

Kant  
*The Metaphysics of Morals*

Private right, chapter II, section II, On  
contract right

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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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own initiative' (for then it would not conform to the principle of the consistency of my choice with the freedom of everyone, and would therefore be wrong). So too, I cannot acquire a right against another through a deed of his that is *contrary to right (facto iniusto alterius)*;<sup>5</sup> for even if he has wronged me and I have a right to demand compensation from him, by this I will still only preserve what is mine undiminished but will not acquire more than what I previously had.

Acquisition through another's deed to which I determine him in accordance with laws of right is, accordingly, always derived from what is his; and this derivation, as an act that establishes a right, cannot take place through a *negative* act of the other, namely his *abandoning* or *renouncing* what is his (*per derelictionem aut renunciationem*); for by such an act this would only cease to belong to one or the other, but nothing would be acquired. This derivation can take place only by *transferring* (*translatio*), which is possible only through a common will by means of which the object is always under the control of one or the other, since as one gives up his share in this common undertaking<sup>6</sup> the object becomes the other's through his acceptance of it (and so by a positive act of choice). – Transfer of the *property* of one to another is *alienation*. An act of the united choice of two persons by which anything at all that belongs to one passes to the other is a *contract*.

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#### § 19.

For every contract there are two *preparatory* and two *constitutive* rightful acts of choice. The first two (of *negotiating*) are *offering (oblatio)* and *assent (approbatio)* to it; the two others (of *concluding*) are *promise (promissum)* and *acceptance (acceptatio)*. – For an offering cannot be called a promise apart from a preliminary judgment that what is offered (*oblatum*) would be *acceptable* to the promisee. This is indicated by the first two declarations, but by them alone nothing is as yet acquired.

But what belongs to the promisor does not pass to the promisee (as acceptant) by the *separate* will of either but only by the *united will* of both, and consequently only insofar as both wills are declared *simultaneously*. But this cannot take place by empirical acts of declaration, which must necessarily *follow* each other in time and are never simultaneous. For if I have promised and the other now wants to accept, I can still during the interval (however short it may be) regret having promised, since I am still free before he accepts; and because of this the one who accepts it, for his part, can consider himself as not bound to his counterdeclaration after the promise. – The external formalities (*solemnia*) in concluding a contract (shaking hands, or breaking a straw, *stipula*, held by both persons), and all

<sup>1</sup> owner of the use

<sup>2</sup> *Gemeinschaft*

<sup>3</sup> act unjustly to another

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the confirmations back and forth of the declarations they have made, manifest the perplexity of the contracting parties as to how and in what way they are going to represent their declarations as existing *simultaneously*, at the same moment, although they can only be successive. They still do not succeed in this since their acts can only follow each other in time, so that when one act *is* the other is either *not yet* or is *no longer*.

Only a transcendental deduction of the concept of acquisition by contract can remove all these difficulties. It is true that in an external relation of *rights* my taking possession of another's choice (and his taking possession of mine in turn), as the basis for determining it to a deed, is first thought of empirically, by means of a declaration and counterdeclaration of the choice of each in time; this is the sensible condition of taking possession, in which both acts required for establishing the right can only follow one upon another. Since, however, that relation (as a rightful relation) is purely intellectual, that possession is represented through the will, which is a rational capacity<sup>u</sup> for giving laws, as intelligible possession (*possessio noumenon*) in abstraction from those empirical conditions, as what is mine or yours. Here both acts, promise and acceptance, are represented not as following one upon another but (as if it were *pactum re initum*) as proceeding from a single *common* will (this is expressed by the word *simultaneously*); and the object (*promissum*) is represented, by omitting empirical conditions, as acquired in accordance with a principle of pure practical reason.

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That this is the true and the only possible deduction of the concept of acquisition by contract is sufficiently confirmed by the painstaking but always futile efforts of those who investigate rights (e.g., Moses Mendelssohn in his *Jerusalem*)<sup>v</sup> to produce a proof of its possibility. — The question was, *why ought I* to keep my promise? for *that I ought* to keep it everyone readily grasps. But it is absolutely impossible to furnish a proof of this categorical imperative, just as it is impossible for a geometer to prove by means of inferences based on reason alone<sup>w</sup> that in order to make a triangle he must take three lines (an analytic proposition), two of which together must be greater than the third (a synthetic proposition, but both propositions are *a priori*). That I ought to keep my promise is a postulate of pure reason (pure as abstracting from all sensible conditions of space and time in what concerns the concept of right). The theory that it is possible to abstract from those conditions without giving up possession of the promise is itself the deduction of the concept of acquisition by contract, just as was the case in the preceding Section for the theory of acquisition of external things by taking control of them.

<sup>u</sup> *Vernunftvermögen*

<sup>v</sup> *Vernunftschlüsse*, which could also be translated "syllogisms"

## § 20.

By a contract I acquire something external. But what is it that I acquire? Since it is only the causality of another's choice with respect to a performance he has promised me, what I acquire directly by a contract is not an external thing but rather his deed, by which that thing is brought under my control so that I make it mine. – By a contract I therefore acquire another's promise (not what he promised), and yet something is added to my external belongings; I have become *enriched*<sup>w</sup> (*locupletior*)<sup>x</sup> by acquiring an active obligation on the freedom and the means<sup>y</sup> of the other. – This right of mine is, however, only a right *against a person*, namely a right against a *specific* physical person, and indeed a right to act upon his causality (his choice) to *perform* something for me; it is not a *right to a thing*, a right against that *moral person* which is nothing other than the idea of the *choice of all united a priori*, by which alone I can acquire a *right against every possessor of the thing*, which is what constitutes any right to a thing.

Transfer by contract of what is mine takes place in accordance with the law of continuity (*lex continuū*), that is, possession of the object is not interrupted for a moment during this act; for otherwise I would acquire, in this condition, an object as something that has no possessor (*res vacua*), hence would acquire it originally, and this contradicts the concept of contract. – Because of this continuity, however, that which transfers what is mine to the other is not one of the two separate wills (*promittentis et acceptantis*),<sup>z</sup> but their united will. So the transfer does not take place in such a way that the promisor first abandons (*derelinquit*) his possession for the other's advantage, or renounces (*renunciat*) his right, and the other immediately takes it up, or the reverse. Transfer is therefore an act in which an object belongs, for a moment, to both together, just as when a stone that has been thrown reaches the apex of its parabolic path it can be regarded as, for just a moment, simultaneously rising and falling, and so first passing from its rising motion to its falling.

## § 21.

In a contract by which a thing is acquired, it is not acquired by *acceptance* (*acceptatio*) of the promise, but only by *delivery* (*traditio*) of what was promised. For any promise has to do with a *performance*, and if what is promised is a thing, the performance can be discharged only by an act in which the promisor puts the promisee in possession of the thing, that is, delivers it to him. So before the thing is delivered and received, the performance has

<sup>w</sup> *vermögender*<sup>x</sup> *Vermögen*<sup>y</sup> richer<sup>z</sup> promising and accepting

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not yet taken place: the thing has not yet passed from one to the other and so has not been acquired by the promisee. Hence the right that arises from a contract is only a right against a person, and becomes a right to a *thing* only by delivery of the thing.

A contract that is immediately followed by delivery (*pactum re initum*) excludes any interval between its being concluded and its being discharged and requires no further separate act by which what belongs to one is transferred to the other. But if a (definite or indefinite) time for delivering the thing is allowed between the conclusion and the discharge of the contract, the question arises whether the thing already belongs to the acceptor by the contract, prior to its being delivered, and his right is a right to the thing, or whether a separate contract having to do only with its being delivered must be added, so that the right acquired by mere acceptance is only a right against a person and becomes a right to a thing only by its being delivered. – That the latter is really the case is clear from the following.

If I conclude a contract about a thing that I want to acquire, for example, a horse, and at the same time put it in my stable or otherwise in my physical possession, it is then mine (*vi pacti re initi*),<sup>a</sup> and my right is a *right to the thing*. But if I leave it in the seller's hands, without making any separate arrangements with him as to who is to be in physical possession of the thing (*holding* it) before I take possession of it (*apprehensio*), and so before the change of possession, then this horse is not yet mine, and what I have acquired is only a right against a specific person, namely the seller, *to put me in possession* (*poscendi traditionem*), which is the subjective condition of its being possible for me to use it as I please. My right is only a right against a person, to require of the seller *performance* (*praestatio*) of his promise to put me in possession of the thing. Now if a contract does not include delivery *at the same time* (as *pactum re initum*), so that some time elapses between its being concluded and my taking possession of what I am acquiring, during this time I cannot gain possession without exercising a separate act to establish that right, namely a *possessory act* (*actum possessorium*), which constitutes a separate contract. This contract consists in my saying that I shall send for the thing (the horse) and the seller's agreeing to it. For it is not a matter of course that the seller will take charge, at his own risk, of something for another's use; this instead requires a separate contract, by which the one who is alienating a thing still remains its owner *for a specified time* (and must bear any risk that might affect it). Only if the one who is acquiring the thing delays beyond this time can the seller regard him as its owner and the thing as delivered to him.

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<sup>a</sup> by force of starting the contract regarding a thing

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

### SECTION III. ON RIGHTS TO PERSONS A<sup>b</sup>KIN TO RIGHTS TO THINGS.

#### § 22.

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

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#### § 23.

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

#### *On the right of domestic society*

##### *Title I: Marriage right.*

#### § 24.

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

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

<sup>c</sup> *Weib*

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

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

### *Dogmatic division of all rights that can be acquired by contract*

#### § 31.

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

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

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guarantor and his separate contract with the promisor, but he still gains the means of coercion for obtaining what is his.

In accordance with these principles of logical (rational) division there are, strictly speaking, only three simple and *pure* kinds of contract. There are innumerable mixed and empirical kinds of contract, which add, to the principles of what is mine or yours in accordance only with laws of reason, statutory and conventional ones; but they lie beyond the sphere of the metaphysical doctrine of right, which is all that should be considered here.

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Every contract has for its purpose either A. *unilateral* acquisition (a gratuitous contract) or B. acquisition by both parties (an onerous contract), or no acquisition but only C. guaranteeing what belongs to someone (this contract can be gratuitous on one side but can still be onerous on the other side).

- A. A *gratuitous contract* (*pactum gratuitum*) is:
  - a) *Keeping goods on trust* (*depositum*),
  - b) *Lending a thing* (*commodatum*),
  - c) *Making a gift* (*donatio*).

B. Onerous contracts.

- I. A contract to *alienate something* (*permutatio late sic dicta*).<sup>o</sup>
  - a) *Barter* (*permutatio stricte sic dicta*).<sup>p</sup> Goods for goods.
  - b) *Buying and selling* (*emtio venditio*). Goods for money.
  - c) *Loan for Consumption* (*mutuum*). Lending a thing on the condition of its being returned only in kind (e.g., grain for grain, or money for money).
- II. A contract to *let and hire* (*locatio conductio*).
  - α. *Lending a thing of mine* to another for his use (*locatio rei*). Insofar as the contract is onerous, a *payment of interest* may also be added (*pactum usurarium*) if repayment can be made only in kind.
  - β. A contract of *letting of work* on hire (*locatio operae*), that is, granting another the use of my powers for a specified price (*merces*). By this contract the worker is hired help (*mercennarius*).
  - γ. A *contract empowering an agent* (*mandatum*). Carrying on another's affairs in his place and *in his name*. If someone carries on another's affairs in place of him but not also in his name, this is called *carrying on his affairs* without being *commissioned* to do so (*gestio negotii*); but when this is done in the other's name we speak of a *mandate*. As a contract of hiring this is an onerous contract (*mandatum onerosum*).

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<sup>o</sup> changing (ownership) broadly speaking

<sup>p</sup> changing (ownership) strictly speaking

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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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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.

## A.

§ 37. *On a contract to make a gift.*

In accordance with *private right*, this contract (*donatio*), by which I alienate without remuneration (*gratis*) what is mine, a thing of mine (or my right), involves a relation of myself, the donor (*donans*), to another, the recipient (*donatorius*), by which what is mine passes to the recipient by his acceptance of it (*donum*). – But it is not to be presumed that I intend by this contract to be coerced to keep my promise and so also to give up my freedom gratuitously and, as it were, to throw myself away (*nemo suum iactare praesumitur*).<sup>1</sup> Yet this is what would happen in accordance with right in the civil condition, where the one who is to receive my gift can coerce me to carry out my promise. So, if the matter were to come before a court, that is, in accordance with public right, it would either have to be presumed that the donor consented to this coercion, which is absurd, or else the court in its judgment (verdict) simply takes no account of whether the donor did or did not want to reserve his freedom to go back on his promise, but takes account only of what is certain, namely, the promise and the promisee's acceptance of it. So even if, as can well be supposed, the promisor thought that he could not be bound to keep his promise should he regret having made it before it is time to fulfill it, the court assumes that he would have had to make this reservation expressly, and that if he did not he could be coerced to fulfill his promise. The court adopts this principle because otherwise its verdict on rights would be made infinitely more difficult or even impossible.

