with it . . . thus only through the united will can a right be acquired. (*Loses Blatt Erdmann*, 12, 23:219–20)²¹

As Kant also says, ‘The synthetic principle of external right cannot be anything other than: all distinction of mine and yours must be able to be derived from the compatibility of the possession with the idea of a communal choice under which the choice of everyone else with regard to the same object stands’ (*Loses Blatt Erdmann*, 11, 23:215). Kant’s idea is that we do not have to appeal to anything other than the idea of freedom itself in order to justify the innate right to freedom of the person—that is what freedom in the external use of the power of choice *means*. However, to explain the possibility of rights to property that go beyond one’s own person we have to explain how the exercise of freedom in control of an external object is consistent both with the nature of the object and with the freedom of the other persons who could, at least as far as their own innate right to freedom would seem to imply, also use or control the object. Providing such an explanation is the task of Kant’s theory of acquired right or property. It is certainly a deduction of the possibility of acquired right, in the form of an explanation of the conditions of possibility of acquiring property consistently with the freedom of all who might be able to use the object acquired or who could be affected by the acquisition of it.

Before examining more fully Kant’s deduction of the possibility of acquired right, however, we must first pause over the suggestion that the principle of innate right is analytic. We shall see that, while Kant does believe that the universal principle of right flows directly from freedom as the fundamental concept of morality, this by no means frees him from the burden of providing a deduction of a proposition that is at least intimately connected with the universal principle of right.

V. The Universal Principle of Right and the Authorization to Use Coercion

Kant’s most basic claim in the general introduction to *The Metaphysics of Morals* is that ‘The concept of freedom is a pure rational concept’, and that ‘On this concept of freedom, which is positive (from a practical point of view), are based unconditional practical laws, which are called moral’ (*MS*, Introduction, III, 6:221). Moral laws, in turn, as Kant has already made plain, include both the principles of right as well as the laws of ethics:

²¹ For many similar passages, see *Vorarbeiten zur Rechtslehre*, 23:227, 235, 297, 303, 309, and 329.

In contrast to laws of nature, these laws of freedom are called *moral* laws. As directed merely to external actions and their conformity to law they are called *juridical* laws; but if they also require that they (the laws) be the determining grounds of actions, they are ethical laws. . . . The freedom to which the former refer can be only freedom in the *external* use of choice. (*MS*, Introduction, II, 6:214)

Kant argues that the *reality* of freedom is not proven from the concept of freedom itself, but is rather proven through our consciousness of the binding force of the ‘moral concepts and laws [that] have their source’ in the reality of our freedom (*MS*, Introduction, III, 6:221). But this means that there is one way in which all moral laws, not only the principles of right which do not refer to any particular ends of human beings but also the ethical laws that do, must be synthetic, because they presuppose the reality of freedom.²² This is so, even though by the criterion of reference to necessary ends, the principles of right are analytic.

In the further introduction to the *Doctrine of Right*, Kant clearly has the dependency of the principles of right upon the *concept* of freedom in mind when he writes that in the case of right ‘All that is in question is the *form* in the relation of choice on the part of [multiple persons], in so far as choice is regarded merely as *free*, and whether the action of one can be united with the freedom in accordance with a universal law’, and thus when he concludes that ‘Right is therefore the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom’ (*RL*, Introduction, §B, 6:230). But in fact Kant does not specifically use the language of analyticity at this point in his exposition, and thus does not explicitly assert that the universal principle of right is analytic. Rather, he explicitly raises the flag of analyticity only at the next step, his assertion that the fulfilment of obligations under the laws of right, unlike those under ethical laws, may be coercively enforced. In fact, it is only in making *this* claim that Kant first explicitly uses the language of postulation as well as that of analyticity. First he says that ‘reason says only that freedom *is* limited to those conditions in conformity with the idea of it and that it may also be actively limited by others; and it says this as a postulate that is incapable of further proof’ (*RL*, Introduction, §C, 6:231); next he says that ‘there is connected with right by the principle of contradiction an authorization to coerce someone who infringes upon it’ (*RL*, Introduction, §D, 6:231); and finally he says that ‘Right and authorization to use coercion therefore mean one and the same thing’ (*RL*, Introduction, §E, 6:232). None of these claims suggests that the content and scope of the princi-

²² This point has been stressed by Mulholland, *Kant's System of Rights*, 171.

plies of right are proven independently of the fundamental moral concept of freedom, nor that the binding force of the principles of right is independent of the binding force of the supreme principle of morality itself; they claim only that ‘no further proof’ is needed *for the right to enforce legal obligations coercively* because the concept of right and that of coercion are connected ‘by the principle of contradiction’ or ‘mean one and the same thing’. Kant’s claim about the analyticity of the principles of right, then, seems to come down to the assertion that the connection between right and coercion is analytic.

Is Kant right to make even this limited claim? His argument for this claim is as short as it is famous:

Resistance that counteracts the hindering of an effect promotes this effect and is consistent with it. Now whatever is wrong is a hindrance to freedom in accordance with universal laws. But coercion is a hindrance or resistance to freedom. Therefore, if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a *hindering of a hindrance of freedom*) is consistent with freedom in accordance with universal laws, that is, it is right. (RL, Introduction, §D, 6:231)

If one use of coercion would interfere with or destroy an exercise of freedom that is in accordance with universal law, then another use of coercion, designed to prevent the first instance of coercion, will preserve the possibility of the originally intended use of freedom, and in that regard is consistent with it and actually promotes it. Is this an analytic judgement, true by the law of (non-) contradiction? Kant supposes that it is, and most commentators have followed him without questioning his claim. However, the very language of Kant’s argument seems to undermine any suggestion that the connection of coercion to right is merely analytic: Kant says not that a hindrance to a hindrance to freedom is simply identical with the lawful use of freedom, but rather that a hindrance to a hindrance of freedom ‘promotes this effect’ (*ist eine Beförderung dieser Wirkung*), or actually secures or produces freedom. This sounds like the language of *real causality*, not that of *logical identity*; but real causality is a synthetic connection, needing an explanation. In particular, in order to avoid the obvious objection that two wrongs simply *cannot* make a right, Kant seems to need to show that the use of coercion against coercion *can* cause the desired effect—namely, the preservation of freedom in accordance with a universal law; and to prove this would certainly be to prove a synthetic rather than an analytic proposition. For Kant to think otherwise would be for him to commit what he had diagnosed as one of the cardinal sins of philosophy as early as 1763, when he warned against confusing logical and real relations, for instance,

confusing the logical relation of contradiction with the real opposition of forces²³ or the logical relation of ground and consequence with the real relation of cause and effect.²⁴ If he is not to make such a mistake, Kant needs to explain *how* the use of coercion can preserve freedom and *why* only it can do so. Thus, the claim about rights that Kant most explicitly says is analytic, at least within the *Doctrine of Right*, even if it is itself analytic, certainly depends upon a synthetic proposition and needs a deduction.

In fact, a variety of Kant's comments reveal that he at least tacitly recognizes that the deduction of the authorization to use coercion must ultimately contain both a theoretical and a moral element—that is, that it must show that there is a use of coercion that can cause a state of universal freedom in a way that respects the rights of all involved. The first comment about his argument that Kant makes shows that he recognizes that this purportedly analytic proposition needs the kind of proof he ordinarily gives to one kind of synthetic a priori proposition, even if not the kind needed by a causal proposition, and thus that it needs a theoretical deduction. He claims that the *concept* of right must be supplemented by a demonstration of the possibility of a *construction* of a sphere of right, analogous to the kind of construction of a mathematical object that is necessary to demonstrate the objective reality of a mathematical concept:

The law of a reciprocal coercion necessarily in accord with the freedom of everyone under the principle of universal freedom is, as it were, the *construction* of that concept, that is, the presentation of it in pure intuition *a priori*, by analogy with presenting the possibility of bodies moving freely under the law of *equality of action and reaction*. In pure mathematics we cannot derive the properties of its objects immediately from concepts but can discover them only by constructing concepts. Similarly, it is not so much the *concept* of right as rather a fully reciprocal and equal coercion brought under a universal law and consistent with it, that makes the presentation of that concept possible. (RL, Introduction, §E, 6:232–3)

Kant continues with the mathematical analogy by noting that, just as mathematical constructions are carried on by means of straight and curved lines whose relations to each other can be precisely determined, so a condition of right requires the determination of '*what belongs to each . . . with mathematical exactitude*', a determination that indeed is not just analogous to mathematical construction, but that is actually based in one of the most fundamental forms of applied mathematics—namely, surveying. However, this is an antici-

²³ See *Attempt to Introduce the Concept of Negative Magnitudes into Philosophy*, Ak. 2:165–204, at 2:171–2.

²⁴ *Negative Magnitudes*, Ak. 2:201–2.

pation of a point that, as we shall see in the next section, should only come into the final stage of Kant's deduction of the acquired right to property. What Kant needs here is rather a more general proof of the real consistency of a legal system of coercion with the preservation of universal freedom: only this would be the construction of a 'law of a reciprocal coercion necessarily in accord with the freedom of everyone', the proof of the objective reality of a concept of freedom that can be coercively enforced.

Such a construction cannot be purely mathematical (any more than the proof of the equality of action and reaction can be purely mathematical), because, by Kant's own account, freedom (just like action and reaction) is a kind of causality: the causality by means of which changes in our intentions can effect changes in our bodies and the world around them, and, in the case of the external use of freedom that is relevant to the concept of right, the causality to effect changes in the circumstances of other persons affected by our actions. As Kant himself had stated in the *Groundwork*, freedom, 'although it is not a property of the will in accordance with natural laws, is not for that reason lawless but must instead be a causality in accordance with immutable laws but of a special kind' (*G.* 4:446). The point is undeniable in the case of right, because the condition of right is defined causally from the outset, in so far as it is defined as a condition in which the actions or external use of the power of choice of each leaves all others an equal freedom; and coercion is equally clearly a causal concept, the concept of an action of one person that can cause a change in the intentions of another through the latter's representation of what has happened or will happen to him because of the action of the former.²⁵ Thus what Kant must demonstrate in order to prove the objective reality of the concept of right, even if, or more precisely, *just because* the concept of authorized coercion means the same thing as the concept of right, is that it is theoretically possible to use coercion in a way that can actually cause a universal condition of right.

Does Kant ever provide such a proof? Most commentators accept Kant's claim that the connection of right and the authorization to use coercion is analytic without recognizing that even on Kant's own account the objective reality of the subject concept in an analytic judgement needs a deduction. Mary Gregor, for instance, claims that the connection stands by itself because the concept of right requires the restriction of freedom to the condition of its accordance with universal law, and coercion just *is*, as Kant says, the 'active'

²⁵ This is particularly clear in Hume's famous account of how the 'constancy and fidelity' of a prisoner's executioners constitute just as reliable a natural force as 'the operation of the ax or wheel'; see *A Treatise of Human Nature*, bk.II, pt. III, sect. i.

institution of that restriction.²⁶ But such a claim still presupposes that it is possible for an action to count as both the coercion of another and yet as a preservation of freedom. Bernd Ludwig, by contrast, holds that Kant recognizes the need to prove the *moral* possibility of coercion, but then argues that this is not much of a challenge for Kant because, since an unprovoked use of coercion would not itself be an instance of the lawful exercise of freedom—that is, of the use of freedom in accordance with a universal law—it is itself outside the protected sphere of right, and another coercive act aimed against it therefore *could not* be incompatible with the lawful use of freedom.²⁷ But this argument, which in any case fails to address the issue of the theoretical possibility of coercion *promoting*, that is, causing freedom, assumes that the freedom of the *perpetrator* of an act of unprovoked coercion can simply be ignored as unlawful, thus that the freedom of the perpetrator does not have to be preserved at all. However, this is not compatible with Kant's idea that principles of right can preserve a truly *universal* condition of freedom. To show that this is possible, Kant needs to prove that, although an unprovoked and unanswered act of coercion would certainly destroy the freedom of its *victim*, the further use of coercion as a hindrance to such coercion can itself preserve the freedom of *everyone*, including the would-be perpetrator as well as his victim. This requires a proof that coercion can actually be an effective cause of universal freedom.

