

Kant  
*The Metaphysics of Morals*

Private right, chapter II, section I, On property right

6:260-70

## THE METAPHYSICS OF MORALS

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

### SECTION I ON PROPERTY RIGHT.<sup>j</sup>

#### § 11. *What is a right to a thing?*<sup>k</sup>

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

<sup>k</sup> *Sachenrecht*

<sup>l</sup> *Gesammtbesitz*

<sup>m</sup> right against whoever is possessor of the thing

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By the term “property right” (*ius reale*) should be understood not only a right to a thing (*ius in re*) but also the *sum* of all the laws having to do with things being mine or yours. – But it is clear that someone who was all alone on the earth could really neither have nor acquire any external thing as his own, since there is no relation whatever of obligation between him, as a person, and any other external object, as a thing. Hence, speaking strictly and literally, there is also no (direct) right to a thing. What is called a right to a thing is only that right someone has against a person who is in possession of it in common<sup>n</sup> with all others (in the civil condition).

*§ 12. First acquisition of a thing can be only acquisition of land.*

Land (understood as all habitable ground) is to be regarded as the *substance* with respect to whatever is movable upon it, while the existence of the latter is to be regarded only as *inherence*. Just as in a theoretical sense accidents cannot exist apart from a substance, so in a practical sense no one can have what is movable on a piece of land as his own unless he is assumed to be already in rightful possession of the land.

6:262 For suppose that the land belonged to no one: I could then remove every movable thing on it from its place and take it for myself until they were all gone, without thereby infringing upon the freedom of anyone else who is not now holding it; but whatever can be destroyed, a tree, a house and so forth, is movable (at least in terms of its matter), and if a thing that cannot be moved without destroying its form is called *immovable*, then by what is mine or yours with regard to that is understood not its substance but what adheres to it, which is not the thing itself.

*§ 13. Any piece of land<sup>o</sup> can be acquired originally, and the possibility of such acquisition is based on the original community<sup>p</sup> of land in general.*

The first proposition rests on the postulate of practical reason (§ 2). The proof of the second proposition is as follows.

All human beings are originally (i.e., prior to any act of choice that establishes a right) in a possession of land that is in conformity with right, that is, they have a right to be wherever nature or chance (apart from their will) has placed them. This kind of possession (*possessio*) – which is to be distinguished from residence (*sedes*), a chosen and therefore an acquired *lasting* possession – is a possession *in common*<sup>q</sup> because the spherical surface of the earth unites all the places on its surface; for if its surface were

<sup>n</sup> *im gemeinsamen Besitz*

<sup>o</sup> *Ein jeder Boden*

<sup>p</sup> *Gemeinschaft*

<sup>q</sup> *ein gemeinsamer Besitz*

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an unbounded plane, people could be so dispersed on it that they would not come into any community with one another, and community would not then be a necessary result of their existence on the earth. – The possession by all human beings on the earth which precedes any acts of theirs that would establish rights (as constituted by nature itself) is an *original possession in common*<sup>1</sup> (*communio possessionis originaria*), the concept of which is not empirical and dependent upon temporal conditions, like that of a supposed *primitive possession in common* (*communio primaeva*), which can never be proved. Original possession in common is, rather, a practical rational concept which contains a priori the principle in accordance with which alone people can use a place on the earth in accordance with principles of right.

§ 14. In original acquisition, the act required to establish a right is taking control (*occupatio*).

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The only condition under which *taking possession* (*apprehensio*), beginning to hold (*possessionis physicae*) a corporeal thing in space, conforms with the law of everyone's outer freedom (hence a priori) is that of *priority* in time, that is, only insofar as it is the *first* taking possession (*prior apprehensio*), which is an act of choice. But the will that a thing (and so too a specific, separate place<sup>2</sup> on the earth) is to be mine, that is, appropriation of it (*appropriatio*), in original acquisition can be only *unilateral* (*voluntas unilateralis s. propria*).<sup>3</sup> Acquisition of an external object of choice by a unilateral will is *taking control* of it. So original acquisition of an external object, and hence too of a specific and separate piece of land, can take place only through *taking control* of it (*occupatio*).

No insight can be had into the possibility of acquiring in this way, nor can it be demonstrated by reasons;<sup>4</sup> its possibility is instead an immediate consequence of the postulate of practical reason. But the aforesaid will can justify an external acquisition only in so far as it is included in a will that is united a priori (i.e., only through the union of the choice of all who can come into practical relations with one another) and that commands absolutely. For a unilateral will (and a bilateral but still *particular* will is also unilateral) cannot put everyone under an obligation that is in itself contingent; this requires a will that is *omnilateral*, that is united not contingently but a priori and therefore necessarily, and because of this is the only will that is lawgiving. For only in accordance with this principle of the will is it possible for the free choice of each to accord with the freedom of

<sup>1</sup> *Gesammtbesitz*

<sup>2</sup> *bestimmter abgeteilter*

<sup>3</sup> *unilateral or proper will*

<sup>4</sup> *durch Gründe dartun*

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all, and therefore possible for there to be any right, and so too possible for any external object to be mine or yours.

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*§ 15. Something can be acquired conclusively only in a civil constitution; in a state of nature it can also be acquired, but only provisionally.*

A civil constitution, though its realization is subjectively contingent, is still objectively necessary, that is, necessary as a duty. With regard to such a constitution and its establishment there is therefore a real law of natural right<sup>v</sup> to which any external acquisition is subject.

The *empirical title* of acquisition was taking physical possession (*apprehensio physica*), based on the original community of land. Since there is only possession in *appearance* to put under possession in accordance with rational concepts of right, a title to take intellectual possession (setting aside all empirical conditions of space and time) must correspond to this empirical title of acquisition. This intellectual title is the basis of the proposition: "What I bring under my control in accordance with laws of outer freedom and will to become mine becomes mine."

But the *rational title* of acquisition can lie only in the idea of a will of all united *a priori* (necessarily to be united), which is here tacitly assumed as a necessary condition (*conditio sine qua non*); for a unilateral will cannot put others under an obligation they would not otherwise have. – But the condition in which the will of all is actually united for giving law is the civil condition. Therefore something external can be *originally* acquired only in conformity with the idea of a civil condition, that is, with a view to it and to its being brought about, but prior to its realization (for otherwise acquisition would be derived). Hence *original* acquisition can be only *provisional*. – *Conclusive* acquisition takes place only in the civil condition.

Still, that provisional acquisition is true acquisition; for, by the postulate of practical reason with regard to rights, the possibility of acquiring something external in whatever condition people may live together (and so also in a state of nature) is a principle of private right, 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 into the civil condition, which can alone make any acquisition conclusive.

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The question arises, how far does authorization to take possession of a piece of land extend? As far as the capacity<sup>w</sup> 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. This is how the dispute over whether the sea is *free* or

<sup>v</sup> *wirkliches Rechtsgesetz der Natur*

<sup>w</sup> *Vermögen*

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*closed* also has to be decided; for example, as far as a cannon shot can reach no one may fish, haul up amber from the ocean floor, and so forth, along the coast of a territory that already belongs to a certain state. – Moreover, in order to acquire land is it necessary to develop it (build on it, cultivate it, drain it, and so on)? No. For since these forms (of specification) are only accidents, they make no object of direct possession and can belong to what the subject possesses only insofar as the substance is already recognized as his. When first acquisition is in question, developing land is nothing more than an external sign of taking possession, for which many other signs that cost less effort can be substituted. – Furthermore, may one party interfere with another in its *act* of taking possession, so that neither enjoys the right of priority and the land remains always free, belonging to no one? Not *entirely*; since one party can prevent another from taking possession only by being on adjacent land, where it itself can be prevented from being, *absolute* hindrance would be a contradiction. But *with respect to* a certain piece of land (lying between the two), leaving it unused, as *neutral* territory to separate the two parties, would still be consistent with the right of taking control. In that case, however, this land really belongs to both in common<sup>x</sup> and is not something *belonging to no one* (*res nullius*), just because it is *used* by both to keep them apart. – Again, can anyone have a thing as his own on land no part of which belongs to someone? Yes, as in Mongolia where, since all the land belongs to the people, the use of it belongs to each individual, so that anyone can leave his pack lying on it or recover possession of his horse if it runs away, since it is his. On the other hand, it is only by means of a *contract* that anyone can have a movable thing as his on land that belongs to another. – Finally, can two neighboring peoples (or families) resist each other in adopting a certain use of land, for example, can a hunting people resist a pasturing people or a farming people, or the latter resist a people that wants to plant orchards, and so forth? Certainly, since as long as they keep within their boundaries the way they want to *live* on their land is up to their own discretion (*res merae facultatis*).

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Lastly, it can still be asked whether, when neither nature nor chance but just our own will brings us into the neighborhood of a people that holds out no prospect of a civil union with it, we should not be authorized to found colonies, by force if need be, in order to establish a civil union with them and bring these human beings (savages) into a rightful condition (as with the American Indians, the Hottentots and the inhabitants of New Holland); or (which is not much better), to found colonies by fraudulent purchase of their land, and so become owners of their land, making use of our superiority without regard for their first posses-

<sup>x</sup> *gemeinschaftlich*

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sion. Should we not be authorized to do this, especially since nature itself (which abhors a vacuum) seems to demand it, and great expanses of land in other parts of the world, which are now splendidly populated, would have otherwise remained uninhabited by civilized people or, indeed, would have to remain forever uninhabited, so that the end of creation would have been frustrated? But it is easy to see through this veil of injustice (Jesuitism), which would sanction any means to good ends. Such a way of acquiring land is therefore to be repudiated.

The indeterminacy, with respect to quantity as well as quality, of the external object that can be acquired makes this problem (of the sole, original external acquisition) the hardest of all to solve. Still, there must be some original acquisition or other of what is external, since not all acquisition can be derived. So this problem cannot be abandoned as insoluble and intrinsically impossible. But even if it is solved through the original contract, such acquisition will always remain only provisional unless this contract extends to the entire human race.

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### *§ 16. Exposition of the concept of original acquisition of land.*

All human beings are originally in *common possession*<sup>y</sup> of the land of the entire earth (*communio fundi originaria*) and each has by nature the *will* to use it (*lex iusti*) which, because the choice of one is unavoidably opposed by nature to that of another, would do away with any use of it if this will did not also contain the principle for choice by which a *particular possession* for each on the common land could be determined (*lex iuridica*). But the law which is to determine for each what land is mine or yours<sup>z</sup> will be in accordance with the axiom of outer freedom only if it proceeds from a will that is united *originally* and *a priori* (that presupposes no rightful act<sup>a</sup> for its union). Hence it proceeds only from a will in the civil condition (*lex iustitiae distributivae*), which alone determines what is *right*, what is *rightful*, and what is *laid down as right*.<sup>b</sup> – But in the former condition, that is, before the establishment of the civil condition but with a view to it, that is, *provisionally*, it is a *duty* to proceed in accordance with the principle of external acquisition. Accordingly, there is also a rightful *capacity*<sup>c</sup> of the will to bind everyone to recognize the act of taking possession and of appropriation as valid, even though it is only unilateral. Therefore provisional acquisition of land, together with all its rightful consequences, is possible.

Provisional acquisition, however, needs and gains the favor<sup>d</sup> of a law

<sup>y</sup> *Gesammt-Besitz*

<sup>z</sup> *das austeilende Gesetz des Mein und Dein eines jeden am Boden*

<sup>a</sup> *rechtlichen Akt*. See 6:237, note b.

<sup>b</sup> *was recht, was rechtlich und was Rechtens ist*

<sup>c</sup> *rechtliches Vermögen*

<sup>d</sup> *Gunst*

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(*lex permissiva*) for determining the limits of possible rightful possession. Since this acquisition precedes a rightful condition and, as only leading to it, is not yet conclusive, this favor does not extend beyond the point at which *others* (participants) consent to its establishment. But if they are opposed to entering it (the civil condition), and as long as their opposition lasts, this favor carries with it all the effects of acquisition in conformity with right, since leaving the state of nature is based upon duty.

### § 17. Deduction of the concept of original acquisition.

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We have found the *title* of acquisition in an original community of land, and therefore of external possession subject to spatial conditions. We have found the *manner of acquisition* in the empirical conditions of taking possession (*apprehensio*), joined with the will to have the external object as one's own. Now we still need to explicate<sup>e</sup> from principles of pure practical reason with regard to rights *acquisition* itself, that is, the external mine or yours, which follows from the two elements given; that is, we need to explicate intelligible possession (*possessio noumenon*) of an object from that which is contained in the concept of it.

The *concept belonging to right*<sup>f</sup> of what is *externally* mine or yours, so far as this is a *substance*, cannot mean, as far as the term *external to me* is concerned, in another *place* than where I am, for it is a rational concept; instead, since only a pure concept of the understanding can be subsumed under a rational concept, the term can mean merely something *distinct* from me. And this rational concept cannot signify the concept of empirical possession (a continual taking possession, as it were), but only that of *having an external object under my control* (the connection of the object with me insofar as this is the subjective condition of its being possible for me to use it), which is a pure concept of the understanding. Now, if these sensible conditions of possession, as a relation of a person to *objects* that have no obligation, are left out or disregarded (abstracted from), possession is nothing other than a relation of a person to persons, all of whom are *bound*, with regard to the use of the thing, by the *will* of the first person, insofar as his will conforms with the axiom of outer freedom, with the *postulate* of his capacity to use external objects of choice, and with the *lawgiving* of the will of all<sup>g</sup> thought as a united *a priori*. This, then, is *intelligible possession* of a thing, that is, possession by mere right, even though the object (the thing I possess) is a sensible object.

The first working, enclosing, or, in general, *transforming* of a piece of land can furnish no title of acquisition to it; that is, possession of an

<sup>e</sup> entwickeln

<sup>f</sup> Rechtsbegriff

<sup>g</sup> allgemeinen Gesetzgebung

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accident can provide no basis for rightful possession of the substance. What is mine or yours must instead be derived from ownership<sup>h</sup> of the substance in accordance with this rule (*accessorium sequitur suum principale*),<sup>i</sup> and whoever expends his labor on land that was not already his has lost his pains and toil to who was first. This is so clear of itself that it is hard to assign any other cause for that opinion, which is so old and still so widespread, than the tacit prevalent deception of personifying things and of thinking of a right to things as being a right *directly* against them, as if someone could, by the work he expends upon them, put things under an obligation to serve him and no one else; for otherwise people would probably not have passed so lightly over the question that naturally arises (already noted above), "How is a right to a thing possible?" For a right against every possessor of a thing means only an authorization on the part of someone's particular choice to use an object, insofar as this authorization can be thought as contained in a synthetic general will and as in accord with the law of this will.

As for corporeal things *on land* that is already mine, if they do not otherwise belong to another they belong to me without my needing a particular act establishing a right in order to make them mine (not *facto* but *lege*), for they can be regarded as accidents inhering in the substance (*iure rei meae*).<sup>j</sup> Anything else that is so connected with a thing of mine that another cannot separate it from what is mine without changing this also belongs to me (e.g., gold plating, mixing some stuff belonging to me with other materials, alluvium, or also, a change in a riverbed adjoining my land and the resulting extension of my land, and so forth). Whether land that extends beyond dry land can be acquired – that is, whether a tract of the ocean floor can be acquired (the right to fish off my shore, to bring up amber and so forth) – must be decided in accordance with the same principles. My possession extends as far as I have the mechanical ability,<sup>k</sup> from where I reside, to secure my land against encroachment by others (e.g., as far as cannon reach from the shore), and up to this limit the sea is closed (*mare clausum*). But since it is not possible to reside on the high seas themselves, possession also cannot extend to them and the open seas are free (*mare liberum*). But the owner of a shore cannot include, in his right to acquire, what is unintentionally *washed up on shore*, whether human beings or things belonging to them, since this is not wronging him (not a deed at all), and though a thing has been cast up on land which belongs to someone, it cannot be

<sup>h</sup> *Eigentum*

<sup>i</sup> accessory [possession] following on his principal

<sup>j</sup> my right in the thing

<sup>k</sup> *Vermögen*

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treated as a *res nullius*.<sup>1</sup> On the other hand, a river can be originally acquired by someone who is in possession of both banks, as far as his possession of the banks extends; he can acquire the river just as he can acquire any dry land subject to the conditions mentioned above.