## B.

§ 38. *On a contract to lend a thing.*

In this contract (*commodatum*) by which I permit someone to use without compensation something of mine, if the parties to the contract agree that this very same thing is to be brought under my control again, the borrower (*commodarius*) cannot presume that the thing's owner (*commodans*) also assumes every risk (*casus*) of possible loss of the thing, or of what makes it useful, that might arise from its having been put into the borrower's possession. For it is not a matter of course that the owner, in addition to granting the borrower the use of his thing (such loss to himself as is inseparable from parting with it), has also issued the borrower a guarantee against any damage that could arise from his having let it out of his custody. A separate contract would have to be made about that. So the question can only be: on which of the two, the lender or the borrower, is it incumbent to attach expressly to a contract to lend the condition about

<sup>1</sup> no one is presumed to throw away what is his

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assuming the risk for possible damage to the thing? or, if no such condition is attached, who can be *presumed* to have *agreed* to guarantee the lender's property (by the return of it, or its equivalent, to him)? Not the lender, for it cannot be presumed that he has gratuitously agreed to more than the mere use of the thing (that is, that he has also undertaken to guarantee the property). It is, rather, the borrower, because in taking on this guarantee he performs nothing more than is already contained in the contract.

Suppose, for example, that having been caught in the rain I go into a house and ask to borrow a coat, which is then, say, permanently stained when someone carelessly pours discoloring material from a window, or is stolen from me when I go into another house and take it off. Everyone would find it absurd to say that I need do nothing more than return the coat as it is, or that I have only to report that the theft occurred and that it was at most a matter of courtesy for me to commiserate with the owner over his loss, since he could demand nothing on the basis of his right. – But no one would think it absurd if, in requesting to use something, I also ask its owner beforehand to take on himself the risk of any mischance that might happen to it while it is in my hands, because I am poor and unable to compensate him for the loss. No one will find this superfluous and ridiculous, except, perhaps, when the lender is known to be a rich and considerate man, since it would then be almost insulting him not to presume that he would generously remit my debt in this case.

Now if (as the nature of a contract to lend involves) nothing is stipulated in it about a possible mischance (*casus*) that might affect the thing, so that agreement about this can only be presumed, a contract to lend is an uncertain contract (*pactum incertum*) with regard to what is mine and what is yours by it. Consequently, the judgment about this, that is, the decision as to who must bear the misfortune, cannot be made from the conditions of the contract itself; it can be decided only as it would be decided *before a court*, which always considers only what is certain in the case (which is here the possession of the thing as property). So the judgment in the *state of nature*, that is, in terms of the intrinsic character of the matter, will go like this: the damage resulting from mischance to a thing loaned falls on the *borrower* (*casum sentit commodatarius*).<sup>m</sup> But in the *civil condition*, and so before a court, the verdict will come out: the damage falls on the *lender* (*casum sentit dominus*).<sup>n</sup> This verdict will indeed be given on different grounds from the decree of sound reason alone, since a public judge cannot get involved in presumptions as to what the one party or the other may have thought. He can consider only that whoever has not attached a separate contract stipulating that he is free from any damages to the thing

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<sup>m</sup> the case is borne by the borrower

<sup>n</sup> the case is borne by the lender

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lent must himself bear them. – Hence the difference between the judgment that a court must make and that which each is justified in making for himself by his private reason is a point that is by no means to be overlooked in amending judgments about rights.<sup>o</sup>

C.  
ON RECOVERY (REPOSSESSION) OF  
SOMETHING LOST

*(vindicatio.)*

§ 39.

It is clear from the foregoing that something of mine that continues to exist remains mine even though I am not continuously holding it; that it does not of itself cease to be mine apart from some act by which I give up my right to it (*derelictionis vel alienationis*);<sup>p</sup> and that I have a right to this thing (*ius reale*) and therefore a right against *whoever* holds it, not merely a right against a specific person (*ius personale*). But the question now is whether this right must also be regarded by *everyone else* as ownership that continues of itself, if I have only not renounced it, when the thing is in another's possession.

Suppose that someone has lost a thing (*res amissa*) and that someone else takes it *in good faith* (*bona fide*), as a supposed find. Or suppose that I get a thing by its being formally alienated by someone possessing it who represents himself as its owner although he is not. Since I cannot acquire a thing from someone who is *not its owner* (*a non domino*), the question arises whether I am excluded by the real owner from any right to this thing and left with only a personal right against the illegitimate possessor. – The latter is obviously the case if acquisition is judged merely in accordance with the intrinsic grounds that justify it (in the state of nature), not in accordance with what is appropriate for a court.

It must be possible for whatever can be alienated to be acquired by someone or other. The legitimacy of acquisition, however, rests entirely on the form in accordance with which what is possessed by another is transferred to me and accepted by me, that is, on the formalities of the act of exchange (*commutatio*) between the possessor of the thing and the one acquiring it, by which a right is established; I may not ask how the possessor obtained possession of it, since this would already be an offense (*quilibet praesumitur bonus, donec etc.*). Suppose, now, that it later turns out that the possessor was not the owner but that someone else was. I cannot then say that the owner could straightforwardly take the thing from me (as he

<sup>o</sup> *in Berichtigung der Rechtsurteile*

<sup>p</sup> abandonment or alienation

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could from anyone else who might be holding it). For I have stolen nothing from him, but have, for example, bought a horse offered for sale in the public market in conformity with the law (*titulo emti venditi*). The title of acquisition on my part is indisputable since I (as buyer) am not bound or even authorized to search the other's (the seller's) title of possession – this investigation would go on to infinity in an ascending series. If the purchase is formally correct, I become not just the *putative* but the *true* owner of the horse.

But against this, the following argument arises with regard to rights. Any acquisition from one who is not the owner of a thing (*a non domino*) is null and void. I can derive no more from another than what he legitimately has. Even though, in buying a stolen horse for sale in the market, I proceed quite correctly as far as the form of acquisition (*modus acquirendi*) is concerned, my title of acquisition is still defective, since the horse did not belong to the one who actually sold it. I may well be its possessor *in good faith* (*possessor bona fidei*), but I am still only its putative owner (*dominus putativus*) and the true owner has a right to *recover* it (*rem suam vindicandi*). 6:302

If one asks what is to be laid down as right *in itself* (in the state of nature) in the acquisition of external things in accordance with principles of justice in people's exchanges with one another (*iustitia commutativa*), then one must answer as follows. If someone intends to acquire an external thing in this way it is in fact necessary for him to investigate whether the thing he wants to acquire does not already belong to someone else; that is to say, even if he has strictly observed the formal conditions for deriving the thing from what belongs to another (has bought the horse on the market in the proper way), as long as he remains ignorant as to whether someone else (other than the seller) is the true owner of it, the most he could have acquired is only a *right against a person* with regard to the thing (*ius ad rem*), so that if someone comes forth who can document his previous ownership of it, nothing is left to the alleged new owner but to have legitimately enjoyed the use of it up to this moment as its possessor in good faith. – Since it is largely impossible to discover who was absolutely first (the original owner) in the series of putative owners deriving their right from each other, no trade in external things, no matter how well it may agree with the formal conditions of this kind of justice (*iustitia commutativa*), can guarantee a secure acquisition.

Here again reason giving laws with regard to rights comes forth with a principle of *distributive justice*, of adopting as its guiding rule for the legitimacy of possession, not the way it would be judged *in itself* by the private will of each (in the state of nature), but the way it would be judged before a *court* in a condition brought about by the united will of all (in a civil condition). In a civil condition, conformity with the formal conditions of acquisition, which of themselves establish only a right against a person,

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is postulated as an adequate substitute for the material grounds (which establish derivation from what belonged to a previous alleged owner); and what is *in itself* a right against a person, *when brought before a court*, holds as a right to a thing. A horse, for example, that someone puts up for sale in a public market regulated by police ordinances becomes my property if all the rules of buying and selling are strictly observed (but in such a way that the true owner retains the right to put forward a claim against the seller on the ground of his earlier, unforfeited possession of it); and what would otherwise be my right against a person is converted into a right to a thing, in accordance with which I can take (recover) it as mine wherever I find it, without having to get involved in how the seller obtained it.

So it is only for the sake of a court's verdict (*in favorem iustitiae distributiae*) that a right to a thing is taken and treated not as *it is in itself* (as a right against a person) but as it can be *most readily* and surely *judged* (as a right to a thing), and yet in accordance with a pure *a priori* principle. – On this principle various statutory laws (ordinances) are subsequently based, the primary purpose of which is to set up conditions under which alone a way of acquiring is to have rightful force, conditions *such that a judge can assign to each what is his most readily and with least hesitation*. For example, in the saying "Purchase breaks a lease," what is a right to a thing (the lease) in accordance with the nature of the contract, that is, in itself, holds as a mere right against a person; and conversely, as in the case discussed above, what is in itself only a right against a person holds as a right to a thing. In such cases the question is what principles a court in the civil condition should rely on in order to proceed most surely in its verdicts about the rights belonging to each.

D.  
ON ACQUIRING GUARANTEES BY OATH.<sup>25</sup>

*(Cautio iuratoria.)*

§ 40.

No other reason could be given which could bind human beings as a matter of right<sup>q</sup> to *believe* and acknowledge that there are gods than that they could thereby swear an oath and be constrained to be truthful in what they say and faithful in keeping their promises by their fear of an all-seeing, almighty power whose vengeance they would have solemnly called down upon themselves in case their declarations were false. That in requiring oaths one does not count on morality in these two respects but only on blind superstition is clear from this: that one does not expect any guarantee *merely* from their *solemn* declarations before a court in matters of rights, even though every-

<sup>q</sup> *rechtlich*

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one clearly sees the duty to be truthful in a case having to do with what is most sacred of all among human beings (the right of human beings). So mere fairy tales are the incentive in taking oaths, as, for example, according to Marsden's testimony, the Rajangs, a pagan people of Sumatra, swear by the bones of their dead ancestors even though they do not believe that there is a life after death; or as the Negroes of Guinea take an oath on their *fetish*, such as a bird's feather, calling upon it to break their neck, and so forth. They believe that an invisible power, whether it has understanding or not, already has by its nature this magical power that will come into play by their invocations. – This sort of belief is called religion but should strictly be called superstition. It is, however, indispensable for the administration of justice since, without counting on it, a *court* would not be sufficiently in a position to ascertain facts kept secret and give the right verdict. A law binding a people to take oaths is therefore obviously laid down only on behalf of the judicial authority.

But now the question is, what basis is there for the obligation that someone before a court is supposed to have, to accept another's oath as a proof, valid for right, of the truth of his testimony, which puts an end to all dispute? That is to say, what binds me as a matter of right to believe that another (who swears an oath) has any religion, so as to make my rights dependent upon his oath? So, too, can I be bound to take an oath? Both are wrong in themselves.

Yet with reference to a court, and so in the civil condition, if one admits that there is no other means than an oath for getting at the truth in certain cases, one must assume that everyone has a religion, so that it can be used as an expedient (*in casu necessitatis*) for the purpose of proceedings about rights before a *court*, which regards this spiritual coercion (*tortura spiritualis*) as a handy means, in keeping with the human propensity to superstition, for uncovering secrets and considers itself authorized to use it because of this. – But the legislative authority acts in a way that is fundamentally wrong in conferring authorization to do this on the judicial authority, since even in the civil condition coercion to take oaths is contrary to human freedom, which must not be lost.

6:305

An oath of office is usually *promissory*, an oath, namely, that the official earnestly *resolves* to fulfill his post in conformity with his duties. If it were changed into an *assertoric* oath – if, that is, the official was bound, say at the end of a year (or more), to swear that he had faithfully fulfilled his office during that time – this would arouse his conscience more than an oath he takes as a promise; for having taken a promissory oath, he can always make the excuse to himself later on that with the best of intentions he did not foresee the difficulties which he experienced only later, during the administration of his office. Moreover, he would be more concerned about being accused of failing in his duty if

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

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

§ 41.