To be sure, Kant does sometimes try to establish what is clearly the *moral* possibility of coercion for the sake of freedom, although by an argument different from the one that Ludwig suggests. Thus, in the Vigilantius lectures, he states the following:

The right to resist the other's freedom, or to coerce him, can only hold good insofar as my freedom is in conformity with universal freedom. The ground for that is as follows: the universal law of reason can alone be the determining ground of action, but this is the law of universal freedom; everyone has the right to promote this, even though he effects it by resisting the opposing freedom of another, in such a way that he seeks to prevent an obstruction, and thus to further an intent. For in the coercion there is presupposed the rectitude of the action, i.e., the quality that the agent's freedom accords with universal freedom. The other, however, obstructs the action by his freedom; the latter I can curtail and offer resistance to, insofar as this is in accordance with the laws of coercion; so *eo ipso* I must thereby obstruct universal freedom by the use of my own. From this it follows that I have a right to all actions that do not militate against the

²⁶ See Mary Gregor, *The Laws of Freedom: A Study of Kant's Method of Applying the Categorical Imperative in the Metaphysik der Sitten* (Oxford: Basil Blackwell, 1963), 43.

²⁷ Bernd Ludwig, *Kants Rechtslehre*, *Kant Forschungen*, ii (Hamburg: Felix Meiner, 1988), 97.

other's right, i.e., his moral freedom; for to that extent I can curtail his freedom, and he has no right to coerce me. (Vig. 27:525–6)

Several pages later, Kant again emphasizes that the 'right of coercion' depends on the condition that 'my action (the freedom of my action, that is) is directed according to universal law, and thus effects no abridgement of universal freedom' (Vig. 27:539). In these passages, Kant directs our attention not to the fact that the *perpetrator* of a crime would use his freedom lawlessly and thus step outside the protection of the law, but rather to the fact that one who would use coercion *against* such a crime must do so in accordance with universal freedom and thereby without militating against the right—that is, the moral freedom—of the other. However, this specification of the proper moral position for the use of coercion still seems to presuppose that in the proper circumstances the use of coercion can bring about the condition of universal freedom. So it looks as if it still needs to be shown that this can actually be done, —that is, that it is theoretically possible for one person to exercise coercion against another without depriving the latter of his right or his part in universal freedom.

In at least one case, Kant clearly does recognize that the possibility of a law depends upon the theoretical possibility of a causally effective use of coercion to achieve its intended end. Kant implies that a proposed use of coercion as a hindrance to coercion must be shown to be causally effective in his discussion of the so-called right of necessity. In the case of a shipwreck, he argues, one person has no right to push another off a floating piece of wreckage in order to save his own life, yet there can be no penal law against such an act because in such circumstances there can be no effective use of coercion as a hindrance to coercion: the threat of possible capture and punishment, no matter how severe, can hardly outweigh the certainty of drowning that faces the person willing to save his own life at the cost of another's, and therefore it cannot modify his behaviour. In this case 'a penal law . . . could not have the effect intended' (*RL*, Introduction, Appendix II, 6:235–6), and so while there is no right to self-preservation in such a case there can also be no right to punish such an attempt. Here Kant recognizes that there is a *factual* question whether an act of coercion against coercion could preserve the freedom it is intended to (in this case, the freedom of the unlucky soul pushed off the wreckage), and thus that here the proposition that the use of coercion *can* be a hindrance to a hindrance to freedom is synthetic, not analytic. Yet it is not clear from this that Kant recognizes that a general proof that a hindrance to a hindrance to freedom can preserve or promote freedom must actually be a proof of a causal and therefore synthetic proposition.

Perhaps in spite of his clear recognition that the objective reality of the concept of right needs a deduction, thus that the analysis of the concept of right must, like any analysis, presuppose a synthesis, Kant was distracted by his focus on the mathematical aspect of the *determination* of claims of right (what is necessary to make them precise) and thereby failed to provide the necessary argument that coercion can ever contribute to a condition of universal freedom. Yet it should not have been hard for him to provide the necessary argument or 'construction'. It could go something like this: while one person who would commit an unprovoked act of coercion against another would certainly deprive the latter of his use of freedom—for a short period, a long period, or permanently, depending upon the nature of the injury he would inflict—the judicial threat and even use of coercion against such a would-be perpetrator does not deprive him of his freedom in the same way that he would deprive his victim of his. When the laws and the sanctions for breaking them are known, it can be argued, anyone who chooses between conforming to them and breaking them can make his own choice freely. If he chooses to conform his behaviour to the law, he may have to give up his particular desire to do violence to another, but at least he does so freely; and, if he chooses to break the law, he does that freely too, and can then even be said to suffer the consequences of his action freely, though undoubtedly not gladly. The point is that while in either case there are ways in which his freedom is limited, he is not simply deprived of it in the way that the victim of a crime is. His freedom is limited—indeed, this is what it means for freedom to be limited to the conditions of its own universality, that is, compatibility with the freedom of others—but unlike his victim's it is not destroyed.²⁸

If Kant needs an argument like this, then his connection of right and the authorization to use coercion not only needs but also can have a deduction that establishes the theoretical condition for the rightful use of coercion—namely, that it can actually bring about a condition of universal freedom, as well as specifying the moral constraints on the use of coercion. Perhaps Kant was never completely clear that the argument required for the deduction of the authorization to use coercion for the sake of right must have both a theoretical and a practical component. In the case of the postulate of practical reason

²⁸ This argument seems open to the objection, pressed upon me by Mark Timmons, that even the would-be perpetrator of a crime leaves his victim a choice, and thus freedom: 'Your money or your life', after all, leaves the victim a choice. But here the criminal places his victim in a situation or forces upon him a choice that is not necessitated as a condition of preserving the universality of freedom, its maximal distribution to all consistent with the equal freedom of each, while the choice offered by a penal code—'Refrain from this crime or suffer the lawful penalties for committing it'—is a restriction of choice justified by the need to preserve the universality of freedom.

regarding the acquired right to property, however, he does seem to recognize clearly that establishing the possibility of the rightful acquisition of property involves both a moral inference from the concept of freedom as well as theoretical and clearly synthetic premisses about the conditions of the possibility of our experience as well. Let us now see how he supplies such a complex deduction while still calling the principle of acquired right a postulate.

VI. The Deduction of the Postulate of Practical Reason with Regard to Acquired Right

I now turn to Kant's theory of acquired right. Although Kant centres his account of property rights around a 'postulate of practical reason', he makes it abundantly clear that such a postulate rests upon synthetic propositions and therefore needs a deduction. He provides such a deduction in the form of an extended demonstration that the conditions for the possibility of a rightful acquisition of property can be satisfied in our relations to physical objects and to each other in space and time. This argument is meant to show that it is possible to acquire property in a way consistent with the universal principle of right or the preservation of universal freedom in the external use of our power of choice and to show that the institution of the state is necessary for rightful property claims actually to be acquired. It seems clearer here than in the case of the authorization of coercion that Kant intends his argument to demonstrate both the moral and the theoretical possibility of rightful property claims, and in this case the two aspects of the deduction can even be associated with particular stages of Kant's exposition: in the first chapter of 'Private Right', 'How to have something external as one's own' (*RL* 6:245), Kant explains the moral condition for the rightful acquisition of property, and in the second chapter, 'How to acquire something external' (*RL* 6:258), Kant establishes the theoretical conditions for the rightful acquisition of property, which must ultimately be realized in the state, before finally arguing that the establishment of the conditions for the rightful acquisition of property is actually a moral necessity.

Kant introduces the postulate of practical reason with regard to acquired rights or property in §6 of the *Doctrine of Right*, immediately following the contrast between the analyticity of the principle of empirical possession and the syntheticity of the principle of intelligible possession that was cited in Section IV. Kant's initial statement of the 'Postulate of practical reason with regard to rights' might initially appear to be simply a statement of a theoretical possibility: 'It is possible for me to have any external object of my choice as mine, that is, a maxim by which, if it were to become a law, an object of choice would

in itself (objectively) have to *belong to no one (res nullius)* is contrary to right' (*RL*, §6, 6:246).²⁹ However, that the possibility of property is to be established by showing that its denial would be contrary to right suggests that Kant intends to show that its assertion is compatible with right, so what is ultimately to be proved seems to include the moral as well as the theoretical possibility of property. The moral side of the claim seems predominant a page or two later when Kant states that the postulate of practical reason with regard to rights is 'that it is a duty of right to act towards others so that what is external (usable) could also become someone's' (*RL*, §6, 6:252); indeed, the second formulation of the postulate appears to tell us it is a duty of right to establish claims to property, while the first appears to tell us only that such claims are morally permissible. In fact, Kant's complete deduction of the postulate attempts to prove both of these claims as well as to prove the theoretical possibility of the rightful acquisition of property. First, Kant will show under what conditions the acquisition of property can be compatible with the principle of universal freedom—this is the establishment of what Kant calls a 'permissive law of practical reason' (*RL*, §6, 6:247).³⁰ Then, Kant demonstrates the theoretical possibility of the rightful acquisition of property. Finally, Kant will argue that we actually have a duty to establish determinate property claims, which can only be done by means of the state or civil condition, when the particular empirical circumstances of our existence are such that we cannot otherwise avoid conflict with other people—under these circumstances the establishment of property rights is a moral necessity and not merely a moral and theoretical possibility. Kant's complete account of the application of the universal principle of right to the actual circumstances of human existence thus includes both a permissive law and a duty concerning property. Given this elaborate argument, Kant's designation of the principle of property as a postulate can hardly be meant to obviate the need for a deduction of it from the general principle of right and through that from the supreme principle of morality.

Yet in calling the principle of property a postulate, Kant might seem to imply that the theoretical possibility of property cannot be proved except by inference from its moral necessity. Thus, in introducing the second statement of the postulate just quoted, he writes that 'The possibility of this kind of pos-

²⁹ I translate Kant's term *rechtswidrig* as 'contrary to right' rather than 'contrary to rights', as Gregor does (*Practical Philosophy*, 405); I see no syntactical basis for her use of the plural, and it seems misleading to me, as it suggests that the denial of the possibility of acquiring property would be contradictory to particular and therefore already established rights, which is tautologous, rather than contrary to the principle of right, which is what Kant's ensuing argument clearly intends to establish.

³⁰ This passage has been moved from §2 to §6 by Ludwig and Gregor, and thus actually succeeds the first formulation of the postulate at 6:250.

session, and so the deduction of the concept of nonempirical possession, is based' upon this postulate (*RL*, §6, 6:252). Here he seems to mean that the theoretical possibility of the acquisition of property is problematic and can be inferred from the moral necessity of acquired right only by means of an 'ought-implies-can' argument: 'There is, however, no way of proving of itself the possibility of nonphysical possession or of having any insight into it (just because it is a rational concept for which no corresponding intuition can be given); its possibility is instead an immediate consequence of the postulate referred to' (*RL*, §6, 6:252). This is clearly an echo of Kant's central argument that the reality of the freedom of the will can be inferred only from our awareness of the binding force of the Categorical Imperative. Kant reiterates the claim several pages later when he states that 'we cannot see how intelligible possession is possible and so how it is possible for something external to be mine or yours, but must infer it from the postulate of practical reason' (*RL*, §7, 6:255). These passages suggest that we need to be precise in how we characterize the second stage of Kant's extended argument: perhaps we should say that in this stage Kant expounds the conditions that make it possible to acquire property consistently with the general principle of right given the fundamental conditions of actual human existence—namely, in the spatiotemporal circumstances of life on the surface of a naturally undivided sphere—without attempting to prove that such conditions can actually be fulfilled otherwise than by means of the practical certainty provided by the moral possibility and indeed necessity of the acquisition of property. It should still seem reasonable to characterize this part of Kant's argument as a deduction of the theoretical rather than the moral possibility of property.

