

KANT'S  
Doctrine  
*of*  
Right

*A Commentary*

B. Sharon Byrd and Joachim Hruschka

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# Kant's *Doctrine of Right*

## A Commentary

Published in 1797, the *Doctrine of Right* is Kant's most significant contribution to legal and political philosophy. As the first part of the *Metaphysics of Morals*, it deals with the legal rights that persons have or can acquire, and aims at providing the grounding for lasting international peace through the idea of the juridical state (*Rechtsstaat*).

This commentary analyzes Kant's system of individual rights, starting from the original innate right to external freedom, and ending with the right to own property and to have contractual and family claims. Clear and to the point, it guides readers through the most difficult passages of the *Doctrine*, explaining Kant's terminology, method and ideas in the light of his intellectual environment. One of the very few commentaries on the *Doctrine of Right* available in English, this book will be essential for anyone with a strong interest in Kant's moral and political philosophy.

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To the memory of  
Mary Gregor  
1928–1994



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# Introduction and methods of interpretation

The *Doctrine of Right* is Kant's masterpiece on legal and political philosophy. The work is highly structured and meticulously formulated. In it Kant makes a few simple assumptions he calls "axioms" and "postulates" and from those assumptions the whole doctrine of right unfolds systematically. It unfolds Kant's most mature thoughts on the peace project. As Kant indicates in the Conclusion to the *Doctrine of Right*, the whole aim of that work is to ensure lasting peace.<sup>1</sup> Peace is ensured in Kant's view by securing and protecting individual rights. Thus Kant's most significant contribution to legal and political philosophy is dedicated to the peace project and is about rights and how those rights can be ensured.

Rights can be ensured only in a "juridical state." Kant fathered the idea of a juridical state, which in German is called the *Rechtsstaat*, or in English a state under "the rule of law," a state guaranteeing "due process of law." Unlike authors before, during, or after Kant's time,<sup>2</sup> Kant expands his inquiry beyond the juridical state of one nation to include the juridical state of nation states and the cosmopolitan juridical state. Kant's ideas thus encompass international law to ensure rights globally and cosmopolitan law to ensure world trading relations and permit peoples to offer themselves freely for commerce with one another. Kant indeed is the only author who provides *one* single model designed to ensure peace on the national, international, and cosmopolitan levels.

We would like to express our sincere gratitude to Arthur Laby for patiently reading and critiquing an earlier draft of this *Commentary*.

<sup>1</sup> AA VI, Conclusion, p. 355, ll. 7–9.

<sup>2</sup> Examples are Montesquieu, Rousseau, or Hamilton, Madison, and Jay. Authors, such as Grotius, Pufendorf, and de Vattel, did discuss international law, but no one developed one single system to ensure peace on the national, international, and cosmopolitan levels, as did Kant.

This *Commentary* explains Kant's system of individual rights, starting from the original innate right to external freedom and ending with the right to own property, to have contractual claims, and to have claims from family relations. Kant takes extreme care in developing his basic theory on private law on the external mine and thine. A quick perusal of the *Preparatory Work on the Doctrine of Right* reveals that Kant started again and again from square one,<sup>3</sup> painstakingly trying to write a coherent text on his theory of rights to objects of choice external from ourselves – to physical things, to someone else's choice to perform an action, to family members. No one before or after Kant formulated such radical questions about rights to external objects and provided such fundamental answers. Unfortunately, Kant's main concern does not seem to lie in his readers' ability to understand his often laconic explanations but instead with satisfying himself that he had the theory right and properly expressed. In this *Commentary*, we hope to have unraveled many of the mysteries associated with Kant's theory of rights to external objects of choice.

The *Commentary* also penetrates Kant's idea of the state which provides the apparatus for ensuring these rights. The ideal form of government for Kant is a republic in which the people, from whom all power and sovereignty proceed, are represented. This representation ensures that the state does not become despotic, violating individual rights through wielding irresistible power. Representation is a surrogate for the united will of all of a people in one nation state. If the people's will is united and all lawgiving proceeds from that united will, then the people have consented and thus can be done no wrong by the laws the state adopts and applies. Furthermore, Kant understands the principle of division and separation of powers. He sees all power as flowing from the people, not only the legislative, but also the executive and judicial powers, and conceives of this power as dividing into a trinity of the universally united will of all. The three powers complement one another, but each is subordinate to the other two. It is this combination of coordinate and mutually subordinate powers that constitutes Kant's conception of checks and balances so crucial to a republican democracy. The *Commentary* then applies Kant's ideas of the ideal juridical state to the international level, claiming that Kant foresaw not only one juridical state of nation states as the ideal model for peaceful international relations, but also one juridical state of all peoples

<sup>3</sup> AA XXIII (*Preparatory DoR*), pp. 311–327.

engaged in commercial trade as the model for peaceful cosmopolitan relations.

## 1. Placement of the *Doctrine of Right* within the *Metaphysics of Morals*

We first pause to consider the placement of the *Doctrine of Right* within the *Metaphysics of Morals* in general and the implications of that placement. Kant's *Metaphysics of Morals* contains (1) an "Introduction to the *Metaphysics of Morals*," (2) *Metaphysical Principles of the Doctrine of Right*, and (3) *Metaphysical Principles of the Doctrine of Virtue*.<sup>4</sup> Kant thus sees law and ethics as two parts of moral philosophy. The introduction is what in the German tradition would be called the "general part," which discusses issues that are relevant for both specific parts, namely for law and for ethics. Freedom, imputation, personhood, and obligation are a few of these issues.

The *Doctrine of Right* is devoted to individual rights, whereby a right is a moral, and thus a metaphysical concept. I have a right against another person if I have a claim that the other person act or refrain from acting in a specified way and if I can assert this claim against that other person.<sup>5</sup> Kant defines a right by saying that it is a "moral faculty to obligate others."<sup>6</sup> By acquiring a physical thing as mine, I impose an obligation on every person who might come into possession of the thing that he return it to me on demand. Accordingly, I have a faculty on the moral level and can assert a claim based on an obligation I impose on others. I have a right to my possession of the thing. By virtue of my faculty to obligate others, I can rightfully say to any possessor of my property "Return it to me!" and the possessor is obligated to do so. His duty is a legal duty and legal duties, as ethical duties, belong to the moral or intelligible world.

"Moral" in Kant's terminology means non-physical. This meaning comes from Pufendorf's distinction between *entia physica* and *entia moralia*, physical and moral entities.<sup>7</sup> "Moral" thus came to mean non-physical and "physical" to mean non-moral. As Kant notes, what

<sup>4</sup> The *Doctrine of Right* and the *Doctrine of Virtue* both have three parts. We discuss the tripartite division of the *Doctrine of Right*, note 49. The three parts of the *Doctrine of Virtue* are: "Introduction to the *Doctrine of Virtue*," "Doctrine of the Elements of Ethics," and "Doctrine of the Methods of Ethics." See AA VI (*Virtue*), p. 379, ll. 1–2, p. 415, and p. 475.

<sup>5</sup> The decisive characteristic of a right is that "another can require me to act according to the law as a matter of his right." AA VI (*Virtue*), Introduction VII, p. 390, l. 35 – p. 391, l. 3.

<sup>6</sup> AA VI, Division DoR B, p. 237, l. 18. <sup>7</sup> Pufendorf, *De Jure* I/I/§§2–4/pp. 13–15.

is moral does not belong to the sensible, but rather to the intelligible world. Legal and ethical duties are non-physical or extra-physical entities, and they become cognizable only from the standpoint of the intelligible world.<sup>8</sup> Kant's moral philosophy is thus necessarily a metaphysics of morals because it deals with extra-physical rather than physical entities.

An ethnographer can determine the mores,<sup>9</sup> or customs of a people by observing physical phenomena. Such determination is the ethnographer's description of what goes on in the physical world. Kant, in contrast, is concerned with a metaphysics of mores, that which *transcends* actual mores or customs. The title of Kant's book means exactly that. "Morals" means mores or customs which are transcended by metaphysics. "Morality" is part of this metaphysics and thus one must differentiate between the mores or morals, on the one hand, and morality (and the adjective "moral"), on the other hand. Everything moral is thus part of metaphysics. A right is a moral category. Accordingly, rights are first cognizable when we place ourselves on the terrain of a metaphysics of morals.

Kant similarly distinguishes between laws of nature (scientific laws) and laws of freedom.<sup>10</sup> Laws of freedom, whether juridical or ethical, are called "moral laws"<sup>11</sup> because these laws have metaphysical character. Freedom as a topic of a metaphysics of morals, be it internal freedom or a right to external freedom, is not a phenomenon in the sensible world. An animal that is neither caged nor tied is externally free. The *homo phaenomenon* who is neither caged nor tied is also externally free. External freedom can be perceived empirically, but internal freedom and the *right* to external freedom can be comprehended only within a metaphysics.

Freedom (internal freedom) gives itself laws, which are significantly different from laws of nature. I as a free person (*homo noumenon*)<sup>12</sup> give myself, alone or with others, laws of freedom to which I am submitted.<sup>13</sup> These laws of freedom are not limited to the Categorical

<sup>8</sup> John Stuart Mill speaks of "moral sciences," as opposed to "physical science," to designate what we today call the "humanities." Mill, *System of Logic*, Bk. VI is entitled "On the Logic of the Moral Sciences." In 1863, Schiel translates "moral sciences" as *Geisteswissenschaften* thus capturing the older meaning of the word "moral."

<sup>9</sup> Latin: *mos*, see AA VI (*Virtue*), §40, p. 464, ll. 16–20.

<sup>10</sup> AA IV (*Groundwork*), p. 387, ll. 14–15. St. James speaks of "laws of freedom" (James 1:25) long before Kant.

<sup>11</sup> AA VI, Introduction MM I, p. 214, ll. 13–17.

<sup>12</sup> On the distinction between *homo phaenomenon* and *homo noumenon*, see [Chapter 14](#).

<sup>13</sup> Cf. AA VI, Introduction MM IV, p. 223, ll. 29–31.

Imperative, the highest of all laws of freedom. Kant, particularly in the *Doctrine of Right*, asks repeatedly what laws of freedom our reason dictates. He determines, for example, that a law prohibiting the use of external objects of our choice cannot be a law of freedom because then freedom would rob itself of the use of these objects and the objects would be destroyed in a practical sense.<sup>14</sup> Kant also indicates that a law of freedom can require a person to perform an act required by contract only if the person has agreed to be bound by the contract.<sup>15</sup> According to laws of freedom, the supreme authority of a state can be “no other than the united will of the people itself.”<sup>16</sup> As we can see from these examples, Kant formulates laws of freedom to the extent these laws can be cognized *a priori* by reason. They are then called “natural (moral) laws.” Not only natural laws but also binding positive laws are laws of freedom in a juridical state. The duty to drive on the right side of the road, which cannot be derived from reason directly, follows from a positive law of freedom called the “traffic code.” The traffic code is a part of metaphysics because duties and rights follow from the traffic code. The *Doctrine of Right*, which concerns our rights and legal duties, is thus a part of the metaphysics of morals regardless of whether these rights and duties follow from natural or from positive law.

## 2. Overall structure of the *Commentary*

Chapter 1 begins with §41 of the *Doctrine of Right*. Section 41 contains the culmination of Kant’s theory of private law and prepares for the transition to public law with the postulate of public law in §42. Because §41 represents the totality of Kant’s preceding ideas in the *Doctrine of Right* and maps the chart for moving forward, it is especially difficult to unravel but equally crucial to understand. In Chapter 1 we provide a rough descriptive structure for understanding §41 and thus for understanding the basic system of rights Kant portrays. Section 41 tells us what a juridical state (*rechtlicher Zustand* – *status iuridicus*) is, and contrasts the juridical state to the non-juridical state or the state of nature. We thus first discuss what a juridical state is for Kant, giving its formal and substantive criteria. Kant labels the formal criteria with the three

<sup>14</sup> AA VI, §2; see Chapter 5, section 2.

<sup>15</sup> AA VI, §18, p. 271, ll. 6–14. “The acquisition of a personal right can never be original and single-handed.”

<sup>16</sup> AA VI, §47, p. 315, ll. 27–28.

*iustitiae*, namely the *iustitia tutatrix*, the *iustitia commutativa*, and the *iustitia distributiva*.

Chapter 2 gives our argumentation supporting the structure we have sketched in Chapter 1. Chapter 2 focuses on the three *leges*, the *lex iusti*, the *lex iuridica*, the *lex iustitiae*, as they are used in §41 and occasionally elsewhere in the *Doctrine of Right*. In particular, Kant associates these three *leges* with his versions of the three Ulpian formulae. Accordingly, in Chapter 2 we discuss these three formulae, showing how they tie into Kant's idea of a juridical state and into the structure of the *Doctrine of Right* we claim §41 reveals. A particularly significant set of concepts for Kant's system are "original" and "adventitious." This set of concepts will be examined in depth in Chapter 2 and they will reappear in our discussion of land ownership. An Appendix to Chapter 2 delves somewhat deeper into one historical source of Kant's ideas on the juridical state. Chapters 1 and 2 and the Appendix to Chapter 2 should be seen as one unit in the development of this *Commentary*. It is a unit that is indispensable to understanding the rest of the *Commentary*.

Chapter 3 looks at the idea most central to Kant's ethical and legal philosophy, namely freedom. We first examine what Kant calls the "axiom of external freedom," the axiom from which the *Doctrine of Right* unfolds. To better understand it, we consider internal freedom in both its negative and positive aspects. Kant himself refers to these two aspects of internal freedom as "negative" and "positive." We then claim that external freedom also has a negative and positive aspect, a claim Kant does not expressly make. We argue that the positive aspect of external freedom is the postulate of public law with its command to move to a juridical state. It is dependence on laws governing external freedom that makes us externally free in the positive sense.

Chapters 4, 5, and 6 explicate Kant's ideas on property ownership. Chapter 4 begins with the permissive law of practical reason, which we claim is a power-conferring norm. It gives us the freedom to have external objects of choice as our own and is the substance of the postulate in §2 of the *Doctrine of Right*. In Chapter 5 we move from the permissive law to the central notion of possession for Kant. We also examine possession as one's own and the idea of a right *in rem*, or a right to a physical thing one has against everyone else. In Chapter 6 we continue with the idea of intelligible possession, in particular of land. We examine the original right to a place on the earth's surface, the original community of the land, and the originally united will of this community, using the distinction between the concepts "original"

and “adventitious” we discuss in [Chapter 2](#). We end [Chapter 6](#) with the postulate of public law. [Chapters 4, 5, and 6](#) together thus form another unit of this *Commentary*.

[Chapter 7](#) moves to Kant’s theory of the state, examining first the ideal state or the “state in the idea” as Kant calls it. The state in the idea provides the norm for all state constitutions. In particular, [Chapter 7](#) looks at the division of powers in an ideal state. The ideal state constitution is what ensures individual rights and gives us the model for the juridical state in reality. It is the state in reality that we discuss in [Chapter 8](#). [Chapter 8](#) begins with the original contract and focuses on the forms of government in a juridical state. It ends with an interpretation of Kant’s position on revolution. We claim that Kant prohibits revolution only in a juridical state but certainly not in a despotic construct that simply calls itself a “state.” [Chapter 9](#) examines Kant’s theories of international and cosmopolitan law. It builds on what Kant expresses in his Preface to the *Doctrine of Right*, namely that the latter parts of the book follow “easily” from the former.<sup>17</sup> We attempt to take the ideas developed in [Chapters 1–8](#) and apply them to the international and cosmopolitan arenas. We claim that Kant envisioned an international juridical state, much like the individual state of one people. His vision was the juridical state of nation states (*Völkerstaat*) organized under one republican constitution valid for all of the individual nation states in the world. In our discussion of cosmopolitan law we argue that it does not govern the individual’s relation to nation states, as is often claimed in the secondary literature. Instead cosmopolitan law governs the right a whole people have to engage in commerce with neighboring peoples. Cosmopolitan law for Kant is indeed the idea of a perfect World Trade Organization. [Chapter 9](#) ends with a discussion of Kant’s peace project. We claim that the juridical state, where rights are ensured, and the state of peace are identical.

[Chapters 10–14](#) pick up some loose ends in Kant’s theory of the juridical state, namely the idea of public law and its limits ([Chapter 10](#)), Kant’s theory of contract law ([Chapters 11 and 12](#)), of criminal law ([Chapter 13](#)), and of the concepts of personhood and imputation ([Chapter 14](#)). One might wonder why we do not discuss contract law in connection with [Chapters 4–6](#) on having an external object of choice as one’s own. Kant follows his discussion of property ownership with contract law in the *Doctrine of Right*. One might also wonder why such

<sup>17</sup> AA VI, Preface, p. 209, ll. 8–11.

basic notions as personhood and imputation do not come at the beginning of the *Commentary*. Kant discusses imputation in the "Introduction to the Metaphysics of Morals" and not at the end. Finally one might say that criminal law in one nation state belongs most naturally to the discussion of the individual juridical state and not following international and cosmopolitan law. We decided that any in-depth discussion of these important areas of the *Doctrine of Right* would cut the main thread running through Chapters 1–9, namely the idea of the juridical state on the national, international, and cosmopolitan levels. For that reason we have placed them at the end.

In writing this *Commentary* we have employed four approaches to understanding the *Doctrine of Right*. We discuss those approaches in sections 3–6. The first is that Kant's own reference to Euclid's geometry in connection with the *Doctrine of Right* should be taken most seriously when interpreting that work. The second is that Kant's work on the peace project in the *Doctrine of Right* can be interpreted only to a very limited extent by examining his previous work in *Theory and Practice* and *Perpetual Peace*. Large discrepancies exist among these works and it is the *Doctrine of Right* that is Kant's final statement on law and rights. Often the scholarly literature mixes arguments from all three of these works, with perplexing results one does not attain if one assumes that the *Doctrine of Right* is the more mature work and Kant, like others, was capable of changing his mind and improving his theory. The third is that the work of Gottfried Achenwall had an enormous influence on the approach and the vocabulary Kant uses in the *Doctrine of Right*, an influence which has been largely ignored until today. Our idea is not to develop an historical account of the development of natural law from Achenwall to Kant. Instead we examine Achenwall's theories of natural law to see the intellectual climate of the time within which Kant was immersed. It is often focusing on Achenwall's vocabulary that enables one even to take note of some of the expressions Kant repeatedly uses and the meaning he attaches to them. Finally, we consider select authors writing between the early seventeenth to the middle of the eighteenth century, many of whom were more famous than Gottfried Achenwall and with whose work Kant was familiar and who provided some of the background for Kant's own thoughts. What we do not do is engage the contemporary secondary literature in this *Commentary*. Doubtless much can be said about the many books and articles on Kant's philosophy in general and his legal philosophy in particular. Any thorough treatment, however, would demand far more time and

words than this *Commentary* can encompass. We do refer to the relevant secondary literature in our footnotes to make readers aware of what is available on the issues we do discuss.

This *Commentary* is not exhaustive. We do not attempt to interpret any and every word of the *Doctrine of Right*. Still, we do attempt to interpret everything we consider to be important in those of Kant's thoughts which run through the entire book. The main maxim which guided our work was that Kant got it right. If his theory seemed self-contradictory or nonsensical, impenetrable or simply confused, we assumed it was our problem, and not Kant's. We never criticize Kant's ideas in the *Doctrine of Right*, but instead attempt to explain them within a unique and complete, logically consistent, whole. Whether we have been successful must remain to the judgment of our readers.

### 3. Kant's geometric method

When selecting the methods for interpreting the *Doctrine of Right* it is important to first consider the methods Kant himself uses. The *Doctrine of Right* is not an omnium gatherum of aphorisms. Instead Kant speaks a scholarly language, as he himself says in his Preface to that work. A scholarly language stands in contrast to a popular language. Kant is not interested in popular language, but instead insists "on Scholastic precision, even though that precision has been labeled embarrassing."<sup>18</sup> Kant compares his work in the *Doctrine of Right* to (Euclidean) geometry on a number of occasions, the most detailed of which is in §E,<sup>19</sup> but also, for example, in his discussion of contract law.<sup>20</sup> Kant's work lies within a tradition which includes not only Spinoza with his major work *Ethica More Geometrico Demonstrata* of 1677, but also Pufendorf with his *Elementa Jurisprudentiae Universalis* of 1660. Even the name of Pufendorf's book reminds one of Euclid's *Elements*. Pufendorf's *Elementa* consists of two books, the first of which contains twenty-one definitions and their corresponding explanations and the second of which begins with two axioms and ends with five observations, again with corresponding explanations. Pufendorf obviously had Euclid in mind when developing the *Elementa*, regardless of how Pufendorf's work sizes up in comparison to Euclid's.

<sup>18</sup> AA VI, Preface, p. 206, ll. 24–26.

<sup>19</sup> AA VI, Introduction DoR §E, p. 232, l. 30 – p. 233, l. 23.

<sup>20</sup> AA VI, §19, p. 273, ll. 11–29.

In line with our comparison to Euclid's *Elements*, Kant's *Metaphysical Principles of the Doctrine of Right* contain axioms and postulates. Kant speaks of an "axiom of law" or "axiom of right" (*Axiom des Rechts*)<sup>21</sup> and of an "axiom of external freedom." Kant refers to the "axiom of law" by this name once in the *Doctrine of Right*.<sup>22</sup> There Kant points to an example he had used<sup>23</sup> of having an apple in one's hand which someone else grabs and removes. The actor "with his maxim," Kant writes, "directly contradicts the axiom of law." Kant refers to the "axiom of external freedom" twice by that name in the *Doctrine of Right*.<sup>24</sup> Kant provides no examples, but without doubt, the "axiom of external freedom" refers to the assumption of an original right to freedom, which Kant in the "Introduction to the Doctrine of Right" formulates as follows: "Freedom (independence from another's necessitating choice) to the extent it can coexist with everyone else's freedom according to a universal law is [the] only original right due every human being by virtue of his humanity."<sup>25</sup> The right to freedom implies the "universal law of right": "Act externally so that the free use of your choice [can] coexist with everyone's freedom according to a universal law."<sup>26</sup> The original right to freedom and the "universal law of right" correspond to each other. With my assumption of my original right to freedom I can require everyone else to act toward me according to the universal law of right. We need to understand the entire *Doctrine of Right* as unfolding from this "axiom of external freedom" in conjunction with the postulates in §§2 and 42 of the *Doctrine of Right*, just as Euclidean geometry unfolds from a few axioms and postulates.

One might conclude that the expression "axiom of law" is just another expression for the "axiom of external freedom." Such an interpretation is suggested particularly by the context within which Kant discusses the axiom of law. If I am the "holder" of a thing, meaning I am "physically connected" to the thing (I hold an apple in my hand) and another person "affects" this thing without my consent (he grabs the apple out of my hand) then he affects and abridges my freedom, which is precisely what "directly contradicts the axiom of law." Similarly, the action Kant describes cannot be compatible with my right to freedom (assuming the action is not justified), or stated differently, it

<sup>21</sup> The word *Recht* in German means both "law" and "right" and thus can be translated either way. We discuss this problem of meaning in [Chapter 1, section 1B](#).

<sup>22</sup> AA VI, §6, p. 250, ll. 1–7. <sup>23</sup> AA VI, §4, p. 247, l. 28 – p. 248, l. 7.

<sup>24</sup> AA VI, §16, p. 267, ll. 12–13; §17, p. 268, l. 25.

<sup>25</sup> AA VI, Division DoR B, p. 237, ll. 29–32.

<sup>26</sup> AA VI, Introduction DoR §C, p. 231, ll. 10–12.

contradicts the universal law of right, or stated yet differently again, the maxim of the action “directly contradicts” the axiom of external freedom. Kant’s argumentation with reference to the axiom of law thus leads to the axiom of external freedom. His readers would not miss anything in Kant’s argumentation if he had spoken of the “axiom of external freedom” instead of the “axiom of law.” It would thus be reasonable to conclude that the expressions “axiom of law” and “axiom of external freedom” mean the same.

We believe, however, that Kant’s choice of words is not accidental and that the expression “axiom of law” means something different from the expression “axiom of external freedom.” One can call the “axiom of law” the requirement Kant connects to the first Ulpian formula and states as “Be a juridical person!”<sup>27</sup> One can also express this requirement as “Take the viewpoint of the law!” (see [Chapter 2, section 4](#)). How does one take the viewpoint of the law? Kant explains: “Make yourself not a mere means for others, but instead be for them at the same time an end.”<sup>28</sup> I make myself an end for others when I *demand* that they respect my right to freedom and my acquired rights. Taking the viewpoint of the law toward others means that I myself fulfill the requirements of law. When I fulfill the requirements of the law then I simultaneously take the viewpoint of the law toward others. Consequently, I too have to respect everyone else’s right to freedom and their acquired rights. That “another by virtue of his own right can require me to act according to the law”<sup>29</sup> is what distinguishes law from ethics. If I take the viewpoint of the law in this way, then I assume the right to freedom (the axiom of external freedom) and the other essential legal principles and rules. Even with our interpretation of the axiom of law, this axiom and the axiom of external freedom lead to the same result. Nonetheless, the two axioms connote different points of view. The axiom of external freedom is the only axiom *within* Kant’s system of rights and law. The axiom of law or right, in contrast, lies on a meta-level to Kant’s system, or *outside* that system, and requires one to assume the system itself.

Let us also consider the postulates Kant assumes in the *Doctrine of Right*. Kant uses the expression “postulate” occasionally to compare the practical laws which follow from the Categorical Imperative to “mathematical postulates.”<sup>30</sup> Elsewhere Kant calls the limitation of freedom,

<sup>27</sup> AA VI, Division DoR A, p. 236, l. 24.      <sup>28</sup> AA VI, Division DoR A, p. 236, ll. 27–28.

<sup>29</sup> AA VI (*Virtue*), Introduction VII, p. 390, l. 35 – p. 391, l. 3.

<sup>30</sup> AA VI, Introduction MM IV, p. 225, ll. 14–31.

meaning that my freedom extends only so far as is compatible with the freedom of all others according to a universal law, a “postulate” “which is capable of no further proof.”<sup>31</sup> Yet otherwise, the word “postulate” is used only to designate the postulates in §§2 and 42 of the *Doctrine of Right*. Section 2 is entitled “Juridical Postulate of Practical Reason.” For Kant the postulate itself is a “permissive law (*lex permissiva*) of practical reason,” which extends itself *a priori* through its postulate.<sup>32</sup> Kant refers to this postulate, which he sometimes calls the “postulate of the capacity”<sup>33</sup> (through which my moral capacity to be the owner of things, the promisee under a contract, etc. is postulated), as a “postulate” on a number of occasions throughout his work and uses it for the purpose of developing his arguments.<sup>34</sup> Kant calls the “postulate of public law” a “postulate” only once in the *Doctrine of Right*, namely in §42.<sup>35</sup> Its relevance can be felt throughout the entire book, just as can the relevance of the postulate in §2. We discuss the synthetic nature of the postulates in depth in Chapter 6, sections 5 and 6.

Because Kant employs techniques of Euclidean geometry he can work with analytic precision. Accordingly, he distinguishes, without pointing it out, between principles within his system and arguments supporting his system, lying outside the system itself. We have attempted to sort principles lying within the system from those lying outside it to explain Kant's ideas and clarify apparent, but non-existent, contradictions within Kant's work. One example is the seeming contradiction between assuming people are good, or the presumption of innocence, and assuming people are evil, or the presumption of badness, both of which Kant makes in the *Doctrine of Right*.

One invaluable tool in attempting to penetrate the *Doctrine of Right*, especially in light of Kant's geometric approach, has been the *Critique of Pure Reason*. Much of what Kant wrote on epistemology proves to be relevant to his system of rights and law. One example is his use of the comparative concepts: “external” and “internal,” “substance” and “form,” to explain the three *leges* corresponding to Kant's version of the three Ulpian formulae. Another is Kant's categories from the first *Critique*. Kant expressly uses the categories of modality to explain the three *leges* as well. Furthermore, we make a claim in Chapter 12 that

<sup>31</sup> AA VI, Introduction DoR §C, p. 231, ll. 17–18.

<sup>32</sup> AA VI, §2, p. 246, l. 4; p. 247, ll. 1–2; p. 247, ll. 7–8. <sup>33</sup> AA VI, §17, p. 268, l. 25.

<sup>34</sup> AA VI, §6, p. 252, ll. 11–13; §7, p. 254, ll. 11–12; §9, p. 257, ll. 34–36; §10, p. 258, ll. 23–25; §13, p. 262, ll. 15–16; §14, p. 263, ll. 17–19; §15, p. 264, ll. 30–32; §17, p. 268, l. 25; §19, p. 273, ll. 22–25; §33, p. 293, ll. 2–6.

<sup>35</sup> AA VI, §42, p. 307, ll. 8–9.

Kant's table of all conceivable types of contractual arrangements corresponds to the table of categories in the first *Critique*. Much, however, remains to be done in this direction, because we are convinced that the first *Critique*, probably more so than any other of Kant's earlier work, provides a key to opening the ideas in the *Doctrine of Right*.

#### 4. Kant's comments in his works preceding the *Doctrine of Right* of 1797

Another method we pursue is to assume that the statements Kant made on legal philosophy before he wrote the *Doctrine of Right*, namely in his lectures in 1784, in *Theory and Practice* of 1793, in *Perpetual Peace* of 1795, and in his short comments in many other works, are steps toward the system of legal philosophy that unfolds in the *Doctrine of Right* of 1797. They are *steps* toward this system, but they do not already contain the system itself in a nutshell. That is obviously so if Kant envisioned his *Doctrine of Right* as being analogous to Euclidean geometry (see [section 3](#)). A system like Euclidean geometry is from one mold, and anything previous to it is piecework. Consequently, Kant's earlier comments on legal philosophy are useful for interpreting the *Doctrine of Right* of 1797 only to a limited extent. We use the earlier works, taking possible contradictions into account, and make the necessary exclusions.

Kant forges his way forward to his system over the course of time, which is most obvious from comparing certain ideas in *Perpetual Peace* to those in the *Doctrine of Right*. In *Perpetual Peace*, Kant has the definition of a "juridical state,"<sup>36</sup> which will play a large role in the *Doctrine of Right*. Still Kant uses it first at the end of *Perpetual Peace* and there only in connection with international law. The concept is not yet on center stage as it later will be in the *Doctrine of Right*. The three definitive articles in *Perpetual Peace*<sup>37</sup> correspond to the three juridical states in the *Doctrine of Right*, but Kant does not yet conceptualize them as the system of juridical states.

It is also conceivable that Kant makes mistakes while groping toward the system he later develops to perfection. Mistakes he too would have called mistakes from his later point of view. One glaring example lies in Kant's position on the question of whether preventive defense is permitted against a neighboring state that is growing to dangerous

<sup>36</sup> AA VIII (PP), p. 383, ll. 9–10.    <sup>37</sup> AA VIII (PP), pp. 348–360.

proportions (*potentia tremenda*). In *Perpetual Peace*, Kant applies his principle of publicity, which although it does not tell us what is right, does say what is wrong.<sup>38</sup> Kant states:

When a neighboring state which is growing to tremendous proportions (*potentia tremenda*) causes anxiety: Can one assume it will, because it *can*, also *intend* to suppress, and does that give the weaker powers a right to unite and attack even in the absence of any previous infringement? – A state which intended to affirmatively announce its maxim would only bring about the evil more certainly and quickly, because the larger power would preempt the smaller. Moreover, the union of the smaller is a weak reed against one who knows how to use *divide et impera*. – This maxim of state prudence, declared publicly necessarily frustrates its own purpose and is thus wrong.<sup>39</sup>

In contrast, Kant not only drops the principle of publicity from the *Doctrine of Right* (he no longer mentions it at all),<sup>40</sup> but also entirely changes his thesis on preventive defense, which he had based on this principle:

In the state of nature among states, the *right to wage war* . . . is the permitted way in which a state maintains its rights against another state . . . In addition to active injury . . . there is the *threat* [of such injury]. Included here are either a prior *build up of armaments*, on which the right of prevention (*ius praeventio-nis*) is based, or also merely another state's *tremendous* growth (through land acquisition) of power (*potentia tremenda*). This growth constitutes an injury of the weaker power merely through the *situation* and before the *superpower* has committed any *act*, and in the state of nature this [preventive] attack is in accordance with right.<sup>41</sup>

This passage shows not only that a preventive attack against a *potentia tremenda*,<sup>42</sup> which is prohibited in *Perpetual Peace*, is permitted in the *Doctrine of Right* but also reveals a further deviation between the two works. The passage verifies that states can have a "right to wage war," whereas in *Perpetual Peace* Kant states: "Conceptually in international law the *right to wage war* is inconceivable (because it is supposed to be a right to determine what is right, not according to universally valid

<sup>38</sup> AA VIII (PP), p. 381, l. 24 – p. 382, l. 1.    <sup>39</sup> AA VIII (PP), p. 384, ll. 6–16.

<sup>40</sup> It is always the *weaker* players whom the principle of publicity prohibits from taking action. The stronger neighboring state can announce its plans to suppress the weaker states without fear of frustrating its plans. The principle of publicity does not say the neighboring state's plans are right, because the principle is, as Kant says in *Perpetual Peace*, "negative." Still the stronger power can cynically declare that the principle of publicity does not tell *it* that its intent to suppress is wrong. Such result leads to imbalance in the moral debate, which is enough to justify sacrificing the principle altogether.

<sup>41</sup> AA VI, §56, p. 346, ll. 9–22.

<sup>42</sup> Kant is familiar with the concept of a *potentia tremenda* (literally: a power which makes one tremble) from Achenwall, *I.N.II*, §265 (AA XIX, p. 436, ll. 18–25).

external laws limiting the freedom of each, but instead according to a unilateral maxim through [exercising] force.”<sup>43</sup> Thus in *Perpetual Peace* there is no right to wage war, whereas Kant assumes precisely the opposite in the *Doctrine of Right*.

A further discrepancy can be seen regarding the question whether a state can coerce another state to enter together with it into a “juridical state” of these two nation states. We discuss the concept of a “juridical state” in great detail in Chapters 1 and 2. Here we would like simply to point out the deviation between *Perpetual Peace* and the *Doctrine of Right*. In *Perpetual Peace*, Kant denies any authority one state might have to coerce another: “According to international law the same cannot be true as is for individuals in a lawless state according to natural law, ‘to ought to leave this state’ (because as a state they already internally have a juridical constitution and thus have outgrown the coercion of others to bring them under an extended lawful constitution according to their own [the other states’] concepts of law).”<sup>44</sup> In the *Doctrine of Right*, Kant instead speaks openly of an “original right to wage war for free states among each other in the state of nature (*in order for example to establish a state approaching the juridical state*).”<sup>45</sup> Accordingly, in the *Doctrine of Right*, establishing a juridical state of states is a permissible reason to wage war, whereas in *Perpetual Peace* precisely the opposite is true.

These deviations are well known.<sup>46</sup> Less understood are the reasons that led Kant to correct his earlier ideas. Two decisive reasons are that Kant (1) has the fully developed idea of a juridical state in the *Doctrine of Right*, which he (2) applies not only to individual persons, but equally to states in their relations to each other. This idea and its broader application are the reasons why the *Doctrine of Right* is different from *Perpetual Peace*.

## 5. Achenwall's natural law

A particularly helpful method of interpreting Kant's legal philosophy is to consult Gottfried Achenwall's *Prolegomena Iuris Naturalis* and his

<sup>43</sup> AA VIII (PP), p. 356, l. 35 – p. 357, l. 2 (emphasis added).

<sup>44</sup> AA VIII (PP), p. 355, l. 33 – p. 356, l. 1.

<sup>45</sup> AA VI, §55, p. 344, ll. 25–27 (emphasis added).

<sup>46</sup> Gregor, for example, points to the different treatment of the *potentia tremenda* (our first example of a deviation), *Cambridge Edition*, p. 349/p. 634 note 12 for *Perpetual Peace* and p. 484/p. 638, note 34 for the *Doctrine of Right*. Kaufmann, “Theory of War,” p. 147, also points to the discrepancy.

*Ius Naturae*. Kant was strongly influenced by Achenwall and often uses Achenwall's terminology. To be more precise, Kant uses German expressions that are translations of Achenwall's Latin terms, often adding the original Latin expressions to his own German translations of them. Undoubtedly, these terms were ingrained in legal-philosophical thought at Kant's time. Kant wrote his legal philosophy shortly after the turning point in the scholarly language from Latin to the vulgate. Most likely Kant added the Latin expressions to his German translations to ensure that readers familiar with the terms would recognize them when expressed in German. When taking Achenwall's terminology, Kant also takes the concepts behind it without indicating each time that they are Achenwall's concepts. One example concerns the words "permitted" (*erlaubt*), to which Kant adds Achenwall's *licitum*, and "merely permitted" (*bloß erlaubt*), to which Kant adds Achenwall's *indifferens*.<sup>47</sup> Kant also sometimes takes Achenwall's concepts without adding Achenwall's terminology to them. One example is the pair of concepts "original" (*ursprünglich*) and "adventitious" (*zufällig*), which correspond directly to Achenwall's *originarium* and *adventitium* respectively.<sup>48</sup> Furthermore, Achenwall often influences the topics Kant discusses in the *Doctrine of Right*. Kant quite commonly begins with one of Achenwall's theories, usually without indicating that the theory is Achenwall's, and then criticizes it while developing his own theory.<sup>49</sup> Kant does actually refer to Achenwall by name twice in the *Doctrine of Right*,<sup>50</sup> and also mentions him in *Theory and Practice*.<sup>51</sup>

Achenwall's influence on Kant's legal philosophy is easy to explain. Kant held lectures on Achenwall's *Prolegomena Iuris Naturalis* and *Ius Naturae* over the course of more than twenty years.<sup>52</sup> That Kant

<sup>47</sup> See Chapter 4, section 1. <sup>48</sup> See Chapter 2, particularly sections 1 and 2.

<sup>49</sup> Indeed, Kant structures the *Doctrine of Right* in reliance on Achenwall's books on natural law. The "Introduction DoR," which Kant himself also calls "Prolegomena" (AA VI, Division DoR B, p. 238, l. 24), corresponds to Achenwall's *Prolegomena*. The "Doctrine of Right Part I" discusses the law in the state of nature; the "Doctrine of Right Part II" discusses the law in the non-state of nature. This differentiation corresponds to Achenwall's in the two volumes of *Ius Naturae*. Kant's distinction between "private law" and "public law," which is closely connected to the distinction between the two parts, extends far beyond Achenwall's.

<sup>50</sup> AA VI, §31 Annex I "What is money?," p. 286, l. 28; §41, p. 306, l. 19.

<sup>51</sup> AA VIII (*T&P*), p. 301, ll. 4, 12.

<sup>52</sup> According to Lehmann, "Einleitung," AA XXVII.2.2, p. 1053, Kant began lecturing on Achenwall "around 1767." From the summer semester of 1771 to the winter semester of 1789/90 inclusively, Kant announced his lecture entitled *Ius Naturae secundum Achenwall* (or similar) fourteen times. See, Oberhausen and Pozzo, *Vorlesungsverzeichnisse*, pp. 318, 340, 374, 388, 402, 416, 430, 444, 466, 473, 500, 524, 547, 566.

regarded Achenwall highly is apparent from a comment Kant makes in *Theory and Practice*. There Kant refers to Achenwall as “a careful, precise and modest” author “in his doctrines on natural law.”<sup>53</sup> Kant also made extensive explanatory and critical comments in his copies of Achenwall’s works over the years, most likely in preparation for his lectures on Achenwall’s natural law.<sup>54</sup> It is thus easy to imagine that Achenwall left an impression on Kant’s thoughts after such intensive treatment of Achenwall’s work.<sup>55</sup>

Achenwall’s three books and Kant’s own *Reflections on Ius Naturae II* provide valuable insights for interpretation of the *Doctrine of Right* and Achenwall’s influence on it. In addition we also have a student’s notes of the lectures Kant gave on Achenwall’s natural law during the summer semester of 1784.<sup>56</sup> Of course Kant did not write these notes himself and thus they are not a part of his works in the narrower sense. Still they have proved to be reliable and the only source of Kant’s thoughts on certain topics.

Achenwall’s books on natural law have a history of their own, which we sketch here because of much confusion that has arisen regarding them in recent attempts to incorporate Achenwall’s ideas into Kant interpretations. Gottfried Achenwall (1719–1772) was a professor at the University of Göttingen as of 1748. Also teaching at the University of Göttingen at the time was Achenwall’s friend, Johann Stephan Pütter (1725–1807). In 1750, Achenwall and Pütter published the *Elementa Iuris Naturae* together. Because of his higher rank at the university, Pütter’s name was listed first on the title page of this book. A second edition of this book appeared in 1753. Two years later,

<sup>53</sup> AA VIII (*TøP*), p. 301, ll. 3–5.

<sup>54</sup> AA XIX, pp. 321–613. Volume XIX contains only Kant’s copy of Achenwall’s *Ius Naturae II* with Kant’s handwritten *Reflections*, because it was the only copy later available in the library in Königsberg. Presumably Kant also had his own copies of Achenwall’s *Ius Naturae I* and *Prolegomena Iuris Naturalis*, and made notes in these two books as well. As we show, the influence of these three books on Kant’s legal philosophy is most obvious.

<sup>55</sup> Kant was not alone in his high regard for Achenwall’s natural law. Achenwall was widely read at German universities between 1770 and 1790, Schröder and Pielemeier, “Naturrecht,” pp. 255–269, 261.

<sup>56</sup> These lecture notes are published in AA XXVII.2,2, pp. 1317–1394. The title page indicates the lectures were given in the winter semester 1784/85. The editor of these notes, Gerhard Lehmann, comments that the title page includes a misprint, namely that the semester is reported to be the winter rather than the summer semester, “Einleitung,” AA XXVII.2,2, p. 1053. As can be seen from the catalogue of classes offered, Kant indeed did announce a lecture *Ius Naturae ad Achenwallium* for the summer semester 1784. In the winter semester 1784/85 a lecture is announced under the same name but Kant did not offer it. Instead it was Christian Jakob Kraus who taught the course in the winter semester. Apparently either the author of the notes, or another person who had the notes, confused the two lectures when preparing the title page.

Achenwall published his own book entitled *Ius Naturae* without any co-authorship by Pütter, and one year after that, in 1756, Achenwall published his *Iuris Naturalis pars posterior*. Achenwall considered his own books to be an improved new edition of the *Elementa*. They then became regarded as the third edition.<sup>57</sup> To what he called the “fourth edition” of *Ius Naturae* (1758/59), Achenwall added the *Prolegomena Iuris Naturalis* (1758). Kant used the second edition of the *Prolegomena* and the fifth edition of *Ius Naturae*, all three volumes from 1763. Achenwall published a third edition of the *Prolegomena* in 1767 and a sixth edition of *Ius Naturae* in 1767/68.<sup>58</sup> In this *Commentary*, however, we quote from the second edition of the *Prolegomena* and from the fifth edition of *Ius Naturae*, which Kant in fact still used for his lectures during the summer semester of 1784, or sixteen to seventeen years *after* publication of the sixth edition.<sup>59</sup> Kant also used the fifth edition when he wrote the *Doctrine of Right* of 1797. One can see, for example, that Kant adopted Achenwall's definition of “contract” from the fifth edition almost verbatim.<sup>60</sup> In the sixth edition, Achenwall's definition of

<sup>57</sup> On the title page is stated: “improved edition following two previous editions” (*Editio post binas priores emendatio*).

<sup>58</sup> Later eighteenth-century editions of Achenwall's work are reprints of the editions of 1767/68.

<sup>59</sup> That Kant used the 5th edition for his lectures can be seen by comparing the lecture notes to the 5th and 6th editions of Achenwall's books on natural law. In the 5th edition, Achenwall discusses the absolute rights in Book I in the following order: Tit. I On everyone's right with respect to himself (*De iure cuiusvis respectu sui ipsius*), Tit. II On natural equality (*De aequalitate naturali*), Tit. III On natural freedom (*De libertate naturali*), Tit. IV On the right to declare one's thoughts (*De iure circa declarationem mentis*), Tit. V On the right to be held in esteem [by others] (*De iure circa existimationem*), Tit. VI On the right to things (*De iure circa res*). In the 6th edition one finds the following ordering: Tit. I On everyone's right with respect to himself (*De iure cuiusvis respectu sui ipsius*), Tit. II On natural freedom (*De libertate naturali*), Tit. III On natural equality (*De aequalitate naturali*), Tit. IV On the right to declare one's thoughts (*De iure circa declarationem mentis*), Tit. V On the right to be held in esteem [by others] (*De iure circa existimationem*), Tit. VI On the right to things (*De iure circa res*). In the 6th edition, Achenwall switched the ordering of Titles II and III in comparison to the 5th edition. In Feyerabend's lecture notes (AA XXVII.2,2., p. 1338, l. 38 – p. 1339, l. 6, and p. 1339, ll. 21–37) Kant deals twice with the right to equality (*Jus aequalitatis*) *before* the right to freedom (*Jus libertatis*), thus following the 5th and not the 6th edition in structuring his lecture.

<sup>60</sup> AA VI, §18, p. 271, ll. 32–34: “The contract is the act of the united choice of two persons through which what one has as his passes to the other.” In the 5th edition, Achenwall's definition of “contract” is: “Thus contract contains the consensus of both of those consenting, i.e. a mutual (reciprocal) consent through which what one has as his is transferred to the other” (*Pactum itaque continet consensum utriusque eorum, qui consentiunt, id est consensum mutuum (reciprocum) de suo alterius consentientis in alterum consentientem transferendo*, I.N.I., §167, p. 146). Noteworthy are Kant's and Achenwall's corresponding uses of “his” (*das Seine* for Kant; *suum* for Achenwall). In addition, Kant emphasizes the “transferring” aspect of contract (*translatio*), which one also finds in Achenwall's definition (*transferendum*), AA VI, §18, p. 271, ll. 26–27. Neither of these aspects of the definition can be found in the 6th edition of *Ius Naturae*.

“contract” is significantly different from that in the fifth,<sup>61</sup> and clearly was not the basis for Kant’s definition. One cannot say, however, that because Kant used the fifth edition, he did not also consult the sixth edition while he wrote. An advantage of using the fifth edition of *Ius Naturae* in this *Commentary*, however, is that at least *Iuris Naturalis pars posterior* is more easily accessible to our readers because of its publication in the Academy Edition of Kant’s works.

In 1995, Jan Schröder published the Latin text with a German translation of the first edition of the *Elementa* of 1750.<sup>62</sup> Of course, this edition expands accessibility to Achenwall’s thoughts. Unfortunately, however, the edition is of little benefit for any interpretation of Kant’s *Doctrine of Right*. Achenwall developed his concepts and arguments over time.<sup>63</sup> These concepts and arguments, to the extent they are included in the first edition of the *Elementa* at all, are rudimentary. Using them alone creates a significant danger of false interpretation.

In the Kant literature today, one occasionally finds misunderstanding of the role Pütter played in co-authoring Achenwall’s book on natural law. Gerhard Lehmann, who is the editor of the notes taken on Kant’s lectures in the summer semester of 1784, for example, calls the book a “commonly produced work by Pütter and Achenwall,”<sup>64</sup> even placing Pütter’s name first as co-author. Jan Schröder determined that Pütter in fact authored only about one-sixth of the first edition of the *Elementa*.<sup>65</sup> In light of Schröder’s discovery, one can assume that Pütter’s contribution to the second edition of the *Prolegomena* and to the fifth edition of *Ius Naturae* was minimal if at all existent. Certainly one cannot say that the 1763 editions were the “commonly produced work” of the two professors in Göttingen.<sup>66</sup>

<sup>61</sup> “Mutual (reciprocal) consent regarding a specific performance, i.e. that something be performed by one of the consenting parties for the other, is called contract (pact, convention).” (*Consensus mutuus (reciprocus) in certam praestationem, hoc est, ut aliquid praestetur alteri consentientium ab altero, pactum (pactio, conventio) vocatur.*) *I.N.I* (6th edn. 1767), §170, pp. 149–150.

<sup>62</sup> Achenwall/Pütter, *Elementa*.

<sup>63</sup> This development, at least with regard to the deontic operators Achenwall uses, is traced in Hruschka, *Sechseck bei Achenwall*, pp. 23–30.

<sup>64</sup> *Feyerabend*, AA XXVII.2.2, p. 1053.

<sup>65</sup> Achenwall/Pütter, *Elementa*, pp. 333–334 in the postscript by Jan Schröder.

<sup>66</sup> If one compares the various editions merely for their size then one sees that the *Elementa* of 1750 has 292 pages and the 2nd edition of the *Elementa* of 1753 has 394 pages. The 2nd edition of the *Prolegomena* and both volumes of the 5th edition of *Ius Naturae* of 1763 have altogether 666 pages (always according to the original pagination in the works). Thus in 1763 the work was 69 percent larger than the longer 2nd edition of the *Elementa* of 1753 and 128 percent larger than the shorter 1st edition of that work of 1750. The pages here refer only to the actual text part of the books. The title pages, prefaces, table of contents and indices are not included. The *Prolegomena* is 134 pages, *Ius Naturae I* 276 pages, and *Ius Naturae II* 256 pages long.

## 6. Additional authors on topics discussed in the *Doctrine of Right*

Of course Achenwall is not the only author who influenced Kant or to whom Kant refers. Hobbes and Kant, Locke and Kant, Rousseau and Kant, to name a few, are often compared and indeed one does see the influence particularly of Hobbes' *Leviathan* on Kant's legal philosophy. We are not especially concerned with comparing Kant's legal philosophy to another author's. What we do care about, and what is at the forefront of our interpretation of the *Doctrine of Right*, are the concepts authors before Kant developed to the extent they shed light on Kant's legal philosophy. Over the course of this book, we refer to the following authors and their works: Grotius, *De Iure Belli ac Pacis* (1625), Hobbes, *De Cive* (1642), Pufendorf, *Elementa Jurisprudentiae Universalis* (1660), Hobbes, *Leviathan* (Latin 1668), Pufendorf, *De Jure Naturae et Gentium* (1672), Pufendorf, *De Officio Homini et Civis* (1673), Locke, *Two Treatises of Government* (1690), Thomasius, *De Praesumptione Bonitatis* (1700), Thomasius, *Fundamenta Juris Naturae et Gentium* (1705), Wolff, *Philosophia Practica Universalis I* (1738), Hume, "Of the Original Contract" (1742), Wolff, *Jus Naturae III* (1743), Montesquieu, *De l'esprit des lois* (1748), Baumgarten, *Initia Philosophiae Practicae Primae* (1760), Rousseau, *Du contrat social* (1762), Beccaria, *Dei delitti e delle pene* (1764), and Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776).<sup>67</sup>

As is true of his use of Achenwall, Kant sometimes simply uses the concepts these authors developed, sometimes takes them and develops them further, and sometimes takes and criticizes them. A particularly good example is provided by Kant's taking the concepts *iustitia distributiva* and *iustitia commutativa* from Hobbes and developing them further (see Appendix to [Chapter 2](#)).

We cannot claim to have found and included all of the influences, or even all of the important influences, on Kant's work by earlier authors. We cannot even claim to have found and included all of them from the works we do use. Most probably there are countless additional sources for Kant interpretation, leaving future research with a large unplowed field to work.

<sup>67</sup> Kant read German, Latin, and French. For English and Italian works, we have checked to ensure that German or French translations were available in the eighteenth century.

Throughout this book we maintain the Latin, and sometimes even the German, terminology, in parentheses following the English we ourselves use. That is intended to facilitate the reader in further research on Kant's concepts and their historical origin. A book full of foreign words can be somewhat tedious to read at times, but we have done our best to ensure that the English text explains the concepts fully. Sometimes our translations of the German terms Kant uses (accompanied by the original Latin terms) may seem odd to the modern reader (e.g. "adventitious state"). Again that is because we are making an effort to use the English equivalents that derive most closely from the Latin (e.g. *status adventitius*). In such cases, however, we also explain what we mean by the term and why we are choosing the translation we use. Sometimes we have simply left the terms in Latin (e.g. *lex iusti, lex iuridica, lex iustitiae*). That is because Kant too left them in Latin, never providing a German equivalent for them. Consequently, their full meaning simply cannot be given with some German or English equivalent, but instead needs quite a bit of interpretation and explanation to understand.

Translations of Kant's works are our own. We have used *Kant's gesammelte Schriften*, which is commonly referred to as the *Akademie Ausgabe*. The Academy Edition is the most complete and commonly used reference for Kant scholars today. Even editions in English and German other than the Academy Edition of some of Kant's works often contain the Academy Edition pagination in their margins. Thus our references to volumes, pages, and lines should be easily decipherable regardless of what edition of Kant's works our readers use. Much of the Academy Edition has been translated under the direction of Paul Guyer and Allen Wood, thus ensuring to the extent at all feasible consistent use of the same English equivalents for the German throughout Kant's work. We have sometimes consulted these translations, particularly the one by Mary Gregor on Kant's practical philosophy. Although the translations are excellent, they do contain some mistakes. We have tried to avoid those mistakes and also point them out to the reader.

The technical defects in the printed versions of Kant's *Doctrine of Right* are well known.<sup>68</sup> The second edition (1798) is somewhat different from the first (1797). We are assuming that Kant himself made

<sup>68</sup> See, e.g., Gregor, "Introduction," *Cambridge Edition*, "Translator's note," pp. 355–356, and Ludwig (ed.), *Rechtslehre*, "Einleitung," particularly pp. XXVIII–XXX.

corrections to the first edition, but we are also assuming that Kant did not read the proof or galley sheets for either edition systematically. The assistant whom he might have employed to read the sheets did not notice the defects. We have generally ignored them. The one-and-a-half-page text inserted in §6 of the *Doctrine of Right*, which most obviously does not belong there,<sup>69</sup> is valuable for interpreting the work in our opinion. We have thus used it, although some more modern editions exclude it. Other supposed defects do not indeed seem to be defects to us at all, but we have noted why we choose to adhere to the Academy Edition text rather than to other “corrected” editions when citing Kant.

<sup>69</sup> AA VI, p. 250, l. 18 – p. 251, l. 36.

## The idea of the juridical state and the postulate of public law

One of the most significant passages in the *Doctrine of Right* is contained in §41, entitled “Transition from the State of Nature to the Juridical State”:

The juridical state (*der rechtliche Zustand*) is the relationship among human beings which contains the conditions solely under which everyone can *enjoy* his rights. The formal principle of the possibility of this state, seen according to the idea of a universal legislating will, is called public justice. In relation to the possibility or reality or necessity of the possession of objects (as the substance of choice) according to laws, public justice can be divided into *protective* (*iustitia tutelatrix*), *mutually acquiring* (*iustitia commutativa*), and *distributive justice* (*iustitia distributiva*). – Here law *first* says merely what conduct internally according to its form is *right* (*lex iusti*); *second*, what as substance is also externally capable of law, i.e. what state of possession is *juridical* (*lex iuridica*); *third*, what, and through the judgment of a court in a particular case under the given law, is in accordance with it [the law], i.e. what is *established as right* (*lex iustitiae*), where one then calls that court the *justice* of a country, and whether such justice exists or not can be called the most important of all juridical issues.

The non-juridical state, i.e. the state in which there is no distributive justice, is called the state of *nature* (*status naturalis*). The state of nature is not contrasted to the *social* state (as Achenwall thinks), which also could be called an artificial state (*status artificialis*), but rather to the *civil* state (*status civilis*) of a society under distributive justice, because in the state of nature there can be lawful societies (e.g. marriage, parental, household in general, and countless others) of which no law *a priori* is valid: “You should move to this state,” as certainly can be said of the *juridical* state, namely that all human beings who can come into legal relations with each other (even though involuntarily) *should* move to this state.

One can call the first and second states, states of *private law*, the last and third however the state of *public law*. Public law contains no additional or different duties for human beings in relation to each other than can be conceived in the state of private law. The substance of private law is the same in both. The laws

in the latter state thus relate only to the juridical form of their [human beings'] interrelation (constitution), and in light of this form the laws necessarily must be conceived as public.<sup>1</sup>

This passage appears at the end of Kant's discussion of private law, or the law of the external mine and thine, and before his analysis of public law. The passage thus contains the culmination of his ideas on private law as it relates to possession of external objects of choice and the transition to public law in the juridical state. The passage is particularly significant because in it lie the keys to understanding Kant's entire *Doctrine of Right*.

Our analysis in this chapter focuses on one idea Kant discusses in §41, namely the idea of the juridical state.<sup>2</sup> In [section 1](#), we explore this idea in connection with the postulate of public law and the interrelated idea that law and rights for Kant are *public* in nature. In [section 2](#), we claim that the formal criteria of the juridical state are the three forms of public justice – protective, mutually acquiring, and distributive justice – to which Kant refers in §41. They are the public institutions without which individual rights cannot be secured and they fulfill the minimum requirements for being able to call a state a juridical state. Section 3 will then discuss the substantive criterion of the juridical state. This one substantive criterion is that public justice accord with the idea of a universal legislating will. This will legislate to ensure that individual freedom be protected to the fullest extent compatible with the freedom of all. Fulfillment of the formal criteria and this one substantive criterion are sufficient for constituting the juridical state.

## 1. The juridical state (*Rechtsstaat*), the postulate of public law, and the public nature of law and rights

In the *Doctrine of Right*, Kant makes one single assumption. He assumes we have an original right to external freedom. From this assumption, which he also refers to as the “axiom of external freedom,”<sup>3</sup> and from several postulates and definitions his whole system of law unfolds. It

<sup>1</sup> AA VI, §41, p. 305, l. 31 – p. 306, l. 35.

<sup>2</sup> For Kant there are really three different types of juridical state: (1) the nation state, which he sometimes calls the “civil state” (*bürgerlicher Zustand*), (2) the state of nation states (according to international law), and (3) the state of peoples in their relation to each other (according to cosmopolitan law). AA VI, §43, p. 311, ll. 12–29. In [Chapter 1](#) we discuss only the first juridical state, namely the nation state. For the two remaining juridical states, see [Chapter 9](#).

<sup>3</sup> AA VI, §16, p. 267, ll. 12–13; §17, p. 268, l. 25.

unfolds as Euclidean geometry unfolds from axioms, definitions, and postulates, into a self-contained, logically consistent whole, and climaxes in the idea of the juridical state. The postulate of public law tells us to move to a juridical state, where law and individual rights are public.

### A. The juridical state

At the beginning of §41, Kant refers to the *rechtlicher Zustand*, which he elsewhere calls by its Latin name *status iuridicus*. We are translating this term as “juridical state” because of its linguistic proximity to *status iuridicus*.<sup>4</sup> In modern German it is called the *Rechtsstaat*, a word of significant import and difficult to translate adequately into English. The word *Rechtsstaat* was not used at the time Kant wrote the *Doctrine of Right*. Yet Kant’s juridical state is the source of the idea behind the *Rechtsstaat*. Kant defines the juridical state as “the relationship among human beings which contains the conditions solely under which everyone can enjoy (*teilhaftig werden kann*) his rights.”<sup>5</sup>

<sup>4</sup> In AA VI (*Religion*), p. 97, l. 29 (B 135), Kant uses the expression *status iuridicus* in a neutral sense to mean any state in which I find myself as a person with rights. In contrast, in AA VIII (*TøP*), p. 292, l. 33, and in AA VIII (*PP*), p. 383, l. 13, he uses it in a normative sense, as he uses *rechtlicher Zustand* in the *Doctrine of Right*, to mean a state in which my rights are secured, as opposed to a state of nature, where they are not.

<sup>5</sup> AA VI, §41, p. 305, l. 34 – p. 306, l. 1. As early as in *Perpetual Peace* of 1795, Kant defines a “juridical state” as “the external condition under which a human being can really enjoy (*zuteil werden kann*) a right.” AA VIII (*PP*), p. 383, ll. 9–10. It is difficult to translate the German *zuteilen*, *zuteil werden*, and *teilhaftig werden* properly into English. Generally recognized translations of *zuteilen* are “to assign,” “to allot,” “to grant,” “to apportion,” and of *teilhaftig werden* “to participate in,” “to take part in,” “to share in,” and finally of *zuteil werden* “to fall to one’s share,” see individual entries in *Langenscheidts*. Gregor uses “can enjoy” for *teilhaftig werden kann* above in the text, as we have done. She uses “can be assigned” for *zuteil werden kann* in the passage from *Perpetual Peace* quoted here in this footnote. We disagree with her latter translation, because the idea behind *zuteil werden kann* is the same as the idea behind *teilhaftig werden kann*, and thus should be translated the same way in both passages as “can enjoy.” In the passage quoted in the text at note 15 for *zugeteilt werden kann*, Gregor also uses “can be assigned,” instead of “can be granted” as we have used. The idea behind *zuteilen* is that you become able to exercise or to enjoy the rights you have. It is one thing to have a right and quite another to be able to exercise that right effectively. In a dictatorial government, for example, everyone might have the “right” to vote, but if only one candidate or party is on the ballot, this right cannot be effectively exercised. The meaning of *zuteilen*, at least as we believe Kant uses it, is *not* that the state allots people rights in the sense that you get your rights from the state, because Kant makes quite clear that we have many rights already in the state of nature before any juridical state has been established. The idea instead is that the rights we have are *secured* by the state and thus we can enjoy and exercise those rights to their fullest. We have taken the verb “to grant,” as in “I grant you that” in an argument or discussion, where the point being granted is obviously true and needs no further discussion. We want to suggest that what is being “granted” is not something in dispute, but rather something that is clear and obvious, and thus to raise the impression that the state simply confirms what is already yours and secures it. Kant’s emphasis on “peremptorily”

The juridical state for Kant is the state that secures rights individuals have by virtue of their being human beings. Since individuals have these rights by virtue of being human beings, they have them in the state of nature, or the non-juridical state, as well. As Kant says “according to their form, the laws regarding the mine and thine in the state of nature contain precisely the same [provisions] as they do in the civil state (*bürgerlicher Zustand*),<sup>6</sup> insofar as the civil state is conceived merely according to pure concepts of reason.”<sup>7</sup> The problem with the state of nature is not that we have no rights, but that these rights are not secured and thus have only provisional character. It is in the juridical state – the *Rechtsstaat* – that our rights become peremptory.<sup>8</sup> Our rights are peremptory in the juridical state because in that state we have a judge to reach a final binding decision when rights are in dispute and a state power to enforce the judge’s decision.<sup>9</sup> Kant’s idea of the *Rechtsstaat* is the idea of a state that secures individual rights.

Let us pause for a moment to consider the meaning and origin of the word *Rechtsstaat*. The German word *Rechtsstaat*, in contrast to “juridical state,” is a word loaded with import. The idea of the *Rechtsstaat* is what in English we express with “the rule of law.” The *Rechtsstaat* is the state under the rule of law, the state ensuring due process of law. It is a state of law and not of men. It is a state of certainty regarding our rights. As noted above, Kant calls it *rechtlicher Zustand*, and it is from this expression, or more probably from its Latin equivalent *status iuridicus*, that the word *Rechtsstaat* later evolves. The word *Zustand*, which we

in “peremptorily granted” in the passage at note 15 also supports our interpretation, because what the state is really doing is not assigning or giving us our rights, but instead making them secure and thus peremptory rights. Sometimes Kant does say that the state determines (*bestimmen*) rights (AA VI, §44, p. 312, ll. 30–33) but as we claim in section 2C, what he means is that the courts in a state are there to determine *in case of dispute* who has what rights, and the (executive branch of the) state is there to enforce those rights.

<sup>6</sup> Kant sometimes uses “civil state” (*bürgerlicher Zustand*) instead of “juridical state,” but in the *Doctrine of Right* the two expressions are often interchangeable and mean the state to which individual persons have a duty to move (see, e.g., AA VI, §43, p. 311, ll. 12–14). Indeed, Kant himself reformulates the command to move to a juridical state (AA VI, §42, p. 307, ll. 8–11) as the command to move to a *civil* state (AA VI, §44, p. 312, l. 21). At AA VI, Division MM in General III, p. 242, ll. 17–19, Kant calls “civil society” (*bürgerliche Gesellschaft*) a society which secures “the mine and thine through public laws.” It would be a mistake to think that “civil state” designates something other than “juridical state,” and in particular that it designates what Hobbes calls “civil society” (*societas civilis*). For Hobbes, “civil society” designates any organized state system, regardless of its quality. Thus Hobbes would also call a dictatorial state a “civil society,” which is not true of Kant’s civil state. In *Theory and Practice* Kant points out that for Hobbes the head of state is not bound at all in relation to the people and can do them no wrong no matter what he does to them, an idea Kant calls “shocking.” AA VIII (*TePP*), p. 303, l. 26 – p. 304, l. 2.

<sup>7</sup> AA VI, §44, p. 312, l. 36 – p. 313, l. 3.      <sup>8</sup> AA VI, §9, p. 256, l. 20 – p. 257, l. 6.

<sup>9</sup> AA VI, §44, pp. 312–313.

translate into English as “condition,” “state,” or “status,” is the German translation of the Latin word *status*, and in turn the Latin word *status* is the source of the German word *Staat*, or English “state,” as in “nation state.” Accordingly, *rechtlicher Zustand* can be expressed as *rechtlicher Staat*, or merging the two words, as *Rechtsstaat*. The word *Rechtsstaat* ultimately found its way into the German language at the end of the eighteenth century in the writings of Johann Wilhelm Petersen, who is most likely the first person to use it.<sup>10</sup> Petersen expressly refers to Kant’s theory when using the expression *Rechtsstaat*. We are focusing on this term because it is what Kant’s *Doctrine of Right* is all about. The *Doctrine of Right* gives us the logically consistent system of rights individuals have *a priori* and the *Rechtsstaat* to secure them. Kant is thus the originator of the idea of the *Rechtsstaat* and he stimulated the original development of the word through his use of the expression *status iuridicus*.

At the end of the *Doctrine of Right*, Kant states that the final goal of that work is to bring about universal and lasting peace.<sup>11</sup> To bring about perpetual peace we have to leave the state of nature, which is a state devoid of (distributive) justice (*Rechtlosigkeit*),<sup>12</sup> and enter the juridical state where rights are secured. Kant thus reformulates the third Ulpian formula, *suum cuique tribuere*, to reflect this idea.<sup>13</sup>

<sup>10</sup> On Petersen, see Fischer, pp. 506–508 and Hamberger/Meusel, p. 406. The title page of Petersen’s work reads: “*Litteratur der Staatslehre – Ein Versuch* von Jo. Wilhelm Placidus Erste Abtheilung, Strasburg 1798.” Not only does Petersen use a pseudonym (“Placidus”), but the book was published in Stuttgart and not in Straßburg. Furthermore, in the first two cited works in this footnote, the authors assume the book was published in 1797 and not in 1798. The fact that Petersen makes no reference to the *Doctrine of Right*, although that would have been the most natural thing to do in the context of his statements, speaks in favor of 1797 being the real publication date. Petersen does, however, give long consideration to *Theory and Practice* and to *Perpetual Peace*. Petersen designates Kant and his followers (Fichte, Reinhold) there (p. 73) as “the critical school or the school of the Rechts-Staats-Lehrer,” (teachers of the *Rechtsstaat*), which Petersen somewhat humorously contrasts to the “Staats-Rechts-Lehrer” (teachers of the law of a particular state). The humor lies in the fact that the Staats-Rechts-Lehrer are what we today would view as the legal positivists, who teach the doctrines of state or public law regardless of what they are and thus uncritically, whereas the Rechts-Staats-Lehrer are what we today would view as natural law theorists, who teach what state or public law should be to ensure individual rights. Petersen also uses the expression *rechtlicher Zustand* (p. 77). For a discussion of the history of the German word *Rechtsstaat* and “Placidus’s” role in coining it, see Stolleis, “Rechtsstaat.”

<sup>11</sup> AA VI, Conclusion, p. 355, ll. 7–9. <sup>12</sup> AA VI, §44, p. 312, ll. 24–27.

<sup>13</sup> (Pseudo) Ulpian, *Digests* 1.1.10.1: “The precepts of law are: to live honestly, to not injure another, to give each his own.” (*Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.*) Kant discusses the three Ulpian formulae in their imperative forms, *honeste vive, neminem laede, et suum cuique tribue* (AA VI, Division DoR A, p. 236, l. 20 – p. 237, l. 12). We discuss them in more depth in [Chapter 2, section 4](#). We got the sources for the Latin legal adages we discuss in this *Commentary* mostly from Liebs, *Lateinische Rechtsregeln*. We have, however, checked every source ourselves.

Literally translated the formula means “to give each his own.” Kant, however, criticizes this notion, because you cannot give someone what he already has. Kant can make this criticism because in what follows his discussion of the Ulpian formulae, he will proceed to demonstrate that we indeed do have certain rights and (moral) capacities, or faculties, by virtue of our own humanity. Kant shows that each person's own is indeed his and not something that is given to him by any higher power or authority. He thus reinterprets the imperative *suum cuique tribue* to mean: “Enter a state where everyone's own can be secured against everyone else.”<sup>14</sup> We are obligated to enter a juridical state, because that is where all of our rights are secured. “The final purpose of all public law [is] the state solely in which everyone can be *peremptorily* granted (*zugeteilt werden kann*) what is his own.”<sup>15</sup>

### *B. The postulate of public law with its obligation to make law and rights public*

Kant calls the command addressed to us to move to a juridical state (“you should move to this state” in §41) the “postulate of public law”:

From private law in the state of nature proceeds the postulate of public law: In a situation of unavoidable contact, you should leave this state [the state of nature] with all others and move to a juridical state, i.e. the state of distributive justice.<sup>16</sup>

The postulate of public law can also be called the “postulate of public rights,” because it applies for both meanings of the German word *Recht*.<sup>17</sup> The German noun *Recht*, as the Latin *ius*, can mean either “law” or “right.” To distinguish between these two meanings, German lawyers today use *objektives Recht* to mean “law,” and *subjektives Recht* to

<sup>14</sup> AA VI, Division DoR A, p. 237, ll. 1–8. For more on Kant's interpretation of *suum cuique tribue*, see Chapter 2, section 4 and Chapter 13, section 2.

<sup>15</sup> AA VI, §52, p. 341, ll. 2–4. Cf. AAVIII (*TøP*), p. 289, ll. 21–28: The purpose of a “society, to the extent it is in the civil condition, i.e. to the extent it composes a commonwealth,” “is to determine (*bestimmen*) and secure (*sichern*) a human being's own under public coercive laws against anyone else's interference.”

<sup>16</sup> AA VI, §42, p. 307, ll. 8–11.

<sup>17</sup> AA VI, Division DoR B, p. 237, ll. 14–23. Because the German *Recht* can mean either “law” or “right,” people can easily disagree on whether Kant has written a Doctrine of Law or a Doctrine of Rights. We believe Kant enjoyed playing with words. Since his *Rechtslehre* focuses on the rights individuals have and on the way law must be to accommodate those rights, he can use the word *Recht* to capture both meanings. His expression *Axiom des Rechts* (AA VI, §6, p. 250, l. 6) thus can connote either “axiom of law” or “axiom of right.”

mean a “right” someone has.<sup>18</sup> Kant too distinguishes between these two meanings of *Recht*, the first being a systematic doctrine of natural and positive *Recht*, or what we would designate as natural and positive law in English; the second being the moral capacity to place others under obligation, or what we would designate as a right. For the meaning “law” as a “systematic doctrine,”<sup>19</sup> one might be tempted to think of constitutional and administrative law as being public law and contract, tort, and property law as being private law, although the distinction between public and private law is not predominant in Anglo-American legal thought. The distinction often drawn today in Germany is that public law governs the relationship of private parties to the state, whereas private law governs the relationship of private parties to each other.<sup>20</sup> Kant’s sense of public law, however, is quite different from the traditional German notion of what public law might be.

Kant characterizes what he means by public law as follows: “The totality of statutes that need to be announced to the public in order to create a juridical state is *public law*.”<sup>21</sup> Decisive in this characterization is that public law needs to be promulgated and it is thus public law only if it has in fact been announced to the public. This law is called “public

<sup>18</sup> For the Latin, Achenwall distinguishes between *ius obiective sumtum* (*ius* taken objectively [law]) and *ius subiective sumtum* (*ius* taken subjectively [a right]). Achenwall as a source, however, is much more complicated than may seem at first blush. In the unpaginated table of contents in the *Prolegomena*, Cap. VII (reference to §113), Achenwall in fact contrasts the expressions *ius obiective sumtum* and *ius subiective sumtum*. In the similarly unpaginated index to the *Prolegomena*, one finds under the heading *Ius* first *Ius obiective sumtum*, and on the next page the expression *Ius subiective pro facultate morali sumtum* (*ius* taken subjectively as a moral faculty). In the index entry *Ius subiective pro facultate morali sumtum*, Achenwall refers to §44. *Prol.*, §44, p. 40, however, contains a printing error. There one finds *ius sumtum obiective hoc est pro affectione personae* (*ius* taken objectively as an attribute of a person). One finds the expression correctly stated at *Prol.*, §63, p. 60. Achenwall corrects the mistake in §44 of the 3rd edition of the *Prol.*, p. 37. In *Prol.*, §113, Achenwall speaks of *ius pro complexu et scientia legum iuridicarum sumtum* (*ius* as a composite and science of juridical laws), meaning an objective *ius*. Kant’s characterization of objective law as a “systematic theory” (AA VI, Division DoR B, p. 237, l. 15) corresponds to Achenwall’s description.

<sup>19</sup> AA VI, Division DoR B, p. 237, l. 15.

<sup>20</sup> The distinction between public and private law is based on Roman legal concepts. Ulpian, *Digests* 1.1.1.2: “Public law is what concerns the state of the Roman republic; private is what concerns individual utility.” (*Publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem.*) Achenwall lies squarely within this tradition. Achenwall distinguishes between public law (*ius publicum*) and private law (*ius privatum*) by saying that public law governs the rights and duties of the civil ruler and the civil subjects in their mutual relationship, whereas private law governs the rights and duties of the civil subjects toward each other, *I.N.II.* §87 (AA XIX, p. 364, ll. 25–29), cf. too §208 (AA XIX, pp. 417–418). Dirk Ehlers has provided a modern German definition: “Public law is the totality of those legal provisions for which at least one of the addressees is a bearer of state power.” Ehlers, p. 379. Kant deviates significantly from this definition.

<sup>21</sup> AA VI, §43, p. 311, ll. 6–8.

law" if and because it is *open* to the public.<sup>22</sup> Kant sometimes calls the juridical state "public juridical state."<sup>23</sup> That is the state in which law is publicly available. Furthermore, Kant's concept of public law includes all law needed to create a juridical state. Initially one might assume Kant is referring only to constitutional law. This assumption, however, overlooks the fact that securing individual rights is the central purpose of the juridical state. Accordingly, all law relating to those rights must also be made public in order to create a juridical state. Kant's notion of public law thus includes private law governing our individual property, contractual, and family rights, constitutional law, public and administrative law (in the modern sense of public and administrative law). Consequently, if we are in a juridical state, then for Kant *all* law applicable in this state is *public* law. Because Kant understands public law as he does, he can say that public law contains "no additional or different duties" than "can be conceived" in the state of nature. "The substance of private law" is the same in the juridical state where it has been made public as it is in the state of nature.<sup>24</sup>

The idea of public law,<sup>25</sup> however, extends beyond Kant's characterization of public law in §43 of the *Doctrine of Right* to include the idea of public rights. "Public" means the opposite of "secret"<sup>26</sup> and thus "public" is what is open or available to everyone or at least to every interested party. In *Theory and Practice*, Kant says: "No law / right (*Recht*) in the state can be concealed . . . by a secret reservation."<sup>27</sup> That this statement applies not only to all law but also to all rights can be seen in *Perpetual Peace*, where Kant states:

If I abstract from all *substance* of public law . . . then still the *form of publicity* remains, the possibility of which contains in itself every claim to any right, because without this form no justice (which can be conceived only as *capable of being announced publicly*), and thus no right, which only justice grants, would exist.<sup>28</sup>

Consequently, in the *Doctrine of Right*, Kant also requires the rights (*Rechte* in the sense of "the capacity to obligate others"<sup>29</sup>) we can

<sup>22</sup> The linguistic connection is more obvious in German because *öffentlich* (public) derives from the root *offen* (open) and *veröffentlichen* means to publish or to make public.

<sup>23</sup> AA VI, §10, p. 259, ll. 23–24; §33, p. 291, l. 27. <sup>24</sup> AA VI, §41, p. 306, ll. 31–33.

<sup>25</sup> AA VI, §36, p. 297, l. 17.

<sup>26</sup> In *Perpetual Peace*, Kant contrasts "public" to "secret": "A secret article in dealings of public law is objectively, i.e. as regarded in its content, a contradiction." AA VIII (PP), p. 368, ll. 23–24.

<sup>27</sup> AA VIII (PP), p. 303, ll. 31–32. <sup>28</sup> AA VIII (PP), p. 381, ll. 4–11.

<sup>29</sup> AA VI, Division DoR B, p. 237, l. 18.

acquire, or at least the rights we can acquire to things, to be public. My ownership of a thing presupposes a “constant act of possession,”<sup>30</sup> which must be a “public act of possession,”<sup>31</sup> a “publicly valid sign of an uninterrupted possession.”<sup>32</sup> Such a sign can be through documentation<sup>33</sup> of my possession, “e.g. through inscription in registers or through unchallenged casting of a vote as a [property] owner at civic gatherings.”<sup>34</sup> The postulate of public law thus states that neither law nor rights can be kept secret.

Kant’s idea of public law in the juridical state follows from his concept of private law in the non-juridical state. The non-juridical state is the state of private law,<sup>35</sup> because the non-juridical state is, as Kant says, a “state of private justice” (*status iustitiae privatae*), in which “various opinions of right are possible.”<sup>36</sup> Kant’s notion of private law in the non-juridical state is thus different from the modern notion of private law as well. The modern notion of private law, as noted above, is that it is the law governing the interrelationship between private parties. Kant’s notion of private law is law that does not yet exist in the sense that it has not yet been made public. It is the law we can derive *a priori* from reason, but about which individuals will potentially disagree due to human weakness and being influenced by what they would like to think is right.<sup>37</sup> Kant describes private law as the law “where everyone follows his own judgment.” It is “the right to do what one thinks is *right and good*, independent from another’s opinion.”<sup>38</sup> It is not *necessarily* a state of injustice because everyone involved in a disagreement about what is right can act justly.<sup>39</sup> Still it is a state that lacks any official statement of exactly what is just in a multitude of possible

<sup>30</sup> AA VI, §33, p. 292, ll. 14–16; see too ll. 21–24 and §21, p. 276, l. 2.

<sup>31</sup> AA VI, Annex of Explanatory Comments 6, p. 364, l. 24 (emphasis added).

<sup>32</sup> AA VI, Annex of Explanatory Comments 6, p. 364, ll. 13–14 (emphasis added).

<sup>33</sup> AA VI, §33, p. 292, ll. 21–24.

<sup>34</sup> AA VI, Annex of Explanatory Comments 6, p. 364, ll. 14–16 (emphasis added).

<sup>35</sup> AA VI, Division MM in General III, p. 242, ll. 13–19.

<sup>36</sup> *Feyerabend*, AA XXVII.2.2, p. 1381, ll. 24–25.

