

Kant

The Metaphysics of Morals

Transition from what is mine or yours in
a state of nature to what is mine or
yours in a rightful condition generally

6:305-8

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an observer is going to look at the sum of his offenses than if they are merely censured one after the other (and the earlier ones have been forgotten). – But a court can certainly not demand swearing to a *belief* (*de credulitate*). For in the first place it involves a self-contradiction; this thing intermediate between opinion and knowledge is the sort of thing that one can dare to bet on but certainly not to swear to. Second, a judge who requires swearing to a belief from a party in order to find out something relevant to his purpose, even if this purpose is the common good, commits a grave offense against the conscientiousness of the person taking the oath, partly by the thoughtlessness to which the oath misleads him and by which the judge defeats his own purpose, partly by the pangs of conscience a human being must feel, when he can find a certain matter very likely today, considered from a certain point of view, but quite unlikely tomorrow, when he considers it from a different point of view. A judge therefore wrongs one whom he constrains to take such an oath.

*Transition from what is mine or yours
in a state of nature to what is mine or yours
in a rightful condition generally*

§ 41.

A rightful condition is that relation of human beings among one another that contains the conditions under which alone everyone is able to *enjoy* his rights, and the formal condition under which this is possible in accordance with the idea of a will giving laws for everyone^r is called public justice. With reference to either the possibility or the actuality or the necessity of possession of objects (the matter of choice) in accordance with laws, public justice can be divided into *protective justice* (*iustitia tutatrix*), *justice in acquiring from one another* (*iustitia commutativa*), and *distributive justice* (*iustitia distributiva*). – In these the law says, *first*, merely what conduct is intrinsically *right*^s in terms of its form (*lex iusti*); *second*, what [objects] are capable of being covered externally by law, in terms of their matter, that is, what way of being in possession is *rightful*^t (*lex iuridica*); *third*, what is the decision of a court in a particular case in accordance with the given law under which it falls, that is, what is *laid down as right*^u (*lex iustitiae*). Because of this a court is itself called the *justice* of a country, and whether such a thing exists or does not exist is the most

^r eines allgemein gesetzgebenden Willens

^s recht

^t dessen Besitzstand rechtlich ist

^u Rechtes

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important question that can be asked about any arrangements having to do with rights.

A condition that is not rightful, that is, a condition in which there is no distributive justice, is called a state of nature (*status naturalis*). What is opposed to a state of nature is not (as Achenwall thinks) a condition that is *social* and that could be called an artificial condition (*status artificialis*), but rather the *civil* condition (*status civilis*), that of a society subject to distributive justice. For in the state of nature, too, there can be societies compatible with rights (e.g., conjugal, paternal, domestic societies in general, as well as many others); but no law, "You ought to enter this condition," holds a priori for these societies, whereas it can be said of a *rightful* condition that all human beings who could (even involuntarily)^v come into relations of rights with one another *ought* to enter this condition.

The first and second of these conditions can be called the condition of *private right*, whereas the third and last can be called the condition of *public right*. The latter contains no further or other duties of human beings among themselves than can be conceived in the former state; the matter of private right is the same in both. The laws of the condition of public right, accordingly, have to do only with the rightful form of their association (constitution), in view of which these laws must necessarily be conceived as public.

The *civil union* (*unio civilis*) cannot itself be called a *society*, for between the *commander*^w (*imperans*) and the *subject* (*subditus*) there is no partnership. They are not fellow-members: one is *subordinated to*, not *coordinated with* the other; and those who are coordinate with one another must for this very reason consider themselves equals since they are subject to common laws. The civil union is not so much a society but rather *makes* one.

6:307

§ 42.

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,^x you ought to leave the state of nature and proceed with them into a rightful

^v *unwillkürlich*

^w *Befehlshaber*. Kant has not yet discussed the relation of the legislative, executive, and judicial authorities in a state. When he does so, in 6:316, the (*Ober*)*befehlshaber* is associated with the executive authority. Here, however, as in § 47, Kant is apparently using the word simply in the sense of "a superior in general."

^x Grammatically, the relation of "with all others" to the rest of the sentence is ambiguous: the phrase could modify "proceed." My reasons for the above translation are, first, Kant's thesis of "original possession in common" of the earth's habitable surface by the whole human race and, second, the fact that the heading of § 41 indicates that § 42 is part of the transition from Private Right to the whole of Public Right. As Kant has said (6:266), until "the original contract" extends to the whole human race, acquisition will always remain provisional.

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condition, that is, a condition of distributive justice. – The ground of this postulate can be explicated^y analytically from the concept of *right* in external relations, in contrast with *violence* (*violentia*).

No one is bound to refrain from encroaching on what another possesses if the other gives him no equal assurance that he will observe the same restraint toward him. No one, therefore, need wait until he has learned by bitter experience of the other's contrary disposition; for what should bind him to wait till he has suffered a loss before he becomes prudent, when he can quite well perceive within himself the inclination of human beings generally to lord it over others as their master (not to respect the superiority of the rights of others when they feel superior to them in strength or cunning)? And it is not necessary to wait for actual hostility; one is authorized to use coercion against someone who already, by his nature, threatens him with coercion. (*Quilibet praesumitur malus, donec securitatem dederit oppositi.*)^z

Given the intention to be and to remain in this state of externally lawless freedom, men do *one another* no wrong at all when they feud among themselves; for what holds for one holds also in turn for the other, as if by mutual consent (*uti partes de iure suo disponunt, ita ius est.*)^a But in general they do wrong in the highest degree* by willing to be and to remain in a condition that is not rightful, that is, in which no one is assured of what is his against violence.

* This distinction between what is merely formally wrong and what is also materially wrong has many applications in the doctrine of right. An enemy who, instead of honorably carrying out his surrender agreement with the garrison of a besieged fortress, mistreats them as they march out or otherwise breaks the agreement, cannot complain of being wronged if his opponent plays the same trick on him when he can. But in general they do wrong in the highest degree, because they take away any validity from the concept of right itself and hand everything over to savage violence, as if by law, and so subvert the right of human beings as such.

^y entwickeln

^z He is presumed evil who threatens the safety of his opposite.

^a The party who displaces another's right has the same right himself.

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Public right, section I, The right of a
state

6:311-18

Public right

Section I.

The right of a state.

§ 43.

The sum of the laws which need to be promulgated generally in order to bring about a rightful condition is *public right*. – *Public right is therefore a system of laws for a people, that is, a multitude of human beings, or for a multitude of peoples, which, because they affect one another, need a rightful condition under a will uniting them, a constitution (constitutio), so that they may enjoy what is laid down as right.* – This condition of the individuals within a people in relation to one another is called a *civil condition* (*status civilis*), and the whole of individuals in a rightful condition, in relation to its own members is called a *state* (*civitas*). Because of its form, by which all are united through their common interest in being in a rightful condition, a state is called a *commonwealth* (*res publica latius sic dicta*).^b In relation to other peoples, however, a state is called simply a *power* (*potentia*) (hence the word *potentate*). Because the union of the members is (presumed to be) one they inherited, a state is also called a *nation* (*gens*). Hence, under the general concept of public right we are led to think not only of the right of a state but also of a *right of nations* (*ius gentium*).^c Since the earth's surface is not unlimited but closed, the concepts of the right of a state and of a right of nations lead inevitably to the idea of a *right for a state of nations* (*ius gentium*) or *cosmopolitan right* (*ius cosmopoliticum*). So if the principle of outer freedom limited by law is lacking in any one of these three possible forms of rightful condition, the framework of all the others is unavoidably undermined and must finally collapse.

§ 44.

It is not experience from which we learn of the maxim of violence in human beings and of their malevolent tendency to attack one another before external legislation^d endowed with power appears, thus it is not

^b republic in the broad sense

^c The English terms “municipal law” and “international law” might be used here, if it were kept in mind that Kant’s concern is only with a priori principles. However, given the meaning of *Recht* specified in AK 6: 229, it seems preferable to continue using this term throughout: *das öffentliche Recht* or “public right.”

^d Although Kant continues to use *Gesetzgebung* and *Gesetzgeber*, which were translated in Private Right as “lawgiving” and “lawgiver,” he is now discussing a condition in which there are positive laws. Hence “legislation” and “legislator” seem appropriate.

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some deed^e that makes coercion through public law necessary. On the contrary, however well disposed and law-abiding human beings might be, it still lies a priori in the rational idea of such a condition (one that is not rightful) that before a public lawful condition is established individual human beings, peoples and states can never be secure against violence from one another, since each has its own right to do *what seems right and good to it* and not to be dependent upon another's opinion about this. So, unless it wants to renounce any concepts of right, the first thing it has to resolve upon is the principle that it must leave the state of nature, in which each follows its own judgment, unite itself with all others (with which it cannot avoid interacting), subject itself to a public lawful external coercion, and so enter into a condition in which what is to be recognized as belonging to it is determined by *law* and is allotted to it by adequate *power* (not its own but an external power); that is, it ought above all else to enter a civil condition.

It is true that the state of nature need not, just because it is natural, be a state of *injustice* (*iniustus*), of dealing with one another only in terms of the degree of force each has. But it would still be a state *devoid of justice* (*status iustitia vacuus*), in which when rights are *in dispute* (*ius controversum*), there would be no judge competent to render a verdict having rightful force. Hence each may impel the other by force to leave this state and enter into a rightful condition; for although each can acquire something external by taking control of it or by contract in accordance with its *concepts of right*, this acquisition is still only *provisional* as long as it does not yet have the sanction of public law, since it is not determined by public (distributive) justice and secured by an authority putting this right into effect.

If no acquisition were cognized as rightful even in a provisional way prior to entering the civil condition, the civil condition itself would be impossible. For in terms of their form, laws concerning what is mine or yours in the state of nature contain the same thing that they prescribe in the civil condition, insofar as the civil condition is thought of by pure rational concepts alone. The difference is only that the civil condition provides the conditions under which these laws are put into effect (in keeping with distributive justice). – So if external objects were not even *provisionally* mine or yours in the state of nature, there would also be no duties of right with regard to them and therefore no command to leave the state of nature.

§ 45.

A *state* (*civitas*) is a union of a multitude of human beings under laws of right. Insofar as these are a priori necessary as laws, that is, insofar as they

^e *Factum*

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follow of themselves from concepts of external right as such (are not statutory), its form is the form of a state as such, that is, of *the state in idea*, as it ought to be in accordance with pure principles of right. This idea serves as a norm (*norma*) for every actual union into a commonwealth (hence serves as a norm for its internal constitution).^f

Every state contains three *authorities* within it,^g that is, the general united will consists of three persons (*triā politica*): the *sovereign authority* (sovereignty)^h in the person of the legislator; the *executive authority* in the person of the ruler (in conformity to law); and the *judicial authority* (to award to each what is his in accordance with the law) in the person of the judge (*potestas legislatoria, rectoria et iudicaria*). These are like the three propositions in a practical syllogism: the major premise, which contains the *law* of that will; the minor premise, which contains the *command* to behave in accordance with the law, that is, the principle of subsumption under the law; and the conclusion, which contains the *verdict* (sentence), what is laid down as right in the case at hand.

§ 46.

The legislative authority can belong only to the united will of the people. For since all right is to proceed from it, it *cannot* do anyone wrong by its law. Now when someone makes arrangements about *another*, it is always possible for him to do the other wrong; but he can never do wrong in what he decides upon with regard to himself (for *volenti non fit iniuria*).ⁱ Therefore only the concurring and united will of all, insofar as each decides the same thing for all and all for each, and so only the general united will of the people, can be legislative.

6:314

The members of such a society who are united for giving law (*societas civilis*), that is, the members of a state, are called *citizens of a state* (*cives*). In terms of rights, the attributes of a citizen, inseparable from his essence (as a citizen), are: lawful *freedom*, the attribute of obeying no other law than that to which he has given his consent; civil *equality*, that of not recogniz-

^f (also *im Inneren*)

^g Or “powers” [*Gewalten*]. In §43 and §44 Kant used *Macht* (*potentia*), which was translated as “power.” He now begins to use *Gewalt* (*potestas*). But once he distinguishes the three “powers” or “authorities” within a state, it is only the executive authority that has “power” in one sense, i.e., it is the authority which exercises coercion.

^h *Herrschergewalt* (*Souveränität*). In this initial distinction of the three authorities within a state Kant specifies that “sovereignty” belongs to the legislative authority. Subsequently he introduces, without explanation, such a variety of terms that it is not always clear which of the three authorities is under discussion. I have used “sovereign,” without noting the word used, only when Kant specifies *Souverän*. When “sovereign” is used for *Herrscher* or *Beherrisher*, a note is provided. Otherwise I have used the more general “head of state,” except for passages that might indicate that one (physical) person has both legislative and executive authority.

ⁱ no wrong is done to someone who consents

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ing among the *people* any superior with the moral capacity^j to bind him as a matter of right in a way that he could not in turn bind the other; and third, the attribute of civil *independence*, of owing his existence and preservation to his own rights and powers as a member of the commonwealth, not to the choice of another among the people. From his independence follows his civil personality, his attribute of not needing to be represented by another where rights are concerned.

The only qualification for being a citizen is being fit to vote. But being fit to vote presupposes the independence of someone who, as one of the people, wants to be not just a part of the commonwealth but also a member of it, that is, a part of the commonwealth acting from his own choice in community with others. This quality of being independent, however, requires a distinction between *active* and *passive* citizens, though the concept of a passive citizen seems to contradict the concept of a citizen as such. – The following examples can serve to remove this difficulty: an apprentice in the service of a merchant or artisan; a domestic servant (as distinguished from a civil servant); a minor (*naturaliter vel civiliter*); all women and, in general, anyone whose preservation in existence (his being fed and protected) depends not on his management of his own business but on arrangements made by another (except the state). All these people lack civil personality and their existence is, as it were, only inherence. – The woodcutter I hire to work in my yard; the blacksmith in India, who goes into people's houses to work on iron with his hammer, anvil and bellows, as compared with the European carpenter or blacksmith who can put the products of his work up as goods for sale to the public; the private tutor, as compared with the school teacher; the tenant farmer as compared with the leasehold farmer, and so forth; these are mere underlings^k of the commonwealth because they have to be under the direction or protection of other individuals, and so do not possess civil independence.

This dependence upon the will of others and this inequality is, however, in no way opposed to their freedom and equality as *human beings*, who together make up a people; on the contrary, it is only in conformity with the conditions of freedom and equality that this people can become a state and enter into a civil constitution. But not all persons qualify with equal right to vote within this constitution, that is, to be citizens and not mere associates in the state. For from their being able to demand that all others treat them in accordance with the laws of natural freedom and equality as *passive* parts of the state it does not

^j *Vermögen*

^k *Handlanger*

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follow that they also have the right to manage the state itself as *active* members of it, the right to organize it or to cooperate for introducing certain laws. It follows only that, whatever sort of positive laws the citizens might vote for, these laws must still not be contrary to the natural laws of freedom and of the equality of everyone in the people corresponding to this freedom, namely that anyone can work his way up from this passive condition to an active one.

§ 47.

All those three authorities in a state are dignities,¹ and since they arise necessarily from the idea of a state as such, as essential for the establishment (constitution) of it, they are *civic dignities*. They comprise the relation of a *superior* over all (which, from the viewpoint of laws of freedom, can be none other than the united people itself) to the multitude of that people severally as *subjects*, that is, the relation of a *commander*^m (*imperans*) to *those who obey* (*subditus*). — The act by which a people forms itself into a state is the *original contract*. Properly speaking, the original contract is only the idea of this act, in terms of which alone we can think of the legitimacy of a state. In accordance with the original contract, everyone (*omnes et singuli*) within a *people* gives up his external freedom in order to take it up again immediately as a member of a commonwealth, that is, of a people considered as a state (*universi*). And one cannot say: the human being in a state has sacrificed a *part* of his innate outer freedom for the sake of an end, but rather, he has relinquished entirely his wild, lawless freedom in order to find his freedom as such undiminished, in a dependence upon laws, that is, in a rightful condition, since this dependence arises from his own lawgiving will.

6:316

§ 48.

Accordingly, the three authorities in a state are, *first*, coordinate with one another (*potestates coordinatae*) as so many moral persons, that is, each complements the others to complete the constitution of a state (*complementum ad sufficientiam*).ⁿ But, *second*, they are also *subordinate* (*subordinatae*) to one another, so that one of them, in assisting another, cannot also usurp its function; instead, each has its own principle, that is, it indeed commands in its capacity^o as a particular person, but still under the condition of the will of a superior. *Third*, through the union of both each subject is apportioned his rights.²⁶

It can be said of these authorities, regarded in their dignity, that the will

¹ *Würden*

^m *Gebeitenden*

ⁿ complement to sufficiency

^o *Qualität*

of the *legislator* (*legislatoris*) with regard to what is externally mine or yours is *irreproachable* (*irreprehensibel*); that the executive power of the *supreme ruler* (*summi rectoris*) is *irresistible*; and that the verdict of the highest judge (*supremi iudicis*) is *irreversible* (cannot be appealed).

§ 49.

6:317

The *ruler* of a state (*rex, princeps*) is that (moral or natural) person to whom the executive authority (*potestas executoria*) belongs. He is the *agent* of the state, who appoints the magistrates and prescribes to the people rules in accordance with which each of them can acquire something or preserve what is his in conformity with the law (through subsumption of a case under it). Regarded as a moral person, he is called the *directorate*, the government. His *directives* to the people, and to the magistrates and their superior (the minister) whom he charges with *administering the state* (*gubernatio*), are *ordinances* or *decrees* (not laws); for they are directed to decisions in particular cases and are given as subject to being changed. A *government* that was also legislative would have to be called a *despotic* as opposed to a *patriotic* government; but by a patriotic government is understood not a *paternalistic* one (*regimen paternale*), which is the most despotic of all (since it treats citizens as children), but one *serving the native land* (*regimen civitatis et patriae*). In it the state (*civitas*) does treat its subjects as members of one family but it also treats them as citizens of the state, that is, in accordance with laws of their own independence: each is in possession of himself and is not dependent upon the absolute will of another alongside him or above him.

So a people's sovereign⁸ (*legislator*) cannot also be its *ruler*, since the ruler is subject to the law and so is put under obligation through the law by *another*, namely the sovereign.⁹ The sovereign can also take the ruler's authority away from him, depose him, or reform his administration. But it cannot *punish* him (and the saying common in England, that the king, i.e., the supreme executive authority, can do no wrong, means no more than this); for punishment is, again, an act of the executive authority, which has the supreme capacity to *exercise coercion* in conformity with the law, and it would be self-contradictory for him to be subject to coercion.

Finally, neither the head of state nor its ruler can *judge*, but can only appoint judges as magistrates. A people judges itself through those of its fellow citizens whom it designates as its representatives for this by a free choice and, indeed, designates especially for each act. For a verdict (a sentence) is an individual act of public justice (*iustitiae distributivae*) performed by an administrator of the state (a judge or court) upon a subject, that is, upon someone belonging to the people; and so this act is

⁸ *Beherrsscher*

⁹ *Souverän*

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invested with no authority to assign (allot) to a subject what is his. Since each individual among a people is only passive in this relationship (to the authorities), if either the legislative or the executive authority were to decide in a controversial case what belongs to him, it might do him a wrong, since it would not be the people itself doing this and pronouncing a verdict of *guilty* or *not guilty* upon a fellow citizen. But once the facts in a lawsuit have been established, the court has judicial authority to apply the law, and to render to each what is his with the help of the executive authority. Hence only the *people* can give a judgment upon one of its members, although only indirectly, by means of representatives (the jury) whom it has delegated. — It would also be beneath the dignity of the head of state to play the judge, that is, to put himself in a position where he could do wrong and so have his decision appealed (*a rege male informato ad regem melius informandum*).^r

6:318

There are thus three distinct authorities (*potestas legislatoria, executoria, iudicaria*) by which a state (*civitas*) has its autonomy, that is, by which it forms and preserves itself in accordance with laws of freedom. — A state's *well-being* consists in their being united (*salus rei publicae suprema lex est*).^s But the well-being of a state must not be understood as the *welfare* of its citizens and their *happiness*; for happiness can perhaps come to them more easily and as they would like it to in a state of nature (as Rousseau asserts) or even under a despotic government. By the well-being of a state is understood, instead, that condition in which its constitution conforms most fully to principles of right; it is that condition which reason, *by a categorical imperative*, makes it obligatory for us to strive after.

GENERAL REMARK

On the effects with regard to rights that follow from the nature of the civil union.

A.

A people should not *inquire* with any practical aim in view into the origin of the supreme authority to which it is subject, that is, a subject *ought not to reason subtly* for the sake of action^t about the origin of this authority, as a right that can still be called into question (*ius controversum*) with regard to the obedience he owes it. For, since a people must be regarded as already united under a general legislative will in order to judge with rightful force

^r from a king badly instructed to a king to be better instructed

^s The well-being of the commonwealth is the supreme law. The saying seems to stem from Cicero *De Legibus* 3.8, *Salus populi suprema lex esto*.

^t *werkätig vernünfteln*

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The Metaphysics of Morals

Private right, Chapter I and introduction
to Chapter II (review)

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*.

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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

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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.

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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*

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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.

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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.

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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*

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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.

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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

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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.

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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.

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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-

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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*

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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.

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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

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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

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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.

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§ 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,

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^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.

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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*

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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.

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^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

Ripstein
Force and Freedom

Chapter 6

Three Defects in the State of Nature

STATES CLAIM POWERS that no private person could have. Not only can they collect taxes and imprison wrongdoers; they can impose binding resolutions on private disputes, restrict agents on grounds of public health, and regulate other aspects of social life. Defenders of limited government insist that the state's power to do these things must be subject to fundamental restrictions. Prior to any question of what factors properly *limit* the exercise of those powers, however, is the more basic question of the justification of the powers themselves: how can an institution, whose offices are filled with ordinary fallible human beings, be entitled to do things to people, or demand things of them, that none of those same human beings are entitled to do or demand on their own? As Kant puts it, all positive laws are contingent and chosen (*willkürlich*) by the persons giving them. How can one person change the normative situation of others, consistent with everyone else's entitlement to be independent of the choice of another? This is the basic question of political authority.

In this chapter, I develop Kant's account of political authority as it is presented in his account of the transition from private right to public right. Those arguments are expressed in the social contract tradition's vocabulary of a state of nature and the need to exit it. Despite this common vocabulary, Kant does not follow Hobbes or Locke in focusing on

the empirical defects of the state of nature, such as self-preference and limited knowledge. Kant's arguments are *a priori* because all internal to the concepts of acquired rights. Kant presents the state of nature as a pure system of private right, containing only the moral principles that govern interaction between private persons.¹ Understood in this pure form as a system of private rights without public law, the state of nature is morally incoherent from the standpoint of rights, in three distinct ways. First, the postulate of practical reason with regard to rights shows that acquired rights are a morally necessary extension of freedom. But, Kant will argue, it is impossible to acquire a right to anything in a state of nature. Second, rights are necessarily enforceable—a right is a title to coerce—but acquired rights cannot be enforced in a state of nature. Third, as aspects of a system of equal freedom, the application of private rights to particulars can only be determined in accordance with standards that are not unilateral exercises of the judgment of one of the parties to a dispute. But such objective standards cannot be established in a state of nature. Each of the defects in a state of nature is a conceptual problem concerning the internal requirements of a system of rights. Unlike the defects identified by Hobbes or Locke, they do not reflect human limitations; they apply “no matter how good and right-loving human beings might be.”²

The remedy for each of the three defects is an institution that has moral powers that private citizens lack. Taken together, the three remedies are related as the three branches in a republican system of government are. The legislative branch is charged with making law, the executive with implementing and enforcing law, and the judiciary with applying it to particulars in cases of dispute.³ The functions are distinct because only the legislature has the power to make law. It does so as the voice of the people, so that they rule themselves; Kant remarks that the people are “represented” by the sovereign, which means that they can only speak and act together through institutions. The executive branch does not make general rules, but takes up means to give effect to them. The judiciary resolves

1. Kant, *Lectures on Ethics*, trans. P. Heath (Cambridge: Cambridge University Press, 1997), 27:589.

2. 6:312.

3. 6:313.

particular disputes. Each is both coordinate with the others and subordinate to them, and “through the union of both each subject is apportioned his rights.”⁴ By the time Kant announces that the obligation to enter a rightful condition can be “explicated analytically” from the concept of right in contrast with violence, he has provided the resources to show why each branch is needed.

As he summarizes it in his lectures on natural right:

Justitia distributiva determines right through a *lex publica*, applies it to each case, and enforces obedience. Renounce your intention to seek right according to your own judgment and leave it to the legislator to determine, to the judge to pass judgment, and give up your power with which you could force the other.⁵

The three defects are distinct, but have a parallel structure: nobody is under any obligation to defer to the deeds, claims, or judgments of others, unless appropriate institutions are in place. The distinctive powers that each institution must have require that those institutions differ in kind from any sort of private association. A private association can only have such powers as its particular members transfer to it. The powers to authorize one person to change the normative situation of all others, to enforce private rights in the name of all, and to impose closure on private disputes are all powers that no private person could have. The point of each argument is to show that these powers are morally required even though private persons lack them.

This chapter will focus on the defects of the state of nature as a system of pure private ordering and the form that any solution to all three of them must take. The next one will turn to Kant’s argument that a state can solve them in a way that is consistent with everyone’s freedom.⁶

4. 6:316.

5. Kant, *Naturrecht Feyerabend*, trans. Lars Vinx (unpublished, 2003), 27:1390.

6. Versions of each of the three defects have drawn the attention of commentators. To mention only some of these, the argument from unilateral action is considered in Bernd Ludwig, “Whence Public Right? The Role of Theoretical and Practical Reason in Kant’s *Doctrine of Right*,” in Mark Timmons, ed., *Kant’s Metaphysics of Morals: Interpretive Essays* (Oxford: Oxford University Press, 2002), and Katrin Flitschuh, “Reason, Right, and Revolution: Kant

I. Unilateral Choice: Property and the Problem of Political Authority

The most general argument focuses on the problem of unilateral choice. Positive law requires a person, or group of persons, to formulate, apply, and enforce it. In each case, that person makes a choice, and the power to do so must be reconciled with the freedom of those who are bound by it. Kant's explanation of how such authorization is possible comes in the course of his discussion of the acquisition of property, but his solution to it applies to all political authority, including the power to make laws in pursuit of public purposes, to enforce laws, and to apply them to particular cases.

Kant's use of property as the central point of analysis provides a direct and powerful argument against the Lockean view that property rights are already fully conclusive in a state of nature. It might be thought to engage less fully with other accounts of private property. Many of these regard property as a conventional way of managing useful resources, or as a reflection of the choices made by a society. Although Kant does not directly address such views, his argument is directly relevant to them. The same form of question arises for any social convention or public policy choice as arises for initial acquisition of property: by what authority does the conventional practice bind people who were not party to it? From the standpoint of freedom, the claim that a certain conventional way of doing things works to everyone's advantage in the long run—however the truth of such a claim might be established—is not sufficient to show that any particular person is bound by it. As we saw in our discussion of Kant's theory of contract, others are not entitled to force you to participate in ar-

and Locke," *Philosophy and Public Affairs* 36, 4 (2008): 375–404. Assurance is central to Robert Pippin's analysis in "Mine and Thine? The Kantian State," in Paul Guyer, ed., *The Cambridge Companion to Kant and Modern Philosophy* (Cambridge: Cambridge University Press, 2006), 416–446, and Otfried Höffe, "'Even a Nation of Devils Needs the State': The Dilemma of Natural Justice," in Howard Williams, ed., *Essays on Kant's Political Philosophy* (Chicago: University of Chicago Press, 1992). Among those who focus on versions of the indeterminacy argument are Leslie Mulholland, *Kant's System of Rights* (New York: Columbia University Press, 1990), 284; Howard Williams, *Kant's Political Philosophy* (New York: St. Martin's, 1983), 169; Paul Guyer, "Kant's Deductions of the Principles of Right," in Timmons, *Kant's Metaphysics of Morals*, 23–64.

rangements that benefit you. More generally, the more artificial the rules of property are taken to be, the more pressing the need for an account of their authority is. If property rules are just the rules of a conventional game, they do not bind anyone other than a voluntary participant. Characterizing such arrangements as a choice “made by society” raises the question of society’s entitlement to make that choice: what is the space of possible choices it might have made, and how could it bind anyone who neither participated in the making of the choice nor agreed to be bound by it? That is just to say that the question of society’s entitlement to make a decision about how resources will be used presupposes some account of how a collective could have acquired the entitlement to determine how things will be used. But that is just a large-scale version of the question of initial acquisition: how does one person’s decision bind others?