An external object which in terms of its substance belongs to someone is his *property* (*dominium*), in which all rights in this thing inhere (as accidents of a substance) and which the owner (*dominus*) can, accordingly, dispose of as he pleases (*ius disponendi de re sua*).<sup>2</sup> But from this it follows that an object of this sort can be only a corporeal thing (to which one has no obligation). So someone can be his own master (*sui iuris*) but cannot be the owner of himself (*sui dominus*) (cannot dispose of himself as he pleases) – still less can he dispose of others as he pleases – since he is accountable to the humanity in his own person. This is not, however, the proper place to discuss this point, which has to do with the right of humanity, not that of human beings. It is mentioned only incidentally, for a better understanding of what was discussed a little earlier. – Furthermore, there can be two complete owners of one and the same thing, without its being both mine and yours in common; they may only be possessors in common of what belongs to only one of them as his. This happens when one of the so-called joint owners (*condominii*) has only full possession without use, while the other has all the use of the thing along with possession of it. So the one who has full possession without use (*dominus directus*)<sup>3</sup> only restricts the other (*dominus utilis*)<sup>4</sup> to some continual performance without thereby limiting his use of the thing.

### SECTION II. ON CONTRACT RIGHT.<sup>5</sup>

#### § 18.

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My possession of another's choice, in the sense of my capacity<sup>6</sup> to determine it by my own choice to a certain deed in accordance with laws of freedom (what is externally mine or yours with respect to the causality of another), is a right (of which I can have several against the same person or against others); but there is only a single sum (system) of laws, *contract right*, in accordance with which I can be in this sort of possession.

A right against a person can never be acquired originally and on one's

<sup>1</sup> thing belonging to no one

<sup>2</sup> right to dispose of the thing which is his

<sup>3</sup> *Vom persönlichen Recht*

<sup>4</sup> *Vermögen*

<sup>5</sup> *eigenmächtig*

<sup>6</sup> direct owner

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Money, intellectual property, etc

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- C. *Contracts providing security (cautio).*
- a) A joint giving and taking of a pledge (*pignus*).
  - b) Assuming liability for another's promise (*fideiussio*).
  - c) Personally vouching for a person's performance of something (*prae-statio obsidis*).

In this table of all the ways of *transferring (translatio)* what belongs to another are to be found concepts of objects or instruments of transfer which [seem]<sup>9</sup> to be entirely empirical and, even in terms of their possibility, have no proper place in a *metaphysical* doctrine of right, in which division must be made in accordance with a priori principles, abstracting from the matter that is exchanged (which could be conventional) and considering only the form. Such, for example, is the concept of *money*, in contrast to all other alienable things, namely *goods*, under the heading of *buying and selling*, as well as the concept of a *book*. – But it will be shown that the concept of money, as the greatest and most useful means human beings have for *exchange* of things, called *buying and selling* (commerce), and so too the concept of a book, as the greatest means for exchanging thoughts, can still be resolved into pure intellectual relations. So the table of pure contracts need not be made impure by anything empirical mixed into it.

### I. WHAT IS MONEY?

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*Money* is a thing that can be *used* only by being *alienated*. This is a good *nominal definition*<sup>1</sup> of it (as given by Achenwall);<sup>22</sup> that is to say, it is sufficient for distinguishing this kind of object of choice from any other, though it tells us nothing about the possibility of such a thing. Still, from the nominal definition one can see this much: *first*, that the alienation of money in exchange is intended not as a gift but for *reciprocal acquisition* (by a *pactum onerosum*); and *second*, that money *represents* all goods, since it is conceived as a universally accepted mere *means* of commerce (within a nation), having no value in itself, as opposed to things which are *goods* (i.e., which have value in themselves and are related to the particular needs of one or another in the nation).

A bushel of grain has the greatest direct value as a means for satisfying human needs. It can be used as fodder for animals, which nourish us, transport us, and work in place of us; by means of it, furthermore, the human population is increased and preserved, and in turn not only raises

<sup>9</sup> The structure of the sentence, *welche ganz empirisch zu sein und . . . nicht Platz haben*, seems to require this addition.

<sup>1</sup> *Namenerklärung*

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these natural products again but also helps to satisfy our needs with the products of art, by building houses, making clothes, providing the enjoyments we seek and, in general, all the conveniences that form the goods of industry.<sup>s</sup> By contrast, the value of money is only indirect. One cannot enjoy money itself or make immediate use of it in any way. Yet it is still a means which, among all things, has the greatest usefulness.

On this basis a preliminary *real definition* of money can be given: it is the universal *means by which men exchange their industriousness<sup>t</sup> with one another*. Thus a nation's wealth, insofar as it is acquired by means of money, is really only the sum of the industry with which human beings pay one another and which is represented by the money in circulation within it.

The thing to be called money must, therefore, have cost as much *industry* to produce or to obtain from other human beings as the *industry* by which those goods (natural or artificial products) are acquired for which that industry is exchanged. For if it were easier to procure the stuff called money than goods, more money would then come into the market than goods for sale; and since the seller would have to have expended more industry for his goods than the buyer, who got the money more readily, industry in producing goods, and therefore trade in general, would diminish and be curtailed, along with the productive industry<sup>u</sup> which results in the nation's wealth. – Hence bank notes and promissory notes cannot be regarded as money, though they can substitute for it temporarily; for they cost almost no industry to produce and their value is based solely on the opinion that they will continue as before to be convertible into *hard cash*; but if it is eventually discovered that there is not enough hard cash for which they can be readily and securely exchanged, this opinion suddenly collapses and makes failure of payment inevitable. – So the productive industry of those who work the gold and silver mines in Peru or New Mexico, especially in view of the industry vainly expended in searches for deposits that are so often unsuccessful, is apparently still greater than that expended on the manufacture of goods in Europe; and this excess of industry would be discontinued from not being paid, letting those countries soon sink into poverty, if the Europeans did not increase their industry proportionately through being stimulated by those very materials, so that the luxuries they offer constantly stimulate in others a desire for mining. In this way industry always keeps pace with industry.<sup>v</sup>

But how is it possible that what were at first only goods finally became

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<sup>s</sup> *Industrie*

<sup>t</sup> *Fleiß*. In view of what Kant regards as his direct quotation from Adam Smith (6:289), one would expect him to use *Arbeit*, "labor," rather than *Fleiß*, "industriousness" or "diligence." However, in "translating" Smith's sentence into German Kant uses *Fleiß*. In the remainder of this passage "industry" is used in the sense of "industriousness."

<sup>u</sup> *Erwerbfleiß*

<sup>v</sup> so dass immer *Fleiß gegen Fleiß in Concurrenz kommen*

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money? This would happen if a powerful, opulent *ruler* who at first used a material for the adornment and splendor of his attendants (his court) came to levy taxes on his subjects in this material (as goods) (e.g., gold, silver, copper, or a kind of beautiful seashell, *cowries*; or as in the Congo a kind of matting called *makutes*, in Senegal iron ingots, or on the Coast of Guinea even black slaves), and in turn paid with this same material those his demand moved to industry in procuring it, in accordance with exchange regulations with them and among them (on a market or exchange). – In this way only (so it seems to me) could a certain merchandise have become a lawful means of exchange of the industry of subjects with one another, and thereby also become the wealth of the nation, that is, *money*.

The intellectual concept under which the empirical concept of money falls is therefore the concept of a thing which, in the circulation of possessions (*permutatio publica*), determines the *price* of all other things (goods), among which even the sciences belong, insofar as they would not otherwise be taught to others. The amount of money in a nation therefore constitutes its wealth (*opulentia*). For the price (*pretium*) of a thing is the judgment of the public about its *value* (*valor*) in proportion to that which serves as the universal means to represent reciprocal exchange of *industry* (its circulation). – Accordingly, where there is a great deal of trade, neither *gold* nor copper is regarded as strictly money but only as merchandise, since there is too little gold and too much copper for them to be easily put into circulation and yet available in sufficiently small parts, as is necessary for the exchange of merchandise, or a mass of it, in the smallest purchase. *Silver* (more or less alloyed with copper) is, accordingly, taken as the proper material for money and the measure for reckoning prices in the great trade of the world; other metals (even more so, nonmetallic materials) can be found as money only in a nation where there is little trade. – But when the first two metals are not only weighed but also stamped, that is, provided with a sign indicating how much they are to be worth, they are lawful money, that is, *coinage*.

“Money is therefore” (according to Adam Smith) “that material thing the alienation of which is the means and at the same time the measure of the industry by which human beings and nations carry on trade with one another.”<sup>23</sup> – This definition<sup>w</sup> brings the empirical concept of money to an intellectual concept by looking only to the *form* of what each party provides in return for the other in onerous contracts (and abstracting from their matter), thereby bringing it to the concept of right in the exchange of what is mine or yours generally (*commutatio late sic dicta*),<sup>x</sup> so as to present the table above as a dogmatic division a priori, which is appropriate to the metaphysics of right as a system.

<sup>w</sup> *Erklärung*

<sup>x</sup> exchange broadly speaking

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### II. WHAT IS A BOOK?

A book is a writing (it does not matter, here, whether it is written in hand or set in type, whether it has few or many pages), which represents a discourse that someone delivers to the public by visible linguistic signs. — One who speaks to the public in his own name is called the *author* (*autor*). One who, through a writing, discourses publicly in another's (the author's) name is a *publisher*. When a publisher does this with the author's permission, he is the legitimate publisher; but if he does it without the author's permission, he is an illegitimate publisher, that is, an *unauthorized publisher*.<sup>y</sup> The sum of all the reproductions of the original writing (the copies) is an *edition*.

*Unauthorized publishing of books<sup>z</sup> is forbidden as a matter of right<sup>a</sup>*

A writing is not an immediate sign of a *concept* (as is, for example, an etching which represents a certain person in a *portrait*, or a work in plaster that is a *bust*). It is rather a *discourse* to the public; that is, the author speaks publicly through the publisher. — But the *publisher* speaks (through his foreman, *operarius*, the printer), not in his own name (for he would then pass himself off as the author), but in the name of the author; and so he is entitled to do this only when the author gives him a *mandate* (*mandatum*). — Now it is true that an unauthorized publisher also speaks, by an edition on his own initiative,<sup>b</sup> in the name of the author, but he does so without having been given a mandate by the author (*gerit se mandatarium absque mandato*).<sup>c</sup> He therefore commits the crime of stealing the profits from the publisher who was appointed by the author (who is therefore the only legitimate one), profits the legitimate publisher could and would have derived from the use of his right (*furtum usus*). So *unauthorized publishing of books is forbidden as a matter of right*.

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Why does unauthorized publishing, which strikes one even at first glance as unjust, still have an appearance of being rightful? Because *on the one hand* a book is a corporeal *artifact* (*opus mechanicum*)<sup>d</sup> that can be reproduced (by someone in legitimate possession of a copy of it), so that

<sup>y</sup> *Nachdrucker*

<sup>z</sup> Or “publishing books without having been empowered by the author.” To translate *Büchernachdruck* as “literary piracy” would seem inconsistent with the “appearance of being rightful” which Kant says it has. The language used here is similar to that of his essay “Von der Unrechtmäßigkeit des Büchernachdrucks,” see this volume, pp. 23–35.

<sup>a</sup> *von rechtswegen verboten*. The term *von rechtswegen* was used earlier (6:250), apparently in the sense of “by legal proceedings.”

<sup>b</sup> *durch seinen eigenmächtigen Verlag*

<sup>c</sup> acts as if he has a mandate without having a mandate

<sup>d</sup> mechanical work

there is a *right to a thing* with regard to it. *On the other hand* a book is also a mere *discourse* of the publisher to the public, which the publisher may not repeat publicly without having a mandate from the author to do so (*praestatio operae*), and this is a *right against a person*. The error consists in mistaking one of these rights for the other.

There is another case, under contracts to let and hire (B,II, $\alpha$ ), in which the confusion of a right against a person with a right to a thing is material for disputes, that of *renting to a tenant* (*ius incolatus*). – The question arises, whether an owner who has leased his house (or land) to someone and sells it to someone else before the lease expires is bound to attach to the contract of sale the condition that the lease is to continue, or whether one can say that purchase breaks a lease (though notice is to be given the lessee, the time being determined by custom). – On the first alternative the house actually had an *encumbrance* (*onus*) on it, a right to this thing that the lessee had acquired in it (the house). This can indeed take place (by entering this encumbrance in the land register, as included in the contract to lease); but then this would not be a mere contract to lease, but one to which another contract had had to be added (one to which few landlords would agree). So the saying “Purchase breaks a lease” is valid, that is, a full right to a thing (property) outweighs any right against a person that cannot exist together with it. But it is still left open for the lessee to complain, on the basis of his right against a person, that he is to be compensated for any damages arising from the breaking of the contract.

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### Episodic chapter. On ideal acquisition of an external object of choice.

#### § 32.

I call acquisition *ideal* if it involves no causality in time and is therefore based on a mere *idea* of pure reason. It is nonetheless *true*, not imaginary, acquisition, and the only reason I do not call it real is that the act of acquiring is not empirical, since the subject acquires from another who either *does not yet exist* (only the possibility that he may exist is admitted) or who has *ceased to exist*, or when the subject *no longer exists*, so that coming into possession is merely a practical idea of reason. – There are three kinds of such acquisition: 1) by *prolonged possession*, 2) by *inheritance*, and 3) by *merit surviving death* (*meritum immortale*), that is, the claim to a good reputation after death. All three can, indeed, take effect only in a public rightful condition, but they are not *based* only on its constitution and the chosen<sup>e</sup> statutes in it: they are also conceivable a priori in the state of

<sup>e</sup> *willkürlichen*

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nature and must be conceived as prior to such statutes, in order that the laws in the civil constitution may afterwards be adapted to them (*sunt iuris naturae*).

### I. ACQUISITION BY PROLONGED POSSESSION.<sup>f</sup>

#### § 33.

I acquire another's property merely by *long possession of it* (*usucapio*), not because I may legitimately *presume* that he consents to my acquiring it (*per consensum praesumptum*), nor because I can assume that, since he does not contradict me, he *has given it up* (*rem derelictam*), but because, even if there should be someone who was the true owner and as such laid claim to it (a claimant) I may still *exclude* him merely by virtue of my long possession, ignore his existence up to now, and carry on as if he existed up to the time of my possession only as a thought-entity, even if I should later learn of his reality as well as that of his claim. – Although this way of acquiring is called acquisition by prescription<sup>g</sup> (*per praescriptionem*), this is not altogether correct, since exclusion of claims is to be regarded only as a result of acquisition: acquisition must have come first. – It has now to be proved that it is possible to acquire something in this way.

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Someone who does not exercise a continuous *possessory act* (*actus possessorius*) with regard to an external thing, as something that is his, is rightly regarded as someone who does not exist at all (as its possessor). For he cannot complain of being wronged as long as he does nothing to justify his title of possessor; and even if later on, when another has already taken possession of it, he declares himself its possessor, all he is saying is that he was once its owner, not that he still is and that his possession has remained uninterrupted without a continuous rightful act. – Hence if someone does not use a thing for a long time, only a rightful possessory act, and indeed one that is continuously maintained and documented, can guarantee that it is his.

For suppose that failure to perform this possessory act did not result in another's being able to base a firm right (*possessio irrefragabilis*) on his lawful possession in good faith (*possessio bona fidei*) and regard himself as having acquired the thing that is in his possession. Then no acquisition at all would be conclusive (guaranteed); all acquisition would be only provisional (up to the present), since investigation of the past cannot reach all the way back to the first possessor and his act of acquisition. – The presumption on which prolonged possession (*usucapio*) is based is therefore not merely in *conformity with right* (permitted, *iusta*) as a *conjecture* but

<sup>f</sup> *Ersitzung*. See note 24.

<sup>g</sup> Or "superannuation of claims," *Verjährung*

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is also in accord with rights (*praesumitio iuris et de iure*) as an assumption in terms of coercive laws (*suppositio legalis*). Whoever fails to document his possessory act has lost his claim to the present possessor, and the length of time during which he failed to do it (which cannot and need not be specified) is put forward only to support the certainty of his omission. That a hitherto unknown possessor could always get something back (recover it) when his possessory act has been interrupted (even through no fault of his own) contradicts the above postulate of practical reason with regard to rights (*dominia rerum incerta facere*).<sup>h</sup>

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If he is a member of a commonwealth, that is, lives in the civil condition, the state (representing him) can indeed preserve his possession for him, although it was interrupted as private possession, and a present possessor need not prove his title of acquisition by tracing it back to the first possessor or basing it on prolonged possession. In the state of nature, however, prolonged possession is in conformity with right not, strictly speaking, for acquiring a thing but for maintaining possession of it without an act establishing the right; and this immunity from claims is also usually called acquisition. – Prescription<sup>i</sup> of an earlier possessor therefore belongs to natural right (*est iuris naturae*).