<sup>37</sup> This notion of private law is very clear in AA VIII (*PP*) p. 383, ll. 17–20: “For without some form of juridical state which actively connects various (natural or moral) persons and thus in the state of nature no law other than private law can exist.”

<sup>38</sup> AA VI, §44, p. 312, ll. 11–12; cf. ll. 14–15.

<sup>39</sup> Kant indicates that all of the parties to a dispute can be acting according to principles of commutative (private) justice, but still be in disagreement as to what is right. The move to the juridical state gains the advantage of having public law and most importantly a judge to resolve disputes with final binding force (AA VI, §44, p. 312, ll. 8–21). Kant also indicates that the decision a judge will make may differ from what principles of commutative justice would otherwise demand (AA VI, §§36–40). We discuss commutative and distributive justice in sections 2B and 2C and the distinction between the demands of commutative and distributive justice in Chapter 10.

situations.<sup>40</sup> Thus although the substance of private law is the same in the juridical state as it is in the state of nature, individuals' ability to see what that law is in the state of nature can be clouded by limitations on their ability to discover *a priori* truths, or their own self-interest in the situation. We discuss the non-juridical state in more detail in [Chapter 2, section 1](#). The public juridical state in contrast is the state of *public* justice. What public justice is will be discussed in the next section.

## 2. The three formal criteria of the juridical state

After giving the definition of the juridical state in §41 of the *Doctrine of Right*, Kant discusses the "formal principle of the possibility" of a juridical state, which he calls "public justice" (*öffentliche Gerechtigkeit*). Public justice can be divided into three types of justice, namely "*protective* (*iustitia tutatrix*), *mutually acquiring* (*iustitia commutativa*), and *distributive* justice (*iustitia distributiva*)."<sup>41</sup> The expression *iustitia tutatrix* was not traditionally used at the time Kant was writing. The other two expressions, *iustitia commutativa* and *iustitia distributiva*, come from the Aristotelian-Scholastic tradition, but Kant interprets them far differently from their traditional meanings.

The key to understanding the three types of justice lies in realizing that they all relate to *public* justice.<sup>42</sup> The three types of public justice are justice attained through humanly created *public institutions*, meaning institutions available to everyone. These three institutions must be established (they are necessary conditions) to attain a juridical state. Kant notes that public justice is the formal principle of the possibility of a juridical state. A principle is the ultimate source of the existence of something. The principle is formal if one does not consider its substance, but instead only its (external) structures. When Kant calls public justice the "formal principle of the possibility" of a juridical state, he means that a juridical state is first made possible through

<sup>40</sup> AA VI, §44, p. 312, ll. 24–26.      <sup>41</sup> AA VI, §41, p. 306, ll. 3–8.

<sup>42</sup> In line with the traditions of antiquity and the middle ages, "justice," as opposed to "public justice," for Kant can mean a virtue a human being can have, e.g. when he speaks of a head of state, who "himself is just" (AA VIII (*Idea*), p. 23, ll. 15–16), or it can mean a standard against which our acts and institutions are measured, e.g. when he speaks of a "civil constitution" as "just" (AA VIII (*Idea*), p. 22, l. 18). When Kant, however, uses the expression "public justice," he means neither an individual virtue nor a standard, at least not initially. In his article "Idea of a Universal History in Cosmopolitan Design" of 1784, Kant speaks of the difficulty of attaining "a commander of *public justice*, who himself is just" (AA VIII (*Idea*), p. 23, ll. 15–16). Here, as we can see from the context, "public justice" is another expression for the state.

public justice embodied in its three institutions. Protective, commutative, and distributive justice are, in other words, prerequisites for a juridical state. They must formally exist, meaning *as* institutions, or else a juridical state will remain unattainable. The three institutions are public lawgiving, the free public market, and the public judiciary.

We have first described the three types of justice as institutions. It is important to see these institutions dynamically and not statically. To draw the distinctions between the three institutions, Kant takes an important approach from Hobbes. For Hobbes, who does not discuss protective justice, commutative and distributive justice relate to human *actions*. Commutative justice for Hobbes is justice brought about by a market participant in the performance of contracts. Distributive justice for Hobbes is justice brought about by an arbiter in reaching arbitral decisions.<sup>43</sup> We discuss Hobbes and his influence on Kant's ideas more closely in the [Appendix to Chapter 2](#). For Kant too the three aspects of public justice are aspects of human *actions*, namely actions committed by a public lawgiver when promulgating laws, actions committed by market participants in the free public market, and actions committed by the public judge in reaching judgments. When we call the three types of justice "institutions" we mean the unity of actions committed by a (justly acting) lawgiver in promulgating laws, the unity of actions committed by (justly acting) participants in the public market when closing and performing contracts, and the unity of actions committed by (justly acting) judges when reaching their decisions.

That Kant indeed means these three institutions will be shown below in [section 5](#) of [Chapter 2](#), where we discuss the comment Kant makes that public justice can be divided into the three types of justice "in relation to the possibility or reality or necessity of the possession of objects (as the substance of choice)."<sup>44</sup> Before we move to that, we would first like to describe the three institutions more precisely.

### *A. Public lawgiving (iustitia tutatrix)*

The first type of public justice is protective justice (*iustitia tutatrix*). The name Kant gives this institution sounds like the name of a Greek deity. In classical Athens, Pallas Athena, whose enormous statue stood at the entrance to the Acropolis in Athens, was worshiped as Athena

<sup>43</sup> See citations supporting our claims in the [Appendix to Chapter 2](#).

<sup>44</sup> AA VI, §41, p. 306, ll. 3–8.

Promachos (*Promachos* = protector), as protector of the cities, meaning unions of human beings.<sup>45</sup> During Latin-speaking Antiquity, certain protective gods were called *tutator* or *tutatrix*.<sup>46</sup> Thus, the *iustitia tutatrix* is justice as protector.<sup>47</sup> The *iustitia tutatrix* is the process of lawgiving, meaning enacting statutory and thus *public* law. Public lawgiving is called “protective justice,” (if and) because it protects our rights. It protects those rights by taking the *a priori* principles of natural law and making them public, and thus binding and enforceable.

Public law means positive – as opposed to natural – law as it exists in a juridical state. Kant also refers to it as “statutory law” (*statutarisches Recht*), which “comes from the will of a [human] lawgiver.”<sup>48</sup> In any actually existing state of interacting human beings, natural law, which consists entirely of *a priori* principles, is first applicable after it has been made positive, meaning after it has in fact been formulated and published. Positive law is “the letter (*littera*),” with which natural law is drafted “in the civil state.”<sup>49</sup> We can, as Kant often does, compare natural law to Euclidean geometry. Euclidean geometry, like natural law, is not temporal when seen in and of itself. Before Euclidean geometry can be used to measure the banks of the Nile, however, Euclid had first to write his *Elements*. Similarly, before a court can use natural law, it has to be drafted (and made binding). Drafting natural law and enacting it (with binding effect) creates positive, statutory law. It is thus not surprising that Kant refers to valid positive law in a juridical state (*Rechtsstaat*) as “public law,”<sup>50</sup> regardless of whether this law protects our property, contractual, or family rights, on the one hand, or establishes the constitutional order, on the other.

<sup>45</sup> Regarding this statue, see Pausanias, Bk. I, Cap. 28, I (Meyer, vol. 1, p. 83) and the translator's commentary, Meyer, vol. 2, p. 564, margin no. 83, note 3.

<sup>46</sup> See Mommsen, vol. 9, p. 143, no. 1549: *Iovi Tutori Maris* (“to Jupiter, protector of the seas”); vol. 12, p. 508, no. 4183: *Deae Fortunae Tutatrice huius Loc*i (“to the goddess Fortuna, the protector of this place”). Twenty years before the *Doctrine of Right*, Kant gave a similar name to an antique deity, calling Minerva *utiliorum scientiarum ac artium faulrix* (“patroness of the more useful sciences and arts”), AA XV.2 (*Draft*), p. 933, ll. 14–15.

<sup>47</sup> For Kant, not only the *iustitia tutatrix*, but also the *iustitia distributiva* and *iustitia commutativa* are personifications of the institutions they embody. Kant also calls equity, which is in the same line with the three types of justice, “a mute *divinity*, who cannot be heard,” AA VI, Annex Introduction DoR I, p. 234, ll. 9–10 and I. 30. For justice, meaning the judiciary (*iustitia distributiva*), to whose scales and sword Kant refers in AA VIII (*PP*), p. 369, ll. 9–22, we are still accustomed to thinking of a goddess.

<sup>48</sup> AA VI, Division DoR B, p. 237, ll. 16–17.

<sup>49</sup> Cf. AA VI, §52, p. 340, ll. 23–24, where Kant says: “The forms of state are only the *letter (littera)* of original lawgiving in the civil state.” The forms of state depend on positive law and are thus adventitious, whereas original lawgiving is part of natural law and thus original in the senses of adventitious and original we develop in Chapter 2.

<sup>50</sup> See section 1.

In his development of rules of law, Kant refers repeatedly to positive law. And he regards fulfilling or not fulfilling the requirements of purely positive law to be of significance for determining what rights we in fact have. Kant was familiar, for example, with the practice of registering ownership of real property in the land register (*Ingrossation*), and he connects legally relevant consequences to doing or failing to do so.<sup>51</sup> Furthermore, he requires that the owner of a thing (real property) exercise a constant act of possession of that thing, which can be accomplished through documentation of his ownership, and again Kant connects legal consequences to the failure to document: "One who fails to document his act of possession" can lose his ownership right through adverse possession.<sup>52</sup> Entering something in public books or registers, however, is possible only through positive law, which first must require registration before legal consequences can be attached to the entry or failure to enter the information.<sup>53</sup> Important to note is that Kant attaches ownership rights in the passages quoted above *not* to any natural law conception of a right to be treated as the owner of some external object. Instead, he attaches legally significant consequences for our ownership rights to whether we performed or failed to perform some act of registration or documentation – an act of the same character as driving on the right (or left) side of the road, namely an act empty of moral content and, in the absence of positive law, legally irrelevant.

We do not mean to suggest that Kant is a legal positivist in the usual meaning of that term.<sup>54</sup> Certainly, Kant is properly considered to be a natural law theorist, and he makes abundantly clear that he thinks a merely empirical theory of law is brainless.<sup>55</sup> Kant's *Doctrine of Right*

<sup>51</sup> AA VI, §31 II, p. 290, l. 25 – p. 291, l. 10; Annex of Explanatory Comments 4, p. 362, ll. 5–28.

<sup>52</sup> AA VI, §33, p. 291, l. 33 – p. 293, l. 16; Annex of Explanatory Comments 6, p. 363, l. 22 – p. 365, l. 20.

<sup>53</sup> In *Feyerabend*, AA XXVII.2.2, p. 1369, ll. 4–5, where Kant discusses the time in which I can acquire a thing through adverse possession, it is stated: "The time of prescription is arbitrary, and arbitrary legislation cannot exist in the state of nature." In other words, we need positive law in order to determine the time after which adverse possession becomes ownership.

<sup>54</sup> For a theory that Kant is a positivist in an untraditional sense of positivism, see Waldron, pp. 1535–1566 *passim*.

<sup>55</sup> "A merely empirical doctrine of right is (as is the wooden head in Phaedrus' fable) a head that may be pretty, but it is a shame! that it has no brain." AA VI, Introduction DoR §B, p. 230, ll. 4–6. In Phaedrus, *Liber Primus*, *Fabula 7*, one finds under the heading: "The fox to the mask" the following text: "The fox chanced upon a mask. – He shouts: Oh beauty, you have no brain! – That is said to them whom Fortune gave honor and glory – but robbed them of common sense." (*Vulpes ad personam tragicam: Personam tragicam forte vulpes viderat: – "O quanta species" inquit "cerebrum non habet!" – Hoc illis dictum est, quibus honorem et gloriam – Fortuna tribuit, sensum communem abstulit.*)

indeed develops law from *a priori* ideas of reason about the way law should be to protect our rights, and Kant insists that positive law not contradict these *a priori* ideas.<sup>56</sup> Nonetheless, when Kant refers to the reality of law for concrete cases arising in the empirical world, he refers to positive law.<sup>57</sup> Positive law, as given by the *iustitia tutatrix*, contains the *a priori* principles of reason about what law should be, but it also gives them effect in the world of experience because it is enacted and enforced. Positive law that corresponds to natural law will protect our rights in the juridical state. It will, as Kant remarks in §41 of the *Doctrine of Right*, ensure that “everyone can enjoy his rights.” The relationship between positive law as enacted and enforced and *a priori* principles of law, however, leads us to the substantive criterion of a *Rechtsstaat*, which will be discussed below in [section 3](#). For the time being, we remain with the formal criteria and turn to the second type of justice, the *iustitia commutativa*.

### B. The public market (*iustitia commutativa*)

The second type of public justice is commutative justice, which Kant also calls “justice valid among people in their mutual intercourse.”<sup>58</sup> Kant defines *commutatio* in the broad sense of the term as the “turnover of the mine and thine,”<sup>59</sup> and as “transactions with external things between the possessor of a thing and a purchaser.”<sup>60</sup> Commutative justice is thus justice as it reigns in mutual exchanges. We could also call it “justice of the public market.”<sup>61</sup> The public market is a public institution, which ensures justice in the exchange of external things, assuming the market is indeed a public market in which free persons engage in transactions free from intervention.<sup>62</sup>

<sup>56</sup> See, e.g., AA VI, §9, p. 256, ll. 22–25; §46, p. 315, ll. 17–22.

<sup>57</sup> See, e.g., AA VI, Introduction DoR §A, p. 229, ll. 5–10: “The totality of statutes [*Gesetze*] for which external legislation is possible is called the *Doctrine of Right* (*Ius*). If such legislation is real, then this Doctrine of Right is a doctrine of *positive law* . . .” Here Kant also speaks of someone being experienced in law when he knows the “external statutes also externally, i.e. in their application to cases that happen in experience.”

<sup>58</sup> AA VI, §36, p. 297, ll. 1–2. <sup>59</sup> AA VI, §31, p. 289, ll. 18–19.

<sup>60</sup> AA VI, §39, p. 301, ll. 12–14; p. 302, ll. 3–5, ll. 20–23.

<sup>61</sup> Kant uses the expression “public market” in connection with his discussion of “justice” or *iustitia commutativa*, AA VI, §39, p. 302, l. 10; p. 303, l. 1. That Kant does not mean corrective justice or any Scholastic notion of commutative justice in his discussion of the *iustitia commutativa* is abundantly clear from Kant’s own definition of commutative justice and the context in which he discusses it. Our interpretation is based on the Hobbesian concept of commutative justice, which we clarify in the [Appendix to Chapter 2](#).

<sup>62</sup> When Kant, who discusses an “intellectual concept” of money (AA VI, §31 I, p. 288, l. 28) and a “pure concept of the understanding” of (physical) possession, speaks of “market” and

Kant has both Hobbes' *Leviathan*<sup>63</sup> and Adam Smith's *The Wealth of Nations* in mind when discussing commutative justice, and indeed Kant refers to Adam Smith by name in the *Doctrine of Right*.<sup>64</sup> Kant's idea that we have a right to acquire and own property,<sup>65</sup> combined with Smith's principle of division of labor and its implied necessity to acquire the things we need through purchase or trade, makes the public market indispensable for Kant.<sup>66</sup> In fact Kant says "market price" when referring to a price: "Whatever relates to general human desires and needs has a market price."<sup>67</sup> Kant also includes the labor market, and says that when a human being's "usefulness" is at issue he has an "external value" called "price (*pretium usus*)."<sup>68</sup> Similarly "skill and diligence in labor" also have a "market price."<sup>69</sup>

Although Kant's reference to "the reality of possession of objects," through which commutative justice is defined in §41, relates to *all* acquirable rights, one can speak of mutually acquiring justice only when a transaction of the mine and thine is possible and permissible. Impossible or impermissible is, for example, selling family rights.<sup>70</sup> Both possible and permissible is a transaction in goods and services, although for human services Kant also imposes limitations.<sup>71</sup> The rules

"public market," one can assume that he does not mean some local marketplace, but rather a pure concept of the understanding of the market, of which Adam Smith also speaks in *The Wealth of Nations* (I.iii.1). For example, in Kant's statement: "If it were easier to procure the stuff that is called money than to procure goods, then more money would come to the market than goods offered there" (AA VI, §31 I, p. 287, ll. 26–28), he cannot mean a local marketplace, but rather the pure concept of understanding of the market. The market as a pure concept of the understanding abstracts from empirical conditions of space and time, just as Kant otherwise abstracts from empirical conditions of space and time, for example in his theory of possession of external things (AA VI, §7, p. 253, ll. 9–10), or in his theory of contract (AA VI, §19, p. 273, ll. 23–24).

<sup>63</sup> For Hobbes, see [Appendix to Chapter 2](#).

<sup>64</sup> AA VI, §31 I, p. 289, l. 12. See also Kant's reference to Adam Smith in *Feyerabend*, AA XXVII.2.2, p. 1357, ll. 14–16.

<sup>65</sup> See Chapters 4–6 on Kant's theory of property ownership.

<sup>66</sup> Adam Smith begins his study with the division of labor and human beings' ability to exchange things (I.i.1–I.ii.1). Undoubtedly, Kant also has Smith's "invisible hand" of the market in mind. See *ibid.* IV.ii.9.

<sup>67</sup> AA IV (*Groundwork*), p. 434, ll. 35–36.

<sup>68</sup> AA VI (*Virtue*), §11, p. 434, ll. 22–31; see too §31, p. 285, ll. 28–31. Following Kant's statement in the *Doctrine of Virtue* on the external value of human usefulness, he contrasts that to the "absolute internal value," which is called "dignity." On Kant's ideas on human dignity, see [Chapter 14, section 3B](#).

<sup>69</sup> AA IV (*Groundwork*), p. 435, l. 9 (emphasis added).

<sup>70</sup> The rights parents have with respect to their children are not subject to transactions. Kant does not consider the possibility of adoption, see AA VI, §29, p. 282, ll. 1–8 and *Feyerabend*, AA XXVII.2.2, p. 1360, l. 43, where Kant says "A husband cannot sell his wife."

<sup>71</sup> In particular, Kant says that my inalienable right to freedom cannot be diminished by my hiring out myself. A contract that results in someone ceasing to be a person is not possible, "because only a person can enter into a contract," AA VI, General Comment D, p. 330,

of property and contract law, as Kant formulates them in the *Doctrine of Right*, are thus constitutive of the market. Those are rules such as “everyone has the capacity to be an owner of things”<sup>72</sup> and “contracts must be performed” (*pacta sunt servanda*).<sup>73</sup> Subject to the limitations Kant sets, the market can be described for the present with the saying: *Do ut des. Do ut facias. Facio ut facias* – “I give to you, so that you give to me. I give to you so that you do for me. I do for you so that you do for me.”<sup>74</sup>

It is not surprising that Kant places this emphasis on the public market as one of three public institutions that are essential in a *Rechtsstaat*. If we consider the overall structure of the *Doctrine of Right*, we see that Kant spends an inordinate amount of effort and pages on what he calls the “external mine and thine.”<sup>75</sup> Part of this effort is devoted to the rather difficult task of justifying ownership rights. Yet, ownership rights alone without the right to buy and sell them are fairly useless. Everyone would be able to originally acquire an external thing, but once these things have been acquired, no one would be able to alter his stockpile of goods. The person with a cow could not exchange some of its milk to get bread from the owner and miller of wheat and vice versa. Human interaction would stagnate and human needs could not be fulfilled. Hence the public market is there to ensure our right to engage in exchanges with others, a right we discuss in [Chapter 11](#).

### C. The state judiciary (*iustitia distributiva*)

The third type of justice, distributive justice, is the crowning feature of any *Rechtsstaat*. Kant uses the expression “public justice” in a whole series of passages, generally meaning the judiciary in a *Rechtsstaat*. He calls judicial decisions “acts of public justice (*iustitiae distributivae*) by a judge or court.”<sup>76</sup> He also states that one calls the “court the *justice* of a country, and whether such justice exists or not can be called the

ll. 10–12. Persons who are not part of my household can put their services at my disposal only if the labor is determined “according to quality and degree,” AA VI, General Comment D, p. 330, ll. 22–23.

<sup>72</sup> This sentence can be deduced from AA VI, §2, p. 246, ll. 5–8.

<sup>73</sup> AA VI, Introduction MM III, p. 219, ll. 36–37; see too §19, p. 273, ll. 15–25.

<sup>74</sup> Achenwall also discusses this saying in *I.N.I.*, §215, p. 187 and Kant discusses it in *Feyerabend*, XXVII.2.2, p. 1360, ll. 34–38. On the relevance of the saying for Kant’s table of contracts in §31 of the *Doctrine of Right*, see [Chapter 12](#).

<sup>75</sup> AA VI, Title before §1, p. 245, l. 5. <sup>76</sup> AA VI, §49, p. 317, ll. 23–25.

most important of all juridical issues."<sup>77</sup> Furthermore, he calls the civil courts "civil justice" (*Zivilgerechtigkeit*) and the criminal courts "criminal justice" (*Kriminalgerechtigkeit*).<sup>78</sup> The state of nature, as Kant often says, is a "*status iustitiae vacuus*," meaning a "state without justice," or a "state of lawlessness," because there is no judiciary to decide with final binding force in case of dispute as to our rights.<sup>79</sup> The judiciary is called "distributive" justice because it decides and determines what is established as right (*Rechtens*) and thus assigns rights to individuals if and when those rights are in dispute. Distributive justice is thus justice in a *Rechtsstaat* as a state institution, namely the judiciary, which, together with public lawgiving and the public market, make a juridical state possible.

The three formal criteria of a *Rechtsstaat* for Kant are thus lawgiving by a human lawgiver, the public market, and the judiciary as the minimum of institutions needed to secure the rights we have. Whether in any particular legal system these institutions in fact function to secure our rights raises the question of whether these institutions meet one substantive requirement. It is to this question that we turn in the next section.

### 3. The substantive criterion of a juridical state

Justice can be perverted. Positive law in a state can be perverted when legislators impose rules that contradict principles of natural law. A public market can be burdened such that a "turnover of the mine and thine (*commutatio late sic dicta*)"<sup>80</sup> is impossible or exceptionally difficult, costly, and inefficient. The judiciary in a state can become arbitrary to the point of taking bribes for judicial decisions, or executing persons known to be innocent<sup>81</sup> and thus committing judicial murder. The dictatorships of today and over the twentieth century provide a wealth of examples of perversion of this kind.

<sup>77</sup> AA VI, §41, p. 306, ll. 13–16.

<sup>78</sup> AA VI, General Comment E, p. 331, l. 11. Other passages in this vein at AA VI, §44, p. 312, l. 32; General Comment E, p. 332, l. 12; p. 334, l. 12; p. 335, l. 23, where Kant says: "the court (public justice)." Kant is not alone in using this type of vocabulary. Other German authors also speak of courts and judicial offices as *Gerechtigkeit* (justice), see Grimm, "Gerechtigkeit," vol. 5, col. 3610, under 7. Even today in the United States we address judges, particularly those on higher courts, as "Justice," and in German the judiciary is called *Justiz* (justice).

<sup>79</sup> AA VI, §44, p. 312, ll. 22–28. <sup>80</sup> AA VI, §31, p. 289, ll. 18–19.

<sup>81</sup> As Friedrich Schiller says: "When justice is blinded by money, and wallows in the debt of vice." (*Wenn die Gerechtigkeit für Geld verblindet, und im Solde der Laster schwelgt.*) See Grimm, note 78.

Let us consider the possibility of “public violations of justice.”<sup>82</sup> When we consider it, the meaning of “public justice” changes from what we have until now called the “*formal* principle of the possibility” of a *Rechtsstaat*, and acquires an additional substantive meaning. If a *Rechtsstaat* is possible, then lawgiving, the public market, and the judiciary, as Kant says, must be “seen according to the idea of a universal legislating will,”<sup>83</sup> meaning it is not sufficient for these institutions simply to exist. Instead they must fulfill this one substantive criterion.

Positive law, and thus public legislation, is evaluated according to the standard set by natural law, which is “based only on pure *a priori* principles”<sup>84</sup> and can be recognized “by everyone’s reason.”<sup>85</sup> Because it can be recognized by everyone’s reason, the universal legislating will legislates according to these pure principles of natural law. Kant’s *Doctrine of Right* is to a great degree an explication of this natural law or law of reason. Natural law cannot “suffer impairment” “through the statutory provisions” in a state. Its principles remain in force, even when positive law, which has only the appearance of law, deviates from those principles.<sup>86</sup> Natural law is the standard by which statutory law is to be measured.

Natural law proceeds from the “axiom of external freedom.”<sup>87</sup> Lawgiving by a human lawgiver, the market, and the judiciary have to be established such that the freedom of one is no more limited than is necessary to maintain the freedom of the other (who has the same rights as the first) in accord with a universal law.<sup>88</sup> Freedom is the sole “principle,” “indeed the condition” for all lawful force the state exercises.<sup>89</sup> State enactment of positive law, state intervention in the market, and state influence on judicial decisions cannot exceed the limits set by this principle.

That one can no longer speak of a juridical state when positive law or the judiciary becomes perverted needs no explanation. Yet by including the public market in the requirements for a juridical state, Kant implies that the public market also must not deviate from the universal principle of law. The public market can, and sometimes *must*, be “ordered through administrative law.”<sup>90</sup> Nonetheless, the authority to

<sup>82</sup> AA VI, General Comment E, p. 333, l. 24.      <sup>83</sup> AA VI, §41, p. 306, ll. 2–3.

<sup>84</sup> AA VI, Division DoR B, p. 237, ll. 15–16.      <sup>85</sup> AA VI, §36, p. 296, ll. 16–17.

<sup>86</sup> AA VI, §9, p. 256, ll. 22–25.      <sup>87</sup> AA VI, §16, p. 267, ll. 12–13; §17, p. 268, l. 25.

<sup>88</sup> See, e.g., “Universal Principle of Law,” AA VI, Introduction DoR §C, p. 230, ll. 28–31.

<sup>89</sup> AA VI, §52, p. 340, ll. 35–37.

<sup>90</sup> See AA VI, §39, p. 303, l. 1, where Kant speaks of a “public market ordered by administrative ordinance.” Kant uses the term *Polizeigesetz*, which literally means “police law,” but

order the market does not mean that the government (the state) can interfere with market freedom. Kant comments on the adage *Salus publica suprema civitatis lex est* (literally: "Public well-being is the first law of the state")<sup>91</sup> by saying that public well-being is "the situation with the greatest accordance between the constitution and principles of law."<sup>92</sup> It is "that legal constitution, which secures each person his freedom through laws."<sup>93</sup> It is "*not the weal of the citizens and their happiness*."<sup>94</sup> Here, as throughout Kant's *Doctrine of Right*, securing freedom and our other rights is the only relevant issue and not our welfare and happiness. Accordingly, undue state interference in the free market cannot be excused with the argument that the state is pursuing some goal for the good of the citizens.<sup>95</sup>

The state is not permitted to take part in economic activities to secure its citizens' happiness. Furthermore, the state is permitted to make only those market regulations that secure the freedom of each, limited only by the freedom of all others, or those market regulations which are compatible with the universal principle of law. Adam Smith emphasizes that the state should not interfere with the private economy because such interference leads to inefficiencies.<sup>96</sup> Furthermore, land belonging to the crown could be used far more productively in the hands of private parties.<sup>97</sup> Whereas Smith provides his arguments for personal liberty and freedom from state intervention based on economic efficiency, Kant argues from a legal philosophical approach to ensuring individual freedom. Kant focuses on the injustice of the state's ownership of land, stating that in a juridical state the

which we have translated as "administrative ordinance." *Polizei* at Kant's time referred to the internal administration of a government or state (*polis*), and not to what "police," or *Polizei*, refers today.

<sup>91</sup> So is the formulation of this adage in Kant's essay *Theory and Practice*, AA VIII (*T&P*), p. 298, l. 14. A somewhat different formulation is in the *Doctrine of Right*, AA VI, §49, p. 318, l. 7. The adage is based on a statement in Cicero's *De Legibus* III, §3,8, p. 302. See also Achenwall, *I.N.II*, §91 (AA XIX, p. 367, l. 25).

<sup>92</sup> AA VI, §49, p. 318, ll. 11–12. <sup>93</sup> AA VIII (*T&P*), p. 298, ll. 13–17.

<sup>94</sup> AA VI, §49, p. 318, ll. 8–9 (emphasis added).

<sup>95</sup> In *Theory and Practice*, Kant also discusses the weal of the citizens the state has to ensure as not meaning their happiness but does accept state interference with global markets in the form of import restrictions to make the state strong internally and externally against foreign enemies, AA VIII (*T&P*), p. 298, l. 21 – p. 299, l. 1 and ll. 33–37. Kant drops the import duties discussion from consideration in the *Doctrine of Right*, perhaps under Adam Smith's influence.

<sup>96</sup> Smith, IV.ix.51, 687–688; IV.ii.10; IV.v.b.16; IV.ix.51; I.x.c.12, where Smith suggests that state intervention in private commerce is unjust and foolish.

<sup>97</sup> Smith, V.ii.a.20, where Smith makes an exception only for public parks, gardens, and other objects of expense and not revenue.

government must not be the owner of parcels of land (*Ländereien*) or of domains (*Domänen*):

Because then the state would run the risk of seeing all ownership of the land as in the hands of the government and all subjects as *bound to the land* (*glebae adscripti*) and possessors of that which is only the property of another and thus robbed of all freedom (*servi*), since the question of how far they [the parcels of land] should be extended would depend on his [the commander in chief's (*des Oberbefehlshabers*)] discretion.<sup>98</sup>

A *glebae adscriptus* is a farmer who is bound to the soil, a serf, and a *servus* is a slave. In other words, if the government can have extensive landed property then we all run the risk of becoming serfs of the state.<sup>99</sup> Since the universal legislating will cannot will other than in accord with the principle of freedom, it cannot will for the state to interfere with market freedom in any manner except to secure the maximum freedom of each that is compatible with the freedom of all others.

In [Chapter 1](#) we have explained Kant's idea behind the juridical state and the institutions necessary to constitute it. We have claimed that the three types of public justice, which Kant calls protective justice (*iustitia tutatrix*), mutually acquiring justice (*iustitia commutativa*), and distributive justice (*iustitia distributiva*), are justice as attained through three institutions, namely positive lawgiving by a human lawgiver, the public market, and the judiciary. These three institutions must be established in a state for that state to be called a juridical state. They are thus the formal criteria and necessary conditions for the juridical state. Furthermore, we have outlined the substantive criterion for determining whether these institutions are in fact functioning as they should in order to say that any particular state is a juridical state. This substantive criterion and the formal criteria provide the sufficient condition for the juridical state.

In the next chapter, we tackle the three *leges* Kant discusses in §41 of the *Doctrine of Right*, the *lex iusti*, the *lex iuridica*, and the *lex iustitiae*

<sup>98</sup> AA VI, General Comment B, p. 324, ll. 7–14.

<sup>99</sup> Kant rejects the welfare state. A paternalistic regime which treats its "subjects as immature children, who cannot differentiate between what really helps and harms them," and who thus "are forced to behave merely passively in order to await the judgment of the head of state on how they *should* be happy and to expect that this [head of state], merely from his grace, also wants [them to be happy] is the greatest conceivable *despotism* (constitution which cancels all freedom of the subjects, who then have no rights at all)." AA VIII (*TøP*), p. 290, l. 33 – p. 291, l. 5 (emphases added); see too AA VI, §49, p. 316, l. 34 – p. 317, l. 3.

(*distributivae*). To do so, we begin by examining Kant's idea of the non-juridical state, or the state of nature. In particular, we look at the work of Gottfried Achenwall, whom Kant mentions by name in §41, to gain insight into Kant's own ideas. Toward the end of [Chapter 2](#), we offer a new interpretation of the Ulpian formulae Kant discusses in the "Introduction to the Doctrine of Right." This new interpretation is based on our understanding of the three *leges*, which seems to be quite different from previous interpretations, particularly of the three *leges* in conjunction with the Ulpian formulae.

## The state of nature and the three *leges*

In this chapter, we continue our analysis of §41 of the *Doctrine of Right*, beginning with the state of nature, or non-juridical state, which is prior to the juridical state. To explain Kant's notions of the state of nature and the juridical state, [section 1](#) will discuss Gottfried Achenwall's work, to which Kant expressly refers in §41. Although Kant disagrees with Achenwall's contrasting the state of nature to the social state rather than to the juridical state, Kant tacitly adopts Achenwall's distinction between "original" (*ursprünglich*) and "adventitious" (*zufällig*).<sup>1</sup> Kant uses these two terms throughout the *Doctrine of Right* and understanding their significance is crucial to understanding that work. Indeed the distinction between "original" and "adventitious" elucidates what Kant means with the three *leges*, namely the *lex iusti*, the *lex iuridica*, and the *lex iustitiae*, in §41.<sup>2</sup> Those *leges* will be fleshed out in [sections 2](#) and [3](#), where we provide a detailed explanation of Kant's use of them. In [section 4](#), we argue that understanding the three *leges* as we claim they should be understood explains Kant's discussion of the three Ulpian formulae, *honeste vive*, *neminem laede*, and *suum cuique tribue*. In particular, it explains what has been considered to be a cryptic comment Kant makes at the end of his discussion of the Ulpian formulae regarding internal legal duties, external legal duties, and those legal duties which contain the derivation of the external legal duties from the principle of the internal legal duties through subsumption. Finally, in [section 5](#), we explain why Kant refers to the "possibility, reality, and necessity of the possession of objects (as the

<sup>1</sup> Gregor translates *zufällig* as "contingent," which is a perfectly acceptable translation. We are using "adventitious" for a reason, which will be explained in [section 1](#).

<sup>2</sup> The reader may wonder why we are leaving *lex* and its plural form *leges* in Latin. As we explain in [sections 2](#) and [3](#), *lex* can mean a variety of things other than "law" and Kant in fact uses these different meanings. There is no English equivalent with the same group of meanings, nor any German, which is why Kant too leaves the terms in Latin when discussing them.

substance of choice)” when dividing public justice into the three types of justice we discussed in the last chapter. [Section 5](#) will thus provide arguments in support of our claims about these three types of justice in [Chapter 1](#).

## 1. The non-juridical state or the state of nature

To understand Kant’s concept of the state of nature and why he contrasts the state of nature to the juridical state,<sup>3</sup> it is helpful to first understand why Kant rejects Achenwall’s contrasting the state of nature to the social state. For Achenwall, a social state is “any union of people formed to pursue a common and lasting goal.”<sup>4</sup> Since people unite to pursue a variety of common goals, many types of social states are conceivable. Achenwall discusses these social states in the second volume of his *Ius Naturae* and includes there not only public law (*ius publicum*)<sup>5</sup> and international law (*ius gentium*),<sup>6</sup> but also other areas of law dealing with social states, such as family law (*ius familiae*) in the broadest sense of the word “family.”<sup>7</sup> Thus Achenwall considers even a union of only two people in a marriage to be a social state.<sup>8</sup> In contrast, an extra-social state is where I find myself with persons to whom I have no relation of this sort. If I happen to meet another person in the desert, then the two of us are in an extra-social state or a state of nature. Also the state in which I find myself with a robber is an extra-social state or a state of nature.<sup>9</sup> Assuming I am not in any blood, marriage, club, or business association with the desert wanderer or the

<sup>3</sup> AA VI, §41, p. 306, ll. 17–18. Contrasts of this sort are not novel. Hobbes distinguishes between civil society (*societas civilis*) and the state of nature (*status naturae*), Hobbes, *De Cive*, Praefatio ad Lectores, p. 148; Pufendorf between the adventitious state (*status adventitius*) and the state of nature (*status naturalis*), Pufendorf, *De Jure*, I/I/§7/pp. 16–17; *De Officio*, II/I/§2/p. 61; II/II/§1/p. 63; and Achenwall between the social state (*status socialis*) and the state of nature (*status naturalis*), *Prolog.*, §91, p. 91. This description of the tradition makes no claim to completeness. Locke, Rousseau, and others also speak of a state of nature. In general, the state of nature in the natural law doctrine of the seventeenth and eighteenth centuries is the state outside a certain order. For Hobbes, the state of nature is the state outside civil society: *Conditio hominum extra societatem civilem*, *De Cive*, p. 148. Kant places himself within this tradition with his contrast between the juridical state and the state of nature.

<sup>4</sup> *Prolog.*, §82, p. 84: *coniunctio plurium ad persequendum finem quemdam communem et perdurantem*.

<sup>5</sup> *I.N.II*, §§85 et seq. (AA XIX, pp. 363 et seq.).

<sup>6</sup> *I.N.II*, §209 et seq. (AA XIX, pp. 419 et seq.).

<sup>7</sup> *I.N.II*, §§78 et seq. (AA XIX, pp. 361 et seq.).

<sup>8</sup> *I.N.II*, §42 et seq. (AA XIX, pp. 348 et seq.).

<sup>9</sup> In his lectures on Achenwall, Kant remarks: “If a robber attacks me, I am in statu naturali, because the authorities cannot possibly protect me” (*Feyerabend*, AA XXVII.2.2, p. 1353, ll. 7–8). Of course if I happen to be married to the robber, or the robber is my child, then I am in a social state with the robber, but not by virtue of the robbery.

robber, then the meeting takes place in the state of nature before any social order or relationship has been established between the two of us. For Achenwall, therefore, "state of nature" means the "state outside an order." Because Achenwall sees the state of nature as the state without *any* order, he sees the *non*-state of nature as the state with (any) one order.

Kant criticizes Achenwall's understanding of the state of nature. Kant notes "in the state of nature there can be lawful societies (e.g. marriage, parental, household in general, and countless others)." For Kant most of these orders are merely artificial states, which can also exist in the state of nature. The state of nature for Kant is the state outside the *required* order. Thus for Kant the proper contrast is not between the state of nature and the social state, but rather between the state of nature and the juridical state, for which it can be said: "You should move to this state!"<sup>10</sup> This criticism is more significant than may first appear. For Kant we have rights in the state of nature before we ever enter a juridical state. Since Kant includes all of our rights – original (innate) and acquired – as rights we have in the state of nature, he can later claim that the juridical state must not violate any of these rights with its positive laws. Thus not only our innate right to freedom, but also our property, contractual, and family rights are rights we have in the state of nature and thus rights we maintain after entering the juridical state.

In fact, Kant does not simply contrast the juridical state to the state of nature but rather distinguishes three states, which he calls first, second, and third states in the passage from §41 quoted at the beginning of [Chapter 1](#). The third state, as he says, is the state of public law. Thus the third state is the same as the juridical state. Kant calls the two other states, states of private law. Since a state of private law is the same as a state of nature, it is apparent that Kant divides the state of nature into two different states.<sup>11</sup> He does not, however, expressly indicate in the *Doctrine of Right* how that additional division is to be accomplished.

Kant's division of the state of nature into two different states is based on an important distinction Achenwall draws and Kant simply adopts. In addition to distinguishing between the social state and the extra-social state, Achenwall also distinguishes between the original state

<sup>10</sup> AA VI, §41, p. 306, ll. 17–28. We discuss Pufendorf's state of nature below.

<sup>11</sup> AA VI, §41, p. 306, ll. 29–30.

(*status originarius*) and adventitious state (*status adventitius*). Although the word “adventitious” in English usually is used to connote a wind-fall, we are using it here because of its linguistic connection to *adventitius* and mean with it something that was contingent but did in fact happen. Whether I take an umbrella with me to work or not is contingent. I can take the umbrella or leave it at home. If I in fact commit a contingent act – take the umbrella – then we are calling that act “adventitious,” meaning the act was contingent but indeed did happen. This usage also seems to capture Achenwall’s and Kant’s ideas of what is adventitious, because both of them consider contingent acts that are in fact committed to be adventitious acts. Relevant for Achenwall’s distinction between an original state and an adventitious state is whether we assume a legally relevant act (*factum iuridicum*) has been committed.

Achenwall considers a *legally relevant act* to be a human act which is the foundation for (new) rights or duties.<sup>12</sup> When, for example, an animal in the wild injures another animal, we do not assume this process (the animal’s movement) is legally relevant. In contrast, when we see one person injuring another person we do assume this act is legally relevant. We may even judge the act to be wrongful and thus possibly the basis for a claim of money damages or punishment. In Achenwall’s original state, we find ourselves in a situation *before* assuming that a legally relevant act has occurred. In Achenwall’s adventitious state, we find ourselves in a situation *after* assuming a legally relevant act has occurred. The assumption of any legally relevant act, regardless of whether the act is wrongful (*A* hits *B*) or not (*A* marries *B*), puts us in the adventitious state. The adventitious state is called “adventitious” because any particular human act is contingent (*A* could have hit *C* rather than *B*; *A* could have married *C* or stayed a bachelor, but he married *B*). In contrast, the original state is the state in which no legally relevant act has yet been committed. Much more importantly for our interpretation of Kant, the original state is the state with the

<sup>12</sup> *I.N.I.*, §62, pp. 54–55: “The natural state of human beings can be seen per se and absolutely, or under an hypothesis, namely when simultaneously a legally relevant act is posited, i.e. a human act through which a right and an obligation are induced (founded), i.e. a new right and a new obligation; the first state of nature is called the original state, the latter the adventitious state.” (*Status hominum naturalis considerari possit qualis per se est et absolute, vel qualis est posito simul facto quodam iuridico, id est facto humano, quo ius et obligatio inducitur, hoc est novum ius et nova obligatio constituitur, hypothetice; prior status naturalis vocatur originarius, posterior adventitius.*)

assumptions we must make in order to see an act as a legally relevant act.<sup>13</sup>

Achenwall's distinction between the original state and the adventitious state is based on Pufendorf's distinction between the state of nature and the adventitious state.<sup>14</sup> Achenwall asks what Pufendorf's state of nature is supposed to be in light of Pufendorf's contrasting it to the adventitious state. Achenwall's answer is that Pufendorf's state of nature must contain the totality of assumptions we make in order to see the concrete legal relations in which we are involved as being *legal* relations. Achenwall also considers what name he can give to this set of assumptions, in order to bring out the contrast to the adventitious state adequately. He decides to use the word *originarium* (original),<sup>15</sup> and defines as original everything that makes an act a legally relevant act (a definition that is previously suggested by Pufendorf). If we pursue this line of thought, then Pufendorf's state of nature would be called "original state" and instead of Pufendorf's distinction between the state of nature and the adventitious state one must contrast the original state to the adventitious state. We have the original state in mind when we abstract from any legally relevant act. In other words, the transition from the original state to the adventitious state occurs when someone acts in a legally relevant way.

Both of the distinctions Achenwall draws contain a complete division in the sense Kant requires for complete divisions.<sup>16</sup> No third state exists in addition to the social state and the extra-social state or state of nature, and no third state exists in addition to the original state and the adventitious state. In other words, the concepts "social state" and "extra-social state" are complementary, as are the concepts "original state" and "adventitious state." These concepts and the

<sup>13</sup> *I.N.I.*, §63, p. 56: "Absolute natural law is the science of those natural laws that have to be observed in the original state of nature. This science teaches the mere natural rights and obligations which can be conceived without positing a legally relevant act or by abstracting from any legally relevant act." (*Ius naturale absolutum est scientia legum naturalium in statu naturali originario observandarum. Ergo docet iura atque obligationes mere naturales, quae sine posito facto quodam iuridico seu abstrahendo ab omni facto iuridico concipi possunt*). According to Achenwall, the right to freedom is one assumption we must make if we want to attribute legal relevance to actions, but he also includes other rights that today we would call "basic rights." *I.N.I.*, §§64–108, pp. 57–91.

<sup>14</sup> On Pufendorf, see note 3.

<sup>15</sup> Achenwall uses *originarium* to designate the (logically) first state as of *I.N.I.* (3rd edn. 1755), §107, p. 51.

<sup>16</sup> See, e.g., AA VI, §31, p. 284, ll. 9–11.

distinctions underlying them, however, can be combined. The point of departure for this combination is the determination that every social state is an adventitious state, regardless of whether the legally relevant act through which the transition from the original state to the adventitious state occurs is a marriage or the founding of a (nation) state. Furthermore, legally relevant acts can occur outside of a social state, for example when *A* hits *B*, and thus bring about adventitious states in the state of nature, meaning Achenwall's state of nature, or the state without any order. In contrast, the original state is necessarily a state of nature, since every social state is an adventitious state. The following table captures Achenwall's system:

extra-social state = state of nature		social state
original state		adventitious state
original state of nature	adventitious state of nature	social state <sup>17</sup>

With this combination we attain a tripartite division between (1) original state (of nature), (2) adventitious state of nature, and (3) social state.

What Kant criticizes in Achenwall's system is Achenwall's concept of the state of nature and thus the distinction between the social state and the state of nature as the extra-social state. What Kant does not criticize is the distinction between the concepts "original" and "adventitious." Indeed, Kant adopts these concepts from Achenwall. According to Kant something is original (*ursprünglich*) if it "lies before any legally relevant act," which is emphasized in various places in the *Doctrine of Right*.<sup>18</sup> This concept is Achenwall's concept of *originarium*. "Legally relevant act" (*rechtlicher Akt*) is Kant's translation of Achenwall's *factum iuridicum*. Accordingly for Kant, original is every assumption we must make for legally relevant acts to be legally relevant. The *Doctrine of*

<sup>17</sup>

<i>status extrasocialis seu naturalis</i>		<i>status socialis</i>
<i>status originarius</i>		<i>status adventitius</i>
<i>status originarius</i>	<i>status adventitius naturalis</i>	<i>status socialis</i>

<sup>18</sup> E.g. AA VI, §6, p. 250, l. 30; §13, p. 262, ll. 26–28; §16, p. 267, ll. 13–15.

*Right* is primarily concerned with formulating these assumptions. Kant expressly calls a number of basic concepts "original," such as the "original" right to freedom,<sup>19</sup> "the original community of the earth and the things upon it (*communio fundi originaria*),"<sup>20</sup> the "original contract,"<sup>21</sup> and the "originally and *a priori* united will."<sup>22</sup> All of these basic concepts are part of the original state and assuming them makes a wide variety of acts legally relevant.

Similarly, Kant uses the word *zufällig* (adventitious) just as Achenwall uses the word *adventitius*. In contrast to the laws in the state of nature, positive laws are adventitious.<sup>23</sup> In general, all of the relationships in which we find ourselves are adventitious, such as our social standing or the fact that we are married.<sup>24</sup> Adventitious is a universal will that has been formed in fact, in contrast to the *a priori* and thus necessarily united will.<sup>25</sup> Adventitious is the reality of a civil constitution,<sup>26</sup> meaning any civil constitution that actually has been adopted.<sup>27</sup>

In light of the above, we must assume that the distinction between original state and adventitious state is one basis for Kant's system of first, second, and third states, the other being the distinction between the non-juridical and the juridical states. As with Achenwall, here we have two complete divisions. There is no third state in addition to the juridical state and the non-juridical state, or the state of nature, and, as for Achenwall, there is no third state in addition to the original state and the adventitious state. The concepts "juridical state" and "non-juridical state" are complementary, as are the concepts "original state" and "adventitious state." Furthermore, as for Achenwall's concepts, Kant's two divisions of concepts can be combined. Every juridical state is an adventitious state, which is what Kant means when he says that the reality of a civil constitution is always adventitious. Still, legally relevant acts are committed outside the juridical state. If *A* hits *B*, or *A* marries *B*, those are legally relevant acts, which can occur in the state of nature, meaning for Kant the non-juridical state. Furthermore, the original state for Kant is necessarily a state of nature, since every juridical state is an adventitious state. A juridical state is

<sup>19</sup> AA VI, Division DoR B, p. 237, ll. 29–32.

<sup>20</sup> AA VI, §6, p. 251, ll. 1–3; §13, p. 262, ll. 26–29; §16, p. 267, ll. 4–5.

<sup>21</sup> AA VI, §47, p. 315, l. 33, *et al.* <sup>22</sup> AA VI, §16, p. 267, ll. 13–15, *et al.*

<sup>23</sup> AA VI, Introduction MM IV, p. 227, l. 14. <sup>24</sup> AA VI (*Virtue*), §44, p. 468, ll. 6–13.

<sup>25</sup> AA VI, §14, p. 263, ll. 25–26. <sup>26</sup> AA VI, §15, p. 264, ll. 5–6.

<sup>27</sup> One can find a contrast of "original" to "adventitious" in AA VI (*Religion*), p. 28, ll. 19–21.

an adventitious state because it first has to be established by committing an act with legal relevance. The following table illustrates Kant's states:

non-juridical state = state of nature		juridical state
original state	adventitious state	
original state of nature	adventitious state of nature	<b>juridical state</b>
= first state	= second state	= third state

Again we arrive at a tripartite division of (1) original state (of nature), (2) adventitious state of nature, and (3) juridical state, which Kant calls first, second, and third states. The original state and the adventitious state of nature are together the state of private law. The juridical state is the state of public law.

It seems Kant is not particularly interested in *this* tripartite division. He refers to it only once in the *Doctrine of Right*, and he does not use it for his work there. What interests Kant are the three concepts that underlie the above table, namely the highlighted concepts "original state," "adventitious state," and "juridical state." Kant refers to them in his lectures of 1784, calling them there *status originarius* (original state), *status adventitius* (adventitious state), and *status civilis* (civil state).<sup>28</sup> There too, Kant refers to these three concepts with express criticism of Achenwall's work. Kant sees that they are insufficient for his purposes, even if he does substitute the juridical state for the social state. In the *Doctrine of Right*, Kant thus works with three newly named concepts, namely the *lex iusti*, the *lex iuridica*, and the *lex iustitiae distributivae*. The *lex iuridica* is identical to the adventitious state and the *lex iustitiae distributivae* to the juridical state. The *lex iusti* includes the original state, but is somewhat broader. The meaning of these three *leges* and our arguments for interpreting them as we do follow in sections 2 and 3. It should also become apparent from our explanation why we are not translating the three *leges* as "three laws" and why we are not translating each of them individually. Indeed, when discussing them in the *Doctrine of Right*, Kant never uses any German equivalents, but leaves the three terms in the original Latin.

<sup>28</sup> Feyerabend, AA XXVII.2,2, p. 1338. ll. 24–29.

## 2. The distinction between the *lex iusti* and the *lex iuridica*

The expressions *lex iusti* and *lex iuridica* appear three times in the *Doctrine of Right*.<sup>29</sup> Combined with, and in reference to them, Kant uses the adjectives “right” (*recht*) for the *lex iusti* and “juridical” (*rechtlich*) for the *lex iuridica*.<sup>30</sup> We argue that the *lex iusti* is the set of assumptions one must make to see acts as having legal relevance. The *lex iuridica*, on the other hand, is composed of the concrete actions that have legal relevance under the *lex iusti*, or by virtue of the *lex iusti*. In this section we thus show that the distinction between the *lex iusti* and the *lex iuridica* is simply the distinction between the law, which defines what is legally relevant, and the legally relevant facts and circumstances themselves to which the law can be applied.

In [section 1](#) we indicated that Kant adopts Achenwall's notion of “original” as being prior to any legally relevant act. For Achenwall, any assumption we must make to see acts as legally relevant is original. Kant, however, seems to disapprove of Achenwall's term “original state.” If Achenwall's original state contains the conditions under which adventitious acts acquire legal relevance, then that so-called state is not a state at all, but rather a system of principles and rules. Kant thus calls what he sees as parallel to Achenwall's original state, namely the system of principles and rules that governs a concrete situation, “law” (*Gesetz*),<sup>31</sup> or *lex iusti*. *Lex* in *lex iusti* means “law,” and for the meaning of “*iustum*” Kant gives us a definition: “What is right according to external laws is called *just* (*iustum*).”<sup>32</sup> The *lex iusti* is thus the law of what is externally right.

We now must ask the question: What is externally right? According to Kant's definition of “just” (*iustum*), one knows what is externally right from the external laws. “External laws (*leges externae*)” are binding laws, “for which external legislation is possible.”<sup>33</sup> External legislation, which Kant also calls “juristic” (*juridische*) or “juridical” (*rechtliche*) legislation,<sup>34</sup> gets its name from the fact that it contains a law which

<sup>29</sup> AA VI, Annex Introduction DoR II, p. 236, l. 30, l. 33; §16, p. 267, l. 7, l. 11; §41, p. 306, l. 9, l. 11.

<sup>30</sup> AA VI, §16, p. 267, l. 16; §41, p. 306, l. 9, l. 11. We postpone discussion of the *lex iustitiae distributivae* and its corresponding “established as right” for the moment and return to it in [section 3](#).

<sup>31</sup> AA VI, §41, p. 306, l. 8.      <sup>32</sup> AA VI, Introduction MM IV, p. 224, ll. 7–8.

<sup>33</sup> AA VI, Introduction MM IV, p. 224, ll. 27–28.

<sup>34</sup> E.g. AA VI, Introduction MM III, p. 219, ll. 3–6 (*juridisch*), l. 17–18 (*rechtlich*).

makes an act a duty, and “allows a motivation other than the idea of duty itself” to be combined with this law.<sup>35</sup> What Kant means is that external legislation permits combining external coercion, such as the threat of punishment, as a motivation to fulfill a duty with the duty contained in the law.<sup>36</sup> There are two sorts of external laws, (1) those external laws “for which the obligation can be cognized *a priori* through reason without any external legislation,” and (2) those external laws “which are not binding at all in the absence of actual external legislation (accordingly without the latter would not be laws).” The laws of the first sort are natural laws. Those of the second are positive laws.<sup>37</sup> As different as these two sorts of laws may be, nonetheless they are both external laws. It thus follows that what is just (right) according to external laws is defined by natural law and by those positive laws that are applicable in a juridical state. Kant’s expression *lex iusti* covers both of these types of laws.

Accordingly, the *lex iusti* is the system of principles and rules that are applicable in a concrete situation. The situation can be a state of nature or a juridical state. In both cases, it is presumed that the external laws are binding laws. That natural law is obligatory needs no discussion. In contrast, whether positive laws are obligatory can be called into question. According to Kant “obligation is the necessity of a free action under a categorical imperative of reason.”<sup>38</sup> Consequently, those positive laws are obligatory which reason categorically commands us to follow. Ideally, that would be true for any law enacted in a juridical state. Reason could categorically command us to follow each of these laws. Each of these laws would then be obligatory. For this reason, the

<sup>35</sup> AA VI, Introduction MM III, p. 218, l. 24 – p. 219, l. 6. This explanation corresponds to Kant’s definition of legislation in general: “In all legislation (*Gesetzgebung*) there are two elements: **first** a law which makes the act that is to happen *objectively* necessary, i.e. which makes the act a duty; **second**, a motivation which *subjectively* connects the determining basis of choice to commit this act with the representation of the law.” AA VI, Introduction MM III, p. 218, ll. 11–17. For ethical legislation, the motivation attached to the duty is the idea of duty itself and not some external motivation, such as the threat of punishment.

<sup>36</sup> Derived from the above idea is the consideration that external legislation can be directed only to external actions because external coercion is possible only for external and not for internal actions. External laws thus always apply to external actions. An external action is an action that can be observed in time and space. An internal action cannot be observed and takes place only in time and not in space. Thus if *A* hits *B* (*A* extends his fist toward *B* now) *A* commits an external action that can be governed by external law. If *A* simply hates his neighbor *B*, then nothing takes place in space and *A*’s action is purely internal. External laws cannot govern that type of action with the consequence that external laws cannot require people to love their neighbors.

<sup>37</sup> AA VI, Introduction MM IV, p. 224, ll. 28–33.

<sup>38</sup> AA VI, Introduction MM IV, p. 222, ll. 3–4.

directive to drive on the right side of the road, for example, could be obligatory in a particular juridical state. Reason commands me to drive on the right, not because any natural law, or law cognizable *a priori* through reason, requires driving on the right, but because in a concrete juridical state a concrete lawgiver enacted a law requiring driving on the right side of the road. Consequently, in a concrete juridical state the *lex iusti* could include not only the natural laws, but also the requirement to drive on the right and many other rules the lawgiver might enact.

The *lex iusti* is parallel to Achenwall's original state. It is the law that is valid and applicable in a concrete situation. If the situation is a state of nature then valid applicable law is limited to natural law. If the situation is a juridical state then the *lex iusti* includes not only natural law but also those positive laws enacted in that state, if and to the extent they are obligatory laws.<sup>39</sup>

Let us now consider the *lex iuridica*. In the expression *lex iuridica*, *lex* does not mean "law," as one might automatically assume. The Latin *lex* can mean law, but it can also mean "manner" or "mode," "quality," or "nature."<sup>40</sup> In Antiquity, Ovid and others used the expression *lex loci* to mean "nature of a place." *Lex iuridica* is the juridical nature of a concrete situation. It relates to our concrete actions and omissions and the concrete circumstances under which these acts and omissions are undertaken. From the concrete acts and omissions under concrete circumstances follow the rights and legal duties we as concretely existing human beings have toward each other. Concrete actions and omissions and the circumstances under which they occur are always *adventitious* acts and omissions, and *adventitious* circumstances.<sup>41</sup> The *lex iuridica* is thus what constitutes the adventitious state, be it the adventitious state of nature or the juridical state, which, as noted above, is always an adventitious state.

In support of our interpretation, we refer to Kant's own contrast of the *lex iusti* to the *lex iuridica*. The *lex iusti* tells us "what conduct

<sup>39</sup> Not all "positive law" that any particular "lawgiver" enacts is obligatory positive law. Non-obligatory pseudo-law is, for Kant, simply not law.

<sup>40</sup> See, Lewis/Short, entry "lex," pp. 1055–1056; *Oxford Latin*, entry "lex," pp. 1021–1022; Georges, vol. 2, entry "lex," cols. 629–631. "Lex" can also mean "rule," "control," "dominion," or "order," as in "legal order." This meaning is relevant for our discussion of the *lex iustitiae* in the next section.

<sup>41</sup> One might object saying that some acts or omissions are coerced with physically irresistible force and thus not adventitious because not contingent. When we speak of an "act" or "omission" in the text above, however, we mean what is the voluntary product of human will.

internally according to its form is *right*.<sup>42</sup> The *lex iuridica*, on the other hand, is “what as substance (*Materie*) is also externally capable of law.”<sup>43</sup> Kant thus draws a contrast between the concepts “form” for the *lex iusti* and “substance” for the *lex iuridica*, and between the concepts “internal” for the *lex iusti* and “external” for the *lex iuridica*.

In order to understand the contrasts Kant draws, it is helpful to take a look at the *Critique of Pure Reason*. There Kant discusses four pairs of comparative concepts (*Vergleichungsbegriffe*),<sup>44</sup> one of which is “the internal and external” and another “substance and form.” For the first pair of the internal and external Kant says in the first *Critique*: “in an object of the pure understanding only that is internal which has no relation (as far as existence is concerned) to anything that is different from itself.”<sup>45</sup> Internal is first and foremost (pure) thought.<sup>46</sup> As an example of what is internal, we are taking Euclidean geometry, which as pure thought (“as far as its existence is concerned”) relates exclusively to itself. In particular, Euclidean geometry has no relation to the land (both banks of the Nile) which it is used to measure. Kant gives us no explanation of the concept “external” in his discussion of the comparative concepts in the first *Critique*. We are assuming that “external” is that which “as far as its existence is concerned” *does* relate to something different from itself.

If we apply these ideas to the definitions of the *lex iusti* and the *lex iuridica* Kant gives us in §41 of the *Doctrine of Right*,<sup>47</sup> we see that when the *lex iusti* tells us what is internally right, that means the *lex iusti* relates only to itself as does Euclidean geometry. It is pure thought. It is the thought of what is right. In the first instance it is “natural law, which is based only on principles *a priori*,”<sup>48</sup> including all practical concepts of reason which are “cognizable by every human reason,”<sup>49</sup> not the least of which are those concepts which Kant himself designates as “original.” It is thus not surprising that Kant repeatedly compares the rules of the *lex iusti* to Euclidean geometry.<sup>50</sup> The *lex iusti* includes

<sup>42</sup> AA VI, §41, p. 306, l. 9. One might perceive a contradiction here between what is right under *external* laws and what is *internally* right according to its form. The definition of the *lex iusti*, however, is not self-contradictory. The *lex iusti* tells us what is right under *external* laws because the action is *internally* right according to its form, meaning *a priori* right according to reason, *and* because the actions are external actions that can be the subject of external (juridical as opposed to ethical) legislation.

<sup>43</sup> AA VI, §41, p. 306, ll. 9–10. <sup>44</sup> AA III, p. 216, l. 3 (B 318).

<sup>45</sup> AA III, p. 217, ll. 29–31 (B 321). <sup>46</sup> AA III, p. 218, l. 6 (B 321).

<sup>47</sup> Concepts of law are not concepts of the understanding as discussed in the first *Critique*, but rather concepts of reason, but this distinction seems irrelevant for our purposes here.

<sup>48</sup> AA VI, Division DoR B, p. 237, ll. 15–16.

<sup>49</sup> AA VI, §36, p. 296, ll. 16–17. <sup>50</sup> E.g. AA VI, §19, p. 273, ll. 17–22.

the axioms,<sup>51</sup> postulates,<sup>52</sup> definitions,<sup>53</sup> and logical conclusions which can be recognized *a priori* through reason, just as Euclidean geometry includes axioms, postulates, definitions, and logical conclusions that are constitutive of it.

The *lex iusti* contains not only natural law, but, as noted above, also positive (statutory) law in a juridical state if and to the extent this positive law is obligatory. Not only natural law but also positive law tells us what is right. According to natural law, for example, it is prohibited to kill another human being, assuming one has no recognized justification for doing so. An act of unjustified killing is thus not right. According to statutory law, it could be required to drive on the right side of the road, with the consequence that driving on the right is right. Driving on the left, unless justified, is thus not right.

In contrast, the *lex iuridica* is what is external, what is capable of law (*gesetzfähig*). We need to take the expression “capable of law,” which incorrectly has been called into question,<sup>54</sup> literally. We have the law, which is the *lex iusti*, and we apply that law to our acts and omissions to the extent these acts are capable of being subsumed under the law. The *lex iuridica* is not law, like the *lex iusti* is law. Instead, the *lex iuridica* is the concrete situation that is legally relevant because of the *lex iusti*. It is our concrete actions and the concrete circumstances in which these actions are committed or omitted and from which the concrete rights and duties evolve, which we as concrete human beings here and now owe each other because, according to the *lex iusti*, we have committed *legally relevant* acts. An example may be of some assistance to understanding the difference between these two *leges*. If *A* and *B* undertake a series of actions defined in the *lex iusti* to be the actions inherent to closing a contract, then they have, by virtue of the *lex iusti*, committed legally relevant acts. They have closed a contract. This contract defines their contractual rights and duties. The actual actions they undertook when closing the contract were concrete actions in concrete circumstances or part of the *lex iuridica*, and legally relevant by virtue of the *lex iusti*. Accordingly, they give rise to concrete rights and obligations

<sup>51</sup> “Axiom of law” (*Axiom des Rechts*), AA VI, §6, p. 250, l. 6, on the one hand, and “axiom of external freedom” on the other, AA VI, §16, p. 267, ll. 12–13; §17, p. 268, l. 25.

<sup>52</sup> The “juridical postulate of practical reason.” e.g. AA VI, §2, p. 246, l. 4, and the “postulate of public law,” §42, p. 307, ll. 8–9.

<sup>53</sup> “Definition of the concept of the external mine and thine,” for example, where Kant speaks both of the nominal and real definitions of that concept, AA VI, §5, p. 248, l. 32 – p. 249, l. 7.

<sup>54</sup> See Ludwig (ed.), *Rechtslehre*, p. 123, note to l. 17.

A and B owe each other as a result of undertaking their legally relevant acts. These concrete rights and obligations are also part of the *lex iuridica*.

We reach the same conclusion when we examine the pair of concepts “form and substance.” In the *Critique of Pure Reason*, Kant says that substance is “the determinable in general,” and “form is its determination.”<sup>55</sup> More concisely, form is what determines substance. When the *lex iusti* says what “is right according to its form” then that means the *lex iusti* gives us the rules that determine the *lex iuridica* as substance. *Lex iusti* and *lex iuridica* are thus to be distinguished as the legal relevance of acts and their surrounding circumstances are to be distinguished from the legally relevant acts and circumstances themselves. The *lex iusti* gives us the reasons that make our acts and the circumstances surrounding them legally relevant. The legally relevant acts and circumstances themselves are the substance that constitutes the *lex iuridica*. This distinction is not at all foreign to modern legal thought. The difference between the legal relevance of acts and their surrounding circumstances and the legally relevant acts and circumstances themselves is the foundation for the distinction between mistake of law and mistake of fact. A mistake of law is a mistake about whether certain acts or circumstances are legally relevant. If I do not know that it is legally prohibited to wear red in Bluesville, then I have made a mistake about the legal relevance of wearing red in that city. I have made a mistake of law. A mistake of fact, on the other hand, is a mistake about the legally relevant acts and circumstances themselves. If I wear red in Bluesville knowing that it is prohibited to do so, but because of color-blindness I think I am wearing green, then I have made a mistake not about the law of Bluesville, but about my act of wearing red, an act with legal relevance in Bluesville, but an act that I am not aware I am committing.

The contrast of the concepts “internal and external” and the contrast of the concepts “form and substance” in the definitions of the *lex iusti* and the *lex iuridica* show that a complementary relationship exists between the *lex iusti* and the *lex iuridica*. These two *leges* complement each other to form a unity, which corresponds to the completeness of the division of all (possible) states into original state and adventitious state. The *lex iusti* is what we have to assume in order for the adventitious acts in the adventitious state to take on legal relevance. The *lex*

<sup>55</sup> AA III, p. 218, ll. 14–17 (B 322).

*iuridica* is the legally relevant nature of an adventitious concrete situation. The situation is legally relevant because it is defined to be so by the *lex iusti*. The *lex iustitiae* (*distributivae*), which we discuss immediately below, lies outside the unity formed by the *lex iusti* and the *lex iuridica* just as the juridical state lies outside the division of states into original state and adventitious state.

### 3. The contrasts among the *lex iusti*, the *lex iuridica*, and the *lex iustitiae*

At the same three places Kant discusses the concepts *lex iusti* and *lex iuridica* in the *Doctrine of Right*, he also discusses the *lex iustitiae*,<sup>56</sup> which he once calls *lex iustitiae distributivae*.<sup>57</sup> Kant uses the term “established as right” (*Rechtens*)<sup>58</sup> in connection with the *lex iustitiae*. In the expression *lex iustitiae*, *lex* means neither law nor character or nature, but instead order, as in “legal order.”<sup>59</sup> *Lex iustitiae* (*distributivae*), which is another expression for juridical or civil state, thus means “the order created through distributive justice,” or, since *iustitia distributiva* can also be translated as “judiciary,” “judicially formed order.” It is the order that develops from a judge applying the rules of law contained in the *lex iusti* to those facts that have legal relevance in the concretely existing world of the *lex iuridica* and arriving at a final binding decision on the rights of the individuals involved.

Again, our interpretation of the three *leges* is supported by Kant's own explanation of them. Kant uses the categories of modality to compare the *lex iusti*, *lex iuridica*, and *lex iustitiae*. In the *Preparatory Work on the Doctrine of Right* and in the *Doctrine of Right* itself, the *lex iusti* is explained as creating the *possibility* of the rights we have (in §41 of the *Doctrine of Right*, as the *possibility* of intelligible possession of objects), the *lex iuridica* as being the *reality* of our rights, and the *lex iustitiae* (*distributivae*) as giving these rights *necessity*.<sup>60</sup>

The *lex iusti* creates the *possibility* of the rights we as concretely living human beings have in relation to each other. Our rights are possible because we assume a system of legal concepts and principles. We assume, for example, that persons have a right to the preservation of their bodily integrity against other persons. On the basis of this

<sup>56</sup> AA VI, Division DoR A, p. 237, l. 8; §16, p. 267, ll. 15–16; §41, p. 306, l. 13.

<sup>57</sup> AA VI, §16, p. 267, ll. 15–16. <sup>58</sup> AA VI, §16, p. 267, l. 16; §41, p. 306, l. 13.

<sup>59</sup> See authorities cited in note 40.

<sup>60</sup> AA VI, §41, p. 306, ll. 4–5; AA XXIII (*Preparatory DoR*), p. 281, ll. 6–15.

assumption, we can then say that (on the level of the *lex iuridica*) *B*'s right to bodily integrity is violated when *A* hits *B*.

In contrast, the *lex iuridica* represents our relevant acts and the relevant circumstances under which we commit these acts. The *lex iuridica* is thus the *reality* of the rights we have as concretely living human beings. It is the nature of a legally relevant situation because of the assumptions we make on the level of the *lex iusti* and the acts and omissions we undertake in the concrete world.

The *lex iustitiae distributivae* also relates to the actual rights we have as concretely living human beings. Indeed, it relates to the same rights as the *lex iuridica*, but it views these rights from the viewpoint of the legal order, the juridical order, which gives these rights *necessity*. In his clarification of the *lex iustitiae* in §41 of the *Doctrine of Right*, Kant writes that this necessity is imparted through the "judgment of a court," which tells us "in a particular case" what is in accordance with the given law, "i.e. is established as right."<sup>61</sup>

The necessity of which Kant speaks in connection with the *lex iustitiae* is a "substantive necessity in existence," not a "merely formal and logical necessity" in the connection of concepts.<sup>62</sup> Kant uses the distinction between substantive and formal necessity in his discussion of the postulates of empirical thought in the *Critique of Pure Reason*.<sup>63</sup> His comments on the postulates of empirical thought provide the clue to understanding the laconic comments Kant makes in the *Preparatory Work on the Doctrine of Right* and in the *Doctrine of Right*. For empirical cognition he says in the first *Critique*:

The categories of modality have the specialty in themselves: that they add nothing to the concept to which they are attached as predicates to specify the object, but instead express only the relation to the capacity of cognition. If the concept of a thing is already absolutely complete, I can still ask of this object whether it is merely possible, or also real, or, if it is the latter, then whether it is even necessarily so? Hereby no specification is additionally thought of in the object itself, but it is only asked how it relates (including all of its specifications) to the understanding and its empirical use, to the empirical power of judgment, and to reason (in its application to experience)?<sup>64</sup>

Decisive here is that the categories of modality add nothing to the specification of the cognized object, but instead relate to our capacity of cognition. When we see a particular object *O*, we can ask whether *O*

<sup>61</sup> AA VI, §41, p. 306, ll. 11–13. <sup>62</sup> AA III, p. 193, ll. 25–27 (B 279).

<sup>63</sup> AA III, pp. 185–198 (B 265–287). <sup>64</sup> AA III, p. 186, ll. 4–14 (B 266).

is (merely) possible or whether it is (even) real, and if it is real, whether it is not perhaps necessarily so. The object *O* remains the same without any alteration. The question is only about our cognition of *O*.

As especially to the “substantive necessity in existence” of *O*, “no existence of objects of the senses can be *completely* cognized *a priori*,” “but instead *comparatively a priori* relative to another already given existence.”<sup>65</sup> That happens by my (as the cognizing being) viewing the object *O* and the surrounding circumstances in light of the laws of science. It is thus not “the existence of things (substances), but their state from which alone we can cognize necessity, and in particular from other states that are given in perception according to empirical laws of causality.”<sup>66</sup> The language is complicated, but can be explained well in an example.

When we conceive of a mountain, for example Mt. Everest, then we can ask whether such a thing as that mountain is possible. If we are looking at Mt. Everest, then we can determine that Mt. Everest really exists. In order to answer the question of whether Mt. Everest necessarily exists, we must use our geological knowledge and make a few assumptions, such as the fact that continental drifts and other natural phenomena have occurred, which tells us something about the nature of the earth. If we order all of this knowledge into laws of nature, then we might be able to say that Mt. Everest necessarily exists.<sup>67</sup>

The *Doctrine of Right* has nothing to do with scientific cognition but rather with the recognition of individual rights. That there is a connection between the two and that Kant proceeds from this connection is revealed in Kant's use of the dual meaning of the German word *Erkenntnis*. First, the word means “insight” and that is how it is used in epistemological connections. Second, the word means “judicial decision.”<sup>68</sup> Accordingly, in the *Doctrine of Right*, the categories of modality also relate to a *capacity of (re)cognition*, namely the capacity of the responsible (competent) judge to reach decisions with final binding effect as to whether a concrete person *P* has a particular right or not.<sup>69</sup> Similarly, to an object of natural scientific cognition, the right remains

<sup>65</sup> AA III, p. 193, ll. 27–29 (B 279) (emphasis added).

<sup>66</sup> AA III, p. 194, ll. 5–8 (B 279–280).

<sup>67</sup> Not as a sort of ideological assumption, but rather on the basis of ordering cognition connections.

<sup>68</sup> For the meaning of *Erkenntnis* in the sense of “judicial decision” see AA VI, General Comment E, p. 333, ll. 26–27.

<sup>69</sup> On this point, see AA VI, §44, p. 312, ll. 26–27. That Kant is primarily interested in the final binding force of the judicial decision can also be seen from AA VI, Introduction MM IV, p. 227, ll. 27–29.

the same regardless of whether we consider its possibility, reality, or necessity. On the level of the *lex iustitiae*, the judge reaches a decision by ordering certain processes in the world of the *lex iuridica*, for example the processes involved in purchasing a horse,<sup>70</sup> and viewing them in connection with the law<sup>71</sup> (the *lex iusti*) in order to then determine whether the purchaser has acquired the horse as his property or not. If the judge determines that the buyer is the rightful owner of the horse, then the buyer's right has a "substantive necessity of existence" and thus the peremptory character that the establishment of the juridical state secures.

If we combine everything we have considered then we can say the following: The *lex iusti* contains the rules of "natural law, which are based purely on principles *a priori*, and positive (statutory) law, which proceeds from the will of a lawgiver,"<sup>72</sup> assuming the positive laws are obligatory. The *lex iuridica* is the world of our actions and omissions to which the rules of the *lex iusti* can be applied. Our concrete rights and duties evolve out of the application of these rules. The *lex iustitiae* is the application of the rules by a judge in the juridical order, who "recognizes as right"<sup>73</sup> our rights with final binding force.

Let us return to the tables of states for Achenwall and Kant, which we developed in [section 1](#). If we introduce the *lex iusti* as a concept, then the assumption of an original state becomes superfluous. Still the idea remains that our real actions and omissions, and with them the concrete rights and legal duties we have, are adventitious. We are thus left with the idea of an adventitious state, which Kant now gives the name *lex iuridica* in order to contrast that state to the *lex iusti*. Kant adapts the concept of the juridical state, which is crucial for him, to this terminology. In our context, the juridical state is called *lex iustitiae distributivae*. We can now express the connections discussed in sections 2 and 3 in a new table:

lex iusti		lex iuridica
	adventitious non-juridical state	lex iustitiae distributivae

<sup>70</sup> One of Kant's favorite examples.

<sup>71</sup> This law is, in contrast to the natural laws to which the postulates of empirical thought relate, a "law of freedom," see AA VI, Introduction MM I, p. 214, ll. 13–14.

<sup>72</sup> AA VI, Division DoR B, p. 237, ll. 15–17.

<sup>73</sup> Today too in Germany, courts write in their judgments that they have "recognized (something) as right" (*für recht erkannt*).

In this table, as in the tables above, we find a combination of two complementary pairs of concepts. The *lex iusti* and the *lex iuridica* stand in contrast as do internal and external, form and substance. The *lex iustitiae distributivae*, the judicially formed order, on the one hand, and the non-judicial adventitious state, which according to definition is a state of nature, on the other, also stand in contrast as a complementary pair of concepts. Kant can use the juxtapositions of these concepts or the juxtapositions of states we discussed in [section 1](#) alternately.

#### 4. Kant's interpretation of the Ulpian formulae

Kant gives us a "General Division of Legal Duties,"<sup>74</sup> for which he uses the Ulpian formulae, *honeste vive* (literally: live honestly), *neminem laede* (literally: injure no one), and *suum cuique tribue* (literally: give each his own).<sup>75</sup> Kant's own interpretations of these formulae are *honeste vive* – be a juridical person, *neminem laede* – do no one wrong, and *suum cuique tribue* – enter a society with others in which everyone's own can be maintained. Kant calls the formulae in his interpretation "Principles of Division of the System of Legal Duties," whereby *honeste vive* represents the internal, *neminem laede* the external, and *suum cuique tribue* those legal duties "which contain the derivation of the latter from the principle of the former through subsumption." Kant clarifies what he is saying by attaching to *honeste vive* the *lex iusti*, to *neminem laede* the *lex iuridica*, and to *suum cuique tribue* the *lex iustitiae*. The full text we interpret in this section is:

Accordingly the three classic formulae stated above are also principles of division of the system of legal duties into internal, external, and those legal duties which contain the derivation of the latter from the principle of the former through subsumption.<sup>76</sup>

Internal and external legal duties are distinguishable in the same way as the *lex iusti* and the *lex iuridica* are distinguishable, which is obvious from the contrast we have discussed in [section 2](#) between internal and external in the definitions of the *lex iusti* and the *lex iuridica*. The internal legal duties thus belong to the *lex iusti*, whereas the external legal duties are the legal duties we as concretely existing human

<sup>74</sup> AA VI, Introduction DoR, p. 236, l. 9 – p. 237, l. 12.

<sup>75</sup> See [Chapter 1](#), note 13. For diverging interpretations of the Ulpian formulae, see Pinzani, "Stellenwert" and Schnepf, "Systematisierung."

<sup>76</sup> AA VI, Division DoR A, p. 237, ll. 9–12.

beings have. The internal legal duties provide the relevance that makes our actions and omissions legally relevant. In the world of the *lex iuridica*, concrete legal duties arise. Those duties are the external legal duties, the fulfillment of which I owe to another concretely existing person in the world of reality by virtue of the other person's original right to freedom or because of my committing a legally relevant act.

Since the internal legal duties belong to the *lex iusti*, they are *not* duties that we have to *fulfill*. Most importantly, they are not legal duties a person has *toward himself*. Kant occasionally toyed with the idea that there were legal duties a person owed to himself.<sup>77</sup> Still he sees at an early date that the (apparent) concept of a "legal duty to myself," which I can or cannot fulfill is self-contradictory. "A right cannot be observed against myself because what I do to myself I do with my own consent."<sup>78</sup> But to the consenting no wrong happens, *volenti non fit iniuria*.<sup>79</sup> I also do not act "in violation of justice when I act against myself."<sup>80</sup> Instead the internal legal duties give us the *possibility* of external legal duties, the latter of which indeed are *real* duties we have to fulfill.

The legal duties of the third category ("those legal duties which contain the derivation of the latter from the principle of the former through subsumption") are the same as the external legal duties, which Kant indicates when he says that the duties of the third category contain "the derivation of the *latter* from the principle of the former," with the "latter" referring to the external legal duties. The difference between the duties of the third category and the external legal duties results from the nature of the subsumption Kant has in mind. As we later show,<sup>81</sup> Kant has a clear concept of subsumption. Subsumption is the construction of the minor premise in a syllogism, in particular in a practical syllogism constructed by a citizen or a judge. In light of the context in which the legal duties of the third category can be found (Kant expressly refers to the *lex iustitiae*), Kant does not mean the subsumption that a citizen can undertake, but instead the subsumption

<sup>77</sup> One example of this idea can be found in Kant's lectures, *Vigilantius*, AA XXVII.2,1, p. 581, l. 21 – p. 582, l. 10.