It cost Kant a great deal of effort to sort out the stages of his argument, and perhaps he never signposted them for us as clearly as we would have liked. Yet I believe it is ultimately possible to discern the outlines of the kind of complex deduction that has been described in the first seventeen sections of 'Private Right'. This argument consists of four main steps, the first two focusing on the moral possibility of property, the third on the conditions that are necessary for satisfying the moral constraints on property given the general structure of our physical circumstances, and the fourth showing that it is actually a moral necessity to establish determinate property rights in the particular empirical circumstances of our existence, which include unavoidable contact with other people. At the first stage of this deduction, Kant argues that there can be no objection from the side of *objects* to our acquisition of property rights in them. Second, he argues that it is possible for all who might use any object to agree to the assignment of the right to it to a particular person, via a *general will* or multilateral agreement to assign unilateral rights to the object, and that only the

consent of the general will to individual rights to property can make those individual rights compatible with universal freedom. Third, he argues that there is actually a way for an individual to acquire a right to an object in space and time as we experience them, either through first acquisition of a previously unowned object or through voluntary transfer of an already owned object from its previous owner to a new one, consistent with the general terms for individual ownership laid down by the general will. Finally, he argues that, in the actual circumstances of our existence, where contact and potential conflict with others cannot be avoided, the rightful acquisition of property can take place only within a civil condition subject to a rule of law that can both make property claims determinate and enforce them, or at least in anticipation of such a state—only a person willing to submit to the rule of a state can rightfully claim property and forcibly require others to recognize his claim.

I will hardly have room here to analyse convincingly all the details of this argument, let alone consider its normative implications.³¹ I will simply try to provide some of the evidence for the key steps in Kant's argument that can be found in the published text as well as in Kant's preparatory notes, which never give a consecutive statement of Kant's whole argument but sometimes illuminate its individual steps.³²

Following his initial statement of the postulate in §6, Kant takes the first step of his argument by arguing that it would be a contradiction in practical reason itself to deny ourselves the use of objects: 'freedom would be depriving itself of the use of its choice with regard to an object of choice, by putting *usable* objects beyond any possibility of being *used*; in other words, it would annihilate them in a practical respect and make them into *res nullius*' (*RL*, §6, 6:246). This presupposes the canon of rationality that underlies all of Kant's claims about contradictions in willing, the presupposition that if it is rational to will an end then it must also be rational to will the means (see *G*. 4:417). But, just as that principle must always be restricted by the permissibility of using an object in question as a means—the restriction most obviously exemplified in Kant's second formulation of the Categorical Imperative as the requirement that we always be

³¹ I have tried to provide some suggestions in that direction in 'Kantian Foundations for Liberalism', *Jahrbuch für Recht und Ethik*, 5 (1997), 121–40, and 'Life, Liberty and Property: Rawls and the Reconstruction of Kant's Political Philosophy', *Recht, Staat und Völkerrecht bei Immanuel Kant*, eds. Dieter Hünig and Burkhard Tuschling (Berlin: Duncker & Humblot, 1998), 273–91, both repr. as chs. 7 and 8, respectively, of my *Kant on Freedom, Law, and Happiness*.

³² Among commentators I have read, Leslie Mulholland, I believe, comes closest to appreciating the full complexity of Kant's complete deduction of acquired right; see *Kant's System of Rights*, chs. 8 and 9. But though I have learned more from Mulholland than from any other commentator, I think the reconstruction I will give makes it easier to see the outlines of Kant's argument than Mulholland's does. However, I do not pretend to engage Mulholland here on the many difficulties he finds in the details of Kant's argument.

able to treat humanity as an end and never merely as a means (*G.* 5:429)—so here too the argument that it would be irrational to deny ourselves the use of something that could be useful as a means must be supplemented by the premiss that it is permissible to treat an external object merely as a means. Kant recognizes the need for this additional assumption in one of his notes:

That one person should restrict another in the use of external objects . . . to the limits of their physical possession would contradict the use of freedom in consensus with the freedom of others in accordance with universal laws and hence with the rights of mankind in general, for in that case freedom in accordance with laws of freedom would make itself dependent upon objects, which would presuppose either the representation of an obligation toward objects (just as if they also had rights) or a principle that no external object should be mine or yours, either of which, as a principle robbing freedom of its use, is self-contradictory. Thus the principle of freedom in the idea of a collective and united power of choice of itself (*a priori*) extends rightful possession beyond the limits of physical possession. (*Loses Blatt Erdmann*, 33, 23:288)

The moral possibility of property rights rests, in the first instance, on the assumptions that it would be irrational to deny ourselves the use of objects that can be used as means to our ends and that, at least in the case of physical objects, the objects themselves have no rights, or we have no obligations to them, that would block this use.³³ Kant assumes this is obvious in the case of non-human physical objects (although contemporary advocates of animals' rights might not take it to be obvious). In the case of rights against other persons in the form of contracts for specific performances and long-term relations of servitude, the point of Kant's further arguments is to show that these rights are limited but not excluded by the humanity of those who are obligated, because they can be instituted in ways that do not reduce the obligees to mere means who are not also ends. Kant's argument also makes the major assumption that the usefulness of objects presupposes long-term individual control or intelligible possession of them, which he never spells out.³⁴

The second main step of Kant's argument, already hinted at in the last sentence of the last quote, is that, since any property right restricts the freedom of others who might also have been able to use the object in question, such a right can be rightfully acquired only under conditions in which all could freely and

³³ See also Mulholland, *Kant's System of Rights*, 250.

³⁴ Mulholland argues that Kant may not have been attempting to prove that *individual* possession of property is necessary, since some forms of common possession, such as by nomadic bands, seem to work perfectly well and to be compatible with Kant's general claim that it would be irrational to deny ourselves the use of objects as far as the objects are concerned; see *Kant's System of Rights*, 275. But the whole issue of whether property rights must be private certainly needs more of an airing than Kant gives it.

rationally agree to the individual acquisition of the right. Kant expresses this condition in the *Doctrine of Right* by arguing that, since ‘a unilateral will cannot serve as a coercive law for everyone with regard to possession that is external and therefore contingent, since that would infringe upon freedom in accordance with universal laws’, it ‘is only a will putting everyone under obligation, hence only a collective general (common) and powerful will, that can provide everyone this assurance’ (*RL*, §8, 6:256). But this almost immediately conflates the moral condition that others be able to agree to the property right with the theoretical condition that there must be a means to enforce this collective agreement, which is part of the deduction of the empirical conditions of the possibility of property that belongs only later in Kant’s argument. The continuation of Kant’s note just cited may clarify his statement of the condition for the moral possibility of property, although it too quickly moves on to the theoretical condition as well:

The possibility of such a principle, however, lies in the presupposition that with regard to corporeal things outside us the free power of choice of all must be considered as united and indeed as originally so, without a juridical [*rechtlich*] act, and indeed because it is related to a possession which is original but communal, in which the possession of each . . . cannot be determined except in accordance with the idea of the consensus of all with a possible aggregate choice. The possibility of merely rightful possession is, as given *a priori*, the rightful determination of it, but is not possible through the individual choice of each, but only through external positive laws, thus only in the civil condition. (*Loses Blatt Erdmann*, 33, 23:288)

This note, however, clearly states the moral condition by itself:

With regard to the possession of a thing external to me I cannot, according to the laws of freedom, exercise any coercion against others unless all others to whom I might stand in this relation can agree with me about it, i.e., through the will of all of them united with my own, for in that case I coerce them through their own wills in accordance with laws of freedom. For all, the concept of a right is a concept of reason which through the idea of a united will grounds all external mine and yours. (*Loses Blatt Erdmann*, 6, 23:277–8)

This passage also makes the point clearly:

An exclusion of all others through my own power of choice alone, however, is a categorical imperative for others to consider such objects as belonging to me. Thus such an imperative actually exists, as it were an obligation can be laid upon the objects to obey only my will, and freedom in regard to corporeal things is a ground of external coercive laws and indeed without a *factum iniustum* [doing an injustice] to others. . . . But

this law is a law of the communal [*gemeinschaftlichen*] power of choice for without this it would rob itself of the use of external things.—Thus it is the communal will together with the communal original possession that makes external things in whose possession I am by nature into my own. (*Loses Blatt Erdmann*, 32, 23:286–7)

Since any property right is a restriction of the freedom of others, and indeed one that may ultimately be coercively enforced, it cannot be right unless it is one that others could freely agree to. This is the moral condition that property rights must be compatible with the universality of freedom in its external use, or the condition that the so-called postulate of acquired right must itself be derivable from the general principle of right.

The next stage of Kant's argument is what we may consider the deduction of the theoretical possibility of property, the explanation of 'How to acquire something external' in a way that is consistent not only with the moral requirements of the general principle of right but also with the physical conditions of our existence. Kant begins the second chapter of 'Private Right' with a recapitulation of the two distinct steps in the first part of his deduction:

The principle of external acquisition is as follows: that is mine which I bring under my *control* (in accordance with the law of outer *freedom*); which, as an object of my choice, is something that I have the capacity to use (in accordance with the postulate of practical reason); and which, finally, I *will* to be mine (in conformity with the idea of a possible united *will*). (*RL*, §10, 6:258)

The first two parenthetical clauses express what I have been calling the first stage of Kant's moral deduction, and the last expresses the second. Kant then embarks upon the theoretical portion of his deduction. This is essentially the following argument, appealing to the most general features of the spatiotemporal conditions of human existence: all rightful possession of property must, given the temporal nature of our experience, originate in a rightful act of acquisition of the property. Such an act could be either a rightful transfer of the property from one owner to another or a rightful first appropriation of the property. There would be an infinite regress if only the former were possible, so the latter must also be possible. But, since the spherical surface of the earth is not naturally divided into lots (this expresses the spatial condition of our experience (see *RL*, §13, 6:262)), any original appropriation of land (the 'substance' which is the basis for all movable property as 'accidents' (see *RL*, §12, 6:261)) must be an individual appropriation from a previously undivided common. Yet if such an appropriation is to confer a rightful title, it must begin from a condition of rightful ownership, so it must be conceived of as a transfer of an original rightful possession of the undivided commons to a rightful pos-

session of a divided portion of the whole. Kant does not conceive of this transfer from the undivided whole as a historical event. ‘Original possession in common is, rather, a practical rational concept which contains *a priori* the principle in accordance with which alone people can use a place on the earth in accordance with principles of right’ (*RL*, §13, 6:262). That is, to ask whether a people as a whole that possessed the land as a whole could freely and rationally agree to a particular system for the distribution of individual property rights is a test of the rightfulness of such a system, which is required by both the moral condition set by the general principle of right and the theoretical condition set by the physical circumstances of our existence.

In his notes, Kant clearly labels this argument a ‘Deduction of the right to an original appropriation of the land’. Here is a compact version of it:

It is grounded on a *factum* which is original, i.e., not derived from any rightful act, namely the original community in the land.

The original appropriation of the land must be independent [*eigenmächtig*], for if it were grounded on the approval [*Einwilligung*] of others it would be derived.