II.  
INHERITANCE.

*(Acquisitio haereditatis.)*

§ 34.

Inheritance is transfer (*translatio*) of the belongings and goods of someone who is dying to a survivor by agreement of the wills of both. – Acquisition by the heir (*haeredis instituti*) and leaving by the testator (*testatoris*), that is, this change of belongings, takes place in one moment, namely the moment at which the testator ceases to exist (*articulo mortis*). It is therefore not, strictly speaking, a transfer (*translatio*) in the empirical sense, since this assumes two acts following each other, namely the acts by which one person first leaves his possessions and the other then comes into them. Instead it is an ideal acquisition. – Now inheritance in the state of nature cannot be conceived of without a *last will* (*dispositio ultimae voluntatis*). Whether this is a *contract of inheritance* (*pactum successorium*) or a *unilateral disposition to the heir* (*testamentum*) amounts to the question, whether and how it is possible for belongings to pass from one to the other precisely at the moment at which the subject ceases to exist. The question of how it is possible to acquire by inheritance must accordingly be investigated apart

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<sup>h</sup> to act on uncertain ownerships of things

<sup>i</sup> Präscription

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from the many ways in which it can be carried out (which are found only in a commonwealth).

"It is possible to acquire something through disposition to the heir." For the testator, Caius, promises and in his last will declares to Titius, who knows nothing of this promise, that upon his death his belongings are to pass to Titius. As long as he lives, Caius therefore remains sole owner of his belongings. Now it is true that by a unilateral will alone nothing can pass to the other person; for this there is required, besides the promise, acceptance (*acceptatio*) by the other party and a simultaneous will (*voluntas simultanea*), which is still lacking here; for, as long as Caius is alive, Titius cannot explicitly accept, so as to acquire by his acceptance, since Caius has promised only on the occasion of his death (otherwise the property would for a moment be common property, and this is not the testator's will). – Titius, however, still tacitly acquires a proprietary right<sup>j</sup> to the legacy as a right to a thing: namely, he has the exclusive right to accept it (*ius in re iacente*), so that the legacy at the moment of death is called *haereditas iacens*. Now, since every human being would necessarily accept such a right (since he can always gain but never lose by it), and so accepts tacitly, and since Titius, after Caius's death, is in this situation, he can acquire the bequest by acceptance of the promise, and the bequest has not become altogether ownerless (*res nullius*) in the meantime but only *vacant* (*res vacua*). For Titius alone has the right to make the choice as to whether or not he wants to make the belongings left to him his own.

Accordingly, testaments are also valid in accordance with mere natural right (*sunt iuris naturae*). This assertion, however, is to be taken as meaning that testaments are fit for and worth being introduced and sanctioned in the civil condition (if this makes its appearance some day). For only the civil condition (the general will in it) confirms possession of a legacy while it hovers between acceptance and rejection and strictly speaking belongs to no one.

### III.

#### LEAVING BEHIND A GOOD REPUTATION AFTER ONE'S DEATH.

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(*Bona fama defuncti.*)

##### § 35.

It would be absurd to think that someone who has died can still possess something after his death (and so when he no longer exists), if what he left behind were a thing. But a *good reputation* is an innate external belonging, though an ideal one only, which clings to the subject as a person, a being

<sup>j</sup> *eigentümliches Recht*

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of such a nature that I can and must abstract from whether he ceases to be entirely at his death or whether he survives as a person; for in the context of his rights in relation to others, I actually regard every person simply in terms of his humanity, hence as *homo noumenon*. So any attempt to stain someone's reputation by falsehood after his death is suspect, because it is at least ungenerous to spread reproaches against one who is absent and cannot defend himself, unless one is quite certain of them. Nevertheless, a well-founded accusation against him is still in order (so that the principle *de mortuis nihil nisi bene*<sup>k</sup> is incorrect).

For someone to acquire by an irreproachable life and the death that ends it a (negatively) good name, which continues to be his when he no longer exists as *homo phaenomenon*; for those who survive him (relatives or strangers) to be also authorized by right to defend him (for unproved charges are dangerous to them as well, since they could get similar treatment when they die); for someone to be able to acquire such a right is, I say, a phenomenon as strange as it is undeniable, a phenomenon of reason giving law a priori which extends its commands and prohibitions even beyond the limits of life. – If anyone spreads it abroad that someone who has died committed a crime which in his lifetime would have made him dishonorable or only contemptible, whoever can produce proof that this charge is an intentional untruth and a lie can then publicly declare the one who spread the evil gossip a calumniator and so take away his honor. He could not do this unless he could rightly assume that the dead man was wronged by it, even though he is dead, and that this defense brings him satisfactions even though he no longer exists.\* An apologist need not prove his authorization to play the role of apologist for the dead, for everyone inevitably arrogates this to himself as belonging not merely to duty of virtue (duty regarded ethically) but to the right of humanity as

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\* But one is not to draw from this any visionary conclusions about presentiments of a future life or about unseen relations to disembodied souls. For what is under discussion here does not go beyond the purely moral and rightful relations to be found among human beings during life as well. These are relations in which human beings stand as intelligible beings, insofar as one logically puts aside, that is, abstracts from, everything physical (i.e., everything belonging to their existence in space and time); but one does not remove them from this nature of theirs and let them become spirits, in which condition they would feel the injury of those who slander them. – Someone who, a hundred years from now, falsely repeats something evil about me injures me right now; for in a relation purely of rights, which is entirely intellectual, abstraction is made from any physical conditions (of time), and whoever robs me of my honor (a slanderer) is just as punishable as if he had done it during my lifetime – punishable, however, not by a criminal court but only by public opinion, which, in accordance with the right of retribution, inflicts on him the same loss of the honor he diminished in another. – Even a plagiarism that a writer perpetrates on a dead person, though it does not indeed stain the dead person's honor but only steals a part of it from him, is still avenged with right, as having wronged him (robbed the human being).

<sup>k</sup> speak nothing but good about the dead

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such; and the strain on the dead person need not have been prejudicial to any particular person, such as his friends and relatives, to justify such censure. – It is therefore indisputable that there is a basis for such an ideal acquisition and for someone's right after his death against those who survive him, even though no deduction of its possibility can be given.

### Chapter III On acquisition that is dependent subjectively upon the decision of a public court of justice.

#### § 36.

If by natural right is understood only nonstatutory right, hence simply right that can be cognized a priori by everyone's reason, natural right will include not only the *justice* that holds among persons in their exchanges with one another (*iustitia commutativa*) but also distributive justice (*iustitia distributiva*), insofar as it can be cognized a priori in accordance with the principle of distributive justice how its decisions (*sententia*) would have to be reached.

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The moral person that administers justice is a *court* (*forum*) and its administration of justice is a *judgment* (*iudicium*). All this is here thought out a priori only in accordance with conditions of right, without taking account of how such a constitution is to be actually set up and organized (*statutes*, hence empirical principles, belong to an actual constitution).

So the question here is not merely what is *right in itself*, that is, how every human being has to judge about it on his own, but what is right before a court, that is, what is laid down as right. And here there are four cases in which two different and opposing judgments can result and persist side by side, because they are made from two different points of view, both of which are true: one in accordance with private right, the other in accordance with the idea of public right. These cases are: 1) A *contract to make a gift* (*pactum donationis*). 2) A *contract to lend a thing* (*commodatum*). 3) *Recovering something* (*vindicatio*). 4) *Taking an oath* (*iuramentum*).

It is a common fault (*vitium subreptionis*) of experts on right to *misrepresent*, as if it were also the objective principle of what is right in itself, that rightful principle which a court is authorized and indeed bound to adopt for its own use (hence for a subjective purpose) in order to pronounce and judge what belongs to each as his right, although the latter is very different from the former. – It is therefore of no slight importance to recognize this specific distinction and to draw attention to it.

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Appendix, sections 6 and 7

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crime).<sup>\*</sup> – But what is to be done in the case of crimes that cannot be punished by a return for them because this would be either impossible or itself a punishable crime against *humanity* as such, for example, rape as well as pederasty or bestiality? The punishment for rape and pederasty is castration (like that of a white or black eunuch in a seraglio), that for bestiality, permanent expulsion from civil society, since the criminal has made himself unworthy of human society. – *Per quod quis peccat, per idem punitur et idem.*<sup>f</sup> – The crimes mentioned are called unnatural because they are perpetrated against humanity itself. To inflict *whatever* punishments *one chooses*<sup>g</sup> for these crimes would be literally contrary to the concept of *punitive justice*. For the only time a criminal cannot complain that a wrong is done him is when he brings his *misdeed*<sup>h</sup> back upon himself, and what is done to him in accordance with penal law is what he has perpetrated on others, if not in terms of its letter at least in terms of its spirit.

### 6.

#### ON A RIGHT FROM PROLONGED POSSESSION.

“A right based on *prolonged possession* (*Usucapio*) should, according to p. 131 ff. [AK. 6:291 ff.]), be established by natural right. For unless one admits that an *ideal acquisition*, as it is here called, is established by possession in good faith, no acquisition at all would be conclusively secured. (Yet Kant himself admits only provisional acquisition in the state of nature, and because of this insists on the juristic necessity of a civil constitution. – I assert that I am the *possessor* of something *in good faith*, however, only against someone who cannot prove that he was *possessor* of the same thing *in good faith* before me and has not ceased by his will to be its *possessor*.)” – This is not the question here. The question is whether I can also assert that I am the owner even if someone should come forward claiming to be the *earlier* true owner of the thing, but where it was *abso-*

\* In every punishment there is something that (rightly) offends the accused's feeling of honor, since it involves coercion that is unilateral only, so that his dignity as a citizen is suspended, at least in this particular case; for he is subjected to an external duty to which he, for his own part, may offer no resistance. A man of nobility or wealth who has to pay a fine feels the loss of his money less than the humiliation of having to submit to the will of an inferior. *Punitive justice* (*iustitia punitiva*) must be distinguished from *punitive prudence*, since the argument for the former is *moral*, in terms of being *punishable* (*quia peccatum est*) while that for the latter is *merely pragmatic* (*ne peccetur*) and based on experience of what is most effective in eradicating crime; and punitive justice has an entirely different *place* in the topic of concepts of right, *locus iusti*; its place is not that of the *conducibilis*, of what is *useful* for a certain purpose, nor that of the mere *honesti*, which must be sought in ethics.

<sup>f</sup> One who commits a sin is punished through it and in the same way.

<sup>g</sup> *Willkürlich Strafen*

<sup>h</sup> *Übeltat*

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lutely impossible to learn of his existence as its possessor and of his being in possession as its owner. This occurs if the claimant has not (whether by his own fault or not) given any publicly valid sign of his uninterrupted possession, for example, by recording it in the registry or by voting as undisputed owner in civil assemblies.

For the question here is, who ought to prove his legitimate acquisition? This obligation (*onus probandi*)<sup>i</sup> cannot be imposed on the possessor, since he has been in possession of it as far back as his confirmed history reaches. In accordance with principles of right, the one who claims to be the earlier owner of the thing is cut completely out of the series of successive possessors by the interval during which he has given no civilly valid sign of his ownership. This failure to perform any public possessory act makes him a claimant without a title. (Against his claim it can be said here, as in theology, *conservatio est continua creatio*).<sup>j</sup> Even if a claimant who had not previously appeared should later come forward supplied with documents he found, there would be room for doubt, in his case again, whether a still earlier claimant could appear at some future time and base his claim on earlier possession. – Finally acquiring something by *prolonged possession* of it (*acquirere per usucaptionem*)<sup>k</sup> does not depend at all on the *length of time* one has possessed it. For it is absurd to suppose that a wrong becomes a right because it has continued for a long time. Far from a right in a thing being based on use of it, *use* of it (however long) presupposes a right in it. Therefore *prolonged possession* (*usucapio*), regarded as acquisition of a thing by long use of it, is a self-contradictory concept. Prescription<sup>l</sup> as a means of conserving possession (*conservatio possessionis per praescriptionem*) is no less self-contradictory, although it is a distinct concept as far as the argument for appropriation is concerned.<sup>38</sup> That is to say, a negative basis, that is, the entire *non-use* of one's right, not even that which is necessary to show oneself as possessor, is taken to be an *abandonment* of this right (*derelictio*), a rightful act, that is, the use of one's right against another, so as to acquire the object of the earlier possessor by excluding it (*per praescriptionem*) from his claim; and this involves a contradiction.

I therefore acquire without giving proof and without any act establishing my right. I have no need for proof; instead I acquire by law (*lege*). What follows? *Public immunity* from claims, that is, *security in my possession* by law, since I do not need to produce proof, and take my stand on my uninterrupted possession. But that any *acquisition* in a state of nature is only provisional has no bearing on the question of the security of *possession* of what is acquired, which must precede acquisition.

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<sup>i</sup> burden of proof

<sup>j</sup> conservation is continuous creation

<sup>k</sup> to acquire by *usucapio*, i.e., by prolonged possession

<sup>l</sup> Or "superannuation of claims," *Verjährung der Ansprüche*

7.  
ON INHERITANCE.

As for the right of inheritance, this time the acuteness of the reviewer has failed to find him the nerve of the proof of my assertion. – I did not say (p. 135 [AK 6:294]) that every human being necessarily accepts any *thing offered* him which he can only gain and not lose by accepting (for there are indeed no such things). I said, rather, that everyone always in fact accepts, unavoidably and tacitly but still validly, the *right to accept the offer* at the same moment, namely when the nature of the matter involves the absolute impossibility of the offer being retracted, the moment of the testator's death; for then the promisor cannot withdraw it and the promisee, without needing to do any act to establish the right, is at the same moment the accepter, not of the legacy promised but of the right to accept or refuse it. When the will is opened he sees that he had already at that moment, before accepting the legacy, become richer than he was before, since he had acquired the exclusive *authorization to accept* and this is already an enriching circumstance. – Although a civil condition is presupposed in order for someone who no longer exists to make *something belong to another*, this transfer of possession by one who is dead does not alter the possibility of acquiring in accordance with universal principles of natural right, even though a civil constitution is the necessary basis for applying these principles to the case at hand. – That is to say, something left unconditionally to my free choice<sup>m</sup> to accept or refuse is called a *res iacens*. If the owner of something offers it to me gratuitously (promises that it will be mine), for example, when he offers me a piece of furniture of the house I am about to move from, I have the exclusive right to accept his offer (*ius in re iacente*)<sup>n</sup> so long as he does not withdraw it (and if he dies in the meantime this is impossible), that is, I alone can accept it or refuse it as I please; and I do not get this exclusive right to make the choice through any special rightful act of declaring that I will to have this right. I acquire it without any such act (*lege*). – So I can indeed declare that I will *not to have the thing* (because accepting it might involve me in unpleasantness with others), but I cannot will to have the exclusive choice of *whether it is to belong to me or not*; for I have this right (to accept or refuse) immediately from the offer, without my declaring my acceptance of it, since if I could refuse even to have this choice I would be choosing not to choose, which is a contradiction. Now this right to choose passes to me at the moment of the testator's death, and by his testament (*institutio haeredis*) I acquire, not yet his belongings and goods, but nevertheless *merely rightful* (intelligible) possession of his belongings or a part of them, which I can now refuse to accept to the advantage of others.

<sup>m</sup> *freien Wahl*

<sup>n</sup> right in a thing cast aside

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Consequently this possession is not interrupted for a moment; succession passes instead in a continuous series from the dying man to his appointed heirs by their acceptance. The proposition *testamenta sunt iuris naturae<sup>o</sup>* is thus established beyond any doubt.

### 8.

#### ON THE RIGHT OF A STATE WITH REGARD TO PERPETUAL FOUNDATIONS FOR ITS SUBJECTS.

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A foundation (*sancio testamentaria beneficij perpetui*) is an institution that has been voluntarily established, and confirmed by a state, for the benefit of certain members of it who succeed one another until they have all died out. – It is called *perpetual* if the statute for maintaining it is bound up with the constitution of the state itself (for a state must be regarded as perpetual). Those who are to benefit from a foundation are either the *people* generally, or a part of them united by certain special principles, or a certain *estate*, or a *family* and its descendants continuing in perpetuity. An example of the first kind is a *hospital*; of the second, a *church*; of the third, an *order* (spiritual or secular); and of the fourth, an estate that is *entailed*.