<sup>78</sup> Menzer, p. 146.

<sup>79</sup> AA VI, §46, p. 313, l. 34. The principle *volenti non fit iniuria* is a well-known legal adage derived from Ulpian, *Digests* 47.10.1.5, where one sees: *Nulla iniuria est, quae in volentem fiat* ("No wrong is done if it happens to a consenting [party]"). The proposition *volenti non fit iniuria* is not valid for ethics, because ethics is not concerned with rights. See Kant's argumentation in AA VI (*Virtue*), §6, pp. 422–423.

<sup>80</sup> Menzer, p. 146. <sup>81</sup> In Chapter 7, section 3.

undertaken by a judge or court. The legal duties of the third category, which are derived from the principle of the internal legal duties through subsumption, are therefore the external legal duties that are determined with final binding force by the judge with jurisdiction over a case in a juridical state (through subsumption of the legally relevant facts under the applicable law).

There is even more support for our interpretation in Kant's use of the categories of modality. *Real* legal duties, which are the duties that concretely living human beings have, are solely the external legal duties, which corresponds with Kant's terminology elsewhere.<sup>82</sup> They are the duties we have because of the legally relevant acts we commit and the resulting legal nature of the concrete situation of the *lex iuridica* in which we find ourselves after having committed those acts. The internal legal duties are the duties of the *lex iusti*, which is the law that creates the *possibility* of (external) legal duties. The duties determined by the judge with jurisdiction over the case and given final binding force are those legal duties that have a (substantive) *necessity* in existence because of the final binding nature of the judge's decision. It is obvious that finally determined and legally binding duties must be *external* legal duties, which Kant expressly states in the passage quoted at the beginning of this section. It is almost unnecessary to note that the internal legal duties, the external legal duties, and the duties of the third category are one and the *same* duties. These duties are distinguished into internal, external, and third-category duties only on the basis of their modality. A duty such as "contracts must be fulfilled" is an internal legal duty of the *lex iusti* which gives us the possibility of acquiring something through agreement. That duty is the same as the duty *A*, who has entered into a contract with *B*, has to actually fulfill because of the concrete actions *A* and *B* undertook in closing the contract. *A*'s duty is an external legal duty of the *lex iuridica* which represents the reality of *A*'s rights and duties under the contract. Both the internal legal duty "contracts must be fulfilled" and *A*'s concrete legal duty to fulfill his obligations under the contract with *B* are the same as the duty a judge will derive from the facts of the case in light of the law. The judicially determined duty is an external legal duty derived from the principle of the law through subsumption of the facts and given a necessity or bindingness to secure our rights.

<sup>82</sup> AA VI, Introduction MM III, p. 219, ll. 17–21.

We can now order the Ulpian formulae in a table that corresponds to the table in [section 3](#):

<b>honeste vive</b>	<b>neminem laede</b>
non-juridical adventitious state	<b>suum cuique tribue</b>

*Honeste vive* requires me “in relation to others to maintain my worth as a human being.”<sup>83</sup> This duty is expressed in the proposition: “Do not make yourself into a mere means for others, but instead be simultaneously an end for them.”<sup>84</sup> In my awareness of the duty expressed in *honeste vive*, I become a juridical subject, meaning a person with rights.<sup>85</sup> A juridical subject is a person who, on the one hand, is endowed with the original (innate) right to freedom and, on the other, can acquire additional rights. Seeing myself as a juridical subject is the same as making an effective claim against all others to respect my rights. Admittedly, the others are already obligated to do so by the Categorical Imperative. Still that duty is a duty they owe to themselves. When I see and present myself as a juridical subject, then they are also obligated *to me* to respect my freedom and (acquired) possessions. *Honeste vive* – Be a juridical person – then means: Take the viewpoint of the law. That is the “principle of the internal legal duties,”<sup>86</sup> which

<sup>83</sup> AA VI, Division DoR A, p. 236, ll. 25–26.

<sup>84</sup> AA VI, Division DoR A, p. 236, ll. 27–28. This proposition contains an obvious reference to the second formulation of the Categorical Imperative: “Act so that you always treat humanity both in your own person and in the person of everyone else also as an end and never merely as a means,” AA IV (*Groundwork*), p. 429, ll. 10–12. When the Categorical Imperative obliges me to treat the humanity in myself always as an end, then that obligation applies as well in situations in which I am confronted with other human beings. I would not be treating the humanity in myself as an end if I did not do so also in my relation to other human beings.

<sup>85</sup> I am a moral subject (person) already because of my awareness of the moral law as a fact of reason (*Factum der Vernunft*); see [Chapter 14](#).

<sup>86</sup> AA VI, Division DoR A, p. 237, l. 11. Kant’s assumption that *honeste vive* is the principle of the internal legal duties has its background in Alexander Baumgarten’s theory of honorableness (*honestas*). Kant held his lectures on practical philosophy and ethics according to Baumgarten’s *Initia Philosophiae Practicae Primae* and *Ethica* (notes taken during Kant’s lectures have been published in the Academy Edition). Baumgarten distinguishes between external and internal honorableness (*honestas externa* and *honestas interna*) depending on whether the honorable observation of the laws relates to external or internal laws (juridical or ethical laws). Natural law contains only external laws, whereby Baumgarten speaks of “natural law in the narrower sense” (*ius naturae stricte dictum*) in direct contrast to the remaining rules of practical philosophy. Accordingly, *honeste vive* understood as *externe honeste vive* (literally: act *externally* honorably) is the principle of natural law in the narrower sense (*primum iuris naturae stricte dicti principium*). The formula *honeste vive* thus means:

Kant elsewhere refers to as the “axiom of law” or the “axiom of right” (*Axiom des Rechts*).<sup>87</sup>

*Neminem laede* – Do no one wrong – stands in contrast to *honeste vive* as the adventitious state stands in contrast to the original state and as the *lex iuridica* stands in contrast to the *lex iusti*. Only in the world of the *lex iuridica*, only in the adventitious state, can I do someone wrong. *Neminem laede*, which prohibits doing others wrong assumes that the viewpoint of the law has already been taken, because without taking it, it would be impossible to say that someone could do another wrong, and without this latter assumption, it would be impossible to say that someone should not do another wrong. For that reason *neminem laede* is the decisive norm for everything in the area of the *lex iuridica* (the adventitious state).

*Suum cuique tribue* – Enter a society with others in which everyone's own can be maintained – makes the *neminem laede* concrete for the juridical state (for the world of the *lex iustitiae*, the judicially formed order). *Suum cuique tribue* is thus constitutive of the juridical state. The judge, who reaches a decision in a case of dispute, takes the viewpoint

“Observe the external laws, i.e. observe the rules of natural law,” Baumgarten, §94 (AA XIX, p. 45, l. 34 – p. 46, l. 12). Kant uses Baumgarten's Latin terminology and distinction between *honestas externa* and *honestas interna* in the *Doctrine of Virtue*, AA VI (*Virtue*), §4, p. 420, l. 27 (*honestas interna*), §40, p. 464, l. 11 (*honestas externa*). The *honestas externa*, “honorableness in external comportment” (AA VI (*Virtue*), §40, p. 464, l. 11), is relevant not only for the doctrine of virtue, but also for law because law contains exclusively external duties. For law, Kant speaks of *honestas iuridica*, of “juridical honorableness,” AA VI, Division DoR A, p. 236, ll. 24–25. For Baumgarten, *honeste vive*, which has to be understood as *externe honeste vive*, is the first principle of natural law. For Kant, *honeste vive*, which also has to be understood as *externe honeste vive*, is the first principle of the *lex iusti* (see section 2). The internal legal duties – internal because the *lex iusti* tells us what is internally right according to its form – are part of the *lex iusti*. Consequently *honeste vive*, understood as *externe honeste vive*, is the principle of the internal legal duties. To the extent Kant sees fulfilling the requirement “to be a juridical person” as the “compatibility of actions with the law,” AA VI (*Virtue*) Introduction VII, p. 390, ll. 30–31, he is operating within Baumgarten's established framework. When, however, Kant connects *honestas iuridica*, meaning the requirement to be a juridical person, to the idea that I should take the viewpoint of the law, he goes far beyond Baumgarten. Taking the viewpoint of the law and keeping the requirements of (natural) law mutually imply one another. To take the viewpoint of the law toward others in fact (“Be for others at the same time an end!” AA VI, Division DoR A, p. 236, ll. 27–28), means that I myself fulfill the requirements of the law. When I myself fulfill the requirements of the law then I simultaneously take the viewpoint of the law toward others. When, for example, I fulfill all of my obligations under a contract according to the law of contracts, then I myself fulfill the requirements of the law. By insisting (even implicitly) that my contractual partner do the same rather than breach the contract, I simultaneously make myself an end for him. I do not permit him to use me merely as a means to attain what he wants by entering into the contract, but require him also to view me as an end by giving me what I want through the contract.

<sup>87</sup> AA VI, §6, p. 250, l. 6. See Introduction, section 3, for our arguments that the axiom of law or the axiom of right is different from the axiom of external freedom.

of the law, making it possible for him to derive the external legal duties from the *principle* of the internal legal duties through subsumption.<sup>88</sup>

## 5. A return to public justice

Let us return to the public institutions which must be established for us to be able to speak of a juridical state and to the topic discussed in [Chapter 1, section 2](#). As we shall see, our interpretation of the three *leges* in this chapter strongly supports our theory of the three institutions. Public justice is “the formal principle of the possibility” of a juridical state, “seen according to the idea of a universally legislating will,” and can be divided “in relation to the possibility or reality or necessity of the possession of objects (as the substance of choice)” according to laws “into *protective (iustitia tutatrix)*, *mutually acquiring (iustitia commutativa)* and *distributive justice (iustitia distributiva)*.”<sup>89</sup> “Possession of objects (as the substance of choice)” according to laws refers here to intelligible possession of things (meaning the ownership of property), to intelligible possession of someone else’s choice (meaning having a contractual claim against someone else, namely a right to require performance on a contractual obligation), and to the intelligible possession of a spouse or a child (which is a family law claim). The things I own and the contractual or family law claims I have are objects of my choice and the possession I have is intelligible possession, meaning purely legal possession. “Possession of objects (as the substance of choice)” according to laws, therefore, relates to my rights, and in particular to rights I can acquire, as opposed to the original (innate) right. We return to this topic in more depth in [Chapters 5 and 6](#).

Protective justice (*iustitia tutatrix*) makes these rights *possible*. I can first articulate my rights (at least some of them), meaning I talk about them and claim I have them, when *public* law, meaning law that has been formulated and promulgated, is available to me. I need, for example, a concept of ownership of a condominium and positive law about how ownership of a condominium is established, acquired, and sold before I can speak of being the owner of a condominium. Condominium ownership thus needs to be recognized by the civil order in

<sup>88</sup> In *Feyerabend*, AA XXVII.2.2, p. 1337, ll. 26–27, one finds the following on *suum cuique tribue*: “Move to the state of the *iustitia distributiva*. If one does not when one can, one harms the others.” That means that everyone who violates the principle *suum cuique tribue* simultaneously acts contrary to the principle *neminem laede*. As one can see from the above table, the same relationship exists between the two principles in the *Doctrine of Right*.

<sup>89</sup> AA VI, §41, p. 306, ll. 1–8.

which I live, for me to claim my ownership rights. That does not mean of course that positive law in a juridical state can arbitrarily determine what my rights are, as discussed in [Chapter 1, section 3](#).<sup>90</sup>

Justice in mutual acquisitions (*iustitia commutativa*) relates to the *reality* of acquirable rights to the extent these rights can be exchanged, meaning bought and sold. The reality of the exchanges occurs in the *public* market where concretely living human beings barter and trade to buy and sell rights to things and services. These human actions are legally relevant, in part because of the achievements of a public law-giver (the *iustitia tutatrix*), who makes public law available on the basis of which certain rights can be created, such as the right to own a condominium, or provides the rules according to which these rights can be bought and sold. Because of these provisions and rules, the parties' rights and duties change *in fact* as a result of a purchase and sale.

Distributive justice (*iustitia distributiva*) imparts *necessity* to our rights if and because the *public* judge in a juridical state gives these rights this necessity through her decisions. The judge looks at the legally relevant facts and circumstances and determines with final binding force that *A* is the owner of Whiteacre and *B* is the owner of Blackacre. She does that by subsuming the legally relevant facts of the *lex iuridica* under the *lex iusti* to determine whether in a chain of causation brought about by human conduct *A* effectively acquired Whiteacre and *B* acquired Blackacre. Her judgment imparts necessity to *A*'s and *B*'s rights and duties because her judgment is enforceable in the juridical state. She thus makes *A*'s and *B*'s rights peremptory.

In this chapter, we have discussed Kant's concept of the state of nature and its juxtaposition to the juridical state. We have also shown that Kant uses the concept "original" (*ursprünglich*) to designate the assumptions we must make in the state of nature in order for our acts to take on legal relevance. Kant uses the term *lex iusti* to designate these assumptions. The *lex iusti* is the law of what external actions are internally right according to their form. It is thus the law we know *a priori* from pure reason and positive law enacted in a juridical state to the extent this law is obligatory. The *lex iusti* governs our external conduct in the concretely existing world. The *lex iusti* gives us the *possibility* of our rights because it defines what new rights and duties evolve out of its definition of legally relevant conduct. We have also shown that Kant

<sup>90</sup> Positive "law" in a state that is not a *Rechtsstaat* is uninteresting in this context.

uses the concept “adventitious” (*zufällig*) to designate acts that in fact have been committed and have legal relevance under the *lex iusti*. Once a legally relevant act has been committed, we move from the state of nature to the adventitious state of the *lex iuridica*, meaning a concretely existing state of a legal nature. Because it is a concretely existing state of a legal nature, it is externally capable of law, meaning the *lex iusti* can be applied to it to determine the new rights and duties the interacting parties now have because one (or both) of them has committed a legally relevant act. The *lex iuridica* thus represents the *reality* of the rights we have in the concretely existing world. Furthermore, we have shown that the *lex iustitiae (distributivae)* is the judicially formed order in a state with distributive justice, meaning for Kant justice as determined by judicial decision when rights are in dispute. The *lex iustitiae* gives our rights *necessity* because in a juridical state there is a judge to reach decisions with final binding effect which will be enforced. To reach that decision, the judge derives the external legal duties of the *lex iuridica* from the principle of the internal legal duties of the *lex iusti* by subsuming the legally relevant facts under the applicable law. In other words, the judge applies the law to the legally relevant facts to determine with final binding force what external legal duties will be recognized and enforced in the juridical state – the *Rechtsstaat*. Finally, we have shown that the three forms of justice, the *iustitia tutatrix*, the *iustitia commutativa*, and the *iustitia distributiva*, correspond to our interpretation of the three *leges* because these forms of justice also give us the possibility, the reality, and the necessity of our rights. They are the three forms of public justice in a juridical state. The *iustitia tutatrix* makes rights *possible* because it is positive lawgiving upon which people can rely to claim their rights. Positive law enables everyone to take the viewpoint of the law and thus to fulfill their duty as expressed in Kant’s interpretation of the Ulpian formula *honeste vive*. The *iustitia commutativa* makes rights a *reality* because it represents the public market where people can exercise their rights to external objects of choice by buying and selling them. The public market concretizes the principle *neminem laede*, because a free market requires all participants in it to respect others’ acquired rights and to harm no one, for example through committing robbery rather than purchasing what the other has to offer. The *iustitia distributiva* imparts *necessity* to our rights because it represents the judiciary with a judge who, in cases of dispute, can decide with final binding force who has what rights. The judiciary is the main figure in Kant’s idea of the juridical state. It ensures that the duty expressed in

the third Ulpian formula *suum cuique tribue* can be fulfilled in Kant's interpretation of "secure each his own" by entering the juridical state where there is a judge to secure rights.

In [Chapter 3](#), we turn to Kant's basic idea of freedom. We discuss internal and external freedom and their negative and positive aspects. Although the negative and positive aspects of internal freedom and the negative aspect of external freedom are commonly understood, the positive aspect of external freedom has as yet not been discussed, at least not in the light in which we claim it needs to be discussed. Our explanation of the positive aspect of external freedom will make Kant's theory of revolution, a theory that has been hotly debated for some time, understandable and convincing. Finally, we turn to the original contract and the original and necessarily united will, which alone is lawgiver. Before we turn to the next chapter, however, we take a short digression into the historical development behind Kant's definitions of the three *iustitiae* to fortify our claims in the first two chapters.

## APPENDIX TO CHAPTER 2

# *Iustitia tutatrix, iustitia commutativa, and iustitia distributiva* and their differences

In what follows we digress from the last chapter to sketch Kant's train of thought leading to the three institutions (*iustitia tutatrix*, *iustitia commutativa*, and *iustitia distributiva*). This digression should also make Kant's terminology more transparent. We show that Kant originally distinguished only between commutative justice and distributive justice, and did not discuss the idea of protective justice as embodied in the *iustitia tutatrix* at all. As noted in [Chapter 1](#), Kant does not use the Scholastic understanding of commutative and distributive justice. For the Scholastics, commutative and distributive justice were virtues. For Kant, in contrast, they are institutions. We explain the radical change between the Scholastic and Kant's views of these two types of justice, tracing this change to Hobbes. Indeed, Hobbes not only provides the frame of reference for Kant's definitions of commutative and distributive justice, but also formulates an early version of what for Kant later becomes the postulate of public law with its dictate to move to a juridical state. Kant refines Hobbes' concepts and ultimately adopts a third – protective justice – by the time he writes the *Doctrine of Right*.

### 1. KANT'S DEVELOPMENT OF HOBBS' DISTINCTION BETWEEN COMMUTATIVE AND DISTRIBUTIVE JUSTICE

We find the background for Kant's ideas on public justice in Hobbes' thoughts on the concepts *iustitia commutativa* and *iustitia distributiva*. In *Leviathan*,<sup>1</sup> as in *De Cive*,<sup>2</sup> Hobbes rejects the Aristotelian-Scholastic tradition and with it the Scholastic definitions of commutative and distributive justice.

According to Hobbes in *Leviathan*, the attributes "just" and "unjust" are attributes of persons or of actions. For Hobbes, the distinction drawn between commutative and distributive justice relates to just and unjust actions. "Just" in

<sup>1</sup> Hobbes, *Leviathan*, Cap. XV, pp. 114–120. We use the Latin text here from 1668, which Kant used in developing his own thoughts. We give our translation of the Latin in our text, and then the Latin text in the footnotes. We do not use Hobbes' English text of 1651 because Hobbes modified the original English text in his Latin version of it seventeen years later.

<sup>2</sup> Hobbes, *De Cive*, Cap. III, §§5–6, pp. 184–186.

the sense of commutative justice is any action which fulfills the requirements of a contract. Hobbes states: "To speak properly, commutative justice is the justice of contractors, that is the performance of a covenant, in buying and selling, loaning and borrowing, hiring, exchanging, and other acts in performance of the covenant."<sup>3</sup> In contrast, distributive justice according to Hobbes is "the justice of an arbitrator, who, because trust has been placed in him, fulfills that trust if he gives each party his own."<sup>4</sup>

On closer examination of the texts one sees that for Hobbes justice, be it commutative or distributive justice, is the justice of specific actions in specific situations. Commutative justice is the justice of actions undertaken while participating in the market. Distributive justice is the justice of an arbitral decision. Kant adopts Hobbes' distinction between commutative and distributive justice and Hobbes' view that commutative justice is the justice of the market. As Hobbes states: "The price of all things is determined by the appetites of the contracting parties; that price is just upon which the buyer and seller agree."<sup>5</sup> Kant speaks similarly of the "market price."<sup>6</sup> Kant asks himself what commutative and distributive justice have in common, and in an early Reflection comes to a revealing conclusion: "Justice is the administration of the law."<sup>7</sup> When contracting parties perform their self-imposed contractual duties, they are fulfilling duties of law, which performance one can call "administering the law" – "administering the law" meaning literally "attending to legal matters." When an arbitral judge gives each his own, one also can speak of "administering the law." The difference between commutative and distributive justice lies in whether *private* parties or an *appointed administrator* (judge) administer the law.

To better understand distributive justice, it is enlightening to consider Hobbes' sixteenth principle of natural law. The sixteenth principle of natural law expresses a requirement: In case of a dispute about rights, the disputing

<sup>3</sup> Hobbes, *Leviathan*, Cap. XV, p. 116: *Justitia commutativa proprie est justitia contrahentium, id est, conservatio pactorum de venditione et emptione, de mutuo datione et acceptione, de conductione, de commutationibus aliisque actibus contrahentium*. The text above translates *commutatio* as "exchanging," for which Kant uses *Umsetzung* or "turnover," making *commutatio* in the broad sense (*commutatio late sic dicta*) the generic term for all types of contractual performances; AA VI, §31, Annex I "What is money?," p. 289, ll. 18–19.

<sup>4</sup> Hobbes, *Leviathan*, Cap. XV, p. 116: *Justitia autem distributiva est justitia arbitri, qui quia fides ei adhibetur, si fidem servat, utrique parti quod suum est distribuit*. The connection between distributive justice and the third Ulpian formula *suum cuique tribue* is obvious here, as it later is for Kant in the *Doctrine of Right*, AA VI, Introduction DoR, p. 237, l. 8.

<sup>5</sup> Hobbes, *Leviathan*, Cap. XV, p. 116: *Pretium omnium rerum contrahentium appetitu aestimatur; pretiumque justum est in quod ambo emptor et venditor consentiunt*.

<sup>6</sup> AA IV (*Groundwork*), p. 434, l. 36 and p. 435, l. 9. In his lecture of 1784, Kant says: "If we agree on the value, then the agreement will be right. When value is determined by the common judgment of the people, it is the *pretium vulgare*, the market price." *Feyerabend*, AA XXVII.2.2, p. 1357, ll. 25–27; see too p. 1359, ll. 18–19. Hobbes' influence on Kant is most obvious in these passages.

<sup>7</sup> AA XIX, R.6814, p. 170, l. 16. In *Feyerabend*, AA XXVII.2.2, p. 1370, l. 1, Kant also speaks of the "administration of the law." See too AA VI, §40, p. 304, l. 17, where Kant speaks of "juridical administration" (*Rechtsverwaltung*).

parties should submit to the decision of an arbitrator.<sup>8</sup> This requirement amounts to a pre-Kantian formulation of the postulate of public law, which requires us to move to the juridical state.<sup>9</sup> In his lectures of 1784, Kant reformulates Hobbes' principle: "Submit to a *justitia distributiva*!"<sup>10</sup> or: "Move to a state of a *justitia distributiva*!"<sup>11</sup> These statements in Kant's lectures are the early Kantian equivalents to the postulate of public law.

Kant's reformulation of Hobbes' sixteenth law of nature extends far beyond Hobbes. The reformulation says that we are required to submit to an institution, which is called "distributive justice," and which decides in case of dispute what our rights are (with final binding force<sup>12</sup>). Further in the lecture, Kant states:

*Justitia distributiva* determines what is right through *legem publicam*, applies that law to each case, and forces one to observe the judgment. Give up wanting to follow your [own] judgment of what is right; instead let the lawgiver determine what is right and the judge decide, and give up your own force with which you could coerce others.<sup>13</sup>

Accordingly, distributive justice for Kant in 1784 provides three services. It provides the public law, it applies this law in cases of dispute, and it enforces these decisions. In these early phases, distributive justice for Kant is much broader than it is in the *Doctrine of Right*, because it is identical to the juridical state in several of that state's essential functions (including the function of lawgiver).

Our interpretation of distributive justice in Kant's lectures explains Kant's somewhat strange assumption in those lectures that commutative justice in the state of nature "is the state of war."<sup>14</sup> With commutative justice administering the law is in the hands of private parties. Commutative justice is thus "private justice."<sup>15</sup> In the state of nature, commutative justice indeed lies *exclusively* in the hands of private parties. Each of these private parties comes to his own decision about what rights we have, because in the absence of an institution which can resolve disputes with final binding force, each individual person *must* reach his own decision. Kant states in the lecture that in the state of nature what is right cannot be determined in a manner valid for everyone. "No one here is required to follow the other's judgment." When the parties' judgments differ, force is the ultimate means remaining to solve a problem confronting those parties. Consequently: *Alter jure aggreditur, alter jure resistit*

<sup>8</sup> Hobbes, *Leviathan*, Cap. XV, p. 120: *Lex naturae decima sexta est in sententia arbitri acquiescere*. "The sixteenth law of nature is to acquiesce in the judgment of an arbitrator."

<sup>9</sup> AA VI, §42, p. 307, ll. 8–11.

<sup>10</sup> Feyerabend, AA XXVII.2,2, p. 1390, ll. 4–5. <sup>11</sup> Feyerabend, AA XXVII.2,2, p. 1337, l. 26.

<sup>12</sup> Kant did not use the term *res judicata* (rechtskräftig in German) in his lecture, but it does appear in AA VI, §44, p. 312, l. 26.

<sup>13</sup> Feyerabend, AA XXVII.2,2, p. 1390, ll. 9–13.

<sup>14</sup> Feyerabend, AA XXVII.2,2, p. 1390, ll. 5–6.

<sup>15</sup> AA XIX, R.6814, p. 170, l. 18. In his lectures, Kant also calls the state of nature a *status justitiae privatae*, Feyerabend, AA XXVII.2,2, p. 1381, l. 25.

("The one rightly attacks, and the other rightly resists").<sup>16</sup> For that reason, Kant calls commutative justice in a state of nature a state of war. Of course it is not necessary that the parties use force to resolve their disputes, but it is always possible that they will do so.

The alternative to private justice is public justice, *iustitia publica*.<sup>17</sup> Unsurprisingly, Kant speaks of public justice in his publications during the 1780s.<sup>18</sup> In the early phases of his work on the doctrine of right, including his lectures in 1784, Kant uses the distinction between commutative and distributive justice and gives commutative justice the meaning of private justice. Public justice in these early phases thus always refers to distributive justice in the broad meaning Kant uses the term to mean in his lectures of 1784, and not yet in the narrower meaning it comes to have in the *Doctrine of Right*.

Establishing a system of distributive justice changes the nature of commutative justice, which then can no longer be called a state of war. Commutative justice remains the market where market prices are valid, but now through the existence of distributive justice it is an *ordered* market.<sup>19</sup> Kant's comments in his handwritten notes that commutative justice prevails in the state of nature,<sup>20</sup> on the one hand, and that without distributive justice there is no commutative justice,<sup>21</sup> on the other, are thus not contradictory. In the former case, he means unordered, and in the latter, ordered commutative justice. Ordering commutative justice by establishing distributive justice turns the market into public justice and thus into the *public* market of which Kant later speaks in the *Doctrine of Right*.

## 2. FROM THE TWO- TO THE THREE-PART DIVISION OF PUBLIC JUSTICE

Although Kant gives some thought to Hobbes' distinction between commutative and distributive justice in his lectures of 1784, he refines his ideas on these two types of justice and adds a third by 1797. This third type of justice is the *iustitia tutatrix*, which is the institution of lawgiving. In this section we explain why Kant expands his concepts of justice to include a third.

The contrast between commutative and distributive justice which prevails in Kant's lectures of 1784 proves to be insufficient to answer the question Kant asks in the *Doctrine of Right* in 1797, namely with what issues must a doctrine of right deal? Kant finds three, rather than merely two, issues to discuss. The first of them is law, and Kant speaks of law as a "systematic theory" which encompasses both "natural law" and "positive (statutory) law."<sup>22</sup> The second

<sup>16</sup> *Feyerabend*, AA XXVII.2,2, p. 1390, ll. 6–8.    <sup>17</sup> AA XIX, R.6814, p. 170, l. 19.

<sup>18</sup> AA VIII (*Idea*), p. 23, ll. 14–16; AA VIII (*Presumed Beginning*), p. 119, l. 23.

<sup>19</sup> See *Chapter 1, section 2B* and *Chapter 1*, note 90.

<sup>20</sup> AA XIX, R.7717, p. 499, ll. 5–6; R.7903, p. 549, ll. 18–19.

<sup>21</sup> AA XIX, R.7933, p. 559, ll. 23–24. See too *Feyerabend*, AA XXVII.2,2, p. 1337, ll. 20–21: "*Iustitia commutativa* without *distributiva* has no *effectus*." ("Commutative justice without distributive justice has no effect.")

<sup>22</sup> AA VI, Division DoR B, p. 237, ll. 15–17.

of these issues is “rights,” meaning concrete rights (and their corresponding duties of law), which each of us as concretely existing human beings has.<sup>23</sup> The third of these issues is the legal order, under whose governance each of us can in fact “enjoy his rights,” as Kant says when defining the juridical state.<sup>24</sup> The trichotomy of issues with which a doctrine of right must deal is reflected in Kant’s three *leges*: the *lex iusti*, the *lex iuridica*, and the *lex iustitiae*.<sup>25</sup> The *lex iusti* is the “law of the right,” the *lex iuridica* is the “juridical nature (of concrete situations),” and the *lex iustitiae* is the “judicially formed order,” as we discussed in [Chapter 2](#).

Kant discusses the relationship among the three issues with which a doctrine of right must deal as a relationship of “possibility,” “reality,” and “necessity of the possession of objects (as the substance of choice) according to laws,”<sup>26</sup> possession here meaning intelligible possession.<sup>27</sup> Kant’s comparison of these three issues to the categories of modality also supports our interpretation of the three *leges* and of the meanings we attach to the three types of justice. The *Doctrine of Right* focuses on the rights we have under the *lex iusti*. The lawgiver creates the *possibility* of enjoying these rights, because our rights are protected by law that is available to everyone. The actual rights I have are the *reality* of the rights I can enjoy under the law because the public market allows me to buy, exchange, or sell objects of my choice and the corresponding rights to their intelligible possession. The reality of these rights is captured in the *lex iuridica*, the juridical nature of a concrete situation in which I as a concrete person have acquired or sold an object of my choice. The judicially formed order, as captured in the *lex iustitiae distributivae*, in a concrete juridical state in which I live (assuming I do live in a juridical state) gives those rights *necessity*, meaning it creates a situation in which I truly can enjoy the rights I have under the law as a concretely existing person who has submitted himself to this juridical state. The judge in a juridical state imparts a necessity to our rights by subsuming the legally relevant actions we undertake under the principles of the law and reaching a decision in cases of dispute as to our rights that is final and binding on both parties to the dispute.

The tripartite division according to the categories of modality dissolves Kant’s notion of the *iustitia distributiva* as we know it from his lectures in 1784. Since Kant maintains the notion of commutative justice as the justice of the public market where our rights become a reality, commutative justice becomes situated in the middle of two functions the *iustitia distributiva* formerly fulfilled, namely providing legislation and providing courts in a juridical state. In the *Doctrine of Right*, Kant can now use the term *iustitia distributiva* for either public legislation, which gives us the possibility of our rights, or for the judiciary, which gives those rights necessity. For fairly obvious reasons in light of Hobbes’ attributing arbitral decisions to the *iustitia distributiva*, Kant decides in favor of

<sup>23</sup> AA VI, Division DoR B, p. 237, ll. 18–23.      <sup>24</sup> See [Chapter 1](#).

<sup>25</sup> AA VI, Division DoR A, p. 236, l. 30, l. 33 and p. 237, l. 8; §16, p. 267, l. 7, l. 11, ll. 15–16; §41, p. 306, l. 9, l. 11, l. 13.

<sup>26</sup> AA VI, §41, p. 306, ll. 3–8.      <sup>27</sup> AA VI, §1, p. 245, ll. 13–21.

the judiciary. Public legislation now has no name. Kant takes the name *iustitia tutatrix*, which is fitting for public legislation and its function.

The purpose of this Appendix was to give historical support to our theory that the three types of justice are institutions. The *iustitia tutatrix* is the institution of public lawgiving, which enacts laws available to everyone. These laws protect our rights through positive enactment, thus creating the possibility of possessing objects of our choice according to law. This type of justice corresponds to the *lex iusti*, which contains the natural law rights we have, now positivized through the *iustitia tutatrix*. The *iustitia commutativa* is the institution of the public market, which, as an ordered market in a juridical state, makes our rights a reality in that we can exercise them in acquiring, exchanging, or selling objects of our choice, and thus transferring the rights we have to possess those objects, as concrete people engaged in commerce. The *iustitia commutativa* corresponds to the *lex iuridica* because both concepts relate to the legally relevant nature of concrete situations involving interactions of rights. The *iustitia distributiva* is the institution of the judiciary, which makes our rights a necessity by recognizing them in cases of dispute and reaching final binding decisions regarding those rights. The *iustitia distributiva* corresponds to the *lex iustitiae*, or the judicially formed order we have when we submit to the decisions of a judge in a juridical state.

## The right to freedom

In [section 1](#) of this chapter, we examine the right to freedom as Kant understands and posits it in his axiom of external freedom. We are examining this axiom because it is an assumption upon which Kant's entire system of rights is built. Kant conceives of the right to external freedom broadly. It thus comprises a number of rights we might see today as being distinct from the right to external freedom, such as the right to a good name or the right to equal protection under the law. In [section 2](#) we consider Kant's notion of internal freedom both in the negative and positive sense to set the stage for our argument in [section 3](#) that external freedom also has a negative and a positive aspect to it. The negative aspect of external freedom is well known but the positive is not. We argue that the positive aspect is embodied in the postulate of public law, which commands us to move to a juridical state, where individual rights are secured. In [section 4](#), we draw two conclusions from the right to external freedom. In [section 4A](#), we claim that because Kant's command is to move to a *juridical* state, his prohibition against revolution refers to revolting in a juridical state and not in some despotic state. So understood, Kant's seemingly extreme stance against revolution becomes more appealing. Indeed, the prohibition against revolution is merely the opposite side of the coin to the postulate of public law. Finally, in [section 4B](#), we consider the implications the axiom of external freedom has for the original contract and the united will of the people.

### 1. The axiom of external freedom

The assumption that everyone has a right to external freedom is the logical starting point for Kant's *Doctrine of Right*.<sup>1</sup> This right is an *original*

<sup>1</sup> This section primarily interprets AA VI, Division DoR B, p. 237, l. 27 – p. 238, l. 11.

right, meaning I have this right in the original state or by virtue of the law that is recognizable *a priori* from reason (natural law). Indeed, freedom is the *one single* original innate right we have. The assumption that everyone has a right to external freedom is what Kant calls the “axiom of external freedom.”<sup>2</sup>

### A. The meaning of the axiom

Kant characterizes the right to external freedom as “independence from someone else’s necessitating choice” (*notigender Willkür*).<sup>3</sup> If I am necessitated, I am coerced to commit an action. The word “action,” however, is ambiguous because it connotes both voluntary action and involuntary movement. If “action” means *voluntary* action, then using force against me that is absolutely impossible to resist cannot cause me to act voluntarily in a certain way. We are thinking here of one person physically overwhelming another person by pushing him into a third person, who is then injured. Because the pushing could not be resisted, one cannot say that the person who was pushed “acted” voluntarily to injure the third. In contrast, if “action” means any human bodily movement, then one can also speak of a person being necessitated to act through the use of irresistible physical force. Kant has this broader notion of action in mind. For Kant “action” means any bodily movement, including bodily movement brought about by natural phenomena or by the use of physical violence. When Kant means an action that was brought about by the actor’s will, he speaks of a “free action.”<sup>4</sup> Because Kant employs a broad notion of action, his notion of necessitation is also broad and includes both the use of *irresistible*

<sup>2</sup> AA VI, §16, p. 267, ll. 12–13; §17, p. 268, l. 25.

<sup>3</sup> Kant’s definition of freedom is oriented toward Achenwall’s. Achenwall writes: “One who does not depend on someone else’s will (choice) when acting, that is one who is not coerced to act according to someone else’s will, is generally free. (External) freedom is thus independence from the will of another when acting.” (*Quatenus quis in agendo a voluntate (arbitrio) alterius non dependet, hoc est ad voluntatem alterius agere non obligatur, in genere liber est; unde libertas (externa . . .) est independentia in agendo a voluntate alterius*), *I.N.I.*, §77, p. 66.

<sup>4</sup> Kant contrasts actions brought about by natural phenomena or by the use of physical violence to free actions. The expression “free action” is used at AA VI, Introduction MM IV, p. 222, l. 3; AA VI (*Virtue*), Introduction III, p. 385, l. 11. The expression “free action” implies that non-free actions are also “actions.” Kant takes this broader meaning of “action” from the natural law theory of the eighteenth century, where the word *actio* has the latter broader meaning. Christian Wolff thus distinguishes between “natural or necessary actions” (*actiones naturales seu necessariae*) and “free actions” (*actiones liberae*), Wolff, *PhPrU*, §12, p. 9. Similarly, Achenwall distinguishes between a “physically necessary action” (*actio physice necessaria*) and a “free action” (*actio libera*), *Prol.*, §§7–8, pp. 4–5. Kant uses the same terminology as Wolff and Achenwall when he uses the word *Handlung* (action). For Kant a *free* or voluntary action is called *Tat* (deed): “*Imputation (imputatio)* in the moral sense is the judgment through

physical force (*A* pushing *B* into *C*) and of compelling but still physically *resistible* force, such as force through the use of threats, or duress.<sup>5</sup> Thus for Kant the right to freedom includes the right to bodily integrity, or the right to be free from any *irresistible* physical force, meaning also the right to be free from any type of physical injury. The right to freedom also includes the right to be free from any *resistible* physical force, such as threats of violence. The right to freedom is a negative right, meaning a right to be *free from* something. To say I have a right to be free from someone's necessitating choice means I have a claim against all others that they refrain from using either irresistible or resistible force against me to necessitate me to move my body in any way, or to act in the broad sense of "acting."

Kant claims individuals have the right to external freedom because they can come into contact with others. As long as Robinson lives alone on his island, he has no right to external freedom. It is first when Friday joins him that rights vest and legal issues can evolve. Because both Robinson and Friday have an original right to external freedom and because by exercising this right they can come into conflict, Kant defines what is right under law as "Every act is right if it or its maxim is compatible with everyone else's freedom of choice under a universal law."<sup>6</sup> From this principle follows the "universal law of right": "Act externally so that the free use of your choice can coexist with everyone's freedom according to a universal law."<sup>7</sup> Both of these ideas follow from the original right to external freedom,<sup>8</sup> which in our example Robinson and Friday each have equally. Indeed legal equality, meaning the right to external freedom to the extent that it is compatible with everyone else's equal right to external freedom, follows from Kant's axiom.

The axiom of external freedom cannot be proved from *within* the system to which that axiom belongs, which is true of any axiom.

which someone is seen as the author (*causa libera*) of an action [*Handlung*], which is then called deed [*Tat*] (*factum*) . . ." AA VI, Introduction MM IV, p. 227, ll. 21–23.

<sup>5</sup> The ALR of 1794 is the first code to introduce the crime of necessitating someone to commit an act (*Nötigung*), and was adopted only three years before the *Metaphysics of Morals* was published: "One who necessitates someone else who is in possession of his own mental capacities through the use of force [*Gewalt*] to do something" will be punished; ALR, II, 20, §1077.

<sup>6</sup> AA VI, Introduction DoR §C, p. 230, ll. 29–31.

<sup>7</sup> AA VI, Introduction DoR §C, p. 231, ll. 10–12.

<sup>8</sup> Kant expresses the idea of equal treatment under the law when he first discusses the original right to external freedom by saying it is a right to freedom, "to the extent it is compatible with everyone else's freedom under a universal law." AA VI, Division DoR B, p. 237, ll. 30–31.

Nonetheless, one can advance sound reasons why precisely this axiom should be assumed from *outside* that system. The axiom of external freedom, which implies equality under the law regardless of physical and other inequalities, is the only alternative to assuming *inequality* under the law. Legal inequality means that the stronger and more powerful have more rights originally than the weaker and less powerful. Legal inequality means the right of the fittest.<sup>9</sup> What “strength” and “power” mean exactly can remain open. Physical strength, beauty, wealth, prudence, insight (particularly political), any quality humans admire in themselves can be plugged into the definition. We also need not limit ourselves to comparing two individuals. Two weak persons can be stronger together than one person who otherwise can outdo both of the two seen individually. If so, then the two weaker persons have more rights under the principle “right of the fittest” than the one alone. Under the principle “right of the fittest” they have a right to overwhelm and subdue him.<sup>10</sup> The “right of the fittest” necessarily means a “state of war,” or the state of nature, which does not have to be a state of currently waged war, but is still a state of constant threat and uncertainty.<sup>11</sup> To want to stay in this state is unacceptable. Accordingly, the sole alternative to the “right of the fittest” is Kant’s axiom of external freedom and equality under the law.

The axiom of external freedom and the axiom of law<sup>12</sup> are on two different logical levels, but assuming the latter necessarily leads us to the former. The axiom of law, which we are interpreting as the principle *honeste vive*, is: “Be a juridical person,” which in turn means “Take the viewpoint of the law.”<sup>13</sup> When I take the viewpoint of the law, I assume the axiom of external freedom and by implication juridical equality. Interestingly, in the one place where Kant refers to the axiom of law by that name, he speaks of a violation of external freedom. The maxim of one who grabs an apple from my hand directly contradicts the axiom of law.<sup>14</sup> That the actor’s maxim is also in direct contradiction to the axiom of external freedom appears obvious. Kant, however, can speak of the axiom of law instead of the axiom of external freedom

<sup>9</sup> Kant refers to the right of the fittest (*Recht des Stärkeren*) at AA VI, §54, p. 344, l. 9.

<sup>10</sup> That the word “right” is being used cynically is clear, and Kant himself says so when he quotes “that Gaullic prince” who claims: “The advantage nature has given the stronger over the weaker is that the weaker shall obey the stronger.” AA VIII (PP), p. 355, ll. 21–25.

<sup>11</sup> AA VI, §54, p. 344, ll. 8–10; see too §43, p. 312, ll. 2–12 and ll. 22–26.

<sup>12</sup> See our discussion of the axiom of law or the axiom of right in our Introduction, [section 3](#) and in [Chapter 2, section 4](#).

<sup>13</sup> [Chapter 2, section 4](#). <sup>14</sup> AA VI, §6, p. 249, l. 34 – p. 250, l. 8.

because assuming the axiom of law automatically leads us to assume the axiom of external freedom.

### *B. Rights that follow from the axiom*

Kant's right to external freedom includes four other rights we might tend to distinguish from the right to external freedom. They are (1) the right to equal treatment under the law, (2) the right to legal independence, (3) the right to be presumed innocent until the contrary is proved, and (4) the right to freedom of expression. All of these rights follow from the axiom of external freedom and Kant's idea that external freedom means being free from anyone else's necessitating choice.

The first is the right to equal treatment under the law, or juridical equality, which we touched upon in [section 1A](#). Achenwall describes juridical equality, which he calls "natural equality" (*aequalitas naturalis*), by saying that the rights and duties of all persons are the same *in the original state*.<sup>15</sup> Kant means the same when he characterizes equality as "independence from being obligated by others to more than what one can mutually obligate them."<sup>16</sup> Others can obligate me to perform and to refrain from performing only those *types* of actions which I myself can conceivably obligate others to perform or refrain from performing.<sup>17</sup> I can obligate others and others can obligate me in certain ways, for example, by acquiring a piece of land, which imposes obligations on others and on me. Imposing obligations may lead to factual inequality in the long run, simply because human beings are not equal in their abilities to deal with others profitably.<sup>18</sup> Still initially my freedom means my freedom from any obligation I do not voluntarily accept and my right to equal treatment under the law means freedom from any *type* of obligation I cannot conceivably impose upon others as well. The legal possibility of creating inequality in the long run is not a reason to say I am not free and equal under the law. To say I am not equal under the law is to say that other persons have rights (privileges) that I cannot equally have. That in turn means that these other persons could obligate me – necessitate me – to perform actions I may not voluntarily choose to perform and their exercise of external freedom would not be compatible with mine.

<sup>15</sup> Achenwall, *I.N.J.* §69, p. 61.    <sup>16</sup> AA VI, Division DoR B, p. 237, ll. 33–34.

<sup>17</sup> Kant thus plays on the mutuality of human interaction and exchange in the world of the *lex iuridica* when he discusses equality under the law.

<sup>18</sup> In his lectures Kant states "Physically and ethically humans are exceptionally unequal, but legally all humans are equal." *Feyerabend*, AA XXVII.2,2, p. 1339, ll. 28–29.

Another right included under Kant's definition of external freedom is the right to be one's own master.<sup>19</sup> If I am externally free among equals under the law, then I and I alone determine what my actions are. No one else can order me to do something that would be obligatory for me, and they certainly cannot compel me to do anything through the use of physical force. As Achenwall says, everyone has the right to use his natural abilities, physical and mental, "to the exclusion of all others,"<sup>20</sup> as he decides is appropriate. Again this right follows directly from Kant's axiom of external freedom and the idea that with the right to freedom one is free from another's necessitating choice. No one may coerce me to perform any action I do not voluntarily choose to perform and thus no one may play my master.

A third consequence of Kant's definition of external freedom is that the definition also covers the quality "of being without reproach (*iusti*).<sup>21</sup> The quality of being without reproach (*Unbescholtenheit*) means I have a right not to be charged with having committed a crime or with any other dishonorable conduct that there is no reason to believe I have committed. A possible purchaser of a horse, for example, which is offered for sale on the public market, may not ask the seller how he came to possess the horse, "because that would simply be an injury,"<sup>22</sup> and thus a denial of the seller's right to be without reproach. The right to be without reproach is only one aspect of the right to external freedom, as opposed to a different and independent right, because Kant considers conduct such as malicious prosecution to be an insult. For Kant, an insult is a form of injury to the person – damage to his reputation – and thus a violation of that person's freedom from another's necessitating choice.

The presumption of innocence is predicated on the right to be without reproach. Pufendorf uses a traditional formulation of it: "Everyone is presumed to be good unless the opposite is proved."<sup>23</sup> Pufendorf's formulation was later criticized. In light of this criticism, Achenwall writes: "Everyone is to be presumed to be just [*iustus*], until the opposite is proved."<sup>23</sup> For law, one need not presume that a person is good,

<sup>19</sup> AA VI, Division DoR B, p. 238, l. 1.

<sup>20</sup> Achenwall, *I.N.I.*, §65, p. 58: *cum exclusione aliorum*. <sup>21</sup> AA VI, §39, p. 301, l. 15.

<sup>22</sup> Pufendorf, *De Jure*, VIII/IV/§3/p. 803: *Quilibet praesumitur bonus, donec probetur contrarium*.

<sup>23</sup> *Quilibet praesumendus sit iustus, donec nimirum probetur contrarium*. In his lectures on Achenwall's natural law theory, Kant says: "A knave can be prosecuted and he can deny it. Who is to prove it? The prosecutor, because the knave, even if he has stolen before, relies on the natural right to a good name that he has done no wrong this time. He can have improved himself subsequent to the time of his evil deeds." *Feyerabend*, AA XXVII.2.2, p. 1340, ll. 6–10.

but rather only that he is not bad.<sup>24</sup> In his lectures, Kant makes the same criticism of Pufendorf. I need not “consider a person positively as good, but merely negatively.”<sup>25</sup> Kant’s claim is that any person I happen to meet should be presumed to be “externally just.”<sup>26</sup> Kant’s presumption thus applies not only in a court of law, but as the example with the horse sale shows, also in our daily interaction with others. It is based on the idea that in the original state, no one has (yet) done any wrong. Kant states: “before any legally relevant act” he has “done no one wrong.”<sup>27</sup>

Finally, the authority “merely to relate his thoughts” to others, “to tell or promise them something, be it true and sincere, or false and insincere (*veriloquium aut falsiloquium*),”<sup>28</sup> also follows from Kant’s view of our right to external freedom. This right to relate one’s thoughts is commonly known as the right to freedom of expression. It follows from our right to external freedom because speaking as such does not limit another’s freedom of choice. Kant’s reasoning is that it depends merely on the others whether they want to believe me or not. If *A* asks *B* whether *B* thinks it will rain in the afternoon, and *B*, who believes it will rain, tells *A* he thinks it will be sunny all day, then *B* has not violated any *legal* duty *B* owes to *A*.<sup>29</sup> Achenwall considers this right as well. He says that in the original state “you have no right with respect to another, and the other no obligation toward you that he tells you what he thinks, and if he says something, no obligation to tell you sincerely what he thinks.”<sup>30</sup> In contrast, it is legally prohibited

<sup>24</sup> See Hruschka, “Unschuldsvermutung,” pp. 285–300.

<sup>25</sup> *Feyerabend*, AA XXVII.2,2, p. 1340, ll. 4–5. We can safely assume that Kant had Achenwall’s definition of the quality of being without reproach in mind when he was writing the *Doctrine of Right*, since Kant includes in his own definition the Latin word *iustum* (just) to clarify what he means with the German *unbescholten* (without reproach).

<sup>26</sup> Achenwall speaks of “external justice” (*iustitia externa*) in connection with his formulation of the presumption of innocence, *I.N.I.*, §§98, 99, p. 84. Kant’s reference to Pufendorf’s formulation elsewhere in the *Doctrine of Right* (AA VI, §39, p. 301, ll. 15–16) does not mean that Kant intended to return to a presumption that fails to distinguish between a positive and a negative version of what we are to assume regarding others.

<sup>27</sup> On presumptions in the technical sense, see [Chapter 9, section 1A](#).

<sup>28</sup> AA VI, Division DoR B, p. 238, ll. 5–8. One might object by saying that it is legally prohibited to make false promises within the context of a contract closed with another party. That is true, but a contract for Kant requires considerably more than a mere promise, and will be discussed in detail in [Chapters 11 and 12](#).

<sup>29</sup> *B* has violated an ethical duty not to lie, but not a legal duty not to harm anyone. One problem with Kant’s claims in the *Metaphysics of Morals* on freedom of expression is that they seem to directly contradict his claims in “On a supposed right to lie from philanthropy,” AA VIII (*Right to Lie*), pp. 425–430, also of 1797. Nonetheless, these contradictions are only apparent, but cannot be explained within the framework of our discussions in this book.

<sup>30</sup> *A natura tibi in alterum non competit ius, nec alteri erga te incumbit obligatio, ut tibi mentem suam declarat, nec ut sincere eam declarat.* *I.N.I.*, §90, p. 77.

to defraud another.<sup>31</sup> Fraud is lying or making a false promise with the intent to harm the other, assuming the other is in fact harmed.<sup>32</sup> Kant uses the example of claiming to have closed a contract “in order to deprive the other of what is his.”<sup>33</sup> The reason for the prohibition follows from the idea “harm no one” (*neminem laede*), because harming someone through telling a lie<sup>34</sup> is one way to “violate someone directly in his rights.”<sup>35</sup> Nonetheless, I have no legal duty not to lie, assuming that the lie does not harm anyone else and thus does not violate the duty expressed in *neminem laede*. Kant’s ideas on the right to freedom of expression are not averse to our ideas today. Generally all western legal systems constitutionally protect the right to freedom of expression. Still, the right to freedom of expression is commonly limited to exclude the right to scream “Fire!” in a crowded theater (unless of course the theater is burning), to practice deceit in order to gain advantage through fraud, to defame another, and so on. In all of these cases, and generally whenever speech is prohibited, the limitation on freedom of expression is justified because the speech could in fact harm another person. Kant’s ideas are no different.

## 2. The negative and positive aspects of internal freedom

The logical starting point in the *Doctrine of Right* is the axiom of *external* freedom. To better understand external freedom, we need to first consider Kant’s comments on *internal* freedom, namely what today is discussed under the rubric of “freedom of will.”<sup>36</sup> Internal freedom, according to Kant, has a negative and a positive aspect. The negative

<sup>31</sup> See Chapter 11, notes 4, 38. Fraud is a *falsiloquium dolosum*, whereby *dolosum* means “intentional” and intent includes the awareness of doing wrong, AA VI, Introduction MM IV, p. 224, ll. 5–7.

<sup>32</sup> Achenwall formulates the general proposition: “Any simulation that is connected with the intent to harm another (namely to harm him in what is his) is naturally prohibited.” (*Omnis simulatio, quae fit animo laedendi (noscendi, in eo scilicet, quod est suum alterius), naturaliter illicita est.*) Achenwall, *I.N.I.*, §94, p. 80.

<sup>33</sup> AA VI, Division DoR B, p. 238, ll. 29–32. Kant seems to be thinking of something like A claiming to have closed a contract with B for the sale of B’s horse to A for \$500 simply to get the horse from B for a low price.

<sup>34</sup> In his lectures, Kant distinguishes between the juridical right to lie and the ethical prohibition against lying, *Feyerabend*, AA XXVII.2.2, p. 1340, ll. 18–33.

<sup>35</sup> AA VI, Division DoR B, p. 238, ll. 30–31.

<sup>36</sup> At AA IV (*Groundwork*), pp. 446–448, and elsewhere, Kant discusses what falls under the rubric “freedom of will.” In the *Metaphysics of Morals*, however, Kant distinguishes between will (*Wille*) and choice (*Willkur*) and the problem of freedom – *internal* freedom – is a problem only in relation to choice. See AA VI, Introduction MM IV, p. 226, ll. 4–11, where Kant states that only choice can be called free, whereas the will is neither free nor not free.

aspect is the independence of my actions from my sensual drives and desires, which although they affect my actions, do not determine what they are. The positive aspect of internal freedom is “the capacity of pure reason to be practical for itself.”<sup>37</sup> This positive aspect means that pure reason can determine what my actions are. My actions are determined by pure reason when I follow the Categorical Imperative: “Act only in accord with those maxims through which you can simultaneously will that they become a universal law.”<sup>38</sup>

The negative and positive aspects of internal freedom are inseparably interconnected. The negative aspect means that I act freely only when I am not determined by my sensual drives and desires to act as I do. My action is determined, as the falling of the Newtonian apple, when it happens according to laws of nature, and thus, as Kant states, is subject to “natural necessity.”<sup>39</sup> When I assume that I act freely, then I leave the viewpoint of the sensible world,<sup>40</sup> which is the viewpoint of natural necessity. Of course I can leave the viewpoint of the sensible world only when I take a different viewpoint, since I cannot take no viewpoint at all. The new viewpoint is the viewpoint of reason.<sup>41</sup> If I act according to reason, then I am free. Assuming this new viewpoint, which happens when I act according to reason, is the positive aspect of internal freedom. Internal freedom is my freedom from determination through the laws of nature. That does not mean my freedom is lawless.<sup>42</sup> Instead, my freedom is subject to laws of a different type than laws of nature. They are laws of reason, which Kant also calls “laws of freedom.”<sup>43</sup> The highest of these laws of freedom is the Categorical Imperative, which, among other names, Kant also calls the “moral law.”

That pure *understanding* (*Verstand*), as opposed to pure reason (*Vernunft*), can also determine my action, for example when I solve a mathematical problem, is a matter we know from daily experience. Here the rules of algebra or Euclidean geometry dictate what I have to write

<sup>37</sup> AA VI, Introduction MM I, p. 213, l. 35 – p. 214, l. 1; see too AA IV, p. 446, l. 24 – p. 447, l. 7.

<sup>38</sup> AA IV (*Groundwork*), p. 421, ll. 7–8.

<sup>39</sup> See, e.g., AA IV (*Groundwork*), p. 446, ll. 10–12: “Natural necessity is the characteristic of the causality of all beings without reason to be determined to activity [*Tätigkeit*] by the influence of foreign causes.” “Activity” here designates movement in the sense of the broad meaning of “action,” see note 4.

<sup>40</sup> See AA IV (*Groundwork*), p. 452, ll. 23–30.

<sup>41</sup> See, e.g., AA IV (*Groundwork*), p. 450, ll. 30–34; p. 452, l. 6 – p. 453, l. 2.

<sup>42</sup> AA IV (*Groundwork*), p. 446, l. 19.

<sup>43</sup> As early as in the *Critique of Pure Reason*, AA III, p. 521, l. 22 (B 830); AA IV (*Groundwork*), p. 387, ll. 14–15; AA VI, Introduction MM I, p. 214, ll. 13–17.

down. Whether I solve the mathematical problem correctly or incorrectly is not a question of natural necessity, but rather depends on a necessity of a different nature, namely on a logical necessity. This necessity is not experienced in the same way we experience the sensible world. Still, the category of correctness (the question of whether an act is correct or incorrect) has something to do with freedom from the necessity of the sensible world. In the sensible world, we find only empirically experienceable phenomena. These phenomena have nothing correct or incorrect about them. They are simply there. They can be described, but not criticized. Nothing that happens as a result of natural necessity can be criticized, but simply must be accepted: for example, the storm that tears a limb from a tree cannot be criticized but must be accepted. One can criticize only what follows certain rules. Thus when I fail to solve a mathematical problem correctly, I have failed to follow the laws of logic and can be criticized. I can be criticized precisely because I was free to apply the laws of logic and solve the problem correctly, but failed to do so.<sup>44</sup>

In the *Metaphysics of Morals*, Kant is not thinking of the type of freedom involved in solving a mathematical problem, but rather of our freedom to act in general and of the rules, the following of which makes freedom possible. He is not thinking of the rules of logic and mathematics, but rather of the rules of conduct that can be derived by applying the Categorical Imperative. Still we can see from the comparison to the rules of logic and mathematics, to which Kant often refers,<sup>45</sup> how we are to conceive of our internal freedom, even though reason, which gives us the laws and their obligatory nature, extends beyond mere understanding. Internal freedom is inconceivable without its positive aspect, which consists of generating the applicable rules from the Categorical Imperative.

We can describe internal freedom as independence in one direction with simultaneous dependence in the other direction. In the *Groundwork for the Metaphysics of Morals*, Kant characterizes the negative aspect of internal freedom as "independence from the determining causes of the sensible world."<sup>46</sup> In the *Critique of Practical Reason*, Kant characterizes the relationship of the will (in the language of the *Metaphysics of Morals*: choice) to the Categorical Imperative as one of

<sup>44</sup> An interesting phenomenon occurs when one writes on a blackboard:  $(a + b)^2 = a^2 + 2ab + b$ . Even dyed-in-the-wool behavioral determinists will rush to correct the mistake.

<sup>45</sup> See, e.g., AA VI, Introduction MM IV, p. 225, ll. 26–28.

<sup>46</sup> AA IV (*Groundwork*), p. 452, ll. 33–35, and elsewhere.

“dependence.”<sup>47</sup> Thus “practical freedom” can be defined as “independence of the will [in the language of the *Metaphysics of Morals*: choice] from everything else other than solely the moral law,”<sup>48</sup> a formulation which Kant considers once again in the *Doctrine of Virtue* in connection with “liberality of mind.”<sup>49</sup> Internal freedom is thus *independence* from the sensible world and simultaneous *dependence* on the moral law.

### 3. The negative and positive aspects of external freedom

We spoke of the negative aspect of external freedom in [section 1](#) of this chapter. Kant characterizes it as “independence from another’s necessitating choice,” a formulation which is parallel to the formulation of the negative aspect of internal freedom (“independence” of choice from “determination by sensual drives”).<sup>50</sup> This parallelism leads one to wonder whether there might not also be a positive aspect of external freedom, and if so, what it is.

External freedom, as internal freedom, can be characterized as independence in one direction with simultaneous dependence in another. The positive aspect of external freedom is what Kant calls “dependence on law ... in a juridical state.”<sup>51</sup> Kant elsewhere speaks of the “state of freedom under public laws.”<sup>52</sup> Accordingly, I am first free when I find myself and all other persons with whom I can come into contact in a juridical state, meaning a state under public law. I am first free as an associate member (*Staatsgenosse*)<sup>53</sup> of a juridical state.<sup>54</sup> External

<sup>47</sup> AA V (*Practical Reason*), p. 32, ll. 21–26.

<sup>48</sup> AA V (*Practical Reason*), p. 93, l. 36 – p. 94, l. 2.

<sup>49</sup> AA VI (*Virtue*), §10, p. 434, ll. 10–13.

<sup>50</sup> AA VI, Introduction MM I, p. 213, ll. 35–37.

<sup>51</sup> AA VI, §47, p. 316, ll. 3–4. For external freedom, Kant distinguishes between “freedom of the members of a society” and “dependence of all on one single universal legislation,” AA VIII (*PP*), p. 349, ll. 9–11, although there he contrasts “mad freedom” to “reasonable freedom,” p. 354, ll. 17–18. In §47 of the *Doctrine of Right*, however, it becomes clear that freedom is only conceivable as “reasonable freedom.” External freedom is thus independence from another’s necessitating choice with simultaneous “dependence on laws” in a juridical state.

<sup>52</sup> AA VI, §9, p. 257, l. 32. <sup>53</sup> AA VI, §46, p. 315, l. 12.

<sup>54</sup> Rousseau, *Du contrat social*, Livre II, Chap. XII, p. 394, claims a relationship between simultaneous dependence and independence in order to describe freedom: *chaque Citoyen soit dans une parfaite indépendance des tous les autres, et dans une excessive dépendance de la Cité; ce qui se fait toujours par les mêmes moyens; car il n’y a que la force de l’État qui fasse la liberté de ces membres.* (“so that each citizen would be perfectly independent of all the others and excessively dependent upon the city. This always takes place by the same means, for only the force of the state brings about the liberty of its members.”) Rousseau’s state is admittedly not yet what one can characterize as a juridical state in the sense of Kant’s *Rechtsstaat*.

freedom, as internal freedom, cannot be lawless.<sup>55</sup> External freedom is also subject to rules, which, as the laws of internal freedom, first make freedom possible. A simple example of rules we need in order to be free are the rules of the road. We need rules such as drive on the left, or drive on the right side of the road, because otherwise the streets would be chaotic, which would not lead to more freedom but instead to mutual interference and thus to a total lack of freedom. Hence, juridical laws are also laws of freedom. I am free in the negative sense of external freedom when I am not being necessitated by anyone else.<sup>56</sup> In the positive sense of external freedom, I become free when I move to a juridical state where my rights are secured through public law.

For internal freedom, the Categorical Imperative in its very general formulation in the *Groundwork* is constitutive of reason, whose laws I have to follow in order to be free. For external freedom, in place of the Categorical Imperative is the general formulation of the “postulate of public law”: “In a situation of unavoidable contact, you should leave this state [the state of nature] with all others and move to a juridical state, i.e. the state of distributive justice.”<sup>57</sup> The postulate is derived from the Categorical Imperative, because the maxim “to want to be and to remain in a state that is not a juridical state, i.e. in which no one is secure on his own against violence”<sup>58</sup> cannot be a universal law. My claim not to be “necessitated by another’s choice” and my right to defend against such necessitation correspond to my duty to succumb to public law<sup>59</sup> in a juridical state. The postulate requires that public law be adopted and thus requires us to enter a juridical state and submit ourselves to this public law.

One might consider claiming that the positive aspect of external freedom is formulated by the “universal law of right”: “Act externally so that the free use of your choice can coexist with everyone’s freedom under a universal law.”<sup>60</sup> Yet this law says no more than what is already contained in the right to independence from the necessitating

<sup>55</sup> AA VI, §47, p. 316, ll. 2–3.

<sup>56</sup> Of course, one is necessitated by the rules themselves and the threat of punishment for violating them. Nonetheless one is externally free in the negative sense because, in the state in the idea, the legislative power inheres in the united will of the people. Accordingly I am co-legislating the rules of the road and thus consent to them. One who consents to a rule can be done no wrong, see AA VI, §46, p. 313, ll. 31–34. We deal with this issue in [Chapter 7, section 1](#).

<sup>57</sup> AA VI, §42, p. 307, ll. 8–11.      <sup>58</sup> AA VI, §42, p. 307, l. 32 – p. 308, l. 2.

<sup>59</sup> As described in [Chapter 1, section 1B](#).

<sup>60</sup> AA VI, Introduction DoR §C, p. 231, ll. 10–12.

choice of another. The universal law of right is simply the opposite side of the coin from the right to be free of others' necessitating choice, just as for any right one person has, the opposite side of the coin is the duty the others have not to violate that right.<sup>61</sup> The universal law of right is thus another way of expressing the negative aspect of external freedom. The positive aspect of external freedom needs more than that. It must imply a duty that extends beyond the duty implicit in the negative aspect of external freedom. For external freedom that is the duty contained in the postulate of public law.

In light of our claims about the postulate of public law, we must once more emphasize that freedom is guaranteed only in a juridical state, or a state under the rule of law. It is not guaranteed in a system that merely calls itself a "state," even if it is recognized by other states as a state. Admittedly, any concrete state we might be willing to accept as a juridical state in the proper sense of the term is not perfect. It is only a state approaching the ideal state. To explain this difference, we have an appropriate comparison for *internal* freedom. Kant discusses holy beings, who act according to moral laws out of "internal necessity,"<sup>62</sup> and unholy beings, such as we are, for whom acting according to duty is merely contingent.<sup>63</sup> A holy being is the freest being. Still an unholy being acts freely when it lets itself be determined by laws of reason, even if that happens only occasionally. Similarly, we can imagine a state that is structured to secure its citizens' freedom in an ideal way. This state is the pure republic, the truly free state.<sup>64</sup> It corresponds to the holy being. As we contrasted the holy to the unholy beings, we can contrast the pure republic to the many states that fall somewhat short of the ideal, with which we are familiar in the world we live in, and which secure their citizens' external freedom more or less adequately.<sup>65</sup>

The judgment regarding any actually existing state's "accordance with law,"<sup>66</sup> which we make by contrasting the real state to the ideal state, is not a judgment about the historical origin of a particular state's power<sup>67</sup> and its accordance with law. As Kant says, "in practice one cannot consider the origin of the juridical state to be any other than

<sup>61</sup> See AA VI (*Virtue*), Introduction II, p. 383, ll. 5–8.

<sup>62</sup> This necessity is not natural necessity, but rather necessity of a different sort that can best be compared to logical necessity.

<sup>63</sup> See, e.g., AA IV (*Groundwork*), p. 414, ll. 1–11; AA VI, Introduction MM IV, p. 222, ll. 6–12.

<sup>64</sup> AA VI, §52, p. 340, l. 32; p. 341, l. 9. <sup>65</sup> AA VI, Conclusion, p. 372, ll. 35–37.

<sup>66</sup> AA VI, §47, p. 315, l. 32.

<sup>67</sup> See, e.g., AA VI, §49 General Comment A, p. 318, ll. 19–22; p. 323, ll. 1–5.

as attained through force, on which force public law is later based.”<sup>68</sup> Instead the judgment about a state's being in accordance with law is a judgment about whether the state's institutions accord with what is right under law. The state of which Kant speaks is the state with a constitution oriented “toward pure principles of law.”<sup>69</sup> It is the state in which the “power which is needed for a rightful constitution” depends, and depends alone, on the condition of freedom.<sup>70</sup> This state is the juridical state, the state under the rule of law.

#### 4. Closing comments on the positive aspect of external freedom

The positive aspect of external freedom and our claim that it is fulfilling the duty expressed in the postulate of public law have impact on the interpretation of two ideas Kant expresses in the *Doctrine of Right*. One of these ideas is the idea that revolution is prohibited, which we discuss in [subsection A](#) of this section. The other is really two connected ideas, namely that the original contract is a *contract* and that the legislating power in any state lies in the united will of the people. We discuss these two connected ideas in [subsection B](#) of this section.

##### A. On Kant's theory of revolution

We now have a solid basis for understanding Kant's theory of revolution. As is widely known, Kant denies that there is any right to revolt against the wrongful conduct of the “legislating head of state.”<sup>71</sup> Kant's position on the right to revolt has caused a lot of problems for interpreting his work. His position, correctly understood, is fully plausible. We too would not want to say that we have a right to revolt every time the state commits individual wrongful acts. It cannot be right to ditch the whole system just because a few mistakes are made. Such problems can be solved through reform and not through revolution, which is exactly what Kant says.<sup>72</sup> We would thus claim that Kant's

<sup>68</sup> AA VIII (*PP*), p. 371, ll. 15–17. Similarly, in AA VI, §52, p. 339, ll. 27–32 Kant, when discussing the impossibility of tracing civil society back to its original foundation, says: “The savage establish no instrument of their submission to the law, and from the nature of crude human beings one can conclude that they will have begun with force.”

<sup>69</sup> AA VI, §45, p. 313, l. 14. <sup>70</sup> AA VI, §52, p. 340, ll. 34–37.

<sup>71</sup> See, e.g., AA VI, General Comment A, p. 320, ll. 11–12.

<sup>72</sup> See, e.g., AA VI, General Comment A, p. 318, l. 19 – p. 323, l. 20; Annex to the 2nd edn. of 1798, Conclusion, p. 370, l. 33 – p. 372, l. 37.

prohibition against revolution only applies in a state that is truly a juridical state.

Kant's rejection of a right to revolt against wrongful actions of the "legislating head of state" is quite consistent with, indeed mandatory in light of, the rest of his theory. The postulate of public law, which requires me to enter a juridical state and even gives me the right to force others to move to this state with me, must imply as a consequence that it is prohibited to leave the juridical state once we are in it and to return to the state of nature. Decisive to this line of reasoning is that I really find myself in a *juridical* state. If I am not in a juridical state, then I am in the state of nature.<sup>73</sup> In the state of nature, resistance is permitted. Against a "state" which kills or enslaves people, of which we have sufficient examples from the present and from the twentieth century, I not only have a right to defend myself, but indeed a duty to do so.<sup>74</sup> After a certain level of rights violations has been attained, the failure to exercise self-defense would be, as Kant states: "Throwing away [my] rights under the feet of others and violating the duty a person has to himself."<sup>75</sup> Far from denying that we ever have a right to revolt, Kant indeed would require revolution against a dictatorial system that oppresses the people under its power, even if it did call itself a "state." We discuss this topic in more detail in [Chapter 8, section 3](#).

### *B. On the original contract and the united will of the people*

In order to form a juridical state one must first conceive of the idea of a state (in the sense of a nation state). We discuss the state in the idea in [Chapter 7](#). Important here is the way in which Kant conceives of founding that state. He says: "The act through which a people forms itself into a state . . . is the *original contract*."<sup>76</sup> Kant notes that he does not mean the *fact* of closing a social contract when he speaks of the original contract. Instead, he means the idea of this act that underlies every actual union of a people into a state. Kant uses the language of contracting for a good reason. The idea of contracting is an extension of the idea of freedom. Everyone is his own master. In the state of nature no one has authority over me. Free persons therefore can unite

<sup>73</sup> Cavallar too argues that totalitarian states without a spirit of republicanism have not abandoned the state of nature, Cavallar, *International Right*, p. 101.

<sup>74</sup> On the duty to exercise self-defense, see Hruschka, "Notwehr," p. 201.

<sup>75</sup> AA VI (*Virtue*), §36, p. 461, ll. 6–8.

<sup>76</sup> AA VI, §47, p. 315, ll. 30–33. See too §52, p. 340, l. 11, ll. 27–28.

only through a contract among legal equals and thus can only enter the juridical state through contracting.

In the ideal state, the lawgiver is the legislating “united will of the people.”<sup>77</sup> This united will is the idea of a united will, united as the legislative power in a state. According to this idea, every positive or statutory law requires the affirmative vote of every citizen.<sup>78</sup> Each citizen’s vote is the consummation of external freedom. In relation to my *internal* freedom, practical reason, which Kant in its legislating role calls “will,” is the giver of the laws, the obedience to which makes me free. It is my own will which gives me the laws for my conduct.<sup>79</sup> Similarly, for *external* freedom, the relevant laws proceed from my own will. Since external freedom relates to the coexistence of many persons, the lawgiver cannot be my will alone, but must be the will of all participating persons. I am free if I am subjected to the laws I give myself “simultaneously with the others.”<sup>80</sup> We discuss the original contract further in [Chapter 8, section 1](#) and the united will of the people as lawgiver in [Chapter 7, sections 1 and 5](#).

In this chapter we have discussed the logically first assumption Kant makes in the *Doctrine of Right* upon which the rest of his theory of law and rights depends. That is the assumption that we have an original right to external freedom, which Kant also calls the “axiom of external freedom.” This right is the right to independence from another’s necessitating choice. The right to external freedom in this sense is reflected in Kant’s formulation of the universal law of right: “Act externally so that the free use of your choice can coexist with everyone’s freedom according to a universal law.” To better understand the right to external freedom, we then examined Kant’s notion of internal freedom. We saw that Kant considers internal freedom in both a negative and a positive light. Negatively understood, internal freedom is *independence* from determination through sensual drives and desires. Positively understood, internal freedom is *dependence* on laws of reason, or laws of freedom. We then claimed that similar to internal freedom, external freedom has a positive and a negative aspect. Negatively, it is *independence* from another’s necessitating choice. Positively, it is *dependence* on

<sup>77</sup> AA VI, §46, p. 313, ll. 29–30.

<sup>78</sup> AA VI, §46, p. 313, l. 29 – p. 314, l. 3. We discuss the issue in more depth in [Chapter 7, section 1](#).

<sup>79</sup> AA VI, Introduction MM IV, p. 226, l. 4; see too AA IV (*Groundwork*), p. 412, ll. 26–30.

<sup>80</sup> AA VI, Introduction MM IV, p. 223, ll. 25–31.

public law in a juridical state. Kant's formulation of the postulate of public law reflects the positive aspect of external freedom, as the Categorical Imperative reflects the positive aspect of internal freedom: "In a situation of unavoidable contact with all others, you should leave this state [the state of nature] and move to a juridical state!" In a truly juridical state rights are secured. We can think of a state which secures rights perfectly without error as a holy being. Any actually existing state may err, as we unholy beings sometimes err and follow the dictates of our sensual drives and desires. Still, the erring state may qualify as a juridical state. If it does, we have no right to revolt, which is the mirror image of the duty expressed in the postulate of public law. If the state in which we live does not qualify as a juridical state, then we not only have a right but also a duty to revolt. Kant's comments on the right of revolution thus take on new meaning under our interpretation. Finally, we examined the implications of the postulate of public law for the original contract and the united will of the people as lawgiver.

In the next chapter, we examine the permissive law of practical reason Kant postulates in order to extend our external freedom beyond the internal mine and thine, or beyond the one original right to freedom of choice and the rights inherent to that right. The *external* mine and thine encompasses rights to external objects of choice, including physical things such as land, contractual claims, and family claims.

## The permissive law in the *Doctrine of Right*

The basis for extending our external freedom to include what Kant calls the “external mine and thine” is the permissive law of practical reason. Kant postulates this law in §2 of the *Doctrine of Right*. The law gives us a moral faculty or authorization to be the owners of physical things, claimants under a contract, holders of family rights. Kant postulates the permissive law because he says it cannot be derived from pure principles of right. Without it we would have the original right to external freedom of choice, but no right to have an external object as our own.<sup>1</sup>

This chapter first examines two different concepts of a permissive law (section 1). These two concepts evolve out of two distinct meanings of the word “permitted.” Kant distinguishes these two meanings of permitted, and bases his permissive law in the *Doctrine of Right* on the narrower meaning, which he calls “merely permitted” (*bloß erlaubt*). That the permissive law in the *Doctrine of Right* is based on the narrower meaning “merely permitted” has not been understood in Kant interpretations. That is because Kant also discusses permissive laws in his earlier *Perpetual Peace*, basing them there on the broader meaning of the word “permitted.” Kant scholars have focused on the meaning of permitted in *Perpetual Peace* and not in the *Doctrine of Right*. Under the broader meaning of permitted, a permissive law is similar to a justification to commit an otherwise prohibited act. In section 2, we argue that the permissive law in the *Doctrine of Right* has nothing to do with the permissive law as a justification Kant discusses in *Perpetual Peace*. Instead, the permissive law in the *Doctrine of Right* is a power-conferring norm. In section 3, we consider the power the permissive law confers and argue that it is the basis for our ability to become

<sup>1</sup> On deduction of the postulate from the universal principle of right, see Guyer, “Kant’s Deductions,” pp. 54–64.

the owner of physical things, the claimant under a contract, and the holder of family rights. Although the permissive law may not be derivable from pure principles of right, still it is dictated by practical reason. Accordingly, the argument that property ownership rights depend on state or social approval is simply wrong.

### **1. Two concepts of a permissive law**

In addition to assuming axiomatically that everyone has a right to external freedom, Kant also postulates that everyone has the capacity to have “external objects of choice”<sup>2</sup> as their own. He calls this postulate the “juridical postulate of practical reason.”<sup>3</sup> This postulate gives me the capacity to have as mine a physical thing, a contractual claim, and a family law claim. In this section, we consider the concept of a permissive law and answer the question why Kant calls the postulate of practical reason a “permissive law.”

Whereas I have an original innate right to external freedom, I do not have an original innate right to be what Kant calls an “intelligible possessor” of anything external to me, such as the owner of an external thing. Granted, in the physical or sensible world we find people with things in their possession, and also relating to each other in physical and emotional relationships, conceiving, bearing, and caring for their children. Still these circumstances are factual circumstances or circumstances observable in the sensible world. Just as Kant contrasts the sensible world to the intelligible world,<sup>4</sup> so too he contrasts physical possession of external objects of my choice to intelligible, or purely legal, possession of these objects.<sup>5</sup> Intelligible or purely legal possession is possession based on rights and duties people have toward each other, and not based simply on physical control. Legal relationships, such as those inherent to ownership of physical things, contractual rights, and family rights, are thus relationships in the intelligible world.

The juridical postulate of practical reason assumes that I have the capacity to be the owner of external things and not just the capacity to take external things into my physical possession. It assumes I can acquire a contractual claim to some future performance and that my right to the performance arises by dint of the contract itself as opposed

<sup>2</sup> AA VI, §2, p. 246, l. 5.    <sup>3</sup> AA VI, §2, p. 246, l. 4.

<sup>4</sup> Kant distinguishes between the sensible and the intelligible worlds in AA IV (*Groundwork*), p. 452, l. 7 – p. 453, l. 2.

<sup>5</sup> AA VI, §1, p. 245, ll. 16–21.

to my physically forcing someone to perform. It assumes that I can become a spouse and not just enter into a physical relationship with a man or woman. It assumes that I can acquire parental rights over a child and not just conceive and bear one. All of these rights are rights that must be *acquired* and thus rights which presuppose an act with legal effect has been committed.<sup>6</sup> The basis for the acquirability of acquirable rights through committing an act with legal effect is that I have the legal possibility – or as Kant says the “moral faculty”<sup>7</sup> – to be the owner of things, a contractual claimant, a spouse, or a parent.

Moral faculty, as Achenwall emphasizes, is a concept parallel to physical faculty.<sup>8</sup> We speak of having a physical faculty when we mean something we can do because of our physical strength or dexterity, or simply what we can do because it is physically possible for us. Correspondingly, a moral faculty is something that I can do because it is morally possible (permissible) for me to do it. The adjective “moral” here means intellectual, in contrast to physical.<sup>9</sup> “Moral” refers to what belongs in the intelligible world, as opposed to the sensible world. We can also call a moral faculty a moral or legal power, which I may or may not have. Kant contrasts legal power to physical power in §2 of the *Doctrine of Right* where he first speaks of the juridical postulate of practical reason.<sup>10</sup>

Kant calls the assumption that we have the faculty to be the owners of external things not only a “postulate” but also a “permissive law (*lex permissiva*) of practical reason.” In addition, he expands on what this permissive law does. The permissive law gives us an “authorization which we cannot derive from pure concepts of right, namely to impose an obligation on everyone else they otherwise would not have to refrain from using certain objects of our choice because we were the first to take those objects into our possession.”<sup>11</sup>

Two quite different concepts of a permissive law can be easily confused, because they are based on two different meanings of permitted, which similarly can be easily confused. Kant uses both concepts of a permissive law. He uses one concept in his earlier work, *Perpetual Peace*, and the other quite distinct concept in his *Doctrine of Right*. Because

<sup>6</sup> AA VI, Division DoR B, p. 237, ll. 18–23.