The discussion of property in Chapter 4 established Kant’s arguments for several claims. First, Kant’s account showed that it must be possible to have things as one’s property, because otherwise the use of objects that can serve as means for setting and pursuing purposes would be forbidden or conditional on the particular purposes of others. That argument, as we saw, grounds the possibility of property in human purposiveness. It thereby precludes any requirement that all others consent to any acquisition. Such a requirement would make the use of a usable thing depend on the *matter* of other people’s choices, and so subject everyone to the choice of each other private person.

Second, Kant argued against the thesis that property rights are to be understood as extensions of rights to one’s own person. Variants of this thesis can be found in the otherwise differing accounts of property in Locke and Hegel. Locke’s example of eating an apple involves explicit incorporation; Hegel’s more abstract analysis in terms of putting your will into a thing captures the same intuitive idea. These accounts of property submerge the significance of acquisition for others, by representing the obligation to respect the property of another as an *instance* of the obligation to respect that person. As we saw, the Lockean/Hegelian strategy cannot explain why such acts of self-relation change the rights of others. Locke incorporates a “proviso” requiring that “enough and as good” be left for others through any appropriation. No saving clause of this sort can address the basic issue, however. Even if it restricts unilateral acquisi-

tion to cases in which doing so does not worsen the ability of others to provide for themselves, it fails to address the question of how one person can place another under an obligation. It may be worse to have others impose obligations on you if those obligations are onerous, but your right to freedom is at issue when others change your normative situation, even if you have other options so that the situation is not burdensome.

Third, Kant introduced an account of unilateral acquisition: the transition from an object's being unowned to its being owned depends on a unilateral act of appropriation. The acquisition of property is nothing more than the change in the status from being subject to the choice of no person to being subject to the choice of some particular person, its owner. The affirmative act required to acquire an object is simply taking control of it and giving a sign that you intend to continue controlling it.

Acquisition requires taking control, giving a sign, and bringing your act into conformity with a "general will." Although a person acquiring an object does so on his or her own initiative without consulting others, the *power* to do so requires an omnilateral will to make the unilateral act binding on others.⁷ Kant thus treats initial acquisition as a special case of political authority.

If you acquire an unowned object, you do not need to consult everyone who could conceivably be affected; such a requirement would violate the postulate of practical reason with regard to rights. Instead, you are entitled to act entirely on your own initiative. This raises an obvious question: why am I bound by your unilateral act? Your innate right prevents me from interfering with your act, but the fact that I may not interfere does not mean that your act has further consequences for my rights.

Your act of acquisition casts a long shadow: you are entitled to exclude others from that object even when you are not using it. You are also entitled to dispose of it as you see fit, subject only to the requirement that you not violate the rights of others in so doing. You can give the fox to whomever you like, though you may not dump its rotting carcass on someone else's land without the owner's permission. Your right to exclude is established through your unilateral act, but the mere fact that you act unilater-

7. 6:262.

ally raises the question of how that action can bind me. As Kant puts it, a unilateral will is not a law for anyone else.⁸

The acquisition of property differs from other ways in which one person might be said to change the normative situation of another. If I wrongfully injure or interfere with you or your property, it is now permissible for you to claim damages from me. Such changes can (though need not) be thought of as changing your normative situation by creating new permissions to proceed against me. Your right to person and property is not changed, however, and, most significantly, you are under no new obligations. Your right to proceed against me is just your right to your person and property. Again, if I move from one place to another, I occupy space which is not available for your occupation while I am there. This change does not place you under a new obligation, but simply applies it to a different circumstance. In these examples, one person's act does not change any other person's obligations, but merely the way in which antecedent obligations apply. The acquisition of property is different: in acquiring a piece of land I make it unavailable to you even when I am not occupying it.

The normative issue is illustrated by considering other examples that John Simmons has suggested are analogous:

I may make a legal will, unilaterally imposing on all others an obligation to respect its terms (which they previously lacked), for the very purpose of limiting others' freedom to dispose of my estate in ways contrary to my wishes. I may occupy a public tennis court to practice my serve, or we may take the softball field in the park for our game, unilaterally imposing on all others obligations to refrain from interference, and do so for the very purpose of enjoying our activities unhindered by such interference. Or I may rush to the patent office and register my invention, unilaterally imposing certain obligations of restraint on all others, for the very purpose of limiting others' freedom to likewise take advantage with their competing inventions. I may buy the rare stamp that many others are busy saving their money to buy, or I may organize a nature walk for children along trails many others use

8. 6:263.

to seek solitude. How different are the rights and obligations involved in these contacts from the right of the original appropriator to take unowned goods, unilaterally imposing obligations of noninterference in all others, for the very purpose of restricting their liberty to the free use and enjoyment of the goods? Not, I think, very different.⁹

Simmons is right that the appropriation of property is not the only unilateral act that changes the situation of others, and his examples make it clear that there are many ways in which it is morally acceptable for one person to do so. But the examples also underscore Kant's point about the need for omnilateral authorization in changing not only the situation of others, but their entitlements. Most of the examples could not even occur in a state of nature. So: making a will presupposes an antecedently and publicly established property right in the objects of the will. Kant also emphasizes that to affect a transfer by a will, there must be a public possessor, entitled to exclude others between the testator's death and the heir's acceptance of the legacy. That is, a "legal will" presupposes public institutions entitled to make the testator's choice binding. Both the "public tennis court" and "the park" presuppose public forms of property with standardized rules of access. Although we can take over the tennis court for our game, we are not allowed to build a house on it, and there are typically rules limiting the number of games in a row that we can play. Such public forms of property will be the topic of Chapter 8, but it is worth noting here that the entitlement to use public spaces is not a natural right that can be either exercised or even conceived in the absence of a rightful public authority, for there could be no such spaces without such an authority. (If there could be such rights without a public authority, they would be cases in which groups rather than individuals acquired unowned objects, and so just cases of first possession by a group rather than an individual.) However exactly we understand patent rights, they are validated through public statutory mechanisms, as the phrase "the patent office" suggests. You cannot register your invention with some other private person, who then grants you the right to prohibit others from making

9. A. John Simmons, "Original-Acquisition Justifications of Property," in *Justification and Legitimacy* (Cambridge: Cambridge University Press, 2001), 220.

substantially similar things, because that private person has no more right than you do to change the entitlements of others.

Simmons's remaining examples create no new obligations; they all illustrate each person's entitlement to exercise his or her freedom in ways that change the context in which others subsequently exercise theirs. Organizing a nature hike for children may disappoint the expectations or wishes of others, but it does not place them under any new normative requirements. Purchasing things that others had hoped to buy narrows the range of things that those others might do, but does not place any new obligations on them. Others were already under an obligation to refrain from interfering with the stamp that you wanted to acquire; they face no new obligations as a result of your acquisition of it. Only their hopes have been dashed. They are in the same position as against you that they were in as against the previous owner: they can still try to make you an offer to convince you to sell it to them, even if you do not actively invite offers.

The original acquisition of property remains distinctive because it does not simply change the world: it places others under new obligations. As we saw in Chapter 4, the basic structure of a property right is if one person owns an object, it is not part of the context which others may change in the exercise of their freedom. Your rights are not violated if people use, damage, or destroy things that are not your property, but they are violated if they interfere with your property in any way. The original acquisition of an object as property changes it from being something that others may use or change at will, or as a foreseeable side effect of their own activities, into something that others are under an obligation not to use, damage, or destroy; it thus places them under a new obligation.

Kant's specific account of the change that appropriation makes to the normative situation of others—that it renders them liable to coercion—is not required for his argument about the way in which property requires omnilateral authorization. The need is the same whether rightful acquisition is supposed to place me under an obligation, give you a power to forcibly remove me from your property, or limit my freedom in some other way. The philosophical literature on promising raises questions about how you could change your *own* normative situation through an act you perform on your own initiative. Kant's point is that the theory of property raises a deeper problem of how one person's act can place *an-*

other person under a new obligation. How can an act done entirely of your own initiative, to which others are not parties, have binding effects on them?

Kant's answer focuses on public authorization. As we saw in Chapter 4, the unilateral aspect of acquisition is not that *having* property is inconsistent with freedom. Nor is it that the acquisition of property narrows other people's range of options. Instead, it is the simple fact that one person changes the normative status of another. Kant's introduction of this point comes at the beginning of his explanation of acquisition in general, which he divides into a three-stage sequence:

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 pha-enomenon*. 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.¹⁰

The third member of this sequence is crucial to the argument for public right: it is only if my choice is exercised in light of an (ideally) publicly conferred power to appropriate that it could possibly be binding on others, apart from my physical possession of the object. As we saw in Chapter 3, a "permissive law" that entitles me to acquire things makes a merely permissible unilateral act have rightful consequences for others. However, it could only have this status provided that it is authorized by everyone, so that my unilateral act is also the exercise of a publicly conferred power. If the public authority is entitled to confer the power on me in the name of everyone, then my specific exercise of the power is also in everyone's name.

The role of the public does not turn property into a sort of instrument or by-product of public policy. The basic structure of property is governed by individual purposiveness; as a matter of private right, you can have external objects as your own because of the postulate of private

10. 6:258.

right. A public authority is required to authorize you to acquire things, because that changes the normative situation of others. But authorizing acquisition is not a discretionary purpose that a public authority might decide about based on some assessment of the desirable consequences or balance of benefits and burdens that will result. A public authority could not be entitled to prohibit all acquisition, as doing so would limit human purposiveness as such. It could, in principle, restrict initial acquisition in various ways—for example, setting aside areas as nature preserves for future generations—and it can impose conditions on properly recording acquisitions. Its power to do such things in particular cases, however, can only be exercised consistent with each person's entitlement to have external objects of choice as his or her own, so it cannot preclude all acquisition.

Kant's invocation of a general will to authorize private appropriation also differs from the view, put forward by Grotius and Pufendorf, which seeks to authorize appropriation in terms of a historical or hypothetical agreement by the people who own the Earth in common to permit people to divide it up. Such accounts incorporate a sort of primitive community of land, and so already presuppose some concept of ownership. As soon as any such content is presupposed, however, given the concept of property, a hypothetical agreement to divide up is not sufficient to bind the parties. Only an actual one could be. The difficulty is that any such common ownership could only function in the Pufendorf/Grotius argument if it was a form of private ownership by a group of persons. As Kant remarks, such 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 possessions on it.”¹¹ The only form of common possession of the Earth prior to appropriation must be the “disjunctive” possession of the Earth’s surface entailed by innate right, that is, that each person is entitled to be “wher-

11. 6:251.

ever nature or chance” has placed him or her, except in whatever place is occupied by another person. Persons who are in merely disjunctive possession of the Earth’s surface, considered separately, are in a position neither to authorize anything nor to bind anyone.

The problem here is not just one of an incoherent imagined history. More fundamentally, an actual agreement in the distant past could only bind future generations if the parties to it had the authority to do so—which is just to say that the Grotius/Pufendorf model reproduces the problem of authorization it is supposed to address.¹² The ability of ancestors to place their descendants under obligation to respect private acquisitions is just an instance of the question raised by initial acquisition: how can their act bind later generations who are not parties to it? A hypothetical agreement based on perceived advantage does no better, because no private person has standing to force another to do what he or she *would* agree to unless he or she *has* agreed.

Kant’s appeal to the idea of a united will makes the object of agreement the rule of law through political institutions, so that individual acts of rule-making are themselves instances of a more general law. The argument is not supposed to show that an agreement has happened, or even that it would be wise or prudent for people to enter into such an agreement so that it would happen under ideal circumstances. It shows only that a form of public authorization on behalf of everyone is required to underwrite private appropriation. Private property requires public right because they are both instances of a single, common problem, which has an irreducibly public element. Rather than trying to reduce the public to the private, Kant’s argument shows that the private is only rightful in the context of the public.

The requirement of public authorization to underwrite private appropriation shows the acquisition of private property to be an example of the familiar features of legal systems that H. L. A. Hart describes as “power conferring” rules. Hart’s own examples involve contracts and wills, which empower a person to change his or her *own* legal situation. Hart remarks

12. Locke’s discussion of the failure of a father’s consent to bind his son to political authority thus applies to the Grotius/Pufendorf account of acquisition. See Locke’s *Second Treatise of Government*, §118.

that they empower people to act as small-scale legislatures.¹³ Kant's example of property makes the legislative aspect of those rules especially clear: my appropriation can only change your legal situation if everyone, including you, has conferred a power on me to appropriate. My act of appropriation is thus a unilateral exercise of an omnilateral power, rather than a unilateral act. That is the point of the third moment in the three-stage sequence. However, if the third moment is presupposed by any possible act of acquisition—I unilaterally act *so as to bind everyone*—my act genuinely binds them only when the general will has authorized it.

The solution to the problem of unilateral will is, then, an omnilateral will, through which everyone authorizes appropriation. An omnilateral permission to appropriate makes private appropriation rightful, and so entitles a private person to bind others through a unilateral act. The act is unilateral, but the authorization for the act is omnilateral.

Kant does not deny that the people might come to recognize each other's claims to property or under contracts without an omnilateral authorization. He characterizes these as “societies compatible with rights (e.g., conjugal, paternal, domestic societies in general, as well as many others); but no law.”¹⁴ Members of such societies might well in fact accept rules and dispute-resolution procedures governing their interactions, but whether they accept them or not depends on the matter of their choices, that is, on the particular ends they happen to have. Such associations are purely voluntary arrangements from which any member might withdraw unilaterally if his or her particular ends were to change. The members themselves might not see things this way, and might think they are morally bound to recognize each other's claims, think it prudent to do so, or fear sanctions if they do not comply. None of these possibilities is sufficient to give either the rules or the procedures genuine authority, because there is no general entitlement to compel the members to accept them. Such societies are like the international order as Kant conceives it: each state has a right to withdraw from any alliance if it perceives that it is endangered by getting drawn into disputes between other members. We

13. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1994), 26–42.

14. 6:306.

shall return to this contrast between voluntary and binding associations in our discussion of enforcement.

Kant's account solves the problem he identified with Grotius's view, according to which private holdings are grounded in some historical agreements to divide up the land. By focusing on the omnilateral authorization of a general power-conferring rule entitling people to acquire things as their own by taking possession of them, Kant does not need to presuppose a prior, collective form of property, and show that private property is consistent with it. The only thing that private property needs to be consistent with is freedom, and that can only be achieved through an omnilateral will capable of binding everyone.

Kant's argument about the need for omnilateral authorization of power-conferring rules focuses on the simple example of the acquisition of property. However, he gives further examples of cases in which a specific rule is required in order to make private rights systematically achievable, but the rule itself must be chosen by a competent public authority. That is, rules conferring the power of appropriation require a further “principle of politics, the arrangement and organization of which will contain decrees, drawn from experiential cognition of human beings, that have in view only the mechanism for administering right and how this can be managed appropriately.”¹⁵ These intermediate principles are required to confer the power, in this case of appropriation, in the same specific way on everyone. Thus what counts as taking control of an object will require some sort of further specification; that control is required can be established *a priori*. In certain familiar examples, such as holding an apple in your hand, the requisite act of taking control will be clear to the point of obviousness. However, when it comes to the appropriation of land, which, as we saw in Chapter 4, is control of a region of the Earth's surface, there can be no straightforward characterization of what it is to be in physical control of the land, only various possible but potentially conflicting accounts. Thus the legal system must choose something that counts as taking possession by taking control. In the same way it must choose something that counts as giving a sign. All of these lawmaking powers generate

15. Kant, “On a Supposed Right to Lie from Philanthropy,” 8:429.

more specific rules so as to make the power-conferring rule governing acquisition clear enough to guide conduct.

To show the necessity of an omnilateral will to underwrite the private appropriation is not the same as explaining its possibility. Like the three branches of government that address them, the three branches of Kant's argument are coordinate, and the solutions are only possible taken together. Both the explanation of how a general will is possible and Kant's account of the authorization to force others into a rightful condition depend on the other two dimensions of political power, executive and judicial, so we must consider those before returning to it.

II. Enforcement: Why Equal Rights Require Assurance

The second problem concerns the enforcement of rights consistent with the freedom of everyone. Like the argument about property, it is driven by the tension between unilateral choice and freedom under universal law. Where the property argument focuses on the power to put others under new obligations, the assurance argument focuses on the entitlement to enforce existing rights, and does not "require a special act to establish a right."¹⁶ Every right is a title to coerce and a part of a system of rights under universal law. Kant's argument shows that these aspects of rights can only be reconciled through public assurance.

To bring it into focus, put the other two problems aside and imagine that people have somehow acquired property, and that there is no controversy about exactly what belongs to whom. In this situation, without public enforcement, people lack the assurance that others will refrain from interfering with their property and, as a result, have no obligation to refrain from interfering with the property of others. The basic thought is that without such a system, nobody has a right to use force (or call on others to do so) to exclude others from his or her property, so nobody has an enforceable obligation to refrain from interfering with the property of others.

Kant introduces the idea of assurance in §8 of *Private Right*, arguing "I am therefore not under obligation to leave external objects belonging

16. 6:256.

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.” Instead, rights to external objects of choice are only consistent in a civil condition, because it is “only a will putting everyone under obligation, hence only a collective general (common) and powerful will, that can provide everyone this assurance.”¹⁷

Before turning to the details of the argument, it is worth remarking that a duty conditional on the conduct of others shows that the *Doctrine of Right* does not impose duties to do what you would do in ideal circumstances, regardless of the actual circumstances in which you find yourself.¹⁸ Whatever the difficulties of this as an interpretation of Kant’s *Groundwork*, no such principle applies to duties of right, because they always concern the claims that one person can enforce against another. You cannot have an obligation of right to accommodate yourself to the specific purposes of others; all obligations of right must be within a system of right “in accordance with universal law.” The only obligation of right that you can owe to another person must be part of the system of reciprocal limits; they have no standing to compel you to do what you would have had an obligation to do had such a system been in place.

It is also worth remarking that the duty is one of right. Kant does not deny that there could be grounds of virtue for accommodating claims of others that would not be enforceable as a matter of right. Instead, the assurance argument shows that acquired rights are not enforceable in a state of nature, so that any attempt to enforce them is unilateral force that others may resist with right.

The assurance argument follows the broader structure laid out in the Introduction to the *Doctrine of Right*. As well as distinguishing between innate and acquired rights, and between public and private right, Kant provides what he calls a “division” of duties of right, which he expresses in terms of the “precepts” of the Roman jurist Ulpian, as they are recorded in Justinian’s *Institutes*. Ulpian says that justice consists in living

17. Ibid.

18. Bernard Williams attributes this view to Kant in his essay “Moral Luck” in his *Moral Luck* (Cambridge: Cambridge University Press, 1981), 20–39. The same attribution is made in Isaiah Berlin’s “Two Concepts of Liberty” in his *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), 138n.

honorable (*honeste vive*), not wronging others (*neminem laede*), and giving each what is his (*suum cique tribue*). Conceding that his interpretation involves a departure from narrow explication, Kant casts Ulpian's infinitives in the form of imperatives:

1. Be an honorable human being. Rightful honor consists in asserting one's worth as a human being in relation to others, a duty expressed in the saying "do not make yourself a mere means for others but be at the same time an end for them."
2. Do not wrong anyone even if to avoid doing so you should have to stop associating with others and shunning all society.
3. (if you cannot help associating with others), enter into a society with them in which each can keep what is his own.

The same division is said to organize duties of right into internal duties, external duties, and duties that "involve the derivation of the latter from the principle of the former by subsumption."¹⁹

The problem of assurance and its solution follow the pattern of reconciling the first precept with the second through the third. Kant's gloss on the third notes that "Give to each what is his" is absurd, "since one cannot give anyone something he already has." In its place, he suggests the paraphrase "enter a condition in which what belongs to each can be secured to him against everyone else."²⁰ The pattern of the argument is to show how rightful honor and the injunction against wronging others are only possible in a rightful condition.

As Kant formulates it, the assurance argument applies only to acquired rights. Your entitlement to use force to exclude others from your own person is consistent with your obligation to refrain from interfering with the person of another, because your right to self-defense is purely protective. That same right gives you a right to defend whatever is in your physical possession, since others can only dispossess you by touching or moving

19. 6:236. The details of this transition can be spelled out in a number of different ways. The simplest and most forceful presentation of it is still Julius Ebbinghaus's. For a succinct formulation, see "The Law of Humanity and the Limits of State Power," *Philosophical Quarterly* 3 (1953): 14–22.

20. 6:237.

you and so interfering with your person. Two people may have potentially conflicting rights to self-defense, but innate right does not give anyone a right to interfere with the person of another except to protect his or her own person. External objects of choice, including property, contractual, and status obligations, are different, because others are only entitled to compel you to refrain from their possessions if such an entitlement is consistent with your independence.

The assurance problem comes up because our entitlements in relation to things we are not in physical possession of are in tension with each other. The second precept requires you to refrain from taking what is mine. If you refrain from taking what is mine, without assurance that I will refrain from taking what is yours, then you are permitting me to treat what is yours, and so an aspect of your capacity to set and pursue purposes, as subject to my purposes. Exactly the same problem comes up for me: my rightful honor demands that I only refrain from using what you possess if I have assurance that you will do the same for me. So if either of us refrains from taking what belongs to the other without assurance, we restrict our choice on the basis of the other's particular choice, rather than in accordance with a universal law.

How frequently the absence of assurance will lead to actual conflict depends entirely on our particular ends—the “matter” of our choices. If I have trained guard dogs and weapons and you do not, I can simply help myself to your possessions, confident that you will be able neither to defend them nor to take mine. In so doing, I treat you as a mere means, because your entitlements are used in the pursuit of my ends. In this situation, your prudent course of action may be just to give in and let me treat you as a mere means. It is bad enough to have me pillage your goods, without making fruitless and dangerous attempts to do the same to mine. But the prudence of your course of action does not render it morally unproblematic. Whether you give in or not is simply a matter of my strength.

Other, more appealing motives might also lead someone to refrain from using things claimed by others. The sympathetic person might allow others to do wrong, forgiving their deeds out of a general philanthropy. Kant does not need to deny that such a person is empirically possible; the problem of assurance arises so long as no person is under an obligation to

be sympathetic or assume that others are. A parallel point applies to the virtuous person, who will not have an undifferentiated sympathy for every aggressor or wrongdoer. Even the virtuous person, however, is under no obligation of either right or virtue to act on the assumption that others are equally virtuous. She is under an obligation of right not to allow others to treat her as a mere means.²¹ Neither of us is under any obligation of right to assume that the other is virtuous.

Kant's remark that we do not need to wait for "bitter experience of the other's contrary disposition; for what should bind him to wait till he has suffered a loss before he becomes prudent?"²² suggests that the experience will indeed be bitter. The assurance argument does not depend on any such premise, however. It may be prudent to use a strategy of tit for tat, waiting for the other to reveal a hostile disposition, before interfering with his or her possessions. What you are entitled to do does not depend on the particular choices of others. Obligations of right are always owed to other persons as parts of a system of reciprocal limits; a free being can only owe another person an obligation of right to accept a system of restrictions together with others; it follows that a free being can only be compelled to respect the rights of others under such a system of restriction. Where others do not restrict their conduct, they may not force you to restrict yours.

Kant invokes the Latin maxim *Quilibet praesumitur malus, donec securitatem dederit oppositi*²³ ("Everyone is presumed bad until he has provided security to the contrary"), not because of any views about the "radical evil" of human beings, such as those he defends in his *Religion*,²⁴ but

21. Kant's discussion of servility in the *Doctrine of Virtue* treats the general failure to stand on your rights as a serious vice. Although you have the rightful power to consent to acts by others, to make the purpose of every other person your own whenever they demand something of you is inconsistent with both rightful honor and virtue.

22. 6:307.

23. Ibid. Gregor mistranslates the maxim as "The party who displaces another's right has the same right himself." A better translation is found in B. Sharon Byrd and Joachim Hruschka, "From the State of Nature to the Juridical State of States," *Law and Philosophy* 27, 6 (November 2008): 605.

24. Kant, *Religion within the Bounds of Mere Reason*, 6:32, in Immanuel Kant, *Religion and Rational Theology*, trans. Allen Wood and George Di Giovanni (Cambridge: Cambridge University Press, 1996). In "From the State of Nature to the Juridical State of States,"

because the alternative is a merely material principle based on the particular motives of those you interact with. All they can force you to do is enter with them into a rightful condition, and that authorization obtains “no matter how good and right-loving human beings might be.”²⁵

The point can be made from the other direction, focusing not on interference but on the right to defend property. If I have no assurance that you will not interfere with my property, I am entitled to regard your attempt to reclaim goods from me as a unilateral use of force against me, which I may resist with right. The same applies to you: you may resist with right my attempts to exclude you from what is mine. As Kant remarks, in such a situation we “do each other no wrong” by feuding among ourselves, even though we “do wrong in the highest degree by willing to be and to remain in a condition that is not rightful, that is, in which no one is assured of what is his against violence.”²⁶

Kant’s analysis of assurance thus differs from the more familiar Hobbesian problem of first performance of a mutually advantageous contract. The Hobbesian argument focuses on a strategic problem: nobody wants to be played for a sucker; absent assurance, nobody will ever perform, and contracts will be factually impossible. The Kantian argument focuses on a moral one: nobody can rightfully be compelled to serve the purposes of another unilaterally. Absent assurance, first performance of contracts is an instance of a much more general moral problem: any act done on the basis of another person’s claim to an external object is an instance of serv-

Byrd and Hruschka attempt to relate Kant’s argument to the “radical evil” of human beings in the *Religion*, and point to his endorsement, in the *Naturrecht Feyerabend*, of Thomasius’s use of a related Latin maxim as a principle of moral philosophy (27:1340). On the interpretation developed here, no such hypothesis is required. Nor does the *Naturrecht Feyerabend* represent Kant’s considered view on this issue. In it he rejects the *Doctrine of Right*’s central claim that the need to enter such a condition is an *a priori* requirement imposed exclusively by concepts of right. In the *Feyerabend*, Kant makes the opposite claim: “No man is obliged *a natura* to enter into civil society with the other. If I could take human nature to be just, i.e. as such a nature that cannot have the intention of harming the other, if I could posit that all human beings have the same insight into right and the same good will, a *status civilis* would not be necessary. But since the opposite is the case, everyone has the right to demand of others that they exit the *status naturalis*” (27:1381).

25. 6:307.

26. Ibid.

ing the purposes of another. It is *permissible* to serve the purposes of another, but each person is entitled to decide whom to cooperate with, so there can be no obligation to do so.

Without an obligation of right, nobody is under any obligations with respect to external objects of choice, and nobody is entitled to enforce any acquired rights they (suppose themselves to) have. As a result, all rights to external objects in a state of nature are merely *provisional*, because they are all titles to coerce that nobody is entitled to enforce coercively. A provisional property right is thus a right to use force to exclude others from an external object while you are in possession of it; although physical possession gives provisional title, in anticipation of a condition in which rights can be made conclusive,²⁷ your entitlement to use force is limited to the case in which interfering with your possession thereby interferes with your person. Any other use of force to secure an object against another is just aggression against that person, which can be resisted with right.

Private rights of enforcement are the cornerstone of Lockean political philosophy; Kant's premise that rights must form a consistent set under universal law preempts that entire line of argument. If I am entitled to coerce you, and you may resist with right, neither of us has a title to coerce consistent with our respective independence under universal law, so neither of us has a right, properly speaking.