It is said that such corporations and their *right* of succession cannot be annulled, since it became by a *bequest* the property of the heirs appointed, so that annulling such a constitution (*corpus mysticum<sup>b</sup>*) would amount to depriving someone of his belongings.

#### A.

Those institutions for the benefit of the poor, invalids and the sick<sup>c</sup> which have been set up at the expense of the state (foundations and hospitals) can certainly not be done away with. But if the intention of the testator's will rather than its letter is to have priority, circumstances can arise in time which make it advisable to nullify such a foundation at least in terms of its form. – So it has been found that the poor and the sick (except for patients in mental hospitals) are cared for better and more economically when they are helped with certain sums of money (proportioned to the needs of the time), with which they can board where they want, with relatives or acquaintances, than when – as in the hospital at Greenwich – they are provided splendid institutions, serviced by expensive personnel, which severely limit their freedom. – It cannot be said then that the state is depriving the people, which is entitled to the benefits of this foundation, of what is theirs; the state is instead promoting this by choosing wiser means for preserving it.

<sup>o</sup> testaments are by right of nature

<sup>b</sup> mystical body

<sup>c</sup> *Die wohlätige Anstalt*

Ripstein  
*Force and Freedom*

Chapter 4

## Private Right II: Property

THE THEORY OF PROPERTY is often thought to be a topic only of interest to libertarians or lawyers. Most recent political philosophy conceives of property as a sort of power the state confers on private persons as part of a broader distributive agenda, a sort of public law carried out by other means. Lockean theories of property stand in sharp contrast, seeking to ground property rights in the distinctive act of original acquisition.

Kant rejects both of these approaches. Against the “public law in disguise” model of property rights, Kant shows how it is a structure of rightful relations between private persons, the form of which can be understood without reference to the state. As we saw in the previous chapter, the possibility of a rightful relation with respect to property follows from the postulate of practical reason with regard to rights, which is supposed to show that it must be possible to have rights to things other than your own person or powers, insofar as these other things could be available as means for setting and pursuing your own purposes. For purposive beings, for whom having means is prior to setting ends, the entitlement to have something subject to their choice must be abstract, because it must not depend on the content of their particular choices. Your freedom to decide just is your freedom to use what is yours for your own purposes.

As we saw, it follows from this that insofar as having objects of choice as your own is consistent with the freedom of others, it is therefore rightful. Thus the *structure* of property rights—the basic rights of possession and use through which one person is entitled to constrain the conduct of others—can be explicated fully in terms of a “state of nature” without any reference to public law, but property rights are only enforceable in a rightful condition.

Kant’s claim that concepts of property can be explicated in terms of the state of nature is not supposed to show that property rights are complete outside of a civil condition, or even that interference with the property of another is *prima facie* wrong in a state of nature. To the contrary, he says that “no one is bound to refrain from encroaching on what another possesses,” in a state of nature, and that “those who intend to remain in a state of nature do each other no wrong” by interfering with each other’s property, even though they “do wrong in the highest degree” by willingly remaining in a state of nature.<sup>1</sup> Kant also uses the concept of a state of nature to characterize a system of purely private interaction, to capture those aspects of right that, although they “take effect only in a public rightful condition, . . . are not based only on its Constitution and the chosen statutes in it: they are also conceivable a priori in the state of nature, and must be conceived as prior to such statutes, in order that the laws in the civil condition may afterwards be adapted to them.”<sup>2</sup> In his lectures Kant refers to this second characterization of a state of nature as an “idea of reason,” that is, a pure system of rational concepts of right.<sup>3</sup> It is in this sense, then, that property can be understood in terms of the state of nature: both its relation to freedom and the characteristic violations of it can be explicated without reference to positive legislation. That does not mean that property can be acquired, or its norms be applied to particulars or enforced in the absence of a rightful condition. It means only that the form of interaction in which property rights constrain the conduct of others does not depend on positive law.

1. 6:307.

2. 6:291.

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

Kant's argument that property is structured by "natural law" but can only be rightful in a public rightful condition stands in sharp contrast to many of the familiar themes of the public law model. One such theme contends that property is a "bundle" of disparate rights, with each stick in the bundle directed at a different purpose, and no principle to unify them.<sup>4</sup> Thus the various "incidents" of property, such as the right to exclude, the right to capital value, the right to use, are said to be separate powers that the law "grants" to owners based on some assessment of the balance of disparate interests. Kant does not explicitly consider the bundle theory, but his discussion of property contains the only possible mode of argument available to respond to it, by showing its unifying structure. As we have seen, his argument for the postulate of practical reason with regard to rights is that if you are physically capable of having means other than your person available to you for setting and pursuing purposes, consistent with the freedom of everyone, you can have a right to those means. Having things subject to your choice must be understood in terms of their being subject to your purposiveness, and so to your exclusive use of them. Your rights to property thus parallel your right to your own person, but because property is something that exists in a different location from you, your right to it can be violated when you are not in possession of it, and further, because it is separate, you can alienate it, either by abandoning it or by transferring it to another person via contract. Once property rights are understood as parallel to the rights each person has in his or her own person, the bundle metaphor falls apart. Your right to your own person includes many of the same incidents, but few are ready to conclude that it, too, is just a bundle.<sup>5</sup>

4. Wesley Newcomb Hohfeld, *Fundamental Legal Concepts as Applied in Judicial Reasoning*, ed. David Campbell and Phillip Thomas (Aldershot: Ashgate, 2001), 75; A. M. Honoré, "Ownership," in A. G. Guest, ed., *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press, 1961), 107–147. Honoré treats "full ownership" as basic, and so resists this attempt to dismantle the concept of property wholesale. Instead, he explains how both private transactions and public law can allow a particular ownership claim to be dismantled "retail" in various ways.

5. The public law in disguise theory can be restated not as a thesis about entitlements, but rather as an attempt to debunk the entire idea of entitlements by presenting them as the products of brute political power. This mode of argument probably dates back to Thrasymachus in Plato's *Republic*. Many who would recoil from Thrasymachus's broader argument believe

The public law in disguise model is also sometimes put forward not as a claim about ordinary concepts of property, but rather as a claim about the entitlement of society as a whole to make decisions about the appropriate allocation of resources. From Kant's perspective, this suggestion does not even manage to be an alternative to his conception of private property. The power of the state to allocate land and chattels based on its priorities, and to determine the ways and terms on which they can be used, is a large-scale version of a property right. As Kant remarks against Grotius's claim that private property originates in a past agreement to divide up communal property, any such primitive community is not just a fiction but presupposes the very thing that needs to be explained. The concept of communal property would "have to be one that was *instituted* and arose from a contract whereby everyone gave up private possessions."<sup>6</sup> Otherwise the community would not be an owner, but would just be a usurper, with no power to divide "its" assets. Thus collective property raises the same questions as the theory of private property: why does this person or group have the power to decide, and limit the ability of private persons to use things in pursuit of their purposes? Those questions in turn resolve into the two issues that Kant's theory of property addresses: What powers does a person or group have in owning a thing?<sup>7</sup> How can something that is not already owned come to be owned?

that it can be deployed selectively, and the concept of property is a favorite target, typically supported by claims about the ways in which uses of resources have varied through human history. This factual assertion is irrelevant to Kant's view about the normative structure of property. Kant's claim that concepts of freedom have a rational basis is not a claim about their being obvious to every human being; grasping the full structure of something that is *a priori* is still a human achievement. Moreover, the claim that a normative concept can be grasped is not an assertion about the inevitable causal efficacy of grasping it.

6. 6:251.

7. A prominent variant on this argument claims that wealth, in particular, is created by social institutions rather than by individual labor; the role of those institutions is supposed to show that society is entitled to tax wealth. See, for example, Thomas Nagel and Liam Murphy, *The Myth of Ownership: Taxes and Justice* (New York: Oxford University Press, 2002). Such an argument provides a possible answer to the Lockean assertion that property rights are grounded in labor, but the terms on which it engages the Lockean argument also reveal its limits. It shares with that argument the premise that those who produce something have a right to constrain others in relation to that thing. The premise itself is indefensible, regardless of the scale on which it is supposed to operate.

Kant's specific way of rejecting the public law in disguise model does not commit him to accepting the broadly Lockean position that is often held out as the only alternative. Against that model, he rejects the aspect of property that Lockean theories suppose to make it prepolitical, namely its acquisition. The core of his argument, which will be considered in detail in Chapter 6, is that a purely unilateral act of acquisition can only restrict the choice of all other persons against the background of an omnilateral authorization, which is possible only in a condition of public right. This point is central to Kant's entire political philosophy, because it shows that what Lockean theories regard as the most straightforward private act presupposes a complete account of the nature of public, political authority. If property rights are only "provisional" outside of a rightful condition, it also follows that they are not enforceable.

The act of acquiring a piece of property is something that one person does on his or her own initiative, which changes the normative situation of others. Acts that were formerly permissible are now forbidden: if you acquire a piece of land, I can no longer use or interfere with it. Whether the act of acquisition places those others under an obligation or only a presumptive obligation, or simply authorizes the appropriator to exclude others from the thing acquired, it is a unilateral act through which one person changes the normative situation of another. As such, the acquisition of property presupposes an account of political authority, of how a merely permissible act can impose a normative constraint on someone other than the agent.

The focus of this chapter is not on the role of the state, but rather on the structure of property: the ways in which one person's property right constrains the conduct of others. All of this can be understood without reference to an omnilateral authorization. So, too, can the part of the theory of acquisition that can be characterized in a "state of nature," without reference to any political institutions. Kant's strategy is to first explain what it is to have a property right in a thing. His subsequent account of what it is to acquire property is simple and even boring, because it is the answer to a very simple question: how can something that is previously unowned make it into a system of property rights? The simple question gets a simple answer: an object becomes subject to somebody's choice when that person takes control of it.

The nature of a property right is structured by the basic requirement of a system of equal freedom in a world in which free persons can use things other than their bodies to set and pursue their purposes. That is why, as we saw in the previous chapter, property rights constrain others in ways parallel to the way rights to your own person constrain others. Your body is your person, and it constrains others because it is that through which you act, your capacity to set and pursue purposes, and any interference with your body interferes with that capacity. Your property constrains others because it comprises the external means that you use in setting and pursuing purposes; if someone interferes with your property, he thereby interferes with your purposiveness.

The same point can be made through the distinction, from Chapter 2, between a person's means and the context in which that person uses them. A changed context raises no issues of right, because it is the inevitable result of people's exercise of their freedom. A system of property is a system in which persons have rights to means others than their bodily powers, and others may not change those means or their availability. If you could not have a right to something in your absence, everything except your bodily powers would be mere context, subject to the choice of others.

The relation of property to setting and pursuing purposes underlies both its rationale and its structure. Freedom requires that external means that can be used in setting and pursuing purposes be available *formally*: an owner's entitlement to use them does not depend on the matter of the owner's or any other particular person's choice. For the same reason, a property right needs to constrain others even when the owner is not in physical possession of an object. Otherwise whether an object was available to the owner to set and pursue purposes would depend on the particular choices of others, and so violate the formality condition. As a matter of fact, you may be able to set yourself the end of making a mushroom omelet without having rights to objects that are not in your physical possession, but you could not have an entitlement against others to set yourself the end of making one. If there were no such rights, someone else would be entitled to take the eggs you had gathered while you were sautéing the mushrooms, and you would not be entitled to do anything to stop her. Your entitlement to set and pursue purposes would thus depend on

the particular choices made by another. Again, the fact that some other person needs or wants what you have more than you do, could use it more effectively than you, or could gain from using it more than you would lose is of no significance. The simplest wrong against property is using what belongs to another without the owner's permission. Kant's account explains why this is a wrong without inquiring into the magnitude of the loss (if any) suffered by the owner, or the benefits the trespasser hoped to gain. Any account that focuses on specific uses—the matter of choice—must regard such a rule as wasteful, since it forbids a transaction that makes one party better off and the other no worse off. In the vocabulary of economic theory, a harmless trespass is a Pareto improvement: one person is made better off, and no other person is made worse off.<sup>8</sup> Perhaps a material analysis, focusing on need or wish, could generate a rule against trespass by reference to secondary problems about the resources people would waste in protecting their property, and so conclude that there are grounds for a general rule that sometimes prohibits people from doing harmless and even worthwhile things.<sup>9</sup> Kant's approach is different: the reason harmless trespasses are prohibited is that they violate the owner's right to determine how his or her property will be used.

By understanding property rights as a constraint on the conduct of others, Kant is able to undermine what he calls the “Guardian spirit” theory of property, according to which property is a special relation between a person and a thing. He refers to this as an “old and widespread view” which leads to the “deception of personifying things and of thinking of a

8. Pareto criteria are often couched in terms of voluntary transactions, but voluntariness enters the economic account as evidentiary rather than constitutive. Two welfare maximizers would only engage in a consensual transaction if each expected to gain by it.

9. As I explain in “Beyond the Harm Principle,” *Philosophy & Public Affairs* 34 (2006): 215–245, a harm-based account faces parallel problems with harmless trespasses against persons, such as medical experiments performed on unconscious patients, or sexual assaults on drugged women that leave no trace. Harm-focused accounts must identify the grounds with prohibiting such actions in terms of indirect effects on other people, such as the climate of fear that they are likely to cause if word gets out, rather than, as the Kantian account does, on the fact that they are wrongs against their immediate victims. The appeal to the indirect effects is always treacherous, since it makes it an open question whether the best way to prevent those effects is to prohibit the acts themselves, or rather, to prohibit people from informing others about them.

right to things as being a right directly against them.” He acknowledges that such a view is natural, and seems to have held it himself in his pre-critical phase.<sup>10</sup> But it leads to a deception because a right is always a constraint on the conduct of others. Your right to your own person is not a feature of your own relation to yourself. So, too, with property: your relation to the object that you own is not the core of the right; your entitlement to constrain others with respect to that object is. Understood as a form of self-relation, property could not be a constraint on the conduct of others, because any such constraint is a relation between persons, with respect to things. Nobody else is constrained by your relation to yourself. Your right to property is your right to limit the conduct of others in relation to particular things. It is an expression of your purposiveness in relation to the purposiveness of others, and so cannot be reduced either to your relation to the object you own or to the restriction on the conduct of others.<sup>11</sup> Thus Kant observes that “it is clear that someone who was all alone on the earth could really neither have nor acquire any external thing as his own, since there is no relation whatever of obligation between him, as a person, and any other external object, as a thing.”<sup>12</sup>

The “mine or yours” structure that governs all acquired rights opens up two new questions that a theory of property must address. First, it

10. 6:269. In his handwritten notes in his copy of *Observations on the Feeling of the Beautiful and Sublime*, Kant appears to fall into that very deception: “The body is mine because it is a part of my I and is moved by my power of choice. The entire animated or unanimated world that does not have its own power of choice is mine in so far as I master it and can move it in accordance with my power of choice. The sun is not mine. The same goes for another person, therefore no property is a *Prioprietat* or an exclusive property. But in so far as I want to claim something as exclusively my own, I will presuppose that the will of the other is at least not opposed to mine, nor [is] the action of the other opposed to mine [67]. Therefore, I will carry out the actions that indicate what is mine, chop the tree down, timber it, etc. The other person tells me that it is his because, through the actions of his power of choice, it is as though it belongs to his self.” *Bemerkungen zu den Beobachtungen über das Gefühl des Schönen und Erhabenen*, AA XX, S. 66f, trans. Patrick Frierson, at [http://people.whitman.edu/~fierspr/kants\\_bemerkungen3.htm](http://people.whitman.edu/~fierspr/kants_bemerkungen3.htm) (accessed October 7, 2008).

11. For an example of a theory of property in which the owner is dispensable, see James Penner, *The Idea of Property in Law* (Oxford: Oxford University Press, 1997). Penner begins with the “mine or yours” structure of property, but focuses exclusively on the restrictions on others. The Kantian objection to this approach is the converse of the objection to the Lockean one: property relates the choices of owners to nonowners, rather than relating either owners or nonowners to objects.

12. 6:261.

must explain how something can belong to a person when that person is not in physical possession of it. You are always in possession of your body, or, to be more precise, your body just is your physical person. Any wrong against your body is a wrong against you. The formal relation of having means to setting ends requires that any rights you have to things that *can* be separate from you apply when they *are* separate. Otherwise your freedom to use external means to set and pursue your purposes depends on what others decide to do with those means.