<sup>7</sup> See, e.g., AA VI, Division DoR B, p. 237, l. 18 and §9, p. 257, ll. 25–27, where Kant says that “under the postulate of practical reason everyone has the faculty to have an external object of his choice as his.”

<sup>8</sup> *Prol.*, §44, p. 39. Achenwall speaks of *facultas moralis* and *facultas physica*.

<sup>9</sup> See Introduction, [section 1](#).

<sup>10</sup> AA VI, §2, p. 246, ll. 9–11 and ll. 25–28.     <sup>11</sup> AA VI, §2, p. 247, ll. 1–6.

Kant scholars have taken his notion of a permissive law in *Perpetual Peace* and used it to explain Kant's permissive law in the *Doctrine of Right*,<sup>12</sup> the permissive law in the *Doctrine of Right* has been incorrectly interpreted. As a result, Kant's theory of property ownership has not been adequately explained.

Kant himself clearly distinguishes both concepts of permitted and both concepts of permissive law. In the "Introduction to the Metaphysics of Morals," Kant distinguishes between "permitted (*licitum*)" (*erlaubt*) and "merely permitted" (*bloß erlaubt*). Permitted (*licitum*) is "an action which is not limited by any contradictory imperative."<sup>13</sup> It is this meaning of permitted Kant uses when discussing the permissive law in *Perpetual Peace*. Kant takes this concept from Achenwall, who defines as *licitum* any action which does not contradict the system of relevant laws.<sup>14</sup> The action is permitted in this sense because it is not prohibited. Nonetheless, it *could* be required. In other words, the permitted action (*actio licita*) can – but need not – be a duty to commit. Let us consider an example. Presumably it is permitted everywhere for a mother to feed her infant child, meaning that the mother's act of feeding her child is not prohibited. But this action is also a required action. Indeed if the mother fails to feed her infant and the infant dies of malnutrition, the mother will be charged with homicide. On the other hand, other actions are permitted but not required. It is permitted to eat popcorn. Still, no law requires anyone to eat popcorn. Both a mother's feeding her infant child (a permitted and required act) and a person's eating popcorn (a permitted but not required act) are permitted in the sense of *licitum*, meaning they are simply not prohibited.

<sup>12</sup> See, e.g., Brandt, "Erlaubnisgesetz," pp. 244, 255; Brandt, "Das Problem der Erlaubnisgesetze," pp. 69–86; Flikschuh, "Das Rechtliche Postulat," p. 316; Flikschuh, "Freedom and Constraint," pp. 102–104, arguing in line with Brandt that the permissive law justifies what otherwise would be a violation of the universal principle of right; Kersting, *Wohlgeordnete Freiheit*, pp. 133–134. Brandt's thesis is discussed exhaustively and refuted in Hruschka, "Permissive Law," p. 62, fn. 48, p. 64, fn. 54, and in Byrd, "Intelligible Possession," §2. On the history of the permissive law as a concept and the connection between the permissive law and possession, see Kaufmann, "Erlaubnisgesetz," *passim*.

<sup>13</sup> AA VI, Introduction MM IV, p. 222, ll. 27–29; see too Gregor, "Kant's Theory of Property," p. 128, who also realizes that the act of possession of an unowned external object of choice is a *morally indifferent* act.

<sup>14</sup> "When a free action is seen in reference to a particular class of laws then it is either the case that it violates or does not violate one of these laws. In the former case (and to the extent the relevant class of laws is assumed) the ACTION is called an UNPERMITTED ACTION, in the latter a PERMITTED ACTION." (*Actio libera si refertur ad certum legum genus, vel alicui earundem vel nulli est contraria: illa ACTIO vocatur (quoad datum scilicet legum genus) ILLICITA, haec LICITA*), *Prol.*, §26, p. 25.

Important for the concept of a permissive law in *Perpetual Peace*, which we shall discuss shortly, is primarily that a permitted action (*licitum*) is logically contradictory to a prohibited action. Accordingly, in relation to the relevant system of laws, every free action whatsoever is either prohibited or permitted (*licitum*). The action cannot be both prohibited and permitted (*licitum*) and it must be one of the two. To return to our examples it cannot be both prohibited and permitted to feed one's child or to eat popcorn in one and the same system of rules. Granted if we mix systems of rules we would have difficulties. It might be *medically* prohibited for some people to eat popcorn. Still it cannot be the case in a *legal* system that eating popcorn is both permitted and prohibited for the same person in the same situation at one and the same time. Thus for this meaning of "permitted," any action whatsoever is either prohibited or permitted, meaning if the action is not prohibited it is permitted (and possibly required).

In contrast, Kant calls what is merely permitted "morally indifferent," *indifferens*, *adiaphoron*, and *res merae facultatis*. An action is merely permitted when it is "neither required nor prohibited, because with respect to it there is no law limiting freedom and thus also no duty."<sup>15</sup> It is important to note here that *no* duty – either to commit or to omit – exists in relation to a *merely* permitted action. Kant takes this concept from Achenwall, who calls the merely permitted action *actio indifferens*.<sup>16</sup> Kant translates *indifferens* with "morally indifferent" (*sittlich-gleichgültig*) but also includes the Latin expression Achenwall uses.<sup>17</sup> An example may serve to clarify the point once more. In probably all legal systems, eating popcorn is a merely permitted action, because it is neither prohibited nor required.<sup>18</sup> A mother's feeding her

<sup>15</sup> AA VI, Introduction MM IV, p. 223, ll. 5–8.

<sup>16</sup> The following quote is a continuation of the quote in note 14: "A free action is either determined by none or by one of these laws. In the former case, the action is called INDIFFERENT; in the latter OBLIGATORY." (*Actio libera vel a nulla vel ab aliqua harum legum est determinata: illa dicitur ACTIO INDIFFERENS haec OBLIGATORIA*), Prol., §26, p. 25.

<sup>17</sup> The concepts "permitted (*licitum*)" and "merely permitted (*indifferens*)," together with the other deontic operators "required," "prohibited," "subject to duty" (i.e. the disjunction of "required" and "prohibited"), and "not required" fit together in a logical system that is today portrayed as the deontic hexagon. The hexagon expands upon the square of opposition (Kneale and Kneale, *Development of Logic*, pp. 54–56), which consists of two pairs of contradictory concepts, by adding a third such pair. See, Lenk, "Konträrbeziehungen," *passim*; Hruschka, "Sechseck in der Jurisprudenz," pp. 775–788. Achenwall developed most of these concepts, which Kant uses in the *Doctrine of Right*. See Hruschka, *Sechseck bei Achenwall*, *passim*.

<sup>18</sup> Of course all merely permitted actions are also permitted actions in the sense of *licitum*, but it is not the case that all permitted actions in the sense of *licitum* are merely permitted actions. The set of permitted actions in the sense of *licitum* thus contains two subsets, (1) the subset of permitted and required actions and (2) the subset of permitted but not required actions (merely permitted actions).

infant child is not a *merely* permitted action, because it is also required. Feeding the infant is thus not morally, meaning ethically or legally, indifferent.

These two concepts of “permitted” correspond to the two concepts of a permissive law. The first concept of a permissive law is specified by the contradictory relationship between “permitted (*licitum*)” and “prohibited.” It thus corresponds to “permitted (*licitum*)” in the sense of being not prohibited. A permissive law in this sense presupposes,<sup>19</sup> as Kant says in *Perpetual Peace*, a prohibition, and makes an exception to this prohibition.<sup>20</sup> Justifications, such as self-defense or necessity as a justification, are examples of permissive laws of this sort. A justification makes otherwise prohibited conduct permitted, and depends on (presupposes) the conduct being prohibited in the first place. Self-defense as a justification, for example, permits one to ward off deadly force, even if one must kill the assailant, to save one’s own life. An act of homicide is thus either permitted (because justified in self-defense) or prohibited, but never morally indifferent. Kant also discusses justifications of this sort in *Perpetual Peace* when using the permissive law in this first meaning of the term.<sup>21</sup>

In the “Introduction to the Metaphysics of Morals,” however, Kant uses an entirely different concept of a permissive law. Here Kant discusses the permissive law (*lex permissiva*) not in connection with the concept “permitted (*licitum*)” (*erlaubt*), but instead in connection with the concept “merely permitted” (*bloß erlaubt*). A merely permitted action is when “someone is free to do or not to do [it] according to his own desire.” In the “Introduction to the Metaphysics of Morals,” Kant asks the question whether a permissive law is necessary for such an action:<sup>22</sup>

An action that is neither required nor prohibited is *merely permitted*, since there is no law limiting one’s freedom (one’s authorization) with regard to it and so too no duty. Such an action is called morally indifferent (*indifferens, adiaphoron, res merae facultatis*). The question can be raised whether there are such actions and, if there are, whether there must be a permissive law (*lex permissiva*) in addition to laws that require (*lex praeceptiva, lex mandati*) and prohibit (*lex prohibitiva, lex vetiti*) in order to account for someone’s being free to do or not to do something as he pleases.<sup>23</sup>

<sup>19</sup> AA VIII (PP), p. 348, l. 11.      <sup>20</sup> AA VIII (PP), p. 348, ll. 25–28.

<sup>21</sup> “This or that is prohibited: *unless* No. 1, No. 2, No. 3,” AA VIII (PP), p. 348, ll. 28–29.

<sup>22</sup> AA VI, Introduction MM IV, p. 223, ll. 9–17.

<sup>23</sup> AA VI, Introduction MM IV, p. 223, ll. 5–14. The passage continues (ll. 14–17): “If so, the authorization would not relate to an action that is indifferent from the very beginning (*adiaphoron*); for, considering this type of action in terms of moral laws, no special law

In the *Doctrine of Right*, Kant comes back to the question and gives an affirmative answer. Such permissive laws do exist. These permissive laws apply to *merely* permitted actions, or actions that are neither required nor prohibited. They confer an authorization on someone he otherwise would not have to take objects of choice into his possession and call them his own.

## 2. The permissive law in the *Doctrine of Right* as a power-conferring norm

Today's reader might be surprised at this answer, because today's reader would not call a law which gives a person the capacity to be the owner of property, the claimant under a contract, a spouse, or a parent a "permissive law" but rather a "power-conferring norm." A power-conferring norm provides a person with a legal power to do something. Still laws we call "power-conferring norms" today were called "permissive laws" in the eighteenth century. Both Christian Thomasius and Achenwall use this concept of a permissive law. In the *Fundamenta Juris Naturae et Gentium*, Thomasius discusses the question Grotius<sup>24</sup> raises of whether permissive laws exist or whether they are self-contradictory.<sup>25</sup> Thomasius writes:

A permission is not an act of law, because the person who permits something does not issue a norm. If one understands a "permission" to be the affirmation of a right someone else has or the introduction of such a right, then at first glance that may seem different. Yet even then the permission is not a new

would be required for it." The continuation seems to suggest that no permissive law is needed for actions that are merely permitted. That conclusion is incorrect. *Adiaphora* seem to be just one kind of merely permitted "actions." Some evidence also suggests that for Kant *adiaphora* were not imputable actions, or simply bodily movements, such as caused when breathing: "*adiaphora* . . . are not at all *facta*, because they are not covered by moral laws," AA XIX, R.7292, p. 304, ll. 6–9. *Facta* are actions that can be imputed to a person as that person's deeds because the person was the author or free cause of the actions. ("*Imputation (imputatio)* in the moral sense is the *judgment* through which someone is seen as the author (*causa libera*) of an action, which is then called *deed (factum)* and is subject to the laws," AA VI, Introduction MM IV, p. 227, ll. 21–23.) If *adiaphora* are not free (voluntary) actions, then they cannot be permitted, prohibited, or required. The same is not true of other types of merely permitted actions. For several other arguments on the continuation of this passage and why it does not exclude permissive laws for all merely permitted actions, see Hruschka, "Permissive Law," pp. 50–51 and Thomasius' response to this question in the text to note 26. See too Grotius' answer in the next note.

<sup>24</sup> Grotius, I/I/§9/p. 34. "A permission is not an act of law but rather the negation of such an act, unless the law obliges someone other than the person who has been given the permission not to interfere with that person." (*Permissio . . . non actio est legis, sed actionis negatio, nisi quatenus alium ab eo cui permittitur obligat ne impedimentum ponat.*)

<sup>25</sup> Kant considers this question in AA VIII (PP), p. 347, l. 34 – p. 348, l. 10.

act of law, but is already included in a prohibitory norm. As long as parental power or citizens' property is allowed by the law, then as a consequence it is prohibited to disturb anyone who is exercising his right.<sup>26</sup>

This passage assumes various types of permission, which need not be discussed here. Decisive for our purpose is that Thomasius recognizes permissions that affirm or introduce certain rights.<sup>27</sup> For Thomasius, as for Kant later, these rights include parental power and citizens' property. Parental power and citizens' property are *introduced* by a permissive law, just as the postulate of private law in §2 of the *Doctrine of Right* introduces everyone's capacity to be the owner of things, claimant under a contract, a spouse or parent.

Achenwall is even closer in his ideas to Kant when he writes: "A law is called a 'permissive law' because through such a law the lawgiver awards the faculty to commit a certain act as a permitted act."<sup>28</sup> Achenwall expressly calls a permissive law a law that attributes a faculty to persons. Similarly, in §2 of the *Doctrine of Right*, Kant says that the permissive law gives us an authorization (*Befugnis*). Kant also calls the permissive law the "postulate of the faculty" (*Postulat des Vermögens*),<sup>29</sup> thereby using terminology which was established long before he wrote.

For Kant it is not in the first instance the state that introduces rights to external objects of our choice, because as Kant notes, property ownership must exist *before* one moves to civil society.<sup>30</sup> Instead, for Kant practical reason introduces or authorizes property ownership and parental power through its laws of reason. That is exactly what the permissive law (*lex permissiva*) of practical reason does for Kant in the *Doctrine of Right*. Accordingly, the idea that one needs a permissive law to introduce property ownership does not mean that property ownership, or parental rights for that matter, needs to be approved by the

<sup>26</sup> Thomasius, Lib. I, Cap. V, §VI, pp. 146–147: *Permissio non est legis actio, quia qui permittit, non praescribit normam, nisi hac voce comprehendatur confirmatio juris alteri competentis, aut ejus introductio. Nam v. g. dum imperium patris, dominium civium &c. in legibus permittitur, per consequentiam alii vetantur, nec utentes suo jure turbent; Hoc pacto tamen permissio non est nova legis actio sed jam comprehenditur sub actu vetandi.* Similarly Walch, col. 3030; Walch/Hennings, vol. II, col. 1708, who in his article "Zulassung" (license) says that one could also "conceive of" the "introduction" of a right, "when, e.g. parental power, citizens' property, etc. are licensed by the law."

<sup>27</sup> Granted, Thomasius says that the law does not contain a permission, but can be seen in norms prohibiting others from interfering with someone who is exercising a right he has by virtue of the permission.

<sup>28</sup> *ProL.*, §90, p. 90: *Appellatur nempe lex...permittens, quod legislator vi talis legis facultatem largiatur, certam actionem tamquam permissam perpetrandi* (emphasis added).

<sup>29</sup> Kant uses the expression at AA VI, §17, p. 268, l. 25.

<sup>30</sup> AA VI, §44, p. 312, l. 34 – p. 313, l. 8.

state as lawgiver. Instead the permissive law empowering me to be a property owner *requires the state* to provide the institutions I need to be an owner of property. The state is required to provide the necessary institutions because without them my freedom would be robbed of the use of its choice with respect to external objects of choice even though my choice is compatible with the free choice of all others.<sup>31</sup> The state therefore must provide the institutions necessary for my ownership of property, my contractual claims, and my family relations.

This idea is easily illustrated with an example from the middle of the twentieth century, both in Germany and the United States. Until 1951 in Germany,<sup>32</sup> and the 1960s in the United States,<sup>33</sup> condominiums did not exist. In Germany and the United States ownership rights in houses and land were recognized, but the idea of a condominium had not yet been conceived. In such states, I simply cannot be the owner of a condominium. It is not that it is prohibited (and certainly not required) to own a condominium, but the legal apparatus I need to be a condominium owner has not yet been established. Thus, to be the actual owner of what is now called a "condominium," I need a law to be enacted that *introduces* property rights in individual dwellings within one multi-family building as rights *in rem*. One might argue that it is the state adopting positive law and thus giving one the right to acquire a condominium. This argument, however, puts the cart before the horse. In Germany, the idea to create the institutional apparatus for condominium ownership came in the wake of World War Two. After the war, many multi-family residential buildings owned by one person could not be renovated and used because not enough of the owners had sufficient funds to renovate the entire building. In contrast, many people needed housing and could finance the renovation for one dwelling within the building. Condominium ownership permitted these smaller acquisitions in response to demand and the buildings could be used. The state necessarily had to enact the appropriate law to accommodate individual choice to acquire housing. If the state had not, its citizens' freedom to use the buildings would have been hindered and indeed the objects of their choice would have been placed beyond any possibility of use. Consequently, individual demand always precedes any action by a state legislature. It is thus not

<sup>31</sup> AA VI, §2 *passim* and Chapter 5, section 2.

<sup>32</sup> The right to own a condominium was introduced through the *Wohnungseigentumsgesetz* (Act on Dwelling Ownership), March 15, 1951, *Bundesgesetzblatt* (Federal Gazette) I, p. 175.

<sup>33</sup> Singer, *Property*, §8.5, p. 355.

the state that creates institutions independent from this demand to give people new rights. The state responds to demand to facilitate the individual's exercise of his own free choice.

### 3. The power the permissive law confers

Decisive for understanding a permissive law in the context Kant uses it in the *Doctrine of Right* is that such a law gives us a moral faculty (*moralisches Vermögen*).<sup>34</sup> Comparing a moral faculty to a physical faculty (*facultas physica*) will help to illustrate the difference between a moral faculty that is inherent to a required (and thus not prohibited but instead permitted in the sense of *licitum*) action and a moral faculty that is inherent to a *merely* permitted action.

A physical faculty designates physically possible movements. It thus covers bodily movements that were brought about by irresistible physical force and bodily movements that were voluntary. Essential is only that the movement was *possible*. Since every movement that actually occurs, either as a result of irresistible physical force or as a result of a person's voluntary decision, is a physically possible movement, every actual bodily movement is the result of a physical faculty. Some actual bodily movements are physically necessary (brought about by irresistible physical force) and thus physically possible to commit. Some actual bodily movements are not physically necessary, but are nevertheless physically possible to commit.

Similarly, a moral faculty designates morally possible actions. To say that an action is morally possible is to say that the action is possible under the applicable rules of conduct. There are two senses in which an action is morally possible. First, an action can be possible as a consequence of it being a morally necessary action. If it is a morally necessary action, then it is both morally necessary and morally possible to commit. Thus under one and the same system of rules, all morally necessary actions are also morally possible actions. Stated differently, I have a moral faculty to commit a morally necessary action. Secondly, some morally possible actions are not morally necessary. Under some systems of rules, eating popcorn, for example, is morally possible but

<sup>34</sup> Kant characterizes a right someone has as a "moral faculty to impose a duty on others," AA VI, Division DoR B, p. 237, l. 18; see too p. 239, ll. 19–21. Kant also calls a moral faculty an "authorization" (*Befugnis*), AA VI, Introduction MM IV, p. 222, l. 29; p. 383, ll. 5–6. The verbatim translation of *facultas moralis* is "moral faculty" (*moralisches Vermögen*), which is more revealing than the translation "authorization."

not morally necessary. Under such a system of rules, I would have a moral faculty to eat popcorn, which is a morally possible but not morally necessary action.

Achenwall compares the two moral faculties by drawing a parallel with permitted and merely permitted actions. A moral faculty that results from a requirement is distinguishable from a moral faculty that results from a permissive law in the same way that a required (and thus permitted in the sense of *licitum*) action is distinguishable from a merely permitted action.<sup>35</sup> When I am required to commit some action, the moral faculty I have is an implication of that requirement. I am permitted, meaning it is morally possible for me, to commit the required action because the action is morally necessary. For a permissive law, the moral faculty I have to commit a certain action is not the result of moral necessity but nonetheless the action is morally possible.

Kant's permissive law of practical reason relates only to *merely* permitted actions. Kant says that the permissive law provides me with a "favor" (*Gunst*).<sup>36</sup> The favor it provides is its expansion of my moral latitude. It expands my moral latitude by giving me the moral faculty to do something I could not do before the permissive law granted me this favor. Here "could not" does not mean I was physically unable to perform some action. "Could not" also does not mean that I now *may* perform an action I was not permitted to perform (morally could not perform) before, because we are considering permissive laws for *merely* permitted actions. "Could not" means that the legal apparatus was not available to allow me to do something that now I can do. Let us return to the example of buying a condominium. Before the 1960s in the United States and before 1951 in Germany, I simply "could not" buy a condominium. I could not buy one because a law had not yet been enacted to recognize ownership rights in a dwelling within a multi-family building. It would have made no sense to say either it was prohibited or permitted to buy a condominium at that time, because condominiums did not exist. Through enactment of the law recognizing rights *in rem* in condominiums, I gained a moral faculty, meaning something became legally possible for me to do that I could not do before the law was enacted.

<sup>35</sup> *Prol.*, §90, pp. 89–90. Achenwall uses the expressions *lex iubens*, *lex permittens*, *actio iussa*, and *actio permissa*.

<sup>36</sup> AA VI, §16, p. 267, ll. 24–25; §22, p. 276, l. 33. The Walch *Lexicon* (Walch, col. 3030) article also speaks of a "license" as a "favor" (*Vergönning*, which means the same in German as *Gunst*) the law provides when it establishes legal institutions such as parental custody or property rights.

The same idea pertains to property ownership in general, contractual, and parental custody rights. Before the institution of private property ownership is established no one can acquire or sell property. The permissive law of practical reason establishes the institution of private property ownership rights, thus giving me the legal possibilities I need to be the owner of property. The permissive law also gives me the capacity to be a promisee under a contract, or to exercise rights associated with marriage or parental custody. The permissive law thus gives me legal powers I do not have without it, making it correct to call it a “power-conferring norm.”

Kant claims that the permissive law of practical reason must exist. Practical reason “wills” that the “postulate of practical reason with regard to rights” “hold as a principle.”<sup>37</sup> If so, practical reason needs a permissive law because “from the mere concept of right as such” we cannot “derive the necessary moral faculty.”<sup>38</sup> Kant’s concept of “right” is “the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom.”<sup>39</sup> This concept follows from the negative aspect of external freedom of choice, namely freedom from interference by others. Property ownership, however, requires more than simple freedom from interference. Being free from someone else’s necessitating choice does not permit me to impose an obligation on all others not to interfere with things I have acquired and call my own. It is the further assumption of the postulate – the permissive law – that permits me to expand my freedom to include the freedom to acquire objects of my choice as my own.

Nonetheless, the permissive law does not *justify* the commission of an otherwise prohibited act. It is not prohibited to impose an obligation on others not to interfere with things I have acquired and call my own. Thus doing so does not need justification. Still, without the institution of property ownership and the laws needed to permit people to take advantage of this institution, property ownership, like ownership of a condominium before the relevant laws are enacted, would not be possible. It is this meaning of “permitted” – morally possible and not required – that underlies the permissive law. Accordingly, any claim that property ownership is inherently wrongful or generally (originally) prohibited and thus needs justification through the permissive

<sup>37</sup> AA VI, §2, p. 247, ll. 6–7.    <sup>38</sup> AA VI, §2, p. 247, ll. 2–3.

<sup>39</sup> AA VI, Introduction DoR §B, p. 230, ll. 24–26.

law is incorrect. Practical reason – and not the state or society – “wills” that we can extend our freedom to include external freedom regarding external objects of our choice.

In this chapter, we have discussed Kant's permissive law of practical reason. We began by distinguishing a broader and a narrower meaning of permitted. Under the broader meaning, all actions are permitted that are not prohibited. Under the narrower meaning, which Kant calls “merely permitted,” actions are permitted if they are neither prohibited nor required. We then showed that two different meanings of permissive law evolve from these two meanings of permitted. Our claim is that Kant's permissive law of practical reason in the *Doctrine of Right* is a permissive law in the narrower sense of permitted. The permissive law gives us a moral or legal faculty enabling us to do something that before was impossible. Accordingly, one can call the permissive law a “power-conferring norm.” The permissive law gives us the moral faculty or capacity to be the owner of physical things, a claimant under a contract, or a spouse or parent with family rights.

In the next chapter, we consider Kant's arguments in what can be called the general part of private law on the external mine and thine. It can be called the general part because it applies to all three specific parts that follow it, namely acquisition and attaining ownership rights to physical things, acquisition and attaining rights under a contract, and acquisition and attaining rights through marriage and child-bearing. In the general part, Kant explains both what it means to have an external object of my choice as mine and how to originally acquire something external to myself. Having something external as mine is possible by virtue of the permissive law we discussed in this chapter.

## The external mine and thine

The permissive law we discussed in [Chapter 4](#) extends my external freedom to include not only freedom from someone else's necessitating choice but also freedom to have external objects of choice as my own. In this chapter we continue with Kant's ideas on the external mine and thine, showing Kant's development of the idea of possession from physical or empirical possession to intelligible possession of external objects of choice. Kant begins by distinguishing four concepts of possession, which we discuss in [section 1](#). In [section 2](#), we turn to Kant's question of how possession as mine is possible. [Section 3](#) focuses on possession of external things, as opposed to possession of objects of choice in general. In particular, [section 3](#) discusses Kant's question of how a right *in rem*, or an ownership right, as opposed to a right *in personam*, or a right against a specific person, such as under a contract, is possible.

### 1. Kant's concepts of possession

Kant states that the subjective condition of the possibility to use an external object of choice is possession.<sup>1</sup> In order to use something I must possess it. Kant continues by distinguishing four different meanings of possession. Possession can be (1) holding a thing in my hand or otherwise physically occupying it. He calls this possession "empirical possession."<sup>2</sup> Possession can also be (2) having something under my control,<sup>3</sup> such as by locking the doors and windows to my house when I leave it. Kant calls this possession "possession as a pure concept of the understanding."<sup>4</sup> Empirical possession and possession as a pure concept of the understanding are subsets of what Kant calls

<sup>1</sup> AA VI, §1, p. 245, ll. 11–12.    <sup>2</sup> See, e.g., AA VI, §6, p. 249, l. 30 – p. 250, l. 7.

<sup>3</sup> AA VI, §7, p. 253, l. 11.    <sup>4</sup> AA VI, §7, p. 253, l. 7.

(3) "physical" or "sensible" possession.<sup>5</sup> Finally, possession can be (4) purely legal possession. Purely legal possession is non-physical, or intelligible possession. Intelligible possession is a pure concept of reason.<sup>6</sup> It does not depend on physical control over a thing, but on duties others have toward me and rights I have against them. Kant's central question in the general part of the external mine and thine<sup>7</sup> is: How is intelligible possession possible?<sup>8</sup> To answer that question, we must first examine in more detail Kant's various meanings of possession. To understand his ideas, it is once again advisable to consider Achenwall's natural law theory, and the concepts of possession Achenwall develops.

Achenwall, unlike Kant, defines (physical) possession of a thing: "Possession is a durational status, during which someone has a thing under his control to the exclusion of others, or during which someone has the physical capacity to use the thing to the exclusion of others."<sup>9</sup> For Achenwall, possession is thus the physical capacity (*facultas physica*) to use a thing over which one has control (*potestas*) to the exclusion of others over time. Achenwall also distinguishes between natural possession and juridical possession. I possess a thing naturally when I have control (*potestas*) over use of the thing to the exclusion of others. I hold, for example, an apple in my hand, or otherwise have (physical) control over the apple,<sup>10</sup> and exclude others from using the apple for an unspecified period of time. I possess a thing juridically when I have control over use of the thing to the exclusion of others and also have the intent to possess the thing as my own.<sup>11</sup> One might jump to the

<sup>5</sup> AA VI, §1, p. 245, ll. 16–21.

<sup>6</sup> AA VI, §7, p. 253, ll. 4–5; §17, p. 268, ll. 12–14.

<sup>7</sup> AA VI, §§1–9, pp. 245–257.

<sup>8</sup> AA VI, §6, p. 249, ll. 31–32.

<sup>9</sup> *Possessio [est] perduratio status, quo quis rem habet in potestate sua cum aliorum exclusione, seu quo quis habet facultatem physicam, re utendi cum aliorum exclusione*, I.N.I., §120, p. 104.

<sup>10</sup> Achenwall writes: "An absentee possesses a thing to the extent he keeps others away from it and can undertake acts of possession as he chooses through another person." (*Etiam absens possidet rem, quatenus adhuc alios tenet a re exclusos, et pro libitu suo per alium actus possessorios exercere potest*), I.N.I., §120, fn. \*\*, p. 105. Undertaking acts of possession through another person, for example by locking one's house and giving the keys to that person, would be having the house under one's control without actually being in the house. If I gave the keys to someone else to house-sit for me, then I could exercise acts of possession through that other person.

<sup>11</sup> I.N.I., §120, p. 104: "A person possesses a thing naturally (*in genere*) when he has control over the use of the thing to the exclusion of others; he possesses a thing juridically (*in specie*), when he has control over the use of the thing which he wills to have as his own to the exclusion of others, or, in other words, when he possesses the thing with the intent that it be his own." (*Possidet rem NATURALITER (in genere), qui usum rei in potestate sua habet cum aliorum exclusione; IURIDICE (in specie), qui usum rei, quam vult esse suam, in potestate sua habet cum aliorum exclusione, seu possidet iuridice, qui rem possidet cum animo eam sibi propriam habendi.*)

conclusion that juridical possession is ownership, but that conclusion is incorrect. I can juridically possess something without owning it, for example if I take someone else's apple with the intent to possess the apple as my own. Thieves possess their booty with the intent to have it as their own, but are nonetheless not the owners of the booty. Achenwall also considers two other types of natural possession. I can possess a thing naturally not as my own, but as someone else's. I do that anytime I borrow something from someone else and intend to return the thing after using it for a period of time. Furthermore, I can possess a thing naturally not as my own and not as anyone else's either, but as no one's thing. I can pick up an apple off the road and simply look at a worm in it with the intent to discard it shortly. Achenwall refers to these latter two forms of possession as non-juridical, nude natural possession, which he calls "detention."<sup>12</sup> As we shall see, Kant assimilates many of Achenwall's concepts into his own discussion of forms of possession.

Kant first distinguishes between sensible and intelligible possession and explains that the former is physical possession and the latter merely legal possession.<sup>13</sup> As noted, Kant does not tell us what possession is. Still, he does rely on the physical capacity so central to Achenwall's concept of possession when characterizing sensible possession. Consequently, we are assuming Kant too means possession to the exclusion of others for an unspecified period of time.<sup>14</sup> Without excluding others from the use of the thing at least for some period of time, one cannot physically possess a thing, at least not if possession is the subjective condition for the possibility of using the thing, as Kant does specify.<sup>15</sup>

<sup>12</sup> "One who thus has subjected a thing to his power to use to the exclusion of others, but considers the thing either as someone else's or possesses it without the intent to have it as his own does not possess it juridically; non-juridical possession or nude natural possession is called DETENTION." (*Qui igitur rem potentiae suae utendi aliis exclusis subiectam quidem habet, sed eam vel tamquam alienam considerat, vel saltem non vult esse suam; iuridice non possidet. Possessio non-iuridica seu nude naturalis vocari solet DETENTIO*), *I.N.I.*, §120, p. 105, fn. \*. Interestingly, modern German law also uses the same concepts. The German *Eigenbesitz* (possession as one's own) corresponds to Achenwall's juridical possession and is captured by §872 *BGB*. *Eigenbesitz* is not ownership under German law either, which is called *Eigentum*, but possession as one's own regardless of whether one is the owner or not. The concept is contrasted to *Fremdbesitz* (possession of someone else's property not as one's own), which is what one does as a borrower or (honest) finder of the property.

<sup>13</sup> AA VI, §1, p. 245, ll. 16–21.

<sup>14</sup> Kant does speak of "possession of a thing to the exclusion of others," AA XXIII (*Preparatory DoR*), p. 296, ll. 5–6.

<sup>15</sup> AA VI, §1, p. 245, ll. 11–12. One could imagine a rope used for a tug of war and interject that use of the rope depends on at least two-party possession. Nonetheless, after the game

For physical possession, Kant then distinguishes between empirical possession and possession as a pure concept of the understanding.<sup>16</sup> Kant speaks of the “concept of empirical possession” and the “empirical envisaging of possession,”<sup>17</sup> both of which “depend on conditions of space and time.”<sup>18</sup> He also calls it possession “in appearance (*possessio phaenomenon*).”<sup>19</sup> In this sense of possession, I possess the apple in my hand, the place where I am standing, the clothes on my back. From the empirical envisaging of possession Kant distinguishes possession as a pure concept of the understanding, which abstracts from conditions of space and time.<sup>20</sup> Although possession as a pure concept of the understanding is an abstraction from the empirical concept of possession, still the physical aspect of possession is preserved because the possessor has the thing under his physical control (*potestas*<sup>21</sup>). In this sense of possession, I possess the house I live in, even when I leave it, as long as I have it under my physical control, for example by locking the windows and doors before I leave. Such possession is factual dominion over a thing,<sup>22</sup> meaning dominion through exercising (physical) control over the thing.

In contrast to physical possession, either by having something in my hand (empirical possession) or having it otherwise under my control, Kant discusses intelligible possession as non-physical possession.<sup>23</sup> Intelligible possession is “purely [*bloß*] legal possession.”<sup>24</sup> Intelligible possession of a thing is “ownership” (*Eigentum*).<sup>25</sup> Kant’s concept of

is over, someone will have to take the rope home for it to be available again for such entertainment (or not) and this person alone is the real possessor of the rope.

<sup>16</sup> AA VI, §7, p. 253, ll. 6–7.

<sup>17</sup> AA VI, §7, p. 253, l. 6 for the former and ll. 8–9 for the latter.

<sup>18</sup> See, e.g., AA VI, §7, p. 252, ll. 34–35.

<sup>19</sup> AA VI, §5, p. 249, ll. 13–14; §7, p. 253, ll. 27–28; §15, p. 264, l. 12.

<sup>20</sup> AA VI, §7, p. 253, l. 7 and ll. 9–10; §17, p. 268, l. 15.

<sup>21</sup> AA VI, §7, p. 253, l. 11. Note that Kant, like Achenwall, uses the Latin *potestas* to indicate physical control.

<sup>22</sup> Modern German criminal law theory defines “possession” as the “factual dominion over a thing as a reasonable person would see it supported by the intent to have this dominion.” Possession is distinguished from ownership in that ownership is *legal*, as opposed to factual, dominion over a thing. See, e.g., Lackner/Kühl, *StGB*, §242, margin nos. 8a and 9.

<sup>23</sup> AA VI, §4, p. 247, ll. 24–27; §6, p. 252, l. 17. Occasionally Kant speaks of non-empirical possession (AA VI, §6, p. 252, l. 12; §7, p. 252, l. 34). Intelligible possession is non-empirical possession, but not all non-empirical possession is intelligible possession. I could have many things under my control that are not in my hand and that I do not own and thus do not intelligibly possess.

<sup>24</sup> AA VI, §1, p. 245, l. 20.

<sup>25</sup> AA VI, after §17, p. 270, ll. 10–31. Intelligible possession for Kant is not the same as juridical possession for Achenwall. A person can intelligibly possess a thing, in Kant’s terminology, without having the physical capacity to use the thing or control its use, which is not true of Achenwall’s juridical possession.

intelligible possession is a concept of reason (*Vernunftbegriff*),<sup>26</sup> whereas physical possession through having something under my physical control is a pure concept of the understanding (*reiner Verstandesbegriff*). Intelligible possession of a thing is *legal*, as opposed to factual, domination over the thing. It is *possessio noumenon*,<sup>27</sup> as opposed to *possessio phaenomenon*.<sup>28</sup> Intelligible possession is possession based on duties others have toward me not to interfere with what is mine and a right I have against all of them to the undisturbed enjoyment of the thing I intelligibly possess. Kant's discussion in §§1–9 of the *Doctrine of Right*, located within the general part of private law on the external mine and thine, is devoted to explaining how intelligible possession is possible. The first step is to show that possession of an external object of choice as mine is possible, which is the question we address in [section 2](#).

## 2. How is possession as mine possible?

To answer this question, let us first consider one more concept Kant discusses, namely “object of my choice.” Kant defines an object of my choice as “something I physically have in my power (*Macht* or *potentia*) to use in any way whatsoever.”<sup>29</sup> In order to use something I must possess it, but before I can possess, and thus before I can use, anything, I must have the ability to take the thing into my possession in order to use it. If I have this ability then I have the thing in my power. I have something in my power if I can take it into my physical possession. Of course, if I already physically possess the thing then I have that thing in my power as well, but it is sufficient for having something in one's power that one can take the thing into physical possession. Kant differentiates between power (*Macht* or *potentia*) and control (*Gewalt* or *potestas*). Kant points out that having something under my control presupposes an act of choice, meaning it requires taking the thing into my control with the will to possess it. Having something in my power,

<sup>26</sup> AA VI, §5, p. 249, ll. 21–22; §6, p. 252, l. 19; §17, p. 268, l. 14. See also §7, p. 253, ll. 4–5, where Kant states that “the legal concept” of possession “lies purely in reason.”

<sup>27</sup> AA VI, §5, p. 249, ll. 11–13; §6, p. 249, ll. 28–29.

<sup>28</sup> The terminology Kant uses follows from the distinction he draws in the *Groundwork* between the sensible and intelligible worlds, AA IV (*Groundwork*), p. 452, ll. 23–30. The sensible world is the world of our experience, which is subject to laws of nature. The intelligible world is the world of intellect, which lies outside the sensible world and is subject to what Kant calls “laws of freedom.” See AA VI, Introduction MM I, p. 214, l. 13. The distinction between sensible and intelligible possession is rooted in the distinction between the sensible and intelligible worlds. For more on this distinction, see [Chapter 3](#).

<sup>29</sup> AA VI, §2, p. 246, ll. 11–12, and ll. 25–28.

on the other hand, refers to a mere capacity, and thus does not presuppose any preceding act of choice.<sup>30</sup> In order to *conceive* of an object as an object of my choice, it is sufficient to think that I have it in my power to acquire physical possession of the object.<sup>31</sup>

According to Kant, a thing is an object of my choice when I have it in my physical power to use, meaning I already physically possess it or I can acquire physical possession of it. If the thing is in my power, then I am physically capable of using it to the exclusion of others. I can, for example, take an apple into my hand – into my physical possession – and eat it. I can take a field under my physical control and sow and reap to the exclusion of others. The question then arises whether I can ever be absolutely prohibited from using such things. Can there be an “*absolute* prohibition against using”<sup>32</sup> the object of my choice I intend to use? By absolute prohibition Kant means that under all circumstances whatsoever it would be prohibited, or wrong<sup>33</sup> to use it. Under all circumstances includes the case in which no one else has the apple or field under their physical control and the apple and field belong to no one. Can it be wrong for me to use objects of my choice, even when no one else is using them or has a right to use them? Kant's answer is no: “Pure practical reason” can in regard to such a thing contain “no absolute prohibition against [its] use.”<sup>34</sup>

Of course pure practical reason does prohibit me from violating another's right to external freedom. It can absolutely prohibit me from using physical force to grab an apple out of someone else's hand, because the grabbing would be a use of coercion that would be incompatible with the other person's freedom of choice to hold onto the apple, and thus a violation of the universal principle of right.<sup>35</sup> On the other hand, if the apple is lying unused and masterless<sup>36</sup> on the ground – ground that does not yet belong to anyone – then I can take the apple into my possession without violating anyone else's rights.<sup>37</sup>

<sup>30</sup> AA VI, §2, p. 246, ll. 25–30.    <sup>31</sup> AA VI, §2, p. 246, ll. 31–32.

<sup>32</sup> AA VI, §2, p. 246, ll. 23–25 (emphasis added).

<sup>33</sup> AA VI, §2, p. 246, l. 13.    <sup>34</sup> AA VI, §2, p. 246, ll. 19–24.

<sup>35</sup> AA VI, Introduction DoR §C, p. 230, ll. 28–31 and p. 231, ll. 10–12; §4, p. 247, l. 34 – p. 248, l. 4.

<sup>36</sup> We are using the word “masterless” for Kant's *herrenlos*, and mean “being without an owner.” A masterless thing is an unowned thing. On the terminology otherwise, see Chapter 6, note 13.

<sup>37</sup> For Kant's argument to withstand attack, Kant need only show that use of an external object of choice does not violate anyone else's external freedom in at least one conceivable situation. If Kant can show that, then his claim that there can be no *absolute* prohibition against the use of some objects of choice is correct. If there can be no absolute prohibition against the use of some objects of choice, then Kant has established his initial claim in §2,

One might object by positing another individual a little farther away from the apple than I am who also would like to take and eat the apple and say: Would it not violate that person's freedom of choice to grab the apple off the ground, thus making it impossible for him to get it? The answer is that my taking it does not violate that person's freedom of *choice* and thus is not something with which the law is concerned. Law, as Kant states, does not relate to one person's choice interacting with another person's *wish*, and thus mere needs, but instead to the other person's choice.<sup>38</sup> The other person has a choice with respect to taking the apple only if he is aware that his own self-determined action can bring forth that object of his desire.<sup>39</sup> If he is farther away from the apple than I am, then he has no choice with respect to taking the apple, because his own self-determined action cannot bring forth that object of his desire. I will get to the apple first and take it, without violating any choice he might like to have had. Kant's definition of object of my choice supports this interpretation as well. As noted above, an object of choice is something I have within my power to use. To use it, I must (physically) possess it, because the subjective condition of the possibility of use is possession.<sup>40</sup> If I do not physically possess it, or do not have it in my power to take it into possession before someone else does, then I cannot use it and it is thus not an object of my choice.

It is important to emphasize that at this stage of Kant's argument, no one has anything yet as his own. In other words, everything – the land and everything on it – is masterless. Kant's goal in §§1–9 of the *Doctrine of Right* is to establish what an ownership right means conceptually and to determine whether ownership of external objects of choice (things) is *possible*. If ownership of external objects of choice is possible, then our freedom of choice is not limited to moving around free from external coercion, but “extends itself *a priori*” to include the freedom to use things as objects of choice without interference by others. Accordingly in §2, which we have been discussing in this section, Kant is considering a situation in which no one yet – “yet” in a logical sense – has any

namely: “it is *possible* to have an external object of my choice as mine.” (emphasis added). Furthermore, in §2 Kant is not talking about any concrete rights to any particular object of choice, but rather about whether one has the physical and therefore the legal *capacity* (*Vermögen*) to use external objects of choice and the *authorization* (*Befugnis*) to exclude others from their use, at least in some circumstances. For a contrary argument, see Westphal, “Property or Usufruct?,” pp. 153–154 and our critique in Byrd and Hruschka, “Property Ownership,” p. 252, note 170.

<sup>38</sup> AA VI, Introduction DoR §B, p. 230, ll. 11–15.

<sup>39</sup> AA VI, Introduction MM I, p. 213, ll. 17–18.

<sup>40</sup> AA VI, §1, p. 245, ll. 11–12 and notes 29–31 and accompanying text.

external object of choice as his own. What Kant is trying to establish is that having external objects of choice as one's own is *possible*, and we are at the very beginning of the argumentation. Accordingly, every external object of choice is conceptually masterless until the argument can unfold completely.

Kant supports his claim that pure practical reason cannot contain any absolute prohibition against using an external object of choice by saying that such a prohibition "would be a contradiction of external freedom with itself."<sup>41</sup> If using a thing to the exclusion of others were wrong, "freedom would rob itself of the use of its choice in regard to an object by placing all *usable* objects beyond any possibility of *using* them, i.e. it would destroy them in a practical sense and make them into *res nullius*."<sup>42</sup> If practical reason contained an absolute prohibition against using an external object of choice, I could not take an unowned apple and eat it. I could not take control of an unowned field, whose plowing, sowing, and reaping presuppose my control over the field to the exclusion of others and their alternative use of the field over a longer period of time. *No one would be permitted to take and use anything*. Such a prohibition would make us spectators in a world filled with usable objects of choice we could not use. The entire land and the things upon it could not be used *by force of law*. We cannot conceive of such a law as a law of *reason* and thus a law of freedom.

We, therefore, must assume that acts of taking possession and using things for an unspecified period of time to the exclusion of others are legally permitted. Legally, I am *permitted* to take and eat an unclaimed apple. I am *permitted* to take control of an unclaimed field and keep it under my control to use. In each case I am *permitted* to exclude others from using the apple and the field, "permitted" meaning I am free to acquire and keep control of the apple or the field, *or not to do so*. I am thus permitted in the sense of "merely permitted" (*bloß erlaubt*) we discussed in [Chapter 4](#) regarding the permissive law of practical reason. Indeed, Kant introduces the permissive law as a juridical postulate of practical reason: "It is possible to have any external object of my choice as mine, i.e. a maxim according to which, if it were a law, an object of choice would have to become *per se* (objectively) *masterless* (*res nullius*) is wrong."<sup>43</sup> The argumentation we have been discussing in this section follows the postulate as Kant's proof of its validity. Subsequently,

<sup>41</sup> AA VI, §2, p. 246, ll. 24–25.    <sup>42</sup> AA VI, §2, p. 246, ll. 13–17.

<sup>43</sup> AA VI, §2, p. 246, ll. 5–8.

he refers to the postulate as a permissive law of practical reason and indicates that, as a postulate, it cannot be derived from pure concepts of right. Instead practical “reason wills that the permissive law be valid as a principle” and thus “practical reason extends itself through this postulate *a priori*.”<sup>44</sup>

The postulate cannot be derived from pure concepts of right because the permission it gives us to have external objects as our own does not follow from the original right to freedom. If we have only the original right to freedom, then it would be conceivable that *no one* could use anything (to the exclusion of others). Even if no one is permitted to use anything, choice in the use of things would be compatible with everyone’s external freedom under a universal law.<sup>45</sup> In other words, *formally* the right to freedom (the universal principle of right) does not prevent the assumption of an absolute prohibition against the use of things. *Substantively*, however, such a prohibition would entail a “contradiction of external freedom with itself.”<sup>46</sup> I cannot *will* such a prohibition.<sup>47</sup> I cannot *will* that the land and all things on it be universally impermissible to use, because then “freedom would rob itself of the use of its choice” in regard to certain objects,<sup>48</sup> which would be unreasonable from the standpoint of practical reason. Accordingly, the *reductio ad absurdum* extends beyond the original right to freedom. Permission to use things as my own to the exclusion of others for an unspecified period of time is an assumption we must make in *addition* to the original right to freedom.

The permission is more expansive than may be apparent at first blush. Recalling Achenwall’s concepts of possession, one realizes that a person can take possession of an unowned thing with three different potential intentions. A person can take something as his own, as someone else’s, or as no one’s. Kant’s permissive law covers all three

<sup>44</sup> AA VI, §2, p. 246, ll. 6–8.    <sup>45</sup> AA VI, §2, p. 246, ll. 17–19.

<sup>46</sup> AA VI, §2, p. 246, ll. 24–25.

<sup>47</sup> This distinction between formal and substantive arguments corresponds to the distinction between the two possible ways of applying the Categorical Imperative, AA IV (*Groundwork*), p. 423, l. 36 – p. 424, l. 14. For the two perfect duties, prohibiting false promising and suicide, the maxim of the prohibited action is self-contradictory and thus cannot even be *thought*. For the two imperfect duties, requiring development of talents and assisting others, the maxim of the negation of the required action is not self-contradictory and thus can be thought, but it cannot be *willed* as a universal law, because such a *will* would be in contradiction with itself. Similarly, practical reason would be in contradiction with itself if it willed that external objects of choice could not be used. One can *think* of a universal law prohibiting the possession of external things (such a law is *formally* consistent with the right to freedom), but one cannot *will* such a law (*substantively*, the law would deprive us of freedom to use things we have the capacity to use).

<sup>48</sup> AA VI, §2, p. 246, ll. 13–16.

cases because the argument is not limited based on the taker's permissible intent in acquiring the thing. Whatever his intent may be, taking a thing into possession is permissible. Thus, it is permitted to take unowned things into physical possession for an unspecified period of time to the exclusion of others *with the intent that they be one's own*, as Achenwall phrases it for his concept of juridical possession.<sup>49</sup> If I am permitted to take an unowned thing into my possession to the exclusion of others, then I am permitted to take it into possession *as mine*. If so, then the institution of ownership is established. Possession as one's own becomes one's own property if possession as one's own is permitted. Kant thus concludes with the statement: "Therefore it is an *a priori* prerequisite of practical reason to assume that any object of my choice is an objectively possible mine and thine and to treat it accordingly."<sup>50</sup>

One might object to Kant's argumentation by saying that the entire *reductio ad absurdum* argument is based on the concept of *use*. According to this objection, Kant would have established the possibility of use rights, but not of ownership rights. After all, the thrust behind Kant's argument is that practical reason cannot will usable objects to be placed legally beyond any possibility of *use*. Accordingly, the objection would claim that although we might be able to *use* external objects of choice, even to the exclusion of others, we may *use them as our own* only for a temporary period of time. After our time has run out, we would have to let someone else use the object. Practical reason may not accept placing external objects of choice beyond all possibility of using them, but that does not mean that it would accept one person's taking an object of choice *indefinitely* to the exclusion of others.

The answer to this objection is that once one accepts that it is possible to have an object of choice as mine for whatever period of time, one has also accepted that I am permitted to take something under my control, if it is in my power and if I do not violate someone else's rights by doing so. If I can take the thing under my control, I can keep it under my control as long as I choose to do so. The question then is not why I can keep it, but rather why someone else can take it away from me. It is not I who has the burden to justify keeping the thing I have taken. I am merely acting in accordance with the postulate of practical reason, which permits me to treat the thing as mine. Instead it is the person who wants to take it away from me who has the burden to justify the taking. And that is true regardless of whether I am holding

<sup>49</sup> See note 11 and accompanying text. <sup>50</sup> AA VI, §2, p. 246, ll. 32–35.

the thing in my hand or I leave it to return to it later, assuming I keep it under my control. Any taking of what I have under my physical control or in my physical possession would be a violation of my rights and therefore wrongful.<sup>51</sup>

The reply to this answer might be insistence that since Kant has only made an argument for a use right, we are justified in keeping the thing under our control only as long as we are using it, and once we have had a chance to use it, we must let others do so as well. Thus our justification for keeping the thing would depend on what the appropriate type of use of that thing would be and the time it would take a reasonable person to use the thing in that way. Yet “use” is a very broad term. Kant indicates several times that “use” means “any use whatsoever” (*beliebiger Gebrauch*).<sup>52</sup> If I take a porcelain cup, for example, I can use it to drink out of, save it in the cupboard to drink out of later, put it on the shelf to admire as a work of art, wear it as an amusing hat, smash it at a wild party for fun, give it to my neighbor as a gift, sell it or rent it out through contract to another person, or pass it over to my child on my death bed. “Use” thus covers any conceivable use.<sup>53</sup> It excludes any other person’s evaluation of whether what I am doing with the object is appropriate use or not, as no one else has a right to pass judgment over potentially desirable and thus permissible forms of use – at least not in the state of nature in which I find myself at this stage of Kant’s argumentation. The bottom line of §2 of the *Doctrine of Right* is the juridical postulate of practical reason, namely that it is *possible* to have any external object of choice *as mine*.

Finally, one might ask why practical reason does not grant the legal power to be an owner of property to humankind as a whole or to the individual states or societies instead of to the individual person. Humankind as a whole cannot have any ownership rights because an ownership right is a right one has against all other persons (see [section 3](#)). All of humankind could not have a right against anyone else, because “humankind” designates everyone leaving no one else who is not included (see [Chapter 6, section 3](#)). Furthermore, assuming humankind could have the legal power to be the owner of property does not solve the problem, because the central issue is *partition*

<sup>51</sup> AA VI, §4, p. 248, ll. 1–4.

<sup>52</sup> AA VI, §2, p. 246, l. 26; §5, p. 248, l. 35 – p. 249, l. 1; §21, p. 275, l. 31.

<sup>53</sup> Achenwall connects “the right to undertake all possible actions with respect to the thing as one sees fit” (*ius, omnes actus circa talem rem possibiles pro arbitrio suscipiendi*) to the concept of ownership, *I.N.I.*, §136, p. 118.

of the land on the earth's surface (see [Chapter 6](#)). Individual states or societies do have the legal power to own property, but not *instead of* the individual person. The state does *not excel* above the individual. The Kantian state is not a god, as is the Hobbesian state,<sup>54</sup> which can do as it pleases. For Kant, the state is nothing more than a union of the individuals who constitute it. Kant is first interested in justifying property ownership in general, be it by an individual or by a society of individuals. He will then later comment on the idea of a state's meta-ownership of the property its individual citizens own individually, or the state's dominion over the territory its citizens occupy.<sup>55</sup> As indicated in [Chapter 1, section 3](#), Kant is opposed to state ownership of land on the primary level, but for different reasons having nothing to do with the nature of, and justification for, property ownership rights.

The juridical postulate of practical reason is supported by a duty, namely the duty "to act toward others so that external (usable) objects can become someone's own."<sup>56</sup> This duty follows directly from the juridical postulate of practical reason, because the duty requires others merely to recognize that I am permitted to treat external objects of choice as possibly mine. The duty to act such that external objects of choice can become someone's own is violated if one person attempts to prevent another person from acquiring an unowned and unused object, not because the first person wants to acquire it as his own, but because he wants to prevent the second person, or anyone else, from acquiring the object as her own. In other words, he wants the object to remain masterless. His act injures the person attempting to acquire the object. As Kant says: "One who proceeds following a maxim through which it would be impossible to have an object of my choice as mine injures me."<sup>57</sup> We can imagine an envious, irresponsible but quick person who has no interest in acquiring things as his own because he does not want to be responsible for keeping track or taking care of them. On the other hand, he does not want anyone else to enjoy something he does not have, regardless of whether he wants to have it or not. Whenever someone tries to take something into his possession to use as his own, the envious, irresponsible, quick person interferes with the

<sup>54</sup> The state as a "mortal god" (*Deus mortalis*), Hobbes, *Leviathan*, Cap. 17, p. 131.

<sup>55</sup> On the difference between meta-ownership and primary ownership see [Chapter 6, section 6](#).

<sup>56</sup> AA VI, §6, p. 252, ll. 13–15.

<sup>57</sup> AA VI, §9, p. 256, ll. 25–27. Section 9 thus contains a reformulation of the same duty Kant discusses in §6.

taking, with the result that no one can ever possess anything. The envious, irresponsible, quick person violates the duty each one of us has to act in a way that external objects of choice can become someone's own. Stated differently, that person acts according to "a maxim which if it were a law would make an object of choice *per se* (objectively) masterless [*herrenlos*] (*res nullius*)"<sup>58</sup> and thus acts wrongfully.

Kant has established that the "intelligible condition (of a purely legal possession) must be possible."<sup>59</sup> He has shown that I am permitted to treat external objects of my choice as *possibly* mine, and I am permitted to do so with regard to those objects of choice that I have under my control for as long as I can keep these objects under my control.<sup>60</sup> The juridical postulate of practical reason and its corresponding duty give me *independence* from interference by others who might attempt to make it impossible to have an external object of choice as mine. The postulate giving me the moral faculty to have an external object of choice as mine is a *necessary* but not sufficient condition for an ownership right to a specific external object of choice. Kant has not yet justified actual ownership rights to any particular object of choice. He has also not explained the nature of an ownership right as *intelligible* possession. The next step in the argumentation is to explain the nature of a right to a thing, a right *in rem*, and thus to explain why I have that right even when I have temporarily lost control of the thing I had as my own. Furthermore, Kant must explain how I can acquire a right *in rem* to a specific external object of choice. We discuss acquiring a right *in rem* to an object of choice, indeed an *original* acquisition of land, in [Chapter 6](#). First, however, let us pause to consider the nature of a right *in rem* in the next section.

### 3. Rights *in rem* to specific objects of choice

An ownership right, or a right *in rem*, is more extensive than a right to treat external objects of choice as possibly mine, assuming I have them under my control. An ownership right means that the owner is injured if another person takes the owner's property even though the owner has no control over it. Furthermore, an ownership right includes the owner's right to demand that his property be returned to him if

<sup>58</sup> AA VI, §2, p. 246, ll. 6–8.    <sup>59</sup> AA VI, §6, p. 252, ll. 22–24.

<sup>60</sup> AA VI, §6, p. 252, ll. 8–10: "any external object of choice, which I have (and only to the extent that I have it) under my control without having it in my [empirical] possession, can be seen as legally mine."

someone else is in physical possession of it.<sup>61</sup> An ownership right, therefore, is not limited to things over which the owner has physical control but also includes the right to things over which the owner has lost physical control. Kant asks: "What is it that enables me to recover an external thing [that is mine and whose owner I am] from anyone who is holding it and to constrain him (*per vindicationem*) to put me in possession of it again?"<sup>62</sup> Stated differently: How is a property right possible, a right *in rem* as opposed to a (mere) right *in personam*?

Kant begins by rejecting the idea that a right *in rem* is based on an obligation a thing has toward me.<sup>63</sup> Things simply do not have obligations. Instead, it is persons who have obligations *vis-à-vis* other persons. Accordingly, as long as Robinson remains alone on the island, he cannot be seen as the owner of the things he uses.<sup>64</sup> It is when Friday joins him that ownership rights first come into play. Furthermore, a right *in rem* is different from a right *in personam*. Both rights *in rem* and rights *in personam* are rights correlative to obligations other persons have toward the right holder. Yet a right *in personam* is a right against one or more other persons only. In contrast, a right *in rem* is founded on one person's claim against *all others* that they not interfere with the property the one person claims is his. A right *in rem* requires *everyone* to accept an obligation toward the one person who has acquired an external thing and declared it to be his own. The question Kant asks, therefore, is: How is a right *in rem* as a right against everyone possible? Stated differently: How is it that all others suddenly have an obligation they did not have before simply because I unilaterally take possession and claim ownership of an external object of choice? It is breaching this obligation that injures the owner of the property, as Kant requires in his definition of the juridical mine: "The *juridical mine* (*meum iuris*) is that with which I am so connected that the use another would like to make of it without my consent would injure me."<sup>65</sup>

In this chapter we have considered four different concepts of possession lying at the foundation of Kant's thoughts on ownership of external objects of choice, namely empirical possession by having something in one's hand or otherwise physically occupying it, possession as a pure

<sup>61</sup> AA VI, §1, p. 245, ll. 9–11; §11, p. 260, ll. 14–16.

<sup>62</sup> AA VI, §11, p. 260, ll. 16–19. The Latin *rei vindicatio* traditionally designates a claim for return of one's property.

<sup>63</sup> AA VI, §11, p. 260, ll. 19–32; p. 261, ll. 11–14.

<sup>64</sup> AA VI, §11, p. 261, ll. 17–21. <sup>65</sup> AA VI, §1, p. 245, ll. 9–11.

concept of the understanding by having something under one's control, sensible or physical possession as the genus for the two first species of possession, and intelligible or purely legal possession by imposing an obligation on all others not to interfere with what one claims to be his. We then considered how possession as one's own is possible and the *reductio ad absurdum* argument in §2 of the *Doctrine of Right*. Finally we explained the nature of legal possession as a right *in rem* which imposes an obligation on all others they did not have before merely because I unilaterally took an external object under my control and declared it to be mine. The question that remains to be answered is how it can be that all others have an obligation to me simply because I unilaterally take possession and claim ownership of an external object of choice.

Much of Kant's legal philosophy turns on the answer to this question. It is (provisional) intelligible possession in the state of nature on which the duty to leave the state of nature and thus the postulate of public law depends: "If there were no external mine and thine in the state of nature, then [there would] also be no legal duty regarding this mine and thine, and thus no command to leave this state."<sup>66</sup> Furthermore, the answer to this question is also of prime importance to international law and the relation of states to other states, because it is not only individual persons who can have intelligible possession of external objects of choice but also moral persons, including states,<sup>67</sup> or the peoples these states represent, which can have juridical dominion over the territory they in fact dominate. Kant's answer to this question revolves around what he calls the *communio fundi originaria*, or the original community of the earth, and the *a priori* necessarily united will of that community to divide the land. It is to this original community that we turn in [Chapter 6](#).

<sup>66</sup> AA VI, §44, p. 313, ll. 5–8.

<sup>67</sup> Kant calls states "moral persons," e.g. in AA VI, §53, p. 343, l. 20.

## Intelligible possession of land

Imbedded in his discussion of property law,<sup>1</sup> Kant comments that the range of a country's cannons to defend coastal waters it claims to possess is the appropriate standard for determining whether a piece of the ocean belongs to the claiming country or not.<sup>2</sup> The comment comes as a surprise because it seems to raise an issue of international rather than property law. This feeling of surprise can be attributed to the traditional philosophical treatment of the issue of property rights, particularly property rights to land. Traditionally authors searching for a justification of ownership rights to land concentrated on why individuals can own land, but not on why a state has any right to an area over which it exercises its dominion. Kant, exceeding far beyond this philosophical tradition, seeks to provide one single justification for both individual and state rights to land<sup>3</sup> because he realizes the issues are inseparably connected. Sections 1–17 of the *Doctrine of Right*, where Kant develops property law and its foundations,<sup>4</sup> thus apply

<sup>1</sup> AA VI, §15, p. 265, ll. 5–10; §17, p. 269, ll. 27–35.

<sup>2</sup> Ownership of the individual areas peoples inhabit is a right of the peoples and states in their relation to each other. Kant distinguishes between ownership of pieces of land by individual physical or moral persons and meta-ownership (*Ober eigentum*) by the sovereign of the territory on which a state exists. The distinction relates to the relationship between the individual owners and the state. On the internal relationship between the sovereign as “meta-owner (*dominus territorii*)” and the individual owners, Kant says: meta-ownership is “only an idea of the civil union that serves to represent . . . the necessary union of the private property of everyone within the people under a universal public possessor in order to be able to determine individual ownership.” The meta-owner cannot “have private ownership of any piece of the land.” Only the people can be private owners of the land “distributively and not collectively.” AA VI, General Comment B, p. 323, l. 22 – p. 324, l. 5. The land within a state's territory thus must be divided.

<sup>3</sup> See “First Part” of the “General Theory of Law” under the heading “Private Law on the External Mine and Thine in General,” AA VI before §1, p. 245, ll. 1–5.

<sup>4</sup> Sections 1–9 deal with the “Way to Have Something External as One's Own” (AA VI before §1, p. 245, l. 7), and §10 deals with the general theory on the “Way to Acquire Something External” (AA VI before §10, p. 258, l. 2) as prerequisites for the then following “Property Law” (AA VI before §11, p. 260, l. 11), which Kant discusses in §§11–17.

equally to an individual's acquisition and intelligible possession of a thing and to a state's acquisition and intelligible possession of an area of land.<sup>5</sup>

In this chapter, we first discuss Kant's original community of the earth (*communio fundi originaria*) and the roots it has in the Grotius–Pufendorf tradition (section 1). We then explain why Kant claims that this community with its originally united will is original, meaning part of the *lex iusti* (section 2). Subsequently, we look at the real nature of this community in light of its claim to the land on the earth's surface (section 3). We argue that the originally united will of the original community of the earth is to divide the land. The will to divide the land imposes on us a requirement to undertake the division (section 4). This requirement is a synthetic principle of law *a priori* (section 5) and connected to the postulate of public law, also a synthetic principle of law *a priori* (section 6).<sup>6</sup>

## 1. How is original acquisition of a piece of land possible?

The first question is: How is original acquisition of a piece of land, be it by an individual person or by a whole people, possible?<sup>7</sup> Acquisition is original that is not derived from what belongs to someone

<sup>5</sup> Peoples, or the states representing them, can be owners of the land they inhabit. This land too is a "belonging (*patrimonium*)" (*Habe*). AA VIII (PP), p. 344, ll. 17–18. As Achenwall says: "A people's territory is under the dominion of the people," *I.N.II*, §226 (AA XIX, p. 423, l. 33): *Territorium gentis est in gentis dominio*. The Latin *dominium* means ownership. See too §228 (p. 424, l. 17): "The people are the owner of their territory." (*Gens [est] domina territorii sui*) and §226 (p. 423, l. 36). In general Achenwall sees the people as the natural owners of their things (*Gens rerum suarum naturaliter domina est*), §224 (p. 423, ll. 8–9). Kant proceeds from this assumption.

<sup>6</sup> Interpretations of Kant's ideas, which partly deviate from our own, can be found in: Gregor, "Kant's Theory of Property"; Thompson, "Political Authority"; and Unruh, "Eigentumsbegründung."

<sup>7</sup> In addition to Kant's question, one could also ask whether it is at all possible to acquire a piece of land, be it originally or derivatively. This question can be asked in two ways, namely first with respect to the other persons who do *not* acquire the particular piece of land because *I* acquire it, and second with respect to the piece of land itself. With respect to the other persons, the possibility of acquisition follows in part from §2 of the *Doctrine of Right*, which we discussed in Chapter 5, and in part from the duty to divide the land, which we discuss below. With respect to the piece of land itself, the possibility of acquiring it follows from the fact that the land is not "originally free" in the sense that it "refuses to be possessed" (AA VI, §6, p. 250, ll. 28–32). Rights, including rights to things, are always rights against other persons and not rights based on the obligations things have toward me, because things have neither rights nor obligations (AA VI, §11, p. 260, ll. 16–32; p. 261, ll. 17–25).

else.<sup>8</sup> In dealing with this question, Kant orients himself critically toward Achenwall's *Ius Naturae*. There Achenwall also asks about the possibility of original, as opposed to derived, acquisition of property.<sup>9</sup> To answer this question, Achenwall discusses two variants of the doctrine of the *communio primæva*, which he attributes to Grotius and Pufendorf.<sup>10</sup> Both variants of this doctrine are intended to provide a foundation for the possibility of private ownership of things. According to Achenwall, the positive version he attributes to Grotius assumes that initially all human beings own the earth and all things upon it. The negative version Achenwall attributes to Pufendorf assumes that initially all human beings have a right to use the land and all things upon it, but that the land and all other things remain ownerless. Each of these two versions raises problems when the question arises how private ownership became established. They both assume that at some point in time a "disturber of the primæval community"<sup>11</sup> appeared who negatively affected this community by taking something into possession as his own and preventing the others from using it. Against this backdrop, the assumption of private ownership can be defended only if one assumes the entire human race approved the private ownership. In other words, the assumption of private property must also assume a corresponding "consensus of humankind."<sup>12</sup>

Achenwall criticizes this doctrine with two arguments. The first argument simply rejects the assumption of a consensus of humankind. Achenwall calls the assumption that all human beings agreed that one

<sup>8</sup> AA VI, §10, p. 258, ll. 7–8. Achenwall and Kant distinguish two concepts of "original." In connection with the "original state," "original" means "before any act of choice with legal effect." In connection with the acquisition of things, "original" means "not derived." The act of apprehension through which I can originally acquire a thing is an act of choice having legal effect. Because an act of apprehension is an act with legal effect, it cannot precede any act with legal effect. An act of apprehension is thus "adventitious," in the sense in which "original" and "adventitious" are complementaries; see *Chapter 2 passim*; on Achenwall, see note 9.

<sup>9</sup> *I.N.I.*, §118, p. 103: "The mode of acquisition of someone else's thing is called 'derived acquisition (secondary acquisition) of the thing'; acquisition of no one else's thing is called 'original acquisition (primary acquisition).'" (*Modus acquirendi rem alienam appellatur modus acquirendi rem derivativus (secundarius); non alienam, originarius (primitivus).*)

<sup>10</sup> What follows is primarily contained in *I.N.I.*, §116, pp. 97–100. In the *Doctrine of Right*, Kant translates *communio primæva* as primæval community (*uranfängliche Gemeinschaft*), AA VI, §6, p. 251, ll. 1–5; §10, p. 258, ll. 14–17; see too §13, p. 262, l. 31 ("primæval common possession"). On Grotius and the *communio primæva* with a contrast to Kant, see Flikschuh, *Political Philosophy*, pp. 152–158.

<sup>11</sup> *Turbator communionis primævae*, *I.N.I.*, §116, p. 100.

<sup>12</sup> *Consensus generis humani*, *I.N.I.*, §116, p. 100. In his lectures of the winter semester 1793/94, Kant still envisions the justification for acquisition of ownership of things "through a common agreement by all," *Vigilantius*, AA XXVII.2.1, p. 595, ll. 22–25.

acquires ownership of an unused<sup>13</sup> thing by taking control<sup>14</sup> of it, a mere fiction.<sup>15</sup> No such common act approving property acquisition ever occurred.

The second argument is that this fiction also gives rise to error. The error is to assume that the person who takes control of an *unused* thing violates the rights of the others to use the thing. Achenwall claims that no such right is violated. The right to use unused things, according to Achenwall, relates (1) not to specific things, but instead promiscuously (to things here or there) in relation to any unspecified thing whatsoever. This use right belongs (2) not to a particular person (as does an ownership right), but rather to everyone. A use right is (3) a consequence of natural freedom and is thus (4) an innate (as opposed to acquired) right.<sup>16</sup> Since a use right is a consequence of natural freedom, no one may hinder me in exercising that right. When I exercise this right and use unused things, then I injure no one. One who claims otherwise confuses the right to use such things with an ownership right. Since I have the right to use things, I also have the right to take them into my possession and keep them for myself, without anyone having to agree. Consequently, no consensus of humankind is required.

The first argument is aimed at both variants of the *communio primæva* doctrine. The second argument is aimed at Pufendorf's negative version of the doctrine. Essentially, Achenwall claims that the whole doctrine is superfluous. To acquire ownership of an unused thing, it is sufficient that the acquirer take the thing with the intent to acquire ownership of it.

<sup>13</sup> We are using the expression "unused thing" for Achenwall's *res vacua*. An unused thing is a thing which at the relevant time (e.g. at the time of the act of apprehension) is not being used by anyone else. A *res vacua* is different from a masterless thing (*res nullius*). A thing is masterless if it has no owner. Kant translates *res vacua* as *ledige Sache* and *res nullius* as *herrenlose Sache* (AA VI, §6, p. 250, l. 22 on *ledige Sache*; §34, p. 294, ll. 23–24 on *erledigte Sache*; §2, p. 246, ll. 7–8 on *herrenlose Sache*). On the distinction between *res vacua* and *res nullius*, cf. Achenwall, *I.N.I.*, §108, pp. 90–91 and Kant's extensive discussion in *Feyerabend*, AA XXVII.2.2, p. 1340, ll. 12–18; p. 1341, ll. 3–6.

<sup>14</sup> With the intent to take the thing into one's own possession.

<sup>15</sup> *Figmentum*, *I.N.I.*, §116, p. 98.

<sup>16</sup> *I.N.I.*, §116, p. 99: "The right to use unused things is an innate right. It does not relate to a specific thing, but instead to any unspecified thing whatsoever here or there, as long as it is unused. It is a general right everyone has as a result of natural freedom." (*Ius ... rebus vacuis utendi, quod est ius connatum, est ius certæ rei non adhaerens, sed promiscue datur in rem quamlibet indeterminatam modo vacuum, et ius universale, omnibus vi libertatis naturalis competens.*) Kant thus differentiates possession of any one place (*possessio*) from "seat (*sedes*)," which is "arbitrary and acquired *perpetual* possession." Possession (*possessio*) of any one place is not yet perpetual possession of this place. AA VI, §13, p. 262, ll. 20–21; §6, p. 251, l. 14.

Achenwall's ideas are the basis for Kant's. Kant agrees with Achenwall that the *communio primæva* doctrine is a mere fiction.<sup>17</sup> Kant, however, does not agree with Achenwall that "through unilateral choice," meaning through my choice to take physical possession of an unused thing, I can obligate anyone "to refrain from using the thing if that person otherwise had no such obligation."<sup>18</sup> Although Kant rejects the *communio primæva* doctrine, still it provides the spark (and to some extent indeed the model) for Kant's own argumentation. If unilateral choice is not enough to impose an otherwise non-existent obligation on everyone else to recognize acquisition of things, and particularly of land, then something in addition to my unilateral choice must fill the gap that the consensus of humankind fills for the *communio primæva* doctrine. For this reason Kant assumes "an original community of the earth and . . . the things upon it,"<sup>19</sup> which he calls *communio fundi originaria*. This original community of the earth in some sense substitutes for the (posited) *communio primæva* because it evokes the idea of the originally united will, which in turn assumes the function of the consensus of humankind. It thus provides the basis for assuming that all others have a duty to recognize my acquisition of an unused (and unowned) thing through taking the thing under my control.

## 2. The original right to a place on the earth

How does Kant support his claim that there is an original community of the earth and an originally and necessarily united will of this community? In particular one wonders about the *original* nature of this community and of the originally united will. What makes the community of the earth *original*?

Kant's ideas are complex but exceptionally clear. Kant begins with the right to freedom everyone has by virtue of his humanity. The right to freedom is the decisive assumption we must make in order to give our concrete actions and omissions legal relevance. Accordingly, the right to freedom is an *original* right.<sup>20</sup> By taking three steps, Kant arrives at the original community of the earth and its corresponding

<sup>17</sup> "Fabrication," AA VI, §6, p. 251, ll. 4–10.

<sup>18</sup> AA VI, §11, p. 261, ll. 8–10. See too §14, p. 263, ll. 23–25; §15, p. 264, ll. 20–22.

<sup>19</sup> AA VI, §6, p. 251, ll. 1–2.

<sup>20</sup> AA VI, Division DoR B, p. 237, ll. 29–32. On the right to freedom as an original right, see Chapter 3.

originally united will. The first step leads to a (my) right to a place on this earth, which we shall discuss immediately. The second step leads to the original community of the earth (section 3), and the third step to the originally united will of that community (section 4).

The first step is based on the original right to freedom, the scarcity of the land, and the fact that I can exercise my right to freedom only if I am in possession of a piece of land. Kant emphasizes the scarcity of the land<sup>21</sup> resulting from the spherical nature of the earth.<sup>22</sup> The earth is not an unlimited plane,<sup>23</sup> on which there are an infinite number of pieces of land. Instead “nature has confined [us] together (by virtue of the spherical form [of our] location, as *globus terraqueus*) within specific borders.”<sup>24</sup> Under this assumption, the right to a piece of land on this earth follows from the right to freedom each of us has. Kant states: “All human beings are originally (i.e. before any act of choice with legal effect) in rightful possession of the earth, i.e. they have a right to be where nature or fate (without their will) has placed them.”<sup>25</sup>

The right of which Kant speaks corresponds to the right to use unused things, with which Achenwall deals in his arguments against the assumption of a *communio primæva* (see section 1). Achenwall’s characterization of this right relates to any movable or immovable

<sup>21</sup> The scarcity of things is a concept that was understood in the eighteenth century; see Adam Smith, IV.vii.a.19, where Smith states that the value of gold and silver is based on their scarcity.

<sup>22</sup> AA VI, §13, p. 262, l. 23; §43, p. 311, ll. 23–24; §62, p. 352, ll. 9–11.

<sup>23</sup> AA VI, §13, p. 262, l. 23.

<sup>24</sup> AA VI, §62, p. 352, ll. 9–11. AA XXIII (*Preparatory DoR*), p. 322, l. 4: The available land is “incapable of enlargement.” For a discussion of the limited area on the earth’s surface and Kant’s cosmopolitanism, see Flikschuh, *Political Philosophy*, pp. 144–205.

<sup>25</sup> AA VI, §13, p. 262, ll. 17–20. In the modern setting, one could object that if fate places you in a hospital at birth, you certainly can be thrown out when beds get scarce, but as we explain in the next two paragraphs the right Kant refers to is the right not to be propelled off the earth’s surface. Kant also states: “Pure physical possession (holding) is already a right to a thing, although certainly not yet sufficient to call it mine.” AA VI, §6, p. 251, ll. 23–25. In AA XXIII (*Preparatory DoR*), p. 237, ll. 4–5, Kant says: “I find myself originally on the land, since it is inseparable from my existence.” Kant uses the Latin *ius in re* (also *ius reale*) and calls it a *Recht in einer Sache* (AA VI, §11, p. 260, l. 15; p. 260, l. 33 – p. 261, l. 1; p. 261, l. 16), which we are translating in the quote above as “right to a thing.” With the expression, Kant means something similar to what is called a “right *in rem*” to property in the Anglo-American legal literature, or a right against *everyone* to that property, albeit not an ownership right. Kant also uses the Latin *ius ad rem*, which in German is *Recht auf eine Sache*. (The contrast between *ius in re* and *ius ad rem* in: AA VI, Annex of Explanatory Remarks 4, p. 362, ll. 1–4; *ius ad rem* is also in AA VI, §39, p. 302, ll. 11–12.) A *ius ad rem* is a right *in personam* to property, meaning, for example, a right against the landlord to the use of property specified in a rental contract, or the right against the owner of property to have that property transferred into one’s ownership, as specified in a sales contract. A *ius ad rem* is a right against *someone*, the landlord or the property owner, not a right against *everyone*, as is a right *in rem*.

thing whatsoever. The right to a piece of land of which Kant speaks relates more narrowly to only parts of the earth's surface. It is a use right in the same sense Achenwall describes. It is a right that relates "promiscuously" to any unspecified piece of land whatsoever that is not being used by someone else. Yet Kant's right is stronger than the right Achenwall describes. My right, which I have against everyone else, is a right to an (unspecified) piece of earth that I have even if all the land on this earth has been claimed by others. In other words, I have a right to exist on the face of this earth as I am. No one may throw me against my will into the ocean or rocket me into the universe.

The place I have a right to be is not any permanent place, but rather some place or other on the earth. The right to a place on the earth is thus not a right to a specific place, but a right to some place. It is a right to a place to be. Kant calls this right to possess "disjunctively universal." "Disjunctive" is Kant's term for Achenwall's "promiscuous" and means: "Everyone can possess this *or* that place on the earth."<sup>26</sup> "Universal" is contrasted to "particular."<sup>27</sup> Universal possession by an individual on the earth's surface is not yet possession of a particularizable,<sup>28</sup> and certainly not of an already particularized, piece of earth, but possession without any particularization, or a still unspecified possession.<sup>29</sup>

The disjunctively universal right to possess an unspecified piece of the earth's surface follows from the universal right to freedom.<sup>30</sup> It follows from the right to freedom in connection with the fact that the land on which we live is scarce. The right to freedom means *inter alia* that no one may kill or injure me physically.<sup>31</sup> Denying me a piece of the earth (by throwing me into the ocean or rocketing me into space) would result in my death, which makes disjunctively universal

<sup>26</sup> AA XXIII (*Preparatory DoR*), p. 323, ll. 26–30; see too p. 320, ll. 20–23: Everyone "has an innate right to all places on the earth to take one *or* the other place" (emphasis added). Disjunctively universal is also found at AA XXIII (*Preparatory DoR*), p. 321, l. 16; p. 322, ll. 10–11, l. 28.