However, the right of the appropriator cannot stand in an immediate relation to things (here, to the land), for to the right there corresponds *immediately* the obligation of others; but things cannot be made to have obligations. Thus the appropriation of a piece of land is possible only through a *rightful act*, i.e., it is possible not through one whereby the appropriator is immediately connected to the land, but only through one whereby the appropriator is *mediately* connected to the land, namely by means of the determination of the will of one person to oblige every other negatively in accordance with universal laws to refrain from the use of a certain piece of land, which restraint is possible only in accordance with universal laws of freedom (i.e., in accordance with laws of right. . . .

In this respect, however, the appropriator can only take possession of a piece of land in order to have it as his own through his private choice, i.e., independently, by means of a rightful act, for otherwise he would place an obligation on everyone through his own merely unilateral will, consequently only as the consequence of a possession in which he finds himself originally (prior to any rightful act), and this also as a common possession by all who could make claim to the same land, i.e., a possession that can unite all possible possession on the land of the earth through one will, which contains an original community (*communio originaria*) of the entire land of the earth, on which alone the act of first taking possession is grounded. (*Loses Blatt Erdmann*, 56, 23:316)

Kant may seem to contradict himself, saying first that original possession cannot be a rightful act and then that it must be a rightful act of taking a piece of property out of the undivided commons with the consent of all or through the

will of all. But the contradiction can be avoided if we interpret him to mean that, although historically the initial appropriation of property may or even must precede the organization of any public entity to license it, morally such an appropriation can create a right only if it is possible to see the individual possession of property as one that could be agreed to through a common or united will by all who could also claim it. It is through such a rational idea that both the theoretical and the moral constraints on the acquisition of property can be satisfied.

That both moral and historical, thus theoretical, constraints must be satisfied in the deduction of the possibility of property is also evident in the final stage of Kant's argument, in which he argues that historically property must be acquired in the state of nature and thus prior to the existence of the civil condition in the form of an organized juridical system, because securing the possession of property is the reason for the creation of a civil entity, yet that, because only the expression of the common will through a juridical entity can make the possession of property legitimate as well as secure, the acquisition of property in the state of nature must be 'provisional' and can only be rendered 'conclusive' through the creation of a civil state (*RL*, §15, 6:264). Kant's argument for this final claim depends on both moral and theoretical considerations, and leads to the final, moral conclusion of 'Private Right', that we actually have a duty to leave the state of nature and enter the civil condition. The moral argument is that, since the '*rational title*' of acquisition can lie only in the idea of a will of all united *a priori*', and 'the condition in which the will of all is actually united for giving law is the civil condition', therefore 'something external can be *originally* acquired only in conformity with the idea of a civil condition, that is, with a view to its being brought about' (*RL*, §15, 6:264). The theoretical argument, however, is that the state is what we might think of as both a mathematical and a psychological condition of the possibility of secure property claims. The mathematical argument is that, since property claims extend beyond the body of the individual, yet beyond the body of the individual there are no other naturally defined boundaries, the state is necessary to introduce determinate boundaries between claims; thus the surveying of boundaries and the recording of deeds to property are among the most basic functions of the state. The psychological argument is that, since no one can reasonably expect to enjoy a claim to property unless others are also allowed to do so as well, but also that no one can reasonably be expected to confine his claims to his own property unless others can also be expected to do so, a system for the public enforcement of the boundaries of properties claims is as necessary as a public system for defining them. Thus the office of sheriff is as basic to the state as is that of the recorder of deeds.

Kant tends to stress the second of these two theoretical conditions in the published text of the *Doctrine of Right*, as when he writes that ‘it is only a will putting everyone under obligation, hence only a collective general (common) and powerful will, that can provide everyone this assurance’ (*RL*, §8, 6:256). Again, however, passages in his notes clearly reveal his fuller argument. A passage like this one expresses the role of the state in creating determinate boundaries between property claims: a person ‘rightfully possesses a piece of land that he does not occupy . . . not through his own power of choice . . . only insofar as he can necessitate others to unite with him into a common will in order to draw the boundaries for each’ (*Loses Blatt Erdmann*, 32, 23:285). And one like this explicitly refers to both the surveying and the enforcement functions of the state:

Every human being has an innate right to be some place on the earth, for his existence is not a *factum* [deed] and therefore not *injustum* [unjust]. He also has the right to be in several places at once *incorporealiter* if he has specified them for his use, though not through his own will alone. But since every one else also has this right, the *prior occupans* has the provisory right to coerce each who would hinder him to enter into a contract to determine the boundaries of the permissible possession and to use force against the refusal [to accept them]. (*Loses Blatt Erdmann*, 10, 23:279–80)

This passage also points to the moral aspects of Kant’s thesis that conclusive possession of property can exist only in a civil condition. On the one hand, Kant holds that, since it is both morally and theoretically possible to acquire property consistent with the universal principle of right, thus that property can be claimed consistently with universal freedom, everyone has a right to claim property, and therefore has a right to coerce others into joining with him to form a state in order to establish property rights. At the same time, since property rights are coercive, they can be rightful only if they are claimed with an eye to the creation of a civil condition. ‘Therefore something external can be *originally* acquired only in conformity with the idea of a civil condition, that is, with a view to it and to its being brought about, but prior to its realization (for otherwise acquisition would be derived)’ (*RL*, §15, 6:264). But, since the psychological and physical conditions of our existence are such that we inevitably will attempt to claim property rights in circumstances where that will bring us into conflict with others, we also have a *duty* to claim such rights with an eye to the civil condition and in turn to bring about that civil condition. Thus Kant concludes his exposition of ‘Private Right’ and makes the transition to ‘Public Right’, his deduction of the conditions necessary for the rightful existence of the state, by means of a complement to the postulate of acquired right—namely, ‘the postulate of public right’:

From private right in the state of nature there proceeds the postulate of public right: when you cannot avoid living side by side with all others, you ought to leave the state of nature and proceed with them into a rightful condition, that is, a condition of distributive justice.—The ground of this postulate can be developed analytically from the concept of *right* in external relations, in contrast with *violence*. (RL, §42, 6:307)

This passage can also stand as one last reminder that Kant cannot mean postulates with regard to right to be principles that stand independently of any deduction. On the contrary, the postulate of public right proceeds from the postulate of private right, just as the postulate of private right has proceeded, by what turns out to be a complex deduction involving both moral and theoretical arguments, from the universal principle of right, which itself proceeds from the supreme moral principle of the absolute value of freedom in its external as well as its internal use.

To sum up this long argument, as has recently been emphasized, there are certainly contexts in which Kant calls some principles of right ‘analytic’ and contexts in which he calls some of them ‘postulates’. But we have to be careful about what he means, since he uses each of these terms in a variety of ways. Further, Kant’s general philosophy makes it clear that both analytic propositions and postulates ultimately need a deduction of the objective reality of their key concepts. Finally, Kant’s philosophy of right, as expounded in both the *Doctrine of Right* in the published *Metaphysics of Morals* as well as in the many preparatory notes for this work that have come down to us, clearly recognizes the need for such deductions and at least in the case of the principles of private right provides an extensive exposition of such a deduction. Kant’s deduction of the objective reality of a concept of right that authorizes its coercive enforcement may be sidetracked by his misleading comparison of such a deduction with a mathematical construction, but there can be no mistaking the key steps by which he expounds the conditions of the possibility of the right to acquire property, even though he calls the principle of such a right a ‘postulate’. As in the less complete argument that Kant gives in the case of the authorization to use coercion, the deduction of acquired right involves both moral and theoretical components. The fundamental argumentative strategy of Kant’s philosophy of right is thus to argue that the key principles of right, even if for various reasons they are called analytic and designated as postulates, are consistent with and required by the most basic moral and theoretical conditions of human existence.

4

COULD IT BE WORTH THINKING ABOUT KANT ON SEX AND MARRIAGE?

BARBARA HERMAN

Kant's views on sex, women, and marriage would best be forgotten by anyone who wanted to take Kant seriously. Or so I always thought. In the discussion that follows, I hardly want to withdraw that thought in its entirety, but I have been struck by certain possibilities in Kant's later work that bear thinking about. Or so I now believe.

Our moral theories (the traditional ones, that is) have not been places one wants to go to think about morality-and-sex or morality-and-women because most discussions of sex range from uncomfortable to hostile, and traditional accounts of women are either misogynist or reflect uncritical transmissions of repressive social structures.

Some recent philosophy has responded to this and related facts, searching out the effects of male bias in our basic categories either to clear the ground for more inclusive accounts of persons or to initiate critical discussion of the features and significance of gendered human beings. Within philosophical accounts, sexuality is now well regarded—an unequivocally good thing among those so situated that they can participate in the free exchange of sexual pleasure. The body has been retrieved from rationalist disdain. And, more generally, our affective lives are taken seriously and our relationships placed at the center of the moral stage.

Some go further, arguing that we must understand that the moral agent is a person in relationships—to parents and children, friends, sexual partners—rather than an isolated individual trying to make "his" way among anonymous others. There can be no single right thing for "anyone" to do in morally demanding circumstances. What we are to do will differ as we are in different nets of relationship. Friends and lovers,

associates and fellow citizens, stand differently in our moral regard than do strangers. The free and equal individual of traditional morality is now encumbered—as we all really are (and especially as most women really are). The encumbrance is not correctly understood as a burden on the life of the individual; rather, it is constitutive of our real nature as moral persons. We are not made unfree or unequal, but new and deeper meaning is given to the possible achievement of freedom and equality. There is a wider set of virtues and a much increased arena for the flourishing human life.

Adjacent to this healthy revision, there has developed a somewhat darker story. Having opened the cast of moral phenomena to feelings and relationships, it is natural to open it still further to other facts hidden or repressed in the philosophical tradition concerning class, race, and gender. But if the initial effect of the, “morality of relationships” was exhilarating, the morality of class, race, and gender may not be. It is not a complicated thought: If we are situated in and partially determined by class, gender, and race (not in the abstract, but by class, gender, and race as-we-know-them), we can be engaged in activities that are not morally acceptable, and we may not be able to “make things right” by scrupulous attention to the details of our lives and relationships.¹

If the socialization of men and women produces deeply different mechanisms for dealing with competition and aggression, we should not be surprised that even good faith efforts at inclusion of women in institutional hierarchies leaves them at a disadvantage (in the “success” terms of the relevant organizations). Or, consider the supposed dilemmas of sexual harassment in the workplace. The premise of the most difficult claims of sexual harassment is that individual sincerity of good (or not bad) intentions is insufficient guarantor of innocence where sex (broadly construed) and inequality of power mix. So the male professor who is certain that he would never make an unwelcome sexual approach to a student or junior colleague, who is offended at the very idea that he would act without consent, cannot see that given the structure of power and authority neither he nor the recipient of his sexual advance can make it the case that their private actions are reciprocally free and equal. These are moral difficulties that do not yield to private solutions.

What has this to do with Kant? To my great surprise, I have come to believe that Kant has things to say that address these and related matters in serious ways. And I believe this in the face of his misogyny, his disdain for the body, and his unhappy status as the modern moral philosopher feminists find most objectionable.

Kantian ethics has been the object of feminist criticism because it presents the requirements of morality in terms of principle-based impartiality, because of its view that persons have moral standing in virtue of their rational nature, and because the moral regard we are to have for one another is to reflect this deep sameness—we are never to fail to treat one another as agents with autonomous rational wills. Certainly if Kantian ethics is to be viable it must accommodate a more complex account of persons and one that is not modeled on a historically specific image of men; it must also develop concepts and modes of argument that take account of the special moral facts of relationships (and of institutions and social roles as well). Whether it can do these things or whether, even if it can, it offers a compelling account of morality is open for argument.