Second, it must explain how external objects of choice can be acquired. The theory of contract includes an account of how things can be transferred, but the theory of property requires, in addition, a theory of initial acquisition.

The first question, of how someone can have a right to a thing of which he or she is not in possession, marks the distinction between theft (or conversion) and battery. If I have my hand wrapped around an apple, you wrong me if you peel my fingers off it or wrestle it away from me, because you interfere with my person. That wrong is not sufficient for a wrong against a property right in the apple, because it provides no constraint on your conduct over and above the constraint already contained in my innate right to my own person. If I am holding a bowl of soup, you can come with a straw and drink the soup without interfering with my person. If I have a property right in the soup that is violated when you come with your straw, it must consist in some claim that is not directly connected to my person. More generally, because property is a relation between persons, if my ownership of an object is to constrain the conduct of others, the constraint must be separable from the constraint already inherent in my right to my own person. Because the right is separable from my right to my person, it can bind others even when I am not in physical possession of or even contact with the object of the right.

The distinction between physical possession and ownership resolves the first-order question about the nature of a property right: a property right is an entitlement to constrain the conduct of others with respect to an object by excluding them from that object. It sets up a new form of potential inconsistency between the freedoms of separate persons. If an external object is your property, it is subject to your choice, and so I must forbear from using it or interfering with it, even if my use or interference does not affect your person.

Because he conceives of right spatially, Kant treats property in land as the basic case of property. A right to property is a right to control a three-dimensional region of space. That is why you violate my property right by drinking the soup in the bowl I hold, even though you did not violate my right to my own person in so doing. To have a right to a piece of land is to have a particular location subject to your exclusive choice. Property in land, or “real property” as it is often called, is the right to constrain the conduct of others with respect to a specific location, including the possibility of constraining their occupation of the location, and what movable objects they bring to it. The postulate of practical reason with regard to rights already establishes that land can be subject to a person’s exclusive choice. The analysis applies to property more generally, and is perfectly consistent with various complex forms of property, including owning shares in a company, land subject to mortgage, and money.<sup>13</sup>

Kant’s normative resolution of the question of property rights also comes with a metaphysical exposition of the sense in which my act interferes with your entitlement to subject an object to your choice. Your basic right to your property is the right that you be the one who determines how it will be used. When, however, you are not physically in control of the property, because it is separate from you, you are not factually controlling it. So my interference with your right to property is not an interference with your factual physical control of it. Instead, I wrong you by interfering with what Kant calls your “intelligible” or “noumenal” possession of the object. Neither Kant’s use of the word “noumenal” nor his introduction of it through the “antinomy of private right” is meant to invoke any ontological theses about some other world in which you are in factual possession of an object when you are not in factual possession of it in this world. Instead, the basic point is that in addition to thinking of things under the aspect of physical location and possession, as we do

13. The one case that goes by the name of property which Kant denies can be explained in terms of the concept of property is “intellectual property.” Kant explains copyright as a non-proprietary right that an author has to “speak in his own name” (6:289). This account provides a more powerful interpretation of the familiar structure of copyright, including the idea/expression dichotomy, the role of the public, and the core exemptions for “fair use.” See Abraham Drassinower, “A Rights-Based View of the Idea/Expression Dichotomy in Public Law,” *Canadian Journal of Law and Jurisprudence* 16 (2003): 3–21; Jonathan Peterson, “Liberalism and the Public Interest in Art,” doctoral dissertation, University of Toronto, 2007.

with respect to each person's innate right of humanity in his or her own person, we are also required—morally required, that is—to understand external objects of choice under normative principles of freedom. There is a nonphysical sense in which your property belongs to you, a sense that, like Kant's noumenal realm, can only be understood by abstracting away from the particularity of space and time. A postulate is required to make sense of this possibility, because the laws of freedom in question take objects in space and time as their subject matter: you have an entitlement to your pen, which is individuated by its empirical properties and location in space at any given time. Your intelligible possession of the pen brings the pen under nonempirical norms. The norms are nonempirical because they classify empirically individuated objects in terms of nonempirical normative features. That is why physical possession and ownership can diverge.

From this perspective, the theory of acquisition must be secondary. Any account of property needs an account of acquisition to complete it, even if the account of acquisition is not likely to regulate any but a tiny fraction of ordinary property transactions. In every system of property that we know, comparatively few unowned objects are up for grabs, and even those are typically located on land that is already private or public property. Despite a limited range of application, the theory of acquisition is systematically important. A theory of rightful rules of property presupposes that the owners of various things have genuine title to them. Even if title is typically acquired from some other person, the possibility of passing good title presupposes the possibility of initial acquisition, because any item of property could belong to someone other than its current owner.<sup>14</sup>

## I. Acquisition

One of the most perplexing features of systems of property is the priority that they seem to attach to matters of timing: the person who got there first enjoys priority over latecomers. Even if it is supposed that the expenditure of toil grounds a claim in desert to the fruits of your labor, the

14. 6:259.

first person to toil on the object is the one who gets the chance to deserve its fruits. The difficulty with acquisition-based theories is that priority in time must enter them as a substantive normative principle. The Kantian alternative allows timing to matter, but only as the way in which objects make it into the system of property, without supposing that timing, as such, has any direct normative significance. If the theory of acquisition matters as only a theory of how particular objects become property, there is no reason to suppose that it must drive the rest of the theory of property.

By focusing on the structure of property rights and the ways in which they constrain the conduct of others, Kant's theory distances itself from the difficulties that bedevil acquisition-focused theories. Acquisition-focused theories represent the way in which property constrains the conduct of other persons as an implication of the way in which the owner acquired the property in question. On prominent interpretations of Locke, for example, the fact that one person has mixed his labor with an object (or, on other readings, made that object) creates a special relationship between a person and a thing, which others are thus bound to recognize and respect. In Hegel's otherwise very different theory of acquisition, the unilateral aspect of acquisition is brought out by contrasting property rights with contractual rights. Contractual rights are acquired bilaterally, and so bind only the parties to them, while property rights are acquired unilaterally, and so bind all others. Since others must respect my will, if I have "put my will" into an object in the requisite sense, others must respect my will as it is in the object.

There are two difficulties with the idea that my toil or will could bind others. One of these is the general problem about unilateral action binding others, to which we will return in Chapter 6. Kant does not deny that property can be acquired through a unilateral act, done entirely at the initiative of the acquirer. His argument is that a broader context of public right is required in order for one person's unilateral act to impose an obligation on another. Even though the *nature* of a property right can be explicated exclusively in terms of private right, unowned objects cannot be acquired except under the authority of a principle of public right. The familiar moral and legal idea that two persons cannot, through their agreement, change the rights of a third who is not a party to their agreement

holds more generally: one person cannot, without more, change the rights of everyone else. Locke restricts the application of his principle to those occasions in which appropriation does not worsen the ability of others to provide for their own subsistence. Any such proviso fails to address the underlying difficulty. One person's ability to unilaterally place others under an obligation raises the same issue even if those who are obligated are no worse off in material terms. Indeed, this difficulty is the mirror image of the basic structure of a property right, understood as the right to exclude. I wrong you if I use your property without your authorization, and it is no answer to your complaint against me for me to say that you are no worse off in terms of your welfare or ability to provide for yourself. You are the one who gets to decide. A parallel point applies to the Lockean proviso: my entitlement to place you under a perfectly general obligation to refrain from using an object raises an issue about your freedom, not about your welfare. Any systematic justification of my entitlement has to address that issue, and restricting a justification to cases in which there is no material disadvantage does not engage the issue of freedom.

The second difficulty is most obvious in broadly Lockean theories which focus on toil or “sweat of the brow,” but it is a general problem for acquisition-based accounts of property.<sup>15</sup> Kant notes that laboring on an object or piece of land does not give rise to a right as such. It is possible for someone to work on land or an object that belongs to another, and in so doing either work for the other or waste his own efforts. This might

15. For example, John Stuart Mill, in his *Principles of Political Economy*, writes of “the essential principle of property being to assure to all persons what they have produced by their labour and accumulated by their abstinence” (Book 2, chap. 2, §5). It is not completely clear that Locke himself has a fully “Lockean” theory in this respect, or whether instead his view marks less of a departure from, for example, Grotius’s. For both Locke and Grotius, a theory of property begins with the assumption that the Earth is owned in common. Grotius argues that common land is divided up through a collective decision; perhaps Locke can be read as relaxing this requirement, and licensing acquisition whenever it does not worsen the situation of others. On this reading, Locke begins with a material principle in a way that is inconsistent with each person’s right to be his or her own master. The grounds of severing property from the commons are also material, since they depend on whether others are made worse off, rather than on any freedom-based entitlement. Still, Locke also attaches great significance to the fact that each person owns and expends his own labor, and others have certainly taken such a message away from his theory. I am grateful to John Simmons for helpful discussion of this issue.

seem to be irrelevant, since the Lockean theory of acquisition focuses on things that are not already owned. Yet the point is more general: it must be possible for a person to waste his own efforts on something whether it is owned or not; improving something is only relevant if that thing is already yours.<sup>16</sup> If you own the object and improve it, you now own an improved object. If you already own it, no toil is necessary to establish your claim to it; if someone else improves something that you already own, then, absent special circumstances, you now own an improved object.

The distinction between improving something you own and frittering away your efforts is internal to the theory of property, and reflects the more general Kantian distinction between wishing and choosing. You can use whatever is yours, both your person and your property, to accomplish whatever purpose you suppose them to be suitable for achieving. One of the ways in which you can use what you already have is to pursue the purpose of acquiring something else. You can use your muscles to pick up a stick; now that you have the stick, you can use it to get at fruit that is out of your reach, and so on. Each time you successfully acquire something, you are the one who gets to decide how it will be used. Until you have acquired it, it is not subject to your choice; it is something you have chosen to pursue, but unless you succeed, it is just something that you wished for.

The means/ends structure of your *use* of objects is paralleled in your *rights* to objects; the right to have something as your own is the right to be able to have it as your means, that is, to decide the purposes for which it will be used. Using your other means for the purpose of acquiring that object is not sufficient for having it as your means. Your property right in the means that you already have constrains others to refrain from interfering with those means, but they are free to change the context in which you use those means as they see fit. That is just to say that they do not need to respect your wishes. All of this is to say that until you have acquired something, your intention to acquire it places no constraints on the conduct of others.

Kant's point about the priority of property to effort expended in improving it is particularly clear in the case of acquisition by capture. Locke

16. 6:265.

offers the example of a person who exerts toil chasing and tiring a hare, arguing that the expenditure of effort generates a property right in it, so that others may not come along and seize it. Locke is correct in the application of his own general account,<sup>17</sup> since the expenditure of effort in giving chase is a use of the chaser's labor. Supposing he has a right to that labor, the person who appropriates the exhausted hare interferes with that right. Kant's point is precisely to deny this, on the grounds that at least sometimes in seeking to acquire something, you simply fritter away your efforts. Since Roman times, legal systems have treated acquisition by capture as Kant does, for simple but systematic reasons.<sup>18</sup> The person who captures the fox or hare that I have chased does me no wrong, because he does not deprive me of something that I already had. I still have my horses, hounds, and bugle; I just failed to achieve the purpose I set for myself in using them. I no longer have my efforts; those were just squandered. Although the person whom the courts call the "saucy intruder" exercised his freedom in a way that caused my plan to fail, he did not deprive me of my toil any more than he deprived me of my horses, hounds, or bugle. My effort and toil were gone once I expended them. I could not have a right to my toil in a way that I have a right to my horses. The most I could have is a right to the *fruits* of my toil, but I could only have that right if I already have a right to exclude others from the object on which I toil. That is, the right to the fruits of my toil only applies if I already have a right to the object on which I work, and so cannot be used to generate a right to that object. The same point applies to the sugges-

17. John Locke, *Second Treatise of Government* (Indianapolis: Hackett, 1980), 20, §30.

18. Justinian, *Digest*, trans. Alan Watson (Philadelphia: University of Pennsylvania Press, 1985), Book 41, chap. 1, par. 5. The classic common law discussion, which considers the writings of Pufendorf, Grotius, and Barbeyrac, can be found in *Pierson v. Post* 3 Cai. R. 175 (1805). All of the classic discussions reject the Lockean view. Wild animals fall into the category of things that can only be acquired by being captured, because capture is required to subject them to a person's choice. Another example in the Anglo-American law of property is percolating water that flows under land, but not in a defined stream. You cannot take possession of percolating water, because you cannot take control of it. You can dig a well and take possession of the water in it and that you draw from it. Bees are another: see *Ferguson v. Miller* (N.Y. 1823) 1 Cow. 243 (1823). You can own the hive, so that anyone who takes honey from it wrongs you. You cannot own the bees, however, because you cannot take control of them. To be more precise, if you capture the bees in a container, you can own them, but while they remain wild, you cannot.

tion that laboring on a thing increases its value, so that the person who increases the value is wronged by those who appropriate the newly valuable thing. Conceptual difficulties attend any attempt to speak of a single act improving the value of an object. Insofar as flushing a hare out of the bushes increases its value, so does pointing it out, since each of these reduces the effort that others would need to put into capturing it. The difficulty is that any such contribution to the ease of others acquiring a thing is just a special case of a beneficial effect of your use of something that is already yours. You do not need to bring in special bees to pollinate your garden if I have planted the right plants; you do not need to first look for or flush the hare if I have spotted or flushed it first. However increasing the value of an object is understood, you do not have a right to the value you create unless you have a right to the things that bear the value. Instead, your right to the value follows from the right to the thing, and so cannot ground a right to a thing.

The difficulty for toil-based theories reveals a more general conceptual problem in the idea that a person has property in his or her own labor. If you have a property right in a thing, then you have a right to exclude others from using or interfering with that thing without your permission. From this perspective, it might seem unobjectionable to say that you have a property right in your labor, since others apparently wrong you if they interfere with your labor or use it without your permission. They certainly wrong you if they interfere with you, that is, your body. The problem comes in specifying what it would be for one person to use or interfere with the *labor* of another except by interfering with that person's body. If you stop me from cutting your hair, there is a sense in which you are interfering with my labor, but, since you are entitled to determine whether I cut your hair or not, you do not wrong me. I make your trip to the store a waste of your labor if I buy the last quart of milk before you get there, but this interference is not a wrong to you. *You* wasted your efforts; *I* just exercised my freedom. I wrong you if I interfere with your person—pushing you out of the way as you reach for the milk. The only way I can wrongfully interfere with your labor, then, is by wrongfully interfering with your person. More generally, whether my interfering with something you are doing violates your property in your labor depends on an independent specification of the permissibility of what each of us is doing.

The same problem applies to the idea of using another person's labor:

if I force you to work for me, I wrong you by using your person, and in so doing, it might also be said that I thereby appropriate your labor. It would be more correct, however, to say that I wrong you because I use you—I subject your person to my choice, contrary to your innate right to independence of the choice of any other private person. In the same way, I wrong you if I take something that belongs to you. If the thing that I take is something you have made, my wrong could be characterized as taking your labor. The problem is to specify this idea so that it is not just a paraphrase of the wrong involved in my taking the object. I wrong you if I take your property even if it cost you no effort to acquire it, and the claim that I have *also* taken your effort adds nothing to your complaint against me.

A further difficulty undercuts the suggestion that your right to your labor, or, as Locke puts it, your ownership of it, gives you a right to the fruits of that labor. As a general matter, the fact that something is an effect of something you own does not give you a right to it. If you landscape your yard, you might increase property values in the neighborhood, or attract beneficial insects that keep the mosquitoes in the yards of your neighbors at bay. Your neighbors who benefit from increased property values or insect-free yards do not need to pay you for the benefit they have received, because they have not deprived you of something you have a property right to. All they have done is take advantage of the effect of your exercise of something you have a right to. You do have a right to exclude others from these benefits—you might put up a tall ugly fence, so that nobody can see how beautiful your yard is, or a fine-mesh one to keep the insects in. You even have a right to warn your neighbors that you will put up a fence unless they pay part of the cost of your landscaping from which they will benefit. Both of these rights are simply the rights to *capture* the effects of what you own. If you fail to capture them, you have no claim against any other person who might take advantage of them. The same point applies to your toil: if the tired fox is the effect of your toil, you are entitled to capture it, but so is everyone else.