<sup>27</sup> See, e.g., AA VI, §14, p. 263, ll. 24, 26, where Kant contrasts the "particular" will to the "universal" will. See too AA VI, §6, p. 251, l. 12: "particular possession."

<sup>28</sup> Kant, AA VI, §6, p. 250, l. 18: "particularizable land" (*absonderlicher Boden*).

<sup>29</sup> Kant states that possession by human beings of the earth can be called "disjunctively universal possession, because it is unspecified" which piece of land belongs to an individual person, AA XXIII (*Preparatory DoR*), p. 321, ll. 14–16. On the nature of this possession, see Flikschuh, *Political Philosophy*, pp. 167–168.

<sup>30</sup> See AA XXIII (*Preparatory DoR*), p. 281, ll. 24–26. The right to possession is derived, as Kant says, from the *internal* (in contrast to the *external*) mine and thine. See also AA VI, §7, p. 254, ll. 3–7, where Kant bases physical possession, as we are discussing here, on an "internal right."

<sup>31</sup> See Chapter 3.

possession a right.<sup>32</sup> Everyone has a claim against everyone else to some place on this earth.

The derivation of this right from the universal right to freedom also indicates that possession of a piece of the earth is an original right. Since the right to freedom is an original right, indeed the only original right,<sup>33</sup> the right to possess a piece of the land I have against everyone, which can be derived from the right to freedom (in conjunction with the scarcity of the earth's surface), is also an original right.<sup>34</sup> Thus Kant verifies Achenwall's thesis that the right Achenwall describes is an innate right following from natural freedom, at least for the right to possess a piece of the earth's surface.

### 3. The original community of the land

The spherical form of the earth not only functions as a premise in deriving the disjunctively universal right to a place on this earth, but, combined with the fact that people do live on the earth's surface, also provides the reason for seeing ourselves as a community in which we find ourselves originally. If the earth were an infinite plane, then the finite number of human beings could disperse over time ("disperse such that they never came into community with each other").<sup>35</sup> The earth, however, is not an infinite plane, but instead a sphere. Its spherical shape does not mean that individual human beings and peoples will necessarily come into contact (in the sense of natural necessity), but on the earth as we know it, contact is always possible. As Kant states, we are all in a relationship of "physical possible interaction (*commercium*)" with each other.<sup>36</sup>

This physical possible interaction (*commercium*) defines a community (*Gemeinschaft*) of all human beings. "Community" here means "membership in a common whole,"<sup>37</sup> but the word has several connotations and Kant uses Latin synonyms (*communio* and *commercium*) to indicate which connotation he means. In addition, *communio* itself has at least two different meanings, one of which is broader and more general, the

<sup>32</sup> Kant also speaks of possession of the land "on which the inhabitants of the earth can live" as an "original right" in AA VI, §62, p. 352, ll. 11–14.

<sup>33</sup> AA VI, Division DoR B, p. 237, ll. 29–32. The fact that the right to freedom is the only original right does not mean that derivatives of this right are not original.

<sup>34</sup> As Kant states: "All human beings are *originally* . . . in rightful possession of the land, i.e. they have a right to be where nature or fate has placed them (without their own will)," (emphasis added), AA VI, §13, p. 262, ll. 17–20.

<sup>35</sup> AA VI, §13, p. 262, ll. 23–26. <sup>36</sup> AA VI, §62, p. 352, ll. 17–19.

<sup>37</sup> The definition is by Wood and Guyer in *Cambridge Edition (Pure Reason)*, p. 318, fn. c.

other narrower and legally technical. Achenwall uses the word in its legally technical sense to mean a community of right-holders, in particular a community of co-owners of a thing.<sup>38</sup> In obvious reliance on Achenwall, Kant also uses the word *communio* in this narrower sense.<sup>39</sup> Still, when Kant speaks of a *communio fundi originaria* he uses the word *communio* in its general sense simply meaning membership in a common whole.<sup>40</sup>

In addition to *communio*, Kant also uses the expression *commercium*, which means exchange, trade, but also community. Kant states: "The word community is ambiguous in our language and can mean *communio*, but also *commercium*."<sup>41</sup> The difference in meaning between *communio* in its general sense and *commercium* is that *communio* makes no statement about potential interaction among the parts of the whole, whereas *commercium* emphasizes this interaction. To understand *commercium*, we need to pause and consider the difference between the external and internal relations of a community, which can be most easily illustrated for a *communio* in the narrower sense. Let us consider a community of co-owners of a thing. The co-owners have a common interest, such as the interest in maintaining the thing, and, from a legal point of view, a common – the same – claim *against all third parties*, namely that they not take, damage, or destroy the thing. This claim against third parties is part of the co-owners' external relations. In addition, the co-owners have claims *against each other*, such as the claim any one of them has to use the thing. This claim against other co-owners is part of their internal relations.<sup>42</sup> Kant's use of the word *commercium* indicates that *commercium* designates the internal relations of the members of a community (*communio* in its general sense) to

<sup>38</sup> *Prol.*, §125, p. 119. See too *I.N.I.*, §161, p. 138.

<sup>39</sup> See AA VI, §10, p. 258, l. 12, ll. 16–17; §62, p. 352, l. 16.

<sup>40</sup> That *communio* in *communio fundi originaria* does not mean community of co-owners is emphasized by Kant's comments in §§10 and 62 of the *Doctrine of Right*, see notes 49–51 and accompanying text. The difference between *communio* in the general sense and *communio* in the narrower sense is apparent from the following: "All peoples are *originally* in a community of the earth, but not in the *juridical* community of possession (*communio*) . . .," AA VI, §62, p. 352, ll. 14–16. If one substitutes *communio fundi originaria* for "community of the earth," then the statement says that a *communio fundi originaria* is not a *communio*. That is either an obvious self-contradiction, which one cannot attribute to Kant, or one has to distinguish between the broader (general) and the legal technical concept of a *communio*.

<sup>41</sup> AA III, p. 182, ll. 27–28 (B 260).

<sup>42</sup> Achenwall draws this distinction in *I.N.II*, §5 (AA XIX, p. 334, ll. 9–10): "A society can be considered either intrinsically and *per se*, respecting its members; or extrinsically, respecting extraneous (external) persons who are not members." (*Societas considerari potest vel intrinsice et per se, respectu sociorum suorum; vel extrinsice respectu extraneorum (exterorum), hoc est non-sociorum.*)

each other. *Commercium*, according to the first *Critique*, is the real community of substances that coexist and consequently influence each other.<sup>43</sup> Correspondingly, Kant speaks of “physically possible interaction (*commercium*).”<sup>44</sup> Human beings living simultaneously on the earth mutually influence each other simply because they can come into contact and consequently they form a community,<sup>45</sup> which arises from their (possible) interaction.<sup>46</sup>

This community is a community (*commercium*) of all human beings in their particular role as holders of a right to a piece of land, a right each has against the others. The community is an *original* community of the earth (*communio fundi originaria*), because the right each has against the others to a piece of the earth’s surface is itself an original right (see section 2). The community of the land follows directly from the axiomatic assumption of the original right to freedom.<sup>47</sup> In light of the earth’s spherical nature, the community of the land is a necessary consequence of our existence on earth.<sup>48</sup>

Several times Kant indicates that the original community of the earth is not common ownership of the earth’s surface by all human beings. “The state of the community of the mine and thine (*communio*) can never be conceived as original.”<sup>49</sup> Furthermore, peoples do not originally exist in “a legal community of possession (*communio*) and thus of use or ownership” of the earth’s land.<sup>50</sup> Here Kant uses *communio* in Achenwall’s technical legal sense. Kant makes these assertions

<sup>43</sup> AA III, p. 182, l. 11 – p. 183, l. 31 (B 259–262).

<sup>44</sup> AA VI, §62, p. 352, ll. 17–19. See too AA XXIII (*Preparatory DoR*), p. 320, ll. 23–27: “Thus all inhabitants of the earth are in an innate potential common possession of the earth’s land, because they are placed in a relation of continuously mutual possible influence through the unity of their location, and this community of the land . . .”

<sup>45</sup> One might ask why Kant uses the word *communio* at all when designating the *communio fundi originaria* rather than using the word *commercium*. The answer could be that the *communio fundi originaria*, for Kant, is supposed to replace the *communio primæva*, which Achenwall criticizes in *Ius Naturæ*. If so, then using the word *communio* is helpful to better contrast the terms. Furthermore, Kant’s use of *communio* as opposed to *commercium* is not incorrect but simply less specific because every *commercium* is a *communio* in the broader sense (but not every *communio* is a *commercium*). In addition, the negative version of the *communio primæva* (attributed to Pufendorf) is per definition not a *communio* in the narrower sense. Achenwall thus also had the problem of contrasting the *communio* in its narrower and broader senses, but nonetheless used the word *communio* rather than *commercium* to designate the *communio primæva*.

<sup>46</sup> Kant discusses this community as early as 1795, AA VIII (*PP*), p. 358, ll. 5–13, l. 14. Still the idea is not developed there any further.

<sup>47</sup> Prior to writing the *Doctrine of Right* Kant wrote: “The *communio originaria* is not empirically based as a fact, but is a right to the land, without which human beings cannot exist and which itself follows from freedom in the use of things.” AA XXIII (*Preparatory DoR*), p. 241, ll. 13–16.

<sup>48</sup> AA VI, §13, p. 262, ll. 24–26. <sup>49</sup> AA VI, §10, p. 258, ll. 11–13.

<sup>50</sup> AA VI, §62, p. 352, ll. 14–17.

because ownership claims are primarily claims that the owner of a thing has against every non-owner of that thing. They are claims in an external relation. Original ownership by *all* human beings of the earth's surface is thus a contradiction in terms. If *all* human beings were co-owners of the land, then there would be no non-owners against whom an ownership claim could be made. Consequently, human beings are not in a community – not in a *communio* in the *narrow sense* – in relation to the earth's surface.<sup>51</sup>

#### 4. The originally united will

The original community of the land and the things upon it evokes<sup>52</sup> the “originally and *a priori* united will,”<sup>53</sup> which Kant *inter alia* also calls the “omnilateral, necessarily united will.”<sup>54</sup> To understand why the original community calls forth an originally and *a priori* united will, it is helpful first to consider the concept of a society (*societas*) as Achenwall uses it. Every society, such as a society founded to operate a pin factory, has a goal, which Achenwall refers to as the common goal (*finis communis*) of the society, from which one determines the common good

<sup>51</sup> Bouterwek in his review of the *Doctrine of Right* writes in 1797: “This important principle: *there is no a priori Adespota* [masterless thing], *originally everything belongs to everyone*, is also in the eyes of the reviewer the key to the theory of ownership.” “Common possession? Should it not be: the common right, but without possession, which belongs to everyone?” “Here one should speak not of common possession, which cannot possibly occur, but of universal ownership, which always occurs.” “In the explanation of this indubitable principle, Mr. K. seems to confuse common possession and common ownership,” AA XX (Bouterwek), p. 448, ll. 19–22; p. 249, ll. 6–7; ll. 12–14; ll. 16–17. Starting with Bouterwek, the opinion that Kant assumes original ownership by all humans of the earth's surface has stubbornly continued, regardless of the clarity of Kant's express contrary position discussed above in our text. Kant, too, in total contrast to what Bouterwek claims, assumes that all things are initially masterless (Bouterwek speaks of *Adespota*) and can be acquired through an act of original acquisition.

<sup>52</sup> Kant speaks of “the innate common possession of the earth's surface and its *a priori* corresponding universal will of permitted private possession of it,” AA VI, §6, p. 250, ll. 20–21. Similarly, in §11, p. 261, ll. 10–11, Kant speaks of the “united choice of everyone in common possession” (emphases added). See too AA XXIII (Preparatory DoR), p. 323, ll. 31–32, where Kant speaks of a “common possession by the human race,” “to which an objectively united or to be united will corresponds.” See also AA XXIII (Preparatory DoR), p. 289, fn. to l. 13; p. 289, ll. 16–18; p. 290, fn. to l. 17.

<sup>53</sup> AA VI, §16, p. 267, ll. 13–14.

<sup>54</sup> AA VI, §14, p. 263, ll. 26–27. This originally and *a priori* necessarily united will is to be distinguished from an originally united will, or as Kant calls it a “united will of the people [Volkswille], which is derived *a priori* from reason,” AA VI, §51, p. 338, ll. 24–25; see too AA VIII (TēP), p. 297, ll. 4–8, and AA VIII (PP), p. 378, ll. 13–14: “universal will of a people given *a priori*.” The originally united will of a people arises in relation to the original contract, which is to be conceived for any state. Here we are considering the originally united will of *all* human beings on the earth's surface, which is originally united without any original contract, as we shall see immediately below in this section.

(*bonum commune*) of that society.<sup>55</sup> Consequently, one can also speak of the will of the society (*voluntas societatis*), as if the society were a (natural) person.<sup>56</sup> It is the will of the society to pursue the society's goal. Kant calls this will a "common will" (*voluntas communis*).<sup>57</sup> Every society has such a common will, which must be distinguished from the wills of the individual members of the society.<sup>58</sup>

For the original community of the earth, Kant draws an analogy to Achenwall's society. Just as every society has a common will, so too the original community of the earth has a common will. That the original community of the earth has a common will is possible only if one can say the original community of the earth follows a common goal. Since the community is a community in the sense of *commercium* and thus a community of persons who have claims against each other within the community, namely claims to places on the earth, the goal of this community must initially be division of the earth's surface. I have not only a disjunctively universal right to a piece of the earth, but this right is connected to the idea of *particularization*. Kant expresses this idea as follows:

All human beings are originally in *common possession* of the land on the whole earth (*communio fundi originaria*) with the *will* (of each) given to them by nature to use the land (*lex iusti*), which, because of the naturally unavoidable confrontation of the choice of each against the choice of the other, would extinguish all use of the land if this will did not simultaneously contain the law for choice, according to which a *particular possession* for each can be determined on the common land (*lex iuridica*).<sup>59</sup>

The disjunctively universal right to a place on this earth would be of little or no value because of the "naturally unavoidable confrontation of the choice of each against the choice of the other," if the right were not connected to the idea of particularization of the land on the earth.<sup>60</sup> Thus the command addressed to humankind to divide

<sup>55</sup> *I.N.II*, §2 (AA XIX, p. 333, ll. 19–21). The idea is reflected in AA VIII (*T&P*), p. 289, ll. 16–18.

<sup>56</sup> *I.N.II*, §24 (AA XIX, p. 340, ll. 11–15).

<sup>57</sup> In his *Reflections* on Achenwall's *Ius Naturae* at AA XIX, R.7526, p. 446, ll. 22–24; R.7528, p. 447, ll. 12–13; R.7709, p. 497, l. 24; R.7858, p. 537, ll. 20–24; R.7962, p. 565, l. 24 (here Kant speaks each time of a *voluntas communis*); R.7665, p. 482, l. 25; R.7682, p. 488, ll. 19–20; R.7713, p. 498, ll. 7–9; R.7963, p. 566, l. 1; R.8055, p. 596, ll. 13–14; R.7880, p. 543, l. 32 (here Kant speaks each time of a "common will").

<sup>58</sup> See, e.g., AA XIX, R.7858, p. 537, ll. 23–24.

<sup>59</sup> AA VI, §16, p. 267, ll. 4–11. The "will" here is the legislating will (see AA VI, Introduction MM IV, p. 226, ll. 4–5).

<sup>60</sup> Kant makes this point clearly in AA XXIII (*Preparatory DoR*), p. 323, l. 33 – p. 324, l. 2: "Without a principle of division (which law can inhere only in the united will), the right

the earth follows. This goal and responsibility (to fulfill the command addressed to humankind) are constitutive for the original community of the earth, the *communio fundi originaria*, and for the will of this community to fulfill the duty. Hence the will is an “*a priori* and thus necessarily united will,”<sup>61</sup> an *originally* united will, which, as Kant almost superfluously adds, “does not presume any legally relevant act for its union.”<sup>62</sup> It is the originally united will that wills the land to be divided. Directly following the quote above from §16, Kant states: “The distributive law of the mine and thine of each regarding the land can come only from an *originally* and *a priori* united will according to the axiom of external freedom.”<sup>63</sup> This comment presupposes a connection between the original right to freedom and the originally united will, as this connection has been explained in sections 2–3.

Kant also considers the alternative that the land, although a thing and not a person, is originally free. If the land were originally free then no one could possess it and the originally united will could not will the land of the earth to be particularized. The land, however, cannot be originally free, because the original “freedom of the land would be an [absolute] prohibition against anyone’s use of it.”<sup>64</sup> Such a prohibition cannot exist (under laws of freedom),<sup>65</sup> “because it would entail a contradiction of external freedom with itself.”<sup>66</sup> Such a prohibition would put the land legally “beyond any possibility of use,” meaning the land “would be annihilated in a practical respect and made a *res nullius*,”<sup>67</sup> and that would be absurd.<sup>68</sup> Therefore it is possible to originally acquire pieces of the earth’s surface and (then) to possess them, which is equivalent to the assumption that it is possible for the originally united will to will that the land be particularized. Combined with the idea that each of us has a right to be somewhere on the earth

human beings have to be somewhere [would] be without any success and destroyed by the universal conflict.”

<sup>61</sup> AA VI, §14, p. 263, ll. 26–27.

<sup>62</sup> AA VI, §16, p. 267, ll. 14–15; for an argument that the will to divide the land depends on the participants’ ability after the division to maintain themselves at least as well as before the division, see Guyer, “Kantian Foundations.”

<sup>63</sup> AA VI, §16, p. 267, ll. 12–15. <sup>64</sup> AA VI, §6, p. 250, ll. 30–33.

<sup>65</sup> Juridical laws are also “laws of freedom,” AA VI, Introduction MM I, p. 214, ll. 13–15.

<sup>66</sup> AA VI, §2, p. 246, ll. 23–25.

<sup>67</sup> Cf. AA VI, §2, p. 246, ll. 15–17. The postulate in §2 and the “original freedom” of the land are mutually exclusive. Denying the original freedom of the land amounts to the same thing as the postulate.

<sup>68</sup> This argument may seem circular because connecting rights to persons and denying them to things means that only persons can be free, which is the opposite of what Kant is assuming in his argument. By “free,” however, for land, Kant means that no one may own it and not that the land has an original *right* to freedom. For land to be free in this sense, Kant says those in its common possession must close a contract mutually agreeing to deny use of the land to each other. The land’s freedom then would be derived and not original freedom.

and that exercising this right requires particularization of the earth's surface, it must be the case that the originally united will does will particularization of the land on the earth (see [section 5](#)).<sup>69</sup>

The act of occupation I commit when I take a piece of land (originally) as mine, is binding for all others, because my own will, which gives me the law for the occupation, is contained in the “*a priori* united . . . absolutely commanding will.”<sup>70</sup> The originally united will wills the division of the available land and with my occupation of it I execute this will. Expressed differently: “What I will to be mine, that is mine,” because this act is “in accordance with the idea of a possible united will.”<sup>71</sup> Additionally, the principle “prior in time, stronger in right” (*prior tempore, potior iure*)<sup>72</sup> applies.<sup>73</sup> Whoever claims a particular piece of the land first has acquired that piece of land originally as his own. Only the first acquisition of a thing can be that thing's original acquisition. Later, further acquisition of that thing is derived acquisition.

## 5. The requirement to divide the land as a synthetic principle of law *a priori*

For the moment we must pause and consider the nature of the particularization idea more closely. Let us first examine the logical relationship between the command to divide the land (see [section 4](#)) and the juridical postulate of practical reason,<sup>74</sup> by virtue of which I have the (legal) capacity to be the owner of things. First, we demonstrate that the command addressed to humankind and the postulate of the capacity are (logically) equivalent. Second, we discuss the synthetic character of the command and the postulate.

Kant is extremely careful in his choice of words. In the passage quoted above, he speaks first of a “law” for choice<sup>75</sup> “according to

<sup>69</sup> In AA XXIII (*Preparatory DoR*), p. 311, l. 13 – p. 324 l. 21, Kant repeatedly begins anew to work through the derivations we have explicated in sections 2–4.

<sup>70</sup> AA VI, §14, p. 263, ll. 19–23. <sup>71</sup> AA VI, §10, p. 258, ll. 24–27.

<sup>72</sup> AA VI, §10, p. 259, ll. 16–17. The legal adage is based on *Codex Iustiniani* 8.17.3. Achenwall also uses this adage in connection with original occupation of things. *I.N.I.*, §119, p. 103.

<sup>73</sup> AA VI, §10, p. 259, ll. 14–17. <sup>74</sup> AA VI, §2, p. 246, l. 4.

<sup>75</sup> A law for choice is a law making an action a duty (with the exception of permissive laws, which do not make actions duties but instead expand upon our capacities to exercise choice). The will, or pure practical reason, gives us laws of freedom to govern the choices we make to act in this way or that. The will arrives at these laws by subjecting the maxims of an actor's possible actions to the test of whether they could be universal laws. Kant sees laws of freedom as one potential determinant of the actor's choice to act. Other determinants could be the actor's drives and desires, but the actor's choice is a free choice and the actor thus can follow the laws of freedom rather than respond to his drives and desires, AA VI, Introduction MM I, p. 214, ll. 1–9.

which a *particular* possession for each can be determined on the common land." Shortly thereafter, he speaks of a "*duty*" to proceed "according to the law of external acquisition."<sup>76</sup> As an individual person I do not have a duty to take unowned pieces of land under my control with the intent to make them mine. Instead, it is humankind as a whole which has the responsibility, the duty (to itself), to proceed according to the law of external acquisition.<sup>77</sup> Still this responsibility of humankind as a whole has consequences for the individual person. The command addressed to humankind as a whole to divide the earth implies my capacity to be the owner of pieces of the earth's surface. Kant states: "To proceed according to the law of external acquisition is a duty; *consequently* also a legal capacity of the will to obligate anyone else to recognize the act of taking possession and acquiring as one's own as valid, even though it be unilateral."<sup>78</sup> The capacity Kant mentions is the same as the capacity "to have any external object of my choice as mine," or the capacity "to impose an obligation on everyone else they otherwise would not have," namely "to refrain from using certain objects of our choice."<sup>79</sup> The capacity to possess a particular piece of the earth's surface follows from the responsibility humankind has to divide the earth. Indeed, without the assumption that everyone has this capacity it would be impossible to divide the land. The capacity is thus a necessary condition for the command to divide, and the command to divide is a sufficient condition for the capacity.

In addition, one needs to realize that the command to divide the land is not only a sufficient but also a necessary condition for my capacity to be the owner of pieces of land. Kant makes precisely this assumption: "the entitlement of reason for acquisition" of things (land) can "only be in the idea of an *a priori* united (necessarily to be united) will of all, which is here tacitly presumed as an incircumventable condition (*conditio sine qua non*)."<sup>80</sup> Original acquisition of things (pieces of land) thus presupposes the authorizing<sup>81</sup> originally united will. If so, then my capacity to be the owner of pieces of land presupposes the originally united will, because without the possibility to acquire things my capacity would be empty. The originally united will, the goal of the

<sup>76</sup> AA VI, §16, p. 267, ll. 18–19.

<sup>77</sup> The "principle of external acquisition" is formulated in AA VI, §10, p. 258, ll. 22–27.

<sup>78</sup> AA VI, §16, p. 267, ll. 18–21 (emphasis added).

<sup>79</sup> AA VI, §2, p. 246, ll. 5–6; p. 247, ll. 4–6. <sup>80</sup> AA VI, §15, p. 264, ll. 17–20.

<sup>81</sup> Cf. AA VI, §14, p. 263, l. 20.

original community of the earth to divide the land, and the command to divide the land, however, are one and the same.<sup>82</sup> Consequently, the command to divide the land is an incircumventable condition (*conditio sine qua non*), meaning a necessary condition, for my capacity to be the owner of land and my capacity is thus a sufficient condition for the command. My capacity to be an owner and the command addressed to humankind to divide the land are thus (logically) equivalent.

The connection is important because a synthetic element enters into the chain of reasoning with the originally united will, the goal of the *communio fundi originaria* to divide the earth, and the command to divide it, which was explained in sections 2–4. The original right to a place on the earth (section 2) follows analytically from the original right to freedom. The original community of holders of this right (section 3) also follows analytically from the right to a piece of the earth and thus from the right to freedom. The same is true for the goal of the community to divide the land, *if* the community has a goal. *That* this community of the earth has this goal, regardless of how reasonable the assumption of this goal may be (section 4), no longer follows analytically from the ideas that precede the assumption of the goal. Instead the goal is assumed through a synthetic principle *a priori*.

Kant repeatedly emphasizes that the goal is assumed through a synthetic principle *a priori*. He says, for example, that “the accordance of choice with the idea of the united will of those who are restrained by that idea” is “the synthetic principle *a priori*” of the rights that can be acquired.<sup>83</sup> In the *Doctrine of Right*, Kant no longer emphasizes this issue and does not expressly say that the assumption of the goal of the *communio fundi originaria*, the assumption of the originally united will, and thus the assumption of the command to divide the earth adds the synthetic element to the chain of reasoning. Instead Kant emphasizes the synthetic character of the assumption of the possibility of intelligible possession, and thus the synthetic nature of the juridical postulate of practical reason.<sup>84</sup> Because the assumptions to which a synthetic character *a priori* is attributed are equivalent, they do not in fact differ from each other. The juridical postulate of practical reason and the

<sup>82</sup> See section 4. <sup>83</sup> AA XXIII (*Preparatory DoR*), p. 220, ll. 3–6; p. 227, ll. 24–33.

<sup>84</sup> AA VI, §2, p. 246. See too AA VI, §6, p. 250, ll. 9–17: “The proposition of the possibility of possession of a thing *external* to me after removing all conditions of empirical possession in space and time (and thus the prerequisite for the possibility of a *possessio noumenon*) extends beyond those limiting conditions and, because this proposition establishes possession even without detention as necessary to the concept of the external mine and thine, it is *synthetic*,” and p. 252, ll. 11–30.

assumption of an originally united will that wills the command to divide the land contain a synthetic legal principle *a priori* for one and the very same reason.<sup>85</sup>

## 6. The postulate of public law

We have concluded our commentary on Kant's justification for the right to own property. Kant's discussion of property is followed by a series of sections on how to acquire external objects of choice and the nature of the rights we can acquire.<sup>86</sup> His main part on private law ends with the transition from the state of nature to the juridical state, with which we began in [Chapter 1](#).<sup>87</sup> The transition ends with the postulate of public law:

From private law in the state of nature proceeds the postulate of public law: In a situation of unavoidable contact, you should leave this state [the state of nature] with all others and move to a juridical state, i.e. the state of distributive justice.<sup>88</sup>

Kant anticipates this postulate in his interpretation of the third Ulpian formula: "Enter a state where everyone's own can be secured against everyone else (*lex iustitiae*)."<sup>89</sup> In this last section of [Chapter 6](#), we would like to begin considering the postulate of public law by first answering the question of why this postulate "proceeds" from private law in a state of nature. We also briefly discuss the synthetic *a priori* nature of the postulate and the relevance the postulate has for both individuals and states.

If we take a close look at both the postulate and at Kant's interpretation of the third Ulpian formula, we see that both have the same focus, namely securing the mine and thine, which can be done only in a juridical state, only in a state of distributive justice, only in a situation of a *lex iustitiae*. Although we have discussed Kant's ideas on property – the mine and thine – we have not yet considered the distinction he draws between two levels of ownership, provisional and

<sup>85</sup> Legal principles are synthetic principles of law if and because they cannot be proved analytically from the assumptions made, but only through the *reductio ad absurdum* of their contradictories (meaning indirectly, only through an apagogical proof, see, e.g., AA XXIII (*Preparatory DoR*), p. 331, ll. 5–26).

<sup>86</sup> AA VI, §§18–40, pp. 271–305. <sup>87</sup> AA VI, §41, p. 305, l. 31 – p. 306, l. 35.

<sup>88</sup> AA VI, §42, p. 307, ll. 9–11. Similarly, §41, p. 306, ll. 24–28.

<sup>89</sup> AA VI, Division DoR A, p. 237, ll. 7–8.

peremptory.<sup>90</sup> This distinction is of prime importance for moving from the state of nature to the juridical state.

Provisional ownership is not secured, but instead preliminarily legal possession.<sup>91</sup> Strictly speaking, it is merely physical possession, i.e. actual control over the thing, but still such that this possession amounts to “comparatively legal possession”<sup>92</sup> in anticipation of a unification of the will of all in a public lawgiving to make this possession legal. In contrast, peremptory ownership is legally secured and thus peremptory intelligible possession. The distinction between provisional and peremptory ownership is based on the fact that first the earth’s surface must be divided before any individual has a property claim to secure. Property must first, as Kant says, be “determined and specified”<sup>93</sup> because any “guarantee presumes the thine of someone (for whom it is secured).”<sup>94</sup> In the state of nature, this property is not secured. Security can be attained only in the juridical state. This security or guarantee is the second step in Kant’s chain of reasoning. This second step culminates in the postulate of public law according to which we are obliged to enter the juridical state. That the originally united will imposes upon us the obligation to enter into a juridical state is the logical continuation of a community (*commercium*) of all human beings whose goal it is to divide the land. The responsibility to divide the land would not be fulfilled satisfactorily unless the division were secured, thus becoming necessary (on the level of the *lex iustitiae*).

Let us return to Kant’s claim that without the external mine and thine there would be no duty to leave the state of nature and enter a juridical state,<sup>95</sup> and thus no postulate of public law. Stated differently Kant’s claim is that without acquisition of (acquirable) rights, a juridical state would be impossible.<sup>96</sup> We pointed to the relevance of private ownership of external objects of choice for the postulate of public law when discussing the nature of a right *in rem* at the end of the last chapter. Could one not object and argue that external freedom of choice alone and without any ownership of external objects of choice is enough to require us to leave the state of nature and enter a juridical

<sup>90</sup> The contrast between “provisional-legal” and “peremptory possession” can be found, e.g., in AA VI, §9, p. 256, l. 35 – p. 257, l. 5.

<sup>91</sup> See the contrast between “provisional (preliminary)” and “peremptory (secured)” in AA VI, §33, p. 292, ll. 28–30.

<sup>92</sup> AA VI, §9, p. 257, ll. 14–19. <sup>93</sup> Cf. AA VI, §9, p. 256, ll. 27–29.

<sup>94</sup> AA VI, §9, p. 256, ll. 30–31. <sup>95</sup> AA VI, §44, p. 313, ll. 5–8.

<sup>96</sup> AA VI, §44, p. 312, ll. 34–36.

state in order to secure our right to freedom?<sup>97</sup> After all, is it not a state of war in which we find ourselves before entering a juridical state and thus a situation in which our right to physical integrity is constantly insecure?

The answer to this objection follows from what we have said in this chapter. Humankind forms an original community only in relation to division of the land and it is this community alone that can call forth an originally united will. It is this community alone upon which arguments supporting the postulate of public law can be predicated and it is this community alone that is a necessary consequence of our existence on earth.<sup>98</sup> Without the goal and the duty to divide the earth there would be no original community of all human beings whatsoever other than as a product of our imagination.<sup>99</sup> Of course we could think that human beings might harm each other even without having the duty to divide the land and that some of them might wish an end to the violence and demand that a juridical state be established. Yet to be able to totally *disregard* the duty to divide the land, we would have to assume that the problems arising with the scarcity of the land did not exist. We thus would have to assume that the earth is an infinite plane. If so then the peace-loving person could avoid the war monger into infinity; human interaction would no longer be unavoidable;<sup>100</sup> leaving the state of nature and entering a juridical state would no longer be necessary, and the postulate of public law would no longer have any foundation. It is the problem with the division of the land alone that can lead to the postulate of public law.

The reasoning behind the postulate of public law is explicated in §42 of the *Doctrine of Right*. The maxim “to leave everything to wild coercion,” or expressed differently, the maxim “to want to be and stay in a state . . . in which no one is secure in his own against wild violence,”<sup>101</sup> cannot be a universal law. The maxim contradicts the

<sup>97</sup> On this question, most recently Friedrich, *Eigentum*, pp. 173 *et seq.*

<sup>98</sup> See AA VI, §13, p. 262, ll. 25–26.

<sup>99</sup> Achenwall, *Prol.*, §§82, 83, pp. 84, 85 assumes a universal society of all human beings (*societas hominum universalis*) without providing a sufficient justification for this assumption.

<sup>100</sup> AA VI, §42, p. 307, ll. 9–10.

<sup>101</sup> Compare the two formulations in AA VI, §42, p. 308, ll. 5–6 and p. 307, l. 32 – p. 308, l. 2. Twice in the *Doctrine of Right*, in §2 and in §42 (AA VI, p. 246, ll. 9–19 and p. 307, ll. 33–36, p. 308, ll. 3–6), Kant calls actions which are not “formally” (*formaliter*) wrong, “substantively” (*materialiter*) wrong. (In §2, Kant does not expressly use the word “substantively,” but it follows from his contrasting use of the word “formally” in that section.) It is not surprising that he makes this contrast particularly in justifying both of the postulates. Because of the postulates, both of which are synthetic *a priori* propositions, actions that are not “formally” wrong become actions that are “substantively” wrong.

Categorical Imperative.<sup>102</sup> We have now arrived at the second issue we wanted to address in this section, namely that the postulate of public law is a synthetic legal principle *a priori*. Just as the goal of the original community of the land, the originally united will, and the command to divide the land do not follow analytically from the concepts preceding them (see section 5), so too the idea of guaranteeing property does not follow analytically from the idea of division. In order to require the transition from unsecured to secured property, one needs a synthetic principle *a priori*. Kant does not discuss this aspect of the postulate. Granted, he does call the postulate of public law a “postulate,” and that means that he attributes synthetic character to it. Of moral postulates, Kant writes: “A synthetic principle of moral practical reason which cannot be proved true is a moral postulate, which unconditionally (not as a means to attain a certain purpose) requires acting in a certain way.”<sup>103</sup> This statement and similar statements, although they refer directly to the juridical postulate of practical reason, also apply in their idea to the postulate of public law.

We should make one last point on the relationship between a state’s legal dominion over a certain territory and an individual’s legal dominion over a piece of land *within* this state territory. On that issue, Kant distinguishes between meta-ownership of the land by the state and private ownership of the land by an individual person, and this relationship is complementary.<sup>104</sup> If individual persons can be the intelligible possessors (owners) of land and other things, as suggested by the last chapter, then moral persons too can be intelligible possessors of land. In this respect, states have no advantage over individual persons. To answer the question whether Robinson is the owner of a piece of land on the island where he lives, just as to answer the question whether a people (which has constituted itself as a state) is the intelligible possessor of the island on which it lives, I need the same logic and the same basic principles.

In this chapter we explained how something external to myself can be legally mine, meaning why others have an obligation they did not have before simply because I take an external object of my choice as

<sup>102</sup> The proof does not become analytic because it derives from the Categorical Imperative. The Imperative is itself a “synthetic practical proposition *a priori*”; see AA IV (*Groundwork*), p. 420, ll. 12–17. On the proof of synthetic legal principles *a priori*, see note 85.

<sup>103</sup> AA XXIII (*Preparatory DoR*), p. 256, ll. 17–20. See too p. 262, l. 36 – p. 263, l. 4.

<sup>104</sup> AA VI, General Comment B, p. 323, l. 22 – p. 324, l. 7.

mine. The answer is that my will to make that object mine imposes this obligation because it is contained in the originally and *a priori* united will of all. This united will is the will of the *communio fundi originaria*, or the original community of all human beings on the face of the earth. The goal of this community is to divide the land. Accordingly, the community's *a priori* united will commands humankind to undertake the division. We connected these ideas to the individual's capacity to be the owner of external objects of choice according to the juridical postulate of practical reason we discussed in [Chapter 4](#). We noted the synthetic *a priori* nature of the original community's goal as being a synthesis of choice with the universal and necessarily united will to divide the land, which will in turn is logically equivalent to the command to divide and to the capacity we have to be the owner of things. Further, we indicated the implication this united will has for the postulate of public law, showing that it is this will upon which the postulate of public law is founded. Thus, we have completed our discussion of Kant's justification of intelligible possession and the right to own external things, particularly the land. Moreover, we have explained the meaning of §41 of the *Doctrine of Right*, with which we began in [Chapter 1](#), and moved from private law in the state of nature to public law in the juridical state. In the next two chapters we continue with the issues the postulate of public law raises and examine first the state in the idea, and then the state in reality.

## The “state in the idea”

In this chapter, we examine the “state in the idea,” which is the state operating under ideal constitutional principles and the norm for any juridical state actually founded by human beings. We first differentiate between the state in the idea and a juridical state ([section 1](#)). We then address §45 of the *Doctrine of Right* and Kant’s distinction of three state powers: the legislative, the executive, and the judicial. In §45, Kant compares this tripartite distinction to the three propositions in a practical syllogism. We consider this comparison and the nature of the three powers in [section 2](#). In particular, we discuss the nature of the executive power, which seems less intuitive than the nature of the other two powers. In [section 3](#), we examine Kant’s understanding of theoretical and practical syllogisms of reason. In [section 4](#) we show that Kant’s comparison of the three state powers to the propositions in a practical syllogism is indeed plausible. In [section 5](#), we consider the three state powers in connection with their attributes: the irreprehensibility of the legislative power, the irresistibility of the executive power, and the inappellability of the judicial power. Finally, we discuss Kant’s arguments for why these three powers must be separated ([section 6](#)).

### 1. The state in the idea and the juridical state

Initially we should distinguish the state in the idea from the juridical state. We have focused on the juridical state until now, portraying it as the concrete situation in which individual human beings (or a whole people) find themselves. We find ourselves in a juridical state if we can in fact “enjoy” our rights.<sup>1</sup> We can enjoy our rights if we can actually exercise them because the state secures them, making them

<sup>1</sup> See [Chapter 1](#) and Kant’s definition of the juridical state in §41 of the *Doctrine of Right*.

peremptory. In contrast, the state in the idea is a concept. It is the concept of a state of *ideal* constitutional principles. Kant discusses the state in the idea in §§45–49 of the *Doctrine of Right*, where he calls it the state “as it is supposed to be according to pure principles of law, which provides the norm for every actual union to form a commonwealth.”<sup>2</sup> As the *norm* for all juridical states, there is only one state in the idea, namely the one concept of a state that is ideal in every respect. In contrast there are many possible concrete instantiations, or juridical states, that come more or less close to fulfilling the requirements of the ideal state but in all of which the citizens can enjoy their rights.

In his closing comments on the state in the idea, Kant quotes a legal adage based on a statement by Cicero:<sup>3</sup> *Salus reipublicae suprema lex est* (The state's well-being is the supreme law).<sup>4</sup> Achenwall also quotes this adage<sup>5</sup> in connection with the good of the community (*bonum commune*), or the commonweal. In contrast to Achenwall, however, Kant emphasizes that the expression “the state's well-being” should not be understood as “the good of the citizens and their happiness,” but instead as “the state of the greatest compatibility of the constitution with legal principles, which reason imposes an obligation on us to strive to attain *through a categorical imperative*.”<sup>6</sup> The legal principles Kant means are those he characterizes as inherent in the state in the idea. Kant's state in the idea is an unattainable ideal, whereas a juridical state is an object of (moral) experience. No concretely existing juridical state can fully satisfy the requirements of the state in the idea, which is a state of perfection.<sup>7</sup> Nonetheless, we have the duty to work continually toward constitutional perfection to approach the ideal state as closely as possible.<sup>8</sup>

To understand the distinction between the state in the idea as a concept of perfection in contrast to any existing juridical state, it is useful to consider one of Kant's own examples. Kant poses questions of how a state ideally is to be formed to guarantee it functions as a juridical state. Regarding the ideal lawgiver, his answer is that “the legislating power” can only “be in the united will of the people,”<sup>9</sup> meaning the people vote in favor of a piece of legislation *unanimously*. That Kant has

<sup>2</sup> AA VI, §45, p. 313, ll. 14–16.    <sup>3</sup> See Chapter 1, note 91.

<sup>4</sup> AA VI, §49, p. 318, l. 7.

<sup>5</sup> *I.N.II*, §92, on the one hand, and §7, on the other (AA XIX, p. 367, l. 25 and p. 335, l. 18).

<sup>6</sup> AA VI, §49, p. 318, ll. 6–14. For a detailed discussion of what the state may and may not do in light of its duty to secure individual rights, see Unberath, “Kantian State.”

<sup>7</sup> AA VI, Annex of Explanatory Comments, Conclusion, p. 371, ll. 29–34.

<sup>8</sup> AA VI, §52, p. 340, l. 27 – p. 341, l. 1.    <sup>9</sup> AA VI, §46, p. 313, ll. 29–30.

unanimity in mind is clear from the *volenti non fit iniuria* (to the consenting no wrong happens)<sup>10</sup> argument he makes. This argument would not apply to anyone who *in fact* voted against a piece of legislation. As a dissenter, the person could be wronged if the legislation applied to him. Thus the *volenti non fit iniuria* argument presupposes unanimity. Furthermore, Kant indicates that each citizen’s freedom protects him from obeying any law “other than one to which he has given his approval.”<sup>11</sup> Important to note is that Kant does not say “to which he *could have* given his approval” as he does in both *Theory and Practice*<sup>12</sup> and *Perpetual Peace*,<sup>13</sup> where he does not yet discuss the state in the idea. In contrast, in the state in the idea of the *Doctrine of Right*, Kant requires the lawgiver to be the united will of the people, and citizens’ freedom to mean that a citizen need not obey any law for which he *in fact* did not vote.

Although in the ideal state all legislation would be unanimously adopted, Kant realizes a unanimous vote cannot be expected in any concretely existing juridical state. Thus of any *concrete* juridical state Kant says: “therefore only a majority of the votes, not directly from the voting population (in a large people) but only from a delegation as representatives of the people, is all that can be foreseen as attainable.”<sup>14</sup> Accordingly, the distinction between the state in the idea and a juridical state with respect to the lawgiver is that in the state in the idea all legislation would be adopted unanimously by the people, whereas in any concretely existing juridical state a majority vote of the people’s representatives would suffice, assuming the majority vote does not impair citizens’ ability to enjoy their rights. Nonetheless, the juridical state in question would have a duty to strive toward the perfection of the state in the idea. In our example, the juridical state would have a duty to improve its constitution to the extent possible to attain a situation in which legislation more perfectly conforms to the choice of its entire people, rather than to the choice of a narrow majority.

<sup>10</sup> On *volenti non fit iniuria*, see [Chapter 2](#), note 79. <sup>11</sup> AA VI, §46, p. 314, l. 8.

<sup>12</sup> AA VIII (*T&P*), p. 297, ll. 18, 22, where Kant does discuss the original contract as a “mere idea of reason” (l. 15), but does not discuss the state in the idea.

<sup>13</sup> AA VIII (*PP*), p. 350, n.\*, ll. 16–18 (emphasis added), where Kant discusses a republican constitution and citizens’ freedom.

<sup>14</sup> See AA VIII (*T&P*), p. 296, ll. 29–33. In AA VI, §52, p. 341, ll. 9–12 and §49, General Comment B, p. 325, ll. 12–15, Kant also seems to accept a representative form of state for any juridical state, with the result that decisions are presumably taken based on a majority vote.

## 2. The distinction of three state powers

That the “legislating power” can belong only “to the united will of the people” is just one of several ideal constitutional principles Kant attributes to the state in the idea. Of these principles, the distinction and separation of three state powers are central to Kant’s ideas, and it is to this topic that we devote the rest of this chapter.<sup>15</sup> Important to remember throughout our discussion is that Kant’s division of three state powers is a division *within* an individual state, or the “state of the individuals of a people in their relation to each other,” which he calls the “civil state.”<sup>16</sup> For the civil state, Kant first considers what powers must exist and subsequently turns to the normative thesis that the three powers must be *separated*. The normative thesis, however, presupposes that one can speak of three and only three relevant powers:<sup>17</sup>

Every state contains three *powers*, i.e. the universally united will in three persons (*trias politica*): the *ruling power* (sovereignty) in the person of the law-giver, the *executive power* in the person of the governor (according to the law), and the *judicial power* (as recognition of everyone’s own according to the law) in the person of the judge (*potestas legislatoria, rectoria et iudiciaria*), comparable to the three propositions in a practical syllogism: the major premise, which contains the *law* of that will, the minor premise, which contains the *direction*

<sup>15</sup> On this topic see Joerden, *Staatswesen*, pp. 33–46. Our analysis deviates considerably from Joerden’s.

<sup>16</sup> AA VI, §43, p. 311, ll. 12–23. In §§45–49, Kant does not consider international law and the state of the individuals of a people in their relation to other peoples, when the civil state is called a “power” and in this role calls for a law of nations. See too §45, where Kant says: “A state (*civitas*) is a union of a group of people under laws,” for which the state in the idea is the norm for “every concrete union to become a commonwealth (thus internally),” AA VI, §45, p. 313, ll. 10–16. Granted, the principles Kant discusses in §§45–49 can be applied to a state of nation states under international law, but still Kant’s focus in §§45–49 is on the individual civil state.

<sup>17</sup> The distinction of state powers is an issue with considerable historical background. That three and only three powers were to be distinguished was far from generally accepted at the end of the eighteenth century, regardless of Montesquieu’s writings (Livre 11, Chap. 6, pp. 396–407) and the doctrines laid down in the Constitution of the United States. (The US Constitution provides for the responsibilities and powers of the legislative in Art. 1, the responsibilities and powers of the executive in Art. 2, and the responsibilities and powers of the judicial branch in Art. 3. On the tripartite division of powers in the United States see too, *The Federalist Papers* (Madison), No. 47, pp. 300–308. That Kant is familiar with the US Constitution is clear from AA VI, §61, p. 351, ll. 1–4.) Interestingly, Achenwall does not accept the tripartite distinction of powers, but instead distinguishes five. (Cf. Achenwall, *I.N.II*, where in §§113–119 (AA XIX, pp. 379–383) the author first speaks of three powers: the legislative, the executive, and the inspecting (*De potestate legislatoria, executoria et inspectoria*), and then in §§127–129 (AA XIX, pp. 387–388) also speaks of the judicial power and the right to armaments (*De potestate iudiciaria et iure armorum*) as the fourth and fifth powers.) Kant focuses on state powers internally thus excluding any consideration of the military as a state power because the power the military has is externally directed toward other states.

[*Gebot*] to proceed according to the law, i.e. the principle of subsumption under that law, and the conclusion, which contains the *judicial decision* (the sentence) of what in the case at bar is established as right [*Rechtens*].<sup>18</sup>

We need to examine these three powers against the backdrop of the tripartite division of public justice Kant discusses in §41 of the *Doctrine of Right*.<sup>19</sup> The legislating power corresponds to protective justice (*iustitia tutatrix*), the goddess of lawgiving; the executive power corresponds to mutually acquiring justice (*iustitia commutativa*), the goddess of the free market; the judicial power corresponds to distributive justice (*iustitia distributiva*), the goddess of the judiciary. This correspondence is apparent for the first and third powers, thus needing no further comment. For the second power, this correspondence is not immediately clear because Kant seems to make mere allusions in the text quoted above. These allusions are to the executive power (1) as the *potestas rectoria* which (2) gives the direction (*Gebot*) to proceed according to the law, i.e. provides the principle of subsumption under the law. Furthermore, Kant elsewhere refers to the executive power when he says that the police order the market. As we shall see, the responsibility of the second power is to order the free and public market and enforce the law and the decisions of the judiciary.

We see the first allusion to the second power’s responsibility to order the free and public market, when Kant labels the executive power of the governor *potestas rectoria*. Otherwise Kant uses *potestas executoria*<sup>20</sup> for the second power, which is the common designation Achenwall also uses.<sup>21</sup> When Kant calls the second power *potestas rectoria*, he uses the Latin name for the governor, the highest commander, who is called *summus rector*.<sup>22</sup>

Kant takes the concept *rector*, and consequently also the concept *potestas rectoria*, from Achenwall’s doctrine of society (*societas*). Achenwall distinguishes societies in which the members are equal and those in which the members are not equal. A society of the latter type is called *societas inaequalis*, or also *societas rectoria*.<sup>23</sup> In a *societas rectoria*

<sup>18</sup> AA VI, §45, p. 313, ll. 17–27. We translate the German *Gebot* here as “direction,” which does not really cover the full meaning of the word *Gebot*, but which will be explained below. The three powers proceed from the universally united will of the people, as explained in §46, which is not an unusual idea in light of modern concepts of the state, see Preamble to the US Constitution: “We the people . . .” and Art. 20(2) of the German Basic Law: “All state power proceeds from the people.”

<sup>19</sup> See Chapter 1.

<sup>20</sup> AA VI, §49, p. 316, ll. 25–26; p. 318, ll. 4–5.

<sup>21</sup> See, e.g., *I.N.II*, title before §113 (AA XIX, p. 379, l. 17). <sup>22</sup> AA VI, §48, p. 316, l. 20.

<sup>23</sup> *I.N.II*, §22 (AA XIX, p. 339, ll. 20–23).

one has a superior (*superior*) and subjects (*subditi*). In the eighteenth-century mind, a prime example of a *societas rectoria* was the family, where the parents are the superiors and the children are the subjects.<sup>24</sup> A marriage, on the other hand, is by its nature a society of husband and wife, where the members of the society are equal. Through closing a contract expressly or impliedly, the husband can be given dominance over his wife.<sup>25</sup> Kant has this latter case in mind when he writes: "The husband has rectorial power in domestic matters (*potestas rectoria rei domesticae*), but he cannot order his wife to do anything. Hence he has only the advantage of disposition."<sup>26</sup> *Potestas rectoria* in the sense of having the advantage of disposition does not mean power of command in the meaning of "command" more commonly used today. Instead this *potestas rectoria* means that the husband has the legal authority to govern domestic matters, including, for example, to sell things in the household, even when those things belong to his wife. It is this authority, and not the power of command in today's sense, that Kant primarily has in mind with the concept *potestas rectoria*. We are thus assuming that the *rector* in the juridical state does not have a simple power of command, but instead a specific authority to create the legal infrastructure on which the free market and social interaction in general depend.<sup>27</sup>

The second allusion to the executive power's responsibility to order the free and public market lies in Kant's equating "the executive power" of the "governor (according to the law)" to the "*direction* [*Gebot*] to proceed according to the law," and in turn equating the "*direction* [*Gebot*] to proceed according to the law" to the "principle of subsumption" under the law.<sup>28</sup> To understand this equation, we need to understand Kant's concept of subsumption in this context, on which we concentrate in the next section.

Finally, Kant refers to the executive power's responsibility to order the free and public market, when he speaks of the "public market

<sup>24</sup> *I.N.II*, §§81–82 (AA XIX, p. 362, ll. 25–27). <sup>25</sup> *I.N.II*, §43 (AA XIX, p. 348, ll. 22–25).

<sup>26</sup> AA XIX, R.7587, p. 463, ll. 2–3.

<sup>27</sup> In his *Reflections* on Achenwall's *Ius Naturae II*, Kant speaks of the second power in the state as *rector* and *potestas rectoria*. Of course, that does not mean in these early phases of working on his doctrine of right that Kant had the same meaning for the concept *potestas rectoria* as we are assuming for the later written *Doctrine of Right* (AA XIX, R.7948, p. 562, l. 21 (*rector*); R.7538, p. 449, l. 20; R.7958, p. 564, l. 27 (*potestas rectoria*); R.7728, p. 501, l. 21 (*potentia rectoria*); Kant also speaks of *potestas rectoria* in his lectures *Feyerabend*, AA XXVII.2.2, p. 1384, l. 6.

<sup>28</sup> See note 18.

ordered by administrative ordinance [*Polizeigesetz*].”<sup>29</sup> When Kant says that the police order the market, he means that ordering the market is the responsibility of internal administration and thus of the executive power.<sup>30</sup>

From the allusions and reference Kant makes he seems to limit the executive power to having two responsibilities. The first responsibility is to create a legal infrastructure to facilitate the functioning of the market. One facet of this responsibility would be establishing a recording office for recording deeds to land, assuming the statutory law of the concrete state makes deed recording mandatory. We examine this example more closely in the next section. The second responsibility of the executive power is to enforce the law and the decisions of the third power, the judiciary.<sup>31</sup>

### 3. Practical syllogisms of reason and the role of the executive

Kant compares the three powers to the “three propositions in a practical syllogism of reason.”<sup>32</sup> This comparison and its formulation can be understood only if we understand the way Kant uses the concept of subsumption, which, although plausible, is definitely uncommon. To understand Kant’s use of the concept of subsumption, we first need to understand what Kant means by a “practical syllogism.”

#### A. Practical syllogisms of reason

Scholars discussed practical syllogisms of reason before Kant, whereby they emphasized that practical syllogisms do not differ basically from what we shall call “theoretical syllogisms,” even though practical

<sup>29</sup> AA VI, §39, p. 303, l. 1.

<sup>30</sup> Although the German *Polizeigesetz*, which means literally “police law,” seems to denote the police, this denotation is incorrect for German spoken during the eighteenth century. The word *Polizei*, which is derived from the Greek *polis*, meaning “city” or “state,” meant the internal administration of a state. Therefore, one could speak of good or bad *Polizei* and mean good or bad administration.

<sup>31</sup> We do not consider this second aspect of the executive power because Kant plainly states that the executive power executes judicial judgments (“*through* the executive power”), §49, p. 317, ll. 32–34 (emphasis added). See too AA VI, §44, p. 312, ll. 30–33, and General Comment E, p. 331, ll. 4–5, where Kant indicates that the governor executes criminal sentences.

<sup>32</sup> AA VI, §45, p. 313, ll. 22–27. See full text in [section 2](#) at note 18.

sylogisms have some particularities.<sup>33</sup> Kant discusses theoretical syllogisms repeatedly in the *Critique of Pure Reason*. In particular, he deals there with a simple syllogism in mood Barbara: "All humans are mortal. – Cajus is a human. – Cajus is mortal."<sup>34</sup> The major premise, as Kant writes, formulates a "universal rule" (*all* humans are mortal), whereas the minor premise contains a "subsumption . . . under the condition of the rule."<sup>35</sup> The minor premise is a declaration that the condition of the rule is fulfilled, which presupposes an act of judgment.<sup>36</sup> In Kant's example, the condition of the rule in the major premise is that the subject of the minor premise is a "human." Later Kant says: "The real judgment, which expresses the assertion of the rule *in the case subsumed*, is the conclusion (*conclusio*)."<sup>37</sup> In other words, application of the rule to the case described in the minor premise leads to the judgment in the conclusion that the predicate (the assertion)<sup>37</sup> in the major premise applies to the subject of the minor premise. The conclusion is the "real," the *actual*, judgment.<sup>38</sup>

Kant discusses practical syllogisms in the *Critique of Practical Reason*. Practical syllogisms proceed, as Kant says,

from the universal in the major premise (the moral principle) through a subsumption in the minor premise of possible actions (as good or bad) under the major premise to the conclusion, namely the subjective determination of the will (to an interest in the practically possible good action and to the maxim founded on it).<sup>39</sup>

Here, Kant considers a *prospective* practical syllogism.<sup>40</sup> He discusses a certain action that one has in mind and the moral judgment about this possible future action. In place of the descriptive universal judgment in the major premise of a theoretical syllogism, we find a moral principle in the major premise of a practical syllogism. As in the theoretical

<sup>33</sup> See, Walch/Hennigs, vol. II. col. 1304.

<sup>34</sup> AA III, p. 251, ll. 2–9 (B 378). In the "use of judgments in syllogisms" individual judgments can be treated as universal judgments, which Kant indicates at p. 87, ll. 20–27 (B 96).

<sup>35</sup> AA III, p. 255, ll. 23–35 (B 386/387). <sup>36</sup> See, e.g., AA III, p. 131, ll. 13–16 (B 171).

<sup>37</sup> An "assertion" for Kant has the same meaning as the predicate of a proposition (AA III, p. 251, ll. 4–5 (B 378)).

<sup>38</sup> What Kant says regarding the simple form of a theoretical syllogism is self-evident. We would like to note that Kant uses the originally medieval Latin verb *subsumere*, which is integrated into European languages (in German: *subsumieren*) and used by continental European lawyers today in its traditional meaning, namely of supplying the minor premise.

<sup>39</sup> AA V (*Practical Reason*), p. 90, ll. 30–36 (A 162). In the second *Critique*, Kant does not yet distinguish between "will" (*Wille*) and "choice" (*Willkür*). In the quote above, Kant means "choice" in the later terminology of the *Doctrine of Right*.

<sup>40</sup> As Kant's ideas on the warning and indicting conscience show (AA VI (*Virtue*), p. 440, ll. 10–24), Kant is familiar with prospective and retrospective practical syllogisms.

syllogism one finds a subsumption in the minor premise of the practical syllogism (namely of the action one has in mind) under the condition of the major premise. The conclusion of a practical syllogism contains the judgment that the predicate in the major premise applies to the action,<sup>41</sup> again *mutatis mutandis* as for a theoretical syllogism. The major premise, for example, could contain the universal proposition (the rule) "lying is prohibited," the minor premise, the determination "the action I am considering is a lie," and the conclusion, "the action I am considering is prohibited." The conclusion contains the actual judgment, whose function Kant describes as the "subjective determination of the will." This function is to be equated with "an interest in the practically possible good and the maxim founded on it." From the determination that the action I have in mind is prohibited, I take an interest in refraining from committing the action, which interest determines, or at least can determine, my will (choice) to refrain.<sup>42</sup>

In the *Vigilantius Lecture Notes*, Kant provides us with a somewhat different example of a practical syllogism. "The defamer shall give honor back to the defamed. He defamed me. Therefore he must provide satisfaction."<sup>43</sup> Here the minor premise concerns a past action. The duty derived in the conclusion relates to a future action. Since the minor premise is related to an action in the past, we can call this type of practical syllogism *retrospective*, even though the conclusion is related to a future action. Otherwise this example is no different from the one in the second *Critique*. Its major premise states a universal rule. Its minor premise contains the subsumption of a concrete action under the condition of the major premise. The conclusion tells us that the predicate of the major premise applies to the concrete action of the minor premise. Kant calls the conclusion of this type of syllogism an *imputatio legis* (an "imputation of the law"), which he equates with the *applicatio legis ad factum sub lege sumtum* ("application of the law to the act subsumed under the law").<sup>44</sup> The conclusion is an imputation or application of the law because it imputes the consequences of violating the law (providing satisfaction) to the concrete action.

In the *Critique of Practical Reason* and in the *Vigilantius Lecture Notes*, Kant discusses norms of prescription or proscription and thus prescribed or proscribed actions. The juridical postulate of practical reason in the *Doctrine of Right*, however, adds a permissive law to the

<sup>41</sup> The act description is the grammatical subject of the minor premise.

<sup>42</sup> More exhaustively on the interest, see Hruschka, "Human Dignity," pp. 69, 76–78.

<sup>43</sup> *Vigilantius*, AA XXVII.2,1, p. 562, ll. 14–18. <sup>44</sup> *Ibid.*, p. 562, ll. 9–10.

prescriptions and prohibitions and thus adds merely permitted actions to the prescribed and proscribed actions to be subsumed under norms. It thereby expands the range of practical syllogisms which can be constructed under norms of conduct. The postulate, as we have seen, is also called a “permissive law (*lex permissiva*) of practical reason.” It attributes to everyone the authority, or the moral capacity, to be the owner of things, the husband of a wife or the wife of a husband, the father or mother of a child with parental power over the child, and so forth.<sup>45</sup> Let us limit ourselves here to the capacity to be the owner of things. The assumption of this capacity makes rules necessary on how a person can acquire ownership of a thing, such as a rule that the transfer of ownership of a movable thing requires the owner to hand over the thing to the acquirer and an agreement between the two of them that the ownership right should transfer.<sup>46</sup> Under these circumstances, practical syllogisms are possible and take the following form:

*Major premise:* An acquirer of a movable thing must agree with the owner of the thing that ownership shall transfer and the owner must hand the thing over to the acquirer in order for the acquirer to become the owner of that thing.

*Minor premise:* A has agreed with B, the owner of a particular pocket watch (i.e. a movable thing), that ownership of the watch should transfer to A, and B has handed the watch over to A.

*Conclusion:* A has acquired ownership of the watch, i.e. A has become the owner of the watch.

Here we have a universal rule on the acquisition of ownership of a movable thing as the major premise, a subsumption in the minor premise of the acts A and B undertook under the conditions of the universal rule, and a judgment in the conclusion that the predicate of the major premise (becoming the owner of a movable thing) applies to the subject of the minor premise (i.e. to A).

Kant has such practical syllogisms in mind when he writes about “rulings, according to which each person . . . can acquire or maintain something as his own according to the law (*through subsumption of a case under it* [the law]).”<sup>47</sup> The formulation that one acquires ownership of

<sup>45</sup> AA VI, §2, p. 246, ll. 5–8. See [Chapter 4](#).

<sup>46</sup> See, e.g., the provision in §929 BGB: “To transfer ownership of a movable thing it is required that the owner of the thing hand it over to the acquirer and that both owner and acquirer agree that ownership should transfer. If the acquirer is [already] in possession of the movable thing, then agreement on the transfer of ownership is sufficient.”

<sup>47</sup> AA VI, §49, p. 316, ll. 27–29 (emphasis added). In *Religion*, Kant speaks of “acquisition” and “maintaining” my rights as essential interests of citizens, AA VI, p. 97, l. 30.

a thing "through subsumption of a case under the law" might seem confusing at first. Still the idea is fairly simple. There can be no doubt that sellers and buyers of pocket watches generally know what legal meaning their actions have. The buyer knows that he acquires ownership of a watch through agreement with the seller and the seller's handing the watch over to him. The buyer goes through the process of acquiring a watch precisely because he wants to acquire ownership of the watch, and he draws the above-formulated conclusion to the relevant practical syllogism. If he did not draw this conclusion, then he would not acquire the watch, unless we assume that someone can acquire a watch *without knowing* that he is acquiring it, which is totally implausible. Consequently, he acquires the watch "through subsumption of a case [*his case*] under the law."

Kant uses this concept of subsumption in §§45 and 49 of the *Doctrine of Right*.<sup>48</sup> Kant's use of this concept is different from the way the concept is used today in legal parlance on the European continent. As the concept is used today, it is the *judge* (and not the citizen) who reaches the judgment from the subsumption. The judge, who decides with final binding force in case of legal dispute, reaches his decision by subsuming a case under the conditions of the law.<sup>49</sup> Kant, however, calls *the undertaking of legally relevant actions on the public market* "subsumption." His idea is that citizens apply the law when they acquire things on the public market. The citizen uses the possibilities provided by the law and Kant calls this use "subsumption."<sup>50</sup>

Let us return to the example of acquiring a watch. In cases of legal dispute over acquisition of a watch, a judge may reach the same practical syllogism conclusion as the buyer. Yet there are differences. The buyer's conclusion that he has acquired the watch is constitutive for acquisition of the watch. If the buyer did not come to this conclusion, the judge would never get involved. Still the buyer's acquisition could be disputed. The judge's conclusion, however, is binding

<sup>48</sup> AA VI, §45, p. 313, l. 25; §49, p. 316, l. 27–29.

<sup>49</sup> Of course everyone can subsume cases as the judge does, but these decisions have no final binding force. See AA VI, Introduction MM IV, p. 227, ll. 23–26, where Kant distinguishes between final binding imputation and judgmental imputation. The former is judicial or valid imputation and the latter is imputation resulting from anyone's private judgment. In the modern sense of subsumption, a citizen who subsumes a case does it *like* the judge does, but it is the judge, not the citizen, who is responsible for the subsumption of cases.

<sup>50</sup> The citizen does not subsume a case *like* a judge would, but instead is the *primary* person who subsumes cases under the law. Naturally, the judge also subsumes cases under the law, but in this context the judge's role is *secondary*, albeit generally of central importance in a juridical state.

for all parties to the dispute. If we assume the judge determines that the buyer has acquired the watch, then the buyer *is* the owner of the watch and this ownership right can no longer be disputed (absent additional facts). The possibility of obtaining a judicial decision gives the buyer the necessary security for his rights (assuming the buyer has correctly subsumed his case under the law). It is thus the judiciary with its final binding decisions that makes rights peremptory. Securing citizens' rights, making those rights peremptory, is precisely the function of the juridical state, which reveals itself through its judiciary.

### *B. The role of the executive*

We have just discussed the backdrop for comparing the three powers to the three propositions in a practical syllogism. To understand this comparison it is helpful to consider an example from traffic law. For a driver, one can think of the following practical syllogism:

*Major premise:* On public roads all automobile drivers must drive on the right side of the road.

*Minor premise:* I am driving an automobile on a public road.

*Conclusion:* Therefore, I must drive on the right side of the road.

This syllogism is simply another example of a prospective syllogism, as Kant discusses in the *Critique of Practical Reason*. The conclusion leads to an (my) interest in undertaking the right action and can also lead in fact to my driving on the right side of the road in accordance with the law. With respect to the prospective nature of the syllogism and its conclusion there is not much difference between this syllogism and the syllogism in the example on the prohibition against lying. Yet in §45 Kant says of the minor premise of the syllogism not that *I* (as a driver in our example here) "proceed according to the law," meaning that *I* observe the law in my actions. Instead Kant speaks of the second power's "*direction* [*Gebot*] to proceed according to the law," and he does not speak of "subsumption under the law," but instead of the "*principle of subsumption*" under the law.<sup>51</sup>

In his remarks on the minor premise, Kant is concentrating on the special function of the executive power in encouraging citizens to implement practical syllogisms. In our example we could think of the traffic police person, who controls traffic. The police person's actions

<sup>51</sup> See full quote from AA VI, §45 in [section 2](#), text to note 18.

are actions, such as Kant describes for the governor (*Regierer*), the agent of the state. The governor's commands (*Befehle*) are, as Kant says, not laws, but instead individual commands, "because they relate to a decision in a particular case and can be changed."<sup>52</sup> Because of my familiarity with the traffic code I know that I must drive on the right side of the road. In a concrete traffic situation, however, the southbound traffic on a four-lane highway might be heavily congested after an accident. The traffic police could then *direct* me as a northbound driver in accordance with the law to drive in the far right lane only and direct the southbound drivers to use all three remaining lanes as southbound lanes. The traffic police thus deliver the *principle* for application of the traffic code by drivers. A principle, at least the way Kant uses the word in accordance with the language of the eighteenth century, is that from which something takes its rise, a beginning, a source of something.<sup>53</sup> The traffic police give drivers directions on how they should apply the traffic rules and drivers apply the law accordingly. The police in our example tell them to drive on the right, but limit or expand the meaning of "right side of the road" in terms of the number of lanes available for them to use in the individual situation. Therefore the traffic police are the *source* of drivers' driving on the right side of the road, they provide the "*principle* of the subsumption" under the law, and in this way, they "execute" the traffic code.

This example from traffic law illustrates how the executive power functions when the law is a law of prescription. To further our understanding of the executive role, it is important to consider what the executive does when the relevant law is a permissive law. Let us recall our practical syllogism for acquiring a pocket watch, but alter it a bit to bring the executive role more into relief. According to §873 of the

<sup>52</sup> AA VI, §49, p. 316, ll. 24–34. The remaining expressions in §49 must be interpreted accordingly. Kant also calls the directions (*Gebote*) of the second power *Regeln* (today literally "rules"), *Verordnungen* ("orders"), and *Dekrete* ("decrees"). All of these terms must be understood as descriptions of decisions in individual cases. In modern German language usage, what Kant calls *Regel* would be called *Regulierung*. *Verordnung* usually means a universal rule of conduct issued by an administrative agency and just below a statute in rank. In non-technical modern language, *Verordnung*, in contrast, can still mean an individual order (*Was hat der Arzt dir verordnet?* – "What did the doctor order?"). Given these translations, we would like to translate the first few sentences of §49 as follows: "The governor of the state (*rex, princeps*) is that (moral or physical) person, who has the executive power (*potestas executoria*): the agent of the state, who appoints the magistrates, issues rulings to the people according to which each person . . . can acquire or maintain something as his own according to the law (through subsumption of a case under it). . . . His commands to the people and to the magistrates and their superiors (ministers), who are responsible for administration of the state (*gubernatio*), are orders, decrees (not laws) because they are directed to decisions in a particular case and are given subject to being changed."

<sup>53</sup> Cf. AA III, p. 238, ll. 12–32 (B 356–357).

German *Civil Code*,<sup>54</sup> to effectively purchase land, the buyer of the land must agree with the seller that ownership of the land should transfer to the buyer and the acquisition has to be recorded in a land registry. In such a system, a practical syllogism can be constructed as follows:

*Major premise:* An acquirer of land must agree with the owner of that land that ownership shall transfer and the acquirer must register the transaction in the land registry in order for the acquirer to become the owner of the land.

*Minor premise:* A has agreed with the owner of Blackacre, B, that ownership of Blackacre should transfer to A and the transfer has been recorded in the land registry at the local court in City X.

*Conclusion:* A has acquired Blackacre and has become the owner of it.

Both the buyer and a judge could draw the conclusion to this practical syllogism. The conclusion will motivate the buyer to in fact perform the actions that bring about the transfer of ownership. If the judge draws the conclusion, it has the consequence discussed above. The judiciary gives the buyer the necessary security and the buyer thus becomes the peremptory owner of the land.

The executive power in the state plays an important role in connection with such a syllogism. The executive must establish the land registry in City X. The legislature only adopts the universal rule needed for such transfers, or in our example it adopts §873 of the *Civil Code*. The executive has to establish the concrete land registry in the particular city. Important in establishing it is not constructing the building, hiring the personnel, and equipping them as needed for the job. The decisive step is giving the legally binding executive proclamation – the dedication – that makes this constructed unit of personnel and equipment a land registry.

For our interpretation of §45, this example shows that we cannot always understand the direction (*Gebot*) to proceed according to the law, which Kant discusses in connection with the second power, to be commands in the narrower sense, as we do in the example of the traffic police. As a command in the narrower sense, a *Gebot* is a categorical imperative. It tells you simply what must be done. Instead we must also understand the directions (*Gebote*) as offers, or in Kantian terminology as hypothetical imperatives. A hypothetical imperative does not tell

<sup>54</sup> “To transfer ownership of a parcel of land . . . it is necessary for the right holder to agree with the other party on the occurrence of the alteration of rights and the alteration must be registered in the land registry . . .”

you what must be done in all cases, but rather what must be done to attain a particular goal. The executive in our example of the land registry provides the apparatus for buying real property and gives us the “direction”: “If you want to become the owner of a piece of real property, then you must use this institution for recording your title to it.”<sup>55</sup>

The principle of subsumption the executive branch provides includes establishing the legal infrastructure needed according to the law,<sup>56</sup> in our case establishing the land registry in City X.<sup>57</sup> That this interpretation is correct follows from the universal rules on transferring ownership – and Kant primarily has cases of property transfers in mind as can be seen from his comments in §49 – including elements other than prescriptions and proscriptions, namely also elements of a permissive law. We do not have a *duty* to acquire a piece of land, and no one can direct or order us to do so. Still, we do have the moral *capacity*, the authorization, to acquire land. Accordingly, the executive’s “directions to proceed according to the law” providing for the acquisition of property are not commands in the narrower sense, but must be seen as offers.

#### 4. Kant’s comparison of the three powers to the propositions in a practical syllogism

To understand Kant’s comparison of the three state powers to the three propositions in a practical syllogism one needs to keep the sort of practical syllogism used in the example regarding the acquisition of land in

<sup>55</sup> In German, this interpretation is more readily seen. In German, *Gebot* has two meanings. It usually means “direction,” and Germans today use *Angebot* to mean “offer.” Still, when speaking of an offer, one can also use the word *Gebot*, which Kant indeed means with the “direction – offer – [*Gebot*] to proceed according to the law.” Kant is primarily thinking of executive offers, as opposed to executive commands. (On this use of the language, see Grimm, “Gebot,” vol. 4, col. 1803 under II 1.) The word *Gebot* in the sense of an offer is used today in German primarily for auctions and means “bid.” Similarly, where Kant speaks of executive *Befehle* (AA VI, §49, p. 316, l. 39), he does not always mean commands in the sense of directions on what to do, but also recommendations. The German word *Befehl* can have this meaning as well (Grimm, “Befehl,” vol. 1, col. 1252 under 2). Similarly, the English “to command” could be used once to mean “to commend” (see, *Shorter OED*, p. 374, Art. “command,” No. 8).

<sup>56</sup> Kant cannot use the word “infrastructure,” because it did not come into being until the twentieth century. He, however, is familiar with the concept from Adam Smith, e.g. in: I.xi.b.5.

<sup>57</sup> Kant could easily have been thinking of the example of a land registry, because he mentions *Ingrossation*, which is entry in the land registry (AA VI, §31, p. 291, l. 2, and Annex of Explanatory Comments 4, p. 362, l. 8), and of course he knows that a land registry has to be established.

mind. We need to focus on the conclusion the citizen reaches when he acquires a piece of land, on the one hand, and the conclusion a judge will reach in cases of dispute regarding this acquisition, on the other. The question arises regarding what the citizen needs to acquire a piece of land through subsumption of his case under the law. The citizen needs (1) the major premise, which formulates the universal rule regarding the acquisition of land, such as the rule formulated in §873 of the German *Civil Code*. The citizen then needs (2) a land registry to subsume his case under the law so he can have his acquisition recorded in the land registry of City *X*. To secure his ownership, the citizen needs (3) the judge, who in case of dispute draws the conclusion that the citizen acquired ownership of the land.

The state is thus actively engaged on behalf of the citizen in the purchase of land in three ways. First, the state provides the lawgiver, who creates law on the acquisition of land in line with the permissive law of practical reason. This law tells the citizen how to exercise his moral capacity to be the owner of external things by acquiring them, should he want to do so. The law thus gives the citizen the rule (in the major premise) for subsuming cases in a concrete situation of land acquisition. Second, the state provides the executive, which establishes the land registry in City *X* to permit the citizen's subsumption under the law in the concrete case (which is why Kant speaks of the principle (source) of the subsumption under the law in §45). Third, the state provides the judge, who ensures that the property acquisition undertaken in the subsumption becomes a peremptory acquisition. Formulated more generally, (1) the state has the responsibility and authority to provide public law, meaning the state has to adopt and promulgate law; (2) the state has the responsibility and authority to make a free and public market possible where goods can be exchanged (*commutatio*),<sup>58</sup> which the state accomplishes by creating the needed legal infrastructure; and (3) finally, the state has the responsibility and authority to provide courts to resolve with final binding force any disputes that arise regarding the acquisition of objects of our choice.

In the *Doctrine of Right*, Kant assumes there are three and only three state powers. Other than comparing the three powers to the three propositions in a practical syllogism, he gives no argument for this tripartite division. A passage in the *Critique of Judgment*, however, clarifies why Kant refers to a practical syllogism in discussing the tripartite

<sup>58</sup> AA VI, §31 I, p. 289, ll. 18–19.

division of state powers, and why this tripartite division is correct. In the *Critique of Judgment*, Kant distinguishes between two types of *a priori* divisions. A division *a priori* is either analytic or synthetic. It is analytic if one can construct it according to the principle of contradiction: Every being is either *A* or non-*A* (*quodlibet ens est aut A aut non-A*). An analytic division is thus dichotomous. A synthetic division, however, if it is to be derived from concepts *a priori*, must "in accordance with what is requisite for synthetic unity in general . . . necessarily be a tri-chotomy." A synthetic unity contains: "(1) a condition, (2) a conditioned, and (3) the concept which results from combining the conditioned with its condition."<sup>59</sup>

A syllogism in mood Barbara provides the model for such a synthetic unity: (1) the major premise, which is formulated generally as: "All *p* are *q*" can be expressed as: "If *p* then *q*." The conditional proposition (if *p* . . .) contains the (sufficient) condition for the occurrence of *q*. (2) The minor premise contains the subsumption of a specific case under the condition of the major premise. The minor premise says that we have a case of *p*. The minor premise thus formulates, in the language of the *Critique of Judgment*, "the conditioned." To say that the minor premise formulates "the conditioned" means that the minor premise assumes relevance under the major premise because it fulfills the conditions contained in the major premise; the minor premise gives us a case of *p*. (3) The conclusion reveals the consequences from the subsumption. From combining the conditioned with its condition in the subsumption, a further concept results, namely the determination that the assertion contained in the major premise (*q*) also applies to the conditioned (a case of *p*) in the minor premise.

The same reasoning as we have used with a theoretical syllogism applies to *practical* syllogisms. A practical syllogism is also a synthetic unity of the three propositions it contains. Let us consider the practical syllogism of a citizen acquiring a piece of land. The universal law in the major premise (e.g. §873 of the German *Civil Code*) says that two things are necessary in order to acquire a piece of land, namely an agreement between the owner and the acquirer and the acquirer's registering the transfer in the land registry. The major premise, stated as a conditional, would be: "If a potential acquirer agrees with the owner of a piece of land that the land is to become the acquirer's land and the

<sup>59</sup> AA V (*Judgment*), p. 197, ll. 18–27; see also AA IX (*Logic*) §113, note 2, p. 147, l. 25 – p. 148, l. 2.

acquirer enters the transaction into the land registry, then the acquirer is the (new) owner of the land." The minor premise contains a description of the acts the acquirer (*A*) performed in order to become the new owner of a piece of land under the conditions stated in the major premise. To satisfy the conditions in the major premise, the acts must be agreeing with the former owner and registering the transaction in the land registry. The minor premise would thus be: "*A* agreed with the owner of Blackacre that Blackacre should belong to *A* and *A* entered the transaction in the land registry." The conclusion declares that *A* has become the new owner of Blackacre, or that the predicate of the major premise applies to the subject of the minor premise. The conclusion in our example would be: "*A* is the owner of Blackacre." These three propositions are (formally) necessary and sufficient to form the syllogism.

This practical syllogism, as all practical syllogisms, is trichotomous. It constitutes a synthetic unity and thus is necessary *a priori*. The three state functions of which Kant speaks when distinguishing the three state powers, however, do not themselves constitute a synthetic unity. Still each function is necessary for the citizen to construct a practical syllogism when acquiring land and thus exercising the moral capacity he has by virtue of the permissive law of practical reason. The syllogism the citizen constructs does constitute a synthetic unity.<sup>60</sup> The distinction of three functions (powers) derives its necessity from the necessity inherent to the trichotomous nature of the citizen's practical syllogism. It follows that three and only three state powers are necessary *a priori*.