But Kant’s views about sexuality are taken to be not only not arguable but also outrageous—appropriate objects of derision, not discussion. Kant has dreadful things to say about women; his hostility toward sex, the body, and our affective lives generally is famous; and he has strongly conventional views about marriage, children, and the family.

There is some temptation to respond by deflecting these problems into the context of theory. Kant wasn’t really hostile toward the body—he was arguing against a sense-based empiricism in ethics; and he wasn’t really out to devalue our affective lives—his target was moral sentimentalism; and so on. Perhaps we can add that his misogyny was “merely” a misreading of what he was seeing in the socially restricted women of his culture. This gives us a more respectable dispute among theoretical positions couched in unfortunate rhetoric. Although I think Kant’s targets were these philosophical positions, what he says and the views about women that he holds cannot be treated as if they did not really matter. In what way are we to take seriously the claim that the morally important thing about us is our rationality, when the exemplar of reason is found in the capacities of middle- and upper-class white males?

This is not an easy issue for me. I am in different ways unhappy with Kant and with the available alternatives to him. I am convinced that Kant gets something very right about morality (though plainly the current state of understanding of Kant does not support this view). The source of much of the difficulty with Kant, I believe, comes from our (not his) asking morality to do too much. Morality does not exhaust the normative: Substantive regulative principles of aesthetics and politics, and perhaps the personal, need to be looked at as coconstitutive of our practical lives. Even if morality is held to be supremely regulative, that fact alone does not impoverish a conception of the good life.

I also believe that there is something very right about Kant’s emphasis on rationality as distinctive of “our” kind of life, though I think we get it wrong about how his conception of rationality works—what it depends on, its autonomy from other faculties or capacities, and so on.

This leaves Kant’s views about women. Why are they not a definitive obstacle to taking the Kantian project seriously? Two things seem to me worth thinking about before slamming the door. Our own best views are hardly “pure”: The distortions of context and ideology are not dispelled in the recognition that they must be present. There is much to be learned about how such limits are overcome—how progress is even possible—in the face of what is not (or not clearly) seen. Part of what I hope to show here is that Kant is a figure from whom such lessons can be taken. The second reason for staying with this project is Kant’s insistence on human freedom as the regulative ideal for personal and social life. I do not find the idea of abandoning this ideal welcome, especially given the increase in the scope and power of the determinisms we now accept. We would do well, I believe, to attend to the details of what happens when Kant’s views about women engage with matters he takes to be central to his enterprise. It is in such places that he is forced to go beyond what he otherwise casually accepts, and that is where things can get interesting.

Since I cannot argue for these convictions here, I must ask that you suspend disbelief (or is it incredulity?), if only to be able to tolerate a longish story. In what follows I want to pursue two lines of thought that presuppose that we have reason to take Kant seriously. One explores the fact that Kant's views about sexuality (not his views about women) are strikingly congruent with a strand of contemporary feminism.² The other considers whether and how far his solution to a moral problem he feels is inherent in sexual activity provides a way of opening rationalist moral theory to the darker side of sexual relations (dependency, power, and so on). This is also a way of introducing the larger question about the possible place of coercive public institutions in a moral theory that values individual autonomy. Both discussions either directly or implicitly engage the issue of the usefulness of this tradition in philosophy to feminist concerns.

I

The chief barrier to understanding Kant's account of sexuality and marriage comes from the custom of taking Kantian ethics to be the ethics of the *Groundwork of the Metaphysics of Morals* and his remarks on substantive issues as either belonging to the *Groundwork's* program or, failing that, being the residue of Kant's undigested puritanical upbringing.

Generations of our students have "applied" the categorical imperative (CI) to suitable maxims describing moral situations, treating it as a universalizability test that is supposed to be completely general in its application. The history of failure to get the CI to work is the stuff of introductory philosophy courses. As everyone knows, depending upon the construction of the maxim presented, it permits or forbids too much, and both inconsistently. Worse, our maxims come already laden with moral stuff—you cannot talk about theft without property (Hegel's point), you cannot judge infidelity without a view of marriage, and you cannot even determine the wrong of acts of violence without a story about the body (and perhaps about the gendered body if we are to capture the moral wrong in rape). Yet there seems to be no way to generate "correct" descriptions or to criticize the terms of the ones employed.

If we are still inclined not to reject Kant's ethics out of hand (and it seems remarkable to me that given the prevalence of this sort of reading of Kant that this did not happen long ago), then we should suspect that we have misread the point of the *Groundwork* and the CI. And I think we have.

First of all, the *Groundwork* is not an ethical treatise. It provides neither a systematic account of the basic concepts of moral discourse nor a practical procedure for resolving moral queries and/or difficulties (despite appearances and traditional reading). Its task is to establish a connection between morality and metaphysics: If morality is to oblige (necessitate), it can do so only if the will (understood as practical reason) is free. The *Groundwork* argument motivates this metaphysical claim through an analysis of the nature of moral requirement.³

The four examples that are traditionally taken to illustrate a procedure for applying the CI as a rule of moral judgment are rather confirming illustrations of the thesis that impermissible maxims do not have universal form. We take there to be a duty not to make deceitful promises. Analysis shows that the deceitful-promise maxim cannot be a universal law. And so on. Although it is true that every impermissible maxim does not have universal form and the CI procedure will confirm that, it does not therefore follow that the CI procedure is by itself all that is needed for moral judgment. It is easy to be misled about this since, as Kant notes, we can and do appeal directly to universalizability in informal moral deliberation (often in the familiar if misleading, "What if everyone did that?" locution).

But since we can deliberate about the permissibility of proposed action only if we are already aware of the morally salient features of our circumstances, it is the task of systematic ethics to supply the relevant descriptive concepts. In Kant's work, the contours of such a project are sketched in the two parts of the *Metaphysics of Morals*. The second part, known to us as *The Doctrine of Virtue*, establishes the basic ethical categories of duty to self and others. The first part—the *Rechtslehre*⁴—argues for a set of moral institutions that provide a necessary civil framework for moral life. This is the location of the justification of marriage with which I will be concerned.

The general argument of the *Rechtslehre* can be looked at in either of two ways: as giving the moral defense of the State or as delineating the possible extent of what Kant calls "external freedom" (how much we can be free to do given the equal claim of all to a like liberty). The State stands in need of moral defense because its primary activity is coercive control of what we do (in the name of external freedom). But the use of force to control action disregards or manipulates the will of the agent—which is normally impermissible. The problem is to explain how, to secure such things as property and contract, State coercion is legitimate. Here we must control our cynicism, for we can miss something if we too quickly respond with a knowing glance at the twin pillars of bourgeois liberalism.

In the *Rechtslehre*, Kant introduces a category of moral dilemma that is created by unavoidable facts of our social lives, a kind of dilemma that cannot be resolved either through acts of unilateral good willing or by private social agreement. The dilemma has a general form: Given the conditions of human life, there are things we each *must* be able to do that are not morally possible absent certain coercive political institutions. Although his central examples are of property (real property and contracts), Kant uses the same form of argument to introduce the legal institution of marriage. Our need to make use of things introduces a moral requirement for (and therefore justification of) a coercive political institution of property. Our sexual need for and use of one another requires a political institution of marriage.

There is an air of paradox here, for the claim is that political institutions can be morally creative in exactly those areas where we have learned to see the role of such institutions as repressive. One may think: How predictable that Kant would find a moral argument to force the institution of marriage. But just as Kant's argument for the necessity of property is not an argument for the necessity of private property, so we

do well to hesitate before we jump to the conclusion that what he would justify is the institution of marriage as-we-know-it.

Consider the *Rechtslehre* argument for a political (that is, coercive) institution of property. Kant argues that (a) there cannot be legitimate moral claims to things (property) without civil society and the possibility of permissible enforcement of claims (coercion); and (b) as we must act on and with the stuff of the world and be able to possess things that we are not presently holding, we must be able to have legitimate moral claims to things; (c) therefore, given our need to act on and with the stuff of the world, we can act as we must only through the mediating civil institutions of property.

The central argument (b) goes this way: For a wide variety of the uses to which a person puts the stuff of the world—from the consumption of food to the construction of works of art—effective use of stuff requires the exclusion of others from use of it. And for any use beyond immediate literal consumption, use requires possession (title) when the stuff is not “in hand” (“possession at a distance,” we might call it). It is not obvious why even stuff in hand should be unavailable for others’ use—in the sense that “because I have it” is in itself a reason for you to refrain from use. It is altogether magical how stuff we are not holding or even near could be off-limits to others. Certainly the fact that we have needs or want something cannot ground permission for the use of coercive force either to get or to protect it (morality precludes that). What is missing is a moral connection between persons and stuff such that the exclusion of others by force or threat is legitimate.

We do not, however, stand in direct moral relation to things. Obligations are with respect to persons only. If persons had rights to things, we would have obligations that were in a sense with respect to things: obligations directed at persons’ rights. The problem is how to get to such a right. As Kant sees it, this is a task that requires a metaphysics of morals.

We want to say that as we may repel (with force) those who would coerce or harm us, so we may repel with force those who would take what is by right ours. (“An object is mine . . . if I am so bound to it that anyone else who uses it without my consent thereby injures me” [*Rechtslehre* 51].) The only justifying reason Kant could accept is that taking what is ours is itself “a hindrance or opposition to freedom” (*Rechtslehre* 36) that may therefore legitimately be counteracted. Possession requires authority, not power.

Private individuals cannot make things property because they cannot separately or jointly create the conditions of reciprocal respect in others that render a claim of right intelligible. There is nothing about either me or the stuff, or about the relations between me and the stuff, that could by itself create a duty of restraint in others. And what I cannot do myself, we cannot do together. There is no agreement that can make things property because, as Kant sees it, the bindingness of an agreement is itself a kind of property: An agreement gives me a claim on someone else’s future action. Only in civil society—in a state with the apparatus of law and enforcement—can there be authoritative rules that determine what can legitimately be claimed and what kind and degree of force may permissibly be used to protect what we possess. Since

possession is a necessary condition of our effective external agency, and since only in civil society is possession possible, Kant argues that we are compelled (because of the nature of our agency) to create or accede to the authority of civil society.⁵ This argument for property is not an argument for any particular system of property, private or communal. It is an argument to the conditions of intelligibility of the moral idea of property or right.

We have become accustomed to thinking about institutions either as they provide means to independently conceived ends or as elements in the social construction of our experience. (These roles are not mutually exclusive.) We less frequently, especially when doing moral philosophy, think of institutions as the necessary condition for moral activity. It is as if we thought we could in principle live moral lives without civil society—if only we and others were good enough. In Kantian theory some institutions are necessary not merely to compensate for our own and others’ deficiencies (of goodness, strength, capacity to trust, and so on); they arise as the necessary social framework in which human beings can exercise and express their rational natures (as free and equal persons). With this in mind, I want to turn back to the official subject of this chapter: Kant on sex and marriage.

II

Kant argues that there is something about what happens in human sexual relations that leads to a condition compromising the moral standing of the partners.⁶ Suppose that sexual relations led to conditions of subordinacy and dependence; that fact would introduce the presumption that sexual relations were morally impermissible (or at least morally problematic). Kant argues that there is such a sex-based moral problem and that it can be resolved only through the legal institution of marriage. He claims that within civil society it is possible to establish and secure the equality and autonomy of the partners in a sexual relationship by defining them, under the law, as husband and wife—that is, as equal juridical persons with public standing.⁷ The argument for marriage follows the form of the argument concerning the necessity of the institution of property. (Of course, not just any legal institution of marriage could be cast in the role of preserving autonomy. One that regards the wife as the property of the husband only reflects the assault on autonomy that is [as Kant saw it] inherent in the sexual relation itself.)