In the same way, if I grow mushrooms in the shade cast by your fence, you cannot claim a portion of my profits. If, however, you tell me that you plan to take down the fence unless I help you to repair it, I am free to accept or refuse your offer. The one thing you are not entitled to do is claim that I have wronged you because I have deprived you of the effects of something that you own. Exactly the same point applies to your owner-

ship of your labor or, as it is sometimes more fashionable to put it, your self-ownership. You have a right to exclude others from your person, but it does not follow that you have any right to exclude others from the effects of the ways in which you permissibly use your person. Your right only protects what you already have, and so cannot generate a right to some further thing. Since you have no right against others to the effects of those things that you have a right to, your right to your own labor cannot generate a right to those things on which you expend it. If somebody else already owns the things on which you labor, then, unless you make arrangements with them, or if you mistakenly work on what is theirs and they freely accept the benefits you have conferred, you will simply fritter away your labor. If I clean your windows in the hope that you will pay me, I have no right to payment. If nobody else owns those things, you have used what you have—whether it is your labor or your hounds, horses, and bugle—to try to acquire something. Nobody is under any obligation to limit her use of what is hers so as to enable you to succeed in the purposes for which you are using what is yours. If you do already own the thing on which you work, you also own the improved thing after working on it. The work itself plays no role in establishing your claim.

If laboring on a thing will not establish a right in it unless you already have it, a different sort of unilateral act is required to make something your own. The only possible answer is the minimalist one: making something your means. We need only the transition itself, from subject to no person's choice to subject to *this* person's choice.<sup>19</sup> That is, the theory of

19. Kant characterizes the authorization as a “permissive law.” Drawing on medieval and early modern uses of this term, Brian Tierney has argued that the permissive aspect of the law is that it grants permission to do something that would otherwise be wrongful. Kant’s earlier use of the concept in *Perpetual Peace* might appear to conform to Tierney’s interpretation, as he says that a permissive law allows a state to delay the full realization of a peaceful condition. See Tierney’s articles “Kant on Property: The Problem of the Permissive Law,” *Journal of the History of Ideas* 62 (2001): 301–312, and “Permissive Natural Law and Property: Gratian to Kant,” *Journal of the History of Ideas* 62 (2001): 381–399. Joachim Hruschka has offered a reading that fits better with Kant’s use in the *Doctrine of Right*, according to which the permissive law makes it possible for a merely permissible act, one that is neither forbidden nor required, to have consequences for rights. This concept plays a familiar part in other contexts. In a game such as chess, the rules create a system of permissions, through which particular moves can be imputed to the players. Hruschka argues that Kant inherited this tripartite structure from Achenwall, whose textbook he used when he taught courses on natural law. In

acquisition follows the structure of the theory of property: to acquire something is to make it your own. The Lockean claim that you must use an object to acquire it is mirrored in his doctrine of waste, according to which you lose an object if you stop using it. Neither is consistent with Kant's formal idea of purposiveness, which makes having means prior to setting ends. That is why Kant generates a doctrine of property rather than *usufruct*. Perhaps a consistent theory of the temporary right to use a thing could be made to depend on acquiring it by using it. The theory of property cannot.

Kant's account thus focuses exclusively on the transition in a thing's status from unowned to owned, that is, the transition from its being available to all to its being subject to one person's exclusive choice. The account is boring because the only factual precondition of rightful acquisition of an unowned object is empirical possession of that object. The act in question is simply bringing a thing under your control, so that you can now decide how to use it. Neither improving it nor putting your will into it is required. Improving it is not required because improving an object is only relevant once you have taken possession of it. Until you take possession, improving just fritters away your efforts. The same point applies to what Hegel describes as “putting your will” into an object, at least if this is understood as something different from simply taking possession of it. Wishing for a thing engages your will in a sense that is irrelevant; subjecting it to your choice—making it a means for setting and pursuing your purposes—is established only by taking control of it. Nothing more is required. All you need to do is take physical possession, and give a sign to

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a later article Hruschka also shows the systematic role of permissions throughout Kant's theory of acquired rights. See Hruschka's *Das deontologische Sechseck bei Gottfried Achenwall im Jahre 1767* (Hamburg: Vanderhoeck und Ruprecht, 1986), and “The Permissive Law of Practical Reason in Kant's *Metaphysics of Morals*,” *Law and Philosophy* 23 (2004): 45–72. See also Katrin Flikschuh, *Kant and Modern Political Philosophy* (Cambridge: Cambridge University Press, 2000), chap. 4. The change between *Perpetual Peace* and the *Doctrine of Right* may only be apparent. In the earlier work, Kant does not say that there is a permission to delay implementation of a peace treaty; he says that the prohibition of acquisition of territory by war or purchase can be delayed until there is a peace treaty. Thus in a state of war, acquisition by purchase or force is a permissive law, i.e. a way in which a state can acquire territory. Such acquisition is valid once peace is achieved because a peace treaty closes off all further dispute, and extinguishes all old claims, including those based on the wrongfulness of past acquisition through force.

others that you are doing so in order to have it as your means rather than just for a specific use. These steps are required because they are just the steps in subjecting a thing to your choice. You do not need to improve the object, because improving an object you are already in possession of is just subjecting it to your choice in some specific way. Unless it is already subject to your choice, however, the ways in which you change it—for example, by tiring it out—do not subject it to your choice. At most, they prepare it for subsequent use.

Taking control must be public, and so Kant says it requires giving a sign. If others could not determine that you meant to bind them, you cannot bind them. You can use something on a particular occasion without acquiring it or even intending to. You might use a stick to balance as you walk up a rocky path without making it your own. It is not that you acquire it and then immediately abandon it. Instead, you use it only while you are in physical possession of it. In so doing, you make no claim to subject the thing to your choice when you are not in physical possession of it. The second unilateral act (strictly speaking, the second aspect of the same unilateral act) is “giving a sign”: you must make your appropriation of the object in question public, in the sense that others could be bound by it. If you are only using the stick to balance, you do not need to give a sign to others; the fact that you are in physical possession of the stick means that they cannot interfere with the stick while you are using it without thereby committing a wrong against your person. So no other person can grab the stick, making you lose your balance, but the wrong of so doing has nothing to do with the stick as such, and everything to do with the fact that you are currently holding it. On the other hand, if you give a sign, then the person who takes the stick from you wrongs you with respect to the stick as well, and so wrongs you by taking the stick when you put it down. It does not follow from the need for a sign that there needs to be a clear marker on every boundary line; only that in bringing the thing under control you make it apparent to others that you intend to make it your own.

## II. Conclusion

Kant understands property rights as parallel to rights to one’s own person, but distinct from them. By developing the parallel, he can explain

what a property right is without attempting to ground it in a theory of acquisition; by developing the contrast, he can generate a theory of acquisition that explains how a rule of priority in time and unilateral action are appropriate to it. By setting things up in this way, his account captures the distinctive sense in which property rights are partly a matter of private rights between persons, but at the same time situates his argument that acquisition is only possible against the background of a public structure of rightful authority.

# Communal Ownership and Kant's Theory of Right

(Revise & resubmit with *Kantian Review*)

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## Abstract

Here, I argue that Kant's argument for ownership entails a standard of *meaningful use* by which property regimes can be evaluated: a regime must make it possible for usable objects to be meaningfully used. I argue that a particular form of fully communal ownership can satisfy this standard. I further argue that this form of communal ownership is compatible with other aspects of Kant's theory of ownership. I conclude that if this is so, there is a great deal of space for further consideration of the rightfulness of diverse regimes of ownership and exchange within a Kantian framework.

**Key Words:** communal ownership, property, freedom, rights, Kant

Immanuel Kant's theory of property picks out a fundamental feature of property rights: when we as a society specify rights with regard to external objects, we do not create rightful relationships to the objects themselves.<sup>1</sup> <sup>2</sup> Instead, when we specify these rights, we structure our rightful relationships to one another.

Putting in place a regime of ownership and exchange structures our relationships to one another in two principal ways. First, when we put in place such a regime, we specify the forms of relationships between individuals and external objects that others can be bound to

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<sup>1</sup> References to Kant's work follow the standard Akademie pagination. I use the following abbreviations and translations: *GW* = *Groundwork of the Metaphysics of Morals* (Kant 1996a); *MM* = *The Metaphysics of Morals* (Kant 1996b).

<sup>2</sup> Kant argues that it would be 'absurd to think of an obligation of a person to things or the reverse,' as doing so involves thinking '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 incursions by them' (*MM* 6: 260).

respect. Second, when we put in place such a regime, we specify which actions of society as a whole or interactions between individuals or groups will rightfully result in the establishment of property rights—we specify how property can be acquired.

Different systems of ownership and exchange will result in different relationships with one another. For example, in a system such as that of the United States, we are predominantly bound to respect others' private control of external objects, and we can establish property rights through market exchange. The rampant economic inequality of this system, though, might lead one to hope that an alternative system of ownership and exchange could be rightfully possible.

Kant's own theory of property as expressed in his *Doctrine of Right* seems to take it for granted that a just legal order (as Kant puts it, a rightful condition) would include a regime of private ownership, which would seem to preclude many such possible alternative regimes of ownership and exchange. Notably, Arthur Ripstein has defended Kant's view, arguing that 'anything less than fully private rights of property, contract, and status would create a restriction on freedom that was illegitimate because based on something other than freedom' (2009: 62).

Despite Kant's own emphasis on private ownership, I argue here that Kant's theory of right and its fundamental principles are compatible with a certain form of communal ownership. As a first step toward establishing this conclusion, I will distinguish private and communal ownership. Next, I will present Kant's postulate of practical reason with regard to rights, which argues that ownership must be possible. I argue that Kant's argument gives rise to a standard by which property regimes can be evaluated: property regimes must secure the possibility of the *meaningful use* of external objects. I then argue that communal ownership regimes of a particular type can satisfy this standard. Finally, I argue that this form of

communal ownership is compatible with key aspects of Kantian freedom understood more broadly.<sup>3</sup>

I hope to establish that a particular form of communal ownership is compatible with Kantian freedom. This is not an argument *for* communal ownership, nor is it an argument *against* private ownership or capitalist systems. In answering the preliminary questions I answer here, though, I do aim to lay the groundwork for further exploration and evaluation of the rightfulness of diverse economic and property systems within a Kantian framework, thereby enriching Kant's theory of right. And once the ground has been cleared within the Kantian framework for consideration of these issues, the powerful conceptual resources of Kant's theory of right can begin to expand and enrich the broader debate concerning the justice of economic and property systems.

### I. COMMUNAL AND PRIVATE OWNERSHIP

In this section, I will distinguish private and communal ownership regimes. In doing so, I will isolate the particular form of communal ownership I will discuss throughout this paper.

Again, when we institute a regime of ownership and exchange, we structure our relationships to one another in two ways. First, when we institute a regime of ownership and exchange, we specify which relationships between individuals and external objects others are bound to respect—we specify how individuals can rightfully control objects. This control could be private or communal. A car that I have the right to the exclusive use of is under my

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<sup>3</sup> David James reaches a similar conclusion, although by a different line of reasoning (2016). Other prominent Kant scholars have also gestured at the compatibility of communal ownership with Kant's theory of right. See, e.g., Korsgaard 2009: 238 fn 7, Williams 1983: 193-4, Hodgson 2010: 62, and Herman 2007: 43 ("Kant's argument for an institution of property is not an argument for any particular system of property, private or communal.").

private control, while a public city park is under the communal control of citizens of that city. This sense in which external objects can be communally *controlled* is not a defining feature of communal ownership of the form I am discussing here. Under regimes of both private and communal *ownership*, both private and communal *control* are possible.

Second, when we institute a regime of ownership and exchange, we specify what actions or interactions with each other will suffice to establish rightful relationships with regard to external objects. Communal ownership as I define it here is exclusively communal only in this second sense—all rights to external objects are allocated via the will of the community as a whole. In contrast, a private ownership regime leaves matters of allocation to be settled between individuals or groups of individuals—for example, individuals might be able to buy and sell objects in such a regime.

This is a rough and abstract distinction that leaves a great deal of detail to be filled out. For example, how can a community collectively allocate all rights to objects? It would be impossible for a community of any substantial size to do something like meet and vote on every single question of allocation. Rules and mechanisms would need to be put in place to decide categories of questions. What sorts of mechanisms, then, can be put in place such that despite the use of these mechanisms, it is still true that questions of allocation are settled by the general will of the community as a whole? Given the abstract conception of communal ownership I am relying on in this paper, I do not aim to provide a full answer to this question here. Still, we can say that if control over allocation is permanently delegated to private individuals or to independent mechanisms such as a free market, such a regime will no longer be communal. The characteristic feature of communal ownership as I define it here is the intentional control of all of the mechanisms of allocation by the people as a

whole. As soon as the community as a whole no longer has this control, a regime is no longer fully communal.

It is also worth noting that any realistic view of private ownership also includes a significant number of communal restrictions on private ownership. Even Blackstone's classic definition of private property includes space for communal restriction of private ownership: according to Blackstone, private ownership consists in an individual's 'free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, *save only by the laws of the land*' (1765-1769: 1:134-35, 140-41 emphasis added). Many of the late-capitalist regimes present in the world today clearly exhibit some communal control over the mechanisms of allocation—for instance, by placing restrictions on the market, or deciding together how certain resources of particular importance or general concern might be used. Still, while these regimes of ownership and exchange have communal elements, they are not fully communal, as the question of who gets what has in many cases been delegated to private individuals and corporations, as well as to a market that is largely independent of communal control.

So, for my purposes here, a communal ownership regime is characterized only by the communal control of all mechanisms of allocation. The community decides who gets what. There need be no difference between the uses that objects can be subjected to under this sort of communal ownership regime and the uses that objects can be subjected to under a typical private ownership regime. The communal ownership regime I imagine here includes the possibility of both private and communal *control* of external objects.<sup>4</sup>

No stretch of the imagination is required in order to envision a regime of private ownership, as the world is full of property regimes that we identify as private. Envisioning

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<sup>4</sup> Though I do not, one might use the term communal ownership to refer to regimes of ownership and exchange that preclude the private control of external objects. See, for example, Thomas More's *Utopia* (2002: 59). Such regimes are potentially problematic in a way that the regime of communal ownership I describe here need not be.

communal ownership, however, does require imagination, especially in light of the historical instances of defective regimes that have been identified as communal. The sense of communal ownership I outline here is abstract, as it is meant to be compatible with a wide range of possible communal ownership regimes, including those that are currently beyond the limits of our imagination.

Still, it is worth pointing out some examples of imagined regimes similar to the regime of communal ownership outlined here.<sup>5</sup> In a brief but fecund footnote, Christine Korsgaard gestures toward a non-capitalist system of ownership using the public library system as a model:

library books are reserved to particular patrons for specified amounts of time. Your right to the exclusive use of a book, for reading only, and for a certain length of time, still counts as a form of ‘property’ in Kant’s sense. In the same way, the means of production might be communally owned and ‘lent out’ to particular users. (2009: 238 fn 7).

While this brief note does not provide us with a full picture of what a communal regime would look like, it does provide us with an inchoate idea of what such a system could be.

For another example, late in his career John Rawls outlined a system of property-owning democracy, where ownership of societal resources is widely dispersed (2001). Scholars have taken up this compelling idea and developed it further (O’Neill 2012). While Rawls refers to this system as a system of private ownership, presumably because it involves the private control of external objects, the terminology used is not important. Whether one would choose to describe this regime (or, for that matter, a regime of communal ownership of the sort under consideration in this paper) as a regime of private or communal ownership, either way it offers a significant potential alternative to a capitalist system of private ownership.

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<sup>5</sup> Works of fiction can also provide powerful models for what alternatives to capitalist regimes of private ownership might look like. For example, see Ursula K. Le Guin’s *The Dispossessed*.

In what follows, I argue that communal ownership can be compatible with Kantian freedom. Importantly, though, I will not argue that communal allocation of external objects itself must always be rightful, nor will I argue that market allocation associated with private ownership cannot be rightful.<sup>6</sup> My aim here is to lay the groundwork for exploring these issues: once we have established that the nature of ownership in a Kantian theory of right does not preclude communal ownership, we can focus on determining what rightful allocation must look like.

## II. THE POSTULATE OF PRACTICAL REASON WITH REGARD TO RIGHTS

In explicating his theory of property, Kant distinguishes two forms of possession. Kant defines empirical possession as '*physical* possession,' and contrasts it with intelligible possession, which he defines as '*a merely rightful* possession of the same object' (MM 6: 245). When a person intelligibly possesses a thing, she retains her right to it even when she does not physically possess it—an object remains hers even when she sets it down.