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

<sup>r</sup> eines allgemein gesetzgebenden Willens

<sup>s</sup> recht

<sup>t</sup> dessen Besitzstand rechtlich ist

<sup>u</sup> Rechtes

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

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

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

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

<sup>c</sup> let and hire of a work

<sup>d</sup> let and hire of a person

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right was not encroached upon if he was given notice before the lease expired.

For the right a lessee has by a contract to lease is a right against a person, to something a certain person has to perform for another (*ius ad rem*); it is not a right against every possessor of a thing (*ius in re*), not a right to a thing.

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A lessee could, indeed, secure himself in his *contract to lease* and produce a right to a thing as regards the house; he could, namely, have this right only to the lessor's house *registered* (entered in the land registry), as attached to the land. Then he could not be turned out of his lease, before the time settled upon had expired, by the owner's giving notice or even by his death (his natural death or also his civil death, bankruptcy). If he does not do this, perhaps because he wanted to be free to conclude a lease on better terms elsewhere or because the owner did not want to encumber his house with such an *onus*, it may be concluded that, as regards the time for giving notice, each of the parties was aware that he had made a contract subject to the tacit condition that it could be dissolved if this became convenient (except for the period of grace for vacating, as determined by civil law). Certain rightful consequences of a *bare* contract to lease give further confirmation of one's authorization to break a lease by sale; for if a lessor dies, no obligation to continue the lease is ascribed to his heir, since this is an obligation only on the part of a certain person and ceases with his death (though the legal time for giving notice must still be taken into account in this case). Neither can the right of a lessee, as such, pass to his heir without a separate contract; nor, as long as both parties are alive, is a lessee authorized to sublet to anyone without an explicit agreement.

### 5.

#### FURTHER DISCUSSION OF THE CONCEPT OF THE RIGHT TO PUNISH.

The mere idea of a civil constitution among *human beings* carries with it the concept of punitive justice belonging to the supreme authority. The only question is whether it is a matter of indifference to the legislator what kinds of punishment are adopted, as long as they are effective measures for eradicating crime (which violates the security a state gives each in his possession of what is his), or whether the legislator must also take into account respect for the humanity in the person of the wrongdoer (i.e., respect for the species) simply on grounds of right. I said that the *ius talionis*<sup>c</sup> is by its form always the principle for the right to punish since it alone is the principle determining this idea a priori (not derived from experience of which measures would be most effective for eradicating

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<sup>c</sup> right of retaliation

Ripstein  
*Force and Freedom*  
Chapter 5

## Private Right III: Contract and Consent

THE SECOND TITLE of Private Right is contract. Contracts are essential to the operation of any legal system, because they are the legal means through which persons are entitled to make arrangements for themselves, and so to change their respective rights and duties. Kant's analysis of contract focuses on the way in which it enables separate persons to set and pursue their own purposes interdependently. The most familiar legal examples of contracts involve two persons making mutual undertakings for future performances: I agree to cut your lawn next Wednesday, and in return you agree to pay me. Kant introduces what he calls a "dogmatic division of rights that can be acquired by contract," which classifies the various ways in which two persons can organize their rights.

The main focus of this chapter will not be the specific legal manifestations of the idea of contract, but rather the underlying normative structure within which parties are entitled to change their legal relations with each other. That structure governs not only explicit contracts, but also, just as significantly, issues of consent. We saw already in our discussions of innate right and property rights that consent is fundamental to a system of equal freedom. I wrong you if I touch your person or use your property without your consent, but if you have consented, it is not that

my wrong is somehow forgiven, but rather that it is no wrong at all. This general structure of consent is in one way completely familiar. Kant's discussion of acquisition by contract shows how this idea of consent is an expression of each person's entitlement to be his or her own master. Self-mastery, as we saw, is a contrastive idea: the idea that you are your own master is equivalent to the idea that no other person is your master. Contract and consent enable free persons to exercise self-mastery together. Moreover, the power to consent is already implicit in their respective rights of self-mastery: as the person who gets to decide what to do, you are entitled both to exclude others from your plans and to include them.

The Kantian conception of both contract and consent understands it as an expression of freedom, bringing both its familiar features and its familiar limitations into focus. Consent provides a complete defense to most torts and crimes against persons and property. Informed consent matters, for example, in medical contexts, because it provides a defense to what would otherwise be the tort (and crime) of battery. An adequate account of its role in all of these contexts must explain what consent is and why, so understood, it would provide a complete defense. Just as important, an account needs to explain the occasions on which it fails to provide a defense. Consent is not a defense if obtained through force or fraud; an account must explain why these always make consent defective. It is not a defense to a charge of murder in any jurisdiction, and it is only sometimes a defense to a charge of battery. An adequate account must explain why it is not available in these cases and also explain whether there is a principled way of identifying the exceptions to those exceptions—why, for example, in the context of sporting activities, victim consent can provide a defense to a charge of battery.

The account I will offer rests on two familiar ideas. The first is the distinction, central to all concepts of right, between wishing for something and choosing that thing. You choose something by taking up means to achieve it; you can wish for or want something that you either lack means to or for which you have means that you do not use. Your wishes do not need to form a consistent set, because you don't have to do anything about them. Your choices are different: you can only choose something if you have the requisite means, and so how you decide to use your means limits what you can choose; to choose to do one thing is thereby to forgo

other conflicting uses of those means. The fact that I want something very badly is not sufficient for me to have chosen it, even if it has been offered to me on what others might think are favorable terms. I might be tempted by the savory treat or expensive toy in a shop window, but choose to resist the temptation.

The second is introduced in Kant's discussion of contract: the idea of a voluntary transaction between two people that engages both of their capacities for choice. The fact that I have decided to do something, even decided to do something involving you, is not equivalent to my having consented to doing that thing *with* you. The fact that you have decided to permit me to do something does not amount to your having consented to that thing unless something transpires between us. Neither your desire that I do some act  $x$ , my true belief about that desire, nor the combination of the two suffices for consent. Instead of merely *matching*, our choices must be *joined*.

Bringing these two ideas together, I will argue that consent is to be understood as two persons uniting their wills to create new rights and duties between them. In so doing, they make new means available to each other.

The account of consent presupposes the specific Kantian account of the wrongs to which consent is a defense. Consent gets its significance against the background of the basic right to independence that private persons have against each other. As we saw in Chapters 2 through 4, this basic right generates correlative duties that each person owes to others to refrain from using or interfering with another's person or property. These duties are relational: to violate these rights is not merely to do something wrong, but to wrong someone in particular; not merely to do something, but to do something to that person.<sup>1</sup> The mere fact that your act sets back my interest in some way does not make it wrongful, and so does not require my consent to make it rightful. Instead, every person owes each other person a duty to refrain from interfering with his or her person or property.

1. On this general theme, see Michael Thompson, "What Is It to Wrong Someone? A Puzzle about Justice," in R. Jay Wallace, Philip Pettit, Samuel Scheffler, and Michael Smith, eds., *Reason and Value* (Oxford: Oxford University Press, 2004), 333–384, and Stephen Darwall, *The Second Person Standpoint: Morality, Respect, and Accountability* (Cambridge, Mass.: Harvard University Press, 2006).

Interactions between persons are fundamentally changed by consent, because they create a new juridical relationship between the parties to them. If I consent to your use of my person (or powers) or property, *I* have decided how they will be used, and so your use of them is an exercise of my freedom. If I consent to your doing something that injures me or damages my property, the injury or damage results from the exercise of my choice. On Kant's strong reading of private rights to independence, "making arrangements" about another person—even touching a person or her property—is presumptively wrongful, unless consensual. In the same way, compelling another to perform an act or deliver property (or pay damages in lieu of performance) is wrongful unless a prior contract gives one person a right to performance or delivery. At the same time, in relations of status, in which one person makes arrangements for another, the arrangements are limited to those that the other could have consented to, had he or she been in a position to. The limits of possible consent will be important for understanding public right.

As we saw in Chapter 3, free persons can set and pursue their purposes separately, concerned only to avoid using or interfering with means that others have. They can set and pursue their purposes together only if they can connect not just their particular purposes, but their purposiveness. We pursue our purposes separately and in parallel if we both seek the same result, but do so independently of the other's pursuit of it. We pursue them together if one (or both) of us makes the other's particular purpose his or her own. If we do that, we unite our choices through a bilateral exchange of terms: one of us proposes something to the other, and the other accepts, each taking up the other's use of his powers in that way as his own. The bilateral aspect of this interaction does not require a bargain, whereby each of us expects to get something out of our arrangement, only that we have an arrangement. Kant's taxonomy of acquired rights thus requires him to distinguish between circumstances in which two persons voluntarily create a special relationship between them and the two other types of private rights. They are unlike property rights, which require a unilateral act for their acquisition, but are structured by the entitlement of each person to set and pursue his or her own purposes. They are unlike status rights because they are entered into and defined through the voluntary participation of the parties.

These familiar features of consent reflect its place in a system of rights, rather than a system of interests. I have the rightful power to make another person's use of my person or property an instance of my use of it, even if I later decide I don't want to, or judge that it would not be for the best, and even if it is not in my interest. All of this can be repackaged into the vocabulary of my long-term or higher-order interest in self-determination, so long as it is understood purely relationally: the only "interest" that matters to my rights is the interest in having no other person determine my purposes.

## I. What Consent Is: Uniting Our Wills

Consent enables people to do things together by eliminating some of the legal consequences of doing those things. But consent itself is also something that must involve both parties.

The transactional nature of consent can be brought out by a contrast between two ways of thinking about the concept of contract, which is a special case of it. A contract is a consensual transaction, which changes the legal situation between the parties by engaging their wills in the appropriate way. A contract is often said to be an exchange of promises, and many commentators have sought to explain the binding force of contracts in terms of the binding force of promises. Different attempts to articulate the morality of promising lead to advocacy of various changes in contract law, to bring it more in line with the morality of promise.<sup>2</sup> It is not my purpose here to adjudicate between competing accounts of promising, because promises can create enforceable obligations to perform future acts only because people have the more general rightful capacity to make arrangements with each other that change those relations.<sup>3</sup>

2. See Charles Fried, *Contract as Promise: A Theory of Contractual Obligations* (Cambridge, Mass.: Harvard University Press, 1981), and Seana Shiffrin, "The Divergence of Contracts and Promises," *Harvard Law Review* 120 (2007): 708–753.

3. Kant assimilates "telling or promising them something" in his examples of things that have no bearing on questions of right, except where they wrong someone because they "diminish what is theirs" (6:238). This assimilation suggests that promising as such is not fundamental to the concept of contract, even though a forward contract will involve a promise, the breach of which will diminish what belongs to another.

Kant provides a fundamentally different way of representing the binding force of contracts. His focus is not on promises as such, but on *voluntary arrangements between people*. Many of those arrangements, especially the ones that get litigated, involve promises of future performance. The grounds for enforcing them, however, are not that they are promises, but that they are aspects of arrangements through which separate persons get together to vary their respective obligations. Again, although many contracts impose an obligation on one or both parties to perform an affirmative act, while familiar instances of consent grant only permissions, such contrasts are of no analytical significance. An obligation of right concerning future performance is a title to compel that performance, consistent with the freedom of the obligee, just as a permission granted through consent is a title to do something to another, consistent with that person's freedom. Arrangements between private persons are expressions of their respective freedom, and so, Kant argues, their enforcement is consistent with that freedom.

Kant uses the simple example of a present transfer of property to illustrate the conceptual structure underlying voluntary arrangements. Suppose I want to give you my watch. The physical transfer is easy to understand: I take it off my wrist and hand it to you. The physical transfer is not sufficient for the legal transfer of ownership. Having handed the watch to you does not extinguish my property right in it. The difference between merely handing it to you and transferring ownership is normative, not factual. Kant also points out that I cannot transfer it to you by abandoning it and having you subsequently acquire it. If transfer required abandonment, there would be a moment (even if infinitesimally small) during which the watch was unowned, and an interloper could come along and take it before you did, without wronging either of us. In the case of a small object like a watch, we might solve this as a *factual* problem by hanging on to it throughout the entire proceeding, so that the interloper would commit some sort of personal wrong against one or both of us by wresting the object from our hands. Any such solution would be limited to small objects. More fundamentally, the abandonment and acquisition account gives up on the idea that I give something *to you*, as you accept that very same thing *from me*.