If the problem is one of reconciling rightful honor with the duty not to interfere with others, the solution is to “enter a condition in which each can be secure in what is his,” by means of “a will putting everyone under obligation, hence only a collective general (common) and powerful will, that can provide everyone this assurance.”²⁸

Only a “common and powerful will” can “provide this assurance” because only it can provide everyone with systematic incentives in relation to the possession of others. The incentive has two dimensions. First, it assures the private right holder that the right will remain intact, even if another violates it. Second, it makes rights violations prospectively pointless. If a right holder is assured of a remedy, others will not normally have

27. 6:257.

28. 6:256.

any incentive to violate rights, because a violator will expect to gain nothing and could possibly lose something through a violation.

First, as we saw in Chapter 3, a remedy in the case of the violation of a private right is not something new, but is rather simply the right itself, which survives the wrongdoing unchanged. If I take your pen without your authorization, you do not stop having a right to your pen. Your entitlement to recover it from me follows from the fact that your right survives the wrong against it. In the same way, if I destroy your pen, your right to have it replaced, or to the cost of replacing it, follows from the fact that your right to your pen survives the violation of it. So on the one hand, rights are vulnerable to wrongdoing; on the other hand, they survive any wrongs against them. The fact that you lose your physical possession of your property does not mean that you lose your rightful possession of it. The same point applies to contractual rights: if I breach my contract with you, you still have a right that I perform. This normative structure is familiar in informal contexts: if I am supposed to meet you at noon, and for whatever reason I am late, I still need to show up at 12:15. The reason I need to show up at 12:15 is just that I was supposed to show up at noon. My obligation, and so your correlative right, survives its own violation. Kant summarizes this thought when he remarks that the right to compensation for an injury just “gives me back what I already had.”²⁹ Thus a publicly assured enforceable right to compensation can guarantee that your right will be effective, even if I violate it, because the object of the right will once again be subject to your choice. In the same way, if I use your property without your authorization, I can be compelled to surrender my gains to you, so that it is as if I had been using your property on your behalf. In either case, whether I damage what is yours or use it without your authorization, your right to have that thing subject to your choice remains effective, because my wrongful act has no effects on the rights of others. Against the background of such public assurance, you have grounds to refrain from interfering with my property. Each of us can respect what

29. In a civil action for a private wrong, the aggrieved party (or in cases of legal incapacity, his or her guardian) must bring a cause of action on his or her own initiative. The state will not step in to guarantee the outcome. This requirement simply reflects the more general feature of private rights: each person is always entitled to decide whether to stand on his or her rights.

belongs to the other without thereby allowing ourselves to be subject to the other's choice.

Second, because a public executive authority provides a remedy in cases of private wrong, it also provides an external incentive to refrain from wrongdoing by depriving wrongdoing of its point. The external incentive is secondary, but supports the assurance provided by the remedy itself. The point of the remedy is not to discourage others from committing similar wrongs; the remedy simply makes the aggrieved party's rights effective, by making factual possession correspond to rightful possession. Against the background of effective rights, however, any violation of rights carries potential disadvantages. If you use what belongs to another without authorization, you do not stand to gain; if you fail to look out properly for the security of others in their person and property, you will end up bearing a burden. These incentives are admissible under right, because right does not need to be the maxim of action. They are derivative of the underlying rights, because all they do is give effect to them. Their effects will sometimes be uncertain, since a private wrong can be committed carelessly or inadvertently, and might even occur despite the wrongdoer's best efforts. I may follow the coal seam under your land, disoriented because I am so far underground, and so trespass against your land and your coal. I may make a contract that, in changed circumstances, I am unable to honor. In these cases, your entitlement to a remedy guarantees that your right is effective in space and time. The further incentive makes no difference to *my* conduct, because an incentive can only guide me if I can recognize that it applies to a particular case. But the remedial aspect of the enforcement gives you all the assurance you need: you have what is yours, because if another wrongs you, you will be able to get it back. Private remedies secure private rights by ensuring that they will be effective in space and time. Norms apply even after they are violated, and coercive enforcement is just their effectiveness in space and time. Without that guarantee, rights are not secure, because whether they are effective depends entirely on the particular purposes of other persons.

When they are authorized by the state, these two incentives combine in a way that renders them consistent with rightful honor. If you act on the prudent consideration of *another private person's* threat advantage, you prudently give up on defending your rightful honor. By contrast, act-

ing on the consideration of a threat issuing from a public authority is consistent with your rightful honor, because the incentive itself has been publicly authorized. Your self-restraint does not make you a means to any other private person's purposes.

From the need for assurance for acquired rights to be effective, Kant concludes that force may be used to bring the state of nature to a close. The right to defend your property can only be part of a system of rights if everyone has the requisite assurance:

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.³⁰

Forcing someone with whom you cannot avoid interacting to enter a rightful condition with you is consistent with that person's freedom because it secures his or her rights. The person who resists wrongs you. By contrast, those who choose to remain outside a rightful condition "do each other no wrong" by feuding among themselves. There is no material wrong in interfering with each other's goods outside of a rightful condition because nobody has a right to exclude others, so there can be no wrong against persons. Instead, the wrong is formal, "wrong in the highest degree,"³¹ because remaining in such a condition is inconsistent with anyone's having rights to external objects of choice. Thus everyone can be compelled to enter a condition in which rights are secure.

III. Indeterminacy

The third problem in the state of nature turns on the possibility of disagreement about rights. It combines aspects of the first two arguments, but it incorporates a general premise independent of them: general rules are not sufficient to classify particulars falling under them. If the applica-

30. 6:256.

31. Ibid.

tion of a rule or concept to some particular required a rule itself, the second rule would also require a rule governing its application, and so on, *ad infinitum*. If rules can be applied to particulars, then, it must simply be possible to apply them, without recourse to further rules.³²

Kant's argument about disputes about rights differs from contemporary arguments that focus on political society as the solution to problems of disagreement about the good life or even about the demands of justice itself. Such arguments generalize Locke's idea of the "settling" function of law: to make official determination of questions that tend to generate disputes.³³ Like Locke, such accounts treat disagreement as an empirical fact. Where Locke thinks that people disagree about moral matters that have fully determinate answers, contemporary exponents of the settling function of law sometimes write as though questions about the basic terms of social life have no answers but somehow require them, so that institutions must step in to answer them.³⁴

Kant's argument is fundamentally different. The source of disagreement is normative rather than empirical or epistemic. Disputes about rights reflect the two aspects of the concept of a right: on the one hand, it is an entitlement to restrain the conduct of others; on the other, it is a part of a system of freedom under universal law. Any entitlement to restrain the conduct of others must be an instance of a universal law rather than a unilateral judgment. If you and I cannot agree about the terms of our contract or the boundaries of our respective property, or about how to resolve our disagreement, neither of us can have rights that are part of a systematic set of reciprocal limits on freedom. Such disputes may or may not lead to actual fighting; if we are both intelligent and calm, we may see that we both stand to lose by raising the stakes.

If anything, empirical cases of disagreement may lead to more conflict, but they raise no issues of right. The person who "disagrees" with the claim that murder is prohibited, or that everyone is bound by law, or that each must refrain from the possessions of others, poses a certain

32. Kant, *Critique of Pure Reason*, A133/B172, A137/B176ff.

33. John Locke, *The Second Treatise of Government*, 66, §124.

34. Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999). Waldron attributes the same type of argument to Kant in "Kant's Legal Positivism," *Harvard Law Review* 109 (1996): 1535–1566.

kind of threat to the rightful condition, but the threat is factual rather than conceptual. No argument is likely to move such a person, but what is required is not an argument, just force, which is authorized by the fact that rights are being enforced. Such disagreements need to be contained by a rightful condition, but they do not need to be accommodated. Everyone has a right to interact with others on terms of equal freedom. Nobody has a right to exempt himself from such terms because he happens to disagree with them, because nobody could have a right, consistent with the freedom of others, to be bound only by laws that he happens to agree with.

Kant's indeterminacy argument, like the unilateral action and assurance arguments, is formal rather than empirical. Kant shows that rights are necessarily subject to dispute, not that they are always disputed. The application of concepts to particulars is always potentially indeterminate, and so requires judgment, as a result of which the classification of particulars is always, at least in principle, indeterminate. This general feature of concept application generates a special problem for right, because concepts of right govern reciprocal limits on freedom and so must apply to all in the same way. As we saw in the discussion of private right, there are some cases in which concepts of right completely determine the outcome of a dispute. No person can have a right that another person use property to accommodate his or her preferred purposes; no person who is not party to a contract has standing to compel its performance. In such cases, the complaining party is said to have "failed to state a cause of action," so the adjudication of the dispute cannot even get started. No question is raised about how to apply concepts of right to particulars. Only an unsupportable allegation about the concepts of right themselves is asserted. In other cases, however, even if it is agreed that concepts of right apply, there can be a dispute about how they apply to particular cases. In this latter class of cases, concepts of right do not always generate a single answer, but because they demarcate aspects of a system of reciprocal limits on choice, their application to particulars must be given a single answer in every case. Although their internal structure requires a single answer, neither the normative concepts nor the relevant facts nor any combination of them guarantees agreement. Again, different people may find the same things obvious, and so actually agree in a wide range of cases. Any

such agreement is, from the standpoint of right, mere coincidence, and so rights are by their nature subject to dispute.

The general difficulty of applying rules to particulars raises a problem for rights in a state of nature, in which each can do no more than “what seems good and right to it.” Equal private freedom presupposes objective standards of interaction. I do not merely need to do my best in avoiding injuring you; I need to exercise the reasonable care of an ordinary person. The meaning of the terms of a contract between two persons is not based on what one or the other of them thinks; nor is it created by some accidental overlap between the thoughts of each of them. Instead, the meaning is given by what a reasonable person would take it to be.³⁵ Objective standards are required because a subjective standard would entitle one person to unilaterally determine the limits of another person’s rights. If I could avoid liability by trying my best, your right to my forbearance would depend on my abilities and judgments, and so be inconsistent with a system of equal freedom. If my contractual obligations reached only as far as I thought they did, your rights would depend on my judgment in a similar way. The point of objective standards in these contexts is not epistemic—it is not that our respective rights are fully determinate, but we have no way to discover them. Nor is it strategic: the risk of opportunistic behavior is secondary. Instead, objective standards of conduct are required by a system of equal freedom, in which no person’s entitlements are dependent on the choices of others.

In these cases, equal freedom requires an objective standard, but such a standard cannot be exhausted by what either of us thinks about it. We can try to reduce the likelihood of disagreement by being more specific, but if the world changes in ways we had not anticipated, or if each of us judges in ways that the other had not anticipated, there is still room for good-faith disagreement. Again, in cases of property, Kant remarks that “the indeterminacy with respect to quantity as well as quality of the exter-

35. This objectivity is most obvious in common law systems of private law, but animates others as well. In French contract law, the terms of a contract are fixed by the subjective intention of the parties, but where intentions appear to diverge, a contract remains enforceable on the basis of legal principles. If one party to a contract is mistaken, the contract may be enforceable, if various normative legal requirements are met. I am grateful to Catherine Valcke for discussion of this issue.

nal object that can be acquired makes this problem (of the sole, original external acquisition) the hardest of all to solve.”³⁶ Even if you and I agree that I have acquired something through my act, and that I am entitled to call upon the state’s agents to enforce that right, we might still disagree about how much I have acquired, because neither the authorization to appropriate nor the title to enforce fixes the boundaries in space and time of my appropriation. A public authorization allows me to acquire things through a unilateral action, but it does not allow me to unilaterally decide the boundaries of that acquisition.

The indeterminacy in the application of concepts of right generates analogues of the problems of assurance and unilateral action. If I believe in good faith that the boundary between our property is in one place, and you, equally in good faith, believe that it is somewhere else, neither of us has any obligation of right to yield to the other. It may be prudent to yield, either because of force or because the subject of the debate is small enough to not be worth the trouble. To yield in such circumstances is, however, to fail to stand on our rights, because the resolution of our dispute depends on the content of our particular ends. More generally, neither of us needs to give in to the unilateral judgment of the other as to how to classify particulars. Unilateral judgment cannot be a law for another person.

The solution to both of these indeterminacy-generated problems is the judiciary: a body that has omnilateral authorization to apply the law to particular cases. The highest court’s decision is final, not because it could not make a mistake, but because it has a public authorization to decide for everyone.

The court is empowered to exercise judgment in accordance with law. That does not mean that all questions of private right must be answered by a comprehensive civil code, only that the legal system as a whole authorizes officials to decide private disputes in accordance with concepts of private right. Private right can include (though it need not) a common law based on precedent, or (though it need not) a civil code that develops its concepts through a consideration of particular cases.

The three arguments are distinct from each other, but coordinate. The

³⁶ 6:266.

assurance argument applies to external objects of choice, regardless of how they are acquired and whether or not their contours are determinate. Even if everybody knows who owns what, the assurance argument suggests that nobody has any claim to enforce a right to what she has, because any such enforcement will be merely unilateral, and so not part of a system of rights. The argument about unilateral choice applies to acquired objects of choice, whether or not they are determinate, and whether or not the obligations to respect them are conclusive or enforceable. The determinacy argument would arise even if rights are enforceable and can be acquired.

The three arguments generate three independent but coordinate branches of government: the legislature must authorize all acts that change, enforce, or demarcate rights; the executive must enforce rights in accordance with law, and the judiciary must decide disputes and authorize remedies, again in accordance with law.

Kant's solution to the three defects is institutional, and brings together the three branches: legislature, executive, and judiciary. Together, they comprise the sovereign.³⁷ They are coordinate insofar as they act together, but each is subordinated to the others because none can solve its own problem consistent with the realization of rights except in collaboration with the others.

The independence of each of the three arguments from the other two underwrites Kant's insistence on the independence of each of the three coordinate branches of government. A legislature and judiciary are not sufficient to render provisional rights conclusive, because to accept the authority of the legislature or the verdict of the court without assurance that others will do the same would be to allow others to treat you as a mere means. An executive and a court without a legislature omnilaterally authorizing the laws that they apply and enforce would simply be an exercise of unilateral choice by officials. And the legislature and executive without a court would leave rights subject to dispute. Taken together, the three arguments operate to establish three branches, which together are able to create a legal system that imposes closure on disputes about rights. Every legal question has a legally authorized answer. Thus neither the ex-

³⁷ 6:316.

ercise of judgment nor the enforcement of the verdict is inconsistent with a system of equal freedom. Neither enforcement nor application is an instance of unilateral choice; and neither legislation nor adjudication involves submission to the will of another person.

Kant compares the three branches to the stages in a practical syllogism.³⁸ The major premise is the product of legislation, because it determines what conduct is prohibited, what conduct is required, and what “merely permissible” conduct has consequences for rights. Thus the activities of the other branches are dependent on law; the executive can only enforce the law, and the judiciary can only apply it. The minor premise is the executive branch, because it is the means available for giving effect to the legislation. Kant represents the judicial verdict as the conclusion, because he represents it as the making-determinate of the authorization to use force in the particular case. In a practical syllogism, the agent takes up particular means on the basis of a general principle; the verdict renders the general appropriately particular.

Although the arguments operate independently of each other, the argument about the legislative will takes priority over the others. Both the exercise of judgment and the enforcement of rights must be done in accordance with law, that is, in accordance with omnilateral choice. The only way that a judge or enforcer can be empowered consistent with right is through the act of a legislative will.

Failure to observe the proper separation prevents the executive and judiciary from solving the problems they are supposed to address. Kant’s approach to the separation of powers thus differs from the familiar form of argument that starts by showing that some kind of state is required, and then goes on to explain the separation of powers within the state as a principle of inner restraint, so as to prevent usurpation and corruption. Locating different powers in separate branches staffed by separate officials reduces the likelihood of arbitrary uses of power. This mode of argument seems to have been prominent in the framing of the U.S. Constitution,

38. Like Aristotle, Kant understands the practical syllogism as the taking up of means, with an action as its conclusion, rather than as a series of inferences between propositions that happens to have action as its subject matter. For Aristotle’s view of the practical syllogism, see *Nicomachean Ethics*, 1147 a27, and John Cooper’s discussion in *Reason and Human Good in Aristotle* (Indianapolis: Hackett, 1986), 46ff.

and is often traced to Montesquieu's *The Spirit of the Laws*.³⁹ Philip Pettit offers a forceful contemporary articulation of this view when he defends the separation of powers on grounds that it reduces the risk of arbitrary exercises of power, in part by imposing general rules and in part by adding complexity to the business of government that makes arbitrary power more difficult to organize.⁴⁰ For both Montesquieu and Pettit the ultimate rationale for the *separation* of powers is the *dispersion* of power.

Kant's argument for the separation of powers is noninstrumental. Each of the basic things that states do must be shown to be made consistent with freedom before turning to any question of how various offices might be staffed or kept under control. Anything that the state does has to be properly authorized by law: the making of law, the taking up of means to give effect to the law, and the passive classification of particulars. Failure to separate the legislative from the executive function turns into a form of despotism, through which some rule over others. The failure to separate the judiciary from the executive and legislative branches creates another version of the same problem: a dispute can only be resolved consistent with the right of the parties if its particulars are brought under a general rule; if the rules can be changed in response to a particular case there is only force, not law. In *Toward Perpetual Peace*, Kant rejects Athenian democracy on the grounds that a form of government that does not distinguish legislative from executive roles is not a form of government at all (*unform*). It cannot be thought of as a system under which people give laws to themselves.⁴¹ Without enabling legislation, there is no distinction between an act of state and an act of members of the executive acting on their own initiative. In the *Doctrine of Right*, the parallel argument makes the more modest claim that failure to distinguish legislature from executive empowers the executive to act on its own initiative, and so not in accordance with law.⁴² Kant's reference to the "practical syllogism" of the

39. Book 11, chap. 6.

40. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997), 174ff.

41. Kant, *Toward a Perpetual Peace*, 8:352.

42. As Ludwig has shown, the differences in formulation reflect Kant's application of the distinction between noumena and phenomena to public right, something that he does in the *Doctrine of Right*, but not in *Perpetual Peace*. See Bernd Ludwig, "Kommentar zum

three separate powers underscores this point: official action under the executive only counts as an action of the people as a whole, rather than the executive acting on its own initiative, if the powers of the executive are prescribed by law. As we saw in our discussion of assurance, it might be prudent to obey an unconstrained executive, but its use of force is no different from any other act of unilateral choice. All authority must come from law, because the only alternative is unilateral choice.

IV. Innate Right in the State of Nature

The three problems are distinct. Even if rules are fixed, they can be applied differently to particulars. Even if title is not in dispute, outside of a rightful condition, people need not abstain from the possession of others. And even if there is an enforcement mechanism and no dispute about particulars, without general legislation, one person's act of appropriation does not bind others.

Kant develops the three problems in terms of external objects of choice, that is, acquired rights. These rights are said to be “provisional” outside of a rightful condition. The innate right of humanity is not said to be provisional in the same way. It might be thought that the problem of determinacy does not come up in the same way with respect to each person's right to his or her own body that it can come up with respect to property or contract.⁴³ That is true of some, though not all, types of property. Horses and islands have clear boundaries, but the unilateral choice and assurance problems still arise. Nor are bodies always exempt from casuistical questions; in the *Doctrine of Virtue*, the second part of *The Metaphysics of Morals*, Kant introduces a series of casuistical problems about the body, including such matters as how a person should properly regard his or her hair. Parallel casuistical questions might come up with respect to interacting persons. If I shout loud enough to startle you when you stand on the edge of a cliff, but do not touch you, do I wrong you? This seems to be a question about our respective rights, which is not resolved

Staatsrecht (II), §§ 51–52; Allgemeine Anmerkung A; Anhang; Beschluss,” in Otfried Höffe, ed., *Metaphysische Anfangsgründe der Rechtslehre* (Berlin: Akademie Verlag, 1999), 173–194.

43. Guyer, “Kant's Deductions of the Principles of Right,” 62.

by some factual consideration about the number of molecules that my shout displaced toward you. I did not blow you over; I startled you. So the indeterminacy argument potentially comes up, in at least some cases.

Your right to your own person is not provisional, because of the two differences between that right and acquired rights that we saw in Chapter 3: your right to your own person does not require an affirmative act to establish it, and your person can never be physically separated from you. Thus neither the problem of unilateral appropriation nor the problem of assurance can arise. Your right in your own person is innate, so no affirmative act changes the rights of others. Your right in your own person is enforceable inasmuch as enforcing it is simply repelling others if they trespass against you; because your person is your body, to stand on your right to your own person is, at a minimum, to keep others away from it. Anyone who touches you without your authorization⁴⁴ hinders your freedom; to repel the trespasser is to hinder his hindrance. Kant characterizes the right to “forestall” a wrongful assailant as “*iustitia inculpatae tutelae*,” the right to blameless defense, and notes that there is no duty of right to “show moderation” in such cases.⁴⁵

When faced with apparent aggression in a state of nature, a person is entitled to shoot first and ask questions later.⁴⁶ In a civil condition, the right to self-defense is much narrower. When self-defense serves as a defense to civil action for battery, the person who claims self-defense must establish it before a court; if the court rejects the defense on the grounds that it has not been proven, then the person who engaged in putative self-defense was just an aggressor. In a situation in which two people both believe themselves to be acting defensively, a court can find that one of them was wrong. The subsequent verdict of the court does not always

44. Parents and other (authorized) caregivers do not need express permission to touch children, because their duty to care for those children generates a right to do what seems to them required to “manage and develop” those children. Thus an infant can be carried, or an older child stopped from running out into traffic.

45. 6:235. At 6:306 Kant identifies “protective justice (*iustitia tutatrix*)” with *lex iusti*, which is in turn identified at 6:236 with the basis of rightful honor in the right of humanity in our own person, that is, innate right.

46. Kant makes this point about the right of nations in a state of nature to defend themselves against apparent aggression and even anticipated aggression (6:346).

provide a prospective guide to action when confronted with what you take to be an aggressor, but it does render defensive rights into a consistent set at the level of repair.

In a state of nature, the rights of several persons to defend themselves do not necessarily form a consistent set, because each is entitled to do “what seems good and right to it.” Different people can act in inconsistent ways, even though each acts in good faith under the idea of the right of self-defense. Any two persons in a state of nature are entitled to defend themselves, and in defending themselves they have no perspective but their own from which to assess aggression. If you act on your right to self-defense in a state of nature, you do so on your own initiative, based on what seems good and right to you. People may sometimes commit aggression in the guise of self-defense, or have sincere but groundless beliefs about the dangers posed by others. But two people can also each act in good faith, each using force purely defensively against the other.

Actual legal systems refuse the defense of self-defense to an initial aggressor, and suppose that at most one of the two can be acting defensively. The other has, at most, some sort of excuse of mistake. This structure is not an accident of positive law, but rather a reflection of the normative structure of self-defense: your right to defend yourself only holds against an aggressor. Yet just as the question of who is an aggressor in a state of nature can be answered by nothing other than what seems good and right to the person defending himself, so, too, these higher-order constraints that require there be only one genuine justified defender can only be applied by the parties themselves. It is thus a structural feature of the situation that it is possible for each party to believe, in good faith, that the other is the sole aggressor. They each make inconsistent claims of right. However, once they have made inconsistent claims of right, there is no answer, apart from what seems good and right to each of them.

The idea that there can be no answer in a dispute about defensive force may seem surprising, because the question of who was the initial aggressor appears to be a purely factual one. But the question of whether defensive force is warranted is not equivalent to the factual question of who made the first move. Your right to defend yourself against an aggressor rests on your belief that someone is wrongfully attacking you, but in a state of nature only you are in a position to judge whether you are under

attack, because you need not defer to anyone else. The entitlement to use defensive force is a reflection of the first Ulpian precept, rightful honor. To defer to the judgment of another about whether something is in fact a case of aggression is, again, to allow yourself to be treated as a mere means. If the other in question is an apparent aggressor, the difficulty with failing to defend yourself is clear. You also have an obligation (the second Ulpian precept) to avoid wronging others. The problem is that the two obligations do not form a consistent set. The other person's unilateral judgment must be both something to you via the second Ulpian precept—he thinks he is defending himself, and you must not wrong him—but also nothing to you, via the first—you don't have to defer to his judgment. Only positive law can guarantee a determinate answer to the question of who the aggressor was, because only under positive law can there be an “irreproachable” judge of such matters.

The imperfection of the right to self-defense does not, however, render that right merely provisional, because it is a conclusive authorization to coerce. Your right to repel those who invade the space occupied by your body does not require an omnilateral authorization. It is imperfect because it is not an authorization under universal laws, since any such authorization would have to be a member of a necessarily consistent set. The inconsistency in the right to self-defense in these cases is contingent, depending as it does on a factual question of whether the same or different things will seem “good and right” to different people. The problem, however, is conceptual: the idea of a rightful condition contrasts with “savage violence” because in the former, disputes are resolved by law, and in the latter, by force. How frequently force is used is entirely contingent, but that is exactly the point. Well-disposed and right-loving people might get into fewer disputes, but if so, it is still entirely contingent. You cannot be fully law-abiding without a lawgiver, no matter how “right-loving” you may be.

If rights to external objects of choice are not enforceable, then, as a specific case of this, contractual rights are not enforceable. This has two important implications for innate right in the state of nature. First, as we saw in Chapter 5, consent is a contractual (and so acquired) right, so it is not conclusive in a state of nature. As a result, the idea of consensual interaction is incomplete. Second, no contractual right to enforcement or

protection is itself enforceable. If I am under attack by some third person, it is difficult to know what it would be for me to be either able or entitled to compel you to assist me while the attack is under way. That is, in the absence of assurance with respect to *external* objects of choice, I can have no assurance that you will keep your end of a mutual protection (or even nonaggression) agreement. The only assurance I could have that you would keep your contract to protect me is if I were entitled to a remedy were you to fail to do so, but no enforceable remedy is possible outside of a rightful condition.

The absence of enforceable rights to external objects of choice also means that you can have no remedial right if someone commits a wrong against your person. As a matter of private right, if somebody wrongs you, you are entitled to damages to make good your loss. However, the possibility of damages requires the possibility of conclusive title to whatever it is that will be transferred as damages. Absent such conclusive title, your right cannot be enforced retroactively. Nor can it be enforced prospectively by the prospect of damages. Thus your right to defend yourself is genuine, but if you fail to hinder a hindrance to your own freedom, it cannot be hindered after the fact.

These difficulties for innate right in the state of nature—indeterminacy, lack of conclusive defense or nonaggression agreements, and the impossibility of a remedy in cases of completed wrongs—do not make innate right provisional in the sense of being unenforceable. They do, however, stand in the way of its being what we might call “conclusively conclusive,” that is, forming an integral part of a consistent system of rights. The fundamental feature of all rights is that they are parts of a system of equal freedom under universal law. In a state of nature, the indeterminacy of innate right and the impossibility of a remedy in cases of its violation mean that innate rights do not form a consistent set, which is just another way of saying that they do not, after all, fall under universal law. Although parallel considerations in the case of interacting nations lead Kant only to the conclusion that nations must bring their disputes before a court, in a civil condition the state must have the further power to bring innate right under universal law. Acquired rights can only be conclusive under universal law, and the universality of that law requires that innate rights also fall under universal law. If each individual were left with the power to do

“what seems good and right” with respect to his or her own person, then each person would be entitled to resist with right the state’s unilateral claim to enforce acquired rights. Instead, the state must claim the power to define the objective standards governing each person’s person, as well as the power to resolve disputes about wrongs against persons in accordance with law that has been laid down in advance. Thus although there is no direct argument from the innate right of humanity to the creation of a civil condition—no civil condition could be mandatory if acquired rights were impossible, because nobody would have standing to force another into one—systematic enforcement of acquired rights generates the state’s authorization to make law with respect to innate right.

V. Conclusion

Kant characterizes the state of nature as a system of private rights without public right. The apparatus of private rights applies to transactions in it, but subject to three defects that make that application merely provisional. Each of the defects reflects difficulties of unilateral action. Objects of choice cannot be acquired without a public authorization of acquisition; private rights cannot be enforced without a public mechanism through which enforcement is authorized by public law; private rights are indeterminate in their application to particulars without a publicly authorized arbiter. Even the innate right of humanity is insecure in such a condition, both because no remedy is possible in case of a completed wrong against a person, and because even the protective right to defend your person against ongoing attack is indeterminate in its application. These problems can only be solved by a form of association capable of making law on behalf of everyone, and authorizing both enforcement and adjudication under law.