The natural response of many to such an argument is, first, to heap scorn on the institution of marriage and, second, to claim that surely it is possible to have sex without moral difficulty—meeting in the moral state of nature, as it were, as free and equal persons sharing the pleasure of one another’s bodies. Kant’s argument has to be (and is) that there is something about the nature of persons and about the nature of the sexual relationship that makes a will to love well insufficient to guarantee the autonomy and equality of sexually involved persons.

The feature of sexual activity that Kant most frequently identified as the source of moral difficulty is the fact (as he saw it) that sexual interest in another is not inter-

est in the other as a person.⁸ Insofar as one is moved by sexual appetite, it is the sex (the eroticized body, the genitalia) of the other that is the object of interest. But since the body is an inseparable part of the person ("in its togetherness with the self it constitutes the person" (*Lectures on Ethics* 166)), the sexual appetite, in taking the body as the object of its interest, compels regard of the person as an object (or blocks regard for the body as the body of a person). According to Kant, the objectification of the other is both natural and inevitable in sexual activity.

Let me string together some passages from *Lectures on Ethics* to give the flavor of Kant's remarks.

Taken by itself [sexual love] is a degradation of human nature; for as soon as a person becomes an Object of appetite for another, all motives of moral relationship cease to function, because as an Object of appetite for another a person becomes a thing and can be treated and used as such by every one.

Because sexuality is not an inclination which one human being has for another as such, but is an inclination for the sex of another, it is a principle of the degradation of human nature, in that it gives rise to the preference of one sex to the other, and to the dishonoring of that sex through the satisfaction of desire. The desire which a man has for a woman is not directed towards her because she is a woman; that she is a human being is of no concern to the man; only her sex is the object of his desires. Human nature is thus subordinated. Hence it comes that all men and women do their best to make not their human nature but their sex more alluring and direct their activities and lusts entirely towards sex. Human nature is thereby sacrificed to sex. If then a man wishes to satisfy his desire, and a woman hers, they stimulate each other's desire; their inclinations meet, but their object is not human nature but sex, and each of them dishonors the human nature of the other. (163–164)

Talk about degradation and dishonor offends our sexually liberated ears. We might say, surely Kant confuses sexuality gone wrong with sex itself. But before yielding to the comfort of such a response, let us look at some other passages.

There is a deep recognition in culture and in experience that intercourse is both the normal use of a woman, her human potentiality affirmed by it, and a violative abuse, her privacy irredeemably compromised, her selfhood changed in a way that is irrevocable, unrecoverable. And it is recognized that the use and abuse are not distinct phenomena but somehow a synthesized reality: both are true at the same time as if they were one harmonious truth instead of mutually exclusive contradictions. . . . By definition, she [has] a lesser privacy, a lesser integrity of the body, a lesser sense of self, since her body can be physically occupied and in the occupation taken over. By definition . . . , this lesser privacy, this lesser integrity, this lesser self, establishes her lesser significance. She is defined by how she is made, that hole, which is synonymous with entry;

and intercourse, the act fundamental to existence, has consequences to her being that may be intrinsic, not socially imposed.

It is especially in the acceptance of the object status that her humanity is hurt: it is a metaphysical acceptance of lower status in sex and in society; an implicit acceptance of less freedom, less privacy, less integrity. In becoming an object so that he can objectify her so that he can fuck her, she begins a political collaboration with his dominance; and then when he enters her, he confirms for himself and for her what she is: that she is something, not someone; certainly not someone equal.

What does it mean to be the person who needs to have this done to her: who needs to be needed as an object; who needs to be entered; who needs to be occupied; who needs to be wanted more than she needs integrity or freedom or equality? . . . The brilliance of objectification as a strategy of dominance is that it gets the woman to take the initiative in her own degradation (having less freedom is degrading) . . . she takes on the burden, the responsibility, of her own submission, her own objectification. . . . The pleasure of submission does not and cannot change the fact, the cost, the indignity, of inferiority.

This, to be sure, is not Kant. This second set of passages is from Andrea Dworkin's recent book, *Intercourse*.⁹ The differences in what Kant and Dworkin say are sharp enough: Dworkin's focus is on the objectification of *women*, on the effects on women of sexuality as-we-know-it, and in particular, on the meaning and inherent violence of the act of intercourse. Still, her key ideas are, one might say, very Kantian. Sex (intercourse) turns women into things; the pleasures of sex lead women to volunteer to be treated as things; sex is not compatible with the standing of the partners as equal human beings. It was this degree of similarity with the parts of Kant that we are supposed to reject out of hand, combined with the power of Dworkin's account on its own terms, that suggested to me that adopting a different attitude toward Kant's treatment of sexuality might prove worthwhile.

Kant does see inequality as among the possible effects of sexuality, but he does not take the moral problem in sexual relations as exclusively a problem of the subordination of women. On either of the obvious interpretations of his account of sexuality, the moral costs are borne by both parties. There is the romantic version of his story: It is not the act of intercourse that by its nature subordinates women, but the ego dissolution of sexual bonding that threatens the boundaries of both persons. If persons cannot sustain the integrity of their agency in certain sorts of relations, those relations are impermissible. And there is what I take to be the central claim about mutual objectification: Sexuality involves the moral loss of self, not in terms of boundaries, but as being persons to and for one another. Dworkin too is committed to a mutual objectification (if in a master-slave sense), but it is less clear whether the cause of the objectification is intercourse per se or intercourse in the absence of sexual equality.

Objectification is plausibly problematic. If each sees the other as object—something for use—then strength (physical and social) can take the upper hand and domination follows. To treat another as a person is to take the person's interests and the conditions of rationality as grounds for moral regard—occasions for action or restraint independent of one's own wishes or interests. Objectification makes the path from sexual use to abuse open. In principle, for Kant, the direction of inequality and mistreatment could go either way, though he seems well aware that it will not.

Kant's concern for the sustenance of equality within the sexual relation is evident in his treatment of incest (see *Lectures on Ethics* 168). The only form of incest absolutely forbidden is parent-child, and that because there are independent and natural causes of inequality between parent and child. The ways that Kant imagines equality being restored to sexual partners are not available when the inequality is inherent in the relationship. There is thus nothing morally impossible in sibling incest.¹⁰

If there is no need to explain why Kantian ethics could not tolerate an activity in which persons are treated as objects, something needs to be offered in support of Kant's reasons for thinking sexuality is such an activity. Kant says the sexual regard is for the body or body part, not the person. The voice of erotic language often speaks of love for the beloved's body: lips, eyes, ears, feet—whatever. But must it? Is there room in sexual language for the terms of moral regard? It is a little odd to imagine sexual arousal at a moral deed—perhaps a bit less odd to be turned on by a quality of virtue, though some more than others: courage more easily than kindness (a cynic might see the marks of virility or maternity as the object here). Certainly the language and imagery of pornography support Kant's view, especially if one holds with those radical feminists who see pornography as an accurate expression of sexual reality.¹¹

It is because Kant regards the sexual appetite *per se* as the cause of objectification that individual or private escape is not possible. Dworkin may similarly be inclined to accept a kind of sexual moral fatalism, given the asymmetry of power between men and women in intercourse. She sees no route of possible escape through private consensual acts. As she says:

[Even visionary sexual reformers fail to face] the fundamental questions about intercourse as an act with consequences, some perhaps intrinsic. [Even with intercourse contingent on consent, and the conditions of consent the woman's desire,] the woman could not forcibly penetrate the man. The woman could not take him over as he took her over and occupy his body physically inside. His dominance over her expressed in the physical reality of intercourse has no real analogue in desire she might express for him in intercourse: she simply could not do to him what he could do to her.¹²

A similar critique of any "escape through consent" solution can be found in the work of Catharine MacKinnon, whose views about sexuality and pornography are often paired with Dworkin's.¹³ MacKinnon, however, makes no comparable essentialist claim—although the alternative picture of the structure of sexual life that she draws is no more permitting of private transcendence than if she had. As she sees it, even if it

is not of the nature of sexuality to objectify, objectification is a truth about sexuality as it functions in the gender structure of male dominance: "The general theory of sexuality emerging from this feminist critique does not consider sexuality to be an inborn force inherent in individuals, nor cultural in the Freudian sense, in which sexuality exists in a cultural context but in universally invariant stages and psychic representations. It appears instead to be culturally specific, even if so far largely invariant because male supremacy is largely universal, if always in specific forms."¹⁴ The problem of objectification thus remains central to this strand of the feminist critique of sexuality as-we-know-it, whether it is in the nature of sexuality to cause objectification or whether sexual practice expresses objectifying social structures.

Suppose—in the light of this—we allow Kant's claim that the sexual appetite in itself is directed at the body. (There are of course, questions to be asked about what it might mean to think of an appetite "in itself," but we will have to leave those aside for now.) Is there any reason to think it follows that the person whose sexuality is aroused cannot see the object of sexual interest as a person? Kant's reasons for thinking it does follow can be seen in the contrast he draws between what he calls human love and sexual love.

Human love is good will, affection, promoting the happiness of others and finding joy in their happiness. But it is clear that when a person loves another purely from sexual desire, none of these factors enter into love. Far from there being any concern for the happiness of the loved one, the lover, in order to satisfy his desire, may even plunge the loved one into the depths of misery. Sexual love makes of the loved person an Object of appetite; as soon as that appetite has been stilled, the person is cast aside as one casts away a lemon that has been sucked dry. (*Lectures on Ethics* 163)

If . . . a man wishes to satisfy his desire, and a woman hers, they stimulate each other's desire; their inclinations meet, but their object is not human nature but sex. (*Lectures on Ethics* 164)

Why can't human love transform sexual love? Does Kant think this because he regards appetites as untransmutable original existences?

We have, one would suppose, an appetite for food *per se* that can be transformed into a taste for and appreciation of fine food. But the structure of an appetite for food remains: hunger and satiety marking its boundaries and, as we might say, the appetite itself remaining an appetite for food. (The possibility of the perversion or inversion of an appetite, or instinct, does not change this.) So the appetite for sex can develop into an appetite for refined or exotic sex, but it is still an appetite for sex in the sense that its object is pleasure of a certain sort to be had from the sexual use of someone's body.¹⁵

Human love is an interest in a person as an agent with a life (with moral capacities and so forth). Although it could include an interest in another's having sexual satisfaction as a component of a good life, it does not have as its object pleasure and so is not structured by the analogues of hunger and satiety. Kant says: "Sexual love

can, of course, be combined with human love and so carry with it the characteristics of the latter, but taken by itself and for itself, it is nothing more than appetite" (*Lectures on Ethics* 163). "Carry with it" is not the language of transformation. Frequently we love as persons those we love sexually, and our concern for their well-being may control and shape the expression of sexual appetite. But for Kant this gets us no further than the fact that absent property, we might not take what was of use to someone we cared about. This would not give the loved one claim or title to the object of use, just as our human love cannot transform the object of sexual love into a subject (a person).

Kant makes the further claim that in satisfying sexual desire one party surrenders use of a part for the purposes of gain or pleasure, giving the other a right of disposal¹⁶ over that part. And since "a human being is a unity," the right gained thereby is over the whole person. But we cannot have rights of disposal over persons because persons are not things. That is why agreement about use does not provide a remedy: The problem is not one of force. One cannot give a right of disposal over a part for it is not a right we have. Thus, Kant argues, unless it is possible to have rights of disposal over persons, sexual activity is morally impermissible.¹⁷

In a full treatment of Kant's views, three claims would need to be examined: first, that objectification leads to a right of disposal; second, that rights over a part of the body are in effect rights over the whole and that a right of disposal of the sexual part is a right of disposal over the person; and third, that we are not the sorts of things over which anyone (including ourselves) can have rights of disposal.