To capture the idea that ownership moves seamlessly from me to you,

without any period of limbo in between, Kant introduces the concept of a “united will” through which the transfer from me to you is continuous because it engages both of us. Kant notes that people making agreements often try to represent this continuity by physical acts that are continuous in the same way, such as shaking hands or breaking a straw. The basic idea, however, has nothing to do with the continuity of the handshake, any more than it has anything to do with the continuity of the physical transfer of a small object. Instead, the reason the watch becomes yours is that we create an entitlement *together*, that the watch becomes yours. I transfer it to you, and you accept it from me. We act together, because my act of transfer and your act of acceptance each takes the other’s act as its object. It is not that I give and you receive without reference to the other—as Leibniz is reported to have contended that paternity was an accident in the father and filiation an accident in the son. My giving to you and your receiving from me are analytically equivalent. The interloper who takes what I am in the process of giving to you is a thief. He cannot say to me that I surrendered all my rights to the watch, and he cannot say to you that you did not have the watch yet, because the transfer of rights takes place seamlessly through our united wills.

Contrary to what is sometimes suggested,<sup>4</sup> Kant’s example of a present transfer does not reflect the idea that either contract or consent must be analyzed in terms of a transfer of rights, or that all rights are modeled on property rights. To the contrary, Kant’s analysis turns on the claim that the idea of an offer being accepted is required to make sense of how a physical transfer of objects can affect a transfer of rights. In a contract of transfer, something does get transferred, but Kant argues that we need the idea of a united will to understand how two people can participate in varying their respective rights.

By uniting our wills, we can transfer a right, even though neither of us on our own has means adequate to entitle us to transfer it. I might wish to

4. B. Sharon Byrd and Joachim Hruschka, “Kant on ‘Why Must I Keep My Promise?’” *Chicago-Kent Law Review* 81 (2006): 47–74; Byrd, “Kant’s Theory of Contract,” *Southern Journal of Philosophy* 36 (1998): 131–153. Byrd’s analysis draws on the *Naturrecht Feyerabend* student notes from 1784–85. There is reason to suppose that Kant’s position on this issue changed in the decade between that and *The Metaphysics of Morals*, since he gives a very different account of slave contracts, beginning with *Theory and Practice*.

transfer my horse to you, but I cannot choose to do so unless I have means that I am entitled to use to achieve that purpose. I might abandon my horse in your stable, but you would not thereby acquire ownership of it. You might covet my horse, but you cannot unilaterally claim it as your own. As owner of the horse, I am entitled to do with it as I see fit, consistent with the rights of others, but making it become your property is not something I am entitled to do on my own initiative, because you have the right to refuse it. You might make acquiring it your end, but here, too, on your own you do not have rightful means sufficient to acquire. You do have the right to accept it, but that right is of no use to you except when exercised together with a corresponding purpose of mine to transfer it to you. Between us, we seem to have everything we need, but that is not quite right, because neither of us can accomplish our purpose except with the other. So even if I am eager to get rid of the horse and you are eager to acquire it, we still need to act together. Indeed, that is just the point about the interloper: I could abandon my horse in your stable, but any other person who was entitled to be in your stable could help him- or herself to the horse. I do not have means of my own sufficient to transfer it to you, nor do you have means of your own sufficient to acquire it from me. The most we can do on our own is abandon and acquire. Each of abandonment and acquisition is a unilateral act; our respective entitlements to freedom as against each other limit us to unilateral acts, because one person cannot unilaterally determine what purposes the other will pursue. I can physically transfer the watch without your participation, but you do not become its owner; you can physically relieve me of the watch without my participation, but you do not thereby acquire any entitlement to use it.

The only way in which you can acquire something *from me* is if we together make use of our respective moral powers.<sup>5</sup> That is where the united will comes in. Together we have the requisite means to make the transfer: I cease to have the horse and you come to have it, because we coordinate our respective means to achieve it, each of us allowing our

5. Kant analyzes contract formation into two “preparatory” and two “constitutive” moments. The former are required to fix the terms; the latter unite the wills so that one person’s powers are subject to the choice of another consistent with the freedom of the first. See 6:272.

powers to be used to affect the transfer. The transfer preserves our respective freedom; not only do I direct the object to you; you accept it from me. When I offer it to you, I act unilaterally, and do not yet change our respective rights; when you accept my offer, both of our respective entitlements are engaged.

The unity of our wills does not presuppose any idea of our ability to act as a collective agent. Indeed, the very possibility of collective as opposed to merely parallel agency presupposes that we have already united our wills, so that we do not merely have a convergent purpose, which each of us pursues in the hope that the other's conduct will make it go smoothly. We act in parallel if I set up my souvenir table outside the cathedral in the hope that you will include it as one of the highlights of the guided tours you offer; we also act merely in parallel if you include the cathedral in your tour in the hope that my souvenir table will interest your tourists. To act together, we need more: to actually make arrangements to make our respective deeds and goods available to the other; that is, we need to unite our wills.<sup>6</sup>

Rather than some prior collective agent, the idea of a united will requires two separate persons, each of whom has moral entitlements in relation to all other persons, and each of whom exercises those entitlements in relation to the other in particular. Contractual and consensual rights create a new moral relationship between two persons so that one (or both) are entitled to act in ways that they were previously not entitled to act. This new relationship could only be consistent with the freedom of those two persons if both of them participate in its creation.<sup>7</sup>

6. On pain of regress, we could only do that if we don't first need to get together and plan for me to make and you to accept my offer. I don't need to say to you, "Why don't we get together and have me offer to cut your hair, and you accept my offer?" Instead, we need to be able to unite our separate wills in order to collaborate. I am grateful to Steve Darwall for discussion of this issue.

7. The juridical assumption of rightful honor, which, as we saw in Chapter 2, is the correlate of the innate right of humanity in your own person, generates a presumption that voluntary arrangements made between people will be bilateral in a further sense as well, because each person will be presumed to be acting for his or her own purposes, and so would not intend to restrict his or her freedom simply for the purposes of another. When agreements are made with respect to future performances, this will generate a version of the common law doctrine of "consideration," according to which a promise must normally be exchanged for

Kant's analysis makes no reference to what he calls the "matter" of choice, that is, the reasons that I might want to transfer my watch or horse to you. Presumably I have some motive for wanting to give it to you, and you some reason for wanting to take it, but the character of those motives plays no role in the account. All that is required is that I freely offer you the watch and you freely accept it.

A present transfer needs to be analyzed in terms of a united will, but a united will can create new rights, including rights to things that need not exist as fully determinate prior to the transfer. In the case of a transfer of property, it is certainly true that there is a right, that is, the property right, which is transferred, and that the transfer itself does nothing to alter either the form or the matter of right in any way. Other contracts may not concern rights that survive the transfer unchanged. For example, you can acquire by contract the right that I cut your lawn next Wednesday. Perhaps there is a way to analyze this as a transfer of part of my future freedom to you. There is no need to do so, however, because the analytical and normative work is done through our united will: we create a right on your part and the correlative obligation on mine that I cut your lawn next Wednesday.<sup>8</sup>

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something of value in order to be legally binding. The same assumption governs the law of unjust enrichment. If you mistakenly pay my telephone bill, you can reclaim your money, because the law will not assume you meant to make me a gift. Kant notes important exceptions to this requirement. A present transfer of an object can be consistent with the transferor's purposiveness. It functions as a presumption because a person can make a gift, but can only enter into a binding contract to do so in a rightful condition (6:298). In many cases of consent, the situation is parallel to that of a present transfer, because one person undertakes responsibility for a particular act by another and can revoke that consent at any time.

8. Bequests might appear to allow one person to unilaterally change the normative situation of another in the way that I have suggested is not possible, since the testator makes the will while alive, and the beneficiary accepts the legacy after the testator's death. Kant characterizes it as a case of "ideal" acquisition because one of the parties to the transaction no longer exists. The issue arises because the testator makes the will while alive, but the beneficiary only has the power to accept the legacy after the testator's death, since the testator is entitled to modify the will at any time until his or her death.

Kant analyzes this as two contracts rather than one. The first contract simply grants the beneficiary an option, which he is free to accept or reject. The beneficiary can be deemed as a matter of law to accept the terms of this first contract in a specific and highly circumscribed sense: a third party, such as a trustee, acting exclusively for the benefit of the beneficiary, is

As in the previous example, the obligation can only be created if we have the requisite means. It is only together that we have the respective means that entitle me to give you the power to require me to cut your lawn. My obligation does not entail that cutting the lawn become my end in any robust sense. It requires only that my cutting it, and even your compelling me to do so, be a consistent exercise of my purposiveness.

The examples so far involve agreements that create obligations to do certain things. Other agreements create permissions as between the parties to them. If I undertake responsibility for your action—as I do if I make certain kinds of representations to you, or a contract to indemnify you under certain circumstances, or if I sign a waiver before you take me paragliding—we create your right against me and my correlative obligation. If I sign a waiver, you acquire a right (as against me) to expose me to danger; you do me no wrong even if I am injured.<sup>9</sup> My right to indepen-

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entitled to accept the first contract on the beneficiary's behalf, and to hold it for the beneficiary until the beneficiary has the opportunity to consider whether to accept or reject the legacy. Although the legacy in itself cannot be treated as an incontrovertible benefit (because the beneficiary may choose not to become wealthy, or to own the particular pieces of property left to him or her), the option of deciding whether to accept the legacy is incontrovertible. As Kant puts it, "every human being would necessarily accept such a right (since he can always gain but never lose by it)" (6:294). Like other examples of incontrovertible benefits in the law, such as having your life saved, it is exceptional, and structures the law's readiness to impute a purpose to reach the conclusion that a third party is acting exclusively on your behalf. The physician who saves your life when you are unconscious can recover his fee because the law imputes to you the intention to stay alive, and concludes that the physician is carrying out that intention when you are unable to communicate it. The beneficiary is in a parallel situation: the beneficiary cannot accept or reject the legacy, as such, unless she is aware of its specific terms, but those terms are not determined until the testator dies. A third party acting on her behalf, can, however, hold the offer for her in the period between the testator's death and the beneficiary's learning of the legacy and exercising the option to accept or reject it. If she subsequently accepts the legacy, it functions as a further united will between the parties. This arrangement is also consistent with the freedom of the testator, because it enables him to dispose of his property as he sees fit, subject only to the acceptance by the beneficiary. Kant emphasizes that this double transaction is only possible in a public legal order in which the state can hold a legacy for the testator between the testator's death and a beneficiary's acceptance of a legacy; the testator can direct the legal system to offer the legacy to the beneficiary. (The same structure can be found in the rules surrounding third-party beneficiaries of contracts in the civil law tradition.)

9. One further difference between paradigmatic cases of contract and other consensual transactions is worth noting, though only to set it aside. Contracts, including those in which

dence ordinarily precludes you from touching me or putting me in the path of danger by doing such things as strapping me into the harness, opening the throttle on the motorboat, and releasing the tow rope attaching me to the boat. When I sign a waiver, those things become consistent with my background right to independence. Interacting with you on those terms is the way in which I, rather than anyone else, determine my purposes, because I have decided that my person and property may be used or endangered by you, in particular, in exactly these ways. In creating your right to do these things to me, we also create a new obligation for me, though my obligation is really just a reflex of your right. Since you are entitled to endanger me (and to touch me as you strap the harness on), I am under an obligation in the sense that my freedom is constrained; I may no longer treat your acts as aggression against me. It may be possible to gerrymander things so as to describe all of this as a transfer, but doing so draws attention away from the fact that the terms of our agreement serve to individuate the object of the agreement; as I give you an entitlement to my future performance, or take responsibility for your acts, I do not transfer something that exists fully determinate apart from our agreement.<sup>10</sup>

The transactional analysis of contract shows what is wrong with many prominent ways of thinking about consent. Like contract, consent is a transaction between two persons, in which they vary their respective rights by uniting their wills. Writers often divide between “attitudinal” and “expressive” accounts of consent, according to which consent is rep-

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one person takes responsibility for the acts of another, typically bind into the future, while in familiar examples, consent can be withdrawn in the middle of the interaction that was consented to. If I have consented to have you cut my hair, and change my mind partway through, you must stop, and there are no residual legal consequences. If you did not violate the terms of my consent, I, rather than you, am responsible for the odd appearance that results. Despite these differences in familiar cases, the underlying structure is the same, since the respective rights and obligations are set by the express or implied terms under which the parties united their wills.