Kant's Political Philosophy

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Basil Blackwell · Oxford

philosophy of the State to reconcile irreconcilable interests. The individual *bourgeois* in pursuing his private economic interests must inevitably jeopardize the well-being of the society as a whole.⁸ To curb this tendency the State must act against the interests of the individual. This aspect of the relation between civil society and the State comes out more clearly in Kant's political theory. He portrays the State primarily as an external, restraining influence on the life of the individual. But this is done at the expense of drawing a distinction between civil life and the life of the State. Marx can no more agree with this than he can with Hegel's view. There is, in his view, an unavoidable tension between the economic level and the political level in capitalist society. The two different levels of organization of society will continue to exist, he argues, and be in conflict, so long as the fundamental basis of modern society remains unaltered.

The a priori Justification of the State

In outlining his approach to the State Kant makes what is, I believe, an important point about political philosophy. He draws a distinction between a historical, factual account of the origins of the State and the ethical justification and analysis of the institution. In his view, the major concern of political philosophy is with the second issue, namely, accounting for the State from a moral point of view. This is what he means by the claim that the need for the State can only be derived from an analysis of the *a priori* ideas of Reason.⁹ He suggests that we have to sort out the problem of the most appropriate type of social organization entirely normatively, in other words, without direct reference being made to any concrete, historical circumstances. Because they fail to do this, he disagrees with the approach of Hobbes, Locke and Rousseau to political philosophy. He disagrees, in particular, with their analysis of the idea of the state of nature. All these thinkers ask us, he argues, to imagine what a 'state of nature' would be like, and they base their theories of political obligation on our supposed experiences under such conditions. These thinkers have, of course, varying views as to what our circumstances and situation would be like in the natural state. Hobbes takes a pessimistic view, arguing there is no distinction between a state of nature and a state of war. Locke strongly disagrees; although our natural state is far from being a settled one he believes it is vastly different from a state of war. Rousseau lies at the other extreme to Hobbes, of course, believing our natural state to be

one of undisturbed, ape-like bliss. But what all these accounts of the state of nature share is a vividness and reality in description. Kant thinks this realism is mistaken. By appealing to experience in this vivid manner, the object of these political philosophers is to make us accept the authority of the State from what Kant describes as 'pathological' motives. By this, he means that a vivid and realistic account of the state of nature is intended to appeal to our emotions, and we consequently recognize the need for the existence of the State from motives such as fear, greed, hatred, or indeed, sympathy and compassion. He is prepared to accept that this may be as a matter of fact how states were established, but he whole-heartedly disagrees with the view that this is how the role of the State should be justified. Facts for him are always the product of experience, and all experience is, he argues, contingent. So facts cannot teach us what ought to be the case, they only tell us what is the case at an arbitrary point in time.

For Kant our experience is a world of appearance where we are neither the master of ourselves nor of our circumstances. We are part of a phenomenal world where both the constancy of our own conduct and the conduct of others is in doubt. Claims about how we would behave under certain natural circumstances can, therefore, be neither verified nor denied. Thus, if on the basis of our experience we made the same assumption as Rousseau, namely, that men are by nature benign and peaceable creatures, from a philosophical point of view it would be impossible for us to depend on this fact. However we conceive the state of nature, we have to assume each individual is free to make up his own mind as to which actions are evil and which are good. So, even if every individual can be assumed by nature to be good, differences of opinion would inevitably arise because each individual values his opinion above that of others and he would be under no compulsion to accept any other view of justness and goodness other than his own. To assert that men follow one pattern of behaviour under natural conditions and for this reason they must accept external authority and law does not establish that authority and law are ethical and right. It merely answers one fact with another. By itself the empirical analysis of man and society cannot answer the central problem of political philosophy which is: what are the principles which, when adhered to, will allow men to live in harmony with each other in society?

Kant believes this problem can only have an *a priori* answer. In his assessment of the usual notion of the state of nature he is in full agreement with Hume who argues in his *Treatise of Human Nature*:

The question, therefore, concerning the wickedness or goodness of human nature, enters not in the least into that other question concerning the origin of society; nor is there any thing to be considered but the degrees of men's sagacity and folly. For whether the passion of self-interest be esteemed vicious or virtuous, 'tis all a case; since itself alone restrains it: So that if it be virtuous, men become social by their virtue; if vicious, their vice has the same effect.¹⁰

Whatever we assume about man's nature, the problem of establishing justice remains unsolved. What have to be decided upon are the conditions under which men will accept the authority of the rule of law. The only assumption we need to make about their character is that they are in possession of a free will. If in the exercise of their free will men accept the rules of justice, no restraint is necessary; however, if in the exercise of their free will the rules of justice become a hindrance rather than a help the use of restraint is necessary. Kant thinks that since we can make no clear assumption about how men will act, a system of justice must incorporate the right to use coercion where its rules are transgressed. As he says in his *Reflections on the Philosophy of Right*:

Right and justice must be in the world. If men are by nature good, then their condition of public justice and right is a natural state, but if they are evil, i.e., it is their fault there is no security of rights, then it is a condition of public justice and right based on force [*einer öffentlichen Zwangsgerechtigkeit*].¹¹

In view of these sharp criticisms of the usual 'state of nature' approach to political philosophy it is difficult to understand why Kant, nevertheless, gives a prominent place to the idea in his own theory. How is it that he is still of the view that one of the main questions a political philosopher has to answer is why men decide to leave the state of nature? But with him this question is posed not as a factual question but as an ethical one. He does not try to evoke, in the manner of Hobbes, an emotive response to an imagined situation. His wish in using the idea of a state of nature is for the individual dispassionately and rationally to conceptualize a situation where there are no laws and there is no State. Above all, Kant understands the state of nature as a hypothetical situation where nobody need be bound by a convention should the other party decide not to be bound by it. His use of the idea coincides with the use which Hume

thinks philosophers may legitimately make of it. 'Philosophers may', he says, 'if they please, extend their reasoning to the supposed *state of nature*, provided they allow it to be a mere philosophical fiction, which never had, and never could have any reality'.¹² Understood in this way the idea of a state of nature may become part of an *a priori* justification of the State. For Kant it is part of the story we tell to ourselves as rational beings in explaining why there should be a State. We are well aware that this story is fictional but it is 'good fiction' in the sense that it provides a moral underpinning for the social order.¹³

It is not, of course, surprising that Kant should see eye to eye with Hume on this point. Kant thought highly of Hume's philosophy and acknowledged that it was David Hume who 'first aroused me from my dogmatic slumber, and gave my investigations in the field of speculative philosophy a new direction'.¹⁴ Kant agreed in particular with Hume's view that we could not assume from experience that there was a necessary relationship between any of the objects we observed. Hume argued that the notion of causality, which assumed such necessary relationships existed, was so generally accepted, not because it was true, but simply out of habit or custom. Kant does not fall in entirely with this view arguing, in contrast to Hume, that although we could not assume from experience there were such necessary relationships, we had to assume so from the viewpoint of the understanding and reason. Kant thinks we can assert that the objects of our experience are causally related (and, indeed, we *must* if we are to experience an objective world) providing we recognize that we are not referring to what those things are in themselves but, rather, as those things are the objects of our knowledge. This distinction applies to any assertions we make about men in the state of nature. We cannot say that they depict individuals as they actually are but, rather, such assertions depict men as they are known to *our* understanding and reason.

The story our *a priori* Reason tells us about the state of nature is this. The state of nature is a condition of general uncertainty. Individuals are 'a standing offence to one another by the very fact they are neighbours'.¹⁵ They can make no accurate assumptions about each other's character. For his own part the individual can be sure he will act in good faith but he cannot vouch for the motives of others. Since there are no rules governing their relationships each individual falls back on his own conscience in deciding what best to do. According to Kant, the major problem the individual is confronted with under these circumstances is making sure of what he thinks to

be his own. There can be no security of property in the state of nature. Property presupposes the acceptance of rules, and since the state of nature is characterized by the absence of enforceable rules it cannot give rise to property. So Kant thinks that once the individual conceptualizes such a state of affairs he will have no difficulty in seeing that the rational thing to do is to join with others to create a united general will which will safeguard his own and everyone else's property. In this Kant agrees with Rousseau's assessment when he says, 'What man loses by the social contract is his natural liberty and unlimited right to everything he tries to get and succeeds in getting, what he gains is civil liberty and the proprietorship of all he possesses.'¹⁶ Rousseau's only error from Kant's point of view is that he fails to see the true status of his account of the origin of the State. He sees as a factual account of the origin of the State what is, more accurately, a moral and *a priori* justification of civil authority.

The Three Aspects of a Constitution

Kant defines a state 'as the union of a great number of men under the rule of law'.¹⁷ Any given state, however, only conforms with the idea of the State in so far as its laws follow from the *a priori* principles of right. To comply with the idea of the State the laws must secure freedom for every man, and equality and independence for each citizen. It is entirely possible, then, for a state to exist which does not attain the standard set by the idea of the State. In Kant's view, however, it is better for us to accept a state which only approximates to its idea rather than endure the state of nature. For this reason he gives the individual the authority to coerce others into a civil society even where those individuals prefer their existing conditions.¹⁸

The free, equal and independent members of the state are, Kant suggests, given a single voice in the constitution. The constitution, in Rousseau's terms, unites the particular will of the citizen with the general will of the sovereign. Kant sees this general will as having three aspects or powers. The first aspect is the power of the sovereign, the second is the power of the executive, and the third is the power of the judiciary. Kant compares these three powers with the three parts of a practical syllogism. The major premiss of the syllogism is, he argues, the law of the sovereign or the legislature. The minor premiss is formed by the executive arm which has the task of seeing

Moral Community: Escaping the Ethical State of Nature

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<www.philosophersimprint.org/009008/>

SUPPOSE THAT SOMEONE with his arms full of groceries asks you to hold a door. You probably take yourself to have a reason to help him. You may think, as I do, that if you refuse his request without some good reason of your own, you wrong him. It seems then that he has the authority to make a claim on your help with his chosen project. But how can one person have the authority to make choices that create reasons for another?

Kant might seem unpromising on this issue, since he holds that something is a reason for you only if you can autonomously will to act on it. Then again, he also affirms a duty to share others' ends, and thus to take their choices to give you reasons to act. These two theses look like they are in tension. In this paper I reconcile the two claims to provide an answer to the question raised above. I model my solution on Kant's justification of the authority of the state.

In *The Doctrine of Right* Kant argues for an obligation to leave the Juridical State of Nature and found the state.¹ Less familiar is a passage in *Religion within the Bounds of Mere Reason* where he argues for an obligation to leave what he calls the Ethical State of Nature by joining together in the Moral Community. Both texts address and try to resolve a tension between our individual freedom and our authority to make claims on one another. The *Doctrine of Right* takes up the apparent tension between freedom and legitimate coercive government authority, arguing that such authority is a condition for the exercise of freedom. You can establish your rights, thus securing your freedom, only in the civil society where we reciprocally recognize the rights of all. The *Religion* addresses personal, rather than political, relationships. Kant's remarks there are both suggestively rich and disappointingly vague. But I take it that they include, among many other ideas, the thought that regarding other people as capable of making choices that give you reasons to act is a condition of the full exercise of your freedom in

1. Throughout I cite most of Kant's works according to the volume and page numbers in *Kants gesammelte Schriften* (published by the *Preussische Akademie der Wissenschaften*, Berlin). The exception is the *Critique of Pure Reason*, which is cited by the page numbers of both the first (A) and second (B) editions. I quote translations from the Cambridge Texts in the History of Philosophy.

another sense.² The relevant freedom is what Kant calls *inner freedom*, and is identical to the *Groundwork's* better-known concept of *autonomy*. In the *Religion*, Kant thus gestures at this ethical parallel to the thesis of the *Doctrine of Right*: you can establish the authority of your choices, making your autonomy possible, only in the Moral Community, a form of relations in which we reciprocally acknowledge authority to give reasons to one another. Kant provides no detailed argument for this thesis. In this paper, I aim to do so. I first review the main lines of argument in the discussion of the Juridical State of Nature, and then develop the argument for the interpersonal case.³

I. The Juridical State of Nature

We are in the Juridical State of Nature with respect to one another just in case we interact but stand under no common authority. Our basic problem in this state, so Kant thinks, is that each person needs property rights if he is to be able to make use of his external freedom, but no one can establish such rights in the absence of a common authority. To understand this argument we must first grasp Kant's conception of a property right.⁴

A right, for Kant, is a permission to back a normative claim by

2. Since Kant's account of the Ethical State of Nature lacks detail, I do not claim that the reading that I offer here is definitive of his thought. In fact, I do not even mean for the second section of the paper to be primarily interpretive, but rather to advance our understanding of contemporary problems in moral theory. This reading is worth considering for the light it throws on the relationship between our own freedom and others' authority to give us reasons to act.
3. In both of these passages Kant mentions problems of conflict. Some of Kant's predecessors, notably Hobbes, took conflict in the State of Nature to be the fundamental problem that the state was needed to solve. In Kant's own work, though conflict and the threat of conflict play a role, the fundamental problem is different. This problem, I will argue, is that in both the Juridical and the Ethical States of Nature we are unable to establish as individuals the normative claims that we need in order to effectively exercise our own freedom.
4. For another reading of Kant's discussion of the juridical state of nature and the transition to the state, see Arthur Ripstein, "Authority and Coercion," *Philosophy and Public Affairs* 32:1 (2004): 2–35.

I have concerns about this treatment because I believe that Ripstein uses the word "can" to slide from claims about power to claims about authority.

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coercion.⁵ Correlatively an obligation or duty of right is a claim that others may coerce you to fulfill. I have a *property* right over an object if, when I claim that it is mine, I do not wrong others in enforcing this claim with coercive threats. Kant explicates the content of a claim that a thing is mine by contrasting what he calls sensible and intelligible possession. I am in *sensible possession* of an object that I am holding or of land that I am currently physically occupying. In general if you would have to move my body to make use of a thing, then I sensibly possess it. Since moving my body against my will obviously constitutes interference with my pursuit of my ends, it looks as if a right to what I sensibly possess follows directly from what Kant calls the right to *external freedom*. Kant claims that this right is innate, and he glosses it as "independence from being constrained by another's choice."⁶ But a right to what I sensibly possess falls short of a property right. For that, Kant thinks I would need to be in what he calls *intelligible possession* of an object. I possess a thing intelligibly if my right to it endures even if I am spatially removed from it: if I put the object down or leave the land. Since you then can make use of the thing without interfering with my body, property rights cannot follow trivially from the right to external freedom.

A property right is thus a relation that holds among you, an object,

5. *Metaphysics of Morals* 6:232. Technically, this is the definition of what Kant calls "strict right." The complication arises because when Kant first introduces the notion of "right," he has in mind a moralized idea: rights as claims that you have against others that it would be *morally* wrong for them to violate. But shortly afterwards Kant separates this moral notion from a more strictly juridical one. He writes, "[S]trict right, namely that which is not mingled with anything ethical, requires only external grounds for determining choice; for only then is it pure and not mixed with any precepts of virtue This is indeed based on everyone's consciousness of obligation in accordance with a law; but if it is to remain pure this consciousness may not and cannot be appealed to as an incentive to determine his choice in accordance with this law. Strict right rests instead on the principle of its being possible to use external constraint that can coexist with the freedom of everyone in accordance with universal laws." What Kant is doing here is trying to separate moral obligations to follow the civil laws, which he does affirm, from the legal obligations that are the correlates to legal rights. The latter, he thinks, we can understand just in terms of permissions to coerce.
6. *Metaphysics of Morals* 6:237.

and all other people.⁷ If some object is rightfully yours then everyone is under obligation not to use it without your permission. So if you can establish property rights over a thing you can thereby place others under a new obligation, creating new reasons for them through your own act of will, your choice that a thing be yours. Kant describes the matter this way: "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."⁸

Keep in mind that the concepts of right, wrong and obligation here are juridical, not ethical, concepts. For Kant this means that they refer not to what you should do as a matter of autonomous self-legislation but rather to what you may coerce another to do. To say that I have an obligation not to use a thing without your permission is, in this context, to say neither more nor less than that you would be justified in forcing or coercing me to refrain from doing so.⁹ This susceptibility to coercion is the reason of right that property creates. If you can by an act of will make something yours, then you may create this reason for everyone.¹⁰

7. Kant himself asserts that a property right is a relation among persons, *not* between a person and a thing (*Metaphysics of Morals* 6:260). I take his point to be that property rights consist in the claims that one person may make upon others. But clearly in any given case these claims must be about some thing, and this is all I mean by including the thing in the relation in question. Kant's scheme is also somewhat more complicated than I allow here, since he believes that we can have rights not only to material objects but also to another's choice, in the case of contracts, or another's status, as for example in marriage. I set these complications aside and focus on what Kant calls a right to a thing.

8. *Metaphysics of Morals* 6:255. Cf. 6:253 and 6:247 (Cambridge edition, p. 41).

9. Uncharacteristically, Kant provides us with a nice example:

[W]hen it is said that a creditor has a right to require his debtor to pay his debt, this does not mean that he can remind the debtor that his reason itself puts him under obligation to perform this; it means, instead, that coercion which constrains everyone to pay his debts can coexist with the freedom of everyone, including that of debtors, in accordance with a universal external law. Right and authorization to use coercion therefore mean one and the same thing. (*Metaphysics of Morals* 6:232)

10. Really there are two reasons in the neighborhood. One is the reason that

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Kant opens the *Doctrine of Right* by asking whether a right to a thing is possible, and if so how. Property rights are puzzling in that they license coercion, and this seems in tension with the innate right to external freedom, and thus with Kant's Universal Principle of Right. This principle states, "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."¹¹ It looks like this principle, which Kant intends as the fundamental constraint on our understanding of all rights, forbids property rights. These would allow you to create a permission to coerce those who are not interfering with your body by choosing to make something yours. It seems like this is to constrain them by your choice and thus is incompatible with their external freedom.

Against this *prima facie* implication of the Universal Principle of Right, Kant argues that the opposite conclusion follows.¹² His first premise is that you need to make use of objects in order to exercise your external freedom. External freedom is the ability to move your body around and pursue your ends in a way that is unconstrained by others' choices. But, being a physical being, you interact with the external world through physical things. Physical objects are your tools for accomplishing most of your ends. So when you actually go about pursuing your ends you will be making use of objects. And many of the ends that you pursue rely on more things, over a longer period of time, than you can keep in your sensible possession.

Thus you can effectively exercise external freedom only with a right to these objects. You exercise external freedom when you pursue your ends unhindered by other people. But suppose that you have no

one has to avoid the consequences of violating enforceable rights. The other is a reason of virtue: violating others' rights would constitute disrespect for humanity. This reason is supposed to spring from our autonomous self-legislation, and in particular from a demand of our practical reason that we make humanity – and thus the rights of humanity – our end. But this is not the reason that concerns me here. If we restrict our attention to nothing more than the realm of strict right, the reason in question must be the threat of coercion.

11. *Metaphysics of Morals* 6:230.

12. *Metaphysics of Morals* 6:246ff.

property rights. Then, though you try to make use of some object to pursue your end, I may snatch it as soon as you lay it down. My choice frustrates your pursuit of the end, and thus interferes with your external freedom. But if you have no right to the thing any such constraint on your freedom would be permissible. I might even choose to snatch every item that you temporarily abandon.

Thus forbidding coercively enforceable rights turns out to severely limit freedom rather than protect it. Now, that something limits external freedom does not by itself establish it as impermissible. The Universal Principle of Right does not assign anyone unlimited freedom, but rather limits each to the freedom that can simultaneously be enjoyed by all. But it does entitle us to the maximal freedom that we can have subject to this restriction. And while it is true that giving you property rights in a thing restricts my freedom to some extent, this restriction is much less serious than the restriction that I would face if I couldn't establish property rights. In the former case, I may be coerced not to interfere with what you own. But in the latter all of my ends could be severely curtailed.

Of course, there may be times when we both need the same object, and in such a case my right may frustrate your ends, or vice versa. This raises issues about conflicts in rights claims, discussed below. But, in any case, forbidding the establishment of any property rights does neither of us any good. Though I could then not rightfully forbid you from using the thing in question, you could not make dependable use of it either. This explains Kant's complaint that if we do not allow the possibility of property rights, we will have made potentially usable things into *res nullius* and "annihilate[d] them in a practical respect."¹³

The Universal Principle of Right thus demands that it be possible to have a right to a thing. Kant calls this the *Postulate of Practical Reason with Regard to Rights*: "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

¹³. *Metaphysics of Morals* 6:246 (Cambridge edition, p. 41).

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one (*res nullius*) is contrary to rights."¹⁴ Kant thus concludes that it must be possible to have property rights. But the potential for conflicts just mentioned continues to make mysterious *how* this is possible, consistent with the external freedom of all.

Kant believes that it is not possible in the State of Nature. But he does hold that we can establish something *like* ownership there. He claims, "...in a state of nature something can actually be mine or yours but only provisionally."¹⁵ Agents wishing to make use of objects in the State of Nature assert a conclusive right over these things, that is, a right to coercively enforce their intelligible possession of them. But no one can succeed in establishing conclusive rights in the State of Nature. Rather the claims that each makes over things establish only *provisional rights*. That is, though they do create some normative demands, these are not the very same normative demands that constitute conclusive rights. There are at least three reasons why you cannot establish the norms of a conclusive right in the State of Nature.

The first, and most fundamental, I call the *problem of unilateralism*. In claiming a property right in the State of Nature you are trying to make a thing yours simply by making a choice. Kant believes that we acquire things only by choosing to do so.¹⁶ In a civil society with an attendant system of property you might exercise this choice by purchasing the thing. In the State of Nature it is less clear how to exercise the relevant choice, but Kant says that you must signal it by either a verbal declaration or some other relevant act. When you do this you are trying to assert a choice that, all by itself, creates a permission for you to coerce others not to use the thing without your authorization. But, however property rights are to be established, it cannot be like this. For this would allow you to *unilaterally* bind all others through your choice,

¹⁴. *Metaphysics of Morals* 6:246 (Cambridge edition, pp. 40–41).

¹⁵. *Metaphysics of Morals* 6:256.

¹⁶. He believes that this is true even of gifts and inheritances, which must be freely accepted by the recipient as well as given. Kant thinks that this raises difficult metaphysical questions about how the gift and the acceptance could be simultaneous. See *Metaphysics of Morals* 6:293–294, and cf. 6:272–273 on the need for simultaneity.

and this permission clearly would constrain their freedom. Kant writes, "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 everyone's freedom in accordance with universal laws."¹⁷

You have a right to a thing only if there is a law laying on each a duty of right not to make use of the thing without your permission. But you do not have the authority to make such a law yourself, and attempting to enforce a purported law with this content is a violation of others' rights. So you cannot have conclusive property rights in the State of Nature.

The problem of unilateralism is clearest in cases where it is paired with another, which I call the *problem of indeterminacy*.¹⁸ The problem here is that you are not competent to determine alone how far your right extends. We may disagree over who has even a provisional property right in the State of Nature, and when we do neither of us has the authority to settle the disagreement. In fact, while we remain in the State of Nature, there may be no fact of the matter about who has the legitimate claim. We can think of cases in which this is plausible: you plant a tree, but then take off for distant lands. I cultivate it to the point where it bears fruit. You return and claim that the tree is yours, while I claim that it is mine.

There is a third problem with provisional rights in the State of Nature, which is closely related to the problem of unilateralism, but conceptually distinct from it. Kant describes it this way:

... the obligation [to refrain from using what another

17. *Metaphysics of Morals* 6:256.

18. It is not clear how Kant himself thinks that the indeterminacy problem is related to the others. He does not mention it in his initial explication of the argument in Part I of the *Doctrine of Right*, on Private Right. But when he begins the section on Public Right, Part II of the *Doctrine*, he cites the indeterminacy problem as though this were the justification for founding the state that he had had in mind all along (6:312–313).

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claims as his own] 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. (6:255–256)

Roughly, the idea is this: others' claims to property rights cannot put you under an obligation unless you have assurance of the effectiveness of your similar claims. Call this the *assurance problem*. Like the problem of indeterminacy, the assurance problem needs a solution that does not violate the unilateralism constraint. If you are by far the most powerful person around, then you could apparently gain assurance by exercising your power over others, or threatening to do so. But this would amount to just the kind of unilateral coercive threat discussed above.¹⁹ So there is no legitimate way for us to provide assurance to one another short of setting up an authority that solves the unilateralism problem, and giving this authority the power to enforce its dictates on us all. This just is to set up the state.²⁰

Founding the state simultaneously solves all three problems with merely provisional rights. Most fundamentally, we must solve the problem of unilateralism. Given such a solution, it is not difficult to see how to handle the other two problems. The state solves the problem of indeterminacy by making determinate laws and procedures for establishing a truth in cases of disagreement. And, in order to count as fully legitimate, it must have the power to back its decisions with coercive force and so provide the mutual assurance that we need.

Since the problem of unilateralism is that none of us is authorized to enforce our rights as individuals, what would solve it is an authority

19. Note that, in contrast, this does apparently solve the problem of Hobbesian trust. Hobbes rules out this kind of situation with his hypothesis that all are approximately equal in power.

20. *Metaphysics of Morals* 6:256.

that represents our collective, united will. Of course, in order to make sense of this we have to understand what exactly it means to say that the state represents the united will of its citizens and how it can be organized to count as accomplishing this. Unfortunately, although Kant gives arguments to show why the state must unite the wills of its citizens in order to solve the problems with provisional rights, he is quite sketchy about just what this requires.²¹ There is a principled reason for this: Kant believes that people must regard their existing states, however they are organized, as legitimate, and this doctrine would cause tension with any attempt to spell out necessary conditions for legitimacy.²² Those who have some sympathy with Kant's approach, but balk at endorsing his claim that under no conditions do citizens have a right to actively oppose their government's authority, have generated a great deal of debate in political philosophy about the conditions under which a state counts as speaking on behalf of its citizens as a whole.²³ Fortunately, we need not enter into these debates. I am happy to treat the unified will of the state as a place-holder for a problem that it is up to political philosophers to solve. My interest lies in understanding the nature of unity in the ethical case.

What is important for the purposes of the ethical analogy that I make below is the normative role that provisional rights play. Above I said that provisional rights establish some normative claims, though not the very claims that they purport to establish. It is now time to

21. See, e.g., *Metaphysics of Morals* 6:264, 6:311, 6:313–314, and 6:315. In the useful terminology introduced by Rawls, we might say that Kant provides the concept of the state – the unity of its citizens' wills – but not the conception. That is to say, he names the characteristic problem that the state must solve, but does not actually spell out the solution. See *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), p. 5.

22. *Metaphysics of Morals* 6:318–319.

23. See, e.g., Christine Korsgaard, "Taking the Law into Our Own Hands: Kant on the Right to Revolution," in *Reclaiming the History of Ethics: Essays for John Rawls*, ed. Andrews Reath, Barbara Herman, and Christine M. Korsgaard (New York: Cambridge University Press, 1996); Thomas Hill, "A Kantian Perspective on Political Violence," in *Respect, Pluralism and Justice* (New York: Oxford University Press, 2000); and Allen Rosen, *Kant's Theory of Justice* (Ithaca, NY: Cornell University Press, 1993), chapter 4.

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discuss what these claims are. What Kant most often cites is importantly not a permission to coercively defend your possession of the object in the State of Nature. If provisional rights gave that permission, it would be difficult to see what set them apart from full-blown conclusive property rights. Rather, it is a permission to coercively force anyone who does or might oppose your claim into joining with you in the civil society.²⁴ So, for example, he writes: "Still, that provisional acquisition is true acquisition; ... in accordance with which each is justified in using that coercion which is necessary if people are to leave the state of nature and enter the civil condition, which can alone make any acquisition conclusive."²⁵

There is an important sense in which the upshot of all this is that, given our ongoing interaction with others, it is extremely unlikely that we will ever find ourselves in a pure Juridical State of Nature. It is almost inevitable that each of us will assert property rights against others, and this is already to invoke an authority that could only be the authority of the state.²⁶ Until we come to sufficient agreement about

24. Kant also believes that we may directly defend our provisional rights, but only against those who are not ready to enter the state with us. See *Metaphysics of Morals* 6:256. This has to mean that we may resist the use of our provisional property only in cases in which the person who would take it from us is not willing to enter the civil society with us, and we are not powerful enough to coerce him to do so.