Kant argues that rightful ownership (intelligible possession) of objects must be possible. He identifies this conclusion as his postulate of practical reason with regard to rights. In support of this postulate, Kant first argues that the choice to use objects is formally consistent with others' freedom—there is nothing inherent in the use of objects that is necessarily inconsistent with others' freedom. Kant then argues that this possibility of rightful use is inconsistent with a hypothetical law of freedom holding that no one may rightfully own anything. So, since rightful use is possible, rightful ownership must be possible—usable objects must not be put beyond the possibility of being used (MM 6: 250).

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<sup>6</sup> For an interesting article that pushes into issues of justice in allocating objects and beyond from a novel Kantian perspective, see Julius 2016.

Kant's argument here is puzzling. Kant argues that rightful use must be possible, and so concludes that rightful ownership must be possible. Why, though, should we think that rightful use could not be possible without rightful ownership? Intuitively, it seems that such use would be possible: people could rightfully use any objects not currently being used by others, even though they would lose all claim to those objects as soon as they put them down. In other words, it seems that people could rightfully use objects in a condition of merely empirical (physical) possession.

What, then, could Kant have been up to in claiming that rightful use is not possible without intelligible possession? We might think that he was just confused and did not envision this obvious possibility, which seems unlikely. Instead, we might think that Kant understood rightful use to be more than mere physical use, and it is this richer sense of use that is impossible without intelligible possession.

### III. MEANINGFUL USE

What could this richer sense of use be? We know that this richer sense of use is the sense of use that is made possible by intelligible possession. Here, I will first describe a condition of merely empirical possession and the possibility of use in this condition. Then, I will contrast this condition with a condition that includes intelligible possession. This contrast illuminates the sense of use made possible by intelligible possession, allowing us to understand Kant's argument for his postulate. My aim in this section is only to describe this richer sense of use. In the next section, I will articulate the connection between this richer sense of use and freedom.

In a condition of merely empirical possession, no one has a right to any object other than those she physically possesses.<sup>7</sup> If someone physically possesses an object, her right to use it is protected insofar as my interfering with her use of it would interfere with her person (*MM* 6: 247-48). Beyond this, however, the use of objects is not protected—one's right to an object terminates as soon as she sets it down. This system seems to straightforwardly allow for the possibility of using objects: one can pick up and make use of any object that is not currently physically possessed by others.

Though mere physical use is possible, the conditions of this use are extremely restricted. Aside from continuous physical possession of an object, one cannot initiate a rightful relationship regarding an object such that that object will rightfully be available for use in the future. So, whether one will be able to carry out any project involving objects at any time will necessarily be dependent on others' whims. Any time you set an object down, you could lose it for good.

Human projects have the potential for great complexity. We can set complex ends involving the intermittent or delayed use of external objects of choice. Even our mundane actions, such as cooking dinner, often exhibit this complexity. In a condition of merely empirical possession, the range and complexity of human projects one can rightfully undertake is severely limited.<sup>8</sup>

Adding the possibility of intelligible possession eliminates this restriction on the complexity of the projects that one can engage in. If a person can have a right to an object

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<sup>7</sup> This condition is similar to a regime of usufruct. While these regimes might differ in some ways, a system of usufruct includes the same essential flaw exhibited by the condition of merely empirical possession.

<sup>8</sup> One could imagine beings who have no inclination to set objects down, such as kangaroo-like beings with giant pouches in which they carry all objects they wish to use in life. So long as they are capable of setting objects down, though, the range of projects they can engage in is still rightfully restricted.

even when she sets it down, then she can engage in complex projects involving those objects she has a right to, secure in her continued right to use those objects.<sup>9</sup>

So, intelligible possession secures the possibility of *meaningful use*: a continued right to an object gives one the opportunity to use that object for one's projects, whatever and however complex they may be. When we can intelligibly possess external objects of choice, we can bear relationships to these external objects that extend beyond our ability to physically possess them. Meaningful use, then, is the richer sense of use made possible by intelligible possession that Kant presupposes in his argument for the postulate.

#### IV. MEANINGFUL USE AND FREEDOM

It still must be shown that right actually does require that this richer sense of use be possible. While presumably few would deny that some use of objects must be possible, many might be content to stop there. So long as physical use is possible, we have objects available for our purposes. Why would anything more than merely physical use be necessary? Here, I set about answering this question.

The foundation of Kant's theory of right is the innate right to freedom, from which all other rights are derived: ‘[f]reedom, (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity’ (MM 6: 237). I follow Ripstein in understanding the innate right to freedom as protecting ‘purposiveness—your capacity to choose the ends you will use your means to pursue’ (2009:

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<sup>9</sup> Natural contingencies could still make the continued use of those objects impossible; for example, a crack could open up in the earth and swallow up my gourmet dinner. However, such natural contingencies are not governed by right, which governs relationships of choice between people.

34). The right to freedom secures the external exercise of this capacity from interference by others.

The fundamental principle of Kant's theory of right is his universal principle of right: 'Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law.' (*MM* 6: 230). Kant's theory exhaustively divides all actions into the categories of right and wrong: if an action or condition violates the freedom of others, it is wrong and prohibited; if it does not, it is right (*MM* 6: 230).

I argue that restricting the rightful possession of objects to merely empirical possession would constitute an unjustifiable restriction of freedom. In such a condition, no one could secure the right to use objects for any project where she would need to set them down. As a factual matter, this would seemingly severely restrict the range of human projects and activities. More importantly from a Kantian perspective, though, this condition would arbitrarily restrict freedom.

In general, as rational beings who must set ends for ourselves in the world, we take ourselves to be related to the means to those ends such that those ends could be carried out. As Kant writes in the *Groundwork*, a means contains 'the ground of the possibility of an action the effect of which is an end' (*GW* 4: 427). Fundamentally, we take ourselves to be related to the means to our ends intelligibly: for a person to conceive of certain things as her means is for her to see herself as related to those means such that she can use them to pursue her end. This relationship extends beyond a person's physical relationship with an object.

In the sphere of right, we use our external freedom to pursue projects. To undertake particular projects, we seek to use external objects to carry out those projects. To have a

right to use an object to pursue a given project just is to have a secure right to the use of that object sufficient to allow that project to be carried out. As in the ethical sphere, this relationship we must bear to external objects is essentially intelligible rather than physical: to have a right to use an object is to have a right to use it to carry out projects.

In a condition of merely empirical possession, we can secure the right to pursue only those projects that do not require setting down the objects we are using to pursue them. While we could attempt to pursue other projects, we cannot secure a right to pursue them—our pursuit of them will necessarily be dependent on the contingent choices of others. Because of the relationship we fundamentally conceive of ourselves as being in with regard to those objects we would use to pursue our projects, this condition restricts the range of projects that we can rightfully undertake to those projects that do not require setting objects down. One cannot secure a right to use objects to pursue any other project.

This restriction of the range of projects that can be undertaken is an unjustifiable restriction of freedom.<sup>10</sup> Since the universal principle of right prohibits only those actions that constrain the freedom of others, the only rightful limitation on the range of projects we can rightfully undertake is the prohibition of pursuing projects that constrain the freedom of others. Projects that involve setting objects down do not necessarily constrain the freedom of others. Since this is so, it should be possible for one to rightfully engage in such projects. So, *meaningful use* must be possible: it must be possible for external objects to be rightfully used in one's projects, even those projects that require setting objects down and picking

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<sup>10</sup> As Louis-Phillipe Hodgson argues, a system of merely empirical possession ‘unjustifiably restricts my external freedom, because there is no reason why my having only two hands (to name only one obvious physical limitation) should determine what means I can rightfully secure for myself’ (2010: 60).

them up again. No project that is consistent with the freedom of others can be rightfully precluded.<sup>11</sup>

## V. MEANINGFUL USE AND COMMUNAL OWNERSHIP

I have argued that Kant's argument for his postulate gives rise to a standard of *meaningful use*: external objects must be available for use in our projects, whatever those projects may be. Any property system that does not secure this possibility will arbitrarily restrict our freedom to engage in our projects. So, if a regime of ownership does not secure the possibility of meaningful use, it will be inconsistent with freedom.

Throughout his discussion of property rights, Kant focuses almost exclusively on private ownership. For example, in arguing for his postulate of practical reason with regard to rights, he asserts that we must treat any object 'as something which could be objectively *mine or yours*', (MM 6: 246, emphasis added) a turn of phrase he uses repeatedly and which suggests that he thinks of ownership as exclusively private. His account of legitimate original acquisition also suggests that he has only private acquisition in mind.<sup>12</sup> It is therefore understandable to interpret Kant as defending a regime of private property ownership.

While there are some indications that Kant viewed some more encompassing forms of communal ownership as rightful,<sup>13</sup> again, my goal here is not to dispute this interpretation

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<sup>11</sup> This is not to say, of course, that all rightful projects must be made *actually* possible—that individuals must have the opportunity to carry out any and all projects they want to carry out.

<sup>12</sup> Kant's account of original acquisition has three aspects: first, a person must apprehend an object (take physical possession of it); second, that person must give a sign that she has taken control of that object and of her 'act of choice to exclude everyone else from it'; third, the general will must give a law that appropriates that object to that individual (MM 6: 258-59).

<sup>13</sup> For instance, Kant seems to acknowledge the possibility of rightful communal ownership of the land. In discussing some casuistical questions regarding the ownership of land, Kant acknowledges the rightful consequences of possession that follow in what appears to be a system of communal ownership of land (MM 6:265). Furthermore, in discussing the duties of the sovereign as the supreme proprietor of the land, Kant asserts that '[a]ll land belongs only to the people (and indeed to the

of Kant.<sup>14</sup> Instead, I wish to argue that despite Kant's own focus on private ownership, the argument that Kant gives for his postulate is also compatible with communal ownership. A system of communal ownership can allow for the meaningful use of external objects of choice, and so can satisfy the standard that arises from Kant's argument for the postulate. Of course, there might be other reasons to question the compatibility of communal ownership with Kant's theory of right. I will respond to such concerns later on. Here, I seek to establish only that a system of communal ownership allows for the meaningful use of external objects.

At first glance, this might not seem to be a controversial claim. Jurisprudence is replete with examples of things that are thought to be ‘too “public” to be parceled out into private ownership’ (Merrill 2007: 308). For example, under Roman law, it was held that a law of nature made air, flowing water, oceans, and the ocean shores common to all (Justinian 1928: 2.1.1-5). These objects are both communally controlled and governed communally. My claim here, though, is not merely that the communal ownership of *some* objects can be rightful. Instead, I argue that a *fully* communal system of property rights can be rightful with respect to the meaningful use standard.

Again, in making this claim I am relying on the specific understanding of communal ownership described above. This regime is a regime of communal ownership in the sense that all citizens govern together the allocation of all external objects. They collectively own all external objects, including land and the means of production, and so decide collectively how to allocate them for use. Private and communal *control* of objects is possible within this system, as is control by smaller groups of varying sizes. When an object is allotted to a

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people taken distributively, not collectively), except in the case of a nomadic people under a sovereign, with whom there is no private ownership of land’ (MM 6:324).

<sup>14</sup> For a more in-depth discussion of how many Kant's own stated views concerning property relate to the conclusions I draw here, see David James' illuminating alternative argument for the conclusion that Kantian principles of right do not necessitate private ownership (2016).

person or group, the entity's use of that object is rightfully protected and others are not permitted to interfere.

I argue that the meaningful use of objects is possible under such a regime of communal ownership. The meaningful use standard requires that it be possible for external objects to be available for all rightful projects: projects that do not violate the freedom of others cannot be rightfully precluded. All rightful projects will be possible under a communal ownership regime of this sort. As just noted, private control is possible within this system: objects that are owned by the community can be allocated to individuals for their exclusive possession and use. Since private, group, and fully communal control of objects can be rightfully secured within this system, any project of any complexity could in principle be undertaken (provided, of course, that the project does not violate the rights of others).

Introducing the element of communal ownership does not restrict the uses that objects could be subjected to. Even though property is communally owned, objects such as food and other consumables would frequently be allotted to individuals for destruction through use. Furthermore, communal ownership does not entail that the possession of objects be limited in time. We could imagine, for example, that objects such as residences might be allotted on a lifetime basis, or at least that your right to your residence would persist until you decide to leave it. And when an object is allotted to a given person, that use will be secured from the interference of others. So, the possibility of meaningful use is secured, as one can secure the right to intelligibly possess objects that are required to undertake any rightful project.

One might argue that not all rightful projects are rightfully possible under such a regime, and so such a communal ownership regime would violate the meaningful use

standard and therefore arbitrarily restrict freedom. Specifically, one might note that a regime where all allocation is communal would preclude the buying and selling (market transfer) of external objects and argue that this would constitute an arbitrary restriction of citizens' choice. However, any property regime must specify rightful methods of acquiring objects. The choice of one method (or combination of methods) will inevitably preclude the adoption of any other possible method of acquiring objects. So, that communal ownership precludes a certain form of exchange does not entail a violation of freedom. Under this regime of communal ownership, the allocation of objects is controlled via collective governance, and buying and selling may not be possible. However, under a regime of private ownership, collective governance of the allocation of resources will be precluded. Neither choice constitutes, for this reason at least, an unjustifiable restriction of freedom.

One might further argue that a regime of communal ownership could allocate specific objects to particular individuals for specific uses. One might then object that if it did so, such a regime would restrict the choice of those individuals to use those objects for whatever purposes they see fit, thereby violating their freedom as well as the meaningful use standard.

This objection depends on the assumption that rights must be held with regard to external objects as such—that if one is to have a right to an object, then anything less than unlimited control of that object will violate one's freedom of choice with regard to it. Even if it were true that control of external objects rightfully must consist in unlimited control of those objects as such, this could still be consistent with the form of communal ownership at issue here. This sort of regime does not necessarily entail the allocation of objects only for specific uses for limited periods of time. If the control of objects must be total, the allocation of these objects could still be carried out communally. Though the question of

whether unlimited (or, for that matter, limited) control of objects must be possible remains open, either answer will be compatible with communal ownership as it is defined here.

Furthermore, it is worth noting that limited rights of this sort are not a distinguishing feature of communal ownership regimes. For example, under a private property regime, I might lease an apartment and so obtain a right to live in that apartment, but not a right to paint its walls or demolish it. Further, this lease might be limited to the term of one year. This is an example of just this sort of limited right—a right to use a specific object only for specific purposes and for a limited period of time.

## VI. COMMUNAL OWNERSHIP AND FREEDOM

I have argued that communal ownership is compatible with the standard of meaningful use that arises out of Kant's argument for his postulate, a standard that I argued is grounded in the innate right to freedom. Even if communal ownership is consistent with this demand of freedom, however, one might still argue that it is inconsistent with the innate right to freedom for other reasons. In this section, I will present and respond to objections of this sort.

### i. Communal Allocation and Freedom

One might argue that certain ways of allocating objects restrict citizens' freedom. The operative intuition here might be that the choice of the community itself in deciding whether or not to allocate objects could be arbitrary, and so the community's decision will violate my freedom. One might argue that when I am subject to the will of the community in order to secure the rights to any objects that I wish to acquire, the community's decision not to provide me with those objects arbitrarily restricts my choice to pursue those projects that I would have used those objects to pursue.

This objection undeniably raises issues of great importance: Who should determine who gets what, and how should this determination be made? Are there any objects we should each have a right to access, making any interference with this access wrongful? All of these issues, though, are beyond the scope of this paper. This objection concerns access to objects that individuals do not own. One's ownership rights are not violated when one is denied access to objects that one does not own, as those objects are *per se* objects that one does not have such a right to. Just as in a private ownership system my ownership rights are not violated when no one wants to sell me a particular car, my ownership rights are not violated in a communal ownership system when the community does not allocate a particular car to me. Though freedom may for other reasons require that individuals have access to certain objects or to all objects on certain terms, these answers do not follow from the nature of ownership itself. As the focus of this paper is on ownership rights, these questions are beyond this scope.

Of course, these questions must be answered to give a full Kantian account of socioeconomic justice. Here, I have set these issues aside to focus on determining whether the nature of ownership itself precludes communal ownership. I argue that it does not. In making this argument, I aim to clear space within Kant's theory of right for consideration of these further questions. I do not presuppose any answers to these further questions here.