10. The familiar Hohfeldian picture of the parties to a transaction having particular powers must not mislead us here into thinking that the powers can be exercised separately. Even in cases in which there is a transferable object, my power to transfer it, and your power to acquire that thing through transfer, cannot be exercised independently of each other. They come as a matched set.

resented either as a mental state or as a performance.<sup>11</sup> Both approaches represent the question of whether someone has consented to something as a question about that person alone.<sup>12</sup> The appeal of these approaches may reflect a view of autonomy according to which a person is sovereign over the choices he or she makes, coupled with a disagreement about how to answer the factual question about what counts as a choice. A similar split animates the debate in discussions of distributive justice about what G. A. Cohen has called the “cut” between “brute luck” and “option luck,” with some partisans supposing that option luck requires inner control, and others supposing that it requires some form of endorsement.<sup>13</sup> Partisans of both sides of those debates, like those on both sides of the attitudinal/expressive split, suppose that through a unilateral act of choice, a person opens up him- or herself to the vagaries of fate or the actions of others.

The difficulty with treating consent as a unilateral act in any of these ways parallels the distinction between abandoning something in another’s presence and transferring it to that person. I can unilaterally abandon something (provided that I do so in a way that does not violate any right of any other person). I can only transfer something with the participation

11. See Peter Westen, *The Logic of Consent* (Burlington: Ashgate, 2004), 51; David Archard, *Sexual Consent* (Boulder: Westview, 1997), 3–5; Joel Feinberg, *The Moral Limits of the Criminal Law*, vol. 3 (Oxford: Oxford University Press, 1986), 173; Nathan Brett, “Sexual Offenses and Consent,” *Canadian Journal of Law and Jurisprudence* 11 (1998): 69–88; Heidi M. Hurd, “The Moral Magic of Consent,” *Legal Theory* 2 (1996): 121–146; Joan L. McGregor, *Is It Rape? On Acquaintance Rape and Taking Women’s Consent Seriously* (Aldershot: Ashgate, 2005), 116; Alan Wertheimer, *Consent to Sexual Relations* (Cambridge: Cambridge University Press, 2003), chap. 7.

12. Peter Westen suggests that when I consent, you acquire a Hohfeldian “privilege,” that you can do something that would otherwise be wrongful without any legal consequences. Analytically, the suggestion seems unobjectionable, but it simply packages the change in the legal situation—you can now do something you would not otherwise have been able to do—without explaining how it can be within my rightful powers to change your legal situation in this way. Westen’s analysis mirrors the abandonment-and-acquisition account of contract, in that he identifies consent with a mental state or observable act by the consenting party, and says that this event causes a change in the other party’s legal situation. This seems to bypass the fundamental question of how one person can change another’s legal situation in the relevant respects. See Westen, *The Logic of Consent*, 91.

13. G. A. Cohen, “On the Currency of Egalitarian Justice,” *Ethics* 99, 4 (July 1989): 906–944.

of another person. In the case of a transfer, this problem takes the form of a problem about the unwelcome gift. I can't give you my toxic waste unless you accept it. Even if I can *direct* my offer to you in a way that I cannot direct my abandonment of an object, you don't have to accept. The parallel problem for consent is that the fact that my unilateral act of offering something to you does not mean that you accept it, no matter how appealing you may find it.<sup>14</sup> Once I have offered, you can accept my offer by accepting the object on offer or performing the invited deed. Those are bilateral acts of acceptance, not unilateral acts.

The bilateral structure of consent presupposes that both parties are morally capable of doing their side of the transaction, and so that both are capable of acting on their own initiative. It requires only that both do act in the required and interlocking ways. I can *make* you an offer unilaterally, without any prior arrangements between us. Conversely, you can take up my offer without a prior arrangement between us regarding how you will respond. And you can decide which of several offers to take up without consulting all of the offerors.

Both my entitlement to direct offers as I see fit and your entitlement to accept or reject offers as you see fit are expressions of our respective rights to independence. The requirement that we unite our wills does not deny that fundamental fact, but builds on it to show that we can only do that if we are both involved. There is a sense in which your freedom is enlarged as soon as I make you an offer—you have an option you didn't have before, namely the option of accepting or rejecting the offer. The same point applies if I manage to accept your offer before you have made it, perhaps by signing the form consenting to a surgical procedure before I know whether I am eligible for it. My signing the form means that you can complete the offer/acceptance structure by scheduling the surgery. Understood in that narrow way, such an option can be represented as

14. The confusion of consent with abandonment reflects failure to distinguish two basic types of private rights. My rights to person and property hold against “all the world”; contractual rights hold only in relation to some other person. To abandon my right against trespass or harm, I seem to abandon it more generally, rather than targeting my abandonment to some other person. The Hohfeldian idea that rights *in rem* are bundles of rights *in personam* against indefinitely large numbers of people can redescribe this problem, but not solve it. I can only abandon an *in personam* right to the party against whom it holds, and so cannot do so unilaterally.

something that I can give you without any affirmative act on your part. That is because it is only an offer. Any contrary appearance grows out of the fact that in many situations you can accept the offer by acting on it, so that there is no intervening event in which you first accept the offer and then act on it. The normative structure still turns on your accepting my offer, not on the offer itself.<sup>15</sup>

As an entitlement merely to enter into legal relations with me, an offer is not a legal relationship. You might not want to enter into any such relationship with me. So if I offer to perform some service for you, or let you do something to me, you are entitled to decline, for *any reason whatsoever*. You are the one who decides what sort of consensual interactions you will enter into and whether the terms interest you. I can no more force you into such interactions by offering to enter into them than I can force you to accept property as your own by offering it to you as a gift. Perhaps you do not want a horse, because you think it will be expensive to feed. If so, you can just say no. Perhaps you don't want to be allowed to hold pieces from my porcelain collection because you are worried about being clumsy.

There are cases in which granting someone permission to do something might be thought to require no acceptance, since the permission seems to be an unqualified advantage to that person, something that he or she could have no grounds for refusing. This appearance is misleading, because concepts of right never deal in advantage. Suppose we are having dinner together and I reach for the check, hoping to pay for your dinner and in so doing to take responsibility for the order that you have placed. There is a straightforward sense in which having your dinner paid for is an incontrovertible benefit, since you receive something for free that you were prepared to pay for. Unlike a horse, the money already in your

15. In other legal contexts, the concept of reliance occupies what, for Kant, must be the same conceptual space as that of acceptance. If I make a negligent representation to you with respect to some particular transaction, and you rely on it to your detriment, I may be liable to you for the losses you incur. Although the concept of reliance appears to be factual—did plaintiff act on the representation?—the plaintiff's entitlement to act on the representation turns on the fact that defendant's representation is taken to be an undertaking or offer to create a legal relationship. By acting on the representation, plaintiff accepts, and so the extent of plaintiff's reliance is just the extent of the loss for which defendant has undertaken responsibility.

pocket or bank account costs nothing to maintain; unlike the case of my porcelain, you do not need to worry about damaging something of artistic value or historical interest. Nonetheless, from the standpoint of your private rights, you are entitled to reject my offer, and so to decline the benefit. Perhaps you worry about the symbolic significance of letting me buy you dinner, or do not like to accept gifts from people who have more (or less) money than you. Maybe you just want nothing to do with me. Or maybe you just don't choose to accept the benefit. My offer entitles you to decide whether to unite your will with mine, on whatever grounds you choose.<sup>16</sup>

The need for both offer and acceptance is even clearer in cases in which the offer amounts to one person asking another for permission to do something. If I ask you for permission to cut your hair, or pitch my tent on your land, you are entitled to accept or reject my offer. It seems odd to describe this as an enlargement of your freedom. Before I asked, you were entitled to decide who would touch you and what would happen on your land. You still have that right. What you have as a result of my offer is just the entitlement to take up the offer. That is not yet a new right that you have, but rather a feature of the context in which you choose, and I do not wrong you in any way if I change the context back, by withdrawing my offer before you have accepted it.<sup>17</sup> If you accept, your assent is sufficient for a united will, because it joins my offer. As a result, I can cut your hair, or pitch my tent, without wronging you. In none of these cases, however, can one party's action alone change the respective rights of the parties. Both offer and acceptance are required. Each can only do its work with the other.

Although the transaction could be repackaged so as to reserve the name "consent" for either offering permission or granting permission in response to a request, such an account would make consent unilateral in

16. I am grateful to Seana Shiffrin for discussion of this issue.

17. Under the Uniform Commercial Code, §2A-205 (2001), it is possible for someone to make a "Firm Offer" that cannot be revoked for a specified period of time. From Kant's perspective, the only way such a commitment could be consistent with the freedom of the parties is if it is analyzed into a separate contract which must be accepted by the other party. You must accept the irrevocable option I offer you in order to have a claim against me that I not revoke it.

name only. The basis of the change in the normative situation of the parties is the combination of offer and acceptance, rather than one of them considered apart from the other.

Again, a unilateral act on my part can factually *enable* you to do something without your participation—I can take down my fence so that you can wander freely on my land, leave my wallet in easy reach of your sticky fingers, or decide not to resist when you reach for my hair with your scissors. Each of those unilateral acts is an exercise of my rights to person and property. But none of these things, taken on its own, *entitles* you to do those things to me. Nor is a right conferred if I privately *decide* that I would be happy to have you on my land, or to give you my wallet. If I take down my fence, I no longer physically exclude any cattle, but my act does nothing to change the legal situation of either wandering cattle in general or yours in particular. Again, perhaps I know you need money desperately, and that you are too proud to accept a gift but not above stealing. I have not transferred the wallet or its contents to you, since, *ex hypothesi*, you would not accept a gift, and if you knew that I had left it out for you to take, your pride would prevent you from taking it. Again, some distinctions are in order: if I welcome your actions, I presumably *won't* complain. But that wasn't our question. Our question was whether you wronged me by so doing. And the answer to that question still seems to be "yes." Although it is true that I had no objection to your doing these things, you were not entitled to act on that truth.

Talk about a united will might be thought to make an illicit appeal to a set of unobservable or even fictitious events somehow standing behind the more familiar thoughts and actions of persons. But the idea of united choice, like the ideas of rights and obligations it aims to explain, is the rational structure through which what people actually do needs to be interpreted: for example, can you take this scratching of my ear as the making of an offer? The application of such concepts to particulars will inevitably depend in part on context and the expectations normal among the people involved, and it will also require the exercise of judgment. Sometimes a gesture is an invitation or the acceptance of one, sometimes not. Sometimes performing the invited deed is the most obvious way of accepting the invitation. The need for some sort of judgment and interpretation does not, however, change the significance of the idea of a united

will. It structures the inquiry, since the question must be whether the parties have in fact agreed. Only through agreement can they act together, make their means available for specified uses consistent with their respective independence. At no point is the inquiry one exclusively about what one or the other party was thinking, because the thoughts a person may have had are indifferent to the distinction between wish and choice. The question must be whether the parties chose together, and what they chose.

Focusing on the transactional nature of consent also provides a principled basis for understanding what goes wrong with two familiar misconceptions about consensual interactions. The first of these identifies consent with risk-taking. The person who walks through a dangerous neighborhood at night takes a risk, but does not consent to any crimes or torts committed against him. After the fact, others might criticize his poor judgment, but the risk he took was the factual risk of injury, not the normative responsibility for the acts of another. One person's risk-taking does not entitle others to do anything they were not entitled to do before.

The second, more prominent misconception applies to consent as a defense in the criminal law, and interprets consent as a mental state on the part of the victim. A familiar line of argument holds that a mistake about consent exculpates a person from criminal liability, no matter how unreasonable the mistake might have been.<sup>18</sup> The proposed line of thought is simple: if the absence of consent is an element of many crimes against a person, then the person who mistakenly believes his victim to have consented did not have *mens rea* with respect to an element of the offense. As a general matter, lack of *mens rea* with respect to an element of an offense exculpates; the person who makes a mistake about consent is not guilty. All of this is correct, so long as the mistake concerns consent. The difficulty arises when it is sometimes concluded from this that if the person accused of a crime sincerely believes that the victim *wanted* him to perform the act in question, he lacks a guilty mind. What makes such “unrea-

18. Alan Brudner, “Subjective Fault for Crime: A Reinterpretation,” *Legal Theory* 14 (2008): 1–38; Glanville Williams, *Textbook of Criminal Law* (London: Stevens & Sons, 1983), 137–138, both discussing *Director of Public Prosecutions v. Morgan* [1975] 2 All ER 347. All of these focus on cases of rape, and all turn on the suggestion that a mistaken belief about consent serves to negate *mens rea* with respect to an element of the offense, that is, the requirement that intercourse be nonconsensual.

sonable” mistakes unreasonable is that they are not mistakes about consent at all.