25. *Metaphysics of Morals* 6:264. Also cf. 6:256: "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." And again "Prior to a civil constitution (or in abstraction from it), external objects that are mine and yours must 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."

26. You can legitimately coerce even someone who makes no property claims to join with you in the state. Call this person a Free Spirit. You can justify coercing the Free Spirit on the following grounds: you want to have a thing as yours, but are unable to do so given the current arrangements. But there is nothing about your owning the thing to which the Free Spirit could legitimately object. So you are entitled to bring about the relations that allow you to make the property claim conclusively. It seems as if the Free Spirit could

the agents of this authority, and these agents have sufficient powers of enforcement, our state is apt to be very badly organized. Functionally, it may not differ from the State of Nature. But normatively it will. In asserting our claims to property we have each already committed ourselves to recognizing the legitimacy of a government that is the condition for the validity of claims of this type.

When we organize the civil society, provisional rights play their second normative role. In this organization, holding a provisional right in something gives you a presumptive claim that your right should be made conclusive. The state could overturn rather than ratify this claim, and due to the indeterminacy problem there may be cases of disagreement in which it will of necessity overturn one party's claim. But the state may not overturn these claims without some good reason. The burden of proof is on those who would refuse to ratify a provisional claim, not on those who assert it for ratification.²⁷

In truth, the previous paragraph is a bit misleading. The Juridical State of Nature is a construct rather than an actual historical situation. So there is no moment in time at which our rights are converted from provisional to conclusive. In practice the second normative role plays out in two ways. First, it gives us reason to regard the property claims that we find in place at any historical moment as legitimate (though the state may override particular claims, just as it may override particular

object that while there is nothing wrong with your having a property right in the thing *per se*, coercing him into the relationship of fellow citizen when he has no interest in it limits his freedom. The Kantian response turns on the fact that both the Free Spirit and you ground your appeals on the Universal Principle of Right, claiming that the other aims to limit your freedom illegitimately. But, as I argued above, because refraining from making any property claims results in a major restriction of external freedom, forming the state leaves us more rather than less free. So finding in favor of the one who would found the state better realizes the value that both parties invoke. My thanks to Japa Pallikkathayil for helping me formulate the points in this note.

27. Kant makes this clear at the end of a passage that I have quoted above. *Metaphysics of Morals* 6:257: "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 . . .".

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provisional rights at its envisioned inception). Second, it sheds light on how we might settle disputes about property rights that arise within the state. The settling of such disputes obviously is not the founding of a new state. But we might think of such settlements as extending the state's organization.

The second role of provisional rights makes it important to limit the ramifications of the indeterminacy problem as much as possible. If provisional rights were radically indeterminate they might still ground the right to coerce one another into the civil society, but they would not be able to play this second function in a meaningful way. It is here that Kant's criteria for establishing provisional rights take on importance. While, as we have seen, these fall short of determining rights with the exactitude that we must demand in the state, they do set some meaningful parameters on reasonable assertions of provisional rights. You cannot assert a provisional right over just anything in the State of Nature. Rather, you must meet certain conditions. Kant says that you must first take physical possession of the thing in question and must then give some sign that you regard it as yours.²⁸ In a nod to Locke's idea that you make a thing yours by mixing your labor with it, Kant holds that you could do this by, for instance, developing some land for agriculture. But you need not; you can claim a thing even without making immediate use of it.²⁹ Nevertheless, you do need to be, in some sense, invested in the thing that you claim, and this may be what motivates Kant's requirement that you be able to defend it in the state of nature.³⁰ In order to claim a piece of land you must occupy it. You cannot assert with any normative force title to a tract of a distant continent that you have never visited. And while this is not as demanding as a requirement that you develop the land, it is

28. *Metaphysics of Morals* 6:258–259.

29. *Metaphysics of Morals* 6:265.

30. 6:257. And cf. 6:265: "The question arises, how far does authorization to take possession of a piece of land extend? As far as the capacity for controlling it extends, that is, as far as whoever wants to appropriate it can defend it—as if the land were to say, if you cannot protect me you cannot command me."

more demanding than the requirement that you merely set foot on it. You cannot run around claiming all the land your body touches, either. Rather, you must be prepared to defend what you claim, and may in fact have to be able to do so.

So the problem in the Juridical State of Nature is that no one can establish in it the normative claims that she needs to make full use of her external freedom. These claims are conclusive property rights, the claim that something is yours, and thus that others wrong you if they make use of it without your permission. You can establish some normative claims in the Juridical State of Nature. We can each establish claims over one another that create a duty to enter together into the civil society. And each can create presumptive claims about the content of the conclusive property rights that the civil society will recognize.

II. The Ethical State of Nature

Kant introduces the Ethical State of Nature in the third book of the *Religion*. He explicitly affirms many aspects of the analogy with the Juridical State of Nature, but does not spell out the ethical analogs in detail. Here I offer an interpretation on which an individual's ends play the role analogous to property claims. Just as you must establish property rights in the Juridical State of Nature to fully exercise your external freedom, so you must commit yourself to ends to fully exercise your inner freedom. But just as it is a condition on having conclusive property rights that you enter with others into the civil society, so it is a condition on having ends with appropriate normative force that you enter into relationships in which you can give reasons to one another by making discretionary choices.

A. What is the Ethical State of Nature?

First we must understand the Ethical State of Nature. The entire social contract tradition develops the idea of the Juridical State of Nature, but Kant is — to my knowledge — unique in considering a moral analog, and even he says relatively little. Nevertheless, his repeated parallels

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to the juridical case show that he does not take the allusion to the *Doctrine of Right* lightly. Consider the following:

A *juridico-civil* (political) state is the relation of human beings to each other inasmuch as they stand jointly under *public juridical laws* (which are all coercive laws). An *ethico-civil* state is one in which they are united under laws without being coerced, *i.e.* under *laws of virtue* alone.

Now, just as the rightful (but not therefore always righteous) *state of nature*, *i.e.* the *juridical state of nature*, is opposed to the first, so is the *ethical state of nature* distinguished from the second. In these two [states of nature] each individual prescribes the law to himself, and there is no external law to which he, along with others, acknowledges himself to be subject. In both each individual is his own judge, and there is no effective *public* authority with power to determine legitimately according to laws, what is in given cases the duty of each individual, and to bring about the universal execution of those laws.³¹

Kant characterizes the Ethical State of Nature as one in which each individual gives himself a law, acknowledging no external authority. But this is puzzling. On the one hand, he clearly thinks that it is a problem, since he compares it to the anarchy of the Juridical State of Nature. On the other, it apparently captures a central insight of his moral theory. Compare this passage from the *Groundwork*:

If we look back upon all previous efforts that have ever been made to discover the principle of morality, we need not wonder now why all of them had to fail. It was seen that the human being is bound to laws by his duty, but it never occurred to them that he is subject *only to laws given by himself but still universal* and that he is bound only to

31. *Religion within the Bounds of Mere Reason* 6:95. Emphasis is Kant's.

act in conformity with his own will . . . I will therefore call [the categorical imperative] the principle of the *autonomy* of the will in contrast with every other, which I accordingly count as *heteronomy*.³²

Rather than reading the *Religion* as rejecting this important tenet of Kant's practical philosophy, I take it that he is revisiting and expanding an issue already under discussion in the *Groundwork*: the relation between our autonomy and others' authority to give us reasons to act.

The problem arises especially forcefully with respect to what I call positive reasons. Someone has a positive claim on me if she is entitled to my active contribution to her projects rather than merely my non-interference. In the *Groundwork* positive duties to others first appear in the derivation of a duty of benevolence under the Formula of Universal Law.³³ If that argument and the vindication of the moral law in *Groundwork III* succeed, then Kant shows that we impose this duty upon ourselves. So to recognize it is not to take one's self to be subject to an *external* law arising from another's will.

But there is a problem. We can understand the duty of benevolence as a prohibition on having a policy of not helping or as a requirement to help others at least sometimes. This provides some practical guidance, but no single omission would violate this duty. Thus it could never ground an objection from any given individual whom I fail to help. But there are cases in which we apparently have such objections, so we cannot take the general duty of benevolence to exhaust our positive obligations to others.³⁴

32. *Groundwork of the Metaphysics of Morals* 4:432–433. Emphasis is Kant's.

33. *Groundwork* 4:423. Kant sometimes refers to this as a "duty of benevolence," and sometimes as a "duty of beneficence." I use the former term here, to distinguish it from the particular view that we should promote others' happiness. Although he often seems to use the terms interchangeably, in *The Metaphysics of Morals* Kant specifies that "Benevolence is satisfaction in the happiness (well-being) of others; but beneficence is the maxim of making others' happiness one's end ..." (6:452). I do not mean to be invoking this distinction between action and regard in using the term 'benevolence' here.

34. Another way to understand the contrast is as between the object of evaluation of the two obligations that I am contrasting. The objection that you can

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Suppose that you are carrying heavy groceries and are unable to open a door. You request my assistance and I flatly refuse. You press me for a reason and I reply that since you, not I, chose to undertake this project, getting through the door is now your problem. If this is my full explanation it seems that you have a legitimate complaint against me. In taking this to be a sufficient reason to reject your request I refuse to acknowledge that your end gives me reason to help.

I owe it to you to be responsive to your claim. In some circumstances such responsiveness demands acting as your claim directs. But if a more pressing reason pulls against my providing help, I could appropriately acknowledge your claim without this moving me to action. In such situations we normally provide the reasons that explain our failure to help.³⁵ Lacking even time to do that, we use other social cues to indicate that we take the reason seriously. We say, "I can't, sorry," or some such thing, as we rush by. But if I do not have a good reason not to help, I owe it to you to hold the door.³⁶ And in any case in such situations you have a particular claim on me.

This is the sort of thing that the *Groundwork's* general duty of benevolence cannot explain. The *Groundwork* argument purports to establish an obligation to, as it were, create a benevolence fund but does not entitle any particular person to draw on it. That is, you don't owe the duty to any particular person. It is merely an obligation *with respect*

make to my not helping arises because of a single interaction between us. But the general duty of benevolence does not evaluate us with respect to single interactions. It takes a whole life, or at least some substantial chunk of it, as its object.

35. Korsgaard makes this point in *The Sources of Normativity* (New York: Cambridge University Press, 1996), p. 140.

36. My argument aims to get duties owed directly to others on the table. On this compare Stephen Darwall, *The Second-Person Standpoint* (Cambridge MA: Harvard University Press, 2006). The duty that I am discussing is just a duty to acknowledge the claim that another makes on me. In some circumstances I will count as acknowledging this claim only if I act as it directs. In others, because the claim is outweighed or overridden by another reason, acknowledging it won't require action. So there is a further step needed to complete this argument, a discussion of how to evaluate the relative force of reasons. I do not purport to accomplish this here.

to others, not one that recognizes another person as having the authority to give you reasons.

We can read the *Religion* discussion of the Ethical State of Nature as attempting to fill this gap by grounding a class of positive duties *beyond* the general duty of benevolence: duties owed to particular others to do particular things. These are different from, though obviously related to, the duties established by the general duty of beneficence. Ethical duties — duties of virtue — are duties to acknowledge certain considerations as reasons and act accordingly. The duties in question are duties to particular others to regard their choices as providing reason to act.

The Ethical State of Nature is then best understood as a certain relationship with others: the relationship in which we attribute no authority to one another's choices. We are in this relationship if we take the general duty of benevolence to exhaust our positive duties towards one another. The problem of each individual's prescribing the law to himself, not acknowledging any external law, is a problem about the practical import that we take our own and others' choices to have. The situation has the potential for conflict because it amounts to disagreement about what reasons there are. But, as in Kant's juridical case, disagreement and conflict are not the fundamental problems. Rather, the problem is that we assert claims over one another that we are not authorized to make.

B. The Postulate of Reason Creation

The first parallel that we need to establish between the Juridical and Ethical States of Nature is that when we exercise our freedom in each case we also assert a normative claim over others. In the juridical case when I assert a property right, I claim to have authority to give others reason to act. The parallel claim in the ethical case is that exercises of internal freedom presume a similar authority.

The threat to your external freedom comes from outside of you, from others' potential interference. As we might expect, Kant takes the primary threat to your internal freedom to come from inside of

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you, from what he calls your inclinations.³⁷ Your internal freedom is violated or limited when these determine what you do. In order to exercise inner freedom you need reasons to stick to a course of action even as new inclinations arise. In the case of discretionary ends, those that are neither forbidden nor required, we take ourselves to have two distinct grounds for these reasons. First, the project's value: it is worthwhile enough to merit time and energy.³⁸ Second, our choice of this project over others.

Both grounds are needed to make the exercise of inner freedom possible. That the project is worthwhile gives you reason to override inclinations to waste time on worthless pursuits when giving in to these inclinations would undermine it. But these reasons do not guard against another temptation: the pull to abandon your project in favor of other equally valuable options. Though it is sometimes appropriate to reconsider a course of action, if you yield to any such inclination you will not stick with any project long enough to make it count, or you will do so only by lucky accident.³⁹ It is in the face of this problem

37. In his later work he develops a more mature view on this and calls the threat in question "passion." For the purposes of this discussion the distinction is unimportant. For more on this see Steven Engstrom "The Inner Freedom of Virtue in Kant's Metaphysics of Morals," Mark Timmons, ed. (New York: Oxford University Press, 2002).

38. I remain agnostic here about what grounds a project's status as worthwhile. What I say in the text may suggest a realist view about this: some projects simply are more worthwhile than others, and this fact has no further explanation. I think that the view as I present it here is compatible with this realist approach but not committed to it.

39. This is just the problem that Plato identified in the democratic man. He cannot accomplish anything, and — despite what he thinks — this constitutes the severest sort of restriction on his freedom. Compare what Plato says:

And so he lives on, yielding day by day to the desire at hand. Sometimes he drinks heavily while listening to the flute; at other times, he drinks only water and is on a diet; sometimes he goes in for physical training; at other times, he's idle and neglects everything; and sometimes he even occupies himself with what he takes to be philosophy. He often engages in politics, leaping up from his seat and saying and doing whatever comes into his mind. If he happens to admire soldiers, he's carried in that direction, if money-makers, in that one. There's neither order nor necessity in his life, but he calls it pleasant, free, and

that the fact that you have chosen the end plays an important role in grounding your inner freedom. Your choice gives you reason to override inclinations to reconsider.⁴⁰ Thus, you are able to exercise a certain kind of authority over yourself, creating reasons for yourself through an act of will.

We also take both grounds to give *others* reasons. Many philosophers have observed the role of the first: if you take a project to be valuable enough to give you reasons, you must also take it to be capable of giving reasons to others who are similarly situated.⁴¹ This is part of the very idea of a reason, so that if you deny that your project gives others reasons, you deny that it is worthwhile and would not be able to make sense of pursuing it yourself.

I mention this way in which your projects make claims on others only to set it aside. Notice that if your projects generated only reasons grounded on their value, others might choose to contribute based on the merits of the project, but they would never owe this *to you*. Even if the value of the project were, under the circumstances, sufficient to demand contribution, failure to contribute would simply be failure to respond rightly to something of value. And for discretionary projects no one who did not choose to contribute would do anything wrong.

blessedly happy, and he follows it for as long as he lives." (*Republic* 561d)

Also compare Korsgaard's example of Jeremy in "Self Constitution in the Ethics of Plato and Kant," *Journal of Ethics* 3 (1999): 1–29.

40. Luca Ferraro argues in *Making Up One's Self: Agency, Commitments, and Identity* (Doctoral Dissertation, Harvard Department of Philosophy, 2002) that having made a decision gives us no reason to continue with the adopted course of action. I am unconvinced by his dismissal of the possibility that a decision I make can give me a reason without the cooperation of other mechanisms such as institutional, social, or psychological sanctions or the costs of undoing the decision, a dismissal for which he gives very little argument. Thus, I am also unconvinced by his claim that regarding a decision as a source of reasons results in self-manipulation on the part of the agent.
41. For instance, Allan Gewirth makes this point in "The Is-Ought Problem Resolved," *Proceedings and Addresses of the American Philosophical Association* 47 (1974): 34–61. Thomas Nagel makes a more complex but related point in *The Possibility of Altruism* (Oxford: Clarendon Press, 1970) when he claims that I must take subjective reasons on which I act as based on objective reasons that could apply to anyone.

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But we take our choices to generate further reasons, making claims on others that they owe it to us to respect. These are the claims that interest me. Though I am most interested in the positive case, consider negative claims first. Almost everyone agrees that people have reasons not to interfere in another's permissible projects. If you are trying to frame the perfect photograph, this gives me reason to avoid the relevant area. If I have no more pressing reason to be there, I owe it to you to stay out of the way.

The *Doctrine of Right* establishes reasons not to interfere with others' property, but negative claims that we make on one another in setting ends go further. In the first place, property rights just license the enforcement, by force or coercion, of certain claims. To establish a right is to refuse to rely on others to take the fact that their action would interfere with your project as a reason not to do it. Instead a right permits the state to give them a quite different reason, that cited in the threat of punishment.⁴² If you are executing your photography project on your own property, you can appeal to this reason, posting signs that read "NO TRESPASSING; POLICE TAKE NOTICE." If all goes well this will secure my non-interference. But it is not *just the same* as my taking the fact that you are trying to take the photograph as itself a reason.⁴³ In the second

42. The right way to put this is a bit more complicated. A strict right does not, in the first place, establish *reasons* for not interfering with another's property. It permits the state to step in to *enforce* rights that would otherwise be violated. To apply force to you to prevent you from violating my rights is to decline to reason with you at all. Because the state's agents cannot be everywhere at once, the state will also set up a system of threats of punishment, so that those who do manage to violate others rights will suffer consequences after the fact. Once this system is in place someone can take the threat of these consequences as reason not to violate others' rights. Kant himself talks this way. Cf. the quote in note 5, above.
43. I believe that the *Doctrine of Right* argument relies on some such argument about the reasons we have. A right, recall, is a permission to back a normative claim with force. But it is a necessary (though not sufficient) condition of having a right that the underlying normative claim also has authority. In order to establish relations of right you need not *acknowledge* the authority of this claim; acting out of the desire to avoid sanction is enough. But it is only because you nevertheless *have* the prior reason for staying off my property that the coercive threat that moves you is permissible. If I am right about this then Kant put the *Metaphysics of Morals* together backwards. The *Doctrine*

place, since the *Doctrine of Right* argument deals only with property claims, it does not ground all reasons that you will take your projects to generate. If you are photographing the Grand Canyon, no government agent is required to protect you from interference, but you will still take others to have reason not to interfere.

Importantly, if I do willfully interfere, I am not just ignoring or disrespecting *the project's* value, I am also ignoring or opposing *your value*. If you are just about to photograph the Grand Canyon, and I intentionally insert myself between you and your subject, you might "take it personally." My interference expresses a view about you: you don't have the authority to give me a reason not to interfere.⁴⁴

The value of the project cannot ground this reaction, since in this case your objection would not be very serious. Photographing the Canyon is not, in the grand scheme of things, very important. The project may not even be very important *to you*. Its value hardly registers when compared to shaping the character of your children, performing well in your career, being a good friend, or keeping yourself healthy. So the value of the project grounds only a very minor objection. But if I actively thwart your efforts, just because I want to, it seems that you have a more significant complaint. In fact, your complaint is the same that you would have if I were to interfere willfully with a truly important project. In that case you would *additionally* object to my impeding

of Right depends on an argument that belongs in the *Doctrine of Virtue*, even though the former appears first in the text.

44. Resentment is especially plausible in a case like this, where the Interfering Person aims directly at upsetting my project. Someone may worry that this will not generalize to cases in which my project is collateral damage in someone's pursuit of an independent end. I focus on the simpler case here, because I aim only to show that we take our ends to be capable of generating some reasons for others. The familiarity of resentment in the simple case is sufficient to show that we attribute some such authority to our choices. In fact this doesn't always generalize, since once we turn to cases in which you have independent reasons to interfere, it might be okay to do so. The reason that my project creates places a burden on you to meet it with a reason of your own before you interfere, but you may be able to meet this burden. This all depends on what your reasons are.

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the realization of an important value, but in both alike my interference amounts to a personal affront.

Positive claims arising from my projects can also outstrip what the value of the project would ground. Just as you would resent someone who willfully interfered with your activities, so you resent those who refuse help without adequate reason. Moreover, no less than in a case of interference, your resentment can be directed at particular individuals. In some situations, we consider our own projects' claims as stronger than that of being one among many possible outlets for others' benevolence. We think of them as making particular claims on particular others' help.

If someone refuses, without excuse, my request to hold the door when I am carrying heavy groceries, I may resent this in the same way that you resent interference with your photograph.⁴⁵ I take this Unhelpful Person to violate a warranted claim that I make on her. She can truly retort that my grocery project is no more pressing than other ends that she could, but does not, pursue. If I agree that she is blameless for not contributing to these, I grant that the value of my project is not sufficient to establish the reason to which I appeal. I may nevertheless think that in refusing to respond to my need the Unhelpful Person fails to respect my authority to make these claims on her and thus fails to respect me.⁴⁶

So far I have been describing what I take to be our normal attitudes towards our projects and our own value. On some views these attitudes are not justified. For example, on certain hedonist views we

45. Someone might have an excuse but not offer it. As I said above, I think that there is normative pressure for us to cite our excuses to one another. But in a particular case, one might have sufficient reason not to. Then I may still feel resentment, but mistakenly. However, my resentment will be unwarranted because it is based on an empirical error: I am not taking whatever circumstance provides your excuse into account.

46. The positive case is somewhat trickier than the negative case, since here there is a wider range for legitimate controversy about how far our claims over one another extend. But we do not need to resolve these controversies now. Doing so parallels the task of resolving conflicting claims to property when we found the state, and we have not yet come to that stage of the argument.

would have to weigh the pleasure that I get from upsetting your photo-shoot against the pleasure that you would take in successfully completing it, in order to determine whether I have reason to allow you to continue. Since I have stipulated that the project may not be very important to you, it will not be obvious within this weighing paradigm that I should refrain. In cases in which your pleasure does outweigh mine, the hedonist is committed to denying that there are any grounds for resentment. Notice that this goes beyond the claim that you ought to *forgo* resentment, as when you forgive an insult or regard it as beneath your dignity to respond. On the hedonist view the Interfering Person is entirely justified, so there is no offense to which one could react. I have not given an argument that rules out the coherence of hedonism, but in what follows I discuss how we might validate the attitudes towards our projects and ourselves that I have been discussing. I leave it to the reader to judge the plausibility of the hedonist alternative.

Like the hedonist, the person who thinks that your projects create no reasons other than those grounded in their value is committed to denying the element of personal affront. This attitude would be strange on its face, and I believe that it manifests a lack of self-respect. But this only renames the deeper problem. That problem is that choices that could not create reasons beyond the value of the project would also fail to have the appropriate authority for you. A project that made all its claims based strictly on its own inherent value could not reliably hold your allegiance. It could not give you reason to override inclinations to abandon it in favor of another worthwhile pursuit. But if you could not give yourself reason to stick with a particular project in the face of competing inclinations, you could not exercise your inner freedom. So we have to attribute to ourselves the authority to create reasons through our choices, and I have argued that among the reasons that we take our choices to create are reasons for others. So when we exercise our inner freedom we also assert interpersonal authority.

I do not take the argument that I have given here to show that you *must necessarily* make claims on others in order to exercise your inner freedom. The argument claims only that when you do what you must

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do to exercise your inner freedom (take your choices as capable of creating reasons) then you *do*, as a matter of fact, assert claims over others, both negative and positive. So, if you think that your choice is the *kind* of thing that generates reasons then you *will* — I claim — assert these claims on others. And, I argue, you need to take your choices to be that kind of thing if you are to exercise your inner freedom.

It's worth noting that the argument in the case of right also does not show that you must necessarily make claims on others. You can exercise a severely truncated version of external freedom without making property claims by working with just what you can empirically control. The problem is that this makes only *immediate consumption projects* reliable. You can grab an apple and eat it immediately. You can pursue longer-term projects so long as others don't interfere, but this requires luck. So forgoing property claims truncates your external freedom by limiting the range of ends that you can successfully pursue to those that do not depend on intelligible possession. In the ethical case declining to see your choices as making claims on others truncates your internal freedom by restricting the ends that it makes sense for you to adopt to those that do not require anything, including non-interference, from others. Given the extent of our interdependence this restriction is severe.

Moreover, ruling out the possibility that our choices create reasons for others would be unwarranted just as ruling out the possibility of property rights is. In fact, in the moral case, assigning this authority to each person arguably generates no *per se* conflict with others' inner freedom. Inner freedom is just a matter of acting only on considerations that you take to be reasons; there is no bar on taking these reasons to originate in another's will. Thus we have a Postulate of Reason Creation, corresponding to the Postulate of Practical Reason with Regard to Rights. Just as it must be possible to have property rights in things, so it must be possible to create reasons by setting ends. Otherwise, in the correlate of the juridical worry that we will make things *res nullius*, no one would have any reason to override her inclinations to abandon or change her projects.

Just as when we established the postulate of property, we now

know that it is possible, consistent with the inner freedom of all, for each to have the authority to give reasons to others through discretionary choices. We have not yet seen *how* this is possible. And, as the compatibility of property and hence permitted coercion with external freedom was *prima facie* puzzling, so is the compatibility of my authority to create reasons for you through discretionary choices and your inner freedom. It is not hard to see how you could choose to regard another's projects as reason-giving without violating your inner freedom. But the idea that my choices could place normative *requirements* on you independent of any choice of yours remains mysterious.

C. Provisional Ends in the State of Nature

I am treating our ends as the ethical corollary to property claims in the Juridical State of Nature. If this is right then these will have normative force analogous to that of provisional rights: our ends will generate normative claims, but not the very claims that we purport to make. In the Juridical State of Nature a provisional right gives us reason to form a social organization, the state, where rights can be made conclusive. Once in the state it creates a presumptive claim on its object. I argue that we should understand our ends as playing similar normative roles in interpersonal interactions.

First we must understand why the claims that we make on one another in the Ethical State of Nature cannot be warranted. Recall the three problems for establishing conclusive rights in the Juridical State of Nature. The most important was the problem of unilateralism: each person lacks authority to establish her rights by herself. The problem of indeterminacy, the impossibility of saying how far property rights extend, compounds this. Finally we face the problem of assurance because we cannot generate appropriate trust in the State of Nature. I will discuss the ethical correlates of the problems of unilateralism and indeterminacy here. The ethical treatment of the problem of assurance differs from the juridical; I take it up at the end of the paper.

As in the civil case, the lack of authority attaching to unilateral demands is the most fundamental obstacle to establishing conclusive claims in the State of Nature. But the problem manifests itself

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differently in the ethical case. In the political case the problem is that it is impermissible to unilaterally *coerce* others to act as if they recognize your claims to property. But in the ethical case you demand not just that others act *as if* they recognize your claim; you insist that they *do* recognize it: that they treat your choice of an end as giving them reasons to act. The problem here is that it is *impossible* to unilaterally bring another to do this. As Kant says, "[a]nother can indeed *coerce* me to do something that is not my end (but only a means to another's end), but not to *make this my end....*"⁴⁷ Coercion leverages ends another already has — the end of staying alive, say, or staying out of prison — rearranging his situation so that doing or avoiding certain actions becomes instrumental to these ends. Even when coerced, a person acts on considerations that he takes to be reasons. Thus, though coercion limits external freedom, it leaves internal freedom untouched. In the juridical case Kant makes use of the principle that I am not permitted to diminish another's external freedom. In the ethical case it is not simply impermissible, but impossible, to make a warranted claim on someone if she cannot recognize and act on it without diminishing her inner freedom.