Finally, though for the reasons given above I cannot address the issue fully here, it is worth noting that private ownership systems will face a challenge analogous to the objection above: under a regime of private ownership, my choice does not determine who gets what. Presumably, such regimes will be accompanied by a system of market transfer. When one must buy and sell her objects in order to transfer the rights to them, her choice is dependent on the wills of others who must choose whether to sell or buy those objects. In addition, her

choices are also dependent on market forces. Insofar as a person's ability to acquire objects is dependent on such forces and the choices of others to buy and sell, such a system will not involve self-government of access to objects. Furthermore, communal ownership may offer a possible solution to this problem that private ownership cannot.<sup>15</sup>

## ii. Communal Ownership and Acquisition

One might also argue that issues relating to original ownership render communal ownership incompatible with freedom. Here, I will consider two categories of objections of this sort.

### Communal Authority

In order for communal ownership as I have imagined it to be rightful, the community must have the authority to control the allocation of all objects that are taken to be a part of the community. So, even if such a system of communal ownership would secure the possibility of meaningful use, such a system will fail to be rightful unless the community does possess this authority.

I argue that Kant's discussion of the sovereign as supreme proprietor of the land provides a good model for understanding why the state must take itself to have this authority.<sup>16</sup> On this view, if we are to establish property rights that specify how land can rightfully be acquired and owned, then we must take ourselves to have the authority to

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<sup>15</sup> It is true that under a communal property regime, others will have input into what objects I have access to. However, others do not have complete control over this access—as a citizen, I also have an equal voice in governing which objects I have access to and in governing which objects all others can access. Thus, a communal property regime involves self-government of access to objects.

<sup>16</sup> According to Kant, acquired rights to the ‘possession and use’ of objects ‘must be derived from the sovereign as...the supreme proprietor’ of the land (*MM* 6: 323). This idea of the sovereign as the supreme proprietor of the land is ‘an idea of the civil union’ that allows us to represent ‘the necessary union of the private property of everyone within the people under a general public possessor’ (*MM* 6:323). The sovereign as supreme proprietor of the land embodies this general public possession and derives from it the authority to legislate concerning the possession and use of objects, as well as the right to tax private ownership (*MM* 6: 325).

control the use of the land we are legislating with regard to—we must take ourselves to collectively own that land, as having the right to control the use of an object is just to own that object. Kant discusses the necessity of innate common possession when he argues that

*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 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... 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. (MM 6: 261).

Although Kant's argument regarding land involves some commitments that are puzzling<sup>17</sup>, the general principle underlying this argument is illuminating. If we are to govern the use of objects, we must take ourselves to have the right to do so. Since establishing laws that govern the use of objects in the entire state can only be made by the state collectively (understood as embodying the general will of the people),<sup>18</sup> we must take ourselves to have collective control of all external objects that the state legislates with regard to.<sup>19</sup> So, this authority that we must take ourselves to have is the authority to govern the use and ownership of objects collectively, which is just the authority needed to put in place a regime of communal ownership.<sup>20</sup>

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<sup>17</sup> We might wonder, for example, whether we must really take the state to necessarily have territory in the form of land. We might also be puzzled by Kant's thoughts on the connection between ownership of the land and ownership of all of the material objects on that land. See, for example, MM 6: 261-62.

<sup>18</sup> According to Kant, we cannot be bound unilaterally—one person cannot impose obligations unilaterally on others. Instead, we can only be bound by an omnilateral will—the combined will of all (MM 6: 263).

<sup>19</sup> As Leslie Mulholland argues, '[o]ne of the main features of innate common possession, especially for a theory of social justice, is that it demonstrates that all private ownership presupposes collective ownership of land and all particular claims to (private) acquired rights must be derived from collective possession through a general will.' (1990: 273-74).

<sup>20</sup> Note that in this sense, all ownership regimes set up within a Kantian system, whether private or communal, will involve this element of communal control. Importantly, my argument here is not simply that communal ownership in this very weak original sense is rightful within a Kantian system. Instead, I argue here that it is rightful to use this original communal authority to establish a fully communal property regime of the sort described above.

### Presumption of Private Ownership?

One might argue, though, that even if we as a society do have the authority required for the establishment of a communal ownership regime to be rightful, there are other reasons to think that there should be a presumption in favor of private ownership. Here, I will discuss two related concerns of this sort.

First, one might argue that original acquisition must be private, and so property rights must include private property rights. Prominently, Kant's own account of original acquisition seems to take it for granted that original acquisition must be private.<sup>21</sup> He sets out a three-step process of original acquisition: first, one must apprehend an object, meaning she must take physical possession of it; second, that person must give a sign that she has taken control of that object and so has acted to exclude everyone else from it; and third, the general will must give laws that bind everyone to this individual's choice (*MM* 6: 258-59). On this view, original acquisition is private, and it may seem that when an individual completes the first two steps of acquisition, the community is bound to make laws that make such an individual's presumptive acquisition rightful.

I argue, though, that any such account of original acquisition rests on a fundamental error: such accounts fail to recognize that ownership relationships are necessarily legally constructed by society and so are not *natural* in the way such accounts seem to assume they must be. Granted, physical (empirical) possession does naturally establish a relationship of right that others must not interfere with: if you disrupt my rightful physical possession of an object, you interfere with my innate right to my own body. However, no individual's interaction with an object can establish *intelligible* (merely rightful) possession of an object.

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<sup>21</sup> Ripstein, in interpreting Kant's theory of property, also argues that shared ownership must be a 'derivative case, because it presupposes the idea of exclusive ownership' (2009: 67 fn 14, citing *MM* 6:251).

Any natural law account that specifies a certain interaction with an object as naturally establishing ownership of that object will necessarily be arbitrary.<sup>22</sup> Why privilege one interaction with an object over any other as the one form of interaction that naturally establishes ownership? Should I own an object when I look at it? Name it? Get close to it? Touch it? Labour on it? Or should I own an object when I physically possess it and then give a sign that I intend to exclude all others from it? No such relationship with an object of this sort suffices to create any natural metaphysical connection to an object sufficient to ground a claim of natural ownership.

Kant himself seems to recognize this when he criticizes the arbitrariness of a Lockean account of acquisition:

Moreover, in order to acquire land is it necessary to develop it (build on it, cultivate it, drain it, and so on)? No. For since these forms (of specification) are only accidents, they make no object of direct possession and can belong to what the subject possesses only insofar as the substance is already recognized as his. (MM 6: 265)<sup>23</sup>

Labouring on land is an ‘accident’—it is something that one can do with land, but it is morally arbitrary and does not establish a rightful relationship of ownership to an object. Although Kant understands the mistake Locke makes, he fails to recognize that a similar criticism applies to the account of acquisition he sets out. Although possession does establish a relationship regarding an object<sup>24</sup> for as long as that object is held, that

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<sup>22</sup> As Rousseau notes, ‘The first man who, having enclosed a piece of ground, to whom it occurred to say *this is mine*, and found people sufficiently simple to believe him, was the true founder of civil society.’ (1997: 161).

<sup>23</sup> Later, Kant further develops this criticism, arguing that ‘The first working, enclosing, or, in general, transforming of a piece of land can furnish no title of acquisition to it; that is, possession of an accident can provide no basis for rightful possession of the substance.’ (MM 6: 268).

<sup>24</sup> Again, on Kant’s theory of property, property rights are relationships between people regarding objects rather than relationships between people and objects themselves. In this way, Kant’s view is importantly different from Locke’s. Still, an analogous criticism goes through: the accident of empirical possession of an object will not naturally create a property right between citizens regarding that object.

relationship is an accident in exactly the same way that labouring on an object is. A relationship of temporary physical possession does not naturally transform itself into a relationship of intelligible possession that persists after the physical relationship ends. Just as labouring on an object is labour wasted unless that object is already yours, physical possession is incidental to whether a relationship of intelligible possession exists.

The relationship of rightful acquisition must be specified by society, and that relationship has rightful consequences because society has made it so. As a result, acquisition need not be private unless society decides to make it so.

A second objection, though, relates to this first: one might argue that provisional rights must be private, and since this is so, society should create a regime of private ownership to be consistent with these provisional rights.<sup>25</sup> For Kant, a provisional right is the relationship an individual can bear to others regarding external objects of choice in the absence of a civil condition (*MM* 6: 264). Since there is no omnilateral will in the absence of a state, conclusive property rights cannot be established, and those property rights that would be conclusive if there were a state can only be provisional. According to this objection, provisional rights are established in the absence of a civil condition; since there is no omnilateral willing in the absence of a civil condition, there can only be private rights in such a condition; so, in order for a society to establish a regime of property law that is consistent with these provisional rights, it must establish a regime of private ownership.

This objection rests on a misunderstanding of the nature of provisional rights. On this view, a provisional right is akin to a weak natural right regarding an object: if I have a

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<sup>25</sup> Kant makes some statements that suggest that he might hold such a view. For example, he asserts that ‘the way to have something 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 hold *comparatively* as rightful possession’ (*MM* 6: 257). Insofar as Kant himself does endorse such a picture of provisional rights, I think this view is mistaken for the reasons I discuss in rejecting this objection.

provisional right to a particular apple, I have a presumptive private property right concerning that apple that need only be approved by society to become a conclusive right. Provisional rights, however, cannot be weak natural rights to objects. Because there is no omnilateral will in the state of nature, attempts to impose a property right to an object on others could only be unilaterally willed. And unilateral wills cannot bind others. Unilateral imposition of obligations on others would violate those others' freedom: one person cannot unilaterally decide for all others that new obligations for them come into being, as to do so would be to impose her will on others and restrict their choice without their consent.<sup>26</sup> So, provisional rights are not binding rights, and the government therefore will not violate any binding rights when it establishes a communal ownership regime.

Instead of thinking of provisional rights as weak natural rights, provisional rights are more appropriately thought of as claims to adjudication with regard to particular objects. For the reasons given above, a provisional right cannot be a claim right to a particular object—such a unilateral imposition would violate others' freedom. Instead, provisional rights are akin to claims to determination and settlement of rights with regard to particular objects. If I take control of an object in the absence of a state, no one can take that object from me rightfully until there is intervention by the state—the only way we can settle the question of which objects belong to whom is to enter into a rightful condition and establish property laws.<sup>27</sup> Since ownership must be rightfully possible, we have a claim against all others that

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<sup>26</sup> As Kant puts it, '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.' (MM 6: 256).

<sup>27</sup> Kant suggests such a line of argument when he argues that 'the possibility of acquiring something external in whatever condition people may live together (and so also in a state of nature) is a principle of private right, 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 into the civil condition, which alone can make acquisition conclusive' (MM 6: 264).

they enter with us into the state so that this determination can occur (MM 6: 307-08). So, provisional rights do not necessitate a regime of private ownership.

### iii. Communal Ownership and Free Use

In *Force and Freedom*, Ripstein argues that freedom requires private ownership. To establish this conclusion, he argues that it follows from Kant's argument for the postulate 'that the only way that a person could have an entitlement to an external object of choice is if that person had the entitlement formally, because having means subject to your choice is prior to using them for any particular purpose' (2009: 62). He then argues that 'the exercise of acquired rights is consistent with the freedom of others, because it never deprives another person of something that person already has' (2009: 62). From these premises he concludes, 'anything less than fully private rights of property, contract, and status would create a restriction on freedom that was illegitimate because based on something other than freedom' (2009: 62).

Since Ripstein's intent here is not to give an argument for private ownership as opposed to communal ownership, the grounds for his objection to communal ownership are somewhat difficult to discern. I believe the key to understanding the force of Ripstein's objection to communal ownership lies in the connection between property rights and individual autonomy. In order for an individual to be able to set an end for herself, she must take herself to have available the means to pursue that end.<sup>28</sup> For a person to be able to set private ends for herself, then, she must have private control over the means to those ends. A regime of communal ownership could be understood as preventing the setting of private ends—if all objects are communally owned, then I am always dependent on the contingent

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<sup>28</sup> As Ripstein asserts, '[i]n order to set an end for yourself, that is, to take it up as an end that you pursue, you must take yourself to have the power to achieve it'; so, 'whether you can adopt a particular end will depend upon the powers and means you have at your disposal' (2009: 66).

choices of all other members of the community in order to be able to carry out my private ends. As Ripstein asserts, ‘If I am to be the one who sets ends for myself, I must have means fully at my disposal, so that I am the one who decides which purposes to use them for.’ (2004: 9). According to this objection, communal ownership precludes the possibility of setting private ends—only communal ends can be carried out without dependence on the choices of others. Communal ownership, then, involves an unjustifiable restriction of freedom as it formally restricts the set of ends that can be pursued to exclude private ends.<sup>29</sup>

To see the force of this objection, consider an example: suppose you would like to make yourself a mushroom omelet (Ripstein 2009: 91). To make yourself such an omelet, you will need multiple ingredients. Let us further suppose that you lack the dexterity necessary to physically possess all of these ingredients and tools at the same time—during the making of your omelet, you will need to set some of them down. As Ripstein argues, if you did not have a private right to the possession of these ingredients, ‘someone else would be entitled to take the eggs you had gathered while you were sautéing the mushrooms, and you would not be entitled to do anything to stop her. Your entitlement to set and pursue purposes would thus depend on the particular choices made by another.’ (2009: 91). To set a private end, then, one must have a right to the means necessary for the pursuit of that end. On this view, if private ownership is impossible, then so is the setting of private ends.

This objection holds considerable force and does seem to constitute legitimate grounds for rejecting many conceivable regimes of property ownership that could in some sense be described as communal. To formally restrict the ends that could be rightfully set to exclusively public ends would constitute an unjustifiable restriction of freedom. However,

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<sup>29</sup> Loren Lomasky makes a similar claim, arguing that private property ownership is required for individuals to be able to pursue their private projects, which he takes to be of fundamental value (1987).

the communal ownership regime that I have described here is structured in such a way that it is compatible with the setting of private ends. To set private ends, I merely require the rightful private control of the objects necessary for the pursuit of that end. This is possible within the communal ownership regime I have described: so long as the rightful use of objects can be securely allocated to particular individuals for given periods of time, the pursuit of private ends will be possible.<sup>30</sup>

Consider again the mushroom omelet. In a regime of communal ownership of the sort under consideration, the community can allocate the exclusive control of the materials necessary for the production of your mushroom omelet to you. You can make (and eat) your omelet rightfully free from the interference of the contingent choices of others. So long as a regime of communal ownership is structured to permit the individual control of material objects of choice, it will be compatible with the setting of private ends. As noted in the first section, this level of individual control might lead some to characterize this regime of ownership as a private property regime. Regardless of whether we call this a system of property private, if such a system is consistent with Kantian freedom, this will certainly constitute an important expansion of the class of possible rightful ownership regimes within a Kantian framework.

## VII. CONCLUSION

Here, I have argued that a regime of fully communal ownership is consistent both with the meaningful use standard that arises from Kant's argument for his postulate and with

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<sup>30</sup> Korsgaard seems to have this in mind in arguing that Kant's view 'does not establish the necessity of "private property" in any controversial sense; it establishes only that the means of production and action must be reserved to the exclusive use of certain individuals in certain times and places...[T]he means of production might be communally owned and "lent out" to particular users' (2009: 238 fn 7).

the innate right to freedom more generally. I further argued that communal ownership is consistent with Kantian views on original acquisition and provisional rights. Contrary to Kant's own apparent presumptions, these Kantian principles do not preclude the rightful possibility of communal ownership. Further exploration of the rightful possibility of such a communal ownership regime can and should be undertaken.

And the rewards of such exploration could be considerable—the possibility of communal ownership brings with it the possibility of a wide range of social and economic regimes. Questions concerning what justice requires with regard to who gets what and on what terms they should get it can now be posed within a Kantian framework: What level of control are we as citizens rightfully required to have over the mechanisms of allocation? Which systems of exchange are compatible with Kantian freedom, and how should we choose between acceptable alternatives? What restrictions are there on what we might choose? For example, which objects, such as the means of subsistence<sup>31</sup>, must citizens have a right to access? Though some of these questions have received substantial attention from Kantians, recognizing the compatibility of Kantian freedom with alternative regimes of ownership and exchange opens up space for more creative consideration of these issues.

Beyond inviting further consideration of these issues within a Kantian framework, this Kantian perspective can provide a meaningful contribution to consideration of these issues generally. Whether these economic and property regimes unjustifiably restrict freedom is a question of undeniable importance. The Kantian idea of freedom can help us answer it.

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<sup>31</sup> Kant himself discusses state provision of the means of subsistence to the poor (*MM* 6: 325-26). In addition, many Kantians argue that within a Kantian rightful condition individuals must have access to the means of subsistence (or more). For example, Allen Wood makes such an argument (2008), as do Arthur Ripstein (2009: 267-299) and many others.

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