The transactional account shows the two flaws in this seemingly straightforward line of reasoning. To consent to another person’s doing something to you is not to be favorably disposed toward it, but to *choose* it by uniting your choice with that person’s so as to make that person’s act consistent with your purposiveness. Whether you have consented does not depend on your settled attitude toward the act, but on whether you have chosen it by uniting your will with another person’s. Thus consent requires both choice and a transaction between the parties.

Consent cannot be identified with wishing, because wishing does not require you to determine what ends you will pursue. You can choose something even if your wishes about it are ambivalent; there may not be a single answer to whether you wish for a certain interaction with another person, any more than there needs to be a single fully determinate answer to the question of whether you are wholeheartedly committed to anything you decide to do. The point here is not that your inner life is always an inconsistent blur; it is only that your ability to make arrangements with others does not depend on the lack of ambivalence on your part. You can consent to something with regret, and you can refuse to consent to something even though you want it badly. So the person who commits a crime believing that the victim has an inner wish that that act be performed does not have a defense, because the belief is about the wrong subject matter. Even if it were true, it would be irrelevant. Conversely, if the victim consents and then thinks better of it, but does nothing to indicate a change of mind, then the change is just a wish that consent had not been given, not a mysterious private act of withdrawing consent.

Even if the accused’s belief is about some action performed by the victim, the action itself needs to be interpreted as making or accepting an offer, not as some sort of outer evidence of victim’s inner thoughts. Suppose that someone is scheduled for a minor surgical procedure and the surgeon asks whether, while they are at it, the patient wishes to have some cosmetic surgical work done as well. Patient declines, but surgeon, thinking that patient was merely embarrassed over the prospect of cosmetic surgery that he wanted quite badly, decides to go ahead anyway. Suppose further that surgeon was correct about patient’s secret wishes. Surgeon

still commits a battery, even if patient is unlikely to complain, or will only complain out of the same embarrassment. Surgeon's correct belief about patient's wishes is not a belief about consent, so even if it is true, it is irrelevant. The same point applies if surgeon is mistaken about what patient wishes for.

Instead, in order for consent to be validly given, there must be a transaction between the parties. Someone can make a mistake about whether his or her offer was accepted by another person, perhaps because confused about conventional social cues, and perhaps another could accept an offer as a result of a similar mistake. Where there is nothing that could count as either an offer or its acceptance, beliefs about the person's wants are beside the point. The only thing that could count as consent is something that the parties do together, but that requires some sort of public act through which their choice can be united. As I suggested, there is one sense in which the public act, such as a handshake, merely represents the unity of purpose and simultaneity of choice, but there is another sense in which *some* public act is required for there to be unity of purpose and simultaneity of choice. People make mistakes about these things from time to time—what the precise terms of the interaction were, and so on. Some of those mistakes are reasonable, just as disputes can arise in good faith about the terms of any other agreement. Others are unreasonable, if they are understood as interpretations of what transpired between the parties—patient's refusal of the cosmetic surgery cannot be taken to be an act of acceptance. Surgeon might believe that patient is dissembling, and so have a different hypothesis about patient's true wants or wishes. That, however, is not a hypothesis about consent, understood as a transaction between the parties.

## II. Why Consent Matters: *Volenti non fit injuria*

Understanding consent transactionally provides an immediate account of why it would provide the basis for a legal defense, both in tort and in the criminal law. The legal maxim *volenti non fit injuria* is a commonplace of liberal thought, and is often paired with another commonplace, Mill's "harm principle," operating to prevent the presumptive significance of harm to which the sufferer consented. The two sit together un-

easily, however, because whatever exactly the proposed significance of harm, understood as some sort of setback either to welfare or to interests more broadly construed, it remains just as significant if the person suffering the harm consented to it. The harm principle rests on the idea that harm *is* ordinarily bad enough to outweigh exercises of freedom. Yet if protecting *you* from harm is sufficient grounds for limiting *my* freedom, it might be wondered why it is not grounds for limiting yours. Nor can the *volenti* principle say that the freedom of two people is enough to outweigh any harm that might result. You and I cannot make a voluntary arrangement that entitles us to harm third parties, claiming that somehow our two exercises of freedom somehow outnumber the harms to others we produce. The *volenti* principle requires the more ambitious idea that *you* have a special relation to any injuries *you* choose to undergo or risk. It does not say that your freedom somehow outweighs those harms. It prevents them from being wrongs at all, by changing the moral nature of the relationship between you and the person who injures you.

The transactional conception of consent traces the relevance of consent to the wrongs to which it provides a defense. If wrongs against persons violate their right to set and pursue their own purposes, consensual interactions are not wrongs at all, because they are consistent exercises of purposiveness.

By uniting your will with another person's with respect to a particular transaction, you can give that person powers over your person and property in a way that is consistent with your exclusive power to determine how they will be used. The *object* of the united will can be your deed, or your responsibility for another person's deed, but not an outcome considered apart from our capacities as purposive agents. You consent to my doing thus and so to you or your goods; I agree to bring it about that you receive the specified goods or services. When you tell me that it is fine for me to pitch my tent in your front yard, or tell your doctor to open you up and take out your malfunctioning appendix, you do not give me, or the doctor, a power inconsistent with your entitlement to determine how your person and property will be used. Instead, by consenting, you make my pitching my tent, or the physician's removing the appendix, an instance of your determining how your land or body will be used. You have the power to integrate my act into your purposiveness, since your

entitlement to determine the purposes for which your person and property will be used is perfectly general, and so can incorporate the actions of another.

Once I have taken responsibility for your acts, I do not somehow forfeit the right to complain about them; that would be like supposing that I abandon my rights, which you then mysteriously acquire *de novo*. Instead, by performing your act you do me no wrong. I might be disappointed about my condition, but my disappointment does not generate a legal wrong. Since I have taken responsibility for it, it is just my problem. Absent some sort of defect in my consent, the situation is just the same.

The claim that I take responsibility for my own acts or for your acts when I make them mine through contract or consent is a normative claim about rights and duties, rather than a metaphysical one about my control over things for which I am responsible. When I sign the waiver before you take me paragliding, I am not asserting or acknowledging that I know everything about it; I am taking responsibility for what happens, including the parts that neither you nor I can control. Taking responsibility for things outside anyone's control might sound like willful gambling, but it is actually the most familiar feature of life as a person capable of setting and pursuing his or her purposes. To make something your purpose is to use your means to pursue it, even though you will normally have no guarantee of success, and no guarantee against unwelcome side effects. When you take responsibility for another person's action, you join your purposiveness with his or hers, again, normally with no guarantee of success or against side effects. When you do so, you are not wronged by what happens, because you've done what you always do—act in an uncertain world.

### III. When Consent Does Not Matter

By consenting to something, you make another person's actions an expression of your freedom. Consent provides a defense, because an exercise of your freedom cannot be a violation of your freedom and so cannot be a wrong against you. There are some cases in which consent is not ordinarily thought to provide a defense. In some cases, consent is said to be defective: if it is fraudulently or coercively obtained, either it is not re-

ally consent, or if it is consent, it is not valid consent. In other cases, the wrong in question is thought to be beyond the power of individual consent. Consent is normally not a defense to a charge of murder or deliberate wounding.

These exceptions have an undisputed place in legal doctrine, but they also have considerable intuitive force apart from it. Defenders of legal moralism often bring out such examples to embarrass their opponents. Lord Devlin used the example of consensual murder to suggest that any coherent legal system must finally be rooted in the sensibilities of citizens, rather than their commitments to individual freedom.<sup>19</sup> Irving Kristol introduced the example of public gladiatorial contests to underscore what he saw as the necessary limits on freedom. Kristol contends that such contests would be objectionable, and any state should prohibit them, even if they could be shown to be fully consensual.<sup>20</sup> Defenders of Mill's harm principle, including Joel Feinberg, have sought to defuse such examples by emphasizing the indirect harm such public displays of brutality would cause.<sup>21</sup>

These exceptions pose an apparent challenge for the transactional account of consent, since that account purports to be formal, and so independent of substantive concerns about the value of activities being consented to, or the terms on which they are accepted. Other than fraud, the exceptions appear to be substantive (what Kant would call "material") rather than formal. The difference between material and formal principles has important implications for the scope of the limits on consent. If the availability of consent as a defense depends upon some public assessment of the worth of various activities, Devlin and Kristol are right, and the state may, if it chooses, prohibit activities considered degrading even when done by consenting adults, or, for that matter, when a person does them to him- or herself without anyone else's participation. If the exceptions can be given a formal analysis, neither degradation nor public assessments of value enter into them.

19. Patrick Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1965), 6.

20. Irving Kristol, "Pornography, Obscenity, and the Case for Censorship," *New York Times Magazine*, March 28, 1971.

21. Feinberg, *Harmless Wrongdoing* (Oxford: Oxford University Press, 1990), 128–129.

Consider force and fraud first. If consent is thought to be either a mental attitude or a public expression, the person who accepts or agrees to something under conditions of force or fraud has consented. The whole point of using force against someone or defrauding him is to get him to accept the terms in question. So the question of whether they have been accepted has an obvious answer. From this perspective, the only defect that could be involved in the use of force or fraud would have to be located in the way in which the acceptance was procured.

It might be thought that fraudulently obtained consent is not real, because in order to consent to something, you must understand what you have consented to and the terms on which you are consenting to it. If I knowingly but falsely told you that my paraglider was in good repair, and you agreed to take responsibility for any risks attendant on our glide, you consented to gliding in a safe glider, not a dangerous one, and so you did not actually consent to what we did. The difficulty with this approach is twofold. First, people often consent to things that they do not understand fully, and that consent is valid. Again, the analogy with contracts is helpful. I might agree to invest in something in the expectation that its price will increase, when in fact all the signs point toward its price dropping. I might buy a painting at an auction, as a result of a mistake I made about the identity of the painter. I might agree to go paragliding with you because I mistakenly believe that there are no downdrafts unless there is a hill or tall building nearby. I have consented even though I was mistaken. The leading cases on negligent misrepresentation have exactly this structure. An auditor or public weigher certifies the reliability of some measurement or accounting. If the representation is carelessly made, the person making it is responsible for the losses incurred by the purchaser or investor, even though he or she undertook responsibility for acts done in reliance on the certification in the firm belief that the weights or accounts *were* accurate. That brings me to the second and more general difficulty: focusing on the way in which deceit interferes with wholehearted agreement leaves out the role of the deceiver.

Parallel considerations apply to force. People ordinarily consent to things because of the circumstances; someone will consent to invasive surgery to avoid illness or death. It does not follow from this that the consent is not valid. You may have an excuse in the criminal law if you were

overwhelmed by circumstances and so might suppose that the overwhelming circumstances block the inference from your conduct to your agency or character. But that says nothing about the relation between you and the other person. In fact, in cases of necessity or duress, the person who is overwhelmed is typically supposed to be civilly liable to anyone who is injured. You don't go to jail for breaking into a cabin to save your life, but you are liable in tort for the damage you cause, because it is still something you did to someone else's property, even if you are not fully culpable. In cases of contracting or consenting where a lot is at stake, the agreement is still something you did. Force is different because of the role of the other person.<sup>22</sup>

Instead of focusing exclusively on the consenting party's situation, the transactional account must focus on the relation between the parties, in order to show that in cases of force and fraud, consent fails for lack of a united will. Both fraud and force stop the parties to an agreement from uniting their wills because the person committing either is already unilaterally determining how the other's means will be used. In cases of fraud, one person misrepresents the situation so as to get the other to agree, but the result is agreement without a united will because the parties lack common terms.<sup>23</sup> Agreements may also lack common terms in cases of mutual mistake, so that I think that I am agreeing to one thing, and you think we are agreeing to another. In such a situation, agreement fails for lack of common terms; for all of our negotiations, we were really just talking past each other. Fraud is distinctive because the willful misrepresentation of

22. There may be cases in which natural or social circumstances lead to so great a disparity of bargaining power that the contract will be judged to be unconscionable. It seems to me unhelpful to assimilate such cases to force cases for the same reason that it is a mistake to assimilate mistake cases to fraud. Instead, such cases reflect the underlying presumption created by the duty of rightful honor that a person does not intend to be a mere means for others. The standard juridical tests—the lack of donative intent and the absence of a functioning market in which exchanges take place—reflect this idea. On the idea that such factors underwrite a court's interest in protecting the integrity of its processes, see Seana Shiffrin, "Patriotism, Unconscionability Doctrine, and Accommodation," *Philosophy & Public Affairs* 29 (2000): 205–250.