As in the juridical case the second problem, indeterminacy, highlights the first. The ethical form of the problem is that in the Ethical State of Nature we cannot say how far my legitimate claim on your help extends. Students of Kant recognize this as the indeterminacy of wide duties: the general duty of benevolence tells us that we owe others assistance, but does not tell us whom we should help or how much.⁴⁸ If this indeterminacy is not brought under some control, defenders of the obligation cannot answer either those who regard it as negligible and easily over-ridden, or those who worry that, if we acknowledge the extent of need in the world, this duty will swamp all other concerns.

47. *Metaphysics of Morals* 6:381.

48. See *Metaphysics of Morals* 6:390. Kant here characterizes a wide duty as one that "... leaves a playroom (*latitudo*) for free choice in following (complying with) the law, that is, that the law cannot specify precisely in what way one is to act and how much one is to do by the action for an end that is also a duty."

In the Ethical State of Nature we assert claims over one another, taking our choices to create reasons for others, but the problems of unilateralism and indeterminacy expose these claims as unwarranted. Provisional ends, like provisional rights, can be conclusive only when they are in some sense jointly ratified by all those whom they bind. And indeed, Kant holds that just as the state removes us from the Juridical State of Nature, what he calls the Moral Community removes us from the Ethical State of Nature. He envisions this community as the historical successor to the Christian Church and takes it to include all of humanity. Unfortunately, it is even harder to get a grip on how Kant understands this universal community than to grasp the problem to which it answers. In particular, it is far from obvious what the moral analog of the unity of the state, represented there by a powerful authority, could be. We need an account of this unity in order to understand the relevant notion of joint ratification. In the next section I try to make a start on this task.

D. Marriage as the Paradigm of the Moral Community

We've seen that we do take our ends to give another reasons to do well-defined things. This happens most dramatically in the context of close relationships.⁴⁹ In these contexts you need to be a source of reasons for another that are categorical, but still contingent in that they depend on your discretionary choices.⁵⁰ You thus need your choice of an end to share an attribute of conclusive property rights: "by it, an obligation is laid upon ... others which they would not otherwise have had."⁵¹

So I suggest that we turn to the friendship that overlays marriage — its ethical, as opposed to juridical, aspect — as a paradigm of

49. Compare Barbara Herman on responding to others' ends in "The Scope of Moral Requirement," *Philosophy and Public Affairs* 30:3 (2002): 229–256.

50. Compare Harry Frankfurt, "Autonomy, Necessity and Love," in *Necessity, Volition, and Love* (New York: Cambridge University Press, 1999), p. 130.

51. *Metaphysics of Morals* 6:253 and cf. 6:247 (Cambridge, p. 241).

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the Moral Community.⁵² There is reason to suppose that Kant would be congenial to this strategy. He takes friendship and the Moral Community to share important features. No one can legitimately coerce us into either, and yet Kant thinks that we have a moral duty to enter them. These are the only two human relationships to which Kant attributes both of these properties.⁵³ Moreover, he suggests that our best friendships are the nearest that we come to realizing the ideal of the Moral Community, explicitly endorsing the former as a paradigm of the latter.⁵⁴

I believe that in marriage, ideally, we solve locally the problems with provisional ends in the Ethical State of Nature. Married friendship can serve as the analog to the state because it embodies another sort of unity. We solve the problem of unilateralism by declining to regard some ends as yours and others as mine, rather seeing ourselves as having shared ends, which we seek to realize together.⁵⁵ We solve the problem of indeterminacy by working out jointly what our ends are and how to share them. There is no *a priori* procedure for making

52. Focusing on this relationship might help us illuminate another aspect of Kant's thinking about the Moral Community, namely, its relationship to the Political Community. Allen Wood highlights the analogy I have in mind, claiming that for Kant marriage is to friendship as right is to virtue (*Kant's Ethical Thought* [New York: Cambridge University Press, 1999], p. 279). Like the political community, marriage puts people in juridical relationship with one another, but these juridical relations are insufficient to establish an ideal interpersonal relationship between them. Kant also believes that, though the formation of the Political Community is not sufficient for the establishment of the Moral Community, it is necessary (6:94). If we spin the analogy out we will claim that in marriage standing in a special juridical arrangement, one recognized by the civil authorities, is a necessary condition for attaining a certain ideal of friendship. There is something right about this. Public recognition of a relationship, and the rights that this gives two people with respect to one another, does allow us to share in one another's ends and build a common life in ways that can be difficult or impossible in its absence.

53. See Allen Wood, *Kant's Ethical Thought*, p. 316 and 408 n. 39.

54. 27:677 and 6:439. Allen Wood draws the conclusion, *Kant's Ethical Thought*, pp. 279–280.

55. I explicate and defend this conception of marriage elsewhere, in "Against Beneficence: A Normative Account of Love," *Ethics* 119:1 (2008): 142–170.

the reasons generated by provisional ends determinate. Rather, actual interactions do real, indispensable work. By choosing our shared ends we jointly create reasons to do things that we would otherwise not have had. This again closely parallels founding the civil society. Kant does not purport to derive an entire body of positive law *a priori*. Rather, the argument concludes that we must organize our relationships so that we can make these laws together authoritatively. When the state acts, making, interpreting, and enforcing laws, it creates — that is, we create — reasons to do things that we would otherwise not have had.

This leaves us with the assurance problem. In interpersonal relationships like marriage we must rely on one another's good will, depending on one another to regard shared ends as reason-giving. This highlights an important disanalogy between the juridical and ethical cases. Politically, we minimize this reliance. The assurance problem arises in the political case just because we cannot assume that we can trust others to follow legitimate laws without further incentive. If everyone were perfectly virtuous, and known to be so, then we could secure our external freedom by solving just the problems of unilateralism and indeterminacy. A state without coercive power could do this if everyone were unfailingly motivated by the obligation to obey the laws. But people are not perfectly virtuous, so we can reasonably trust them to respect our external freedom only in the context of an institution that gives them an independent incentive to do so. Thus, we forge the unity of the state by setting up a sovereign with both power and authority to exercise coercion.

However the Moral Community *cannot* involve coercion. This is a conceptual truth, but confusion about it leads to moral errors. It is a conceptual truth because the task of the Moral Community is to come to agreement about what to make our ends and thus about what reasons we have. And, as I explained above, we cannot use coercion to accomplish this.⁵⁶ Thus, whereas the power that unifies the state is the

56. Moreover, attempts to coerce someone into making something his end tend to misfire and become attempts to make him act as if a thing were his end. But the community united by coercive demands to act as if various things are our ends is just the civil society. Because of its license to exercise coercion, the scope of the civil society's authority is importantly limited. A Moral

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coercive power of the sovereign, the Moral Community can remain united only through the power of choice of the individuals involved.

This leaves us inescapably vulnerable to one another in our personal relationships in a way that we can limit in politics. And the closer, and thus more demanding, our relationship is, the more vulnerable we are. Regarding others' ends as reason-giving for you *does* expose you to the danger of being treated unfairly. And the danger is real: you interact with some of the same people whose supposed vices require empowering a sovereign before we can establish political trust.

It may be in an attempt to make this risky trust more palatable that Kant invokes God as the sovereign of the Moral Community.⁵⁷ This move is otherwise extremely puzzling, since God cannot play the same role in the Moral Community that the political sovereign plays in the state. Reiterating his longstanding view about the relation between morality and religion, Kant makes clear that he does not think that God can act as *legislator* for the Moral Community.⁵⁸ And God is no more able to *enforce* the laws of virtue than anyone else. Some interpreters have taken it that God is uniquely capable of enforcement because God can discern human motives.⁵⁹ But it is not a lack of epistemic access to motives that makes external sanction impossible in the Moral Community. It is rather that no one, not even God, can force us to have a given motive by making not having it costly. If you need a threat of punishment for motivation then avoidance of punishment is your reason. But if you act to avoid punishment then you are only acting *as if* you take the relevant ends to give you reasons. If you did take them as reason-giving, the threat would be superfluous. But perhaps Kant imagines God as playing another role: God makes trust in the

Community that tried to unite its members coercively would thus amount to a state overreaching its proper bounds. This, in a very small nutshell, is the doctrine of what John Rawls calls "political liberalism." See *Political Liberalism* (New York: Columbia University Press, 1996).

57. *Religion* 6:99.

58. *Religion* 6:99.

59. This seems to be part of Allen Wood's argument for the claim that God must be the Moral Community's sovereign, *Kant's Ethical Thought*, p. 317.

moral order of the universe reasonable, assuaging our worries about exposing ourselves to being taken advantage of by others. If we think that there is a moral orderer of the universe, we can have what Kant elsewhere calls *practical faith* that fulfilling the demands of morality will not, in the end, leave our own lives impoverished.⁶⁰

Once we have established the Moral Community, the second normative role for provisional ends kicks in: these have a presumptive claim to be included in the plans that we make together. Again, it is easiest to envision this in the case of a developed relationship like a marriage. In deciding what to do together we should not start from scratch as if we had no reason to do any one thing rather than another. Rather I presume that your ends are worthy of inclusion, and you regard mine likewise. We may together overturn some end that one of us has, but we must have some reason to do this.

Again, this makes it important to limit the role of the indeterminacy problem. And again, we accomplish this in similar ways. In order for an end to count as making a presumptive claim on your contribution, I must have a certain investment in it. It may be that I have poured time and resources into it, and my claim to have it included in our joint ends is greater for this. But it might be enough that I have invested my identity in the plan, that pursuing some particular end has been important to my self-conception over a long period of time. In any case, just as I cannot make property claims willy nilly in the Juridical State of Nature and expect that these claims will be honored in the state, the ends with which I lay provisional claim to your help with cannot be mere whims.

I have been developing marriage as a model of the way that others' choices give us reasons to act. This model is admittedly sketchy, but let me now say how we can apply it to interactions with strangers. Earlier

60. For Kant's more extended treatments of this issue, see *Critique of Pure Reason* A797/B825-A830/B858, *Critique of Practical Reason* 5:107–148, *Critique of Judgment* 5:416–485, and the Introduction to the *Religion* 6:3–7. For an alternate reading of Kant's Moral Community and the role of God as its sovereign, see David Sussman, *The Idea of Humanity: Anthropology and Anthroponomy in Kant's Ethics* (New York: Routledge and Kegan Paul, 2001), especially pp. 317–320.

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I pointed out that it seems to many as if in some situations a stranger can, by making choices, give you not only negative, but also positive, reasons to act. Insofar as we can apply the model of sharing ends in marriage to these far less developed relationships, we can explain and vindicate this sense.

Of course I would not deny that entering an intimate relationship dramatically extends the content of what partners can claim from each other. In cases like the person carrying groceries, the relationship in question is extremely thin, normally consisting of just a single conversation. It may seem crazy to compare this to marriage, but I believe that there are helpful similarities in kind here, even if there are wild differences in degree. In both cases, our actual interactions determine the reasons that we have with respect to one another. It is not your need as such that makes a claim on me, or not only this. When you ask me for help, an interaction begins. I suggest that I could hold the door. You gratefully accept. Your provisional claim gives me reason to enter such an interaction. Then the interaction makes your claim on me conclusive.

Consider what it would be like if I began this exchange and then abruptly walked away. One thing to notice about this is that, absent further explanation, this would be an odd derailing of my own agency. Having undertaken to help you, I take on your project as my own, at least locally. I share your end, so now, it is like my other ends in that I need some reason to give it up. This also explains why, once we are interacting, your claims are no longer unilateral: They are part of our shared project of getting you through the door. Moreover, if I begin helping, but then abandon you, it seems more obvious that I have wronged you than it does in the case in which I never begin to help. Refusing to enter into any interaction with you violates only a provisional reason. But once we have worked out together the particular thing that I will do towards the end at hand, I have reason to do that very thing.

Our relationship continues: I have helped with the door, but now you then ask for more. You want me to follow you to your car and help you with the keys. This would encroach on my own projects, so I

start giving you reasons stemming from these: I promised to be home for dinner with my family and must go now to make it on time. You accept this, affirm the importance of my reason, and thank me for the help that I gave. Notice that this give and take of reasons, determining together what it makes sense for us to do, is the same sort of work that people do in more developed relationships.

So I am treating the Moral Community as an actual ordering of relationships, not a mere abstraction. The reasons that we give one another by choosing ends are merely provisional apart from embedding in actual interactions that solve the problems of unilateralism and indeterminacy. But provisional reasons do the normative work of exerting pressure to form the kind of relationship in which they can be made conclusive, and setting parameters on the way that we adopt joint ends within these relationships.

I want to be clear about what this solution does not purport to accomplish: it does not give us determinate answers about what positive duties we have towards others in particular cases. There are two reasons for this. First, since making the reasons in question conclusive requires actual interaction to settle some of the problems of indeterminacy, no theory can bring us all the way to the particular things that we ought to do. Remember, this is just like Kant's declining to endorse a full body of law in the *Doctrine of Right*. Second, even when we have eliminated this indeterminacy we have only established *reasons* to do particular things. But we come to these interactions with many reasons already in place. So we still need some way to compose reasons stemming from others' choices with our other reasons to make an all-things-considered judgment about what we ought to do. This important and difficult project is downstream from this paper.

Moreover, the theory that I am sketching here does not attempt to account for all positive duties to others. The duties that I am trying to ground are just those owed to particular others, on account of their choices, to do particular things. These, I claim, are grounded in reasons that arise from actual interactions, but I do not claim that we have no reason to help others apart from interactions like this. The reasons

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that interest me supplement rather than replace those falling under the general duty of beneficence. For instance, the reasons that we have to donate to institutional charities often stem from this general duty.

III. Conclusion

I have argued that, just as we must establish the state to legitimately secure the conditions of our external freedom, so we must establish the Moral Community to legitimate the claims that we make on others when we exercise our internal freedom. In order to secure internal freedom we need to take our choices as having the authority to give us reasons. In particular they must give us reasons to act against inclinations to abandon an end in favor of an equally worthwhile project. But when we make choices that have this authority for us we also assert claims over others. However, the problems of unilateralism and indeterminacy make all such claims unwarranted. So our ends can be only provisional prior to the proper organization of relationships. These provisional ends give us reason to form a relationship in which we share our ends, and function as presumptive claims once we achieve this organization.

In these final sections I have suggested that to understand this relationship, which Kant calls the Moral Community, we look to the friendship overlaying marriage as a paradigm. Though not exactly what Kant has in mind in the *Religion*, these relationships ideally solve the very problems that the Ethical State of Nature presents. I claim that in these relationships we aim to achieve a unity that would solve the unilateralism and indeterminacy problems. The unity that the sovereign provides in the juridical case is here forged directly through the agencies of the parties to the relationship. When they set ends together, each regards the sources of his reasons for action as something shared in common with the other. This is an important disanalogy with the juridical case in that it provides no solution for the assurance problem. In the Moral Community we are vulnerable to one another, and must exercise trust in relying on one another's good will. Kant argues that this justifies practical faith.

I have said very little about the structure of the ethical relationship and the norms that should govern it, so we are left with several questions. What are the parameters on appropriate interaction? What exactly does it mean to share one another's ends? How can we adjudicate disagreements to preserve both unity and individual freedom? All of these questions parallel questions about the organization of the state, and I have not addressed this above. Kant is not particularly helpful about what should count as a legitimate state authority. So, rather than pursue the parallel between right and ethics further, I leave these questions for future work.⁶¹

61. This paper developed over several years and with the help of many minds. Though I am no doubt forgetting some who deserve thanks, I want to mention especially Melissa Barry, Bill Bristow, Michael Kessler, Christine Korsgaard, Japa Pallikkathayil, Simon Rippon, Tim Scanlon, Gisela Striker and the members of the Moral and Political Workshop at Harvard University.



Deriving Morality from Politics: Rethinking the Formula of Humanity

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Source: *Ethics*, Vol. 121, No. 1 (October 2010), pp. 116-147

Published by: [The University of Chicago Press](#)

Stable URL: <http://www.jstor.org/stable/10.1086/656041>

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Deriving Morality from Politics: Rethinking the Formula of Humanity*

Japa Pallikkathayil

Kant's Formula of Humanity famously forbids treating others merely as a means. It is unclear, however, what exactly treating someone merely as a means comes to. This essay argues against an interpretation of this idea advanced by Christine Korsgaard and Onora O'Neill. The essay then develops a new interpretation that suggests an important connection between the Formula of Humanity and Kant's political philosophy: the content of many of our moral duties depends on the results of political philosophy and, indeed, on the results of actual political decision making.

Kant's Formula of Humanity famously forbids treating others merely as a means. It is unclear, however, what exactly treating someone merely as a means comes to.¹ In the first part of this article, I explore

* I am indebted to many people for helpful comments on earlier drafts of this essay: Kyla Ebels Duggan, Michael Joel Kessler, Niko Kolodny, Christine Korsgaard, T. M. Scanlon, and the members of the Harvard Workshop in Moral and Political Philosophy. I am also grateful for questions from audiences at these conferences: APA Central Division, the Northwestern University Society for Ethical Theory and Political Philosophy, the UK Kant Society Graduate Conference, the Graduate Philosophy Conference at the University of Illinois at Urbana-Champaign, and the Syracuse University Graduate Student Conference in Philosophy. Finally, I am grateful for questions from audiences at Boston University, Columbia University, New York University, University of Notre Dame, Stanford University, Syracuse University, Tufts University, the University of California at Berkeley, the University of California at Davis, the University of California at San Diego, and the University of Chicago.

1. Throughout this essay, I will be concerned with a fundamental category of wronging that Kant identified. The idea of 'treating someone merely as a means', however, has taken on a life of its own. Insofar as this idea is now present in commonsense morality, it has come to represent a more specific kind of wrong, that is, that of 'using someone'. So, I do not claim that the category of wronging that I will explicate on Kant's behalf is now most naturally described as treating someone merely as a means. For an apt description of the more specific kind of wrong, see T. M. Scanlon, "Means and Ends," in *Moral Dimensions: Permissibility, Meaning and Blame* (Cambridge, MA: Belknap, 2008).

one prominent approach to explicating this idea, the “possible consent interpretation.” This approach, advanced by Christine Korsgaard and Onora O’Neill, suggests that one treats another merely as a means if one treats the other in a way the other could not possibly consent to being treated. I identify three problems with this view. First, this view faces difficulties as an interpretation of Kant. Second, this view involves some noteworthy counterintuitive implications. Third, once the motivation behind the possible consent interpretation has been made clear, it actually supports a different interpretation, one which has counterintuitive implications of its own. I conclude, therefore, that the possible consent interpretation is fundamentally flawed.

In the second part of this article, I develop a new interpretation of the Formula of Humanity. This interpretation suggests an important connection between the Formula of Humanity and Kant’s political philosophy: the content of many of our moral duties depends on the results of political philosophy and, indeed, on the results of actual political decision making. After developing this interpretation, I explain how it avoids the problems that plagued the possible consent interpretation. Finally, I briefly note the independent interest of both the political theory sketched in this essay and the relationship between moral and political philosophy that it entails.²

I. THE POSSIBLE CONSENT INTERPRETATION

A. *The Interpretation*

Kant’s Formula of Humanity version of the Categorical Imperative reads: “So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means.”³ By ‘humanity’, Kant here means rational nature, that is, the capacity to set and pursue ends.⁴ The prohibition on treating someone merely as a means thus constrains how one interacts with this capacity.

Some of Kant’s interpreters, Allen Wood, for example, suggest that applying the Formula of Humanity in moral deliberation always requires combining it with substantive claims about what constitutes

2. I abbreviate *Groundwork of the Metaphysics of Morals* as *G*, *The Metaphysics of Morals* as *MM*, *Critique of Practical Reason* as *C2*, “On the common saying: That may be correct in theory, but it is of no use in practice,” as *TP*, and “On a supposed right to lie from philanthropy” as *LP*. For all citations of Kant’s work, I give the page numbers of the relevant volumes of *Kants gesammelte Schriften* (published by the Preussische Akademie der Wissenschaften, Berlin), which appear in the margins of most translations. All quotations from Kant’s work are taken from Immanuel Kant, *Practical Philosophy*, ed. and trans. Mary J. Gregor (Cambridge: Cambridge University Press, 1996).

3. *G* 4:429.

4. See *G* 4:437 and *MM* 6:392. For a helpful discussion, see Christine M. Korsgaard, *Creating the Kingdom of Ends* (Cambridge: Cambridge University Press, 1996), 110–14.

proper respect for rational nature. There is no straightforward criterion for treating someone merely as a means that falls out of the Formula of Humanity itself.⁵ Others, like O'Neill and Korsgaard, are more optimistic about the prospects for such a criterion.⁶ Although O'Neill's and Korsgaard's views are very similar, I will focus on Korsgaard's view, since it is a bit more developed.

Drawing on Kant's treatment of the case of the lying promisor, Korsgaard suggests that "you treat someone as a mere means whenever you treat him in a way to which he could not possibly consent."⁷ The lying promisor purportedly does just this. If I ask you for a loan with no intention of repaying it, then when you hand over the money, you have not agreed to participate in bringing about the realization of my true end, namely, the permanent acquisition of your money. You think my end is something entirely different. So, you cannot agree to further my true end.

B. Assessing the Interpretation

There is something very intuitive about this characterization of treating someone merely as a means. If your actions are put in service of an end that it is impossible for you to agree to further, there seems to be a clear sense in which your agency has been co-opted. But when we consider the concrete implications of the possible consent criterion, problems begin to emerge. Korsgaard claims: "Kant's criterion most obviously rules out actions which depend on force, coercion or deception for their nature, for it is of the essence of such actions that they make it impossible for their victims to consent. If I am forced, I have no chance to consent. If I am deceived, I don't know what I am consenting to. If I am coerced, my consent itself is forced by means I would reject."⁸

The complete condemnation of these act types generates an interpretative and a substantive problem for the possible consent interpretation. The interpretive problem is that the complete condemnation of force is at odds with Kant's political philosophy, where he acknowledges that the use of force is sometimes permitted and perhaps even sometimes obligatory. This suggests that the possible con-

5. Allen Wood, *Kant's Ethical Thought* (Cambridge: Cambridge University Press, 1999), 150–55. Wood rejects the Korsgaardian interpretation I am about to consider on 153. John Rawls also seems skeptical of placing too much emphasis on consent in interpreting the Formula of Humanity. See John Rawls, *Lectures on the History of Moral Philosophy*, ed. Barbara Herman (Cambridge, MA: Harvard University Press, 2000), 190–91.

6. See Korsgaard, *Creating the Kingdom of Ends*, 106–32, 137–40, 295–96; and Onora O'Neill, "Between Consenting Adults," in *Constructions of Reason* (Cambridge: Cambridge University Press, 1989), 105–25.

7. Korsgaard, *Creating the Kingdom of Ends*, 295.

8. Ibid.

sent interpretation misrepresents Kant's own position. The substantive problem is that, intuitively, the use of force, coercion, and deception is not always impermissible. This suggests that the possible consent interpretation saddles Kant with an implausible view. I will begin by fleshing out the interpretive problem and then I will follow with some brief comments about the substantive problem.

The absolute condemnation of force generates an interpretive problem for the possible consent criterion, because Kant acknowledges at least four cases in which the use of force is permitted and, in the latter three cases, perhaps even obligatory. First, I may use force to defend myself and the objects in my possession in the state of nature if the establishment of a civil condition is not possible.⁹ Second, I may use force to compel others to leave the state of nature and enter the civil condition.¹⁰ Third, agents of the state may use force to enforce its laws, as when the police interfere in the commission of crimes.¹¹ Finally, agents of the state may use force to punish criminals.¹²

It is important not to be distracted by the role of the state in these cases (direct in the third and fourth cases, indirect in the second case, and, perhaps, still lurking somewhere in the first case). Since Kant is often included in the social contract tradition, it might be tempting to think that, insofar as the state is involved, Kant is committed to thinking that one can consent to the treatment one receives. At least with respect to the fourth category, Kant explicitly denies this—one cannot consent to being punished.¹³ Moreover, as I will argue later when I delve into Kant's political philosophy in more detail, despite the contractual language Kant employs in his work on political philosophy, the idea of consent is not doing any substantial justificatory work in his view. I will not attempt to work through these issues in this section, though. Even if one could defend the claim that one can consent to the treatment one receives from the state, that claim would not actually help the possible consent interpretation.

In order to defend the possible consent interpretation from the

9. Kant writes: "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 to freedom*) is consistent with freedom in accordance with universal law" (*MM* 6:231). Kant uses the term 'coercion' (*der Zwang*) to include physical force. Kant indicates that interfering with another's body is inconsistent with freedom in accordance with universal laws (250). So, one is permitted to stop others from interfering with one's body. Kant also indicates that one may defend one's provisional property (265).

10. *Ibid.*, 312.

11. Kant does not say much about enforcement as opposed to punishment. But he acknowledges the need for a police force to provide for, among other things, security (*ibid.*, 325).

12. *Ibid.*, 331–37.

13. *Ibid.*, 335.

objection that Kant allows for cases of permissible force, one must deny either that in these cases the use of force really is permissible or that in these cases the use of force makes consent impossible. The first denial would involve abandoning all of Kant's political philosophy and result in an extraordinarily implausible view. The second denial seems clearly preferable. But this denial is a nonstarter given the conception of the possibility of consent we have been working with. The very nature of force, coercion and deception are supposed to make consent impossible because, at the time of the interaction, one has no real opportunity to consent. So, we would need another conception of when consent is possible in order to make the suggestion work.

There are two natural alternative conceptions of possible consent. First, one might say that although one cannot consent to being the subject of, say, force at the time one is forced, one can consent to it prior to the interaction.¹⁴ So, I might say to you, for example, "If it ever seems like I am going to hurt myself or others, restrain me." But, at most, prior consent seems like it does work only when consent is actual.¹⁵ If the mere possibility of this kind of consent is all that is needed to make uses of force permissible, the possible consent criterion will no longer condemn force at all because it is possible to allow any future use of force for any reason. Hence, no use of force you undertake would involve negating the possibility of my prior consent.

Perhaps, then, we might want to consider the possibility of rational consent. Here the idea is that one treats another merely as a means if one treats the other in a way she could not rationally consent to being treated. This interpretation moves quite a distance from the

14. Perhaps one might also wonder about a future-oriented consent principle. Such a principle would consider whether a person might in the future consent to a past action. It seems clear that interpreting the possibility of consent in terms of what a person might possibly consent to in the future would render the prohibition on treating others merely as a means articulated by the possible consent interpretation far too weak. For a helpful discussion of a future-oriented consent principle, see Gerald Dworkin, "Paternalism," *Mosaic* 56 (1972): 64–84. For problems with a future-oriented consent principle, see John D. Hodson, "The Principle of Paternalism," *American Philosophical Quarterly* 14 (1977): 61–69.

15. Actual prior consent can indeed change the permissions that others have. If I tell you that you may borrow my car, doing so is now permissible and would not have been otherwise (other things being equal). Notice, though, that an 'actual prior consent' criterion for all interactions would not work. How could I even begin interacting with you if I needed to get your permission to do so first? And even if we somehow get around that conceptual puzzle, an actual prior consent criterion still does not seem to give the right verdict on all uses of force. Self-defense and defense of others seems permissible even if the aggressor has never said, "If it ever seems like I am going to hurt myself or others, restrain me." On the plausibility of using tacit consent to resolve these problems, see Sec. I.C.

original possible consent interpretation. Here much of the work is done by the idea of rationality rather than by the idea of consent. Indeed, as we will see below, on the most plausible interpretation of the possible rational consent criterion, the idea of consent ceases to do any justificatory work at all.

Before examining this interpretation of the possible rational consent criterion, it is important to note a structural problem with employing the idea of rational consent in explicating the Formula of Humanity: this makes the Formula of Humanity at least partially circular. The Formula of Humanity is a principle of practical reason. So, we need to know how it governs our actions before we can determine what we could rationally consent to. But on this view, we need to know what we could rationally consent to in order to interpret the second half of the Formula of Humanity.¹⁶ Thus, we end up stuck.