Important to emphasize is that Kant is primarily interested in the external mine and thine throughout his discussion of private law, and in how individuals go about acquiring something external to themselves. He also claims that without any property rights we would never need to move from the state of nature to the juridical state. Property acquisition and ownership are thus of utmost importance to his doctrine of right and literally lead us into the juridical state, for which the state in the idea is the model. It is thus not surprising that Kant focuses on what an individual needs within the state in order to acquire property, or that he concludes the individual needs a state that provides him with what is necessary to acquire it. For this purpose, the citizen needs

<sup>60</sup> The syllogism a judge will construct to decide a case of dispute also constitutes a synthetic unity but is not relevant for explaining the trichotomous nature of state power.

the apparatus to enable him to undertake practical syllogisms of the kind we have been discussing, or three and only three state powers.<sup>61</sup>

## 5. The doctrine of the three state dignities

Section 47 of the *Doctrine of Right* assumes that the three powers in the state are “dignities” (*Würden*), and in particular “state dignities” (*Staatswürden*).<sup>62</sup> All three powers derive their dignity from the united will of the people alone<sup>63</sup> and thus could be seen on the same level. Still, in the *Doctrine of Right*, Kant attributes the “highest” dignity to the legislature,<sup>64</sup> which he thus calls the “sovereign.”<sup>65</sup> The lawgiver is “higher” than both the highest executive and the highest judge and thus stands *above* them, because the second and third powers are *subject to*, or *under* the law.<sup>66</sup>

The highest dignity in the state traditionally has the name “majesty.”<sup>67</sup> In the *Doctrine of Right*, Kant gives the state dignities neither this nor any other traditional name.<sup>68</sup> Instead as names for the three dignities, Kant uses the typical attributes of the three powers. For the will of the lawgiver “in regard to the mine and thine” Kant uses “irreprehensible,” for the executive capacity of the *summus rector* he uses “irresistible,” and for the judgment of the highest judge he uses “inappellable.”<sup>69</sup> The dignities have these attributes from the nature of their office.

The three attributes: irreprehensibility, irresistibility, and inappellability, are traits of the divine will,<sup>70</sup> which Kant assigns to the

<sup>61</sup> One might argue that one single power could fulfill all three of these functions, but at the moment we are not discussing the *separation* of powers, but the three functions, or three powers, in a state. That the powers have to be separated will be discussed in section 6.

<sup>62</sup> Kant takes this idea from a line of tradition. We find the tradition, for example, in Achenwall, who describes the sovereign of a state (*imperans*) as being endowed with the highest dignity in the state: *Imperanti civili inhaeret summa in republica dignitas*, I.N.II, §122 (AA XIX, p. 385, ll. 18–19).

<sup>63</sup> AA VI, §45, p. 313, ll. 17–18; §47, p. 315, ll. 27–28.

<sup>64</sup> AA XIX, R.7725, p. 500, l. 22, where Kant states: *Die dignitas legislativa ist also maiestas*.

<sup>65</sup> See, e.g., AA VI, §45, p. 313, ll. 18–19; §49, p. 317, ll. 9–11.

<sup>66</sup> AA VI, §49, p. 317, ll. 9–11 for the *Regent*. That the judge is subject to the law is self-evident because the judge has to apply the law, AA VI, §49, p. 317, ll. 32–33.

<sup>67</sup> See AA XIX, R.7459, p. 385, l. 3, where Kant comments with the word *maiestas* for Achenwall’s *summa in republica dignitas*. Cf. R.7725, p. 500, ll. 22–23.

<sup>68</sup> Kant has the names for the three dignities in AA XIX, R.7948, p. 562, ll. 21–22: *Maiestas legislativae potestatis, Auctoritas rectoriae et sanctitas iudicatoriae*. (The majesty of the legislative, the authority of the executive, and the holiness of the judicial powers.)

<sup>69</sup> AA VI, §48, p. 316, ll. 17–22.

<sup>70</sup> See, e.g., Hobbes, *Leviathan*, Cap. XXXI, p. 256, where it is stated: “that it is impossible to resist the divine power” (*quod divinae potentiae resistere impossibile est*).

legislative, the executive, and the judicial powers even prior to the *Doctrine of Right*.<sup>71</sup> The attributes Kant uses do not imply that citizens have any particular duties. It is not “prohibited” for citizens to criticize the law, but instead the will of the lawgiver *cannot* be criticized. It is not “prohibited” to resist the *summus rector*, but instead no one has the moral capacity to resist the *highest* commander.<sup>72</sup> It is not “prohibited” to appeal the decisions of the highest judge, but there is simply no possibility to do so.

That these attributes should be so interpreted is most obvious for the third power. The judgment of the highest judge is inappellable, because that trait lies in the concept of a legally binding judgment by the highest court in the land. If the inappellability of the highest judge's decisions is inherent in the concept of the highest judge, then one can assume that the irresistibility of the highest commander's executive power must also inhere in the concept of the highest commander, and the irreprehensibility of the lawgiving will must also inhere in the concept of a lawgiver.

The *summus rector's* power is irresistible because his decisions develop a bindingness no one can resist. No one can resist, for example, the dedication of an institution consisting of personnel and equipment as a “land registry.” Once the institution has been dedicated, the agency *is* a land registry, and everyone who wishes to acquire a right that has to be entered into the land registry is forced to use the land registry. Similarly, the traffic police cannot be resisted. If a police person directs traffic to drive in the far right lane, then that decision is binding and any conduct contrary to it becomes by definition a traffic violation. In other words, the police person's decision to redirect traffic changes the nature of what is correct conduct on the roads in the concrete situation.

The lawgiving will's irreprehensibility seems to raise a problem, because it is obvious that not every physical or moral person who offers himself as a lawgiver can be called irreprehensible. *One* irreprehensible lawgiver, however, is conceivable, namely the “united will of the people,” or more precisely “the concurring and united will of all, to the

<sup>71</sup> AA XIX, R.7728, p. 501, ll. 18–27. Kant also indicates there that the three attributes can only be united in God. In the same Reflection, p. 502, ll. 1–4, Kant, however, still characterizes the three attributes such that “one” “may” not “resist” the highest ruler, the highest judge, and the highest governor. Cf. R.7538, p. 449, ll. 14–15.

<sup>72</sup> Achenwall also does not connect a prohibition with the concept of irresistibility, but rather a lack of moral capacity. In *I.N.II*, §206 (AA XIX, p. 416, ll. 8–10) Achenwall reports that the “Machiavellists” are of the opinion that the prince has an irresistible right (*ius irresistibilitatis*) over the people subject to him of the sort that he *can* do the people no wrong.

extent each decides in the same way for all and all for each.”<sup>73</sup> This lawgiver is irreprehensible under the principle *volenti non fit iniuria*.<sup>74</sup> Accordingly for *this* lawgiver, any possibility of criticism is excluded. If *every one* of a people agrees to a law, then there is no one left (*inside* the state) to criticize this law. Kant’s three attributes thus crystallize the essence of each of the three powers in the state in the idea.

## 6. The separation of powers

Kant requires the three state powers to be separated,<sup>75</sup> and provides the arguments for this separation.<sup>76</sup> Kant first formulates the responsibilities of the executive and explains why this power must be separated from the legislative power. The executive must treat citizens “in accordance with laws of their own autonomy,” according to which “each is in possession of himself and is not dependent on the absolute will of another alongside him or above him.”<sup>77</sup> Consequently, the citizens are independent, and they tend to their own affairs. The regent (executive) must not interfere in the citizens’ affairs because he is not their guardian. Otherwise, the government would be paternalistic, which is the worst form of despotism.<sup>78</sup>

Kant defines despotism as a government (executive) that is “simultaneously lawgiving.” The lawgiver’s responsibility is to adopt provisions that apply universally. The executive’s responsibility is to issue directions that apply in the individual case. If the lawgiver and the executive are united in one and the same (moral) person, then every individual decision by the executive that is not in accord with the law amounts to a change of the law. Indeed, the executive *as the lawgiver* could change the law at any time and thus the executive would not be bound by the law. The executive might not in fact interfere with the citizens’ affairs, but no interference could ever be designated as contrary to law. The union of lawgiver and executive thus endangers citizens’ autonomy.<sup>79</sup>

<sup>73</sup> AA VI, §46, p. 313, l. 34 – p. 314, l. 2. In the *Reflections* (AA XIX, R.7547, p. 452, ll. 9–10) one finds: “The legislative power in a society can lie only in the common will.” (*Potestas legislatoria societatis non potest residere nisi in voluntate communi.*) See too AA XIX, R.7725, p. 500, ll. 21–23 and R.7756, p. 508, l. 16.

<sup>74</sup> See Chapter 2, note 79. <sup>75</sup> AA VI, §48, p. 316, ll. 8–16.

<sup>76</sup> AA VI, §49 *passim*. <sup>77</sup> AA VI, §49, p. 317, ll. 5–8.

<sup>78</sup> AA VI, §49, p. 316, l. 34 – p. 317, l. 3. Kant took this position as early as AA VIII (*TðP*), p. 290, l. 33 – p. 291, l. 5.

<sup>79</sup> Montesquieu, Livre 11, Chap. 6, p. 397: “When the legislative power is mixed with the executive in one and the same person or one and the same office, freedom ceases to exist. One would need fear that the same monarch or the same senate would issue tyrannical laws and then would apply them tyrannically.”

Kant complements the despotism argument with a further argument for the separation of the legislative and executive powers, which he gains from the irreprehensibility of the lawgiving sovereign. "The ruler [*Beherrscher*] of the people (the lawgiver) cannot simultaneously be the regent [*Regent*], because the latter is subject to the law and is obligated by the former and thus by another, the sovereign [*Souverän*]."<sup>80</sup> Because the regent is *under* the law, his actions can (and must) be evaluated according to the law. Consequently, cases are conceivable in which the regent can be criticized and therefore it is "below the dignity" of the irreprehensible sovereign, or lawgiver, to simultaneously be the regent.<sup>81</sup> Kant makes a similar argument for the relationship between the legislative and judicial powers.<sup>82</sup>

The most interesting aspect of Kant's arguments on the separation of state powers begins with his claim that neither the lawgiver nor the executive can judge. The argument quickly advances to a plea for the jury system of trial. One has to remember that Kant was writing at a time when Germany and most of continental Europe had an inquisitorial system.<sup>83</sup> Against this backdrop it is clear why Kant is wary of having the prosecutorial and judicial powers combined within the person of the judge. Kant claims that both the sovereign and the executive can do the parties to a trial wrong, because they are superiors (*Obrigkeit*) and the people are subjects. As superiors they are seized of state power, whereas the parties to the trial are powerless. Consequently, the parties to the trial are placed in a *merely passive* role toward the judge. This passivity opens the door to their being wronged by those in power.

Kant sees, however, that his arguments also raise concern about an individual judge being solely responsible for reaching a decision in a

<sup>80</sup> AA VI, §49, p. 317, ll. 9–11.

<sup>81</sup> The "below the dignity" argument can be found in AA VI, §49, p. 317, l. 37 – p. 318, l. 3 for the relationship between the lawgiver and judge, but it is equally applicable for the relationship between the lawgiver and regent. Kant makes a similar argument in AA XIX, R.7725, p. 500, ll. 16–27. See too AA XIX, R.8006, p. 580, ll. 13–15, where Kant provides other cases in which the sovereign can be reproached. Two more of Kant's earlier *Reflections* remain valid for the *Doctrine of Right*: "The executive and the judge are bound to govern and to judge according to the law. Thus they are *under* the law," AA XIX, R.7984, p. 572, ll. 29–30 (emphasis added). They can do wrong because they subsume individual cases under the law (AA XIX, R.7781, p. 517, ll. 23–24). "Thus the sovereign can neither govern nor judge," AA XIX, R.7984, p. 572, ll. 30–31; cf. too R.7653, p. 477, ll. 25–28 (for the judge).

<sup>82</sup> AA VI, §49, p. 317, l. 37 – p. 318, l. 3. Of course there is an obvious reason why the united will of the people cannot judge. The united will of the people would include the will of the parties to the trial, but, as Kant notes, no one can judge in his own case, AA VI, General Comment E, p. 335, ll. 29–30.

<sup>83</sup> Achenwall also discusses the sovereign's right to investigate criminal offenses as an aspect of the sovereign's duty to prevent crime, *I.N.II*, §199 (AA XIX, p. 414, ll. 6–14). The inquisitorial system was abolished in France following the revolution in 1789.

trial. The judge is a civil servant (“magistrate,” “administrator of the state”) appointed by the executive. As a civil servant, the professional judge also wields state power and the parties to the trial, who are subject to that power, must remain passive. Consequently, Kant favors a jury system with a separation between the jury’s and the judge’s roles.<sup>84</sup> The jury is responsible for finding the facts; the judge is responsible for applying the law to the facts the jury found.<sup>85</sup>

Another way of expressing these responsibilities is to say the jury is responsible for determining the truth of the minor premise of a practical syllogism, the conclusion of which the judge will draw with final binding force. In a case like the example we discussed in [section 3](#) of acquiring a watch, it is the jury that determines whether the acquirer actually agreed with the owner of a watch that ownership of the watch should transfer to the acquirer and whether the owner handed the watch over to the acquirer. Accordingly, it is not only the citizen acquirer who subsumes his own case under the law when acquiring a watch, but in case of later dispute, it is the citizen juror who subsumes that same case under the law by affirming or denying whether the facts contained in the minor premise are indeed true. In other words, the jury tells the court whether or not we have a case of *p*. The judge is then bound to apply the law, which contains the conditions under which the subsumption is to be made. In light of the jury’s determination, the judge must draw the conclusion that the predicate of the major premise now applies (or does not apply) to the subject of the minor premise of the practical syllogism, namely to the putative acquirer. This application of the law is the conclusion of the syllogism, namely that a plaintiff is or is not the owner of the watch.<sup>86</sup> As Kant states, at issue is awarding (conferring upon) the plaintiff or the defendant “what is his.”<sup>87</sup>

<sup>84</sup> For the next three paragraphs see AA VI, §49, p. 317, ll. 9–36, where Kant also uses the English “jury.”

<sup>85</sup> AA VI, §49, p. 317, ll. 32–34.

<sup>86</sup> Kant has both private law and criminal law trials in mind when discussing the jury system. In AA VI, §49, p. 317, l. 31, however, Kant uses the expressions *schuldig* and *nicht schuldig* with respect to the jury’s verdict, which Gregor translates as “guilty” and “not guilty.” The translation is too narrow because it indicates that Kant is considering only the criminal law trial, which is incorrect. A better translation is “liable” and “not liable,” which can be used for civil or criminal trials.

<sup>87</sup> AA VI, §49, p. 317, ll. 23–27: “For a judgment (a sentence) is an individual act of public justice (*iustitiae distributivae*) performed by an administrator of the state (judge or court) upon a subject, i.e. upon someone belonging to the people and thus not vested with any power, to award (confer upon) a subject what is his.” The Gregor translation is incorrect. It uses “verdict” instead of “judgment,” which is incorrect because Kant is talking about the judge’s decision (*Richterspruch*) and not the jury’s. Furthermore, it attributes “thus not

Execution of the judgment is then the responsibility of the executive power.<sup>88</sup>

Kant's model is the procedural law of England during the eighteenth century. In a description of English trial procedure Achenwall wrote in 1768, he says that the jury is responsible for deciding on the truth of the claims put forth by the plaintiff or the defendant. Not until the jury has *unanimously* decided does the judge enter judgment based on the law.<sup>89</sup> In such a system, the judge exercises the judicial function directly. Still Kant emphasizes that the jury judges at least "indirectly."<sup>90</sup> That the jury judges indirectly is important for Kant, because Kant assumes that the jury – in contrast to the sovereign, the executive, and the civil servant judge – can do no wrong to the parties to the trial. They can do no wrong because the jurors, as representatives of the people, are selected "through free election" by the people for each individual case. Both the plaintiff and the defendant are *actively* involved in the selection process,<sup>91</sup> and this active involvement is an exercise of public power. The jury thus represents "the people," meaning *all* of the people without exception.<sup>92</sup> Both the plaintiff and the defendant are represented by the jury as well. Decisive is that the jury decides unanimously, which Kant does not expressly state but clearly presumes. Again the idea behind the *volenti non fit iniuria* argument is applicable. The plaintiff and the defendant suffer no wrong at the hands of the jury, because they are represented by the jury and the jury reaches its verdict unanimously. The role of the civil servant judge is marginalized because once the jury has determined the minor premise of the relevant practical syllogism, the judge must decide according to the law – law that the

vested with any power" to the administrator of the state (judge or court), who indeed does have the power to award a subject what is his. Kant goes on to say that the jury judges *indirectly*, meaning through the court, and that the court has the judicial power to apply the law to the facts the jury found and let everyone be awarded what is his.

<sup>88</sup> AA VI, §49, p. 317, l. 33: "through the executive power." Achenwall, *I.N.II*, §127 (AA XIX, p. 387, ll. 25–29), distinguishes between fact-finding, sentencing, and executing a judgment, attributing all three functions to the judicial power. Kant differentiates more strongly, attributing the fact-finding to the jury, the sentencing to the judge, and the executing of the judgment to the executive power.

<sup>89</sup> Achenwall, *Staatsverfassung*, p. 310.

<sup>90</sup> AA VI, §49, p. 317, l. 36.

<sup>91</sup> Montesquieu also discusses this aspect of the selection process, Livre 11, Chap. 6, p. 398.

<sup>92</sup> In *Perpetual Peace*, AA VIII (PP), p. 352, ll. 20–23, Kant criticizes the case "in which all decide for and, if need be, against one (who thus does not agree), so that all, who are nevertheless not all, decide" as "a contradiction of the universal will with itself and with freedom." This objection cannot be made against a system where the parties are actively involved in jury selection and the jury has to decide unanimously.

people have given themselves and which therefore can do them no wrong.

In this chapter, we first considered Kant's "state in the idea," which is on the level of the *lex iusti*, and contrasted it to a state in reality, or the concretely existing state formed by a people and on the level of the *lex iuridica*. We saw that the three powers correspond to the three types of justice, the *iustitia tutatrix*, the *iustitia commutativa*, and the *iustitia distributiva*, with the legislative power providing protective justice through adopting and promulgating law, making it available to the public, the executive power facilitating commutative justice in mutual acquisition by administering the public market, and the judicial power providing distributive justice by reaching final binding decisions on individual rights in cases of dispute. We discussed Kant's comparison of these three powers to the propositions in a prospectively oriented practical syllogism and argued that the tripartite division of three state powers results from the formal necessity of the practical syllogism. Accordingly, there are three and only three state powers. We then outlined the attributes Kant assigns to the three state powers as state dignities, leading into our discussion of Kant's arguments for why these powers have to be separated.

In the next chapter we discuss the state in reality, meaning the juridical state, on the level of the *lex iuridica*. We consider the different forms of state – autocracy, aristocracy, and democracy – and the forms of government – despotism and republicanism – Kant discusses in the *Doctrine of Right*. We shall discover that Kant's idea of the perfect juridical state is a representative democracy where the lawgiving power is under a duty to reform the constitution until it accords most perfectly with the idea of the state we have discussed in this chapter, the lawgiving power making itself superfluous over time.

## The state in reality

Kant's decisive question on public law is: How is a "supreme state power," a *summum imperium*,<sup>1</sup> possible? The question is *not*: How is an *actual* dominion of humans over humans possible? History shows it is. "States" indistinguishable from dens of thieves, slavery, despotism, concentration camps, confining walls, and the like have existed from time immemorial. Instead Kant's question is: How is a dominion of humans over humans with the character of *law* possible? The concept of a supreme state power includes an authorization to establish law, meaning the supreme power has the right to establish law, but more importantly the moral capacity (*facultas moralis*) to do so. Even for a system of "only positive law," Kant notes, "a natural law must precede which establishes the lawgiver's authority (i.e. the capacity to obligate others through his choice)."<sup>2</sup> The basic question of the law of state is thus: Why do people who call themselves "lawgivers" have the authority to give law? Kant formulates the question as follows: "In every commonwealth there is a *summum imperium* [supreme power], and therefore also *subditi* [subjects]. *Prior to any real dominion and subjection, however, there must be a right of human beings according to which it [dominion] is originally possible.*"<sup>3</sup> The question thus is: How is legal dominion originally possible?

<sup>1</sup> AA VI, General Comment A, p. 318, ll. 23–24.

<sup>2</sup> AA VI, Introduction MM IV, p. 224, ll. 33–37. The "hierarchical structure of the legal order" plays a role in German theory on legal positivism. This hierarchical structure is a pyramid of power-conferring norms for the issuance of laws and regulations. The structure depends on a "supra-positive basic norm." The "supra-positive basic norm" is assumed and not proved or established. See Kelsen, *RR*, pp. 196–227 (on the "basic norm"), and pp. 228–282 (on the "hierarchical structure of the legal order"). Kant's comment in the text above provides the model for every relevant "tiered construction" of legal orders. Kant, however, *asks* whether a natural law establishing the lawgiver's authority exists, whereas Kelsen's legal positivism depends on this question not being asked and indeed on the impermissibility (according to the positivists) of asking it.

<sup>3</sup> AA XIX, R.7974, p. 568, ll. 5–8 (emphasis added).

This question of public law aligns with the questions Kant raises regarding private law. For property law Kant asks: How is legal (as opposed to purely factual) dominion over external things possible? For contract law: How is one person's legal dominion over another person's choice to perform a particular act possible? For family law: How is one person's dominion within a family possible? As for these areas of private law, the relevant question for the law of state is: How is legal dominion over a whole people possible?

The answer to this question begins with the postulate of public law,<sup>4</sup> which requires us to move to a juridical state where our rights are secure. Fulfilling this requirement takes us from the state in the idea of the *lex iusti* to the state in reality of the *lex iuridica*. The move to any concretely existing state is accomplished through closing the original contract. We consider the idea of the original contract in [section 1](#). Kant's concepts underlying the nature and content of the original contract lean heavily on Achenwall's concepts, particularly on Achenwall's distinction between the *universi* and *singuli* ([subsection A](#)), and on his distinction among the three forms of state. Establishing any one of these three forms will determine the content of the original contract ([subsection B](#)). Kant's ideas regarding the forms of state (autocracy, aristocracy, democracy) can seem perplexing because his position on them changes radically from *Perpetual Peace* to the *Doctrine of Right*. We examine this change of position in [section 2](#) in order to flesh out his final position on the ideal form of government in a juridical state. In [section 3](#) we return to Kant's position on revolution, a topic we broached in [Chapter 3](#), arguing further that Kant rejects revolution only in a juridical state. In a juridical state, Kant replaces the right to revolt with the duty to reform the constitution in an effort to align it with the ideal constitution of the state in the idea.<sup>5</sup> We discuss the duty to reform in [section 4](#).

## 1. The original contract

The juridical state is the state in which my rights are secure, the state in which *everyone's* rights are secure. This security is reciprocal: "No one is obligated to refrain from interfering in another's possessions, unless the latter gives the former security that he will observe the same

<sup>4</sup> AA VI, §42, p. 307, ll. 9–11; see too [Chapter 1](#), section [1A](#) and [B](#) and [Chapter 6](#), section [6](#).

<sup>5</sup> On the duty to reform the constitution, see Unberath, "Kantian State," pp. 340–344.

restraint toward him.”<sup>6</sup> By entering a juridical state, everyone gives everyone else this security from interference. We, meaning those of us who can come into contact with each other, are thus obligated *together* and *with all others* to enter a juridical state.<sup>7</sup>

One can conceive of free and equal persons entering a juridical state only through agreement, or by closing a contract, because agreement is the only basis for a union that is compatible with the original right to freedom.<sup>8</sup> Kant calls this agreement the “original contract.”<sup>9</sup> The original contract is the (idea of an) act through which a people “constitutes itself as a state.”<sup>10</sup> Kant bases this contract on “omnilateral”<sup>11</sup> agreement, meaning the agreement of every contracting party. The postulate of public law, which requires this union, thus includes the idea of such a contract.<sup>12</sup>

In the *Doctrine of Right*, the attribute “original” means “prior to any act with legal relevance.”<sup>13</sup> The *idea* of the original contract is thus a principle of the *lex iusti*. The original contract is original because it

<sup>6</sup> AA VI, §42, p. 307, ll. 14–16. See too AA XIX, R.7665, p. 482, ll. 19–23; R.7666, p. 483, ll. 10–11; R.7732, p. 502, ll. 24–26. We consider the problems connected with this statement in [Chapter 9](#), [section 1](#).

<sup>7</sup> AA VI, §42, p. 307, ll. 24–26.

<sup>8</sup> See AA XIX, R.7974, p. 568, ll. 6–12: “A right of human beings . . . must precede any real dominion and subjection according to which it [dominion] is originally possible. That can be only if all those subjected convened: because only in this way can the freedom of everyone be completely compatible with his subjection. Therefore, all commonwealths must be seen as derived from an ideal original contract.” For an in-depth study of the nature and role of consent in the idea of an original contract, see Hill, Jr., *Human Welfare*, pp. 77–95. On the original contract in *Theory and Practice*, see Kulenkampff, “Ursprünglicher Vertrag.”

<sup>9</sup> Kant takes the idea of an original contract from tradition established by authors such as Rousseau with his idea of a “social contract,” Rousseau, *Du contrat social*. Locke, in contrast, speaks of an “original compact,” Locke, *Two Treatises*, Second Treatise, §97, p. 207. A French translation of Locke’s *Two Treatises* was available in the eighteenth century, see Achenwall, *I.N.II*, §88 (AA XIX, p. 366, ll. 8–16). Hume also speaks of an “original contract” rather than a “social contract,” Hume, “Original Contract,” *passim*. A German translation was available in the eighteenth century. Kant essentially equates the original contract to the social contract. So expressly in AA VIII (*TeP*), p. 297, l. 5: “*contractus originarius* or *pactum sociale*.” See too AA VI, §52, p. 340, ll. 7–9 and §54, p. 344, ll. 14–15, where Kant speaks of a “social contract,” which in light of the context must be identical to the original contract, see [section 1B](#).

<sup>10</sup> AA VI, §47, p. 315, ll. 30–34. <sup>11</sup> AA VI, §10, p. 259, l. 26.

<sup>12</sup> AA VI, §47, p. 315, ll. 30–36; Annex to the 2nd edn. of 1798, Conclusion, p. 372, l. 11, ll. 34–35. See too AA XIX, R.7960, p. 565, ll. 15–18, which we quote in full in [section 1B](#) at note 41. On this point see Herb and Ludwig, “Kants kritisches Staatsrecht,” p. 446 *et seq.*

<sup>13</sup> See [Chapter 2](#). The attribute “original” in “original contract” does *not* have the meaning “not derived,” as Kant indicates. The (conceived) act of the contract closing, as far as the state it establishes is concerned, is a *first* act, but as an “omnilateral” act it is derived from the agreement of all others as far as the individual person is concerned. Thus in *this* sense it is not “original.” See AA VI, §10, p. 259, ll. 22–26: “Accordingly, the first acquisition is not necessarily the *original* acquisition, because the acquisition of a state of public law through the union of the wills of all to give universal legislation would be an acquisition prior to which no [acquisition of this type] can occur, and still it would be derived from the particular wills of everyone and *omnilateral*.”

must be presupposed to impart legal relevance to any actual union of free and equal persons to a state. The *act* of closing an original contract for any concrete state, however, is adventitious and thus part of the *lex iuridica*. Kant indeed speaks both of the *idea* and the *act* of closing the original contract.<sup>14</sup> Conceptualizing the act of closing the original contract raises two major problems. The first is determining who the parties to the contract are and what their relation is to those granted power under the contract. We tackle this problem in [subsection A](#). The second is determining what the precise content of this contract must be, which we discuss in [subsection B](#).

### A. The difference between the *universi* and *singuli*

Achenwall illuminates Kant's ideas about the parties to the original contract and their relation to those in power. Achenwall calls the original contract "pact of civil union" (*pactum unionis civilis*). Through closing this contract the *singuli*, meaning the individuals who close the contract seen singly, obligate the *universi*, meaning these same individuals taken as a whole, to care for security and a sufficient standard of living, and the *universi* obligate the *singuli* to further the common good.<sup>15</sup> Kant does *not* accept the substance of Achenwall's theory. Kant is not concerned with providing a sufficient standard of living or with furthering the common good,<sup>16</sup> as Achenwall understands the *bonum commune*. Kant, however, does use Achenwall's distinction between the *universi* and *singuli*,<sup>17</sup> contrasting the "united people," the *universi*, to the "multitude of that people severally,"<sup>18</sup> the *singuli*.

To fully appreciate Achenwall's doctrine of the *universi* and *singuli* one should consider the Roman law concept *universitas*. A *universitas* is a corporate body which is distinguished from the *singuli*, or the individual persons who constitute the *universitas*. In Roman law the concepts are used primarily to distinguish between goods and receivables which belong to the *universitas* and those which belong to the individual persons.<sup>19</sup> Examples of *universitates* are cities with city theaters,

<sup>14</sup> AA VI, §47, p. 315, ll. 30–33. Closing the original contract to which Kant refers in §15, p. 266, ll. 34–37, which extends "to the entire human race," must also be conceived as a concrete (adventitious) act.

<sup>15</sup> *I.N.II*, §91 (AA XIX, p. 367, ll. 20–23).

<sup>16</sup> For more arguments on this point, see Unberath, "Kantian State," pp. 344–349.

<sup>17</sup> AA VI, §47, p. 315, ll. 34, 36. <sup>18</sup> AA VI, §47, p. 315, ll. 28, 29.

<sup>19</sup> *Institutiones*, 2.1.6 and Marcian, *Digests*, 1.8.6.1: *Universitatis sunt, non singulorum* . . . ([These things] belong to the *universitas* and not to the *singuli*). Ulpian, *Digests*, 3.4.7.1: *Si quid universitati debetur, singulis non debetur*. (If something is owed to the *universitas*, then it is not owed to the *singuli*.)

stadiums, and similar facilities. These facilities belong to the city. The individual citizens of the city are *not* owners, and certainly not joint owners of these facilities.

For Achenwall, a *universitas* is a corporate body (such as a city) formed for an indefinite period of time.<sup>20</sup> Achenwall develops the distinction between the *universitas* and the individual persons forming the *universitas* by further distinguishing between two aspects of the natural persons who belong to the *universitas*. If one sees the individual persons as a whole, then Achenwall speaks in the plural, and only in the plural, of *universi*. If one sees the individual person as an individual, leading an individual life unrelated to the body, Achenwall speaks of a *singulus*.<sup>21</sup>

The state can also be conceived as such a corporate body (*universitas*). With the pact of civil union (*pactum unionis civilis*), a multitude of individuals constitute a union, which is the state. As a union, these individuals compose the *universi*. The contract of civil union imposes obligations on the *universi* toward the *singuli* and on the *singuli* toward the *universi*. The contract thus vests rights in the *universi* corresponding to the obligations of the *singuli* and rights in the *singuli* corresponding to the obligations of the *universi*.<sup>22</sup>

Two of the conclusions Achenwall draws from these assumptions are relevant to understanding Kant. The first is that the *universi* stand *above* the laws of the state, because the *universi* form the state and, much like the members of a constitutional congress, are free to form it as they like. Accordingly, the *universi* can promulgate whatever laws they choose, amend the laws, or repeal them altogether. The *singuli* are subject to the laws.<sup>23</sup> Correspondingly, Kant calls the *universi* “the united people” as the “superior over all,” and he calls the “multitude of that people severally,” the *singuli*, the “subjects.”<sup>24</sup> Kant’s idea that the

<sup>20</sup> Achenwall, *I.N.II*, §123 (AA XIX, p. 385, ll. 34–36), defines a *universitas* as a *societas civilis* (civil society), which forms a *corpus aeternum* (eternal corporation).

<sup>21</sup> The distinction between *universi* and *singuli* is classic and can be found in a non-legal sense in Antiquity, e.g. in Tacitus, *De Vita*, Cap. 12, p. 17: *ita singuli pugnant, universi vincuntur* (“thus they fight individually and are defeated together”). In a legal sense, the distinction provides two different concepts of “people”; the “people” “seen collectively” is the unity of the *universi*; the “people” “seen distributively” is the sum of the “*singuli*.” See AA VI, General Comment B, p. 324, ll. 4–5. Similarly, in *Perpetual Peace*, Kant distinguishes between the “collective unity of the united will” and the “distributive unity of the will of all,” AA VIII (PP), p. 371, ll. 6–10. The contrast between the *universi* and the *singuli*, also in a legal sense, can be found long before Achenwall, see, e.g., Pufendorf, *De Jure*, III/III/§5/p. 240. On Pufendorf’s use of the concept *universi*, see our text in Chapter 9, section 4A.

<sup>22</sup> Generally for every society, *I.N.II*, §8 (AA XIX, p. 335, ll. 20–25).

<sup>23</sup> See *I.N.II*, §30 (AA XIX, p. 342, ll. 30–36), where that is said for any society whatsoever.

<sup>24</sup> AA VI, §47, p. 315, ll. 26–30.

“lawgiving power” can “be attributed to the united will of the people alone”<sup>25</sup> corresponds to Achenwall’s idea that the *universi* stand above the law and thus can promulgate, amend, and repeal it.

Kant supplements Achenwall’s ranking the *universi* above the law by attributing “irreprehensibility” to the *universi* as lawgiver. From this irreprehensibility it follows that the lawgiving power can belong only to the united will of the people. If the “concurring and united will of all” decides such that “the one over all and all over one decide exactly the same” then no wrong can be done, because the principle *volenti non fit iniuria* applies.<sup>26</sup> This lawgiver, who can do no wrong, is “irreprehensible” and thus stands above the law.<sup>27</sup>

A second conclusion Achenwall draws is that the *universi* can determine the form of state.<sup>28</sup> The forms of state Achenwall has in mind were recognized in Antiquity and are the monarchy,<sup>29</sup> aristocracy,<sup>30</sup> and democracy.<sup>31</sup> Since the contract of civil union establishes dominion (*imperium*),<sup>32</sup> it must also establish the form of state. In other words, the dominion originally belonging to the *universi* has to be transferred to one, some, or all of the participants. Achenwall speaks of a *translatio imperii* (transfer of power).<sup>33</sup> Achenwall calls the contract transferring dominion over the state the *pactum subiectionis (civilis)*, or (civil) contract of subjection. This contract transfers the *universi*’s right (*ius universorum*) to the future head of state.<sup>34</sup> This second conclusion relates to the content of the original contract, with which we deal in the next subsection.

### B. The content of the original contract

When speaking of the original contract, Kant uses the same expressions (*unio civilis*<sup>35</sup> and *pactum subiectionis civilis*<sup>36</sup>) as Achenwall. Kant also sees the idea of the *universi* being the head of state as a purely “conceptual thing.” One needs one or more physical persons to represent

<sup>25</sup> AA VI, §46, p. 313, ll. 29–30.

<sup>26</sup> AA VI, §46, p. 313, l. 29 – p. 314, l. 3. See Chapter 2, note 79.

<sup>27</sup> See Chapter 7, sections 1, 5.

<sup>28</sup> *Universi pro arbitrio de forma reipublicae suae convenire possunt. I.N.II, §93* (AA XIX, p. 367, l. 34 – p. 368, l. 16). See too §96 (p. 369, ll. 15–21).

<sup>29</sup> *I.N.II, §§142–173* (AA XIX, pp. 398–407). <sup>30</sup> *I.N.II, §§180–190* (AA XIX, pp. 409–411).

<sup>31</sup> *I.N.II, §§174–179* (AA XIX, pp. 407–408). <sup>32</sup> *I.N.II, §94* (AA XIX, p. 368, ll. 17–22).

<sup>33</sup> *I.N.II, §§97, 101* (AA XIX, p. 369, ll. 22–31; p. 371, l. 31 – p. 372, l. 24).

<sup>34</sup> See *I.N.II, §§175, 176, 179* (AA XIX, p. 407, l. 32 – p. 408, l. 6; p. 408, ll. 34–40).

<sup>35</sup> AA VI, §41, p. 306, l. 36. <sup>36</sup> AA VI, General Comment A, p. 318, ll. 27–28.

the highest state power.<sup>37</sup> Consequently Kant also speaks of three forms of state, which he designates "autocracy," "aristocracy," and "democracy." He, like Achenwall, assumes that establishing dominion over the state occurs *simultaneously* with unification to a state, the *unio civilis*, which Kant translates as *bürgerlicher Verein* (civil union).<sup>38</sup> Kant thus includes the head of state (*imperans*) in the civil union, which means that without a head of state there can be no civil union:

The *civil union* (*unio civilis*) cannot be called a *society* because the *commander* (*imperans*) and the *subject* (*subditus*) are not in partnership. They are not fellows but instead *subordinated* to each other, not *coordinated*. Those who coordinate with each other must see themselves as equals to the extent they are subject to common laws. Such a union *is* thus not a society but much more *constitutes* a society.<sup>39</sup>

Founding a state depends on establishing dominion over the state.<sup>40</sup> Consequently, the original contract, in unifying human beings to a state, determines the form of that state (autocracy, aristocracy, democracy). According to a Reflection on Achenwall, the original contract determines the external institutions of the state (*institutiones externae*), which include the form of the state:

Because the *unio civilis* [civil union] is necessary, the idea of a *pacti* [contract] as *originarii* [original] must precede it, whose content, however, includes only the *institutiones externas* [external institutions] and places in them the *salutem publicam* [public well-being]; otherwise everyone may take care of his own well-being.<sup>41</sup>

It is now apparent why Kant prefers to speak of an *original* rather than a *social* contract.<sup>42</sup> The contract Kant means is inherently a contract of subjection (*pactum subiectionis*) to state dominion, but a contract of subjection is *not* a social contract because it subjects the one to the

<sup>37</sup> AA VI, §51, p. 338, ll. 26–30.

<sup>38</sup> The German *Verein* originally meant the *act* of forming a union, although today it means the union as a *body*. Kant plays on the word in the passage in §41 quoted below by interchangeably using both meanings.

<sup>39</sup> AA VI, §41, p. 306, l. 36 – p. 307, l. 6. Correspondingly in AA XXIII (*Preparatory PP*), p. 161, ll. 10–14, where Kant writes that between a "superior and the people" an "alliance" can be conceived, "*Unio*, but no society." Similarly in AA VIII (*PP*), p. 291 ll. 19–28; see too discussion in note 9.

<sup>40</sup> Kant presupposes a close connection between the contract of subjection and the original contract in AA XIX, R.7899, p. 548, ll. 23–26; see too R.7851, p. 534, l. 28 – p. 535, l. 2.

<sup>41</sup> AA XIX, R.7960, p. 565, ll. 15–18. Kant also considers whether the original contract specifies the limits and borders of external objects that an individual person can acquire, or if an original contract for states is involved, what external objects an individual state can acquire. Here, Kant is primarily thinking of the acquisition of pieces of the earth's surface, see AA VI, §15, p. 266, ll. 28–37.

<sup>42</sup> In AA VI, §52, p. 340, l. 8, Kant speaks of "social contract" (*gesellschaftlicher Vertrag*) and in §54, p. 344, ll. 14–15, of "original social contract" (*ursprünglicher gesellschaftlicher Vertrag*).

other (rather than equally ranking its members). As Kant says, the civil union *is* not a society but *constitutes* a society. What Kant means is that founding a civil union necessarily defines a society of individuals subjected to the commanding power in this union. These individuals, meaning all those subjected to the commanding power, do form a society. This society is a society of subjects in their relation to each other, or more modernly expressed a society of the citizens of a state, which does not include the commander *qua* commander. Thus every contract of civil union entails a social contract but a contract of civil union is not the same as a social contract, because many types of social contracts other than one to form a state are possible.<sup>43</sup> Nonetheless, a social contract that is a *necessary* contract under the postulate of public law also entails that a civil union has been formed, because without a civil union this particular society of citizens would not exist. Thus presuming that the social contract is a necessarily existing contract under the postulate, one sees that the two concepts “contract of civil union” and “social contract” become identical and the terms can be used interchangeably.

Every state must be conceived as arising from an original contract.<sup>44</sup> The purpose of the original contract is subjecting the *singuli* to the *universi*’s lawgiving will and transferring the *universi*’s lawgiving capacity to one or more physical persons who then have dominion over the *singuli*. The number of recipients to whom this lawgiving capacity is transferred will determine whether the state is an autocracy, an aristocracy, or a democracy. It is the meaning of those terms that the next section explores.

## 2. The forms of state and the “representative system of the people”

Kant discusses the forms of state in *Perpetual Peace* and the *Doctrine of Right*. As is true of other vital areas of Kant’s legal philosophy,<sup>45</sup> Kant takes a different position in the later work from his position in the earlier. In this section we first discuss his position in *Perpetual Peace* and

<sup>43</sup> AA VIII (*T&P*), p. 289, ll. 16–18.

<sup>44</sup> The original contract *can* “extend to the whole of the human race,” AA VI, §15, p. 266, ll. 34–37. The original contract would extend to the whole of the human race if a comprehensive universal union of states (*allgemeiner Staatenverein*) were established. See our discussion of §61 in [Chapter 9](#). Before the establishment of a universal union of states, however, the concept of an original contract applies only to individual states.

<sup>45</sup> See in particular our Introduction, [section 4](#) for Kant’s radical change in opinion on several issues of international law.

then in the *Doctrine of Right* in order to clearly define the two positions and thus avoid confusion about his final position on the issue in 1797. Another unfortunate source of confusion on Kant's forms of state is that Kant sometimes uses different terms for one and the same concept. This problem too will be weeded out in this section.

### A. The forms of state in Perpetual Peace

The discussion of forms of state in *Perpetual Peace* may be misleading because Kant discusses only the *executive power* when elucidating these forms. He does make a few comments about the separation of the executive and legislative powers, particularly when considering despotism, but the goal of his discussion is distinguishing the various modalities of executive power. That Kant means the executive power only is clear when he says that democracy as one form of state "founds an *executive power*," and *not*, as a modern reader would most likely assume, a legislative power.<sup>46</sup>

Kant begins by saying that the forms of state can be divided into the "form of dominion (*forma imperii*)" (*Form der Beherrschung*) and the "form of government (*forma regiminis*)" (*Form der Regierung*),<sup>47</sup> which Kant sometimes calls the "style of government" (*Regierungsart*).<sup>48</sup> For the form of dominion, the issue is who has "the power of dominion," which can be one person (autocracy), some people (aristocracy), or all people (democracy). In contrast, for the form or style of government, the issue is "the way in which the state makes use of its power as determined by the constitution," and that can be "republican or despotic."<sup>49</sup>

Kant requires the form of government to be "representative," calling a non-representative form of government a "non-form" (*Unform*).<sup>50</sup> Indeed, a representative form of government is a necessary condition for that government to be republican. Accordingly, all non-representative governments are despotic. In the final analysis, Kant requires the executive power to be representative and republican. The First Definitive Article in *Perpetual Peace* thus states: "The civil constitution in every state should be republican."<sup>51</sup>

Let us first consider the notion of representation. For Achenwall, *repraesentatio* is essentially a category of international law. An

<sup>46</sup> AA VIII (PP), p. 352, ll. 20–21 (emphasis added). <sup>47</sup> AA VIII (PP), p. 352, ll. 1–14.

<sup>48</sup> AA VIII (PP), p. 352, l. 32; p. 353, l. 9. <sup>49</sup> AA VIII (PP), p. 352, ll. 13–14.

<sup>50</sup> AA VIII (PP), p. 352, ll. 24–25. <sup>51</sup> AA VIII (PP), p. 349, l. 8.

ambassador represents the people who send him.<sup>52</sup> The head of state (*imperans summus*) and the regent (*rector civitatis*) also represent the people over whom they preside in their external affairs with other nations.<sup>53</sup> Achenwall discusses these topics under the heading *Ius Gentium Universale* (universal international law). He distinguishes between civil and despotic dominion (*imperium civile* and *imperium despoticum*). Civil dominion is moderate dominion, whereas under despotic dominion the people subjected to this dominion lose their civil freedom.<sup>54</sup> Nonetheless both the civil head of state and the despot represent their own (state) people abroad.<sup>55</sup>

Kant disagrees. A despot is characterized by the fact that he does *not* represent the people over whom he has dominion, which is the criterion Kant uses to distinguish between a “republican constitution” and a “despotic constitution.”<sup>56</sup> Under a republican constitution, the head of state and the regent represent the people, whereas in a despotic state they do not. The despot is, as Kant states in *Perpetual Peace*, “the owner of the state” (*Staatsigentümer*) and not an “associate in the state” (*Staatsgenosse*) and the subject is “not a citizen of the state” but simply a subject.<sup>57</sup>

What are the criteria for a “representative system”?<sup>58</sup> One indication lies in a comment Kant makes about Achenwall’s *imperium despoticum*, to which Kant adds “without laws.”<sup>59</sup> In other words, a despot governs without laws, meaning either that there are no laws in his dominion, or, if laws exist, the despot ignores them. To avoid despotism, Kant thus requires a separation between the legislative and the executive powers. “Republicanism is the state principle of separating the executive power (the government) from the legislative.”<sup>60</sup> The head of state adopts the laws and the government executes them.<sup>61</sup> The government is then subject to the laws and is bound by them. The despot,

<sup>52</sup> *I.N.II*, §246 (AA XIX, p. 430, ll. 14–19). <sup>53</sup> *I.N.II*, §212 (AA XIX, p. 420, ll. 13–17).

<sup>54</sup> *I.N.II*, §§107, 37 (AA XIX, p. 375, l. 35 – p. 376, l. 15; p. 345, ll. 21–27).

<sup>55</sup> *I.N.II*, §212 (AA XIX, p. 420, ll. 13–17): *Populus . . . gens est; . . . quilibet imperans summus tum civilis tum despota, monarcha, collegium optimatum et collegium popolare, immo et rector civitatis gentem suam repraesentant.* (“The state people . . . is a folk; . . . every head of state, be it a civil head of state, be it a despot, a monarch, a college of aristocrats, a college of the state people, or a civil regent, represents its folk.”)

<sup>56</sup> “Republican constitution,” AA VIII (PP), p. 351, l. 21; “despotic constitution,” p. 373, ll. 3–4.

<sup>57</sup> AA VIII (PP), p. 351, ll. 13–16. As early as in his *Reflections* on Achenwall, Kant calls the despot, the “absolute master.” See AA XIX, R.7402, R.7403, p. 358, ll. 7, 9; R.7560, p. 454, l. 27, where the despot is called *dominus*.

<sup>58</sup> The expression “representative system” in AA VIII (PP), p. 352, l. 31; p. 353, ll. 12–13.

<sup>59</sup> AA XIX, R.7368, p. 345, l. 9. <sup>60</sup> AA VIII (PP), p. 352, ll. 14–16.

<sup>61</sup> See the “executor” (*Vollstrecker*) in AA VIII (PP), p. 352, l. 26.

in contrast, executes “laws, which he himself has adopted,” “high-handedly.”<sup>62</sup> Because the despot is simultaneously the lawgiver and the government, he (as the government) is not bound by the laws that he (as lawgiver) can change anytime.<sup>63</sup> In contrast, if the head of state is bound by laws a legislature has adopted, he cannot rule high-handedly but instead has to execute the legislative will, which can be representative of the people.

Kant discusses the state forms in *Perpetual Peace*, rejecting democracy, but not favoring either of the other state forms as the express criterion of a republican constitution. Both the autocratic and the aristocratic state constitutions can “adopt a style of government in conformity with the spirit of a representative system.”<sup>64</sup> For a “democratic” constitution, however, that is “impossible.” A democratic constitution “necessarily” leads to despotism,<sup>65</sup> “because there everyone wants to dominate.”<sup>66</sup> If the executive power is in the hands of all then there is no one left to hold the legislative power and the two cannot conceivably be separate.

It would be a mistake to understand Kant's ideas based on a modern concept of democracy. As Rousseau, who speaks of the diverse forms of government (*les diverses formes du gouvernement*),<sup>67</sup> Kant uses the concepts: autocracy,<sup>68</sup> aristocracy, and democracy, to refer to the three forms of the executive. In a democratic constitution “all those together who form the civil society” have “the power of dominion,”<sup>69</sup> meaning expressly the “executive power.”<sup>70</sup> The people are not only the lawgiver but they also form the government. Such an arrangement

<sup>62</sup> AA VIII (PP), p. 352, ll. 16–18.

<sup>63</sup> We find a corresponding argument for the relation between the lawgiving and the judicial powers in AA XIX, R.7941, p. 561, ll. 18–21: “One who has the highest power cannot judge, because the judge can do wrong. Therefore, there must be power against him. Especially the sovereign cannot judge, because the laws would then be void. The judgment would depend on his own will.” On the separation of powers see too, [Chapter 7, section 6](#).

<sup>64</sup> AA VIII (PP), p. 352, ll. 28–32.      <sup>65</sup> AA VIII (PP), p. 352, ll. 18–23.

<sup>66</sup> See AA VIII (PP), p. 352, l. 24 – p. 353, l. 1. Also in AA XIX, R.8054, p. 595, ll. 14–18, it says: “Even the democracy can be despotic if its constitution is without insight, e.g. as the Athenian, which allowed someone to be judged merely through a majority of votes without legal cause according to written law.”

<sup>67</sup> Rousseau, *Du contrat social*, Livre III, Chap. II, p. 400.

<sup>68</sup> Rousseau uses the traditional expression “monarchy” (*Du contrat social*, Livre III, Chap. VI, p. 408).

<sup>69</sup> AA VIII (PP), p. 352, ll. 7–8.

<sup>70</sup> AA VIII (PP), p. 352, l. 20. Furthermore, in AA XXIII (*Preparatory DoR*), p. 352, ll. 4–7, see text to note 78. Also in *Feyerabend*, AA XXVII.2.2, p. 1389, ll. 20–21, one sees consideration of whether the expressions “monarchy,” “aristocracy,” and “democracy” can mean three different “types” of government.

naturally leads to problems. If a *whole* people reach an individual decision that affects one single person, the person who is affected will, or at least *can*, vote against making the decision. The situation Kant describes will then occur that “all over and possibly against one (who does not agree), thus all, who are not in fact all, decide, which is a contradiction of the universal will with itself and with freedom.”<sup>71</sup> Here Kant has the Athens of Antiquity<sup>72</sup> in mind with its ostracism and the banning of some, such as Aristides.<sup>73</sup>

In *Perpetual Peace*, Kant would probably call what we today call “democracy,” or at least “representative democracy,” an “elected aristocracy.” This term would be in line with Rousseau, who favors an aristocratic form of government, and in particular an aristocracy based on elections.<sup>74</sup> Kant, however, sees that one needs to be cautious even with such a form of government. The representatives could be “purchasable.”<sup>75</sup> Representation even through an elected aristocracy is possible *without* the “spirit of a representative system.”<sup>76</sup> Accordingly, Kant states that “the style of government [namely, whether the people live under a republican or despotic constitution] is far more important for the people than the form of state” (meaning the form of dominion: autocracy, aristocracy, democracy), albeit making the limitation that nevertheless it “depends considerably” on the “more or less appropriateness” of the “form of state” to attain a republican constitution.<sup>77</sup>

### B. The forms of state in the Doctrine of Right

Kant maintains the premise that the forms of state relate to the *executive* branch of the government into his *Preparatory Work on the*

<sup>71</sup> AA VIII (PP), p. 352, ll. 18–23.

<sup>72</sup> See AA VIII (PP), p. 353, l. 15: “none of the old so-called republics.” See too AA XXIII (Preparatory PP), p. 167, ll. 3–4: “The Greeks did not understand the representative system.”

<sup>73</sup> See AA XIX, R.8054, p. 595, ll. 13–21 and AA XX (Comments Beauty), p. 143, ll. 15–16: “ostracism. Aristides.”

<sup>74</sup> Rousseau, *Du contrat social*, Livre III, Chap. V, pp. 406–407: *L'Aristocratie élective... est l'Aristocratie proprement dite... Outre l'avantage de la distinction des deux pouvoirs, elle a celui du choix de ces membres; car dans le Gouvernement populaire tous les Citoyens naissent magistrats, mais celui-ci les borne à un petit nombre, et ils ne le deviennent que par l'élection.* (The elected aristocracy... is the aristocracy in its proper meaning... In addition to the advantage of distinguishing between two powers, it also has the advantage of choice of its members; because for a popular government [meaning a democratic government] all citizens are innate magistrates, yet this form of government limits them to a small number, those who are picked only through election.)

<sup>75</sup> AA VI, General Comment A, p. 322, ll. 12–15. See too note 89.

<sup>76</sup> Cf. AA VIII (PP), p. 352, l. 31. <sup>77</sup> AA VIII (PP), p. 353, ll. 9–11.

*Doctrine of Right*, although he seems to conflate the meanings of “style of government” and “form of dominion.” Kant writes: “To be just, all constitutions must be republican. Yet the style of government [instead of form of dominion] can be monarchical, aristocratic, or democratic, i.e. the executive power can be arranged differently under the legislative.”<sup>78</sup> In the *Doctrine of Right*, however, Kant again refers to an autocracy, aristocracy, and democracy, but with a different slant. The new slant comes from Kant’s consideration of the *universi* transferring dominion to one or more physical persons, who then “represent the highest state power.”<sup>79</sup> The dominion that is transferred includes all of the three relevant powers in the state simultaneously, because the *universi*, who transfer this highest state power, hold, as the “universally united will of the people,”<sup>80</sup> all three powers. Kant combines all three powers when he speaks of the *one* “universal head,”<sup>81</sup> who can be the united people only, and of all three powers being only “three relationships of the united will of the people flowing *a priori* from reason and a pure idea of a head of state.”<sup>82</sup> Autocracy, aristocracy, and democracy then mean that the holder of the highest state power – one, several, or all together in the state – has *all* power. Kant says as much when talking about the autocracy: the autocrat, or single ruler, is one “who has *all* power.”<sup>83</sup> The same is necessarily true of an aristocracy or of the “whole number of the people in a democratic union”<sup>84</sup> who have dominion. After dominion is transferred, they too have *all* power. Accordingly, Kant calls the autocrat (the king) and the aristocrats “lawgiver.”<sup>85</sup> Again what is true of these two forms must likewise be true of the “united will of all.”<sup>86</sup> If the king in an autocracy and the aristocrats in an aristocracy are the “lawgiver,” then in a democracy, the united will of all is the lawgiver. In the *Doctrine of Right*, the executive is no longer in the forefront for the three state forms (as in *Perpetual Peace*).

Kant also maintains the distinction between republicanism and despotism in the *Doctrine of Right*, although we do not find the two expressly contrasted as we do in *Perpetual Peace*. Kant now takes the contrast as self-evident. Despotism remains the situation we have

<sup>78</sup> AA XXIII (*Preparatory DoR*), p. 352, ll. 4–7 (emphasis added).

<sup>79</sup> See section 1; AA VI, §51, p. 338, ll. 28–29. <sup>80</sup> AA VI, §45, p. 313, ll. 17–18.

<sup>81</sup> AA VI, §47, p. 315, ll. 24–30. <sup>82</sup> AA VI, §51, p. 338, ll. 22–26.

<sup>83</sup> AA VI, §51, p. 339, ll. 1–2.

<sup>84</sup> For the expression “the whole number of people in a democratic union” see AA VI, §52, p. 341, ll. 13–14.

<sup>85</sup> AA VI, §51, p. 339, ll. 3–7. <sup>86</sup> See AA VI, §51, p. 339, ll. 8–12.

in a government “which is simultaneously legislative.”<sup>87</sup> Despotism thus necessarily violates the principle of separation of powers. In the *Doctrine of Right*, Kant contrasts despotism to the “pure republic,” the “true republic,” as the “sole lawful constitution,”<sup>88</sup> and thus the only constitution toward which one should strive. A true republic, however, is a representative system: “Every true republic...is and cannot be other than a *representative system* of the people in order to attend to the rights of the citizens through their delegates (deputies) and doing that in the name of the people with all citizens united.”<sup>89</sup>

This change in characterization of an autocracy, aristocracy, and democracy in the *Doctrine of Right* (in contrast to *Perpetual Peace*) leads to a change in evaluation of the three state forms. Now Kant is skeptical of the autocracy, which is “as far as right is concerned, the most dangerous for the people in light of the despotism it invites.”<sup>90</sup> That Kant favors a representative democracy in the *Doctrine of Right* is apparent from the last quote in the preceding paragraph. The “united people” “is originally vested with the supreme power,” and all rights, for example of a king, who is an “office holder of the state,” must be derived from this original supreme power.<sup>91</sup>

### 3. Revolution in the *Doctrine of Right*

We can now return to Kant’s position on revolution.<sup>92</sup> Kant’s argument in its clearest formulation is as follows: The people’s resistance

against the highest legislation [can] never be other than contrary to law, indeed it must be conceived as destructive of the whole lawful constitution. To be authorized there would have to be a public law which permitted the people’s resistance, i.e. the highest law must contain a provision that it is not the highest and in one and the same judgment make the people, as subjects,

<sup>87</sup> AA VI, §49, p. 316, ll. 34–35. <sup>88</sup> AA VI, §52, p. 340, ll. 31–32; p. 341, l. 9.

<sup>89</sup> AA VI, §52, p. 341, ll. 9–12. Still, Kant describes the possibility of a representation of the people through “deputies (in parliament),” where the people have “in these guardians of their freedom and rights people who are vitally interested in their own and their families’ well-being, who are dependent on the minister for their placement in armies, fleets, and civil offices” and who are “always prepared to play into the hands of the government,” AA VI, General Comment A, p. 319, l. 33 – p. 320, l. 4. That Kant has the British constitution at the end of the eighteenth century in mind can be seen from a passage in AA VII (*Faculties*), p. 90, ll. 1–20, where Kant uses a similar description, referring to the British system (ll. 3–4).

<sup>90</sup> AA VI, §52, p. 339, ll. 12–15. <sup>91</sup> AA VI, §52, p. 341, ll. 15–18.

<sup>92</sup> We first mention his position in [Chapter 3, section 4A](#); for other accounts see, Flikschuh, “Revolution” and Westphal, “Kant on the State.”

the sovereign over the one to whom the people themselves are subject, which is self-contradictory.<sup>93</sup>

The argument is formal and claims simply that one who has the *highest* power has the highest power and there cannot be someone else who has a higher power. This conclusion lies in the very meaning of the *highest* power.<sup>94</sup> Attempting to take the highest power away from the holder of that power violates the law granting this person the highest power. It follows that revolting against a system of rules and regulations violates the rules from the point of view of the system itself.

This argument can be applied to any system whatsoever, to a den of thieves with an alpha thief, to a dictatorial system, and also to a juridical state. As a formal argument, it has no substance, no legal content in particular. It acquires legal content first when it is applied to the juridical state. Applying it to the juridical state also reveals the real drive in Kant's repeated statements rejecting revolution by the people against the highest state power. If the postulate of public law commands us to move with all others to a juridical state, then it must also prohibit us from destroying a juridical state once established. The prohibition against revolution is the opposite side of the coin from the postulate of public law. This prohibition is rational only if it relates to the juridical state, which is defined by its ability to ensure individual rights. Indeed, Kant's focus throughout public law is on the *juridical state*, and not on any state whatsoever, such as the Hobbesian state, which includes despotic states. Kant's only interest in despotic states is to reject them. Accordingly, to interpret Kant as prohibiting revolution against any type of state whatsoever would make the prohibition against revolution irrational within Kant's system of public law and in light of the postulate of public law.

The effect of revolting in a juridical state is returning to the state of nature. A revolution is "not amendment of the civil constitution, but dissolution of it, and the transition to a better [constitution] is not metamorphosis but instead palingenesis, which requires a new social contract on which the previous (now repealed) has no effect."<sup>95</sup>

<sup>93</sup> AA VI, General Comment A, p. 320, ll. 23–30. Similarly, p. 319, ll. 19–28, where Kant explains that no constitution can "contain an article which allows one power in the state to rebel against, and thus to limit, a supreme commander who has violated the constitution." The German GG has made this mistake since 1968 with its express formulation of a "right to revolt" in Art. 20(4).

<sup>94</sup> See too AA XIX, R.8046, p. 592, l. 22: "The highest power is unlimited by the nature of the concept."

<sup>95</sup> AA VI, §52, p. 340, ll. 3–9.

Consequently, Kant rejects Achenwall's doctrine providing the people with a right to revolt.<sup>96</sup> Achenwall formulates the people's right to revolt against a wrongful head of state,<sup>97</sup> noting that if the revolution is successful the people (in relation to the previous head of state) return to the state of nature.<sup>98</sup> Precisely this consequence of a revolution, the return to the state of nature, is what Kant argues must be avoided. Thus revolution in a juridical state is prohibited.

Kant makes his position limiting the prohibition against revolution to revolution in a juridical state abundantly clear. In his arguments, he is exclusively concerned with "the people who are already subject to a civil law,"<sup>99</sup> with "civil society,"<sup>100</sup> with "civil-juridical relations" and the "civil constitution,"<sup>101</sup> with the "juridical state" in general.<sup>102</sup> One need only be aware that all of these expressions mean the juridical state, as defined in §41 of the *Doctrine of Right*.<sup>103</sup> In a juridical state, even if it is imperfect, no revolution can be undertaken against the highest state power, because that would mean a return to the state of nature.

Of course not every association that calls itself a "state" or a "civil society" is a juridical state. It may be that regardless of a move in the right direction, a juridical state has not yet been attained. A juridical state could also revert to a non-juridical state. Kant is far from prohibiting revolution in a "state" which, although it calls itself a "state" and surrounds itself with state emblems, otherwise remains a den of thieves and thus indistinguishable from the state of nature. Consequently, we have to distinguish between a "state" and a "den of thieves," as did Augustine<sup>104</sup> and Achenwall. Achenwall states: "When a larger society coalesces to commit theft and robbery then such a society is not worthy of the name 'state,' such that it certainly is not a legitimate society."<sup>105</sup>

<sup>96</sup> In AA VIII (*T&P*), p. 301, ll. 5–11, Kant repeats the relevant passages from Achenwall in German translation.

<sup>97</sup> *I.N.II*, §§203–205 (AA XIX, p. 415, ll. 10–35).

<sup>98</sup> *I.N.II*, §205 (AA XIX, p. 415, ll. 31–32): *Populus . . . respectu tyranni in statu libertatis naturalis revertitur*. ("The people in relation to the tyrant return to the state of natural freedom.")

<sup>99</sup> AA VI, General Comment A, p. 318, ll. 31–32.

<sup>100</sup> AA VI, §52, p. 339, ll. 28–29.

<sup>101</sup> AA VI, General Comment A, p. 319, l. 8; §52, p. 340, ll. 4–6.

<sup>102</sup> AA VI, General Comment A, p. 320, l. 13. <sup>103</sup> See [Chapter 1](#).

<sup>104</sup> Kant would agree with Augustine's question: "Without justice, what are states other than large dens of thieves?" Augustinus, *Lib. IV, Cap. IV*, p. 101 (*Remota . . . iustitia quid sunt regna nisi magna latrocinia?*), assuming "justice" means "distributive justice in a juridical state."

<sup>105</sup> *Si qua societas maior ad rapinas et latrocinia agenda coalescit; ea civitatis nomine adeo est indigna, ut ne quidem societas legitima sit*. *I.N.II*, §89 (AA XIX, p. 366, ll. 36–38). Achenwall may have had North African pirates in mind.

We not only have a right to defend ourselves against a den of thieves who kill or enslave people, but also a duty to defend ourselves.<sup>106</sup>

Kant attempts to delimit the juridical state by using the distinction between republicanism and despotism. Since in a despotism the government is “simultaneously lawgiving,”<sup>107</sup> the despot (as executive) is not bound by the laws that he (as lawgiver) can change anytime. Without any separate lawgiver to bind him, the executive can make *ad hoc* arbitrary decisions. The subjects have no laws on which they may rely when challenging the executive. In other words, the *iustitia tutatrix*, protective justice, is gone and with her the very possibility of a juridical state. Kant formulates these conditions in his summary of his position on revolution: “There is no rightful resistance by the people . . . against the lawgiving head of state, because a juridical state is possible only by subjection to his universal lawgiving will.”<sup>108</sup> A prerequisite for the prohibition against revolution is that we have a *lawgiving* head of state, who expresses his *universal lawgiving will*. If we do not, only a despot remains, who, in Kant’s words, is the “owner of the state,” where the subjects are “not citizens” but rather merely subjects.<sup>109</sup> The prohibition against revolution does not apply in a despotic state. The despot and his followers, as the den of thieves, have usurped dominion in the state and no prohibition against revolution applies to a den of thieves.<sup>110</sup>

#### 4. Reforms in the *Doctrine of Right*

Although rejecting a right to revolt in a juridical state, Kant recognizes that the sovereign not only can but indeed must reform the constitution:

The *spirit* of the original contract (*anima pacti originarii*) contains the constituting power’s *obligation* to make the *style of government* compatible with this idea

<sup>106</sup> See Hruschka, “Notwehr,” p. 201 *et seq.*

<sup>107</sup> AA VI, §49, p. 316, ll. 34–35. See too sections 2A and B.

<sup>108</sup> AA VI, General Comment A, p. 320, ll. 11–13.

<sup>109</sup> AA VIII (PP), p. 351, ll. 13–16. In the terminology of the *Doctrine of Right*, the legislating head of state is not an “associate in the state” “because the *commander* (*imperans*) and the subject (*subditus*) are not in partnership,” AA VI, §41, p. 306, l. 37 – p. 307, l. 1, regardless of the comments on the contrasts in *Perpetual Peace*.

<sup>110</sup> Correspondingly in *Feyerabend*, AA XXVII.2.2, p. 1392, ll. 3–6: “But a tyrant is one under whom no citizen of his [the tyrant’s] state is secure in his [the citizen’s] goods and land. Here no laws are possible from either side. The human being is in lawlessness and in *statu naturali* [the state of nature].” For other arguments against the widespread assumption that Kant denies a right to revolt in any “state” whatsoever, see Hill, Jr., “Kant’s Opposition to Revolution,” p. 283; Westphal, “Kant on the State,” p. 383.

[the idea of the original contract] and if that cannot be accomplished immediately, to gradually and continually reform it [the style of government] to make it compatible *in its effect* with the sole lawful constitution, namely one of a pure republic.<sup>111</sup>

The style of government refers to whether the government is despotic or republican. In a juridical state the government is republican, but even in a republican state the constitution may be imperfectly aligned with the idea of the original contract. The idea of the original contract “makes freedom the sole principle, indeed the condition of all coercion that is necessary for a juridical constitution.”<sup>112</sup> If freedom is the sole condition for all state coercion then the state may act coercively only to the extent necessary to protect each person’s freedom of choice as long as that freedom is compatible with everyone else’s freedom of choice under a universal law. In other words, if my act is right under the universal principle of law,<sup>113</sup> then the state may, indeed must, exercise coercion to prevent others from hindering me in committing it. Furthermore, if I am acting according to the power conferred on me by the permissive law of practical reason, then the state also must use coercion to prevent anyone from hindering me in acquiring external objects of my choice. Many types of legitimate state coercion may be employed to maintain order in a juridical state, or to maintain the juridical state itself, because our freedom ultimately depends on the security it receives from entering and maintaining the juridical state we have. Still, state coercion cannot be wielded unless it is *justified* to protect individual freedom. Any limitation on my right to freedom that is unnecessary to ensure the equal freedom of all is simply an excess of state power. A juridical state with some degree of excess in state power is to some degree despotic and thus not a *pure* republic, not a government totally aligned with the idea of the original contract.

As finite and fallible human beings we can only approach the state in the idea, and thus will never actually realize the perfect constitution, the idea of the original contract. Yet we need not establish what Kant considers the “sole lawful constitution,”<sup>114</sup> the “true republic.”<sup>115</sup> Instead, the object of reform is to find a way and means of

<sup>111</sup> AA VI, §52, p. 340, ll. 27–32.

<sup>112</sup> AA VI, §52, p. 340, l. 35–37. See AA VIII (*PP*), p. 374, ll. 13–15, where Kant writes that “the concepts of reason accept only establishing lawful force according to principles of freedom, through which first alone a justified lasting state constitution is possible.”

<sup>113</sup> AA VI, Introduction DoR §C, p. 230, ll. 28.

<sup>114</sup> AA VI, §52, p. 340, l. 31. <sup>115</sup> AA VI, §52, p. 341, ll. 9–12.

governing the people that is compatible *in its effect* with the sole lawful constitution.<sup>116</sup>

Not the form of state, but rather the style of government is decisive when reforming the constitution.<sup>117</sup> Still, by characterizing the true republic as “a representative system of the people”<sup>118</sup> and rejecting autocracy as the most dangerous of the three state forms, Kant favors a representative democracy as the state form most likely to ensure that the style of government is republican and not despotic. Nonetheless, the state form is secondary to the question of whether we have a true republic. “The forms of state are only the letter (*littera*) of the original lawgiving in a civil state,” and they can be sustained as they happen to be.<sup>119</sup> Indeed, the “sovereign” – meaning the physical person on whom the united will of the people has conferred sovereign power – may not change the state from one of these pure forms of state into another.<sup>120</sup> Therefore, reforms may be undertaken, but not to change the state form, only to change the style of government to align it with the pure republic.<sup>121</sup>

The reforms leading to a republican constitution must occur “gradually and continually”<sup>122</sup> through “lawgiving,”<sup>123</sup> by the “lawgiving superior.”<sup>124</sup> Attaining the ultimate goal of the reforms will make the constitutional lawgiver superfluous. “This is the sole lasting state constitution, where the *law* is self-governing and does not depend on any particular person; the final goal of all public law, the state solely in which everyone’s own can be *peremptorily* distributed.”<sup>125</sup> As long as the highest power, the lawgiver, is represented by a (moral) person, which poses the danger that the constitution will be changed unnecessarily, we will continue to have only provisional rights and no “absolutely juridical state of the civil society.”<sup>126</sup> The sovereign, who gives the laws, must become “virtually invisible,” as Kant also indicates in

<sup>116</sup> AA VI, §52, p. 340. ll. 26–32.

<sup>117</sup> In this respect, Kant maintains the position he adopted in *Perpetual Peace* (see [section 2A](#)).

<sup>118</sup> AA VI, §52, p. 341, ll. 9–10. <sup>119</sup> AA VI, §52, p. 340, ll. 23–27.

<sup>120</sup> AA VI, §52, p. 340, ll. 13–22.

<sup>121</sup> At this point, Kant either begins to think in terms of the philosophy of history, or at minimum expresses his own hope for the future. The “old empirical forms,” “which merely served to bring about subjection of the people,” will disappear. Kant is most likely thinking of the inherited monarchy of his time. These old forms will dissolve into the “original (rational)” form for which “solely freedom” will be the “principle and condition for [the use of] all coercion.” It is precisely that freedom which is the sole principle and condition for the use of all coercion that is required for “a juridical constitution” in the real meaning of the word “state,” AA VI, §52, p. 340, ll. 31 – p. 341, l. 1.

<sup>122</sup> AA VI, §52, p. 340, l. 30. <sup>123</sup> Cf. AA VI, §52, p. 340, l. 3.

<sup>124</sup> AA VI, Annex of Explanatory Comments, Conclusion, p. 372, ll. 13–18.

<sup>125</sup> AA VI, §52, p. 341, ll. 1–4 (emphasis added). <sup>126</sup> AA VI, §52, p. 341, ll. 4–8.

*Theory and Practice*, and the “personified law” must replace the person or persons who act as lawgiver.<sup>127</sup>

In this chapter, we have considered the state in reality – the juridical state – as it approaches the perfect state, the state in the idea. We saw that in the *Doctrine of Right*, Kant’s three forms of state – autocracy, aristocracy, democracy – relate to the transfer of power, namely all three state powers, by the united will of the people to one or more physical persons to represent the people in exercising this power. Furthermore, we considered the distinction between despotism, where the people’s will is not represented, and republicanism, where it is, showing that Kant favors a representative democracy as the ideal form of state in a true republic. The lawgiver in this true republic has the duty to continually reform the state constitution to align it increasingly with the state in the idea. In the most perfect state, however, the lawgiver will ultimately become superfluous.

In the next chapter we move from Kant’s thoughts and arguments on the juridical state of individual human beings in a nation state to Kant’s idea of a juridical state of nation states, the *Völkerstaat*, which Kant also calls *Weltrepublik* in *Perpetual Peace*, showing that his idea of the ideal international arrangement is one juridical state of nation states, and not, as has often been argued, a league of nation states (*Völkerbund*), which can dissolve at any time. Toward the end of the next chapter we also consider cosmopolitan law.

<sup>127</sup> Cf. AA VIII (*TøP*), p. 294, note, ll. 21–22.

## International and cosmopolitan law

Kant devotes very few pages to international and even fewer to cosmopolitan law. Nonetheless, as he himself notes, much of what he says about private and state law can be applied analogously to the international and cosmopolitan arenas.<sup>1</sup> In this chapter we do just that. Our conclusion is that Kant has a vision of international and cosmopolitan law we today have come nowhere near attaining.

Far from accepting a loose league of states, such as the United Nations, or a commercial negotiation forum, such as the World Trade Organization, Kant envisions a state of nation states and a cosmopolitan legal order, both with courts backed by coercive enforcement powers, as the ideal solution to ensuring peace on the international and cosmopolitan levels. Until we secure the rights of individuals in their relations to nation states and of nation states in their relations to each other, as well as the rights of whole peoples in their mutual trading relations, all rights remain provisional, even rights within our own juridical states.

We begin with the authority we have to coerce others to leave the state of nature and enter a juridical state. We show that this authority is a form of preventive defense<sup>2</sup> based on the presumption of badness Kant makes in the *Doctrine of Right*. The presumption of badness can be dispelled only if everyone provides security that he will not violate anyone else's rights. One provides this security by entering a juridical state (section 1). We then move to the state's similar authority to coerce all other states to enter a juridical state as a form of preventive defense (section 2). In section 3 we examine three models Kant considers for the international juridical state, showing that Kant favors the state of nation states (*Völkerstaat*) as the ideal model to ensure world

<sup>1</sup> AA VI, Preface, p. 209, ll. 8–11.

<sup>2</sup> We do not distinguish between “preventive” and “preemptive” defense because §56 of the *Doctrine of Right* covers both, AA VI, §56, p. 346, ll. 16–23.

peace. In [section 4](#) we discuss the cosmopolitan juridical state, within which whole peoples trade freely. Finally in [section 5](#) we consider the security the juridical state gives us with its assurance of perpetual peace.

### 1. The permission to coerce others to enter a juridical nation state

We have not yet discussed one aspect of the postulate of public law, namely the permission to coerce all other individuals to move with us to a juridical state. Kant supports this permission with the legal possibility to have intelligible possession of external objects of our choice.<sup>3</sup> “If it must be legally possible to have an external object as one’s own, then the subject must also be permitted to *coerce* all others with whom a dispute arises concerning such an object to enter with him into a civil constitution.”<sup>4</sup>

How can this authority to coerce be justified? In the state of nature we have rights, albeit provisionally, such as the original right to freedom and the other rights we acquire. The “authority to coerce is connected”<sup>5</sup> to these rights “according to the principle of contradiction,”<sup>6</sup> meaning we have the authority to defend our rights. Talk of a right is semantically nonsensical if one does not simultaneously connect to the right an authority to defend. Moreover, if our neighbor has a *legal* duty to move with us to a juridical state, then we have a corresponding right to have him make the move.<sup>7</sup> We may enforce this right, because otherwise the “right” would not be a right. Accordingly, the use of coercion to enforce a right is permitted to the extent it is required to defend the right.<sup>8</sup>

<sup>3</sup> AA VI, §44 (Annex), p. 312, l. 34 – p. 313, l. 8. We have discussed the legal possibility of having intelligible possession of external objects of choice in Chapters 4–6 and do not pursue it further now.

<sup>4</sup> AA VI, §8, p. 256, ll. 14–18. Similarly, Kant claims: “each may use coercion to force the others to move to a juridical state.” AA VI, §44, p. 312, ll. 27–28.

<sup>5</sup> AA VI, Introduction DoR §D, p. 231, l. 23.

<sup>6</sup> AA VI, Introduction DoR §D, p. 231, ll. 32–34.

<sup>7</sup> See AA VI (*Virtue*), Introduction II, p. 383, ll. 5–8: “To every duty corresponds a right regarded as an *authorization* (*facultas moralis generatim*), but it is not the case that to all duties correspond *rights* of another to use coercion (*facultas iuridica*). These duties [that *do* correspond to rights of another to use coercion] bear the name *legal duties*.”

<sup>8</sup> Of course we do not have an authorization to attack another. Assuming we could ambush another would be contrary to the concept of right. In the state of nature, law also is supposed to “further universal and lasting peace.” See AA VI, Conclusion, p. 355, ll. 7–9. An authorization to attack would be totally contrary to this goal.

The right to defend in the state of nature is very broad. Kant discusses this right at length following the postulate of public law.<sup>9</sup> His discussion climaxes in a variation of what we can call a “presumption of badness.” The presumption, which Kant states only in Latin, is: *Quilibet praesumitur malus, donec securitatem dederit oppositi* (“Everyone is presumed to be evil until he provides security for the opposite”).<sup>10</sup> Kant’s formulation of this presumption relies on the tradition within which he is writing, altering the traditional presumption to suit his own purposes. It is this presumption that permits us to coerce all others to move to a juridical state.

### *A. The presumption of badness as the basis for the authority to coerce*

Kant is in full command of the system of technical terms and rules.<sup>11</sup> He is familiar with the distinction between presumptions in the narrower sense and what Leibniz calls “conjectures.”<sup>12</sup> Conjectures are preliminary individual judgments about facts or circumstances. They are descriptive and not normative.<sup>13</sup> Unfortunately, the tradition preceding Kant and Kant himself call assumptions that judges make, which are merely conjectures, also “presumptions,” namely *praesumptiones hominis* (presumptions of a person).<sup>14</sup> In contrast to mere conjectures, presumptions in the narrower sense are propositions with normative character that require us to assume certain facts or circumstances as given. Kant also knows that one must distinguish between

<sup>9</sup> AA VI, §42, p. 307, ll. 12–26.

<sup>10</sup> AA VI, §42, p. 307, ll. 25–26. The translation of the Latin in Gregor, *Cambridge Edition*: “He is presumed evil who threatens the safety of his opposite” is incorrect.

<sup>11</sup> On what follows, see Hruschka, “Unschuldsvermutung,” pp. 285–300.

<sup>12</sup> Leibniz, *Théodicée*, Discours préliminaire §33, p. 69: “The lawyers call a presumption that which can provisionally pass as the truth if the contrary cannot be proved. Presumption says more than conjecture although the Dictionary of the Academy has not yet worked out the difference.” (*On appelle présomption chez les Jurisconsultes, ce qui doit passer pour vérité par provision, en cas que le contraire ne se prouve point, et il dit plus que conjecture, quoique le Dictionnaire de l’Académie n’en ait point épluché la différence.*)

<sup>13</sup> If I am in my living room and hear noise in the kitchen, I may make a conjecture about whether my husband is cooking dinner. My conjecture might be based on the time of day and the aroma coming from the kitchen. This conjecture is purely factual – that he is in fact cooking dinner – and has no normative content. It is valid only for me, because others might make completely different conjectures about his cooking at the moment. And it is only preliminary, because as soon as I can get to the kitchen I may well change my mind about whether he is cooking or not.