23. Analyzed in terms of Kant's structure, the two "preparatory acts" of offer and assent are not completed, and so there are no terms on which to complete the "constitutive acts through which the parties unite their wills."

the situation *guarantees* that there can be no united will; the fraud does not suppose he shares a united will with his dupe. Of course the dupe thinks there is a united will and that there is an agreement. That is why he's a dupe.<sup>24</sup>

In cases of force, whether direct or threatened, a united will is impossible for a different reason. The problem is not that someone consents in response to an inducement, even an extreme one. People almost always agree to things in response to some incentive for inducement offered by some other person; I sign the waiver because I want you to take me paragliding; I consent to the surgery because I want you to remove my festering appendix. In cases of force, the incentive offered is one that the person offering it has no entitlement to offer, typically the other person's life or bodily integrity. Although self-preservation can be among a person's purposes—as consent in the medical context makes clear—parties can only unite their wills with respect to things to which they have rightful powers. In uniting their wills, the parties exercise rights that they have so as to create new rights and obligations. That is why you cannot unilaterally transfer something to another person; your entitlement to alienate and the other person's entitlement to accept need to be brought together. If I agree to do something in response to a threat, the person making the threat is offering something that he has no right to offer. Thus even if the terms are clear, they are not exercises of the respective rights of the parties.<sup>25</sup>

24. In principle this analysis could also apply if A consents to some interaction with B as a result of fraud by a third party, C, provided that B is aware of C's fraud. Although B does not perpetrate the fraud, common terms are lacking. If B is unaware of fraud, a court may provide A with a remedy of rescission of a foreword contract, but no court would grant A a remedy for trespass or battery against B, precisely because they had united their wills.

25. Analyzed in terms of Kant's structure, the two "preparatory acts" pose no conceptual problem because the terms are common, but there is a difficulty with the two "constitutive acts." In principle this analysis could extend to cases in which A consents to some interaction with B as a result of a threat by a third party, C. If B is aware of the threat, C's not carrying out the threat is an implied term of the contract, so B wrongs A by engaging in the interaction. If B is unaware of the threat, B does not wrong A by engaging in the interaction. A court may provide A with a remedy of rescission of a foreword contract in such circumstances, but no court would grant A a remedy for trespass or battery against B, precisely because they had united their wills.

#### IV. Material Exceptions: Slavery and Murder

Consent is not a defense to a charge of murder. In English law, at least since *Wright's Case*,<sup>26</sup> it is not a defense to a charge of deliberate wounding. In that case, the accused was asked by a beggar to maim him, to make him a more pathetic specimen as he asked for money. The court accepted the accused's description of the facts, but held that "on grounds of public policy," victim consent was not a defense in this case. In more recent cases, courts have held that in the case of a consensual fistfight from which death ensues, victim consent does not provide a defense. In German criminal law, in very limited circumstances, consent may reduce a charge of murder to one of manslaughter, but it does not serve to make the killing rightful.<sup>27</sup> These exceptions are familiar, and most people find them plausible and obvious. The same can be said for the limits to contract law that exclude slave contracts. Although some philosophers in the rapture of theses about "self-ownership" have tried to defend them, even those defenses have been halfhearted, typically limited by caveats about the requisite circumstances not applying, or competing values, extrinsic to issues of consent and contract, overriding them.

These material exceptions might seem to be in tension with the transactional account, as they seem to stop someone from taking responsibility for something for which he or she wants to take responsibility. Thus they may appear to be holdovers from paternalistic ideas of protecting people against their own poor judgment, or ideas about the wrongfulness of suicide. I want to suggest, however, that they are not only compatible with the account, but actually presupposed by it. I will do so by imbedding the examples in the broader conception of private interaction that underlies it. You cannot consent to your own murder or enslavement because it lies beyond your normative power for uniting your will with that of another.

For the transactional account of consent, consent is important against the background of a more general idea that private persons are free and

26. Co. Litt. f. 127 a-b (1603).

27. Although the best-known example of this doctrine involves the grisly case of a cannibal who advertised for the victim over the Internet and videotaped the entire proceedings, its more usual operation is in cases in which the killing took place on compassionate grounds.

equal *to each other* in the sense that each is entitled to pursue whatever purposes he or she might have, provided that this can be done in a way that is consistent with a like freedom for others to pursue their purposes. Within such a regime of equal freedom, people are independent, and able to do as they please. As a result, they are able to do as they please when it comes to interactions with others. Consent is fundamental to this picture, because it enables people to modify the boundaries that make their equal freedom with others possible, in light of their particular purposes. That is why consent serves as a defense. It enables one person to permit another to do what would otherwise be forbidden. In so doing, it lets each person determine the boundaries of his or her interactions with others. Moreover, it lets each person determine those boundaries in consultation or coordination with particular people, one at a time. So I can decide to consent to have you visit my home without thereby inviting everyone into my home; conversely (subject to antidiscrimination laws) I can invite the public into my business premises, but make an exception so as not to let you in.

Not every arrangement that two people might wish to make is consistent with this background of mutual freedom, because the background is structured by each person's innate right of humanity, which, as we have seen, is a right to independence of the choice of another. Kant's emphasis on the distinction between persons and things reflects the normative priority of the innate right of humanity. Thus in the Division of Rights in the Introduction to the *Doctrine of Right*, Kant notes that we cannot conceive of "the relation in terms of rights of human beings towards beings that have only duties but no rights."<sup>28</sup> He notes that this category is empty, for these would be "human beings without personality (serfs, slaves)." In the division of Acquired Rights, he notes that there are only three possible categories, rights to things, rights against persons, and rights to persons ("akin to" rights to things), because the fourth category, rights against things, is necessarily empty.<sup>29</sup> The distinction between person and thing is not put forward as a conceptual claim, but rather as an implication of the moral nature of rights. Rights always govern the interactions of free

28. 6:241.

29. 6:357.

persons. Among the rights that free persons can have is the right to vary their rights as against other persons by contract. As we saw in Chapter 3, contract belongs in the class of acquired rights, because if it is possible to do something for another person, it would be an arbitrary limit on freedom were people unable to have entitlements to performances by others. The power to contract thus constitutes an extension of innate right. At the same time, however, it is constrained by the duty of rightful honor, so that a contract cannot turn a person into a thing.

If consent is represented as a way in which one person through a unilateral act of choice becomes responsible for something, then the decision to become the slave of another might appear to be no different from any other decision. Provided that there was neither force nor fraud, it is just something someone decided to do.

Kant's objection to slave contracts rests on his broader understanding of contract, and in turn on his broader conception of the right to freedom under universal law. The possibility of two people uniting their wills presupposes each person's capacity for taking responsibility for actions. Thus the terms on which you unite your will with another's cannot presuppose the legal irrelevance of one of the two wills. Others can acquire your property or particular deeds, but not your person, because your person, understood as your entitlement to set your own purposes, forms the background against which you can take responsibility for deeds, whether yours or those of others. Put differently, two people can only act together in a way that is consistent with their freedom provided that they unite their purposes while preserving their separate purposiveness.

From this perspective, the problem with slave contracts is that slavery is the annihilation of legal personality: the slave becomes an object, fully subject to the master's choice. As such, the slave is incapable of undertaking obligations, because she has no rightful power to bind herself. Only the master has that power. Having purportedly transferred her capacity to be bound, however, she is no longer capable of being legally bound, and so has no contractual duties at all, so none to the master. A contract creates new rights and duties as between the parties to it; a slave contract purports to bind the slave, and at the same time dissolve her legal personality, so that she cannot be bound in her own right. Thus the slave who disobeys does not wrong her master, and so, although the master

may be *able* to coerce her, the master could not be entitled to do so by way of enforcing a right. The slave has not deprived the master of anything, because a contract to transfer everything can transfer nothing.

The same argument can be stated in the vocabulary of the duty of rightful honor. As we saw in Chapter 2, like all duties relating to right, the “internal duty” of rightful honor restricts the ways in which a person can exercise his or her freedom to be consistent with the Universal Principle of Right. No rightful act on your part can bind you to a condition in which you are subject to another person’s choice. So the limit on the exercise of your freedom must be the preservation of that freedom.

This argument for the incoherence of slavery contracts parallels the familiar Kantian “contradiction in conception” test in ethics in one way, but differs from it in another. When Kant argues in the *Groundwork* that the making of a lying promise could not be a universal law, his point is that such a law would require that all promises both be kept and not be kept.<sup>30</sup> The difficulty with slave contracts, however, lies not in the possibility of their universalization, but rather in the form of relation that they presuppose. You can only vary your rights and obligations in relation to another insofar as you are a being entitled to set your own purposes; a slavery contract both presupposes and rejects that entitlement. As Kant remarks, the moment you close such a contract, you are no longer bound by it.<sup>31</sup> Kant’s point is not that you will be unable to meet such a contractual obligation; people who undertake contractual obligations they cannot meet are still bound by them. The problem instead is that a slave can have no legal obligations whatsoever, and so cannot have the obligation of obedience that is a supposed term of the contract. The master may think otherwise, as, indeed, may the slave. But the fact that the parties wish to create such a relationship does not show that they can make one, because their contract has inconsistent terms, and so cannot be the object of an agreement.

The idea that your right to freedom is inalienable follows from the rela-

30. Kant, *Groundwork of the Metaphysics of Morals*, 4:422.

31. In *Theory and Practice*, Kant makes this point by saying that a person “cannot, by means of any rightful deed (whether his own or another’s), cease to be in rightful possession of himself” (8:293).

tion between each person's innate right of humanity and the normative structure of contract. A slave contract is incoherent because the slave is both a person and a thing, subject to an obligation to do the master's bidding, yet not a being capable of rights. The inconsistency between something's being both a person and a thing is not logical but normative. Kant does not try to ground the inalienability of each person's right to his or her own person in a conceptual claim that the concept of ownership cannot be reflexive; he shows that transferring your person is inconsistent with each person's innate entitlement to be independent of the choice of all others, which is a precondition of anyone's having the power to transfer rights.<sup>32</sup>

This analysis does not depend upon any substantive concerns about the vices of servility. Kant gives powerful expression to such concerns in his *Doctrine of Virtue*, but, as he remarks in the *Naturrecht Feyerabend* lectures, as a matter of right you can do as you want with your own person as far as right is concerned.<sup>33</sup> The servile person who always does the bidding of another may well suffer from self-inflicted immaturity, but is always nonetheless *entitled* to grow up.<sup>34</sup> The person who signs a slave contract is in a fundamentally different situation, having given up the entitlement to set and pursue his own purposes and to meet his own obligations, including those incurred under the contract. The slave contract gives up on the right to purposiveness, while the servile character is an exercise of that right, even if it is a debased and pathetic one. The idea that people are entitled to set and pursue their own purposes includes the entitlement to set and pursue them in pointless ways.

Slave contracts are sometimes said to be void on grounds of “public policy,” but properly understood, that formulation simply underscores Kant’s point. The relevant concept of policy here is not consequentialist.

32. G. A. Cohen accuses Kant of trying to “pull a normative argument out of a conceptual hat,” in *Self-Ownership, Freedom and Equality* (Cambridge: Cambridge University Press, 1995), 212. Kant’s argument for the distinction between persons and things is itself normative. There is a sense in which the problem with slave contracts reflects the problem with slavery itself, which lies at the heart of the Kantian account of each person’s entitlement to independence of the choice of others.