A right of disposal, I presume, is a right of free use (in the sense of having something at my disposal). We can take it as obvious that, and why, Kantian theory holds that we cannot freely use persons in this sense. But how do we get to a right of disposal from the fact that sexual interest is in and for a body (or for the pleasure to be had from sexual engagement with another's sexuality)? Kant seems to take it as given that sexual activity involves mutual surrender, so that to enjoy a person sexually is to enjoy a thing given to us. (The difficulty in getting agreement on limits of use for things we possess suggests the intuition that if an object is in my power, that I have a right of disposal over it is not without foundation.) Certainly there is much talk of possession, surrender, and use in erotic language.

In any case, I am here less interested in defending the odd metaphysics of Kant's claims about parts and wholes than I am in marking the fact that just such views about sexual use are integral to the kind of feminist argument both Dworkin and MacKinnon present. Their central programmatic task is to demonstrate that the effect of sexual regard or relationship cannot be partial—mere sex—but that the very categories of gender, of who we are as men and as women, are functions of objectifying sexual regard.

Although on Kant's view sexuality creates a morally impermissible relation between the sexual partners, it is neither desirable nor possible to forbid sexual activity. Sexual intercourse is the now standard (then necessary) means for procreation, and love relations with sexual components are essential to happiness (for many). So we have a kind of relationship that we cannot forego (as the kind of beings we are) but

that is not morally acceptable. Marriage is supposed to solve the problem—resetting the moral stage so that there is a morally permissible way for sexual life to take place without inevitable moral loss or danger.

III

We have reason to be dubious about any social institution's ability to restore or preserve what may be threatened or lost in intimate relations. We have special reasons to be dubious about the institution of "marriage" as it reflects and sustains just the exploitative and agency-demeaning features of moral concern. Rather than support the institution of marriage as-we-know-it, Kantian ethics should give reasons to judge that institution impermissible.

The institution of marriage as-we-know-it involves the State's acknowledgment of only certain relationships, entered into in only certain ways, creating thereby certain State-enforced rights and liabilities. It allows the State some security about property and children—someone is responsible for getting the kids to school and in condition for minimal socialization, and property is cared for through the regulatory role of the divorce courts.¹⁸ Marriage encourages the creation of small, isolated, economically insecure units vulnerable to the vagaries of the market. It protects the chief arena of abuse of women and children, it endorses sexual inequality (protecting the sexual and social advantages of men), and it penalizes gay men and lesbians. The institution of marriage as-we-know-it is a nasty thing. If sexuality carries a moral burden, marriage hardly seems to be the arena of its resolution.

Before thinking that what is needed is a reform of the institution of marriage, we want to wonder about the very idea of casting a social institution in this sort of morally creative role. Is it even possible to have a legal form of marriage that does not merely reinforce the moral damage of sexual relations between men and women as-we-know-them? How could the legal construction of the relationship re-create what practice has destroyed (or preserve what is endangered)? Kant has two different answers to these questions, one of which deserves some further attention.

In his *Lectures on Ethics*, Kant argues that

the sole condition on which we are free to make use of our sexual desire depends upon the right to dispose over the person as a whole—over the welfare and happiness and generally over all the circumstances of that person. . . . [I obtain these rights over the whole person (and so have the right of sexual use of that person) I only by giving the person the same rights over myself. This happens only in marriage. Matrimony is an agreement between two persons by which they grant each other equal reciprocal rights, each of them undertaking to surrender the whole of their person to the other with a complete right of disposal over it.] (167)

Now the part that does the work:

But if I yield myself completely to another and obtain the person of the other in return, I win myself back; I have given myself up as the property of another, but in turn I take that other as my property, and so win myself back again in winning the person whose property I have become. In this way the two persons become a unity of will. . . . Thus sexuality leads to a union of human beings, and in that union alone is its exercise possible. (167)

Marriage solves the problem because each grants the other “equal reciprocal rights” and no one loses anything. Why suppose that if I give myself and get someone else back, that I get myself? Perhaps it goes this way: I give myself (or rights over myself) and you give yourself; but since you have me, in giving yourself to me you give me back to me. And so on. The idea might be this: Suppose I give you every pencil I own or will come to own knowing that (or on condition that) you will give me every pencil that you own or will come to own. One could say that we thereby create a community of pencil ownership—a unity of will about pencils.

But even if this makes some sense, a unity of will out of two persons or a “union of human beings” does not. Although one sees what Kant may have wanted—a kind of romantic blending of self into a new and larger self—it is not possible for him to get what he wants. If the problem with sex is that we are embodied selves, and use of the body implies title over a self, things are not greatly improved if we become parts of a new self that has two bodies (and sex would then be what?). The threat to the autonomous agent would seem to be increased rather than resolved in the surrender to the new union of persons, a threat that is especially acute to women, who are not likely to share equally in the direction of the new union.¹⁹

Furthermore, the account is a mess in Kant's own terms—for it does not even make sense to “grant reciprocal rights” over a self when one's self is not the sort of thing over which there can be rights. Nor is there any need for marriage as a public institution, because the granting of reciprocal rights, if one had them, would be a matter of free contract.

The argument for marriage in the *Rechtslehre* is interestingly different and possibly more fruitful. I must admit that I do not think this because of any new long account it contains (most of the *Rechtslehre*'s remarks on marriage can be read as compatible with what is said in the *Lectures on Ethics*), but because the account of marriage fits the general pattern of argument for necessary political institutions that is the heart of the *Rechtslehre*'s program.

The problem leading to the institution of marriage in the *Rechtslehre* is once again the reduction of person to thing—the surrender of self (rational personhood)—inherent in sexual activity. What goes in as individuals with an interest in reciprocal possession of their sexual faculties comes out this time, not as a private union of wills, but as two equal juridical persons. That is, within the State (or civil society) it is possible to reestablish and secure the equal autonomy of the partners in a sexual relationship by defining them (and so setting the conditions of their sexual relationship) under the law as equal legal persons, giving them new public natures,²⁰ as it were, conventionally called “husband” and “wife.” This version of Kantian marriage is not

(and cannot be) an agreement between two persons; nor can it be any other possible private act. The idea seems to be that through mediation by law, the natural tendencies to objectification, and so dominance and exploitation, in sexual relations are blocked. The institution of marriage in this way resolves the moral difficulty arising from sexual activity.

To make such an idea even intelligible, we must return to the *Rechtslehre* account of property. In a natural state (without Law), exclusion by force of anyone from use of anything is wrong; yet without the possibility of rightful exclusion, secure use is impossible. Since effective agency requires secure use, a system of rights and coercive enforcement that define conditions of legitimate possession and use is necessary and justified. We need an *institution* of property—conventions, conditions of enforcement—because there is no natural “right way” to allocate possession. But not just any institution of property will do. The justification of possession—that it is necessary for effective agency—puts constraints on the kind of institution of property that is permissible. Thus one person or one class owning everything is not.

The justification of the juridical institution of marriage should work the same way. But though it may be easy to see why property requires an institution—rules to determine legitimate possession, transfer, limits of use—it is less clear where an institution fits into the resolution of the moral problem of sexuality. We need to explain how a system of rights and enforcement could serve as the moral condition of sexual activity in a way that eliminates or resolves objectification.

Accepting a legal relation as a condition of sexual activity is to give up the freedom to act as appetite directs. But if the sexual appetite makes me regard my partner as an object, how can legal prohibition of certain sorts of use affect how I regard him? The *Rechtslehre* gives no guidance. We can, however, support the *Rechtslehre*'s claim with a somewhat conjectural answer constructed from other Kantian theses about appetite and practical rationality.

Kant sees the appetites as original (biological) springs to activity. As rational beings, we are neither constrained by the trajectory of appetitive desire nor by a conception of the object of desire as object of desire. I may be moved to play tennis because I need an outlet for aggressive energy. I may choose to play it as a pleasant social activity in which I also get exercise. Because I am a rational being, the latter interests are able to regulate my activity (controlling how and with whom I play), though there may be some tension with my natural and motivating aggressivity that needs to be monitored and controlled. Though a bit oversimplified, this example offers a model for understanding the possible role of institutions in transforming appetite-driven regard.

Morality requires that I treat other people as persons, not things. I may have and act on appetites that, if I identified with them, would lead me to regard others as things. As a rational being I need not do so. If what I desire is that you perform some useful-to-me service, morality requires that I take your voluntary participation as a condition of your action. Whatever my instrumental interest in you, I may not regard you as a mere instrument. This is not a matter of attitude or feeling. Regarding you as a person is accepting a set of constraints on my actions: I may not use force or deceit to

gain your compliance with my will. Thus Kant might think: Although the sexual appetite leads me to regard and so treat another as a thing suitable to yield sexual pleasure, morality opposes this. One may grab a piece of fruit seeking its sweetness; one may not "grab" a person for sexual pleasure. That is rape.

If this is the problem of objectification, regulative *moral* principles resolve it. Why, then, does Kant think a juridical institution (marriage) is necessary? The puzzle is about the need for rules (law). In the cases of possession and contract, we must have mutually recognized property rights and mutually recognized rules governing promise and delivery. Because there is no uniquely right way to accomplish these morally necessary tasks, rules must be set; the law of property and contract will be to some extent arbitrary (the terms of "first acquisition," the conditions of adverse possession, and so on). If the justification for the institution of marriage is on parallel grounds, it must be that what is involved in regarding one's sexual partner as a person is also to some extent open.

The purpose of the institution of marriage is to block the transformation of regard that comes with sexual appetite. The point is not just to put force behind moral prohibitions on abuse (though there is that); we can treat another "well" without acknowledging his or her moral status (perhaps as a highly valued object or pet). Other appetites (for example, aggression) may tempt one to act impermissibly, but they can be deflected, regulated, or simply rejected as motives. The special problem of sexuality is that what we want is to satisfy it, even though, Kant thinks, it cannot both be satisfied and not affect the status of our regard for our partner. Then how is it possible to secure the moral status of the partners by introducing juridical marriage as the necessary moral condition of sexual activity? In order to permissibly satisfy sexual appetite, both parties must first accept a juridical relationship of rights and responsibilities. The particular rights and responsibilities (and their correlative legitimate expectations) are to some extent arbitrary, though as before, given the moral basis of the legal institution, not any set of rights and responsibilities will do the job.²¹ What they are to do is to secure regard for one's partner as a person with a life, which is what the sexual appetite by itself causes one to disregard.

Marriage does not do the job of love. Human love—the concern for the life and well-being of another—is responsive to the particulars of individual need and interest. Marriage introduces rules of care and support that are, by the nature of rules, without such sensitivity. But human love will also not do the job of marriage, for the need to which the lover responds may itself undermine autonomy. The rules are not so much to restrain or oblige action as to construct moral regard. That is, they make the sexual interest in another person possible only where there is secure moral regard for that person's life, and they do this by making the acceptance of obligations with respect to that person's welfare a condition of sexual activity.

What is remarkable in Kant's account is the argument to the necessity of public rules for what we think of as the most private relationships. When sexuality and marriage are thought of as private, they are conceptually prior to any State institution of marriage that protects and regulates some but not all sexually based relations. So we get a kind of Lockean story of some consent-based relationships that are of regulatory

concern to the State, usually because the family is the natural vehicle on which inheritance travels and because of children. However, it is the preexisting marital relationship that the State protects and that determines the limits of public authority. Thus the State may require the education of children (which is in its interest) and regulate the terms of divorce (which concerns the fate of property), but it may not interfere with domestic activity (which is private and prior to its concern).