<sup>14</sup> Thomasius, *Dissertatio*, §8, p. 10; Christian Wolff also recognizes the *praesumptio hominis*, Wolff, *Jus Naturae III*, Cap. VII, §1032, p. 714. We return to this topic in [Chapter 10](#), note 24.

rebuttable and irrebuttable presumptions. He gives the example of the presumption of innocence in its traditional formulation: "Everyone is presumed to be good until the opposite is proved" as a rebuttable presumption,<sup>15</sup> and uses the traditional designation of *praesumptio iuris et de iure* (presumption of law and on account of the law) for irrebuttable presumptions.<sup>16</sup> Elsewhere in the *Doctrine of Right* Kant calls the presumption of innocence "presumption of being a juridical man."<sup>17</sup>

The presumption of badness is, as is the presumption of innocence, a proposition with normative character that requires us to make a certain factual assumption. We see the presumption of badness in the work of Christian Thomasius in the year 1700: "Everyone is presumed to be evil until through the fruits of his life, namely through leading a truly virtuous life, he has provided proof to the contrary."<sup>18</sup> In his lectures of 1784, Kant uses Thomasius' presumption, adapting the presumption of badness linguistically to the presumption of innocence: "Everyone is to be presumed to be evil until the opposite is proved."<sup>19</sup>

The presumption of badness is clearly not a presumption of *law*. Thomasius writes: "We customarily consider human actions in light of each of these courts either in a *philosophical* or in a *legal* perspective."<sup>20</sup> The courts to which Thomasius refers are the internal court (*forum internum*) or court of heaven (*forum poli*), on the one hand, and the external or earthly court (*forum externum*, *forum soli*), on the other. Kant latches onto Thomasius' remark in his 1784 lectures and calls the presumption of badness a "principle of morals" and the presumption of

<sup>15</sup> *Quilibet praesumitur bonus, donec probetur contrarium*, AA VI, §39, p. 301, ll. 15–16, where Kant omits the last two words, substituting for them an "etc." He assumes his readers are familiar with the formula. For the full formula see, e.g., Pufendorf, *De Jure*, VIII/IV/§3/ p. 803.

<sup>16</sup> AA VI, §33, p. 292, l. 34.

<sup>17</sup> *Präsumtion eines rechtlichen Mannes*, AA VI, §9, p. 257, ll. 22–23. In his lectures of 1784, Kant uses Achenwall's formulation of the presumption of innocence: "Everyone is to be presumed just until the contrary is shown." *Quilibet praesumendus est justus, donec probetur contrarium*, Feyerabend, AA XXVII.2.2, p. 1340, ll. 10–11. Achenwall formulates the presumption as: *Quilibet praesumendus sit iustus, donec nimirum probetur contrarium*, I.N.I., §98, p. 84. In his discussion of the right to freedom through which everyone has the "quality of a person . . . who is without reproach (*iusti*)," AA VI, p. 237, l. 29 – p. 238, l. 11, Kant presupposes Achenwall's formulation of the presumption of innocence. This comment must be read in connection with the immediately following discussion of the question "who is required to bear the burden of proof (*onus probandi*)," AA VI, p. 238, ll. 12–20.

<sup>18</sup> *Quilibet . . . tamdiu malus praesumitur, donec fructibus vitae suae, seu vita vere virtuosa, contrarium probatum dederit*. Thomasius, *Dissertatio*, §11, p. 13.

<sup>19</sup> *Quilibet praesumendus sit malus, donec probetur contrarium*. Feyerabend, AA XXVII.2.2, p. 1340, ll. 11–12.

<sup>20</sup> *Actiones hominum intuitu duplicis huius fori vel philosophice, vel iudice considerari solent*. Thomasius, *Dissertatio*, §11, p. 13.

innocence a “principle of law.”<sup>21</sup> Elsewhere in these lectures, Kant calls the presumption of badness a “rule of prudence.”<sup>22</sup> Even though Kant differentiates in this way and calls the presumption of badness a moral presumption or a prudential rule, still the question remains of how the presumption of innocence and the presumption of badness can be compatible. It appears self-contradictory when Kant makes both presumptions in the *Doctrine of Right*, not to mention somewhat unusual that the presumption of badness, as a “principle of morals,” is even located there.

Closer examination, however, reveals that the presumption of innocence and the presumption of badness are not contradictory. The presumption of innocence, as a presumption of law, concerns only external human actions. The question is whether a person has done something, such as commit a theft. The presumption of innocence requires us to assume that the person has not committed this act, unless the opposite is proved. The presumption of innocence thus relates to the *past*. When we consider the *future*, then the presumption of badness comes into play. The presumption of badness does not relate to external actions, but rather to human character. We have to presume that our fellow human beings are evil, at least until the opposite is proved. We will discuss the reasoning behind this presumption shortly. For now, let us ask how the opposite can be proved. Thomasius' formulation of the presumption of badness facilitates answering this question. Proof that a person was not only a good person in his external actions, but also that he is a good person in his attitudes and persuasions, can be had only through his leading a virtuous life, to the very last minute. If a person has led a life that one could call “holy” for a longer period of time, that says nothing about his character. He may commit an evil act later in life. If so, one will no longer call him holy, but instead ask how such a bad person managed to fool the world for so long of his holy existence. Indeed, saints are first designated as saints after their death and never during their lifetimes.

In *Religion*, Kant provides the reasoning behind the presumption of badness: “A human is by his nature evil.” “He is aware of the moral law and has nonetheless (when he has the occasion) taken deviation from it into his maxim.” When opportunity presents itself, the human being will deviate from the moral law. This tendency toward evil is not

<sup>21</sup> Feyerabend, AA XXVII.2,2, p. 1340, ll. 10–12.

<sup>22</sup> Feyerabend, AA XXVII.2,2, p. 1354, ll. 29–30.

a “natural phenomenon,” but “something that can be *imputed* to the human being.”<sup>23</sup> In the *Doctrine of Right*, Kant readdresses this topic: “The tendency humans have in general to play the master over others (not to observe the superiority of others’ rights if they feel at an advantage in power or cunning)” is one which everyone can “perceive sufficiently in himself.”<sup>24</sup> We all know ourselves well enough and therefore the presumption of badness, as we know it from Kant’s lectures (“everyone is to be presumed evil until the opposite is proved”), is valid.

This presumption provides the *foundation* for a proposition of law and, although located outside the system of legal propositions, is nonetheless properly included in a doctrine of right. The proposition of law is that we may interfere with another’s possessions to defend our rights, if the other poses a danger of attack. Presuming others are evil, we can further assume that others might attack us in the state of nature. Consequently, we need “not wait” until we learn of another’s evil disposition through a “sad experience.” We are authorized to use force against another who “by his very nature” threatens us with force.<sup>25</sup> We have now arrived at our right to take preventive measures against others.

### *B. Use of the authority to coerce others to enter a juridical state of individuals*

Important to note is the adjustment Kant makes to the presumption of badness. Rather than having to live a virtuous life to the end in order to dispel the presumption of badness, we can enter a juridical state. By doing so, we give “security”<sup>26</sup> that we will not interfere with anyone’s possessions. Provision of security cancels the right to exercise preventive defense. On the level of law we cannot require a change in another’s attitudes (we have reason to presume he has). It is necessary, and sufficient, that we mutually guarantee security *through a certain act*. This act is entering the juridical state. Thus Kant’s reformulation of the presumption of badness is: “Everyone is presumed to be evil *until he provides security for the opposite*.” On the level of law, the presumption of badness is dispelled by entering a juridical state and thus providing security through submitting oneself to coercive law.

<sup>23</sup> AA VI (*Religion*), p. 32, ll. 11–33 (emphasis added).    <sup>24</sup> AA VI, §42, p. 307, ll. 19–23.

<sup>25</sup> AA VI, §42, p. 307, ll. 14–25.    <sup>26</sup> AA VI, §42, p. 307, l. 15.

This justification of the postulate of public law can be rational only if the juridical state in fact guarantees our freedom and our (intelligible) possessions. Kant does not require us to enter a wrongful state in which our life, our freedom, and our possessions are not secured. He does not require entering any state whatsoever, but only entering a juridical state.

## 2. The duty states have to enter a juridical state of nation states

Kant's ideas on the postulate of public law apply not only to the interaction of individual persons who are obligated to enter a juridical state, but also to the interaction of states in their relations to each other. States too have a duty to enter a juridical state. One formal argument for extending the postulate of public law to the interrelationship of states is that the postulate is formulated in §42 of the *Doctrine of Right* immediately before Kant proceeds to distinguish the three forms of juridical state in §43. Nonetheless, Kant discusses this duty *expressis verbis* under the title "International Law" (*Völkerrecht*). "From the nature of things" "the states in their external relations toward each other" find themselves "(like lawless savages)" "in a non-juridical state." This state is a "state of war," in which although constant warring actions do not occur, still they can erupt at any moment. "The states adjacent to each other are obligated to leave" this state.<sup>27</sup> Kant further notes shortly thereafter that "the state of nature of states, just as of individual persons, is a state one should leave in order to enter a juridical [state]."<sup>28</sup>

Before the states enter a juridical state of states, thus when they are still in the state of nature, they have a "right to wage war." The war states have a right to wage is not a war of aggression. Instead, it is a defensive war, which "is the permitted way a state asserts its rights against another state *through its own force*, namely when the first state believes [itself] to have been injured by the second." The reason is that in the state of nature, the states cannot assert their rights through a "proceeding" in court, because the state of nature is defined as a state without distributive justice, meaning for Kant there is no court with the coercive force needed to enforce its decisions.<sup>29</sup> Kant's position in the *Doctrine of Right* on the right to wage war is exactly the opposite to his position in *Perpetual Peace*, where he says a "right to wage

<sup>27</sup> AA VI, §54, p. 344, ll. 6–14.    <sup>28</sup> AA VI, §61, p. 350, ll. 6–8.

<sup>29</sup> AA VI, §56, p. 346, ll. 9–14.

war” is inconceivable. In certain cases there must be a “right to wage war” because otherwise the states, as individual persons in the state of nature, would be left helplessly lost by (natural) law in their relations to their evil neighbors.<sup>30</sup>

In determining whether defense is required, the judgment a state makes about the dangerous situation in which it believes it finds itself is alone relevant. That is because there is no court which can reach any judgment in the state’s stead. We are in exactly the same situation for the states as for individual persons in the state of nature. Without a court, the individual persons must evaluate the situation in which they find themselves and act on the basis of this individual judgment. Of course individuals are bound by reason to make this judgment according to their best knowledge and conscience, but they have no choice except to make this judgment themselves. The same is true of states in the state of nature.

Let us apply these ideas to a state endangered by a neighboring state whose power is growing to tremendous capacity. Kant calls such a neighboring state a *potentia tremenda* (a tremendous power), in both *Perpetual Peace* and the *Doctrine of Right*. According to the presumption of badness, we must assume that the tremendous power is evil and intends to attack us as the weaker state. A state, just as the individual person, is to be presumed evil until the opposite is proved. There is no reason to distinguish the states from individual persons in this regard.

Finally, Kant says that states have a right in the state of nature to coerce their neighboring states to enter a juridical state of states. If their neighbors are not willing to enter a juridical state, the state can wage war to coerce the neighbors to do so. A war waged in order “to establish a state approaching a juridical state”<sup>31</sup> must be permitted if and because the states are required to leave the state of nature and enter a juridical state. Here too, everything valid for the individual human beings in their interrelations concerning their right to use force to coerce others to enter a juridical state is likewise valid for the states. Kant abandons his position in *Perpetual Peace* that states have “outgrown” the force needed to enter a juridical state, because they “already have a juridical constitution internally.”<sup>32</sup> This position is beside the point anyway,

<sup>30</sup> On these and the following comparisons of the *Doctrine of Right* to *Perpetual Peace*, see the citations in our Introduction, section 4. For other views, see Kaufmann, “Theory of War,” *passim*; Bernstein, “Rights and Coercion,” pp. 86–94.

<sup>31</sup> AA VI, §55, p. 344, ll. 25–27. <sup>32</sup> AA VIII (PP), p. 355, l. 36 – p. 356, l. 1.

since logically an internal constitution *cannot* unilaterally govern the state's external relations to other states.

### 3. The nature of a juridical state of nation states

One of the topics of most confusion in the secondary literature on Kant's legal philosophy is the construct Kant has in mind as the ideal arrangement for a juridical state of nation states. This confusion can be traced to Kant's own seemingly self-contradictory statements when discussing this issue in his three main political writings, *Theory and Practice* of 1793, *Perpetual Peace* of 1795, and the *Doctrine of Right* of 1797, because he tends to switch terms or use a variety of terms for one and the same construct. If the terminology is sorted out, Kant's ideas become clear and not self-contradictory. In this section, we first examine three models, two of which Kant discusses in *Theory and Practice* and all three of which Kant discusses in *Perpetual Peace*. We then discuss Kant's final ideas in the *Doctrine of Right* on two of the models from his earlier work and on the permanent congress of states.

#### A. The models in *Theory and Practice* and *Perpetual Peace*

Kant distinguishes two forms of possible unification of all human beings on this globe in *Theory and Practice*. We call them the first and second models. In *Perpetual Peace*, Kant distinguishes three models, namely the first and second models from *Theory and Practice* and a newly introduced third model. In the *Doctrine of Right*, Kant does not discuss the first model, which he has rejected in *Theory and Practice* and in *Perpetual Peace*. In the *Doctrine of Right*, Kant discusses the second and third models, and what he calls the "permanent congress of states."

##### 1. The first model: the single world state

The first model from *Theory and Practice* is that "the states" enter "into a cosmopolitan constitution." With a cosmopolitan constitution we have a "cosmopolitan commonwealth"<sup>33</sup> under "one head [*Oberhaupt*]." <sup>34</sup> A cosmopolitan constitution thus ends in one single state,<sup>35</sup> the world state. The world state has one "head," which is, as "creator and

<sup>33</sup> AA VIII (*T&P*), p. 310, ll. 36–37. <sup>34</sup> AA VIII (*T&P*), p. 311, ll. 4–5.

<sup>35</sup> That is the meaning of the expression "commonwealth" (*gemeines Wesen*), which Kant uses at AA VIII (*T&P*), p. 311, l. 4.

maintainer" of the state, not "subject to any coercive law."<sup>36</sup> The world state is thus one *single* world state. Kant rejects this model for reasons we shall discuss below.

In *Perpetual Peace*, Kant calls the world state a "universal monarchy."<sup>37</sup> Kant does not use the word "monarchy" to mean that one single person reigns, as is the usual meaning of the term. For a state with one single ruler, Kant uses the term "autocracy."<sup>38</sup> Instead Kant means with "monarchy" a state with only *one* source, only *one* origin of state power. This meaning thus excludes the individual states that have dissolved themselves into the single world state as independent sources of state power.

In *Religion, Theory and Practice*, and *Perpetual Peace*, Kant has two arguments for rejecting the single world state. The first, in *Religion* and in *Theory and Practice*, is based on the tacit assumption Kant makes that the world state must be a juridical state, about which Kant has his doubts for the single world state. A single world state is always in danger "as has often happened in states of too large dimensions" that it "will lead to the most terrible despotism" and for that reason is "more dangerous to freedom" than the peril of constant wars.<sup>39</sup> The argument is repeated in *Perpetual Peace*<sup>40</sup> and supplemented with a second argument. The second argument focuses on the fact that the individual states are dissolved as independent sources of state power in the single world state. The juridical state into which the peoples represented by their nation states are to enter, however, should not dissolve the peoples and nation states. As far as international law, or the law of peoples (in the plural), is concerned, the peoples cannot simply dissolve into one single people and state without self-contradiction. Kant states:

<sup>36</sup> AA VIII (*T&P*), p. 291, ll. 20–24.

<sup>37</sup> AA VIII (*PP*), p. 367, l. 14. The expression "universal monarchy" is also used in *Religion*, AA VI, p. 34, l. 27; p. 123, ll. 30–31. Moser, *Grund-Sätze*, p. 61, claims that Lisola, in his famous book, *Shielding the state and justice from the manifestly unconcealed design toward a universal monarchy under the vain pretext of the Queen of France's (territorial) claims*, initiated the discussion of Louis XIV's ambition to establish a European universal monarchy. (The title is our translation of the original French, Lisola, *Bouclier d'Estat*.) "Universal monarchy" thus received a negative connotation, which Kant maintains, although Kant uses the expression in a totally different sense from Lisola.

<sup>38</sup> AA VIII (*PP*), p. 352, ll. 4–9; AA VI, §51, p. 338, l. 34 – p. 339, l. 3.

<sup>39</sup> AA VIII (*T&P*), p. 310, l. 37 – p. 311, l. 3. In AA VI (*Religion*), p. 34, ll. 25–31, Kant describes the "universal monarchy" as a "monster" where all laws eventually lose their force.

<sup>40</sup> If a single state becomes too large, the "laws" lose their enforceability with the increasing size of the "government" (*Regierung*). Consequently despotism is a threat, which in the final analysis leads to anarchy, AA VIII (*PP*), p. 367, ll. 12–17.

In that lies a contradiction because each state carries with it the relation of a *superior* (lawgiver) to an *inferior* (who is obedient, namely the people); many peoples however in one state would only constitute one people, which (since here we are speaking of the right of *peoples* in their interrelationships to the extent they constitute different states and should not melt together into one state) would contradict the presupposition.<sup>41</sup>

The second argument is purely formal and says simply that the law of peoples in their interrelations cannot be the law of one people without contradicting the goal one set out to attain. The first argument combined with the second, however, does provide a substantive argument against the single world state. If the peoples of the world are melted into one people within one state, nonetheless they will retain their cultural identity as peoples. A state that treats them as one people will be unable to deal with their cultural differences and the sources of dispute arising among them. Absent a law of peoples – different peoples – in their interrelation, the only means available is to suppress the sources of dispute by using dictatorial measures to eradicate cultural, linguistic, and religious differences. Kant describes the universal monarchy as a constitution: “where all freedom and with it (which it entails) all virtue, taste, and scholarship must disappear.”<sup>42</sup> The universal monarchy thus will lead to despotism to suppress cultural diversity and thus suppress, rather than resolve, disputes.

## 2. *The second model: the state of nations*

The second model Kant discusses in *Theory and Practice* is that the states enter “a juridical state of a federation according to a commonly agreed international law.”<sup>43</sup> This international law is based “on public laws combined with coercive force” “to which every state must subject itself” “according to the analogy of a civil or state law for individual persons.”<sup>44</sup> This model leads to a “universal state of *nations* [*Völkerstaat*],”<sup>45</sup> in which the peoples and the states representing them are preserved.

In *Perpetual Peace*, the second model is called the “state of nation states (*civitas gentium*)” (*Völkerstaat*). Kant remarks:

<sup>41</sup> AA VIII (PP), p. 354, ll. 9–15. The “in that” (*darin*), with which the sentence begins, means “in what follows” and does not relate to any thesis established in a preceding sentence. The sentence must thus be read: “In what follows lies a contradiction. . . .”

<sup>42</sup> AA VI (*Religion*), p. 34, ll. 25–31. <sup>43</sup> AA VIII (*T&P*), p. 311, ll. 5–6.

<sup>44</sup> AA VIII (*T&P*), p. 312, ll. 25–29. <sup>45</sup> AA VIII (*T&P*), p. 313, ll. 10–11.

For states in their relation to each other there can be no other way according to reason for them to leave the lawless state of constant war than that they, as the individual persons, give up their savage (lawless) freedom and satisfy themselves with public coercive laws and thus form a (certainly and constantly increasing) *state of nation states* (*civitas gentium*) that finally will comprise all the peoples of the earth.<sup>46</sup>

It is obvious that Kant favors this model, because he claims it is the only model according to reason for states to leave the lawless state.

The state of nation states is also called a “world republic” (*Weltrepublik*)<sup>47</sup> in *Perpetual Peace*. This world republic should not be confused, as so often happens, with the single world state, or the universal monarchy. For Kant the word “republic” has a positive meaning from the time of *Religion* (1793) all the way through the *Doctrine of Right*. In *Religion*, Kant speaks of a “republic of free and united states,”<sup>48</sup> and in the Conclusion to the *Doctrine of Right* of a “republicanism of all states,”<sup>49</sup> each time meaning the state of nation states.

### 3. The third model: the league of nations

A third model is introduced in *Perpetual Peace*. It is the league of nations (*Völkerbund*),<sup>50</sup> in contrast to the state of nations (*Völkerstaat*). In connection with the league of nations, Kant also speaks of a “league of peace (*foedus pacificum*)” (*Friedensbund*), a “federalism” (*Föderalität*), a “free federalism” (*freier Föderalismus*), and a “federal union” (*föderative Vereinigung*).<sup>51</sup> The main distinction between a state of nations and a league of nations is that in a state of nations the individual states give up their “savage” freedom and subject themselves to “public coercive laws,”<sup>52</sup> whereas in a league of nations the states are not subject to “public laws and coercive force under them.”<sup>53</sup> Although the league of nations is not oriented “toward any acquisition of state power, but only toward maintaining and securing *freedom* for a state and simultaneously for the other states in the league,”<sup>54</sup> it is in comparison to the

<sup>46</sup> AA VIII (PP), p. 357, ll. 5–11. <sup>47</sup> AA VIII (PP), p. 357, l. 14.

<sup>48</sup> AA VI (*Religion*), p. 34, ll. 32–33. <sup>49</sup> AA VI, Conclusion, p. 354, l. 30.

<sup>50</sup> AA VIII (PP), p. 354, ll. 8–9.

<sup>51</sup> AA VIII (PP), p. 356, l. 7, l. 15, l. 32; p. 367, l. 11. Important to note, however, is that because of the distinction Kant now draws between the state of nations (*Völkerstaat*) and the league of nations (*Völkerbund*), Kant means something different with the expression “federation” in *Perpetual Peace* from the meaning that word has in *Theory and Practice*, where Kant does not discuss the league of nations at all, but instead connects the term “federation” to the state of nations, or the second model.

<sup>52</sup> AA VIII (PP), p. 357, ll. 5–11. <sup>53</sup> AA VIII (PP), p. 356, ll. 10–14.

<sup>54</sup> AA VIII (PP), p. 356, ll. 10–12.

state of nations only a "surrogate,"<sup>55</sup> because the states in the league are not subject to coercive laws. Even though Kant favors the state of nations, still the league of nations is better than nothing in avoiding war.

In *Perpetual Peace* he assigns the blame to the individual states for not wanting to form the more perfect state of nations and being satisfied with the minimum (the league of nations). The states cling to their "majesty"<sup>56</sup> and according to their own "idea of international law" do not want the state of nations, or as Kant says they "reject *in hypothesi* what *in thesi* is right."<sup>57</sup> In other words, "the states" reject "*in hypothesi*," namely under the condition of the "frailty of human nature," what "*in thesi*," namely "objectively in the idea,"<sup>58</sup> is right. Kant thus considers human weakness and accepts the minimum when in *Perpetual Peace* he writes as the title of the Second Definitive Article: "International law shall be established as a *federalism* of free states."<sup>59</sup>

In the terminology of *Perpetual Peace* the three models are: (1) the universal monarchy (*Universalmonarchie*), (2) the state of nations (*civitas gentium*) (*Völkerstaat*), and (3) the league of nations (*Völkerbund*). The distinction between the individual models must be drawn on the basis of substantive and not terminological criteria. Kant switches terms but the substantive criteria of the three models remain the same. The substantive criteria are: The universal monarchy is one single state into which the individual states dissolve. Every individual person is then a "world citizen" and no longer a citizen of his or her original state. In the state of nations and league of nations, however, the individual states and the peoples they represent remain intact. In the state of nations, in contrast to the league of nations, the individual states (and not only the individual persons) are subject to public coercive laws. In the league of nations, however, the states are not subject to public coercive laws.

<sup>55</sup> AA VIII (PP), p. 356, ll. 31–32; p. 357, l. 15.      <sup>56</sup> AA VIII (PP), p. 354, ll. 23–26.

<sup>57</sup> AA VIII (PP), p. 357, ll. 11–13.

<sup>58</sup> This is the explanation of the two expressions in AA VI (*Religion*), p. 29, ll. 24–30. In *Theory and Practice*, Kant, in using these two expressions, states "what sounds good in theory is invalid in practice (One often expresses the idea: this or that proposition is indeed valid *in thesi*, but not *in hypothesi*)," AA VIII (*T&P*), p. 276, ll. 15–18. Kant, however, continues to say: "In contrast, I put my trust in theory, which follows from the principle of right on how the relations among persons and states *should be* and which commends to earthly gods the maxim always so to behave in their conflicts that such a universal state of nations (*Völkerstaat*) will thereby be established, and so to assume that it is possible (*in praxi*) and that it *can be*." AA VIII (*T&P*), p. 313, ll. 7–12. For more extensive argumentation on this point, see Byrd, "State as 'Moral Person,'" pp. 187–188, note 64.

<sup>59</sup> AA VIII (PP), p. 354, l. 2.

### B. The models in the Doctrine of Right

Kant no longer discusses the universal monarchy in the *Doctrine of Right*. The universal monarchy is an infeasible model for securing peace among peoples because it dissolves the individual peoples, which necessarily occasions the despotic use of suppression.<sup>60</sup> Kant calls the second model the “state of nations” (*Völkerstaat*), but also the “universal union of states” (*allgemeiner Staatenverein*) with the addition “(analogous to the way a people become a state).”<sup>61</sup> Kant does not use this terminology in *Theory and Practice* or in *Perpetual Peace*.<sup>62</sup> Still the description through analogy to the way a state is founded by individual persons is included in *Theory and Practice*. The universal union of states is characterized by the fact that it has “sovereign power (as in a civil constitution).”<sup>63</sup> Kant calls the third model the “league of nations” (*Völkerbund*), and says that this league involves “only a cooperative (federalism – *Föderalität*).”<sup>64</sup> Just as Kant states in *Perpetual Peace* that the league of nations is only a “surrogate” for the state of nations, so too Kant says in the *Doctrine of Right* that the league of nations is only an “[international] law *in subsidium* [subsidiary] to another and original law,”<sup>65</sup> whereby with “another and original law” Kant can mean, in light of the entire context, only the international law of the state of nations.

If we consider the juridical state individuals are obliged to enter, we see that the crucial characteristic of such a juridical state is that we have courts (“distributive justice”) supported by an executive power to enforce court decisions resolving disputes arising between individual persons. Similarly, in the juridical state nation states are required to enter, courts must be established to resolve disputes between two or more states. These courts too must be supported by an executive power. Accordingly, Kant emphasizes, particularly in *Perpetual Peace*, that the only rational way to deal with the problem is for the states to submit themselves to “public coercive laws.”<sup>66</sup> Kant means the same in

<sup>60</sup> See subsection A(1). <sup>61</sup> AA VI, §61, p. 350, ll. 10–11.

<sup>62</sup> In *Religion*, Kant does speak of a “union of states” (*Staatenverein*), which he designates as a “republic of free united peoples” (*Republik freier verbündeter Völker*), AA VI (*Religion*), p. 34, ll. 32–33.

<sup>63</sup> AA VI, §54, p. 344, ll. 17–19, where “sovereign power” is negated for the league of states.

<sup>64</sup> AA VI, §54, p. 344, ll. 18–19. Kant compares the league of nations with the Antique unions for the protection of holy objects (mainly of Delphi), with reference to which Kant speaks of *foedus Amphictyonum* (meaning literally: “union of neighbors”). AA VI, §54, p. 344, l. 23.

<sup>65</sup> AA VI, §54, p. 344, ll. 21–22. <sup>66</sup> Cf. text at note 46.

the *Doctrine of Right* when he attaches the analogy to the way a people become a state to the universal union of states. To enter a universal union of states, or a state of nations, states must submit themselves to public coercive law. If they do, then we have a state of nations, and not a league of nations.<sup>67</sup>

Kant realizes that establishing a state of nations is more difficult than establishing a league of nations. He does not assign any blame to the states for failing to enter a state of nations, as he does in *Perpetual Peace*. In the *Doctrine of Right* he sees the problems for attaining perpetual peace as follows:

Because for too large an extension of such a state of nations over broad stretches of land, governing it and thus protecting each member of it must in the final analysis be impossible. A number of such states of nations, however, would in turn lead to a state of war, making *perpetual* peace (the final goal of all of international law) admittedly an unrealizable idea.<sup>68</sup>

The first problem is unsurprising, but not a reason to abandon the effort to attain a state of nations. Indeed it is a problem we have within the individual juridical state as well. The problem is simply that perfect protection cannot be had in any state. In our own juridical states crimes are committed, meaning individual rights are violated, on a daily basis. Nonetheless we do not contemplate returning to the state of nature among individuals because our juridical state cannot perfectly govern and protect all of us all of the time. Similarly, we should not discontinue our efforts to establish a juridical state of nation states, even though war might break out between two of its members somewhere sometime. Such wars, if they do break out, can be stopped effectively only in a juridical state with an international court and coercive executive power to enforce the court's decisions.

The second problem Kant foresees for attaining perpetual peace stems from maintaining a number of smaller states of nations. Having many rather than one state of nations solves the problem of largess thus making government and protection more feasible. The solution, however, foils the purpose of the state of nations, because with many states of nations one would again have the constant threat of war among the states of nation states. This threat of war would be no different from the threat of war we have without any international

<sup>67</sup> In the *Doctrine of Right*, Kant thus also speaks of a "state law of peoples" (*Völkerstaatsrecht*), AA VI, §43, p. 311, ll. 24–25, which is to be distinguished from "law of peoples" or "international law" (*Völkerrecht*).

<sup>68</sup> AA VI, §61, p. 350, ll. 12–17.

arrangement at all. Furthermore, the problem equally confronts a number of leagues of nations, and is thus not peculiar to the state of nations. In effect the second problem simply points back to Kant's solution of having *all* states incorporated into one state of nations.

Because of the problems inherent to attaining the perfect state of nation states, Kant concludes "perpetual peace (the final aim of all of international law) is a non-executable idea." Nonetheless, he continues:

The political principles, however, that aim toward it [perpetual peace], namely to enter such unions of states which serve to continually *approximate* it [perpetual peace], are not [unattainable]. Instead, as this [approximation] is a responsibility based on duty and thus on the rights of individuals and states, it is indeed executable.<sup>69</sup>

According to Kant, we thus have a duty to strive toward the constitutional perfection of one single state of nations in an effort to approximate perpetual peace. The duty to strive toward an unattainable goal in an effort to approximate it is no different from the duty we have in our individual juridical states to strive toward constitutional perfection, where everyone's rights are perfectly secured. Although we cannot completely attain our goal, nonetheless we can come as close as possible to attaining perpetual peace, the final end of the doctrine of right.

### C. *The permanent congress of states in the Doctrine of Right*

Kant reports of a "permanent congress of states" that took place

in the first half of this century in the assembly of States General in The Hague, where the ministers of most European courts and even the smallest republics brought their complaints of injuries the one had caused the other thus seeing all of Europe as one single federated state which they accepted, so to speak, as arbiter in their public disputes.<sup>70</sup>

In this context Kant does not mean "congress" in its (later) technical meaning of a body of heads of state and prime ministers, such as the Congress of Vienna of 1815. Instead, the Latin *congressus* must be taken literally to mean simply "coming together" or "meeting." In Kant's example, the expression means a meeting of ministers, namely of ministers plenipotentiary, or envoys. Kant also speaks of a

<sup>69</sup> AA VI, §61, p. 350, ll. 17–22. <sup>70</sup> AA VI, §61, p. 350, ll. 23–33.

"convention" (*Zusammentretung*).<sup>71</sup> The convention was less a formal than a factual convention of ministers. Foreign powers sent their best diplomats *de facto* to The Hague. This situation permitted formal or informal discussion of common problems. The assembly of States General or its members may have functioned as intermediaries.

The history of such a congress in The Hague during the first half of the eighteenth century is somewhat murky. Certain is that The Hague played an important role in the diplomacy of this time. In his description of the Netherlands, François Michel Janiçon writes in 1729:

Another indication of the significance and authority of the States General is the meeting of ministers who foreign powers send to The Hague and render the assembly of States General the center of almost all negotiations in Europe.<sup>72</sup>

Janiçon describes the situation which Kant has in mind precisely.<sup>73</sup>

Kant's assumption that envoys from the European courts saw "all of Europe as one single federated state" also accords with perceptions during the first half of the eighteenth century. In 1732, public law professor Johann Jacob Moser wrote *Principles of the Science of the Present State Constitution of Europe and of the International Law or General State Law Common among the European Powers*.<sup>74</sup> The mere title of the book, which equates European international law to a universal public law of Europe, treats all of Europe as one single state. Moser thus seems to share the view Kant attributes to the envoys in The Hague.

Kant takes the assembly of envoys to The Hague during the first half of the eighteenth century as a model for a permanent congress of states, which he understands to be an "arbitrary convention of various states which is dissoluble at any time."<sup>75</sup> A permanent congress of states is thus similar to a league of nations in that a league is also dissoluble.<sup>76</sup> The permanent congress of states, however, is distinct from the league of nations in that a league arises through the member states' closing treaties whereas the permanent congress of states is

<sup>71</sup> AA VI, §61, p. 351, l. 2.

<sup>72</sup> Janiçon, *État*, p. 91: *Une autre marque de la grandeur & de l'autorité des Etats Généraux, c'est le concours des Ministres les Puissances étrangères envoient à la Haye, & qui rendent l'Assemblée des Etats Généraux le centre de presque toutes les Négociations de l'Europe.*

<sup>73</sup> Janiçon also seems to have had the connections to know what he is talking about. He dedicated his book on the Netherlands to the envoy of the Landgrave of Hesse-Cassel in The Hague. On Janiçon, see Vouillot, "Janiçon."

<sup>74</sup> The title above is our translation of Moser, *Anfangs-Gründe*. On Moser, see Laufs, "Moser."

<sup>75</sup> AA VI, §61, p. 351, ll. 1–2.

<sup>76</sup> On the dissolubility of the league of nations, see AA VI, §54, p. 344, ll. 17–21.

in a pre-contractual phase of negotiations. In Kant's example, the fact that the best diplomats are sent to The Hague occurs perhaps because of a tacit, but certainly not any formal, agreement among the sending states. Kant gives such a *de facto* congress the responsibility to agree on a "public law" for the participating states "to resolve their disputes in a civil manner."<sup>77</sup> Kant calls this meeting of diplomats and their pre-contractual negotiations a "permanent congress of states."

During pre-contractual negotiations, the permanent congress of states also has other duties, such as mediating disputes among the negotiating parties. According to Kant, the congress of ministers in The Hague also mediated disputes. Kant assumes that the first step is taken in the right direction when the states find themselves in a permanent congress of states, deliberating on a common public law and mediating disputes as they arise.

#### 4. Cosmopolitan law

The term "cosmopolitan law" is the common translation of Kant's *Weltbürgerrecht* which Kant also calls *ius cosmopoliticum*.<sup>78</sup> A *Weltbürger* is a citizen of the world, and *Weltbürgerrecht* is the law of world citizens. People are world citizens, however, only in one united world state, which Kant rejects because it is an inappropriate arrangement for states in their relation to each other. Thus the term "cosmopolitan" is somewhat misleading. Nonetheless we retain Kant's terminology and consider Kant's writings not only in the *Doctrine of Right*, but also in his earlier *Perpetual Peace*, just as we did for public law within one state and for the law of peoples, or international law.

##### A. Cosmopolitan law in *Perpetual Peace*

In *Perpetual Peace*, Kant discusses the "right to visit," namely the "right a stranger" has "not to be treated with animosity by another because of his arrival on that other person's land," a right that "all human beings have to offer themselves as companions."<sup>79</sup> The backdrop for Kant's ideas lies in a discussion of the "right to non-damaging use" (*ius utilitatis innoxiae*), which took place in the natural law literature preceding

<sup>77</sup> AA VI, §61, p. 351, ll. 5–9. <sup>78</sup> See, e.g., AA VI, §62, p. 352, l. 24.

<sup>79</sup> AA VIII, p. 358, ll. 1–9. Generally Kant's cosmopolitan law has been analyzed primarily on the basis of *Perpetual Peace*, see Cavallar, *Strangers*, pp. 359–368. For an approach based on the *Doctrine of Right*, see Flikschuh, *Political Philosophy*, pp. 144–205.

Kant. Grotius, in reliance on authors of Antiquity, assumes that people have such a right,<sup>80</sup> and Pufendorf carries this idea forward.<sup>81</sup> An example of non-damaging use is drinking or washing with water from a river belonging to another people.<sup>82</sup> Another example is crossing land for a legitimate purpose.<sup>83</sup> According to Pufendorf, when the primæval community (*communio primæva*)<sup>84</sup> was dissolved and ownership rights were established, the *universi*<sup>85</sup> retained such use rights, assuming the use did not damage the owner. Consequently everyone has a right to such use of others' things.<sup>86</sup>

Ideas change over the course of the eighteenth century. In particular, the assumption that a whole people have a right to march through foreign territory because the march is a non-damaging use raises eyebrows. Achenwall thus rejects Grotius' and Pufendorf's ideas. Achenwall claims that even non-damaging use of foreign territory, namely by entering and marching through it, and certainly by remaining in it, is impermissible without the consent of the people to whom the land belongs. Accordingly, whether, and if so under what conditions, a foreigner could use, march through, or remain in a foreign land depends exclusively on the will of the people in the host country.<sup>87</sup>

Kant's assumption of a right to visit in *Perpetual Peace* departs from Achenwall's ideas and returns somewhat to Grotius' and Pufendorf's notions of a right to non-damaging use. Kant provides two arguments for this assumption. The first is that we are all in some sense "to be seen as citizens of a universal state of human beings" (*allgemeiner Menschenstaat*).<sup>88</sup> In fact we are not citizens of a universal state, particularly if Kant's ideas on the law of peoples were to be adopted in practice. In the state of nations Kant has in mind, its members are the states and not the individuals who are citizens of these states. We would be citizens of a "universal state of human beings" in a "universal monarchy," but Kant has rejected this arrangement for international law.<sup>89</sup> Accordingly, Kant formulates the "Third Definitive Article" to *limit* cosmopolitan law to a mere right to visit: "*Cosmopolitan law shall be limited to the conditions of universal hospitality.*"<sup>90</sup> The universal

<sup>80</sup> Grotius, II/II/§11/p. 195.

<sup>81</sup> Pufendorf, *De Jure*, III/III/§3/p. 238; *De Officio*, I/VIII/§4/p. 37.

<sup>82</sup> Grotius, II/II/§12/p. 195; Pufendorf, *De Jure*, III/III/§4/p. 239.

<sup>83</sup> Grotius, II/II/§13/pp. 195–199; Pufendorf, *De Jure*, III/III/§5/pp. 240–241.

<sup>84</sup> On the concept, see Chapter 6, section 1.

<sup>85</sup> On the concept, see Chapter 8, section 1A, where we discuss it in relation to the state, whereas here Pufendorf uses the concept in relation to the primæval community.

<sup>86</sup> Pufendorf, *De Jure*, III/III/§5/pp. 240–241. <sup>87</sup> *I.N.II*, §226 (AA XIX, p. 423, ll. 34–38).

<sup>88</sup> AA VIII (PP), p. 349, ll. 31–33. <sup>89</sup> See section 3A(1).

<sup>90</sup> AA VIII (PP), p. 357, ll. 20–21.

hospitality Kant means is the only right to non-damaging use Kant retains from Grotius' and Pufendorf's discussions.

Kant takes the second argument for a right to visit from the doctrine of "common possession of the earth's surface," on which surface "they [human beings] cannot scatter infinitely but will ultimately have to tolerate each other in proximity, originally however no one having more right to be in one place on the earth than the other."<sup>91</sup> This remark can be interpreted as a beginning of Kant's ideas on the "original community of the earth (*communio fundi originaria*)."<sup>92</sup> Kant uses this idea of common possession of the earth's surface to derive the right to visit. His argument is similar to Pufendorf's that the *universi* retained certain rights to use someone else's things when the ownerless things were divided and ownership established. For Kant the *universi* retained simply the right to visit.

Derivation of the right to visit from the "original community of the earth" is problematic. The disjunctively universal right to be in a place on the earth's surface becomes concrete when human beings fulfill the duty to divide and particularize the land. When the land is particularized, however, the disjunctively universal right to a place on this earth is made concrete, especially for a people. When it is, the right to be in a place other than the one an individual rightly occupies disappears, and with it the right to visit that other place. To claim that the original community of the earth retained a right for everyone to visit everyone else would then be simply an assumption, but not a derivation of that right from the original community of the earth.

Furthermore, Kant has not yet developed the idea of the "original community of the earth" in *Perpetual Peace*. He first does so in the *Preparatory Work on the Doctrine of Right* and in the *Doctrine of Right* itself. For this reason it is difficult to base the interpretation of *Perpetual Peace* on ideas Kant develops several years later. If so, then we are left with the conclusion that Kant does not advance beyond Pufendorf and his idea of the *universi*'s retaining certain rights – for Kant the right to visit – when the earth was divided and ownership established. Thus the idea is simply an assumption but not a necessary consequence of the original community of the earth.

### *B. Cosmopolitan law in the Doctrine of Right*

In the *Doctrine of Right*, Kant still uses the expression *Weltbürgerrecht* (cosmopolitan law), but he abandons his concept of "cosmopolitan

<sup>91</sup> AA VIII (PP), p. 358, ll. 9–13.    <sup>92</sup> See Chapter 6, section 3.

law" from *Perpetual Peace*, where it means a right to visit. We are not suggesting he also abandons the idea that we have a right to visit. Instead, we are claiming he no longer thinks this right to visit is a right of cosmopolitan law, but rather one of international law. Kant indicates that the relation of individual persons from one state to those of another state and the relation of individual persons of the one state "to the other state as a whole" are governed by international law (*Völkerrecht*).<sup>93</sup> If so, then the right to visit is a right under international and not under cosmopolitan law.

Once we have realized this difference between international and cosmopolitan law, then we discover that cosmopolitan law in the *Doctrine of Right* does not govern the rights of an individual stranger, but instead the rights of "a people" "to offer themselves to each other for commerce." Not individual persons, but instead a whole *people* have this right. Kant speaks of a "community of all *peoples* on the earth," and then says:

All *peoples* are *originally* in a community of the earth . . . [and thus] in a thoroughgoing relation of one [people] to all the others [other peoples] *to offer themselves to each other for commerce* and they each have a right to make this attempt without the foreigner being authorized to treat it [the people who make this attempt] as an enemy.<sup>94</sup>

Furthermore, the rest of Kant's discourse on cosmopolitan law is about peoples engaging in global trade and not about individual persons.<sup>95</sup>

The issue now becomes what relevance does this change of approach have? The answer lies in Kant's understanding of international law, which in German is *Völkerrecht*, meaning literally "law of peoples." This so-called "law of peoples" in fact governs the relation of *states* to each other and the relation of foreign individuals to other *states*.<sup>96</sup> Accordingly, Kant says we should speak of the public "law of states (*ius publicum civitatum*)"<sup>97</sup> rather than the "law of peoples." Cosmopolitan law in the *Doctrine of Right*, however, does deal with the relation of *peoples* to each other and this relation is not governed by international law, or the law of peoples, as strange as that may sound. Kant thus uses the expression *Weltbürgerrecht* (cosmopolitan law) to speak

<sup>93</sup> AA VI, §53, p. 343, l. 28 – p. 344, l. 2.

<sup>94</sup> AA VI, §62, p. 352, ll. 14–22 (emphasis on "peoples" added). The reading above is required by the grammatical construction of the statement quoted. It is also Gregor's interpretation in her translation of the *Doctrine of Right* in the *Cambridge Edition*.

<sup>95</sup> For a discussion of cosmopolitan law as the right of peoples to engage in international commerce, see Thompson, "Cosmopolitan Right."

<sup>96</sup> AA VI, §53, p. 343, l. 28 – p. 344, l. 2. <sup>97</sup> AA VI, §53, p. 343, ll. 16–18.

of the law that governs the relation of peoples to each other: "This law, to the extent it relates to a possible union of all peoples with the intent to establish certain universal laws for commerce, can be called cosmopolitan law (*ius cosmopoliticum*)."<sup>98</sup>

Kant says that cosmopolitan law governs the relation of all peoples to each other in a union directed toward establishing "certain universal laws for commerce." Indeed in the *Doctrine of Right*, Kant's whole discussion of cosmopolitan law concerns "commerce" (*Verkehr*), for which the peoples mutually offer themselves.<sup>99</sup> Kant uses the expression *Verkehr* in its broader meaning to indicate "interaction,"<sup>100</sup> but in the context of cosmopolitan law it means "commercial trade" (*Handelsverkehr*).<sup>101</sup> Such trade is neither the state's nor the state of nations' job, because the states are not to engage in any commercial trade whatsoever, and thus the state of nations has no interstate trading relations among states to regulate. Instead, solely "peoples" engage in international trade, just as on the national level solely individual persons operate on the public market.<sup>102</sup> The state's responsibility is to regulate the market, making a free public market possible. Cosmopolitan law in the *Doctrine of Right* deals with the international market and Kant requires that universal *public* laws for a possible international commercial trade among peoples be adopted. In other words, Kant calls for legal regulation of international commercial trade, something on the order of but more far-reaching than today's General Agreement on Tariffs and Trade. It is the responsibility of all the individual states (and not of the state of nations) to establish this cosmopolitan law through treaty, ideally and ultimately through one treaty to which all states are party.

<sup>98</sup> AA VI, §62, p. 352, ll. 22–25. Kant uses the expression *das weltbürgerliche [Recht]* (cosmopolitan law). The formulation indicates that Kant is somewhat hesitant to use this expression, or the expression *Weltbürgerrecht* for that matter, because he says "can be called" cosmopolitan law, rather than simply "is called" cosmopolitan law. What Kant envisions is new in comparison to earlier natural law theory and he seems reluctant to use the word *Weltbürgerrecht*, which connotes something quite different from what he has in mind.

<sup>99</sup> Although relatively short, it nonetheless includes even fine details, such as that foreign territory can be acquired "only through contract" where the one contracting party's lack of knowledge may not be exploited, AA VI, §62, p. 353, ll. 19–21.

<sup>100</sup> See, e.g., AA VI (*Virtue*), §48, p. 473, ll. 16–17, where Kant speaks of a human being with his "moral perfection" having a duty to interact with others (*untereinander Verkehr zu treiben*).

<sup>101</sup> It also means commercial trade in AA VI, §31 ("What is money?"), p. 289, ll. 12–14; §39, p. 302, ll. 3–6, and in many other places.

<sup>102</sup> See our discussion of the state's obligation to refrain from participating in the market in Chapter 1, section 3.

If we consider the relationship between international and cosmopolitan law in the *Doctrine of Right*, we see that international law deals with public law and legislation (*iustitia tutatrix*) to establish a juridical state of nation states, which the states have a duty to enter, and with securing the rights of states within this state of nation states by establishing an international court that can reach final binding and enforceable decisions (*iustitia distributiva*). Not surprisingly, cosmopolitan law deals with commutative justice (*iustitia commutativa*) and establishing public order for the international market. Kant's ideas for putting an end to war for all time indeed do follow, albeit not "easily" as he claims,<sup>103</sup> from his much lengthier explication of the original and acquired rights of individual human beings. What is true for individual persons within one state is equally true for individual peoples within the state of nation states.

Let us return our attention to *Perpetual Peace* and the "First Annex: On the Guarantee of Perpetual Peace" where Kant writes that "every people will take up" the "spirit of trade" and it is this "spirit of trade which cannot coexist with war." In other words, "mutual self-benefit" will encourage the peoples (and consequently the states) "to promote noble peace" and "to ward off war through diplomacy" where it "threatens to break out somewhere in the world in the same way as if they [the states] were in continual leagues for this purpose."<sup>104</sup> Although Kant is not discussing cosmopolitan law in the First Annex, still we can view this passage as the actual starting point for Kant's ideas on cosmopolitan law in the *Doctrine of Right*. Kant realizes that international trade, meaning trade among peoples, needs a legal framework. Accordingly, Kant requires that "certain universal laws" to govern a "possible commerce"<sup>105</sup> among the peoples be formulated and promulgated.<sup>106</sup> Through such laws a juridical state is established, namely the third juridical state necessary to establish and maintain perpetual peace.<sup>107</sup>

<sup>103</sup> AA VI, Preface, p. 209, ll. 8–11.

<sup>104</sup> All passages quoted from AA VIII (*PP*), p. 368, ll. 1–13.

<sup>105</sup> AA VI, §62, p. 352, ll. 22–25.

<sup>106</sup> Of course the natural law of international commercial trade, what we call the *lex mercatoria*, is available for resolving international trading disputes, just as in the state of nature among individuals natural law is available through applying the "universal principle of right" to govern human interaction, and on the international level customary international law is available to govern the interaction of states. Still, to establish a cosmopolitan legal order we need to make this private law, or natural law, public and coercively binding.

<sup>107</sup> AA VI, §43, p. 311, ll. 20–24.

Why does Kant distinguish between international and cosmopolitan law? Is it not so that we have simply (1) the domestic level, and (2) the international level, and thus (1) domestic law, and (2) international law? If so, then no room remains for cosmopolitan law. Yet the matter is not so simple. There is a difference between the domestic and international levels for the market, the *iustitia commutativa*. These two levels have in common that the market already exists in the state of nature.<sup>108</sup> Before the individual juridical state has been established individuals will trade with each other. Similarly before the state of nations has been established individual peoples will trade with each other. Yet there is a difference between the domestic and international levels. We need public laws (*iustitia tutatrix*) and the public judiciary (*iustitia distributiva*) domestically to be able to order the market and thus to make it a free public market (*iustitia commutativa*), which is a necessary condition for the (domestic) juridical state. On the international level, in contrast, the establishment of a universal state of nations is neither a necessary nor a sufficient condition for ordering the (international) market. The individual nation states can, and indeed have the responsibility to, agree on an ordering of the (international) market, independent of whether they have formed a state of nation states. Consequently, an ordered *iustitia commutativa* and thus “cosmopolitan law” can exist on the international level in the absence of a *iustitia tutatrix* and a *iustitia distributiva* in a state of nation states. Cosmopolitan law is thus (logically) independent from law in a state of nation states. It requires its own *iustitia tutatrix*, meaning public law and legislation ordering the international market, the *iustitia commutativa*, and its own *iustitia distributiva*, meaning an international trade court which can reach final binding decisions under cosmopolitan law in case of trade disputes. Otherwise, states remain in a state of nature with a non-functional market in the sense that disputes revolving around trade can be resolved only by force and thus by war.

## 5. Security for the mine and thine in a state of peace

In Chapters 1 through 9 we have explicated the concept of a juridical state and the development of the three juridical states on the national, international, and cosmopolitan levels. The purpose of establishing a

<sup>108</sup> See Appendix to Chapter 2, section 1.

juridical state is securing the mine and thine. By entering a juridical state on the national level, I give others and others give me security for my (their) rights.<sup>109</sup> The same is true *mutatis mutandis* for the two other juridical states through which the states and the peoples mutually provide security. Everyone is presumed to be evil until he provides this security.<sup>110</sup> Kant never tires of emphasizing the security function of the juridical state: A "civil constitution is solely the juridical state through which everyone's own is *secured*."<sup>111</sup> The decisive command for everyone is thus: "Move to a state where everyone can have his own *secured* against everyone else."<sup>112</sup>

According to Hobbes, people enter a civil society for a life that is better than that which "the merely natural human condition"<sup>113</sup> offers them. An important distinction between Hobbes and Kant is that for Hobbes we have no rights in the state of nature whereas Kant assumes precisely the opposite. Hobbes writes that in the state of nature, "there is no dominion, no property, no mine or thine but instead each is seen to have (in fact) what he (in fact) has acquired and for as long as he is able to keep it."<sup>114</sup>

Kant considers the possibility that no one can acquire external objects in the state of nature,<sup>115</sup> but then rejects this idea. A "real external mine and thine can occur"<sup>116</sup> in the state of nature. With "real" Kant is alluding to the *lex iuridica*, confirming the idea that when an individual takes possession of an external object of choice and claims it as his own, a concrete situation of a *juridical* nature arises. Kant, in contrast to Hobbes, views the state of nature on the meta-level of rights, whereas Hobbes provides merely a factual description of the state of nature. Although for Kant the right to the external mine and thine in the state of nature is not "peremptory," still it is "provisional legal possession."<sup>117</sup> Indeed for Kant, our rights to external objects of choice in the state of nature are necessary for our duty to leave it: "If in the state of nature there were no external mine and thine even provisionally, there would also be no legal duties in this regard and thus also no command to leave this state."<sup>118</sup> Yet we do have this command:

<sup>109</sup> E.g. AA VI, §42, p. 307, ll. 14–16. <sup>110</sup> See [section 1](#).

<sup>111</sup> AA VI, §9, p. 256, ll. 27–29 (emphasis added).

<sup>112</sup> AA VI, Division DoR A, p. 237, ll. 7–8 (emphasis on "secured" added).

<sup>113</sup> *Leviathan*, Cap. XIII, p. 102: *conditio humana mere naturalis*.

<sup>114</sup> *Leviathan*, Cap. XIII, pp. 101–102: *Eidem conditioni hominum consequens est, ut nullum sit dominium, nulla proprietas, nullum meum aut tuum, sed ut illud uniuscujusque sit, quod acquisivit, et quamdiu conservare potest*.

<sup>115</sup> AA VI, §8, p. 255, ll. 23–25. <sup>116</sup> AA VI, §9, p. 256, ll. 20–21.

<sup>117</sup> AA VI, §9, p. 257, ll. 3–4. <sup>118</sup> AA VI, §44, p. 313, ll. 5–8.

*Exeundum esse e statu naturali* ("The state of nature is to be left").<sup>119</sup> We are obligated to leave the state of nature to secure our and others' rights.

One could think that the purpose of every juridical state is not security for our rights but establishing peace. Kant indeed says: "One can say that establishing this universal and perpetual peace is not simply a part but rather the entire final purpose of the doctrine of right within the limits of reason alone."<sup>120</sup> The "systematic doctrine" of law itself, namely the unfolding of "natural law based only on pure principles *a priori*" and the (binding) "positive (statutory) law that proceeds from the will of a lawgiver,"<sup>121</sup> has one purpose, to contribute to establishing peace on this earth.

Kant makes clear that "peace" does not refer to the (empirically verifiable) cemetery stillness portrayed on the sign of an inn in Holland.<sup>122</sup> Peace is also not simply a situation when enemy combat is not taking place. Peace means more. If two individuals or groups of individuals are fighting, then one can say they are at war.<sup>123</sup> If they stop fighting that does not mean their war is over, because they can always resume fighting later. One can determine empirically whether fighting is going on at any particular time, but one cannot determine empirically whether peace reigns between the two.

As Kant says, peace must be "established."<sup>124</sup> Establishing peace, however, is only possible through *a contract* between the previously battling parties.<sup>125</sup> By closing a contract we leave the level of empirically determinable facts and move to the moral level, or more precisely, to the level of law. Moreover, peace is based on an agreement between the parties who establish a juridical state. A juridical state is a situation in the relations of human beings in which "everyone can enjoy his rights."<sup>126</sup> Kant, after saying that peace is the final purpose of the doctrine of right, says: "The state of peace is solely the state of the

<sup>119</sup> This statement, which we usually associate with Hobbes, became something of a motto in the eighteenth century. For Kant, it is located in AA VI (*Religion*), p. 97, ll. 34–35.

<sup>120</sup> AA VI, Conclusion, p. 355, ll. 7–9. <sup>121</sup> AA VI, Division DoR B, p. 237, ll. 15–17.

<sup>122</sup> AA VIII (*PP*), p. 343, ll. 1–3. The sign portrayed a church cemetery entitled "Perpetual Peace."

<sup>123</sup> Kant does not limit the concept of war to physical conflicts between *groups* of human beings, such as between peoples, but includes in it the physical battle between individual persons. E.g. AA VIII (*PP*), p. 349, ll. 16–17.

<sup>124</sup> E.g. AA VIII (*PP*), p. 349, ll. 2–3.

<sup>125</sup> AA VIII (*PP*), p. 356, ll. 4–6. In AA VI, §10, p. 259, ll. 23–25, Kant speaks of "acquisition of a public juridical state *through agreement of the wills of all* to a universal lawgiving" (emphasis added).

<sup>126</sup> AA VI, §41, p. 305, l. 35 – p. 306, l. 1.

mine and thine secured under *laws* for a group of neighboring individuals and thus those who are in a constitution together.”<sup>127</sup> “Peace” and “state of peace” are both legal concepts. It is not the case that establishing a juridical state is a *means* to establishing peace. It is also not the case that establishing a juridical state *brings about* peace. Instead the state of peace is *identical* to the juridical state and this peace occurs if and only if we have a situation in which the mine and thine is secured.

In this sense peace is a relative concept. If we live in a (nation) state that can be called a juridical state then peace reigns among those who live in this state. That this state has peace internally, however, does not mean that peace reigns on earth. We can speak of universal peace only if the states – all states – live in a juridical state in their relations to each other. And even this state of peace is insufficient. The relations not only among the states but also among the peoples of the world must be governed such that we can speak of a juridical state.

Furthermore, the juridical states on the various levels are interdependent. Between (nation) state *A* that is a juridical state and (nation) state *B* that is not, we can conceive of no juridical state (on the level of international law). Juridical states and despotisms can hold conferences (even those they call “peace conferences”) but that does not constitute a juridical state. A cosmopolitan juridical state will be stable only if we have a stable juridical state on the international level just as vice versa a juridical state on the international level will be stable only if we have a stable juridical state on the cosmopolitan level. As Kant states: “When among the three possible forms of a juridical state only one lacks the principle limiting external freedom through laws, the edifice of all the others will unavoidably be eroded until they finally collapse.”<sup>128</sup>

With this chapter we have concluded our analysis of the core theory behind Kant's *Doctrine of Right*. The remaining chapters examine specific problems Kant discusses in accord with this core theory, namely the four cases on the difference between commutative and distributive justice, contract law, criminal law, and personhood and imputation.

<sup>127</sup> AA VI, Conclusion, p. 355, ll. 9–12.

<sup>128</sup> AA VI, §43, p. 311, ll. 26–29.

## The “idea of public law” and its limits

Kant contrasts commutative to distributive justice twice in the *Doctrine of Right*, once expressly using these terms in discussing a group of “four cases”<sup>1</sup> and once in connection with equity, where he speaks of “equity,” meaning commutative, and of “law in the proper sense (strict law),”<sup>2</sup> meaning distributive, justice. The four cases involve (1) a gratuitous promise, (2) a lending agreement, (3) a good faith purchase of stolen goods, and (4) a court placing a witness under oath. These cases all illustrate implementation of the “Idea of Public Law.”<sup>3</sup> When Kant considers the equity cases (the trading company and the domestic servant cases) he does so in combination with a necessity case<sup>4</sup> to indicate that the idea of public law requires sacrifice. There are “rights that have no judge,”<sup>5</sup> rights that cannot have any judge.

In this chapter, we first review Kant’s terminology for commutative and distributive justice (section 1). This review leads into our analysis of the four cases. We show that the four cases lay the foundation for the three institutions of protective, mutually acquiring, and distributive justice in a juridical state (section 2). Finally, we provide an overview of Kant’s ideas on rights that have no judge. This overview explains his equity, necessity, infanticide, and dueling cases (section 3).

### 1. Kant’s terminology on the distinction between commutative and distributive justice

The distinction between commutative and distributive justice provides the key to understanding the four cases.<sup>6</sup> Kant employs Hobbes’

<sup>1</sup> AA VI, §§36–40, pp. 296–305. Kant speaks of “four cases,” p. 297, ll. 13–14.

<sup>2</sup> AA VI, Annex Introduction DoR I, p. 234, ll. 16–24. <sup>3</sup> AA VI, §36, p. 297, l. 17.

<sup>4</sup> AA VI, Annex Introduction DoR II, p. 235, ll. 13–14. “The Right of Necessity (*Ius necessitatis*).”

<sup>5</sup> AA XXIII (*Preparatory DoR*), p. 279, l. 28: “On the right that has no judge – *aequitas, casus necessitatis*.”

<sup>6</sup> AA VI, §36, p. 296, l. 16 – p. 297, l. 5.

definitions of these two types of justice.<sup>7</sup> Commutative justice is the justice of the individual market participant, who determines what is “right” (*recht*) in a concrete case by reaching his own “private” judgment. In contrast, distributive justice is the justice of the public judiciary in a juridical state, which determines what is “established as right” (*Rechtens*) by reaching its “public” judgments.

Kant uses a variety of expressions and terms in pairs which are associated with either commutative or distributive justice. To facilitate grasping the contrasting terminology, we have placed it in the following table:

Commutative justice	Distributive justice
Private justice	Public justice
Justice <i>coram foro interno</i>	Justice <i>coram foro externo</i>
Court of conscience ( <i>forum poli</i> )	Civil law ( <i>forum soli</i> )
Equity	Law in the proper sense (strict law)
Objective reasons for exercising a right	Subjective reasons for exercising a right
Before reason	Before a court
What is right in itself ( <i>recht</i> )	What is established as right ( <i>Rechtens</i> )
A right in the broader sense ( <i>ius latum</i> )	A right in the narrow sense ( <i>ius strictum</i> )

The various expressions indicate the connotations that Kant connects to the concepts of commutative and distributive justice.

We discuss these pairs of terms in the order listed. The concepts “private justice” and “public justice” follow from the characterizations of commutative and distributive justice indicated above and thus need no further elaboration. Kant speaks of “justice *coram foro interno*” (before the internal court), meaning “commutative justice,” and “justice *coram foro externo*” (before the external court), meaning “distributive justice” when discussing some of the four cases in his lectures of 1784.<sup>8</sup> The

<sup>7</sup> See Appendix to [Chapter 2](#).

<sup>8</sup> That the distinction between commutative and distributive justice corresponds to the distinction between justice *coram foro interno* and justice *coram foro externo* is revealed in Kant's lecture, where he discusses the lending agreement and the question of who bears the risk of accidental destruction of something borrowed. In discussing *justa commutativa* and *justa distributiva* (Feyerabend, AA XXVII.2,2, p. 1359, ll. 17–18), Kant says that according to strict law, which follows from distributive justice, the lender bears the risk of destruction. According to equity, which follows from commutative justice, the borrower bears the risk (Feyerabend, AA XXVII.2,2, p. 1359, ll. 23–40). Elsewhere, Kant says that the principle of distributive justice imposing the burden on the lender (*casum sentit dominus* – the owner feels the casualty) is “a principle of the administration of law *coram foro externo*.” In contrast, the principle of

equation of commutative justice with “justice *coram foro interno*” and of distributive justice with “justice *coram foro externo*” is feasible because when committing a commutatively just act, such as performing a contract, I, the contracting party, myself decide according to my best knowledge and understanding what is right in a given situation. My decision is reached in my internal court of conscience. When committing a distributively just act, a judge decides what is right in an external public court. In the *Doctrine of Right*, Kant substitutes the expressions “court of conscience (*forum poli*)” and “civil law (*forum soli*)”<sup>9</sup> for the expressions “justice *coram foro interno*” and “justice *coram foro externo*.” In the *Doctrine of Right*, Kant also contrasts the expressions “equity” and “law in the proper sense (strict law).”<sup>10</sup> Equitable is what I, according to my best knowledge and understanding, recognize as right, whereby the judge is required to follow strict law. Kant calls what I as a private market participant decide with my conscience, what I recognize with my reason as right, “objective reasons for exercising a right.” In examining my conscience and recognizing with my reason I determine what “is right [*recht*] in itself.” In contrast, what a court<sup>11</sup> decides as “established as right” (*Rechtens*)<sup>12</sup> is based on “subjective reasons for exercising a right.”<sup>13</sup> What is “right” in itself corresponds to a “right in the broader sense (*ius latum*)”; what is “established as right” corresponds to a “right in the narrow sense (*ius strictum*).”<sup>14</sup>

The terminology is perhaps confusing for the modern reader, particularly when Kant attributes the ability to determine “objective reasons for exercising a right” to the *private* person, but says the external court, which represents *public* justice, has only “subjective reasons for

commutative justice (*casum sensilis, in cuius utilitatem aliquid datum est* – the person for whose benefit something has been given suffers the casualty) is a “principle *coram foro interno*” (Feyerabend, AA XXVII.2.2, p. 1370, ll. 1–3; see too the extensive discussion of the lending agreement, ll. 3–24).

<sup>9</sup> AA VI, Annex Introduction DoR I, p. 235, ll. 9–11; *forum poli* = “heavenly court” – *forum soli* = “earthly court.” The addition of *forum soli* to “civil law” indicates that Kant is thinking of the public judiciary. The public judiciary must decide according to civil law rules.

<sup>10</sup> AA VI, Annex Introduction DoR I, p. 234, ll. 16–24.

<sup>11</sup> For the contrast between “before my reason” and “before a court,” see AA VI, Annex Introduction DoR II, p. 236, ll. 10–11.

<sup>12</sup> For the contrast between “what is right in itself (*recht*)” and “what is established as right (*Rechtens*)” see AA VI, §36, p. 297, ll. 11–13.

<sup>13</sup> For the contrast between “objective” and “subjective” reasons for exercising a right see AA VI, Annex Introduction DoR II, p. 236, ll. 10–11. The concepts “objective” and “subjective” are also similarly contrasted at p. 235, ll. 24–26; p. 236, ll. 2–4; §36, p. 297, ll. 21–29.

<sup>14</sup> AA VI, Annex Introduction DoR, p. 233, l. 34 – p. 234, l. 2.

exercising a right." Also confusing might be that Kant, of all people, contrasts "reason" and "court" such that the private person reaching a judgment represents "reason." It seems appropriate to ask whether what the "court" decides is unreasonable.

On closer examination, however, Kant's terminology becomes transparent. I, the private person reaching a judgment, judge the legal issue in which I am embroiled according to my reason. According to my reason, and *not* according to my choice, because as a rational being I must act according to reason. I can discuss the legal issue with others, but in the final analysis I decide myself how to resolve the issue. The decision I reach is then a commutatively just decision based on *objective* reasons. The reasons are objective because they do not depend on me (the *homo phaenomenon*),<sup>15</sup> but on reason and its testing of my maxim under the conditions of the Categorical Imperative. Thus the judgment I make should correspond with any other private person's judgment.

In contrast, the court, which represents distributive justice, cannot and must not look for reasonable solutions to legal problems in the same way a private market participant does. The court is bound by the law that has been made positive in a juridical state. Indeed the idea behind a juridical state is that everyone not "follow his own judgments."<sup>16</sup> Instead, law determines what is established as right through public lawgiving. A court bound by public law does not have objective, but instead *subjective*, reasons for its decisions because law promulgated in a concretely existing juridical state is "adventitious,"<sup>17</sup> and everything adventitious is "subjective," meaning bound to the concrete subject, here to the concrete court reaching the decision.<sup>18</sup> It is in this manner that we need to understand Kant's title: "On Subjectively Conditioned Acquisition through the Decision of a Public Judiciary."<sup>19</sup> The party to whom a court attributes a right which the party would not have under principles of commutative justice acquires the right through the decision of a public judiciary. This acquisition is "subjectively conditioned," because it depends on a concrete court in a concrete juridical state being confronted with the issue of law.

<sup>15</sup> On this concept, see [Chapter 14](#). <sup>16</sup> AA VI, §44, p. 312, l. 15.

<sup>17</sup> AA VI, Introduction MM IV, p. 227, l. 14.

<sup>18</sup> See, e.g., AA VI, §15, p. 264, ll. 5–6, where Kant indicates this contrast: "The civil constitution, although its reality is *subjectively adventitious*, is still *objectively*, i.e. as duty, necessary" (emphasis added).

<sup>19</sup> AA VI, §36, p. 296, ll. 13–14.

## 2. Kant’s treatment of the “four cases” in §§36–40 of the *Doctrine of Right*

When Kant speaks of the four cases, what he means is four case *types*, because for each of these four cases one can conceive of countless parallel cases, some of which Kant himself discusses. The equity cases are parallel to the gratuitous promise case. Furthermore, good faith adverse possession<sup>20</sup> is a case parallel to the good faith purchase of stolen goods.

In his treatment of the four cases, Kant proceeds in three steps, first asking for each case: (1) What is the just solution according to principles of commutative justice? (2) What is the just solution according to principles of distributive justice? For each case, Kant determines that when the judge applies principles of distributive justice he does injustice to the party favored by principles of commutative justice. Kant’s statement on equity could be made for each case: “The strictest law is the greatest wrong (*summum ius summa iniuria*).”<sup>21</sup> Still, the judge is obligated to apply principles of distributive justice in reaching a decision.<sup>22</sup> Finally, on a meta-level Kant considers: (3) Why is it that principles of distributive justice, which bring about injustice, are to prevail? Sometimes Kant’s reasons are relatively short, perhaps because he finds them obvious. He discusses good faith acquisition of stolen goods in the most detail because his view of this type of case has changed from his view preceding the *Doctrine of Right*.<sup>23</sup>

### A. The gratuitous contract (§37)

(1) In this case, the question is whether someone who promises to make a gift can be forced to fulfill his promise, or whether he can revoke his promise at any time before the gift is made. According to principles of commutative justice, the decision would be that he can revoke his promise because one cannot presume that he not only promised to make the gift but “also to give away . . . [his] freedom [from

<sup>20</sup> AA VI, §33, pp. 291–293.

<sup>21</sup> AA VI, Annex Introduction DoR I, p. 235, ll. 6–7. The legal adage *summum ius summa iniuria* (literally: the highest right is the highest wrong) according to Cicero, *De Officiis*, I, §33, p. 14.

<sup>22</sup> See AA VI, §36, p. 297, ll. 21–27, where Kant says that the court is “indeed bound” to decide according to the rules of distributive justice.

<sup>23</sup> In his lecture, Kant is of the opinion that the good faith purchaser of stolen goods must return them to their owner, *Feyerabend*, AA XXVII.2.2, p. 1356, ll. 24–27; p. 1375, ll. 13–14.

coercion] for nothing.”<sup>24</sup> Under principles of commutative justice, the purported recipient of the gift would acquire nothing by virtue of such a promise.

(2) The judge in an external court applying principles of distributive justice, however, would apply the principle “contracts are to be performed” (*pacta sunt servanda*)<sup>25</sup> and decide that the donor must make the gift as promised. Under principles of distributive justice, the donee acquires the right to coerce the donor to hand over the gift.

(3) Kant uses this case to underscore the *public nature of law*. Public law includes not only law promulgated by a public lawgiver, but also contracts closed by virtue of the parties’ private autonomy. Achenwall states: “Contracts provide the law that is valid for the contracting parties,”<sup>26</sup> and Kant follows suit: “Contracts provide the law.”<sup>27</sup> This law is public, albeit not publicly available, because it is open to the parties and, in case of dispute, to the public court.<sup>28</sup> The judge must decide the case solely on the basis of what is public (“*the promise and the promisee’s acceptance*”<sup>29</sup>), and not on any presumptions as to what the parties might have meant, but did not say, when closing the contract. The court’s responsibility in this case is no different from its responsibility to apply the public positive law of a lawgiver in general. The court

<sup>24</sup> AA VI, §37, p. 298, ll. 2–5. Kant also discusses the case of a gratuitous promise in his lecture, *Feyerabend*, AA XXVII.2.2, p. 1358, ll. 2–25. One must emphasize that in §§37 and 38 of the *Doctrine of Right*, Kant uses a concept of “presumption” (*Vermutung, Präsuntion*), namely the concept of “presumption of a person” (*praesumptio hominis*), which is different from the concept of presumption in the narrower technical sense we discuss in Chapters 3 and 9. “Presumptions of a person” have no normative character, but instead are more or less well-founded assumptions about facts or circumstances. Leibniz calls such presumptions “conjectures,” but in the terminology generally used in the eighteenth century they were called “presumptions” (see Chapter 9, notes 12, 14). The person who makes the presumption can be anyone. In §38, Kant speaks of one of the participants (“the receiver of what is being lent”) not being able to presume this or that (AA VI, §38, p. 298, ll. 28–29). “Presumptions of a person” acquire particular relevance when it is the judge who makes them. That Kant is thinking also of judicial presumptions in §§37 and 38 is apparent from the context but also because he says that “a public judge cannot entertain presumptions of what this or that party might have thought” (AA VI, §38, p. 300, ll. 12–13 (emphasis added)). In §§37 and 38 there is discussion only of whether a party or a judge can “presume” something in one direction or the other (in the sense of a “presumption of a person”) because the contract lacks any relevant and express rule on the matter. In the final analysis, Kant believes that all presumptions of a person must be excluded in a public court because of the “idea of public law.”

<sup>25</sup> See AA VI, Introduction MM III, p. 219, ll. 36–37; Chapter 11, note 51.

<sup>26</sup> *Pacta dant legem inter paciscentes*, I.N.I., §182, Comment, p. 160, derived from *Digests* 2.14.7.5.

<sup>27</sup> *Pacta dant legem*, *Feyerabend*, AA XXVII.2.2, p. 1354, l. 9.

<sup>28</sup> Similarly, if a trial is closed to the public but still open to the parties to the lawsuit, then it nonetheless is considered to be a public trial, because the concept “public” tolerates such limitations. See, e.g., *ZPO*, §357.

<sup>29</sup> AA VI, §37, p. 298, ll. 13–14 (emphasis added).

must apply the law as it has been made public and not second-guess the lawgiver. Similarly, in the gratuitous contract case, the court must apply the law as made public through the contract and not second-guess the contracting parties.

That Kant is emphasizing the public nature of law is also apparent from his discussion of the alternatives the parties had when closing their contract. They could have expressly agreed that the donor could revoke the gift anytime before performance.<sup>30</sup> If the parties had so agreed, then the reservation would have been part of the contract and also public. In such case, the judge would not coerce the donor to perform. If the donor did not expressly reserve the right to revoke, however, the court has nothing but the express wording of the contract on which to base a decision and will thus enforce the promise.

The gratuitous promise case is no different from the equity cases. The first equity case is of a trading company formed on the basis of “equal advantages.”<sup>31</sup> In this case, one of the partners invested significantly more work and money in the company than the others, and the issue raised is whether that partner should receive more than his equal share of the company’s assets on dissolution. The second equity case concerns a contract between a master and a domestic servant based on a particular “currency.”<sup>32</sup> At the time payment is due, this currency has been devalued dramatically through inflation, and the issue raised is whether the amount of payment should be adapted to take account of the inflation. For equity, the public judge must also base her decisions on the contracts as they were closed. These contracts are a part of *public* positive law. If solely what “was stated in the contract” is decisive, and the judge cannot decide on the basis of “unspecified conditions,” meaning unspecified in the contract,<sup>33</sup> then she must decide in favor of “equal advantages” and she must decide on the basis of a particular “currency.”<sup>34</sup>

<sup>30</sup> AA VI, §37, p. 298, ll. 17–19. <sup>31</sup> AA VI, Annex Introduction DoR I, p. 234, l. 17.

<sup>32</sup> AA VI, Annex Introduction DoR I, p. 234, ll. 27–28.

<sup>33</sup> AA VI, Annex Introduction DoR I, p. 234, ll. 30–32.

<sup>34</sup> Kant discusses the case of the domestic servant in his lecture, where he reaches the same result, *Feyerabend*, AA XXVII.2.2, p. 1328, l. 41 – p. 1329, l. 8. Kant’s equity case shows us what the common law of Kant’s time also reveals. According to strict principles of law, the master would have had to pay the domestic servant only the amount of money in the currency he promised to pay in the contract. Nonetheless, it was the injustice inherent to applying strict principles of law in some cases that sparked establishing a court of equity in England in the fourteenth century and maintained it during the seventeenth and eighteenth centuries at the prime of its development, *Smith and Bailey*, pp. 5–7. Although the German legal system never had a court of equity distinct from a court of law, the *Civil Code* today has its own back door through which the German judge in a court of law can escape

### B. The lending agreement (§38)

(1) The second case raises the question of who bears the risk of accidental loss or destruction of a thing that has been borrowed when the lending agreement is silent on the issue of security and neither party is at fault.<sup>35</sup> "It is not self-evident that the owner [the lender] sacrificed not only the use of his thing . . . but also security against all damage that could accrue to him [the owner] because he gave up his own control over the thing."<sup>36</sup> The just decision according to principles of commutative justice is therefore that the borrower bears the risk of loss or damage.

(2) In contrast, the public judge must decide that the lender bears this risk. This decision is based on the principle: "Damage falls on the lender (*casum sentit dominus*)."<sup>37</sup> The borrower acquires something through the public court's decision, namely security against the risk of accidental damage or destruction.

(3) Decisive for the lending agreement case is "*possession of the thing as its owner*."<sup>38</sup> Just as law is law only if made *public*, so too (acquirable) rights are rights if and because they are connected to an "act of possession (*actus possessorius*) of an external thing"<sup>39</sup> and thus to a corresponding "*publicly valid sign*."<sup>40</sup> Reserving ownership ("intelligible possession") when lending something is such a *public* act of possession. For the holder of any right, however, the rule is: "Everyone has to cover his own loss,"<sup>41</sup> from which Kant's solution to the case under principles of distributive justice follows.

if applying strict principles of law leads to injustice in a case. Today the relevant law in Germany is §242 BGB on good faith (*Treu und Glauben*), and common law courts now apply principles of equity themselves.

<sup>35</sup> Kant's lending case requires return of the thing borrowed and not return in kind, such as would be the case with a loan of money.

<sup>36</sup> AA VI, §38, p. 298, l. 33 – p. 299, l. 2. Kant also deals exhaustively with the lending agreement in his lecture, *Feyerabend*, AA XXVII.2.2, p. 1358, l. 26 – p. 1360, l. 2. Here too Kant relies on the distinction between commutative and distributive justice, *Feyerabend*, AA XXVII.2.2, p. 1359, ll. 17–18.

<sup>37</sup> AA VI, §38, p. 300, ll. 9–10. *Casum sentit dominus* literally means: The owner feels the casualty. Achenwall also discusses *casum sentit dominus*, *I.N.I.*, §245, p. 223. He says *inter alia*: "The promisee feels the casualty unless something else has been stipulated" (*Casum sentit creditor nisi aliud stipulatum fuerit*). Kant reaches the same conclusion, but in contrast to Achenwall gives a reason for it. *Casum sentit dominus* is a legal adage still used in the original Latin in Germany today.

<sup>38</sup> AA VI, §38, p. 300, ll. 4–5 (emphasis added). <sup>39</sup> AA VI, §33, p. 292, ll. 14–15.

<sup>40</sup> AA VI, Annex of Explanatory Comments, "6. On the law of adverse possession," p. 364, l. 13.

<sup>41</sup> In his lecture, Kant says: *Ius in rem perit pereunte re* ("When a thing perishes, so does the right to the thing"), *Feyerabend*, AA XXVII.2.2, p. 1369, l. 26, quoting Achenwall, *I.N.I.*, §244, p. 222.

Here too, Kant considers the parties' ability to have agreed on who bears the risk and included a risk-assignment clause in the lending agreement.<sup>42</sup> In the *absence* of such a clause the court must decide on the *public* nature of the *right* in fact asserted, which here is the lender's public act of possession of something as his property. Since the owner of property bears the risk of accidental loss, the judge will decide the owner bears the risk, unless he has publicly provided otherwise in the agreement.

### C. Recovery of lost property (§39)

(1) The third case involves a claim for the return of stolen goods from a *bona fide* purchaser who bought them from an unjustified seller. Here, the principle of commutative justice is: "I cannot derive for myself more from what another has than what he has rightfully."<sup>43</sup> The commutatively just decision would thus be to order the good faith purchaser to return the goods to their original owner. Under principles of commutative justice the good faith purchaser acquires nothing from the purchase other than a right against the unlawful seller to return of the purchase price.