33. Kant, *Naturrecht Feyerabend*, trans. Lars Vinx (unpublished, 2003), 27:1334.

34. Thomas Hill Jr., “Servility and Self-Respect,” *Monist* 57 (1973): 87–104.

It focuses instead on the broader presuppositions of a regime of contract, according to which you can only alienate by contract what civilian legal systems call your “patrimony.”<sup>35</sup> As we saw in Chapter 3, acquired rights always have a “mine and yours” structure such that, although a particular person has this right, it could coherently have belonged to another person. Property is the most obvious example of this structure: it is my horse, but if you had been the one who acquired it, you would have the same set of rights in relation to it. Actions have the same “mine and yours” structure: if I cut your hair, I might just as well have cut somebody else’s hair, or you have had someone else cut yours. The structure of rights involved would have been the same. By contrast, your right in your own person could not belong to any other person. As we saw in Chapter 2, it is innate because it does not require an affirmative act to establish it; your right in your own person is something you enjoy simply in virtue of your humanity. It could not coherently require an affirmative act to establish it, because affirmative acts sufficient to establish rights presuppose persons capable of performing them antecedent to those acts. Your person, then, is the precondition of any entitlement you might give to anyone else, because it is your ability to give others rights in relation to your person, your

35. Other contracts that are said to be void on grounds of public policy also lie outside a person’s patrimony. A contract to pay a bribe to an official is not enforceable, because the official does not have his office subject to his private choice, and so the performance or nonperformance of official duties is not subject to his choice. As a result, the official’s choice cannot be united with that of another person with respect to conduct of those duties. A contract to vote for a candidate in an election is not enforceable for the same reason: a citizen’s right to vote is not a private power to be used for private purposes. Some courts have held that a contract to convert to or practice a certain religion cannot be enforced. The right to vote, the powers of an office, and freedom of religion are all fundamentally different from your right to your deeds and possessions. The right to vote is something each person has in his or her capacity as a citizen; the example of officeholders is just a narrower case of this. The right to determine which religion you will practice is a further example with the same structure: the law will permit you to undertake and act on religious vows, but will not permit others to force you to do so, or to hold you to a contract to do so. The other prominent class of exceptions involves contracts to violate fiduciary duties, including both corporate directors (a private variant on the example of a bribe) and parents accepting inadequate child support for their children or opting out of their obligations as guardians in return for payment. In these examples, someone has possession but not use of either property or another person, and so cannot accept payment in return for failing to fulfill the concomitant duties.

deeds, and your property. The most you can do is to give another person a right to a particular use of your person or a particular deed. It is no accident, then, that any attempt to alienate it must fail, because you can only unite your will with another provided that your personality survives the union.<sup>36</sup>

Kant's brief discussion of slave contracts represents them in their purest form. Many historical instances of slavery and serfdom permitted slaves some legal powers. For example, under Roman law slaves could inherit, and enter into contracts that bound their masters. These differences do not render Kant's analysis irrelevant to these examples. Kant remarks that although you can give another person a right to a particular performance, and so to a use of one of your powers, you cannot alienate those powers. This restriction on alienating your powers is parallel to the restriction on alienating your person. Suppose I wanted to give you a right, not to have me do this or that service for you, but rather the right to permanently control the use of my arms. The difficulty with any such agreement is that it would limit my entitlement to exercise any other rights. So I could not sign a contract without your permission, or move (my arms) from one place to another. That in turn means that I am not allowed to do anything inconsistent with your directing my arms, and so my entire person is a mere object, even though I retain a variety of other legal powers, since you are entitled to determine whether I will exercise them or not. More generally, a form of slavery that reserved certain rights to the slave would give the master the right to determine whether the slave could exercise those rights by determining what the slave could do with his body. Since the slave is not entitled to decide whether to exercise his rights, the limited slave contract has an incoherent term. Gerrymandering

36. Defenders of "self-ownership" sometimes conclude that slave contracts are binding because a person is entitled to do whatever he wants with his own person. Such an account requires both an explanation of how a right can be transferred at all, which self-ownership theorists have yet to provide, and a specification of what is transferred when a person is such that the person can be transferred and still be subject to an obligation to the person to whom he is transferred—Kant's two issues. Although I cannot show that these could not be addressed, Kant's argument shows that the mere fact that someone might conclude that such a transfer was advantageous does not show that it can create a right in one person to own another.

the terms of such an imagined contract cannot solve this problem, because the underlying problem is that others can only assert a claim of right against you, that is, can only restrict your freedom, insofar as you are a free being, that is, your own master.

This brings us to consensual murder. Slavery is not the same as death, but it has been characterized as a form of social death.<sup>37</sup> From the standpoint of a system of equal freedom, the converse point is more relevant. Death is just a biological fact; murder, by contrast, is a form of biological slavery, since the murderer decides whether the victim will continue to exist. The reason that consent is not a defense to murder is the same reason that you cannot contract your way into slavery. In both cases, the possibility of people acting together in a way that is consistent with their respective freedom presupposes that they are able to maintain their separateness through that unity.<sup>38</sup> That is what makes the united will an exercise of their freedom. Thus the terms of the interaction and agreement must be consistent with the preservation of their separateness.

The difficulty for consent as a defense to murder thus turns on the distinction between murder (as biological slavery) and death as a mere biological fact. Consensual murder requires that one person taking the life of another is a term of the agreement, and so that one person relinquish any claim to resist with right the force that the other uses. As we saw, you can only agree to some action by another person by giving another person a right to do that thing, which is equivalent to undertaking an obligation to permit the other to do it. Victim cannot undertake an obligation to permit himself to be treated as an object; if he is an object, he can have no obligations. Thus the victim is both a person and a thing, which is normatively impossible.

This focus on the right that victim would have to give to aggressor underwrites the contrast between cases in which someone consents to being killed and those in which someone consents to participate in an activity

37. See John Rawls, *Justice as Fairness: A Restatement* (Cambridge, Mass.: Harvard University Press, 2001), 24. Rawls cites Orlando Patterson, *Slavery and Social Death* (Cambridge, Mass.: Harvard University Press, 1982).

38. Kant's own treatment of relations of status as ones in which one person has possession but not use of another person reflects the same requirement of maintaining separateness through unity.

that carries risk of death, even a significant risk, such as extreme skiing or freefall skydiving. In that sort of case, the terms of the united will do not presuppose the violation of their respective separateness. Even in sports where the risk is not merely of injury or death, but injury or death through the actions of an opponent, the parties consent not to one person doing something to another, but rather to two persons interacting in a way that foreseeably injures one or both of them, and from which one or both could die. Perhaps a consensual boxing match is more brutal than this description suggests. I do not mean to suggest otherwise, but only to note that the only way that it can be treated as a case of a consensual activity that results in injury is if it can be represented as a contest of strength, in which each boxer makes himself available as a target while trying to overpower the other, but neither grants the other the right to hit him when he is down.

A consensual fight to the death—Kristol’s gladiatorial contest—is different. It cannot be represented as a consensual contest that carries with it a significant risk. Each of the gladiators in the example gives the other the power of life and death, and the winner is not declared when the loser gives up. Thus it is an arrangement in which the victim is turned into a mere thing, and so one to which the parties cannot agree.<sup>39</sup>

This may seem to be a misrepresentation of the gladiatorial contest, in which the entitlement to resist might appear to be a term of their agreement. But if one person cannot consent to being killed by another, then two cannot each consent to being killed by the other. Contrary to appearances, the gladiators do not have a right to defend themselves; the terms of the imagined contract would need to require that each agrees to be turned into a thing, and then the two things fight to the death, in the manner of animals that are sometimes made to fight to the death to entertain spectators.

In contrasting boxing matches with gladiatorial contests, I do not mean to be offering a brief in favor of boxing, or commenting on the best way to classify a consensual fight to the death in a less spectacular setting. The Kantian theory at the level at which I have sought to develop and defend

39. The problem is only exacerbated if we imagine that the arrangement involves a forward contract so that each gladiator’s consent is irrevocable.

it is abstract, and speaks only to the factors relevant to classify particulars, without classifying any of them. The important contrast is between consenting to something that carries a risk of death, even a significant one, and consenting to death. The latter guarantees that the consenting party cannot be bound; the terms of the agreement provide the guarantee, so the agreement is not binding even if the victim survives.

The contrast between your person, which lacks the “mine or yours” structure of your deeds and possessions, also provides a framework for thinking about other cases in which consent is sometimes said not to be a defense, such as mutilation, including *Wright's Case*, involving the beggar who asked to be maimed so as to improve his earning prospects. Few would want to claim that consent was not a defense in many cases of one person permanently changing the structure of another's body. In addition to the obvious medical cases, cosmetic procedures including ear piercing and tattooing are wrongful if nonconsensual, but unobjectionable if consensual. Consensual mutilation looks different through something like the following chain of reasoning: your body simply is your person (that is why crimes against the body are “offenses against the person”); the “members” of the human body are not parts, but form an essential unity,<sup>40</sup> so that depriving a person of a body part deprives her of part of her general purposiveness. There is something appealing about this chain of reasoning, though perhaps also something implausible. Both the appeal and the implausibility reflect different considerations that might be brought to bear in determining whether maiming is, like tattooing, simply a way of decorating a person according to her highly unusual tastes, or whether instead, it is, like murder, a removal of purposiveness. At the level of abstraction at which the idea of consent as a united will operates, it provides no particular resolution of such questions, although it does show what is at issue in them.

The bar to consent as a defense to murder differs from the moral prohibition on suicide in the same way that the argument against slave contracts differs from the moral prohibition of servility.<sup>41</sup> Kant famously ar-

40. 6:278.

41. Because it does not depend upon the wrongfulness of suicide, the bar to consent as a defense to murder does not automatically preclude the legality of assisted suicide in cases in which a terminally ill person is incapable of taking his or her own life. Such cases might appear to be straightforward examples of consensual murder, in the sense that one person acts

gues in the *Groundwork* that a rational being could not adopt a maxim of self-love according to which a person makes it “my principle to shorten my life when its longer duration threatens more troubles than it promises agreeableness.”<sup>42</sup> Kant argues that such a maxim could not be conceived as a universal law because it would violate its own presuppositions. Whatever its successes or limitations, this ethical argument against suicide has no bearing on rights, since it concerns only the relation between the end to be pursued and the means being used in pursuit of it. As Kant makes clear in the Introduction to the *Doctrine of Right*, the relation between an agent’s ends and the means he or she uses doesn’t matter for right; only the form of interaction with others does. So the wrongfulness of suicide does not enter the argument.<sup>43</sup>

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through another, and so takes responsibility for the action of another of taking the life of the first. As such they seem to suffer from the incoherence that besets consensual murder. A significant hurdle to any attempt to distinguish them is generated by the familiar legal rule, in both civil and common law systems, that a person who acts to preserve the life of another is normally (though defeasably) deemed to be acting on the other’s behalf and so commits no battery. A physician who treats an unconscious patient is entitled to payment for services; those injured trying to rescue another person (but not property) can recover in tort from those who created the initial danger. In these cases, the law treats each person as having the purpose of maintaining his or her continued purposiveness; this deemed purpose has been held to apply even to a case in which a physician revives someone who has attempted suicide. None of these doctrines would interfere with Kevorkian-type assisted suicide, in which one person provides another with a mechanism that enables the other to take his own life. Active cases would seem to require a different analysis, for the person who wishes to end his life is capable of doing so but chooses not to, wanting instead another person to do so. In such cases, it would seem that consent can be no defense. Perhaps an argument could be made consistent (though certainly not required) with Kantian concepts of right according to which an advance directive empowering an agent to act on a patient’s behalf should patient be unconscious or otherwise unable to act for herself could include provisions not only for withdrawal of life support, but also for affirmative measures. If it could be shown that this is an instance of acting for the patient’s purposes, in circumstances in which there is no possibility of future purposive action by the patient, perhaps it could be treated as an instance of one person acting as the legal guardian of another. But it would have to be restricted to such cases.

42. *Groundwork*, 4:422.

43. A corporation can consent to the annihilation of its own legal personality (through acquisition by sale, or going out of business) because that personality is derivative in two senses. First, a corporation is a structure of acquired rights through which individual human beings act. Second, a corporation does not have full personality because it is not entitled to use

## V. Conclusion

Consent matters because it is a condition of free persons exercising their freedom together. Freedom in turn matters independently of the particular ways in which it is exercised: each person is entitled to set and pursue his or her own purposes, subject only to the condition that he or she does so in a way consistent with the entitlement of others to do the same. Such an austere account of freedom does not permit any assessment of different choices on the basis of some public index of their importance. Instead, it requires only that free persons be morally capable of getting together to change their respective rights and obligations.

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its means to set whatever purposes it wishes. Its directors and officers are charged with acting for the purposes of its owners or, in the case of philanthropic corporations, its creators. They cannot set or pursue whatever purposes they see fit, and when dissolving the corporation advances the corporation's limited purposes, they may do so.