So, in order to make the possible rational consent interpretation of what it is to treat someone merely as a means coherent, we need to identify some other rational norm that could be used to give the idea of rational consent content.¹⁷ This would be difficult to do within the Kantian framework. Kant identifies two kinds of norms of practical rationality: categorical imperatives, which apply to us unconditionally, and hypothetical imperatives, which apply to us in virtue of having adopted a certain end. As we will see, neither of these kinds of norms can be used to give content to the idea of rational consent in a way that would enable that idea to contribute to the interpretation of the Formula of Humanity.

Kant emphasizes the claim that there is only one categorical imperative. While he gives at least three formulations of the Categorical Imperative, and the relationship between the various formulations is not completely clear, he claims that these “three ways of representing

16. Consider a concrete example. Ashley wants to know whether she would be treating Theodore merely as a means if she pushed him out of her way. On the possible rational consent interpretation, in order to answer this question, she must establish whether Theodore could rationally consent to the treatment. But consenting is itself an action and in order to determine whether Theodore could rationally consent, we need to know whether he could consent without treating either Ashley or himself merely as a means. If we use the possible rational consent interpretation to think about ways of treating oneself, the way to determine whether Theodore would be treating himself merely as a means is to determine whether Theodore could rationally consent to the treatment. And that is just what we were trying to determine in the first place. Thus we end up stuck. If we consider whether consenting would involve treating Ashley merely as a means, we need to consider whether Ashley could rationally consent to being given consent. But it seems that whether Ashley could rationally consent to being given consent by Theodore depends on whether he could rationally consent to her consenting to his giving consent. And so on. Hence we end up stuck again.

17. I am indebted to Patrick Smith for pressing me on this point.

the principle of morality are at bottom only so many formulae of the very same law, and any one of them of itself unites the other two in it.”¹⁸ For this reason, as an interpretative matter it would be difficult to treat another formulation of the Categorical Imperative, for example, the Formula of Universal Law, as a rational norm that is independent of the Formula of Humanity in the way needed to evade the circularity objection above. Substantively, this strategy would face questions regarding how to justify privileging one of the formulations in this way.

Consider, instead, the suggestion that we appeal to hypothetical imperatives in order to fill out the idea of rational consent. We must specify some set of ends in order for hypothetical imperatives to yield any results regarding what it would be rational for someone to do. If we consider the specific, contingent ends of any given person, this way of filling out the idea of rational consent will have problematic implications. It might not be possible for a murderer to rationally consent to being restrained given her particular set of ends. Yet it seems permissible to restrain her.

Kant attributes a special status to the end of happiness as an end that we all naturally pursue.¹⁹ So perhaps the advocate of the possible rational consent criterion might suggest explicating the rationality in rational consent in terms of the end of happiness rather than the merely contingent ends of agents. The trouble with this suggestion is that Kant seems to have had a desire-fulfillment conception of happiness.²⁰ Privileging happiness so understood leads to the same problems for the possible rational consent criterion as focusing on the specific, contingent ends of a person. It might not be rationally possible for a murderer to consent to being restrained, given the goal of promoting her own happiness.²¹

18. G 4:436.

19. Kant’s views on happiness are rather slippery. A full discussion of those views goes beyond the scope of this article. Here it suffices to note that the problems I identify above for using the end of happiness to explicate rational consent would hold even if the end of happiness were a rationally required end rather than simply an end we all naturally have.

20. C2 5:124.

21. Perhaps instead of considering the end of happiness directly, we should take a step back from the specific, contingent ends of each person and consider instead the resources a person might need to achieve any of her ends. Perhaps there is some bundle of generic resources that each person is rationally committed to obtaining as the means to the pursuit of her happiness. If so, then, perhaps no agent could rationally consent to being deprived of these resources. So, on this interpretation of possible rational consent, perhaps one treats another merely as a means if one deprives the other of the bundle of generic resources she is rationally committed to obtaining as the means to her happiness.

Is there some bundle of generic resources that each person is rationally committed to obtaining as the means to the pursuit of her happiness? The plausibility of thinking that

Perhaps instead we should consider the ends or commitments that flow from the rational commitment to one's own autonomy.²²

there might be may stem from the loosely Rawlsian character of the suggestion. And so, in order to appreciate the difficulty this suggestion faces, it may be helpful to situate Rawls's project in this discussion. Rawls argues that, in the original position, rational persons concerned to advance their own interests would agree to his two principles of justice, principles that regulate the basic structure of society and thereby specify bundles of primary social goods to which each person has a claim. Although these parties are concerned to advance their own interests, they are not concerned to ensure that they obtain some specific bundle of primary goods. To the extent that Rawls's project suggests a rational commitment to obtaining some specific bundle of primary goods, this is an implication of the reasoning in the original position rather than an input into that reasoning. That is, the rational commitment to obtaining some bundle of primary goods stems from reasoning about how it is rational to structure our social interactions, not vice versa.

The above suggestion asks that we understand each person as having a rational commitment to obtaining some bundle of generic resources that could be used to ground the moral entitlement not to be deprived of those resources. The difficulty the suggestion faces is to argue for a specification of the bundle of resources one is supposed to be rationally committed to obtaining in the absence of some reasoning about how one's interest in the resources is to be reconciled with the interests of others. Here I am not attempting to argue that such a specification could not be given. I simply note that some such specification must be defended in order to make the above suggestion work.

There may be resources in Kant's view that one might draw on if one were pursuing the development of such a specification. See, for example, Rawls's discussion of Kant's references to 'true needs' (John Rawls, "Themes in Kant's Moral Philosophy," *Collected Papers* [Cambridge, MA: Harvard University Press, 1999], 497–528). Kant's references to true needs are rather cryptic and I am dubious that this approach will yield plausible results. Moreover, as I will argue in Sec. II.C, I think that Kant focuses on developing a different approach. Kant recognizes that people have a rational interest in the way that their interactions with other agents affect their access to the means to their ends. But he uses this to argue directly for norms governing our interactions with others rather than proceeding via reflections on what resources we could not rationally consent to being deprived of.

Setting aside the original suggestion, the discussion above might nonetheless lead one to wonder whether Rawls gives us an example of some other way in which the idea of rational consent can be used to ground foundational moral claims, i.e. the claims of justice. After all, the original position depicts rational deliberators as agreeing to the principles of justice. I think that it is nonetheless not obvious that the idea of rational consent plays a fundamental justificatory role in Rawls's account. The original position is a 'device of representation' showing us what follows from the idea of persons as free and equal and society and as a fair system of cooperation (John Rawls, *Political Liberalism* [New York: Columbia University Press, 2005], 24–27). But considering this matter in detail goes far beyond the scope of this paper. My claim here is that Kant's view is not best understood as making a foundational appeal to the idea of rational consent. As I go on to argue in Sec. II.D, to the extent that Kant invokes the idea of rational consent, this is best understood as a heuristic device that enables us to more vividly appreciate principles that are grounded independently of this idea. I am indebted to an anonymous reviewer from *Ethics* for prompting me to consider these issues.

22. I am indebted to an anonymous reviewer from *Ethics* for prompting me to consider this possibility.

Notice, however, that for Kant autonomy consists in following the Categorical Imperative. So, the rationally necessary ends and commitments of autonomous agents will be implications of the proper interpretation of the Categorical Imperative rather than inputs that can be used to interpret the Categorical Imperative. Thus, in identifying the implications of the Formula of Humanity properly interpreted, we may identify rationally necessary ends and commitments of autonomous agents. And it may make sense to interpret the Formula of Humanity as claiming that one treats another merely as a means if she treats the other in a way that is inconsistent with the pursuit of these ends or the upholding of these commitments. Nothing is added by claiming instead that one treats another merely as a means if one treats the other in a way that the other could not rationally consent to being treated given these ends/commitments.²³

So, given the resources of the Kantian view, there does not seem to be a way to explicate the idea of rational consent that would allow that concept to play a role in the interpretation of the Formula of Humanity.²⁴ Recall that the problem with the original possible consent interpretation was that it could not allow that one can sometimes consent to the use of force, a claim that is needed to make sense of Kant's political philosophy. We have therefore considered two alternative conceptions of the idea of possible consent. Neither the possible prior consent view nor the possible rational consent view can help with this problem. This leaves the possible consent interpretation with no way to make sense of Kant's political philosophy and thus undermines the plausibility of this interpretation.

Setting aside interpretive issues, the substantive problem with the possible consent interpretation is that the use of force, coercion, and deception is not always impermissible. Consider the infamous case of the murderer at the door. Someone has come looking for a friend who is in your home in order to murder him. You know what the would-be murderer is up to and you must decide whether or not to lie to him. Unlike his more moderate view on force, Kant's view on deception seems to be just as extreme as it has been made out to be.

23. In Sec. II.D, I make clear the way in which the idea of rational consent can at best be used as a heuristic device in expressing the implications of the Formula of Humanity on my proposed interpretation.

24. I have only argued against using the idea of rational consent in the formulation of foundational moral principles within the Kantian framework. For a general argument against the use of this idea in the formulation of foundational moral principles, see Japa Pallikkathayil, "Your Money or Your Life: Coercion in Personal and Political Contexts," (PhD diss., Harvard University, 2008), 96–112.

Kant claims that you must not lie, not even to the murderer at the door.²⁵ This, however, seems like the wrong conclusion.

Korsgaard attempts a complicated solution to this latter problem which involves a substantial revision of Kant's view.²⁶ I do not believe that this solution is successful. But, I will set aside that debate here.²⁷ What is important for our purposes is just to note that the possible consent interpretation involves serious drawbacks both as an interpretation of Kant and as a view on how we ought to treat one another. Before pursuing this view further, then, it is worth stepping back to consider what was initially plausible about it and whether that initial plausibility can be better captured in some other way. So, I will turn now to an examination of the motivation behind the possible consent interpretation.

C. An Ideal for Relationships

Korsgaard suggests that the possible consent interpretation of the Formula of Humanity articulates an attractive ideal for human relationships. We must reason together with anyone we want to play a role in our plans. In other words, our relationships should be cooperative rather than manipulative. I am going to argue, however, that this emphasis on cooperation suggests a different interpretation of the Formula of Humanity, one which has implausible implications of its own.

25. It is worth noting, however, that Kant frames his discussion of the murderer at the door in terms of political philosophy, rather than moral philosophy (*LP* 8:423–30). So, it is not clear that it is appropriate to understand his reasoning regarding that case directly through the lens of the Formula of Humanity. See Sec. II.E for a further discussion of this case.

26. Korsgaard, *Creating the Kingdom of Ends*, 133–58.

27. Here is a very brief outline of Korsgaard's view and my worries about it. Korsgaard's strategy essentially involves distinguishing between ideal and nonideal theory. She treats Kant's various formulations of the Categorical Imperative as having different statuses. The Formula of Universal Law governs all of our actions. The Formula of Humanity, however, articulates an ideal that it is sometimes impossible to realize. As we will see in Sec. I.C, Korsgaard maintains that this ideal is one of cooperation. You cannot cooperate with the murderer at the door because the murderer refuses to cooperate with you. This is thus a nonideal condition. Under nonideal conditions, we may be permitted and in fact obligated to act in ways that the Formula of Humanity forbids, for example, to lie to the murderer at the door. We nonetheless continue to be guided by the Formula of Humanity in that we must still regard cooperation as the ideal and work toward its restoration.

As I will argue in Sec. I.C, I do not think that we should read the ideal of cooperation into the Formula of Humanity. Beyond that, I worry that Korsgaard's strategy undermines the status of the Formula of Humanity as a principle of practical reason—it sometimes tells us to do the wrong thing and yet remains an authority for us in some more abstract sense. I find it difficult to understand how a principle of practical reason could operate in this way.

It is supposed to be important that our relationships be cooperative because each person should be the determiner of how his or her own agency is used. As Korsgaard puts it:

On Kant's view, the will is a kind of causality (G 446). A person, an end in itself, is a free cause, which is to say a first cause. By contrast a thing, a means, is a merely mediate cause, a link in the chain. A first cause is, obviously, the initiator of a causal chain, hence a real determiner of what will happen. The idea of deciding for yourself whether you will contribute to a given end can be represented as a decision whether to initiate that causal chain which constitutes your contribution. Any action which prevents or diverts you from making this initiating decision is one that treats you as a mediate rather than a first cause; hence as a mere means, a thing, a tool.²⁸

If you are a first cause, you decide for yourself whether you will contribute to a particular end. This seems to suggest that I treat you merely as a means unless you are aware that I am using you and have the option of refusing. This suggests a criterion that is a bit stronger than what we have had in mind. Force, coercion, and deception all supposedly require making consent impossible in order to be successful—the deceiver can successfully deceive only if the other party is unaware of what is going on and hence cannot consent. But now it seems that the reason for condemning such actions applies equally to cases in which consent is not, strictly speaking, impossible.

An example will make this clear. Maggie takes a stranger's picture as he is walking down the street in order to use that picture in a collage for a school project. Here she is using his action (walking down the street) to further her end (creating an image for her project). She makes no attempt to hide what she is doing and does nothing to prevent the stranger from telling her that it is okay for her to use the picture. But she neither asks the stranger's permission nor would she desist if he asked her not to use his image. (It is the perfect picture for her purposes.) Now, there is a sense in which Maggie has done nothing to make consent impossible. The stranger could inquire about her activities and respond very positively. Maggie, however, has made consent irrelevant. She is going to proceed whether he likes it or not. So, the stranger is not in control of whether his actions will further her ends. If he does not object, he is simply lucky that he happens to endorse the end that he is being used to further. But his endorsement in no way affects what will happen. Hence he is being treated simply as a mediate cause. If he objects, his attempt to direct

28. Korsgaard, *Creating the Kingdom of Ends*, 140–41.

his own contribution to what will happen is thwarted and he is again treated simply as a mediate cause.

So, when we consider the ideal that is motivating the possible consent criterion, we see that something a bit stronger than the possible consent criterion is implied. Consent must be not only possible but meaningful. That is, in order to avoid treating someone merely as a means, that person must be made aware that she is being used and have the option of refusing. Let us call the norm according to which consent must not only be possible but meaningful the ‘meaningful consent criterion’.

It might perhaps seem that the meaningful consent criterion suggests the right result—that what Maggie is doing is objectionable, and it is objectionable precisely because of the way she is using the stranger. But regardless of what one says about this case, it is clear that one does not always wrong others by not giving them a veto over how one uses their actions. Suppose that you are trying to decide whether it is cold enough outside to wear a coat. You look outside your window to see whether people on the street are wearing coats. Here you use their actions (walking around with or without a coat) to further your end (determining what to wear). In this case, just as with Maggie, you need not do anything that prevents others from seeing what you are up to. Hence, some passerby might notice that you are looking out the window at the people on the street and attempt to signal you to stop. Unlike with Maggie’s stranger, though, it seems much less intuitive to think that the passerby’s wishes must be decisive. It seems as though one may look out one’s window at the activities on the street even if some particular person on the street objects.

Both looking out the window and taking a picture of someone on the street seem to be activities that are governed by privacy norms. At least in contemporary American society, the latter seems more like a violation of privacy than the former. Could a defender of the meaningful consent criterion make use of this consideration to limit the applicability of the criterion in the window case? It seems not. One would need to show that the passerby is somehow consenting to participate in your plans despite his apparent objection—otherwise he is not being treated as a first cause but rather simply as a mediate cause.

At this point, one might suggest that the passerby tacitly consents to being observed. Although this suggestion is very natural, it does not work in the end. I take it that the talk of tacit consent is meant to signify that, just by acting in a certain way, one changes the permissions others have whether or not one wants those permissions to change and would refuse to endorse the change if asked. So, by walking down the street, a person makes it permissible for others to watch

him, whether or not that is something he would rather not have happen. On this suggestion, in describing this situation we can say that he tacitly consents to being observed.

My worry about this suggestion is about how we establish when it is appropriate to attribute tacit consent. Notice that having expectations about the way others are likely to act is not sufficient to ground the attribution of tacit consent. Suppose I live in a high crime area. I know that if I leave my bicycle chained to the bike rack outside my apartment, it is quite likely that it will be stolen. But this does not mean that I have tacitly consented to its theft. What I am doing is imprudent given what I know about what others are likely to do, but it does not change what others are entitled to do. So, if tacit consent were going to do any work, it would have to involve more than merely acting in light of expectations about how others will respond.

Attributing tacit consent makes sense only if there are justified conventions or practices that support norms specifying when certain actions change others' permissions. But now all the normative work is being done by these conventions and the norms they involve. So, we need to investigate when such conventions are justified. If we accept Korsgaard's account of the motivation behind the Formula of Humanity, how could there be justified conventions that allow us to treat one another in ways that bypass meaningful consent? Perhaps these conventions could be justified if the conventions themselves were subject to the meaningful consent of those who would be governed by them. But that is not how the conventions governing privacy work. People do not have the opportunity to opt out of these conventions if they do not want others to treat them in accordance with the norms specified by these conventions. So, although it is a very natural suggestion, I do not think that talk of tacit consent can help the meaningful consent criterion.

This suggests a serious problem with the meaningful consent criterion. The very idea of a public/private distinction rests on the thought that one is not always required to be sensitive to others' wishes about how and when they are observed. The meaningful consent criterion is committed to denying this—sensitivity is always required because our relationships should always be cooperative. There is much to be said about why we should affirm the need for a public/private distinction, which I will not be able to discuss here. Here I shall simply note that this distinction is a significant aspect of our commonsense view of the moral landscape. Hence denying it makes the ideal that motivates both the possible consent criterion and the meaningful consent criterion less plausible.

Why, then, did the emphasis on cooperative relationships seem attractive as an ideal? When cooperative relationships are contrasted

with manipulative ones, the former clearly seem better. But what we have just seen is that relationships can fail to be cooperative without being manipulative. When you observe people through your window, you are neither working together with them nor intervening in their activities to get them to do what you want. Instead, you are simply making use of what they are already doing. It is far from obvious that this way of interacting with another is always inappropriate. Indeed, the discussion of the public/private distinction above gives us reason to think that it is not. The emphasis on cooperative relationships thus seems plausible only when we think that the only alternative to a cooperative relationship is a manipulative one.

To summarize, then, the ideal that motivates the possible consent criterion actually implies the stronger meaningful consent criterion. Once we appreciate the full implications of the ideal, it seems much less plausible. It seems, then, that the possible consent criterion is an inadequate reflection of an implausible ideal.

II. AN ALTERNATIVE APPROACH

A. An Outline

In light of the deep problems with the possible consent interpretation and the motivation behind it, we should investigate other interpretations. Let me begin by outlining my approach to this project. Kant suggests that the sense in which another can be treated merely as a means is clearest in cases in which their freedom or property is assaulted. On the basis of this observation, Kant draws a close connection between the transgression of rights and treating another merely as a means.²⁹ These remarks indicate that when interpreting the Formula of Humanity, Kant's political philosophy should not be an afterthought but instead a starting place.

This is both a point about methodology and a point about the justificatory relationship between Kant's moral and political philosophies. The methodological point is simply that it makes sense to focus on the most vivid cases of treating someone merely as a means when attempting to articulate what treating someone merely as a means is. Kant's claim that rights violations are particularly vivid, then, gives us a good reason to focus on those cases.

29. Kant claims that when we reflect on the cases of assaults on freedom and property "it is obvious that he who transgresses the rights of human beings intends to make use of the person of others merely as a means" (*G* 4:430). I suggest that this passage pushes us in the direction of thinking that Kant viewed rights violations as paradigmatic cases of treating someone merely as a means. As I will argue, though, this view is still rather inchoate in the *Groundwork*, and the motivation behind it only becomes clear in the *Metaphysics of Morals*.

The justificatory suggestion is more complicated. Let me briefly outline what this involves before describing in more detail the issues I will be dealing with in the remainder of this essay. I suggest that we should think about the relationship between Kant's moral and political philosophies as having three stages: beginning in the moral, moving through the political and then returning to the moral. At the first stage, we begin with the Formula of Humanity.³⁰ The Formula of Humanity provides the justification for the foundational elements of Kant's political philosophy. The requirement of equal external freedom on which Kant relies is, I think, ultimately grounded in the value of humanity. At the second stage, when we use these foundational elements to do political philosophy, we discover something that I think is quite surprising. Kant argues that in the absence of political institutions our rights to our bodies and property are merely provisional. We need to establish political institutions in order to make these rights conclusive. In this way, a detour through political philosophy is required to establish basic elements of what is involved in treating someone not merely as a means. With this account in place, we can return, at the third stage, to moral philosophy in order to specify many parts of moral philosophy that are otherwise indeterminate: for example, what beneficence involves in light of what we owe others merely as a matter of justice.

So, that is the overall picture I am working with. Treating the second and third stages in depth would amount to giving an account of all of moral and political philosophy. That is, of course, beyond what I can accomplish in the remainder of this essay. Instead, my plan is to discuss the first two stages in some detail. I will then briefly discuss the relationship between the second and third stages, so as to make it clear why I think that we need the results of political philosophy and, indeed, the results of actual political decision making in

30. We could begin with any version of the Categorical Imperative and move through the same three stages. I take the Formula of Humanity as my starting point because it seems to me to connect in the most intuitive way with the claims in political philosophy that I am arguing are justified via the Categorical Imperative. Notice, though, that the Formula of Universal Law also has a natural correlate in the Doctrine of Right, that is, the 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" (MM 6: 230). And notice that Kant's representation of the Categorical Imperative in terms of a Kingdom of Ends in the *Groundwork* already at least evokes the idea of a political society. So, the focus on the Formula of Humanity in what follows is not meant to suggest that the Formula of Humanity has a privileged status among the versions of the Categorical Imperative or that the other versions are less significant. Thanks to an anonymous reviewer from *Ethics* for prompting me to consider these connections.

order to provide the foundation from which our other duties can be explicated.

B. Background

The possible consent interpretation focuses heavily on Kant's discussion of the Formula of Humanity in the *Groundwork*. My interpretation, however, focuses on the description of our duties that Kant provides in the later work *The Metaphysics of Morals*, which is divided into "The Metaphysical First Principles of the Doctrine of Right" and "The Metaphysical First Principles of the Doctrine of Virtue." This division tracks Kant's distinction between what he calls duties of right and duties of virtue. Kant draws the distinction between these kinds of duties in a number of ways. We need not sort through these distinctions here. What is important for our purposes is that both kinds of duties are genuine moral duties. While the duties of virtue are straightforwardly moral duties, duties of right are, as I understand Kant, moral duties that are established through political philosophy.³¹ Unless we take seriously the claim that duties of right are genuine moral duties, the *Metaphysics of Morals*'s account of our duties is seriously incomplete. A brief overview of the duties to others described in the Doctrine of Virtue will make this clear.

Kant divides the duties of virtue that we owe to others into what he calls duties of love and duties of respect.³² Duties of love are duties to treat humanity as an end in itself, and duties of respect are duties to avoid treating humanity merely as a means. Here the idea of treating humanity as an end itself seems to be cashed out in terms of treating the ends that others set as reason giving. This suggestion is, I think, confirmed by the particular duties of love that Kant describes: the duties of beneficence, gratitude, and sympathy.³³

With this conception of treating humanity as an end in itself in mind, we can turn to what is involved in treating humanity merely as a means. Under the heading of duties of respect, Kant only discusses duties against arrogance, defamation, and ridicule. Essentially, these are duties not to pose as morally superior to others by expressing that

31. Ibid., 218–20.

32. Ibid., 450.

33. When one is beneficent, one makes the happiness of others one's own end by taking their ends as one's own (ibid., 452–54). When one is grateful, one recognizes another's beneficence (454–56). In that way, one takes seriously the fact that the other has taken up one's own happiness as an end. Finally, when one sympathizes with others, one takes an active interest in their joy or pain (456–57). In this way, one regards the success or failure of another in achieving her ends as a matter of practical significance. Hence all of the duties of love are tracking the status of others' ends as reason giving in one way or another.

another agent and/or her ends have lesser value. Given that these are the only duties that Kant describes under the heading of duties of respect, we are now faced with what might seem to be a puzzling set of omissions. Where are the familiar duties against force, theft, coercion, deception, and promise breaking? All of the duties to others that one might have regarded as most basic seem to have been left out of the account of what we owe others found in the Doctrine of Virtue.

These omissions, however, become at least somewhat less puzzling when we consider the duties Kant discusses in the Doctrine of Right and the justificatory strategy he uses to establish those duties. In the Doctrine of Right, Kant explicates and argues for a conception of our duties to others with respect to their bodies and property. Kant only briefly engages with the duties to keep promises and not to deceive others in the Doctrine of Right. But I think that Kant is best understood as holding that the existence and contours of these duties also depend in crucial ways on the results of political philosophy. So, we can see the motivation behind what I will call the “Three-Stage Account” beginning to take shape: a full understanding of Kant’s moral philosophy involves moving through the political.

As I develop the Three-Stage Account, I am going to offer a reconstruction of Kant’s political philosophy that resolves problems with Kant’s own arguments rather than giving a close reading of the Doctrine of Right. This reconstruction is faithful to the starting points and major conclusions of the Doctrine of Right, so it will suffice to show how the view developed in this work could play the justificatory role I am suggesting in my overall interpretation. With this in mind, let us turn to the first stage of the Three-Stage Account.

C. The First Stage

As I mentioned above, I claim that the foundational elements of Kant’s political philosophy are justified by the Formula of Humanity. In order to see how this is so, we need to spend a little more time considering what Kant has in mind when he refers to ‘humanity’. As we have already seen, by ‘humanity’, Kant means our capacity to set and pursue ends, that is, our capacity to act. Action is free when it is self-directed. Kant uses the distinction between ‘internal’ and ‘external’ freedom to capture two respects in which action can be self-directed. On the one hand, if your actions are simply the product of the push and pull of inclinations operating within you, your actions are directed by these forces rather than by you. Internal freedom consists in directing yourself rather than being directed by your inclinations. On the other hand, if your actions are simply the product

of other agents pushing you around, there is a different but equally real sense in which your actions are not self-directed. External freedom consists in directing yourself rather than being directed by other agents.

In his moral philosophy, one of the things that Kant is most concerned to argue is that internal freedom—that is, autonomy—is achieved through following the Categorical Imperative. In what follows, I am not concerned with that part of his project. We are simply going to take the Formula of Humanity as our starting point. The intuitive thought is that, if the value of humanity can be used to generate requirements on how one affects the external freedom of others, it will make sense to regard the violation of these requirements as treating someone merely as a means: violations will limit the ability of others to engage in self-directed action and, in that sense, will involve directing others rather than allowing them to direct themselves. And this seems to be a way of treating someone as on a par with a mere tool.

So, what I need to show is how the value of humanity can be used to ground requirements on how one affects the external freedom of others. The argument has two steps. First, notice that we need the concept of a right in order to explicate the idea of external freedom. There is a sense in which, no matter what I do, I affect the options that you have. By occupying some particular place or another, I make it the case that you do not have unfettered access to that very spot. But it would be a bizarre conception of self-directed action that requires that there only be one self anywhere in existence. So, we need a way of understanding one's relationship to others such that their mere existence need not pose a threat to one's ability to engage in self-directed action. If we think of each person as having rights to control certain features of the world, then each person has a sphere of discretionary space, that is, a domain within which she is entitled to control what happens. Within this sphere, one's choices could be insulated from the choices of others, and in that sense one would be able to engage in self-directed action.

With this understanding of external freedom as consisting in the space for self-directed action secured by a bundle of rights, we can turn to the second step in the argument. Here the value of humanity, that is, of each person's capacity for self-directed action, justifies the foundational claim of Kant's political philosophy. That claim is that each person is entitled to an equal sphere of discretionary space in virtue of her capacity for self-directed action. That is, each person has an innate right to equal external freedom in virtue of her humanity.

D. The Second Stage

Having seen how the value of humanity can be used to ground a requirement of equal external freedom, we can move to the second stage of the account and consider the reconstruction of Kant's political philosophy. What we need is to determine which specific rights people have. That is, we need an account of what the contours of each person's discretionary sphere are.