With Kantian property, the State has no special problem about taxing for welfare or education since the right to property is an institution-based right, grounded in the conditions of effective human agency. If a legitimate sexual relationship can exist only within a juridical relationship, legal limitations on the form of the relationship (permissible demands, support, responsibility, and the like) would not be any invasion of privacy because the sexual relation, by its nature, is not a permissible private relation. This would not be marriage as-we-know-it. So, for example, Kantian marriage offers no conceptual barrier to defining and prohibiting spousal rape, battering, and so on. (The fact that in marriage as-we-know-it spousal rape has been held to be impossible and wife beating at times a husband's prerogative provides strong evidence in support of the objectification thesis.)²²

IV

I must admit that at different times much of this discussion has seemed to me to be simply absurd. Then on reflection I find that I am not so sure. First there is the uncomfortable claim that sexual activity is unavoidably morally problematic. But given heterosexual sex as-we-know-it, this does not seem so farfetched. So long as sex is inter-leaved with power, so-called private sex is morally difficult. Date rape, battering, sexual harassment, are not aberrations. Where there seems room for argument is over our individual or joint capacity to have "good" sex (morally good, that is). Here I am sympathetic with Kant's remarks that things aren't really changed by living in a community of saints—so long as they are human saints. The structures latent in human sexual relationships set the moral machinery going. If love is not sufficient to secure respect for persons within sexuality (responsiveness to another will not do if the response may be to another's self-abnegating surrender), then perhaps the only way out is through the conventions of a healthy public culture. (This is the flip side of the feminist concern with the social construction of gender and sexuality.)

On the other hand, one might think that the very fact of sexual activity as in some sense public activity (available for scrutiny and interference), requiring a prior juridically defined relationship, would gravely distort and damage sexual life. Certainly what we know of the practice of such scrutiny is that it has been both puritanical and comfortably tolerant of the sexual abuse of women. But that is not quite the issue. I take the point rather to be this: If it turned out that violence is a natural or normal expression of the sexual appetite, and that violence is not compatible with equal moral regard for persons, then violence would be prohibited (morally) and the State could and should interfere with sex (that aspect of sexual expression). Such pro-

tection would not require bedroom police. It offers grounds for complaint, prevention, and redress on the one hand and terms of public sexual education on the other. In this sense, sexuality would indeed be distorted, if by that is meant that its permissible forms of expression are to be other than they would be without juridical rules, public education, and so forth. That does not seem to be altogether a bad thing, given the forms of sexual expression as-we-know-them. But might not there also be something of value that would be lost if sexual expression were not utterly private and spontaneous? Maybe so. But there is no argument that morality must leave everything as it finds it. If we were not drawn to act impermissibly by what we value, we would have no need for moral constraint.

There is, in Kant's account, a challenge to the inherent "goodness" of the sexual appetite that may disturb us. It is his general view of the appetites as causal impulses, neither good nor bad. Acting to satisfy them must be regulated by the principles of practical rationality independent of their capacity to give pleasure. The sexual appetite differs from the others in that its object (normally) is a person. Hunger gives us an interest in food, but the relation to the food substance falls under moral regulation only when what we would eat is someone else's property, when resources are scarce, and so on. Moral concern with sexual activity does not arise from its contingent intersection with moral requirements from other domains.

There may be deeper discomfort at the idea that moral difficulties that (appear to) arise interpersonally are not to be resolved interpersonally, but require the alienating "third term" of a juridical relationship. I do not find it hard to believe that personal "good faith" efforts can be inadequate to resolve moral difficulties that are supported by the social world in which we gain our conceptions of self and other. This, of course, does not mean that there is no difference between decency and violence in sexual relations, or that it is not worth struggling for something better. But I find myself persuaded, if not by Kant then by Dworkin and MacKinnon, that the distance between decency and violence is not the chasm we sometimes persuade ourselves it is.

The chief obstacle for me in Kant's account comes from doubt about the idea of "moral institutions"—that is, institutions that transcend the power relations that reside in the practices they "govern." What is taken to be natural—the structure of sexuality that sets the terms of the moral problem—is already a social construction. How can introducing an institution to protect the moral interests of sexual partners do other than preserve the essential social nature of those interests and the embedded relations of power and exploitation?²³ A juridical institution seems too external to the moral difficulty if what is needed is a transformation of sexuality itself. But if sexuality is not "natural," then it is less clear why the reconstruction of social relations could not be transformative—and from the "outside." Kant's failure, I would say, was in thinking (if he did) that juridical relations could secure individual autonomy without the deep transformation of social relations and the family.

That Kant's account does not resolve the problem I now think he saw surprises me far less than the discovery that at least some feminists agree that it is this problem that bears worrying about. To those who see the law as a positive avenue for radical social change, Kant may provide an unexpected source of theoretical insight and support.²⁴

Notes

1. The philosophically neutral "we" should itself be a source of concern here.
2. This is not a connection I went looking for. A year and a half ago I was teaching Kant's political philosophy and participating in a study group that was reading Andrea Dworkin and Catharine MacKinnon. In the midst of a class discussion I found that I could paraphrase Kant's views of sexuality using Dworkin and MacKinnon's analysis. It seemed at once a perverse and right thing to do. I'm not sure I yet know which. This essay was supposed to help me figure that out.
3. The *Groundwork* argues this way: If obligation is possible, universalizability is the form of moral judgment (no action is permissible whose maxim cannot be willed a universal law). If the requirement of universalizability sets a possible reason for action, then the will must be free. Only a will that is free (capable of being motivated by considerations of practical rationality alone) can take universalizability as a reason for action. It remains to be shown that no other explanation of obligation is possible (a task taken up by the *Critique of Practical Reason*).
4. The main argument of the *Rechtslehre* is found in John Ladd's translation, *The Metaphysical Elements of Justice* (Indianapolis: Bobbs-Merrill, 1965), secs. 1–9. Ladd, however, omitted sections 10–35 of the original text that present the details of Kant's views on property, contract, and rights over persons. In particular, sections 24–30 contain Kant's account of marriage and the family. A nineteenth-century English translation of the complete *Rechtslehre* is available in W. Hastie's *The Philosophy of Law* (Edinburgh, 1887). Page numbers are to the Ladd translation; section numbers refer to the Hastie (and the original German). (Since this chapter was completed, Cambridge University Press has published Mary Gregor's new translation of *The Metaphysics of Morals*. It contains the complete text of the *Rechtslehre*.)
5. "[I]t is a duty of justice to act towards others so that external objects (usable objects) can also become someone's property" (*Rechtslehre*, p. 60). That is, "if it must be *de jure* possible to have an external object as one's own, then the subject must also be allowed to compel everyone else with whom he comes into conflict over the question of whether such an object is his to enter, together with him, a society under a civil constitution" (*ibid.*, p. 65).
6. Kant is almost always talking about sexual activity between consenting adult men and women. This aspect of his critique of sexuality would apply equally to same-sex sexual relations—though Kant has other sorts of "unnaturalness" objections to them.
7. It is this—and not sexual squeamishness—that is the basis for his claim that engaging in sexual relations without marriage is not morally possible.
8. Kant, *Lectures on Ethics*, tr. Louis Infield (New York: Harper Torchbooks, 1963), p. 164.
9. Andrea Dworkin, *Intercourse* (New York: Free Press, 1987). Quotations are from pp. 122–123, 140–141, and 142–143, respectively.
10. Some recent university sexual harassment policies may reason in a similar fashion in adopting a presumption invalidating apparent consent when there are sexual relations between persons in positions of unequal power. One could understand this simply as a strong disincentive to engage in such activity. A more suggestive reading finds such policies taking to heart the impermissibility of sexual relations where conditions of equality are absent.
11. "Pornography is not imagery in some relation to a reality elsewhere constructed. It is not distortion, reflection, projection, fantasy, representation, or symbol either."

It is sexual reality." Catharine MacKinnon quoted in Christine Littleton, "Feminist Jurisprudence: The Difference Method Makes," *Stanford Law Review* 41 (February 1989): 772.

12. Dworkin, *Intercourse*, p. 136.

13. Andrea Dworkin and Catharine MacKinnon together drafted and worked for the adoption of a model antipornography ordinance in Minneapolis. They share a view of pornography as a central, not marginal, aspect of sexuality, and both argue that sexual activity is an arena for the expression of masculine power and domination. Dworkin has more overtly Kantian commitments to a conception of the person that sexual practice debases.

14. Catharine A. MacKinnon, *Towards a Feminist Theory of the State* (Cambridge, Mass.: Harvard University Press, 1989), p. 151.

15. Transformations of the sexual appetite to having an object that is not the body of another can be ignored here.

16. There is some ambiguity in Kant's moral charge: Are we brought by the sexual appetite to regard our partners as objects, *as if* we had rights of disposal over them, or is it that in sexual relations we *are* objects for each other over which we do have rights of disposal?

17. "The sole condition on which we are free to make use of our sexual desire depends upon the right to dispose over the person as a whole—over the welfare and happiness and generally over all the circumstances of that person" (*Lectures on Ethics*, pp. 166–167).

18. As a law professor friend remarked, from the State's point of view, marriage is about divorce.

19. Stories such as this are the basis of Carol Pateman's critical analysis of the role of marriage in liberal political theory. See her *Sexual Contract* (Stanford, Calif.: Stanford University Press, 1989).

20. I am thinking of the idea of a "second nature" as discussed in Kant's *Conjectural Beginning of Human History*, in *On History*, ed. L. W. Beck (Indianapolis: Bobbs-Merrill, 1963), pp. 53–68.

21. Kant thinks monogamous heterosexual marriage is the only such institution, but the logic of his argument should at most establish it as one possibility or variant.

22. Since on Kant's account the moral difficulty is with sexuality per se and not male-female sex (he would see gender domination as a contingent function of strength made possible by the objectification inherent in sexual relations), same-sex relationships would also be morally possible only with marriage. And since Kant does not hold that the State has an interest in sexual activity because or only when it is procreative (see *Rechtslehre*, see. 24), there is also no conceptual barrier to same-sex marriage and a strong argument for it. Of course Kant opposes same-sex relations on the grounds that they are unnatural—as unable to promote "nature's" procreative purposes (*Lectures on Ethics*, p. 170)—so I do not mean to suggest that he would endorse my extension of his views.

23. Marx, in his *On the Jewish Question*, offers a similar criticism of the idea of the "rights of man"—which extend rights that had been the province of class privilege to all people—on the grounds that the very idea of rights protects the essential framework of private property and social isolation that stands in the way of real human emancipation.

24. My thanks to Charlotte Witt, whose insightful comments on the earlier draft of this paper helped me learn from my own project; to Margaret Radin, for teaching with me in a way that made it possible to think about new ideas in old places; and to the participants in the University of New Hampshire's symposium on "Feminism and Rationality," for two days of conversation that removed some of the sense of oppressive opposition between the ambitions of feminism and philosophy.

2002
Second Edition

FEMINIST THEORY AND POLITICS

Virginia Held and Alison Jaggar,
Series Editors

A Mind of One's Own:
Feminist Essays on Reason and Objectivity, Second Edition,
edited by Louise M. Antony and Charlotte Witt

Rediscovering Women Philosophers:
Philosophical Genre and the Boundaries of Philosophy,
Catherine Villanueva Gardner

Globalizing Care: Ethics, Feminist Theory,
and International Relations,
Fiona Robinson

The Power of Feminist Theory,
Amy Allen

The Feminist Standpoint Revisited and Other Essays,
Nancy C.M. Hartsock

Feminists Rethink the Self,
edited by Diana Tietjens Meyers

Revisioning the Political:
Feminist Reconstructions of Traditional Concepts in Western Political Theory,
edited by Nancy J. Hirschmann and Christine Di Stephano

Care, Autonomy, and Justice: Feminism and the Ethic of Care,
Grace Clement

Lee

A MIND OF ONE'S OWN

Feminist Essays on
Reason and Objectivity

Edited by Louise M. Antony and Charlotte E. Witt



A Member of the Perseus Books Group