The first step toward a specification of rights involves observing a fundamental feature of having a right. Kant claims that having a right necessarily involves the authority to limit the freedom of others in defense of that right. The argument for this claim proceeds as follows. First, we suppose that we may identify some action or another as violating a right. Now we can ask what responses to an attempt at violating this right are consistent with the equal external freedom of all, that is, with maintaining the integrity of the would-be violator's discretionary sphere. In attempting to violate another's right, the violator attempts to take control of a feature of the world that another is entitled to control. In other words, the violator leaves her discretionary sphere and encroaches on the discretionary sphere of another. If the victim acts to thwart the violator's action, this only involves limiting her freedom to do something she has no claim to be permitted to do. In other words, actions needed to thwart a rights violation only prevent the would-be violator from performing an action that is not in her discretionary sphere. Hence such defensive actions are consistent with the violator's equal external freedom.

Consider the matter more concretely. Suppose you try to grab an apple from me that I have the right to be holding. If I push you away, I thwart your action. But I am not doing so in a way that is inconsistent with the equal freedom of all because, *ex hypothesi*, you had no claim to be able to grab the apple from my hand. So, I have only prevented you from making a choice you had no claim to be able to make. For this reason, the idea of having a right for Kant involves not just having a moral claim against others acting in certain ways but also having the authorization to compel others to refrain from these actions.

Notice that this authorization extends only to actions needed to thwart a rights violation. If pushing you away would keep you from my apple, I am not entitled to cut off your hand.³⁴ Actions that go beyond what is needed to thwart a rights violation essentially involve dragging the wrongdoer into your discretionary sphere rather than

34. This discussion does not engage the potentially difficult question of how to specify which actions are necessary in the relevant sense. Unfortunately, I do not have the space to adequately address this issue here.

forcing her out.³⁵ Although the wrongdoer has left her own discretionary sphere in attempting to violate another's right, the wrongdoer remains a being with the innate right to freedom, that is, a being who is entitled to have a discretionary sphere. So, although the wrongdoer has no rights-based grounds for complaint at being prevented from engaging in a rights violation, she has grounds for complaint against any further limitations on her freedom.³⁶

Furthermore, notice that this authorization to defend one's rights directly extends only to the person whose rights are in jeopardy. Suppose my friend sees you lunging for my apple. As I have noted, you have no claim against being prevented from grabbing the apple, since it is outside of your discretionary sphere. But the apple is also outside of my friend's discretionary sphere. Since the apple is in my discretionary sphere, what happens to it is up to me. I might, perhaps, prefer to let you get away with grabbing it rather than to involve my friend in an altercation. If this is the case, my friend would also be encroaching on my discretionary space by intervening, because she would be determining the fate of the apple rather than leaving that up to me. So, the authorization to defend one's rights that follows from having a right only indirectly extends to other individuals through one's consent.³⁷

With these structural claims regarding the nature of rights in

35. Consider a vivid example. Suppose Darryl is trying to steal Diane's car. Diane ties him up and keeps him tied up indefinitely in order to amuse herself by hurling insults at him whenever she walks by. Darryl might truthfully say, "I'll leave your car alone, just let me go." If Diane ignores this plea, she treats Darryl as if he were something she is entitled to control and hence a component of her discretionary sphere, like a plant or a piece of furniture. But that is not what Darryl is. Darryl remains a being with an innate right to freedom. So, although Darryl cannot complain at being prevented from stealing the car, he can complain at being prevented from returning to his discretionary sphere. In this way, actions that go beyond what is needed to thwart a rights violation are inconsistent with the innate right to freedom of the wrongdoer. So, returning to the case of our conflict over the apple, if I cut off your hand, you can complain that the force I used was greater than the force needed to prevent your rights violation and, to that extent, I treated you as an object that I am entitled to control rather than as a being with the innate right to freedom.

36. This formulation suggests that individuals are not permitted to punish those who transgress their rights. Kant treats punishment in his discussion of public right rather than in his discussion of private right. This, I suggest, indicates that Kant regards the state as the only entity that can properly punish those who violate rights. An examination of the grounds on which the state might be held to have the right to punish is beyond the scope of this article.

37. Here I am arguing that individuals can have only a derivative right to enforce the rights of others. I will go on to argue that the state can have a right to enforce the rights of citizens that does not depend on citizens consenting to the state's enforcement of these rights.

mind, we can now turn to considering which specific substantive rights we should regard as comprising each person's discretionary sphere. Notice that we are able to act only through the use of our bodies. If one person physically restrains another person, the subjected person is to that extent unable to act at all. Control over one's own body is thus a precondition for engaging in self-directed action, and hence any specification of the content of discretionary spheres must include the right to that control.

Moreover, notice that your right to your own body gives you a derivative right to any objects that cannot be moved without moving you. So, for example, if you are holding an apple, I may not come along and pry it out of your hand. Doing so would interfere with your use of your body and hence violate your right to your body. This, however, does not amount to a property right to the apple. A property right involves a claim against others even when one is not in physical possession of the object.

Why think that it is possible to acquire property rights? This is a difficult question, and Kant's answer is, I think, not as transparent as one might hope. But before we turn to reconstructing Kant's argument for this claim, it is important to be clear that the kind of rights Kant means to pick out when he refers to property rights are in a sense weaker than the kind of rights that commonly might be thought of as property rights. The claim against others involved in a property right for Kant just is a claim against others with respect to an object even when one is not in physical possession of the object. This understanding leaves it open what specific entitlements a property right involves. It is, for example, consistent with this conception of a property right that the right be limited in duration—say, a property right that only lasts ten years—or safeguard only a circumscribed set of uses—say, a property right that does not include the right to destroy the object or transfer ownership.

With this conception of a property right in mind, we can return to the question of why we should understand people's discretionary spheres as involving a right to acquire property. Why not instead regard people's discretionary spheres as encompassing only their bodies and whatever they can physically possess? The answer, I think, involves considering the possible grounds for drawing the boundaries of people's discretionary spheres in one way rather than another. The only reason for limiting a person's right to engage in a certain kind of activity is the need to preserve the equal external freedom of others. Kant's claim is that there is no reason based on equal external freedom for limiting rights to objects to those objects that one physically possesses. In order to see why, notice that uses of objects that require or are consistent with continuous physical possession do not exhaust

the ways in which an object might be used. The purpose of establishing equal discretionary spheres does not in itself provide reason for privileging the protection of one kind of use over others. In other words, limiting possible rights against others with respect to objects only to objects in one's physical possession would be arbitrary, on a par with a limitation of rights against others with respect to objects only to objects that one physically possesses while, say, one is whistling. It seems, then, that we should conclude that the right to acquire property is a component of each person's discretionary sphere.

Nonetheless, and perhaps surprisingly, including this right in each person's bundle of rights does not actually suffice to make it possible to acquire property. Anyone trying to acquire a property right faces three distinct indeterminacy problems. First, the mere idea that it must be possible to acquire a property right to an object does not settle how such acquisition is to be accomplished. Kant favors something like a "first come, first served" principle. But even if we granted that such a principle is suggested by the right to acquire a property right, more is needed to specify the procedure by which property rights are acquired. At the very least, when acquiring a property right to an object, one must somehow signal to others that this is what one is doing. What kind of signaling is sufficient is an open question. Is it, for example, enough to put up a sign next to territory that one is trying to claim? Would putting up a fence do? In this way, the procedure whereby property rights are acquired is indeterminate. And a straightforward consequence of the requirement of equal external freedom is that no person can have a unilateral right to resolve this indeterminacy, because such a right would make that person's discretionary sphere larger than everyone else's.

Second, as I noted above, the idea of property that Kant is working with is simply the idea of a claim against others with respect to an object that one does not physically possess. This description alone leaves unspecified the contours of such a claim. It might be clear that your right to the daffodils you are growing on your land gives you a claim against me reaching over the fence and plucking them out of the ground. But consider, for example, whether I have a right to set up a fan on my territory that will blow over your daffodils or to build a wall that will block their access to the sunlight. In this way, what exactly your property right to your daffodils entails is indeterminate. And just as before, the requirement of equal external freedom implies that no one can have a unilateral right to resolve this indeterminacy.

Finally, no matter how detailed the rules regarding the acquisition of property rights and defining the contours of those rights are, the possibility of reasonable disagreement regarding the interpretation of those rules remains. So, for example, even if it were established

that a sign must be posted next to territory that has been claimed, people might disagree about how large the sign must be and about what language the message must be written in. And once again, no one can have a unilateral right to settle disputes over interpretation.

Perhaps even more surprisingly, the latter two kinds of indeterminacy problems also seem to affect one's right to one's body.³⁸ As in the second problem, the mere idea that one must be able to control one's body might pick out a core of protections but leaves the precise contours of one's right to one's body indeterminate. So, for example, would playing my music in your vicinity so loudly that it gives you a headache count as violating your right to your body? And, as in the third problem, no matter how precisely rules are specified, the possibility of reasonable disagreement remains. Finally, one's right to one's body is also subject to a derivative indeterminacy problem stemming from the indeterminacy surrounding our property rights. Suppose that you and I are in the midst of a border dispute and I come over to what you regard as your land. If you have a property right to the land, you have the authorization to use force to defend your property right. But whether or not you have a property right is just what is in dispute, and hence your right to use force and my right to my body are similarly a matter of disagreement.

The solution to all of these indeterminacy problems lies in the establishment of an impartial decision procedure for adjudicating disputes over rights. Only this kind of decision procedure will be able to resolve disputes in a way that preserves our equal external freedom because only this kind of procedure can represent both of our claims to external freedom without deferring to either of our individual judgments about our respective rights.

Notice that although social practices can do some work establishing expectations in the state of nature such that the state of nature need not be a complete mess, these social practices are not sufficient to establish conclusive rights. As Kant puts it: "It is true that the state of nature need not, just because it is natural, be a state of *injustice* (*iniustus*), of dealing with one another only in terms of the degree of force each has. But it would still be a state *devoid of justice* (*status iustitia vacuus*) in which when rights are *in dispute* (*ius controversum*), there would be no judge competent to render a verdict having rightful force."³⁹

The trouble with mere social practices is that, although they may

38. Since there is indeterminacy in our rights to our bodies, Kant's argument for the necessity of establishing the state could work even if his argument for the necessity of property rights does not work.

39. *MM* 6:312.

establish expectations that prevent constant fighting, they lack the impartiality needed to establish a rightful condition. There is no mechanism for challenging informal social norms as inconsistent with equal external freedom or for challenging the view another person has about the proper application of a norm in a given case. Only an impartial decision-making procedure for settling disputes over rights can address these problems in a way that is consistent with equal external freedom.

Just what kind of decision procedure would suffice is, I think, a difficult question and one that goes beyond the scope of this essay. Kant himself held the position that, although institutions embodying a decision procedure can be more or less just, any such institution will do to solve the indeterminacy problem. I disagree. I think that the requirement of impartiality and the need to maintain equal discretionary spheres place constraints on the kind of institutions that will count as solving the indeterminacy problem. But as I said, I will not be able to pursue this issue further here.⁴⁰ Notice, though, that even robust standards for the structure of the political institutions in a just state would not resolve all of the indeterminacy problems. Actual political decision making will be needed to settle at least the fine-grained details of our rights. It is, for example, unlikely that the disputes described above about rights to one's daffodils would be settled by the constitution of a just state.

Notice that resolving the indeterminacy problems only opens up the conceptual space needed to make self-directed action possible. Something more is needed for this possibility to be realized. Here is what I mean. The result of solving the indeterminacy problem is a way of carving up the world such that each person is entitled to an equal discretionary sphere. But the ability of each person to direct herself within her respective sphere still depends on the decision of others to respect the rights that constitute this sphere. For example, having a right to use land does not enable me to engage in self-

40. One promising direction for developing a more detailed account of the requirements for a just state lies in the suggestion that impartiality and equal spheres of discretionary space require equal rights to political participation. This suggestion requires much more elaboration and defense than I can provide here. But properly elaborated, this suggestion could support far-reaching criteria for a just state. Some kind of democratic structure along with constitutional protections might, for example, be needed to preserve equal rights to political participation.

It is worth noting that despite his insistence that all states are legitimate, Kant had quite a bit to say about what a just state should look like (*MM* 6:311–42). Some of Kant's claims are more plausible than others. Although he has views that pull in the opposite direction, his condemnation of hereditary rights seems to support the above suggestion about rights of political participation (*TP* 8:292, 297).

directed action if you trespass. What we need in order to establish equal external freedom is for each person's rights to be protected against transgression. Thus, in addition to the indeterminacy problems, we have a problem of enforcement.

The institutional apparatus that resolves the indeterminacy problem is both entitled and required to solve the enforcement problem.⁴¹ The argument for this claim is as follows. First, recall that having a right implies the authorization to compel others to respect that right. So, an institution with the right to determine the scope of the discretionary spheres of individuals has the right to compel individuals to respect that determination. Thus, in enforcing its right to determine the scope of discretionary spheres, the institution thereby also enforces the rights of individuals. Next, recall that the problem of enforcement is only solved when each person's rights are protected. Given the structural features of rights I discussed earlier, although each person has the right to enforce her own rights, she does not necessarily have the right to enforce others' rights. Only the aforementioned institution has the right to enforce everyone's rights because doing so amounts to enforcing its own right to determine the scope of rights. Hence only this institution could solve the enforcement problem. And since the resolution of this problem is needed for the establishment of equal external freedom, this institution is required to solve the enforcement problem.

What we end up with, then, in order to establish equal external freedom is an institution that defines the scope of our rights and enforces those rights. In other words, what we need is the establishment of the state. So, now we are in a position to appreciate the overall structure of Kant's political philosophy. Kant's argument is that the innate right to freedom requires that we have rights to our bodies and the possibility of acquiring property rights. But these rights are merely provisional in the state of nature. That is, although we can make claims on one another to abide by our respective rights, the definitive shape of these rights remains unsettled and the assurance that they will be respected is absent.

Provisional rights can therefore only be made conclusive through the establishment of the state. Hence each of us has the right to have our interactions with others governed by a state and, given the individual right of enforcement, each of us may therefore compel others to enter into a state.

41. Talking about an institution as a bearer of rights is shorthand for talking about the rights of individuals employing a decision-making procedure. The individuals are the bearers of the rights, but they bear these rights only insofar as they are acting in accordance with the procedure.

Although there is much more in Kant's political philosophy that is worth exploring, this much suffices to set up my conclusion regarding the relationship between Kant's moral and political philosophy. Before turning to that conclusion, however, I want to make good on a promissory note from Section I.A. There I indicated that, although Kant is regarded as working in the social contract tradition, I do not think that the idea of consent is playing a foundational role in his political philosophy. Now we are in a position to see this.

Moving from the state of nature into the state involves establishing an impartial decision procedure backed with the power to enforce its conclusions. And it is just at this point that one might think that the idea of consent is doing some work. Indeed Kant sometimes refers to the establishment of the state as taking place through an original contract.⁴² But in the account I just sketched, the legitimacy of the state stems directly from its ability to solve the indeterminacy problems and the enforcement problem. It needs no authorization from its citizens to do this. I suggest, then, that the idea of a contract is best understood not as a justificatory device but rather as a heuristic device that enables us to vividly appreciate the requirement of equal external freedom.

E. Moving from Stage Two to Stage Three

With the basic framework of Kant's political philosophy in mind, we can now turn to the transition from the second to the third stages in the account and thus consider the move from political philosophy back into moral philosophy. In this section, I am going to do three things. First, I will finally give the interpretation of idea of treating someone merely as a means that I think follows from the political theory I just sketched. Second, I will show how the contours of the duties of love I mentioned earlier depend on the results of political philosophy and actual political decision making. Third, I will show how Kant's brief comments on the duties against promise breaking and lying confirm my interpretation and might be developed into a fuller account of these duties.

The Formula of Humanity revisited.—To begin, I suggest that one treats another merely as a means if and only if one either (1) violates her rights or (2) expresses the denial of the claim that the person has equal practical standing in virtue of her humanity. My focus in this essay has been on the first prong. I will say just a little bit about the second prong before returning to the first. The second prong reflects the duties of respect against arrogance, defamation, and ridicule that Kant describes in the Doctrine of Virtue. The general idea

42. TP 8:297.

behind these duties seems to be that one ought not act as though one is morally superior to another, thereby expressing that the other's humanity is of no worth and hence that the other is a mere object. The characterization I gave above of this way of treating someone merely as a means is tentative. Much more work would need to be done to motivate and defend this characterization than I can do here. Here I will simply note the plausibility of the two-pronged approach. It seems possible to disrespect another's agency without limiting her ability to engage in self-directed action. The two-pronged approach captures this.

The general duty of respect not to pose as morally superior to others, which the duties against arrogance, defamation, and ridicule seem to reflect, does not depend on the results of political philosophy. Thus the second prong of the characterization of what it is to treat someone merely as a means may be developed entirely in the domain of ethics. The story is quite different when we return our attention to the first prong, that is, the claim that one treats another merely as a means if one violates the other's rights. The thought here is that one disregards the other's humanity by disregarding the significance of her external freedom, thereby interacting with the other as if she were merely an object. As I have argued above, the content of the prohibition on violating another's rights cannot be specified in the absence of political philosophy and actual political decision making. So, this way of treating someone merely as a means has a political character.

The duties of love.—With this characterization of what it is to treat someone merely as a means in mind, we can consider how our rights shape the contours of the duties of love. The content of these duties depend to varying degrees on the contours of our rights to our bodies and our property. Beneficence is the clearest example. How we ought to help others pursue their ends depends straightforwardly on the resources we are entitled to control. This is so in two ways. First, of course, I may not help you with resources that belong to someone else. Second, and perhaps less obviously, if I have a duty of right to give you assistance, this duty may preempt the duty of beneficence, making focusing on beneficence in this context in some sense misguided. This makes the resolution of certain questions in political philosophy crucial for understanding the appropriate place of the duty of beneficence in guiding our actions. If, for example, the state is required to ensure that everyone has the resources needed to subsist, as Kant claims in the further development of his view, the duty of beneficence in these cases may be preempted by the duty of right.⁴³

43. MM 6:326.

This may make a serious practical difference in how we ought to approach others' needs for resources. Thus we arrive at the conclusion that the results of political philosophy and actual political decision making determine the contours of many of our duties, both directly through establishing duties of right and indirectly through creating a just background within which our other duties can be situated.

This conclusion is confirmed when we consider the other duties of love Kant mentions: the duties of gratitude and sympathy. Kant casts gratitude as a response to beneficence.⁴⁴ One ought to express gratitude to one's benefactors. Therefore, as in the case of beneficence, the proper scope of the duty of gratitude depends on political philosophy and actual political decision making. For example, gratitude would be the wrong response to a gift of stolen goods.

When one sympathizes with others, one takes an active interest in their joy or pain.⁴⁵ But the proper scope of sympathy depends in part on the moral status of the ends of others and so in part on the results of political philosophy and actual political decision making.⁴⁶ For example, one ought not cheer for Jesse James when he evades the law.

The duties against promise breaking and lying.—Kant's treatment of the case of the lying promisor in the *Groundwork* is what motivates the possible consent interpretation. Since this case combines the duties against promise breaking and lying, it might be surprising that these duties do not take center stage in the *Metaphysics of Morals*. In fact, Kant has almost nothing to say about promises and only rather puzzling, seemingly incomplete discussions of lying. The reason for this, I suggest, is Kant's development of the distinction between internal and external freedom. The difficulty with both breaking promises and lying is that Kant has come to see the objection to these activities in terms of their effect on the external freedom of others. And, perhaps counterintuitively, that would make the duties against these activities duties of right and hence a part of political philosophy.

Consider first the case of promises. Kant at least in one place seems to treat promises as contracts.⁴⁷ And in his political philosophy, Kant argues that contractual rights are property rights in another's action.⁴⁸ As property rights, these rights are subject to the indeter-

44. Ibid., 455–56.

45. Ibid., 456–57.

46. Kant acknowledges the sensitivity to the moral status of others' ends in the general gloss of the idea of a duty of love: "The duty of love for one's neighbor can, accordingly, also be expressed as the duty to make others' *ends* my own (provided only that these are not immoral)" (*ibid.*, 450).

47. Ibid., 220.

48. Ibid., 273–74.

minacy problem and the enforcement problem. Hence, these rights are conclusive only in light of the establishment of the state. This understanding of promising thus makes the duty against promise breaking a duty of right and involves situating this component of what we owe to others within political philosophy.

It may seem, however, that although my interpretation helps us make sense of Kant's brief comments on the duty against promise breaking, it saddles Kant with an implausible account of that duty. According to this objection, surely there are at least some promises that need not and should not be enforced by the state. I am not going to take a stand on the merit of this objection. Here it will suffice to note that the account has room to accommodate this objection if it needs to. Recall that the duty of beneficence requires us to respond to the value of others' ends. Although the duty of beneficence generally gives one some latitude in deciding which actions to undertake to further others' ends, sometimes it seems to decisively suggest one course of action. These are cases in which one must act in a specific way in order to count as valuing another agent's ends at all, for example, throwing a life preserver to a drowning man. Perhaps there are ways of inviting others to rely on one's actions without going as far as giving them ownership of one's action. If so, perhaps there are circumstances in which proper regard for the ends of others requires one to make good on these invitations. Hence even on this account it might be possible to make sense of some promissory obligations as duties of virtue rather than duties of right and thus as not enforceable by the state. Notice, though, that even on this suggestion, promissory obligations are shaped by our rights. With more familiar instances of the duty of beneficence, what we may do for others is constrained by the resources we have the right to control. Here, what we may promise others is constrained by the resources we have the right to control.

The case of lying is similar, though a bit more muddled. In the Doctrine of Right, Kant seems to take a 'buyer beware' attitude toward communication, suggesting that an immediate implication of the innate right to freedom is the right to tell others something regardless of its truth or falsity, because "it is entirely up to them whether they want to believe it or not."⁴⁹ The only exceptions to this claim are lies bearing directly on matters of right, for example, a lie about the terms of a contract.

In contrast to the radically permissive view on lying in the Doctrine of Right, Kant argues for an absolute prohibition on lying in the Doctrine of Virtue. However, surprisingly, he argues for this as a duty to oneself. Consider the following passage: "Lying (in the ethical

49. Ibid., 238.

sense of the word), intentional untruth as such, need not be *harmful* to others in order to be repudiated; for it would then be a violation of the rights of others. It may be done merely out of frivolity or even good nature; the speaker may even intend to achieve a really good end by it. But his way of pursuing this end is, by its mere form, a crime of a human being against his own person and a worthlessness that must make him contemptible in his own eyes.”⁵⁰

An adequate discussion of duties to oneself goes beyond what I can undertake here. Notice, though, that this passage together with the absence of any further discussion of the duty against lying in the Doctrine of Virtue seems to suggest that, by the time he wrote of the *Metaphysics of Morals*, Kant had come to believe that if the duty against lying were a duty to others, it would be a duty of right.

The *Metaphysics of Morals* thus seems to leave us with a highly permissive understanding of the duty against lying insofar as it is a duty to others: we are obligated to others not to lie only when the subject of the lie is a matter of right. Kant, however, seems to have been torn between a highly permissive and a highly prohibitive conception of the duty of right against lying. When we finally get to the infamous murderer at the door in an essay published after the *Metaphysics of Morals*, Kant does an about face regarding duties of right not to lie, suggesting that all lies undermine the possibility of rightful relations and going so far as to suggest that any bad consequences that might follow from lying to the murderer at the door may be legally imputed to the liar.⁵¹ The highly prohibitive account of the duty of right against lying is quite implausible. But at least as an interpretative matter, Kant’s discussion of the duty against lying confirms that he regarded the Doctrine of Right as crucial in understanding this duty.

While the highly prohibitive account of the duty of right against lying leads to a counterintuitive result in the case of the murderer at the door, the more permissive view might be made to work. This limited duty of right against lying might be combined with something like the account I sketched above that placed the duty against promise breaking under the heading of duties of beneficence. Valuing the ends of others might require honest interactions with them. Notice that this suggestion would give a more plausible verdict in the case of the murderer. The murderer’s ends are contrary to his duties and hence we have no duty to value them. So, on this suggestion one may lie to the murderer at the door precisely because of his immoral ends. This understanding of the duty against lying would still involve a serious detour through political philosophy: sometimes the duty against

50. Ibid., 553.

51. LP 8:426–27.

lying is itself a duty of right and, even when it is not, the permissibility of lying depends at least in part on whether the person being lied to is acting rightfully. This suggestion is thus able to explain the difference between lying to the murderer and lying to an officer of a just state who has come to the door to execute a lawful arrest warrant.⁵²

A great deal more would need to be done to develop and defend the suggested accounts of both the duty against promise breaking and the duty against lying. Here I have only aimed to show how Kant's own discussions of these duties confirm my overall interpretation and to indicate a way in which his views might potentially be improved that is still consistent with my interpretation. This, together with the discussion of the duties of love above, provides ample support for the claim that, for Kant, many of our most fundamental moral duties depend on and are shaped by political philosophy and actual political decision making.

III. COMPARISON WITH THE POSSIBLE CONSENT INTERPRETATION

With the interpretation of what it is to treat someone merely as a means supplied by the Three-Stage Account in hand, we are now in a position to compare this interpretation with the possible consent interpretation. Recall that there are three problems with the possible consent interpretation. First, it involves attributing to Kant a view with a serious internal tension because it cannot be reconciled with his political philosophy. My proposed interpretation is developed explicitly in light of Kant's political philosophy and thus avoids this inconsistency.

Second, the possible consent interpretation involves attributing to Kant an implausible view because it rules out the use of force, coercion, and deception across the board. My interpretation does not saddle Kant with these consequences. But, admittedly, much more work needs to be done to develop Kant's political philosophy and to give an account of our duties against lying and promise breaking before we can assess the overall plausibility of this account.

Finally, let us consider the motivation behind the two interpretations. In a way, both interpretations take the idea of self-direction as a starting point. But the possible consent interpretation understands self-direction in terms of giving people discretion over all the ends they contribute to. This, as we have seen, amounts to a requirement that all interactions be cooperative. My interpretation understands self-direction in terms of leaving each person the same discre-

52. This account would still need to be reconciled with Kant's discussion of the duty to oneself against lying. As I noted above, a full discussion of duties to the self is beyond the scope of this article.

tionary space. Here the emphasis is on observing people's rights rather than cooperating with them. This allows us to acknowledge the possibility that one might interact with others in a way that involves neither manipulating nor cooperating with them. In this way, the conception of self-direction that my interpretation employs is able to avoid the false dichotomy that gets the possible consent interpretation into trouble.

IV. MERITS OF THE THEORY

I think, then, that there is good reason to regard the interpretation that the Three-Stage Account yields as an improvement over the possible consent interpretation. To conclude I want to just briefly note why I think that both the political theory I have described and the conception of the relationship between moral and political philosophy this suggests are compelling.

First, the idea that we have provisional rights in the state of nature attributes to us moral claims on one another that seem to be of just the right strength to avoid the pitfalls of the two prominent alternative views in the social contract tradition. One way of characterizing a persistent worry about a certain kind of Hobbesian political theory is that, if we begin with no moral claims on one another, it is unclear how we can ever end up with such claims. That is, we never actually get rights to our bodies and property in any strong moral sense of 'rights'. One lingering problem with a Lockean political theory is that, if we begin with a conception of individuals as having full-blown rights to their bodies and property in the state of nature, it is unclear how to understand the exit from the state of nature without relying on an untenable conception of tacit consent. That is, we end up trapped in the state of nature. The idea of provisional rights, that is, the idea of a moral claim on others to leave the state of nature in the case of a dispute over rights, is not so weak as to make it mysterious how we could arrive at conclusive rights and not so strong as to make it mysterious how we could end up in the state.

Second, whatever else one thinks about the details of the political theory I have sketched, the various indeterminacy problems I have explicated seem to provide compelling reason to conclude that property rights are, at least in some ways, conventional. This consideration alone is enough to suggest that we should think about moral norms as both contributing to and being shaped by political philosophy: the conventions governing property rights should be subject to moral norms and the contours of the resulting conventions shape our other duties. The account I have sketched gives us a way of understanding moral and political philosophy as related in this way while still regarding these two domains as involving distinct justificatory tasks. But alas, considering these issues in detail is a task for another day.