(2) The public judge must decide that the good faith purchaser has acquired ownership of the stolen property. The judge will support her decision by saying that a thing offered on a public market governed by administrative law becomes the buyer's property if he has observed all rules of purchase and sale exactly.<sup>44</sup> This decision is unjust toward the (previous) owner, because he loses his ownership right through no fault of his own. The *bona fide* purchaser acquires something through the court's decision, namely a right *in rem* to the goods.

(3) Applying the principle "No one can transfer more rights than he himself has" requires a potential buyer to determine whether a seller really owns the goods he offers for sale. The buyer would bear the burden of searching through the entire chain of previous owners back to the "absolutely first" owner (the "original owner")<sup>45</sup> in order to

<sup>42</sup> AA VI, §38, p. 300, ll. 13–16.

<sup>43</sup> AA VI, §39, p. 301, ll. 30–31. Kant's principle is a reference to the *Nemo plus iuris transferre potest quam ipse habet* principle (literally: "No one can transfer more rights than he himself has"). Ulpian, *Digests* 50.17.54 *inter alia*. Kant also discusses good faith purchases in his lecture, *Feyerabend*, AA XXVII.2.2, p. 1356, ll. 16–27; p. 1375, ll. 7–25.

<sup>44</sup> AA VI, §39, p. 303, ll. 1–3. Kant speaks of *bona fide* acquisition of a *stolen* horse (p. 301, l. 33), which today is impossible according to positive German law (§935(1) *BGB*) as well as according to US law ("In the United States... a purchaser cannot obtain good title from a thief," Dukminier and Krier, *Property*, p. 166).

<sup>45</sup> AA VI, §39, p. 302, l. 19.

determine whether he can acquire something. If the buyer does not conduct this title search, he can never be certain that he has become the owner of the thing he bought.<sup>46</sup>

Kant realizes that requiring such a title search is impractical and will always be hindered by the presumption of innocence.<sup>47</sup> It follows from this presumption that I am not permitted to *ask* the seller how he came to possess the goods because asking “would be an injury.”<sup>48</sup> The potential buyer is thus in a dilemma, and this dilemma burdens the public market. Under principles of commutative justice “no exchange of external things . . . could ensure certain acquisition.”<sup>49</sup> Secure acquisition, however, must be possible because it follows from the postulate of practical reason.<sup>50</sup> As Kant states: “*Everything alienable must be acquirable by someone.*”<sup>51</sup> Accordingly, if a buyer observes the rules of the public market,<sup>52</sup> then a *bona fide* purchase<sup>53</sup> is possible and the buyer becomes the “real owner”<sup>54</sup> of the thing.<sup>55</sup> The rules of distributive justice in this case protect the functionality of the *iustitia commutativa*, the public market.

<sup>46</sup> That is precisely the burden on the common law purchaser of real property in the United States, who has to trace ownership of land back to the original land grant from a sovereign before the buyer can be sure that he has acquired ownership of the property, Dukminier and Krier, *Property*, p. 577. This system is without a doubt clumsy and burdensome for the buyer.

<sup>47</sup> See Chapter 3, section 1B. <sup>48</sup> AA VI, §39, p. 301, ll. 14–16.

<sup>49</sup> AA VI, §39, p. 302, ll. 20–23.

<sup>50</sup> Kant's argumentation is similar to his argumentation on the possibility of acquiring something through adverse possession. The long-term and undisputed good faith possessor of a thing must be able to be certain he is the thing's owner, because otherwise “no acquisition [would] be peremptory (secure), but instead all would be provisional (temporary),” AA VI, §33, p. 292, ll. 25–32. Here too Kant relies on the postulate of practical reason, AA VI, §33, p. 293, ll. 2–6, which postulates not only the possibility of acquisition but also the possibility of *secure* acquisition.

<sup>51</sup> AA VI, §39, p. 301, ll. 9–10 (emphasis added).

<sup>52</sup> Kant: “the formality of the legally relevant act of exchange (*commutatio*) between the possessor of the thing and the acquirer,” AA VI, §39, p. 301, ll. 12–14.

<sup>53</sup> AA VI, §39, p. 300, l. 34. <sup>54</sup> AA VI, §39, p. 301, l. 37 – p. 302, l. 1.

<sup>55</sup> Achenwall, *I.N.I.* §197, pp. 173–174, regards the good faith purchase of a thing that does not belong to the seller (assuming the seller is not dealing as the owner's agent) as impossible. In his lecture, Kant agrees with Achenwall. The acquirer is merely a putative owner (*dominus putativus*), who must return the thing to the owner when and if he discovers the truth about the property, *Feyerabend*, AA XXVII.2,2, p. 1356, ll. 16–27. The Prussian *ALR* of 1794 (I, 9, §§584 and 648) does not recognize good faith purchases of stolen goods, but rather only good faith adverse possession. In contrast, the Austrian *Codex Theresianus* of 1766 (II/8/4), which never became law but did serve as a model for the still valid Austrian *ABGB* of 1811, does provide for good faith purchase of stolen goods. In the French discussion of the eighteenth century the possibility of good faith purchase was justified in part with the *sûreté du commerce* (security of commerce), an argument we then find in Kant. In the *Doctrine of Right*, Kant takes the more modern position that good faith purchases are legally possible in general and extends that position to include purchases of stolen goods. On the history see Troje, “Guter Glaube.”

## D. Placing a witness under oath (§40)

(1) In this case, Kant considers two interrelated questions, namely whether I can be obligated to take an oath in court, and whether I can be obligated to accept someone else's testimony under oath as "valid evidence of the truth of his statement."<sup>56</sup> Under principles of commutative justice, "coercion to taking oaths is contrary to inalienable human freedom."<sup>57</sup> A lawgiver who gives the judiciary the authority to coerce the taking of an oath commits a wrong.<sup>58</sup> Furthermore, it is *per se* wrong for anyone to obligate me legally "to believe that another (the witness under oath) has any faith at all, in order to allow my right to depend on his oath."<sup>59</sup>

(2) Nonetheless a law may be adopted in a concrete juridical state permitting a judge to force a witness to take an oath. If no other means of getting the truth is available, one must assume that everyone has a faith in order to use this faith as a justified means to necessitate witnesses to tell the truth in court. Accordingly, the witness can be obligated to take an oath and the parties have to accept that the judge will base his decision on the witness's statement.

(3) In the final analysis, the reason to allow using coercion to force a witness to take an oath is that it can be "*indispensable for the administration of justice*" to *presuppose the faith* connected with the oath, because "without relying on it [faith], the court would not be sufficiently capable of discovering secretly hidden facts and reaching a judgment on rights. A law that binds one to take an oath is thus obviously . . . given to the behoof of the judicial power."<sup>60</sup> The rules of distributive justice in this case protect the functionability of the *iustitia distributiva*, the public judiciary.

## E. The "four cases" in preparation for §41 of the Doctrine of Right

The meta-level reasoning Kant gives in the four cases are all reasons that, as Kant notes, result from the "idea of public law."<sup>61</sup> In the *case of the donation* (and the equity cases), the issue is the function of public

<sup>56</sup> AA VI, §40, p. 304, ll. 22–23. Kant also considers the problem of placing a witness under oath in his lecture, *Feyerabend*, AA XXVII.2.2, p. 1365, l. 1 – p. 1366, l. 29.

<sup>57</sup> AA VI, §40, p. 305, ll. 1–2. <sup>58</sup> AA VI, §40, p. 304, l. 36 – p. 305, l. 1.

<sup>59</sup> AA VI, §40, p. 304, ll. 24–26.

<sup>60</sup> AA VI, §40, p. 304, ll. 15–20 (emphasis added). This presupposition would be a presumption of (positive) law.

<sup>61</sup> AA VI, §36, p. 297, l. 17.

law as laid down in a contract. The contract would lose its meaning if the court did not decide based on its terms, but instead reached some independent judgment according to its own lights. In the *case of the lending agreement*, the issue is the function of a right that I have only under the condition of its being public. The owner's act of possession (retaining his ownership of the thing lent) would lose its meaning if the principle "the loss falls on the owner" (*casum sentit dominus*) did not apply. In the *case of the good faith purchaser*, the issue is the ability of the public market to function. In the *case of the oath*, the issue is the ability of the public judiciary to function.

The four cases lay the foundation for §41, where Kant introduces the concept of a juridical state and discusses its formal criteria. These formal criteria are elements of public justice, namely public lawgiving as "protective justice (*iustitia tutatrix*)," the free public market as "mutually acquiring justice (*iustitia commutativa*)," and the public judiciary as "distributive justice (*iustitia distributiva*)."<sup>62</sup> The four cases denote these three types of justice. The first two cases relate to the protective justice of a lawgiver. The rule on gratuitous promises supports the functioning of positive law, the law of the contract. The rule on lending agreements supports the functioning of public rights. Law and rights both relate to protective justice because law reflects rights and rights reflect law, just as the *lex iusti* is reflected in the *lex iuridica* and vice versa. The case of the good faith purchase of a thing relates to the functionability of the *iustitia commutativa* and the taking of an oath to the functionability of the *iustitia distributiva*.

### 3. On rights that have no judge

Our discussion of the four cases indicates that there are rights that "have no judge." One who has made a gratuitous promise has a right to revoke it unless the gift has been executed. The lender has a right to compensation for damage or loss of the thing lent; the original owner of the horse has a right to have the stolen horse returned; everyone has a right not to be placed under oath. And yet the public judge will decide against these rights.<sup>63</sup> In the trading company case, the partner who

<sup>62</sup> See Chapter 1.

<sup>63</sup> In his lecture, Kant emphasizes this point in particular for the lending agreement but speaks of "equity" instead of "commutative justice." "The lawyers treat equity as if it were arbitrary. It is, however, a real right, but the judge cannot decide in accordance with it." Further he notes that when someone loses something he borrowed the owner expects the borrower "to at least give him good words." If the borrower owed the owner nothing, then he would

did more for the company but “through fate lost more than the other partners” has a right to more than equal division of the company’s assets. The domestic servant has a right to a wage adapted to inflation, but in these cases the public judge must decide against them too. The domestic servant, like the unlucky partner, can only “call on equity,” “a mute goddess, who cannot be heard.”<sup>64</sup> These are the sacrifices the “idea of public law” requires.

We can now examine the case of necessity against the backdrop set in this chapter. Kant takes the Plank of Carneades case as an example: Following a shipwreck, *A* is sitting on a plank that can only carry one person. *B* is swimming in the water and will drown if he does not push *A* off the plank. If *B* does that, *A* will drown.<sup>65</sup>

Kant calls the equity and necessity cases “cases in which a right is in question” but “for whose decision no judge can be designated.”<sup>66</sup> A “right in question” is a *ius controversum*,<sup>67</sup> meaning a right in dispute. In the first equity case, the right disputed is the partner’s right to compensation because he has contributed more and lost more than the other partners. In the second equity case, the right disputed is the servant’s right against his master to adaptation of his income because of inflation. Kant says that both the partner and the servant have these rights. Still these rights are rights only from the point of view of reason. They are rights only in the broader sense, which their holders cannot enforce in a public court. No public judge can recognize the partner’s or the servant’s right. The right is a “right without coercion.”<sup>68</sup>

In the plank case, it is disputed whether the first in possession of the plank has the right to keep the plank. Kant affirms this right, and thus that no one else has the right to take the plank from him. Kant debates unnamed legal theorists who claim there is a right of necessity, meaning in our case a right to take the plank with force if needed. Kant

not need to give any good words. Kant imagines the following situation: *X* asks owner *O* to lend him a thing and *O* knows that if the thing is lost *X* will be rude and deny any right *O* might have. Kant’s somewhat humorous comment is: “If I know that I might lose the thing, I will still lend it, but if I also know that the borrower will deny all my rights then I will lend it to no one. One feels in oneself what is internally right.” *Feyerabend*, AA XXVII.2,2, p. 1359, l. 37 – p. 1360, l. 2.

<sup>64</sup> AA VI, Annex Introduction DoR I, p. 234, l. 30.

<sup>65</sup> Lactantius, *Divinae Institutiones*, Lib. V, Cap. 16 (see Lactantius, *Opera I*, p. 451) seems to provide the oldest written description of the case. Hobbes and Pufendorf both discuss the case, Hobbes, *Leviathan*, Cap. XXVII, p. 216, and Pufendorf, *De Jure*, II/VI/§4/p. 208.

<sup>66</sup> AA VI, Annex Introduction DoR, p. 234, ll. 6–7.

<sup>67</sup> AA VI, §44, p. 312, ll. 25–26; General Comment A, p. 318, l. 22.

<sup>68</sup> AA VI, Annex Introduction DoR, p. 234, l. 4.

disagrees. It is wrongful (*culpabile*)<sup>69</sup> to take the plank from the first person in possession. Nonetheless, the wrongfulness of this act cannot be *determined* by a *public* court, because the act is wrongful only under principles of commutative justice. Under principles of distributive justice, determining that the act is wrongful would result in punishment of the plank taker. Punishment, however, is not possible for the reasons Kant indicates.<sup>70</sup> Taking the plank forcefully is “coercion without right.”<sup>71</sup>

In the equity cases, the defendants (the other partners in the company, the master) can defend themselves by arguing that something *else* was agreed upon (namely equal participation in the profits, a wage in the currency specified in the agreement) from what the claimants are demanding. In both equity cases, the arguments are legally relevant and can be used in a court of law to defend against the claim. In the necessity case, the actor's reason for taking away the plank is also legally relevant. The legally relevant reason is that otherwise the actor would lose his life. This legally relevant reason makes the first possessor's right to keep the plank a “right in question,” a controversial or disputed right.

In the equity cases, the defendants' arguments are decisive for the decisions in the cases. The claimants cannot prevail in a court of law. Similarly for the case of necessity. Kant's solution to the case is that the victim (through the prosecutor) cannot get the court to decide in favor of his right to keep the plank. The court could say that the act in necessity is “unjust,” but such a declaration would be practically meaningless, because the court cannot do anything about it. In particular, it cannot punish the actor, and it is only punishment that would legally highlight the victim's right to keep the plank and the actor's violation of that right. Although the first possessor of the plank has a right to defend his possession, any subsequent coercion through a public court is impossible.

Both the equity cases and the necessity case involve rights “in the broader sense” “for which no judge can be had.” Or, as Kant also states, rights in the broader sense can be recognized for “objective,” but not for “subjective reasons for exercising a right.”<sup>72</sup> Such rights and claims

<sup>69</sup> See note 79.

<sup>70</sup> We discuss the criminal law implications of this case in [Chapter 13, section 5](#).

<sup>71</sup> AA VI, Annex Introduction DoR I, p. 234, l. 4.

<sup>72</sup> AA VI, Annex Introduction DoR II, p. 236, ll. 10–11.

of their violation belong in the court of conscience (*forum poli*) and not in a public court (*forum soli*);<sup>73</sup> they belong “before reason” and not “before a court.”<sup>74</sup>

We can now see the reasoning behind Kant’s determination that the actor in the Plank of Carneades case cannot be punished. For some cases, any attempt to maintain the function of public law is hopeless. “Public justice”<sup>75</sup> simply fails. Thus the proposition “necessity has no law (*necessitas non habet legem*)”<sup>76</sup> applies, meaning no public law can unfold its effect in the plank case.<sup>77</sup> The proposition does not mean that the actor in necessity has a *right* to push the victim off the plank and thus to kill him. Necessity does not make what is wrong into what is “in accordance with law.”<sup>78</sup> The act, as Kant says, “is not to be judged as inculpable (*inculpabile*),” but instead as only “unpunishable (*impunibile*),” whereby “inculpable” means “not wrongful.”<sup>79</sup>

Kant’s remark that the equity cases involve a “right without coercion” and the necessity case “coercion without right” suggests reciprocity. The equity cases relate to the ability of public law to function and the necessity case relates to the inability of public law to function properly, namely through its threat of punishment. This inability to function leads to the inapplicability of public law.

Two further cases are comparable to the necessity case, namely a mother’s killing her child born out of wedlock and an insulted officer’s killing the insulting fellow officer in a duel.<sup>80</sup> Kant initially solves

<sup>73</sup> AA VI, Annex Introduction DoR I, p. 235, ll. 9–11; see note 9.

<sup>74</sup> AA VI, Annex Introduction DoR II, p. 236, ll. 10–11. In Anglo-American terminology, they belong in a court of equity and not in a court of law.

<sup>75</sup> AA VI, §41, p. 306, l. 3.

<sup>76</sup> AA VI, Annex Introduction DoR II, p. 236, ll. 5–6. The legal adage *necessitas non habet legem* is derived from Glossa “*expedire*” on *Digests* 1.10.1.1, col. 83.

<sup>77</sup> The objection that effective “punishment” and its corresponding “threat of punishment” are conceivable in such cases and would have a deterrent effect (such as the threat not only to execute the actor but also his family in an excruciatingly painful way) is superficial because Kant’s argumentation proceeds only from punishments as they can be executed (and thus threatened) in a juridical state and not in a despotism. In a juridical state only the punishment that equals the evil inherent in the crime according to retributive principles can be threatened and executed.

<sup>78</sup> AA VI, Annex Introduction DoR II, p. 236, ll. 6–7.

<sup>79</sup> AA VI, Annex Introduction DoR II, p. 235, l. 35 – p. 236, l. 2. *Culpa* does not mean “blame-worthiness” but instead “wrong,” and *inculpabile* thus means “not wrongful.” In his lecture (*Feyerabend*, AA XXVII.2.2, p. 1333, ll. 26–27), Kant says “an act (*factum*)” is either “*culpabile* or *inculpabile*,” and it is “*culpabile* if it is not in accordance with the law,” which indicates that it is *inculpabile* if it is in accordance with the law. Correspondingly, in his *Reflections* on Baumgarten, Kant translates *exculpatio* with “justification.” AA XIX, R.6574, p. 88, l. 2. Joerden, “Notrecht”; Küper, *Karneades*, pp. 48–49 point in the right direction.

<sup>80</sup> AA VI, General Comment E, p. 335, l. 36 – p. 337, l. 7.

these cases with the means available to him. Although "the categorical imperative of punishment justice" is valid in these cases, namely "the death penalty must be imposed for the wrongful killing of another,"<sup>81</sup> still the punishment should be reduced: "It seems that . . . killing . . . in both [cases] is indeed punishable but cannot be punished by the highest authority with the death penalty."<sup>82</sup> The killing of the child and of the fellow officer cannot be called "murder (*homicidium dolosum*).<sup>83</sup> The reason is that the act "occurred reluctantly."<sup>84</sup> For Christian Wolff, the "reluctantly committed act" (*actio invita*), a concept that comes from Aristotle's *operatio mixta* (mixed action),<sup>84</sup> is not fully imputed and thus more leniently punished.<sup>85</sup> Kant reaches the same conclusion.

The "reluctantly committed act" (*actio invita*) puts us into the necessity arena. Achenwall states: "A reluctantly committed act is an act whose opposite the actor would prefer if he did not fear that a [great] evil would arise from the alternative act."<sup>86</sup> The legally protected interests in conflict are the victim's life and the actor's honor, whereby Kant accepts the concept of honor prevailing at his time.<sup>87</sup> Of course one cannot say, as one can in the plank case, that the deterrent effect of the criminal law is dysfunctional. Public criminal law remains effective, but this effectiveness is limited, which leads to a reduction of punishment. Kant, however, does not want to leave it at that. He criticizes the "civil constitution" (of his own time) as "barbaric and underdeveloped" and thus at fault for the consequence that public opinion – Kant refers expressly to the public opinion of officers<sup>88</sup> – leads to killing the child and the fellow officer. He thus calls for a change in public opinion,<sup>89</sup> which would make special treatment of these cases obsolete.<sup>90</sup> As we all know, this change of opinion has come to pass.<sup>91</sup>

<sup>81</sup> AA VI, General Comment E, p. 336, l. 37 – p. 337, l. 1.

<sup>82</sup> AA VI, General Comment E, p. 336, ll. 11–14 (emphasis added).

<sup>83</sup> AA VI, General Comment E, p. 336, ll. 29–31 and p. 336, ll. 12–13.

<sup>84</sup> Aristotle, *Nicomachean Ethics*, III, §1, p. 111.

<sup>85</sup> Wolff, *PhPrU*, §589, p. 433: "The reluctantly committed act is imputed, but less than the fully free action" (*Actio invita imputatur, etsi minus, quam voluntaria*).

<sup>86</sup> *Actio invita est cuius oppositum agere agens maluisset, nisi aliquod malum inde emergens metuisset*, Achenwall, *Prol.*, §40, pp. 34–35.

<sup>87</sup> AA VI, General Comment E, p. 336, l. 33: "The idea of honor [is] no delusion here."

<sup>88</sup> AA VI, General Comment E, p. 336, ll. 22–23.

<sup>89</sup> Kant speaks of "public opinion" in a draft on "A Matter of Honor," which is published in AA XXIII (*Preparatory DoR*), pp. 363–370.

<sup>90</sup> AA VI, General Comment E, p. 336, l. 31 – p. 337, l. 7.

<sup>91</sup> The privileges accorded infanticide and homicide within a duel were abolished in Germany in the twentieth century, the privilege for infanticide as late as 1998.

In this chapter we have explained Kant’s four cases in terms of the public nature of law and rights, or the functioning of the *iustitia tutatrix*, the functioning of the free public market, the *iustitia commutativa*, and the functioning of the public judiciary, the *iustitia distributiva*. We then discussed rights that have no judge, namely rights of equity and necessity, or the sacrifice that the public nature of law and rights demands.

## Contract law I

### Why must I keep my promise?

Kant begins his discussion of private law with what one can call the “general part” of private law on external objects of our choice.<sup>1</sup> External objects of our choice include (1) physical things, (2) someone else’s choice to perform an act, and (3) someone else, such as a spouse or child, in their relation to me.<sup>2</sup> An external object of choice is thus not only an external thing one can own, but also someone else’s choice to perform an act under a contractual agreement.<sup>3</sup>

In this chapter we explain how Kant’s ideas of intelligible possession apply to contractual claims. [Section 1](#) begins with the permissive law of practical reason and its power-conferring norm. The permissive law gives everyone the moral capacity to be the claimant under a contract, and thus makes contractual claims *possible*. [Section 2](#) then considers the exact nature of a contractual claim for Kant. We argue that Kant sees a contractual claim as a right we have against our contracting party and in addition as a *universal right*, meaning a right against everyone else. Kant’s theory of contract thus treats contractual claims similar to property rights.<sup>4</sup> [Section 3](#) discusses the *reality* of contractual

<sup>1</sup> Private law on the external mine and thine, as Kant also calls it, is organized into one general part and three specific parts. The general part discusses (1) how someone can have an external object of choice as his own and (2) the universal principle of acquisition, or how my legal capacity to have an external object of choice can be concretized. In the specific parts, Kant discusses (1) acquisition of things, (2) acquisition of someone else’s choice to perform an act, and (3) acquisition of rights to a person akin to rights to a thing. For acquisition of someone else’s choice to perform an act, the argumentation is exceptionally brief and contained in AA VI, §§18–21, pp. 271–276.

<sup>2</sup> AA VI, §4, pp. 247–248.

<sup>3</sup> For an insightful discussion of Kant’s theory of contract see Unberath, “Bindung an den Vertrag,” pp. 719–732; Unberath, *Vertragsverletzung*, pp. 32–51.

<sup>4</sup> One must distinguish between the promise to do something in the future and the duty to actually do it when due. If I make a false promise and the promisee believes me and in reliance on my promise gives me something of value, then I commit fraud at the time of making the promise, independent of whether I actually perform under my promise at the time performance is due. If I do not perform under my promise at the time performance is due then I breach the contract, independent of whether I planned to breach the contract at

claims. In order to acquire a contractual claim in reality, one person must close a contract with another. By closing a contract, one acquires another person's choice to perform an act through the parties' united self-legislating wills. Section 4 discusses the *necessity* of such a claim. To make the contractual claim necessary, meaning that courts will enforce it under principles of distributive justice, the bilateral legislating wills of the two contracting parties must be contained in the *a priori* necessarily united will of all. Section 5 then answers the question: Why must I keep my promise?

### 1. The moral capacity to have a contractual claim

The question Kant poses is: How is it legally possible to have someone else's choice to perform an act as my own? Kant's favorite example is a contract for the purchase of a horse, which we use to answer this question. *A*, the owner of a horse, agrees with *B*, the buyer of the horse, that *A* shall transfer ownership of the horse to *B* next week and *B* will pay *A* \$10,000 for the horse. The question Kant asks is: How is it legally possible for *B* to have *A*'s choice to transfer the horse next week as *B*'s own?

Kant emphasizes the temporal difference between closing a contract and performing on that contract. What one acquires through contract is the other party's freedom of choice to perform an act in the *future*:

I cannot say I have the *performance* of something through the other party's choice as mine if all I can say is that this performance came into my possession *simultaneously* (*pactum re initum*) with his promise, but only if I can say I am in possession of the other party's choice (to determine him to perform) even though the time for performance is yet to come.<sup>5</sup>

Here, Kant distinguishes two cases. Both cases relate to the derived acquisition of an object of choice. We are limiting the discussion here to derived acquisition of a thing (a horse). Either the contract and the transfer occur simultaneously or they occur at different times. In the first case, which Kant calls a *pactum re initum*,<sup>6</sup> the promisee acquires ownership of the horse immediately and has no further claims against

the time I made the promise or not. In this chapter we are not concerned with the veracity of the promise at the time it is made (on this issue see AA IV (*Groundwork*), p. 402, l. 16 – p. 403, l. 17; p. 422, ll. 15–36), but instead with the duty to fulfill the promise.

<sup>5</sup> AA VI, §4, p. 248, ll. 8–13.

<sup>6</sup> Literally: "a contract closed with regard to an object [of choice]." See too AA VI, §19, p. 273, l. 6; §21, p. 275, ll. 7–8, ll. 22–23, ll. 34–35; §31, p. 284, l. 19.

the promisor.<sup>7</sup> In the second case, the promisee does not acquire ownership of the horse at the time the contract is closed. Instead the promisee acquires the promisor's choice to act in the future, meaning the promisee can determine the promisor to perform under the contract by transferring ownership of the horse.

To show how it is possible for one person to have as his own another person's choice to perform an act in the future, Kant begins with the postulate of practical reason: "It is possible to have any external object of my choice as mine, i.e. a maxim which if it were a law would make an object of choice *per se* (objectively) masterless [*herrenlos*] (*res nullius*) is wrong."<sup>8</sup> It may seem odd to speak of an object of choice becoming masterless when the object of choice is someone else's choice to transfer a horse. After all, *A*'s choice to do whatever he wants with the horse seems to remain *A*'s, and thus not masterless. Nonetheless, *A*'s choice to transfer the horse to *B* (because it is *B* who is willing to pay *A* \$10,000 for the horse) would be masterless, if *B* did not have the moral capacity to acquire *A*'s choice. Indeed one could not even speak of *A* having any choice, but rather only of *A* having a *wish*<sup>9</sup> to transfer the horse to *B*, if *B* cannot possibly have *A*'s choice as *B*'s own. Thus *A*'s choice to transfer the horse to *B* depends on *B*'s ability to have *A*'s choice as *B*'s own.

To show that one can have someone else's choice as one's own, Kant begins by saying that an object of choice is something one *physically* has the power to use.<sup>10</sup> In order to use something, one must possess it.<sup>11</sup> *B* would have the physical power to use *A*'s choice to transfer the horse, for example, if *B* can threaten *A* with a gun in order to get *A* to give the horse to *B*. If *B* does threaten *A* in order to get *A* to turn over the horse, then one can say *B* has empirical physical possession of *A*'s choice, similar to one's having empirical physical possession of an apple when

<sup>7</sup> With "promisee" we mean someone to whom a contractual obligation is owed. The "promisee" is the offeree who has accepted the offeror's promise and thus entered into a binding contract. The "promisor" is the person who made the offer the promisee accepted. See too note 32.

<sup>8</sup> AA VI, §2, p. 246, ll. 5–8. We have discussed the meaning and argumentation behind the postulate of practical reason in depth in Chapters 4–5. *Res in res nullius* (as in *pactum re initum*) does not mean "thing" but rather "object" (of choice).

<sup>9</sup> AA VI, Introduction MM I, p. 213, ll. 14–19, where Kant differentiates choice from wish. "The faculty of desire according to concepts, insofar as the ground determining it to act lies within itself and not in the object, is called a faculty to do or not do as one pleases. If it [this faculty] is connected with the awareness that one's action can bring about the object [of one's desires] then it is called *choice*." If it is not so connected it is called "*wish*." In our example, if *A* has the desire to transfer the horse to *B*, but *B* cannot have *A*'s choice as his own, then *A* has only a wish to transfer, but not a choice to transfer the horse to *B*.

<sup>10</sup> AA VI, §2, p. 246, ll. 9–10. <sup>11</sup> AA VI, §1, p. 245, ll. 11–12.

one has the apple in one's hand. If *B* discontinues the threat then *A* may not give him the horse. *B* will then have lost empirical physical possession of *A*'s choice, just as someone who drops an apple from his hand loses empirical physical possession of the apple. As long as *B* continues the threat, however, he retains empirical physical possession of *A*'s choice and thus has the physical power to use *A*'s choice to give him the horse.

*B* could also threaten *A* to get *A* to give him the horse next week by telling *A* that he (*B*) will come for the horse next week, gun in hand. Then one can say that *B* has non-empirical physical possession of *A*'s choice to deliver the horse next week, which Kant also calls "possession as a pure concept of the understanding."<sup>12</sup> *B*'s possession is non-empirical because *B* leaves *A* with the horse, separating himself from *A* in space and sacrificing his direct control over *A*'s choice regarding the horse. Nonetheless *B* still has physical possession of *A*'s choice. *B* has *A*'s choice under his physical control by virtue of his credible threat to come for the horse next week with his gun. *B*'s having non-empirical physical possession of *A*'s choice is similar to having an apple under one's control by placing the apple in a building and locking the windows and doors before leaving the building.<sup>13</sup> If *B* has non-empirical possession of *A*'s choice to transfer the horse, then *B* indeed has the physical power to use it. *A*'s choice is thus an object of *B*'s choice. Of course, *B* need not use a gun to have physical possession of *A*'s choice. *B* could also threaten to expose *A* to others as a promise breaker if *A* does not deliver the horse to *B* (assuming *A* is susceptible to such threats), or if *A* is a member of *B*'s family simply tell *A* how sad he (*B*) will be if *A* refuses to deliver the horse.

Kant then moves to the claim that if one has the physical power to use an external object of choice but not the *legal capacity* to use it, even when using it is compatible with everyone's (including *A*'s) freedom under a universal law, then freedom would rob itself of the use of its choice with respect to external objects of choice by placing usable objects beyond the possibility of any use. Objects of choice would then be destroyed in a practical sense because they could not be used. Imagine a world in which no one's choice to perform an act could be used legally by anyone else. *A* could want to dispose of his horse

<sup>12</sup> AA VI, §7, p. 253, l. 7.

<sup>13</sup> Kant develops these ideas primarily in AA VI, §7, p. 252, l. 31 – p. 255, l. 21 and §17, p. 268, l. 1 – p. 270, l. 9. We are simply adapting them to relate more directly to a contractual claim.

and prefer having \$10,000 to having the horse. *B* could need a horse and be glad to pay \$10,000 for *A*'s horse. If it were legally impossible for *B* to acquire *A*'s horse through agreement, even in cases in which no one's freedom of choice were violated by *A*'s and *B*'s transaction, then *A*'s choice would be a mere wish and no longer a legally possible object of *B*'s choice. Agreements to exchange goods and services would be legally impossible. That cannot be, says Kant, and thus "it is a requirement *a priori* of practical reason to see and treat any object of my choice as an objectively possible mine and thine."<sup>14</sup>

Kant thus posits the postulate of practical reason with which we began this section. This postulate is a permissive law which gives us the legal capacity to have external objects of our choice – including someone else's choice to perform an act – as our own. Kant has now shown that it is *legally possible* to have a contractual claim as one's own. He has not yet shown that such a contractual claim exists in reality or how to go about acquiring one. In particular, Kant has not shown how one can acquire someone else's choice to perform an act without violating that person's or anyone else's right to freedom. We turn to this problem in [section 3](#), but before we discuss that problem we must first consider a further aspect of the permissive law of practical reason.

## 2. A contractual claim as a universal right

The permissive law of practical reason gives us not only the capacity to have a contractual claim as our own, but also an "authorization . . . to impose an obligation on everyone else they otherwise would not have to refrain from using certain objects of our choice because we were the first to take those objects into our possession."<sup>15</sup> We have discussed this latter aspect of the permissive law in depth for physical things and rights *in rem*.<sup>16</sup> A right *in rem* is a right against *everyone*. In acquiring a right against everyone to the undisturbed possession of an external thing, I impose an obligation on all of them to refrain from interfering with the external thing I have acquired and willed to be my own. The problem Kant faces is explaining why the others have this unilaterally imposed obligation. His solution is that this obligation is imposed by my will if my will is contained in the *a priori* united absolutely commanding will of all.<sup>17</sup>

<sup>14</sup> AA VI, §2, p. 246, ll. 32–35.    <sup>15</sup> AA VI, §2, p. 247, ll. 1–6.

<sup>16</sup> Chapters 4–6.    <sup>17</sup> AA VI, §14, p. 263, ll. 19–23.

Kant's concept of a contractual claim is akin to his concept of a property claim. By applying the permissive law to contractual claims and thus empowering individuals to establish such claims, Kant indicates that all others have an obligation not to interfere with the parties' claims under the contract. Consequently, when the parties close a contract they establish not only claims against each other but also against third parties. Claims against third parties, however, evolve only from the *a priori* united will of all "because the unilateral will (which includes the *bilateral* yet *particular* will) cannot impose an obligation which in itself is adventitious on everyone, but instead an *omnilateral* not adventitious but *a priori* and thus necessarily united and lawgiving will is needed."<sup>18</sup>

Both Achenwall and Kant understand and recognize the distinction between a right *in rem* and a right *in personam*.<sup>19</sup> As Kant sees it, a right *in rem* is a "right against any possessor" of a thing, whereas a right *in personam* is a right only "against a specific person."<sup>20</sup> For contractual rights, Achenwall also discusses what he ultimately calls a "universal right." Achenwall assumes I have a "right against everyone" that they "not violate my right acquired through contract."<sup>21</sup> I have a right, for example, not to tolerate someone's hindering my promisor from performance.<sup>22</sup> Achenwall first calls the right to freedom from interference with my contractual claims a "non-personal right" (*ius non-personale*),<sup>23</sup> and later a "universal right" (*ius universale*).<sup>24</sup> As a right against everyone, it indeed is not a right *in personam*, if a right *in personam* is a right "against a specific person," as Kant defines it. My right against everyone that they not interfere with my contractual relationship, however, is also not a right *in rem*, because a right *in rem* is a right to property. Still, a right to non-interference with one's contractual claims does have one common feature with a right *in rem*. It, like a right *in rem*, is a universal right, namely a right against everyone. Thus the primary division of rights for Achenwall is not between a right *in rem* and a right *in personam*, but rather between a right against a person and a universal right. A right *in rem* is then one type of universal

<sup>18</sup> AA VI, §14, p. 263, ll. 23–27 (emphasis on "bilateral" added).

<sup>19</sup> Achenwall, *I.N.I.* §188, p. 164; AA VI, §20, p. 274, ll. 5–12; *Feyerabend*, AA XXVII.2.2, p. 1354, l. 32–43.

<sup>20</sup> AA VI, §39, p. 300, ll. 27–29.

<sup>21</sup> *Ius ... in quemlibet, ne quis violet ius suum pacto adquisitum*, *I.N.I.* §186, p. 162.

<sup>22</sup> *Ius non patiendi, ut quis promittentem in praestando impediatur*, *I.N.I.* §186, p. 163; see too §§188, 191, 192, pp. 164–168.

<sup>23</sup> Achenwall, *I.N.I.* §186, p. 163.      <sup>24</sup> Achenwall, *I.N.I.* (6th edn. 1767), §186, p. 167.

right, a right to freedom from interference with a contractual claim is another.

When Kant writes that through acquiring a right to an external object of choice, including a contractual claim, we impose an obligation on everyone they otherwise would not have to refrain from interfering with the right acquired,<sup>25</sup> he is characterizing a contractual claim as a universal right in Achenwall's terminology. One who interferes with my contractual relations violates the principle "do no one wrong" (*neminem laede*) – assuming as Kant does that I have in fact acquired something from my promisor through his promise.<sup>26</sup> This aspect of contractual rights is interesting in and of itself, because it fortifies the idea that not fulfilling a contractual claim, or interfering with someone else's contractual claims, is a violation of the promisee's possessions or assets, more similar to theft than to moral failure to do as one promised.<sup>27</sup>

Kant indicates two related duties to recognize another's possession of an external object of choice in the general part of private law on the external mine and thine. The first is "a legal duty to act toward others so that external (usable) objects can become someone's own."<sup>28</sup> This duty reflects the authorization contained in the permissive law of practical reason. The permissive law gives me the capacity to have an external object of choice, for instance another's choice to act in a certain way, as my own. This duty requires everyone to act toward me and me toward them in a manner recognizing this capacity. Within the context of contract, it would be a breach of this duty if someone acted to prevent anyone from ever acquiring something derivatively through contract. Such action would also be an injury to the person attempting to acquire something derivatively: "One who proceeds following

<sup>25</sup> AA VI, §2, p. 147, ll. 1–6.

<sup>26</sup> Interestingly, one finds in both German and US tort law recognition of the universal-right approach to contractual claims. If I close a contract with *P* for the purchase of a horse, and *T* locks *P* up when *P* is supposed to be delivering the horse, then *T* has violated not only *P*'s right to freedom of choice, but also a right I have against *T* that he not interfere with *P*'s performance under the contract. Under both German and US tort law, I would have a claim for money damages against *T*. BGB, §826 Palandt, 8(a)(dd); *Restatement (Second) Torts*, §§766, 766(a), 766(b).

<sup>27</sup> See *Feyerabend*, AA XXVII.2.2, p. 1336, l. 43 – p. 1337, l. 5, where Kant states that the duty to perform a contract may seem to be a duty to act rather than a prohibition against acting in a certain way. The former type of duty is a duty of ethics and the latter, if owed to someone else, is a duty of law. Kant confirms that the duty to perform a contract is a negative duty and if not fulfilled is a violation of *neminem laede* "because the other already regards [my performance] as his own; and if I do not give it [my performance] to him then I take what belongs to him" (emphasis added).

<sup>28</sup> AA VI, §6, p. 252, ll. 13–15.

a maxim through which it would be impossible to have an object of my choice as mine injures me.”<sup>29</sup> It would be a breach of this second duty if someone proceeds according to a maxim that makes it impossible for a potential acquirer to have another party’s choice as his own.<sup>30</sup>

### 3. Acquiring a contractual claim in reality

Although we have the legal capacity to have a contractual claim as our own, we do not have any contractual claims *in fact* until we have acquired such a claim. Kant has explained that originally acquiring an external thing requires taking it under one’s control and willing it to be one’s own.<sup>31</sup> The unilateral will of the claimant thus suffices to acquire originally an external thing in reality. For a contractual claim, the unilateral will of one of the contracting parties is insufficient to take control of the other party’s choice to perform an act. Unilaterally taking control of someone else’s choice to act would violate the other party’s right to freedom of choice. Accordingly, the wills of both parties must unite for one of them to be able to take control of the other’s choice to perform an act.

The contracting parties’ wills unite through the promisor making a promise and the promisee accepting that promise.<sup>32</sup> It is through promise and acceptance that the parties’ wills unite and become one common will, legislating the duties of each of the parties under the contract. Conceptualizing this union of wills to one common will raises difficulties if one imagines the process in the empirical world of space and time. The acceptance necessarily follows the promise in time and thus the promisor is free to change her mind before the promisee accepts the promise. Similarly, when the promisee accepts he does not know whether the promisor has already changed her mind and thus need not feel bound by his acceptance either. If the promise and acceptance do not occur simultaneously, then the wills do not unite and no contract can be formed.

<sup>29</sup> AA VI, §9, p. 256, ll. 25–27.

<sup>30</sup> For a discussion of the §§6 and 9 duties for the acquisition of external things, see [Chapter 5, section 2](#).

<sup>31</sup> See AA VI, §10, p. 258, l. 1 – p. 259, l. 20.

<sup>32</sup> AA VI, §19, p. 272, ll. 2–6. Kant notes that the person making a promise becomes a promisor through the promisee’s acceptance of the promise. No one becomes a promisor through *merely* making a promise. My own will alone is insufficient to make me a promisor, *Feyerabend*, AA XXVII.2.2, p. 1354, ll. 12–15.

Kant's solution to the simultaneity problem lies in a transcendental deduction<sup>33</sup> of the "concept of acquisition through contract" which abstracts from conditions of time.<sup>34</sup> What one acquires through contract is another person's choice to perform a certain act, such as deliver a horse. Although empirically the acceptance follows the promise in time, still the parties' relationship is purely legal. Because the relationship is purely legal and thus intellectual, the transcendental deduction abstracts from the temporal difference in declarations of the parties' wills and assumes they occurred *simultaneously*. By abstracting from conditions of time, one sees the parties' wills as common and each party's choice as acquired. Because the party's choice is seen as acquired, the party no longer has any freedom of choice with respect to the act constituting performance under the contract. Nonetheless, acquisition of the party's choice does not violate that party's or anyone else's freedom of choice. The party's freedom is not violated if the party voluntarily entered into the contract. No one else's freedom of choice is violated because no one else had any choice to buy the horse the offeror offered to the offeree. Thus acquisition under contract can be compatible with Kant's universal law of right.<sup>35</sup> Indeed for Kant one can enter into a contractual relationship only through one's free choice. Otherwise the wills of the two parties are not self-legislating and one cannot say they united.

#### 4. Freedom of contract and its limits

In [section 3](#) we discussed only the wills of the contracting parties. The question arises whether the united will of the two contracting parties is a sufficient foundation for one party's claims against the other party. The answer is no. Kant in his characterization of the contract is careful to indicate that closing the contract is a necessary but not a sufficient condition for the validity of the agreement.

To determine what the sufficient condition is for the validity of an agreement, we must draw the analogy Kant himself draws.<sup>36</sup> Acquisition of another person's choice through contract is comparable to

<sup>33</sup> A transcendental deduction is "an explanation of how concepts can relate *a priori* to objects," AA III, p. 100, ll. 5–7 (B 117).

<sup>34</sup> The full transcendental deduction is in AA VI, §19, p. 272, l. 30 – p. 273, l. 10.

<sup>35</sup> "Act externally so that the free use of your choice [can] coexist with everyone's freedom according to a universal law," AA VI, Introduction DoR §C, p. 231, ll. 10–12.

<sup>36</sup> Kant compares acquisition through contract to acquisition of external things by taking them under one's control (*Bemächtigung*), AA VI, §19, p. 273, ll. 25–29.

acquisition of an external thing by taking control of it. When discussing property claims to external things, we indicated that the will of the original community of the earth's surface (*communio fundi originaria*)<sup>37</sup> is to divide the land. The original community of the earth has this will to avoid constant conflict in a world in which people will necessarily come into contact due to the spherical shape of the earth's surface. To avoid this potential conflict the land must be divided. To divide it, individuals are permitted to take external things, such as land, under their control and unilaterally will them to be their own. It is the idea of legislating through my unilateral will which makes the appropriation effective to give me purely legal possession (*possessio noumenon*), or ownership of the thing. In this way, the *a priori* united will legitimates concrete ownership rights.

The *a priori* united will wills that originally acquired external things be the acquirer's own precisely because this will seeks to avoid conflict in an effort to attain perpetual peace. The potential for conflict is no less for contractual claims. If the united will did not recognize contractual claims, people could never acquire anything except originally. Once all external things had been acquired, individuals could keep what they had declared to be their own, but never engage in any exchange of goods. The farmer with horses could not sell a horse to buy clothing. The maker of clothing could not exchange the clothing for food. If someone needed a horse, he could steal a horse or rob the farmer to get one, but he could not enter into a contract to acquire one derivatively.<sup>38</sup> This society would be one where there is a "naturally unavoidable conflict between the choice of one with that of another,"<sup>39</sup> or a society with the constant threat of aggression.

One might interject that even if the united will did not recognize contractual claims people still could abandon what they have and hope

<sup>37</sup> AA VI, §6, p. 251, ll. 1–2; §16, p. 267, l. 5. See [Chapter 6](#).

<sup>38</sup> In a world *with* contract law, theft and robbery undermine contract as a means of acquiring goods derivatively. Kant thus calls theft and robbery "public offenses." Theft and robbery are public offenses because they "endanger the commonwealth and not merely an individual person," AA VI, General Comment E, p. 331, ll. 7–17. "They endanger the commonwealth" here means they endanger the public market for the exchange of goods. The market is the medium of ensuring commutative justice, meaning justice in mutual acquisitions, which is one instance of "public justice," AA VI, §41, p. 306, l. 4 (cf. [Chapter 1, section 2B](#)). In contrast, "embezzlement, i.e. misappropriation of money or goods entrusted for commerce" and "fraud in buying and selling" are private offenses, both of which presuppose ownership and contractual rights. A person who commits embezzlement or fraud attacks the market from within, utilizing albeit abusing the rules of contractual exchange. He depends on the market in order to defraud others. He is thus not an enemy of the public and its institutions, but rather only of the individual victim.

<sup>39</sup> AA VI, §16, p. 267, ll. 7–8.

to find abandoned what they need. Presumably if one can acquire external things originally by willing them to be their own, they should be able to reverse the effect to disown those things by willing that they no longer be their own. Kant also speaks of abandoning or renouncing what is one's own.<sup>40</sup> Accordingly, ownership and disownment could be accomplished through unilateral declarations of will, but nothing could be transferred or exchanged through bilateral declarations of will made by two parties to an agreement. If people had to depend on abandonment to acquire something, they would be in a world without commutative justice, or what Kant also calls "mutually acquiring justice,"<sup>41</sup> because no acquisition could be mutual. Of course the horse farmer could "agree" with the clothier to abandon one of his horses if the clothier abandons specified articles of clothing. Then the farmer and the clothier could acquire the clothes and the horse originally. They, however, could never be certain that the other party will indeed let loose his goods rather than holding on to them and simply grabbing the other party's already abandoned property.<sup>42</sup> This uncertainty would lead to conflict, similar to the conflict that would result from theft and robbery of needed goods.<sup>43</sup>

To avoid conflict, the *a priori* united and absolutely commanding will wills that contracting parties' bilateral wills impose an obligation on them and everyone else to respect the contractual obligations the two individual wills have adopted. The *a priori* united will thus legitimates concrete contractual rights. In this way, a party to a contract attains intelligible possession of his contracting party's choice based on duty under a law of freedom. Once the transition to the juridical state has been undertaken, a court will recognize and enforce intelligible possession of another's choice, making this possession necessary.

Freedom of contract has its limits. Unconscionable contracts are not contained in the universally united will of all, e.g. if *A* consents to *B*'s surgically removing *A*'s healthy finger. The limits on freedom of contract correspond to the limits on the original acquisition of land. Basically, Kant assumes that an original acquirer can define the borders

<sup>40</sup> AA VI, §18, p. 271, ll. 23–25; Achenwall defines *renunciatio* and *derelictio* in *I.N.I.*, §§158, 159, p. 136.

<sup>41</sup> AA VI, §41, p. 306, ll. 6–7.

<sup>42</sup> Kant makes mention of this approach to bilateral exchange and rejects it, AA VI, §20, p. 274, ll. 21–24.

<sup>43</sup> For a discussion of the conflict that would occur if property claims were not recognized, see Chapter 6.

of his property,<sup>44</sup> but in his preparatory work he writes that no person can acquire the entire surface of the earth because he must leave room for the others.<sup>45</sup> In the *Doctrine of Right*, Kant limits the capacity to take land into possession through the acquirer's (physical) capacity to have the land under his control, meaning to defend it (in the state of nature).<sup>46</sup> Yet, Kant sees that the questions accompanying the rational order of property ownership cannot easily be answered: "The lack of specificity regarding the quantity as well as the quality of the external acquirable object makes this problem ( . . . original external acquisition) the most difficult of all to solve."<sup>47</sup> The limits of freedom of contract are as unspecified as the limits of freedom to originally acquire land.

### 5. Why must I keep my promise?

Let us consider the question raised at the beginning of this chapter: Why do promises have to be kept? Kant's argument is logical and unfolds like the principles of Euclidean geometry.<sup>48</sup> The argument is limited to promises that have been accepted.<sup>49</sup> The promise and the acceptance are both acts of choice, and the acceptance in particular is an act of choice by which the offeree takes the offeror's choice to perform an act under his control. The argument is as follows:

1. The permissive law of practical reason gives me the legal capacity to be a promisee, meaning the legal capacity to have a promisor's choice to perform an act as mine. Contractual claims are thus possible.
2. I cannot acquire a contractual claim originally because original and unilateral acquisition of someone else's choice "would not accord with the principle of harmony between the freedom of my choice and everyone else's freedom and thus be wrong."<sup>50</sup>
3. It follows from no. 2 that the promisor must promise to perform an act in order for me to acquire a contractual claim by accepting his promise.

<sup>44</sup> AA VI, §16, p. 267, ll. 24–26. <sup>45</sup> AA XXIII (*Preparatory DoR*), p. 320, ll. 16–18.

<sup>46</sup> AA VI, §15, p. 265, ll. 1–4. <sup>47</sup> AA VI, §15, p. 266, ll. 28–31.

<sup>48</sup> As usual, Kant rejects utilitarian considerations for promise keeping. Kant states that authors who write about this topic usually take cost-benefit considerations into account. They claim that breaking promises is harmful. Kant notes that "nothing results" from such calculations, *Feyerabend*, AA XXVII.2,2, p. 1350, ll. 29–32.

<sup>49</sup> AA VI, Introduction MM III, p. 220, l. 2.

<sup>50</sup> AA VI, §18, p. 271, ll. 12–14.

4. If it were not the case that (accepted) promises had to be kept, then contractual claims would not be possible (contrary to no. 1 and the capacity I have to be a promisee). Therefore, (accepted) promises must be kept (*pacta sunt servanda*).<sup>51</sup>

Kant's reasoning shows the relationship between the idea that contractual claims are possible under the postulate of practical reason and the legal principle that (accepted) promises must be kept. The legal principle that (accepted) promises must be kept is the opposite side of the coin from the idea that contractual claims are possible. That accepted promises must be kept indeed *means* that the promisee has a contractual claim. Contrarily, someone's having a contractual claim *means* that accepted promises must be kept. Accordingly, when Kant calls the legal principle that (accepted) promises must be kept a "postulate of pure reason,"<sup>52</sup> he is referring to the postulate of practical reason with its permissive law. Accepted promises are called "contracts." This line of argumentation is not "proof" that accepted promises must be kept. As Kant notes, any further proof of "this categorical imperative" is as impossible as proving that one needs three lines to construct a triangle, two of which together must be longer than the third.<sup>53</sup>

<sup>51</sup> "Contracts must be fulfilled." Cf. AA VI, Introduction MM III, p. 219, ll. 36–37. *Pacta sunt servanda* is a legal adage derived from the *Digests* 2.14.7.7.

<sup>52</sup> AA VI, §19, p. 273, ll. 22–25. <sup>53</sup> AA VI, §19, p. 273, ll. 15–22.

## Contract law II

### Kant's table of contracts

Section 31 of the *Doctrine of Right* contains a “Dogmatic Division of all Contractually Acquirable Rights.” Kant says that a dogmatic division is a division according to a principle *a priori*, as opposed to a fragmentary empirical division, which cannot resolve the question of whether the division is complete.<sup>1</sup> Kant claims that his division is complete and specific and thus comprises a real system of all derivatively acquirable rights.

Divisions of contracts have existed since Antiquity. The *Digests* understand market activity as the exchange of goods and services, and arrive at a four-part division of contracts by combining two elements, namely to give (*dare*) something, or to do (*facere*) something:

*Do ut des.*                      *Do ut facias.*                      *Facio ut des.*                      *Facio ut facias.*  
(I give so you give. –I give so you do. –I do so you give. –I do so you do.)<sup>2</sup>

Achenwall reduces the classic four-part division to a three-part division.<sup>3</sup> Kant agrees with Achenwall's reduction because *Do ut facias* and *Facio ut des* describe the same process.<sup>4</sup> Kant's table of contracts, however, extends far beyond this model. As it is imperative for the reader to have the table in order to understand this chapter, we are including it here in full:

- A. The gratuitous contract (*pactum gratuitum*) is:
  - (a) The *keeping* of entrusted goods (*depositum*).
  - (b) The *lending* of a thing (*commodatum*).
  - (c) The donation (*donatio*).

<sup>1</sup> AA VI, §31, p. 284, ll. 6–16.      <sup>2</sup> Paulus, *Digests* 19.5.5.pr.

<sup>3</sup> *I.N.I.*, §215, p. 187; see too §218, p. 189.      <sup>4</sup> *Feyerabend*, AA XXVII.2,2, p. 1360, ll. 34–39.

B. The *onerous* contract.I. The contract of exchange (*permutatio late sic dicta*).

- (a) The barter (*permutatio stricte sic dicta*). Goods for goods.
- (b) The purchase and sale (*emptio venditio*). Goods for money.
- (c) The loan (*mutuum*): exchange of a thing under the condition of getting it back in kind (e.g. grain for grain, or money for money).

II. The contract of transfer (*locatio conductio*).

- (α) The transferring of my thing to another for use of the thing (*locatio rei*), which if the thing may be returned merely in *specie* can, as an onerous contract, also be combined with *charging interest* (*pactum usurarium*).
- (β) The wage contract (*locatio operae*), i.e. consenting to the use of my energy by another for a specified price (*merces*). The worker under this contract is the wage earner (*mercennarius*).
- (γ) The contract of authorization (*mandatum*): conducting business in someone else's stead and *name*, which, if it is merely in someone else's stead and not simultaneously in his (the principal's) name, is *conducting business without authorization* (*gestio negotii*); if it, however, is conducted in the name of the other it is called *mandate*, which here, as a contract of transfer, is an onerous contract (*mandatum onerosum*).

C. The contract of guarantee (*cautio*):

- (a) The pledging and taking of a pledge (*pignus*) together.
- (b) The *vouching* for another's promise (*fideiussio*).
- (c) The personal surety (*praestatio obsidis*).<sup>5</sup>

Kant's completeness claim is puzzling at first. How can all conceivable contracts be contained in a table of only twelve contract types? Even Kant notes that there are innumerable mixed and empirical kinds of contracts. The secret to understanding the table is realizing that each of its elements reveals only one aspect of a contractual agreement. Each aspect, however, can be combined with one or more aspects of

<sup>5</sup> AA VI, §31, p. 285, l. 12 – p. 286, l. 6. We translate *Veräußerungsvertrag* (B.I.) as “contract of exchange” because *veräußern* for Kant and in common German usage means giving someone something for payment, which excludes gratuitous contracts, and thus implies reciprocal acquisition through an onerous contract (cf. AA VI, §31 I, p. 286, ll. 31–33). We translate *Verdingung* (B.II.α) as “transferring” because *verdingen* means letting someone have something through contract (Grimm, “verdingen,” vol. 25, col. 234 under 2b). Gregor's translation of *Verdingung* as “lending” in group B.II.α is too limited because *Verdingung* includes transferring ownership, as one can see from Kant's own example of the loan. Furthermore, Gregor also uses “lending” for *verleihen* in group A(b), thus using the same word for two different concepts and German words.

the other elements in the table to form a wealth of possible empirical instantiations of contractual relationships. In this chapter, we explain the table and indicate what aspect Kant is highlighting for each of the twelve types of contract.

### 1. The three “pure” forms of contract

Interestingly, but unsurprisingly, Achenwall discusses all twelve of the contract types in Kant's table.<sup>6</sup> Achenwall's discussion is unsurprising because Roman law recognizes most of these types of contracts and natural law scholars preceding Kant discuss them. Achenwall to some extent advances the traditional understanding of the twelve types of contracts. Kant's contribution to the discussion is his systematization of the contracts based on insights Achenwall does not have.

First, Kant indicates that only three simple and pure forms of contract exist, namely those aimed at:

A. *unilateral* acquisition (gratuitous contract), or at B. *mutual* acquisition (onerous contract), or at no acquisition at all, but rather at C. *security* for one's own (which, on the one hand, can be gratuitous, but, on the other, still can be onerous as well).<sup>7</sup>

Kant then forms four groups of three types of contract each. In the first group (gratuitous contracts) Kant includes the same three gratuitous contracts Achenwall discusses, but reorders them, beginning with the deposit and ending with the donation. For the second group (onerous contracts), Kant discusses the same six onerous contracts Achenwall discusses, but places them into two subgroups, the group of contracts of exchange (B.I.) and the group of contracts of transfer (B.II.). In the

<sup>6</sup> Achenwall discusses three forms of contract under the titles “Of gratuitous and onerous contracts” and “Of guarantee” in exactly the same order as Kant: *De pactis beneficiis et onerosis*, *I.N.I.*, §§208–223, pp. 180–196; *pacta gratuita*, §§208–212; *pacta onerosa*, §§213–223; *De cautione*, §§224–229, pp. 196–201. Achenwall discusses the three gratuitous contract types albeit in the reverse order from Kant. For the onerous contracts, Achenwall considers the purchase and sale (*emptio venditio*), the hiring out contract (*locatio conductio*), which for Achenwall includes the transferring of my thing for another's use (*locatio rei*) and the wage contract (*locatio operarum*), the barter (*permutatio strictius dicta*), the loan (*mutuum*), and the contract of authorization (*mandatum*) in that order. As contracts of guarantee Achenwall considers the vouching for another's promise (*fideiussio*) and the pledging and taking of a pledge (*oppignoratio*). Kant includes all of these types of contracts in his table, and adds the personal surety (*praestatio obsidis*), which Achenwall discusses under international law, *I.N.II.*, §245 (AA XIX, p. 429, ll. 29–34). Kant also mentions conducting business without authorization (*gestio negotii*), which Achenwall considers to be a fictional contract and thus discusses in the general part of contract law, *I.N.I.*, §175, note, p. 153.

<sup>7</sup> AA VI, §31, p. 285, ll. 7–11.

third group (contracts of guarantee), Kant adds the personal surety to the two guarantee contracts Achenwall discusses, thereby gaining a three-part division here as well. Our theory is that Kant's new ordering of the twelve types of contracts is motivated by his table of twelve categories in the *Critique of Pure Reason*.<sup>8</sup>

If we take a look at the first group of contracts (A.) involving unilateral acquisition we find that nothing about any of these types of contract need be gratuitous.<sup>9</sup> The first contract is for the deposit of goods, or bailment, and the bailee can take the goods in deposit for free or require payment for the service. Similarly, the second contract in the group, the lending agreement, is gratuitous, but if done in exchange for money it is a rental contract. Finally, the donation is gratuitous, but if done in exchange for money, it is a sale.<sup>10</sup> The three contracts in the second group (B.I.) indeed do require some type of exchange and thus could not be performed gratuitously but instead only for the payment inherent in what is given in exchange. Such an exchange also takes place for the loan agreement even when the loan is made without interest<sup>11</sup> because a loan requires at least that the amount loaned be repaid. The contracts in the third group (B.II.) again can be performed gratuitously or for payment. I can transfer a thing, for example, for the recipient to use for free and then return, in which case this contract becomes a lending contract as the second contract in the first group, or for the recipient to use for free and then return in kind, in which case this contract becomes a loan as the third contract in the second group. Furthermore, I can work for someone else for free and without requiring any wage. Finally, the authorization contract can authorize someone to perform acts in my stead and name and the person need not charge me any fee. Kant knows that the contracts in Group B.II. can be free of charge, as the classic loan (*mutuum*),<sup>12</sup> and the mandate (*mandatum*).<sup>13</sup> Still Kant makes an effort to show that the contracts

<sup>8</sup> AA III, p. 93, ll. 1–20 (B 106).

<sup>9</sup> In fact they were considered to be gratuitous under Roman law, Zimmermann, *Obligations*, p. 188 (*commodatum*), p. 213 (*depositum*).

<sup>10</sup> In *Feyerabend*, AA XXVII.2.2, p. 1360, ll. 39–41, Kant draws the comparison between donation and sale.

<sup>11</sup> Achenwall, *I.N.I.* §220, p. 191 indicates that a loan can be made without interest.

<sup>12</sup> Although Kant refers to the loan (*mutuum*) in group B.I., it is also a type of contract of transferring a thing (*locatio rei*) in group B.II.α.

<sup>13</sup> See Zimmermann, *Obligations*, p. 154 (*mutuum*), p. 415 (*mandatum*). Achenwall recognizes that a *mutuum* and a *mandatum* can be either gratuitous or onerous, *I.N.I.* §220, p. 191; §223, p. 194. See also *Feyerabend*, AA XXVII.2.2, p. 1362, l. 41 – p. 1363, l. 7. For a loan, one must consider two obligations the debtor may have: (1) repayment of the loan and (2) payment of interest on the loan. Kant speaks of repayment of the loan in B.I.c and of

in Group B.II. can also be onerous contracts. Finally, the last group of contracts (C.) again can be performed gratuitously or in exchange for payment, which Kant points out, although he states that they involve no acquisition, but rather only "security for one's own."

At first blush, the initial division into contracts involving unilateral, mutual, and no acquisition does not seem to be particularly helpful in explaining the twelve types of contracts. As we shall see, however, Kant has good reasons for (1) tracing the difference between the contracts in Groups A. and B.I. to the difference between gratuitous and onerous contracts, and (2) clearly distinguishing the contracts in Group C. from the contracts in Groups A. and B. In the next section, we examine the four groups of three contract types and explain what aspect of the contractual relationship Kant has in mind in each part of his table. We shall see that taken dynamically, the table indeed is revealing about contractual relations.

## 2. The twelve aspects highlighted in the table

The table concerns rights acquirable through contract. These rights include rights to physical things, to another's choice to perform an act, and to the person of another.

### A. Group A. Quantity

Let us focus on the first group of contracts, namely (a) the deposit or bailment, (b) the lending of a thing, and (c) the donation. If we consider what is actually transferred through such contracts, we see for the deposit that the owner of the thing transfers mere possession of the thing to the deposittee, but no right to use it.<sup>14</sup> For the lending agreement, the owner transfers to the borrower both possession of the thing and the right to use it in a specified way.<sup>15</sup> For the contract of donation, the owner transfers possession of the thing, the right to use it in any way and for any amount of time the donee sees fit, and the ownership right to the thing, meaning the right to exclude all others from interfering with the thing.<sup>16</sup>

paying interest on a loan in B.II.α. When Achenwall calls a loan (*mutuum*) gratuitous, he means that no interest is charged on the loan.

<sup>14</sup> Achenwall, *I.N.I.*, §212, p. 184, "The deposittee is neither the owner of the thing deposited nor may he use it." (*Depositarius nec rei depositae est dominus, nec ea uti potest.*)

<sup>15</sup> Achenwall, *I.N.I.*, §210, p. 182. See also Feyerabend, AA XXVII.2,2, p. 1358, ll. 26–27.

<sup>16</sup> Feyerabend, AA XXVII.2,2, p. 1357, l. 39 – p. 1358, l. 2.

The first group of contracts thus focuses on what extent or quantity of rights to a physical thing can be transferred through contract, again regardless of the other aspects of the contractual agreement, such as whether the transfer is undertaken for payment or gratuitously. One can transfer (a) mere *possession*, (b) possession and the right to *use*, or (c) full *ownership* rights to the thing, meaning the right to possess, use, and permanently exclude all others from interfering with the thing. Interesting in this progression is that it corresponds to the steps undertaken to acquire an external object of choice as one's own. These steps are stated in the "Principle of External Acquisition":

What I (according to the law of external *freedom*) bring under my *control*, and which I have the capacity to use as an object of my choice (according to the postulate of practical reason); finally, what I *will* (in accord with the idea of a possible united *will*) it shall be mine: that is mine.<sup>17</sup>

The steps are (a) taking control of the object, meaning taking it into my physical *possession*, (b) having the capacity to *use* the object, and (c) willing that it be mine, or that I be the *owner* of the object. Similarly, if I am the owner of an object, I can transfer some or all of the rights of ownership I have. I can transfer merely the right to *possess* the object, the right to *use* that object in a particular way (assuming the person has the capacity to use it in that way), or all of what I have, namely the *ownership* right to the object.

The first group of contracts thus reflects Kant's categories of quantity from the first *Critique*, namely unity, plurality, totality. Seen *physically*, the unity of a particular thing, such as a cup, is the substance of that thing. It is the thing defined through its space and time coordinates. Seen *morally*, or in relation to human action, the unity of a thing is possession of the thing. Kant notes that "possession is the condition for the possibility of using"<sup>18</sup> the thing in any way whatsoever.<sup>19</sup> Thus possession is the foundation for any possible type of use on the moral level, just as substance is the foundation for any possible attributes a thing may have on the physical level. Plurality is the wealth of possible uses of the thing. A cup can be used to drink from, to place on a shelf as decoration, to wear as an unusual hat, to smash at a wild party, or to pass on to your child on your deathbed. Totality is the unity of the plurality<sup>20</sup> of all possible uses of the object, or ownership.

<sup>17</sup> AA VI, §10, p. 258, ll. 22–27.

<sup>18</sup> AA VI, Annex of Explanatory Comments 3, p. 359, ll. 6–7; cf. §1, p. 245, ll. 11–12.

<sup>19</sup> Cf. AA VI, §2, p. 246, l. 26. <sup>20</sup> AA III, p. 96, ll. 8–9 (B 111).

We can now see why Kant begins with gratuitous contracts, although these contracts play an insignificant role in contractual relations. The reason is that Kant can abstract from any possible exchange or payment by regarding these contracts as gratuitous and thereby highlight the *quantity* of rights being transferred. Furthermore, if the contracts were onerous, this group would be asymmetrical because the person receiving payment would not always be the person transferring the right. For a deposit, the party who *transfers* the goods pays the depositee for keeping them. For a rental or sale, the person who *receives* the goods pays the rental or sales price. This asymmetry would distract from the point Kant is making in this first group of contracts. If the contracts are gratuitous, Kant can focus on the *right being transferred*. The keeping of entrusted goods results from the owner transferring possession of the goods to the depositee; the lending agreement results from the owner transferring possession connected to a right to use the goods to the borrower; the donation results from the owner transferring ownership of the goods, which includes the right to possess and use the goods in any way one likes.

### B. Group B.I. Quality

Although the first two contracts in this group, the barter and the sale, look like traditional buying–selling arrangements, the third does not. The third contractual arrangement is a loan of fungibles, like money or grain, which is to be repaid in kind.<sup>21</sup> It is thus a loan for consumption, meaning the debtor acquires ownership of the thing loaned.<sup>22</sup> Furthermore, in group B.I. we have no progression in the quantity of rights

<sup>21</sup> Achenwall distinguishes between a contract through which a thing is alienated *in genere* and a contract through which a thing is alienated *in specie* (*I.N.I.*, §188, p. 164; §191, p. 167), and thus between promising to transfer a thing *in genere* and *in specie* (§216, pp. 187–188). In the former case, one promises to transfer a thing in kind; in the latter, one promises to transfer an individual thing. Consequently, the debtor promises to repay the loan *in genere* (§219, p. 189). Kant uses Achenwall's distinction in his lecture. He discusses the example of selling a house, which is sold *in specie*, meaning one particular house, *Feyerabend*, AA XXVII.2.2, p. 1361, ll. 3–7. In the *Doctrine of Right*, however, and in particular in his table of contracts, *in specie* no longer means “an individual thing” but instead “something in kind.”

<sup>22</sup> Although the third contract might seem similar to the lending agreement (*commodatum*) in group A., that impression is misleading. For the lending agreement, the borrower acquires only use rights and not ownership rights to what he borrows. When goods or money are loaned on the condition that they be returned in kind, however, the debtor acquires ownership rights over what he has borrowed. He can convert the money or grain into anything he likes, sell it, or even burn it. If the money or grain is destroyed through neither party's fault, the debtor must still repay the debt, whereas the borrower under a lending agreement would be released of any obligation to the lender, see Chapter 10, section 2B.

being transferred, as we do in group A., because for all three contracts full ownership rights are transferred. Instead, the contracts of exchange are unique in that they necessarily require a *payment*. For the barter, payment occurs through turning over goods. For the sales contract, payment occurs through turning over money. For the loan, payment occurs by returning goods of the same kind, whereby Kant abstracts from paying interest on the loan and concentrates on the payment inherent in returning the goods loaned.

It is important to realize that Kant's concept "goods" (*Ware*) includes things, services, and the possession or use of things, but does not include money.<sup>23</sup> Accordingly, when Kant speaks of "goods for goods" in the first contract in B.I., he means "things for things," "things for services," and "things for the use of things," etc.<sup>24</sup> When Kant speaks of "goods for money" in the second contract he means "things for money," "services for money," and "the use of things for money." The final contract, the loan, is distinct because it is limited to "things" that can be returned in kind, such as "grain for grain," "money for money," and any other exchange where the things exchanged are themselves interchangeable.

The three contracts in this group can be understood if one concentrates on the *form* of what is being exchanged. To explain the form of something exchanged as opposed to its substance, Kant uses the example of "money."<sup>25</sup> Although one may tend to see money empirically, still one can consider money only according to its *form* by abstracting from the substance exchanged and resolving the concept of money into pure intellectual relations.<sup>26</sup> The "substance" exchanged is the actual silver coin. As a substance, the coin is a good, which is acquired for its own intrinsic value. Its *form*, however, is its nature as a means of exchange. As a means of exchange, a coin need not be any particular silver coin, but can be any silver coin whatsoever. Furthermore, we do not acquire money (considered only according to its form) for

<sup>23</sup> "The intellectual concept which is the basis for the empirical concept of money is thus the concept of a thing, which, seen in the circulation of possession (*permutatio publica*), determines the price of all other things (goods), to which [things or goods] belongs even scholarly knowledge to the extent it is not taught to others for free," AA VI, §31 I, p. 288, ll. 27–32.

<sup>24</sup> Additional permutations would be "services for things," "services for services," "services for the use of things," and so forth.

<sup>25</sup> AA VI, §31, p. 286, ll. 7–23.

<sup>26</sup> In his excursus "What is Money?" Kant, using Adam Smith's definition, states that it brings the empirical concept of money to an intellectual concept "by looking only to the *form* of the mutual performances in onerous contracts (and abstracting from their substance)," AA VI, §31 I, p. 289, ll. 14–18.

its intrinsic value but rather to use to acquire goods with some specific value for us. Similarly, when we say "grain for grain," we are not referring to any specific kernels of grain, but rather generally to grain as a good with value because of its potential use. We mean fungible goods, which can be replaced with the same type, amount, and quality of goods.

Group B.I., seen from the point of view of the *form* of what is being received, thus includes the following concepts: (a) goods, including services and use rights, which have a specifically defined purpose and thus are acquired for their intrinsic value; (b) money, which generally is not acquired for its intrinsic value, but which represents all goods as a means of commerce and is thus completely interchangeable; and (c) a thing with a specific intrinsic value, such as grain, that is seen from the perspective of a medium of exchange, or as something, like (and including) money, that is completely interchangeable. If we look at the exchange involved in the three contracts in B.I. we then have (a) non-fungible goods with intrinsic value in exchange for non-fungible goods with intrinsic value; (b) non-fungible goods with intrinsic value in exchange for fungible money with no intrinsic value; and (c) fungible goods or money in exchange for the same type of fungible goods or money. Therefore, we can explain group B.I. by looking at the nature or quality of the thing one receives in terms of the value we assign to it as having intrinsic value and thus being non-fungible, as having no intrinsic value and thus being completely fungible, or as possibly having intrinsic value, such as one particular silver coin or grain when used to feed animals, but being treated as if it had none.

If we call what is received "payment," then the categories of the second class in the first *Critique* – reality, negation, limitation – relate to the payment. For the barter, payment occurs through turning over goods (including services, etc.) and thus through turning over things with intrinsic value, i.e. with *real* value. The first contract in this group therefore represents the category of reality. For the sales contract, the money used for payment has no intrinsic value and thus *no* real value. The second contract in this group thus represents the category of negation. Finally, "limitation [is] nothing other than reality connected to negation."<sup>27</sup> We take goods with intrinsic value (*real* value) and treat them as if they had *no* intrinsic value. In other words, we treat them as

<sup>27</sup> AA III, p. 96, ll. 9–10 (B 111).

if they were money. For this reason we can exchange grain for grain just as we exchange money for money.

### C. Group B.II. Relation

To designate the three possible contracts of transfer, Kant uses the expressions *locatio rei*, *locatio operae*, and *locatio (conductio) personae*. The expressions *locatio rei* and *locatio operae* are rooted in Roman law and were commonly discussed in the jurisprudence of the eighteenth century.<sup>28</sup> Kant includes *locatio rei* and *locatio operae* in the table of contracts.<sup>29</sup> He first speaks of *locatio personae* in connection with the contracts in Group B.II.γ in the Annex of Explanatory Comments.<sup>30</sup> Kant uses these three expressions in their broadest possible meanings, namely in the meaning of “placement”: “placement of a thing,” “placement of one’s work efforts,” “placement of a person.” I place a thing that belongs to me with another person (B.II.α), or I place my choice to perform certain tasks with another person (B.II.β), or I place myself in community with another person (B.II.γ). One of Kant’s major advancements in his table of contracts is realizing that the contract for placement of a person belongs in this group. This advancement is the consequence of his seeing this group of contracts in terms of the categories of relation in the first *Critique*.

Indeed, and in contrast to the categories of quantity and quality he does not mention in the *Doctrine of Right*, Kant tells us that external objects of my choice can be (1) a physical thing, (2) someone else’s choice to commit a specified act, and (3) someone’s status in relation to me “according to the categories of *substance*, *causality*, and *community*.”<sup>31</sup> I can acquire the *substance* of a physical thing. I can acquire *causality* over someone else’s choice. I can acquire *community* with another person.<sup>32</sup> The contracts of obligation in group B.II. thus correspond to the three types of external objects of choice Kant discusses under the categories of relation. When discussing the categories of relation,

<sup>28</sup> For Achenwall, see note 6. <sup>29</sup> AA VI, §31, p. 285, ll. 25, 28.

<sup>30</sup> Annex of Explanatory Comments 3, p. 360, ll. 31–32. We leave out the *conductio* in the expression *locatio conductio personae* in order to adapt the term to the other two as they are expressed in the table of contracts.

<sup>31</sup> AA VI, §4, p. 247, ll. 21–23.

<sup>32</sup> An external physical thing can be acquired originally or derivatively. Someone else’s choice to perform an act and community with another person, in contrast, can be acquired only derivatively because of the other person’s right to freedom. For acquisition of a personal right, cf. AA VI, §18, p. 271, ll. 11–14. Group B.II. concerns only derived acquisition because only for derived acquisition is a contract necessary.

however, Kant focuses on the person acquiring the right, whereas in group B.II. he focuses on the person sacrificing the right.

On closer examination, one sees that the *subject matter of the contract* of transfer, or what the transferor must sacrifice under the agreement, is the decisive aspect of the contracts in group B.II. By virtue of this transfer, the transferee (the acquirer) acquires an object of choice from the transferor through accepting the transfer. First, I can transfer a physical thing (substance) for the other party to use, which is what Kant indicates in his table. Second, I can transfer possession of my choice with respect to performing certain acts, meaning I can submit to someone else's (an employer's) directions (causality).<sup>33</sup> Third, I can transfer my person, meaning I can enter into community with another through which I have duties of loyalty and duties of care<sup>34</sup> by virtue of my entering the community.<sup>35</sup> In a business relation, a mandatory's acceptance of a mandate is essentially the same as the mandatory's transferring his person to a community with the client.<sup>36</sup> Furthermore, the contractual aspects in group B.II.α can also be combined with those of group A. I can transfer a physical thing (a) for the other party to possess without having the right to use it, (b) for the other party to use in connection with his right to possess it, and (c) for the other party to acquire ownership of the thing.<sup>37</sup>

To take a more modern example, let us imagine a factory for the production of some product. (1) I may transfer the possession, use, or ownership of my machine to the owner of the factory. (2) I may transfer the use of my labor in the sense that I come and operate a machine for one day in his production plant. (3) I may transfer the use of my full talents in running the factory if I am hired as the owner's agent to act on her behalf. In the third agreement, I transfer rights to the use of my person. The principal who hires me as her agent can expect more from me than just the performance of certain specified

<sup>33</sup> This submission results in the dependency Kant discusses in the first *Critique*, AA III, p. 93, l. 11 (B 106).

<sup>34</sup> For a discussion of the fiduciary's duties of loyalty and care from a Kantian perspective, see Laby, "Resolving Conflicts," pp. 98–125.

<sup>35</sup> In Kant's excursus "What is a Book?" he discusses the agency agreement in more detail, using the example of the publisher of a book who speaks for its author on mandate, AA VI, §31 II, pp. 289–290. See also *Feyerabend*, AA XXVII.2.2, p. 1362, ll. 33–40.

<sup>36</sup> Transfer of my person to a community, or at least assumption of duties resulting from entering a community, can also occur without any mandate, which is why Kant mentions not only the mandate but also the *gestio negotii*, or conducting business without authorization.

<sup>37</sup> That Kant includes transferring ownership in this group is shown by the fact that Kant once again, as in group B.I., refers to the loan agreement, which is connected to transferring ownership of the thing loaned.

work. She can expect me to act on her behalf to the full extent of my abilities to run her factory. She acts through me and my acts are imputed to her as her own, at least to the extent I act within the limits of the mandate given.

#### D. Group C. Modality

The final group of contracts includes three types of guarantee or security arrangements (*cautio*). It comprises (a) the pledge (*pignus*), (b) the vouching for another person's promise (*fideiussio*), and (c) the personal surety agreement (*praestatio obsidis*). The personal surety is an arrangement whereby the surety gives himself up, literally as a hostage (*obses*), to the creditor. This arrangement might seem somewhat strange for today's reader, but certainly was not totally uncommon on the international level in the eighteenth century.<sup>38</sup>

This group is on a meta-level with respect to the other three groups, because it does not involve acquisition but rather securing what is supposed to be acquired. These three contracts, therefore, can be entered into to secure performance of any of the contracts in the other three groups.<sup>39</sup> Furthermore, security can be given either for free or for some price, and therefore the contracts can involve unilateral or bilateral acquisition.<sup>40</sup>

A contract of guarantee is collateral to a primary contract and arises when the promisee (*Acceptant*) under the primary contract requires security for the deal from the promisor (*Promittent*). This security is given by a warrantor (*Cavent*), who closes a contract of guarantee with a warrantee, or the promisee under the primary contract.<sup>41</sup> Kant takes

<sup>38</sup> *Feyerabend*, AA XXVII.2.2, p. 1393, l. 22: "States give each other persons for security and they are hostages."

<sup>39</sup> On the security contract, see *Feyerabend*, AA XXVII.2.2, pp. 1363–1364.

<sup>40</sup> AA VI, §31, p. 285, ll. 9–11.

<sup>41</sup> For Kant's use of this terminology, see AA VI, §31, p. 284, ll. 28–30. Cf. *I.N.I.*, §224, p. 197, where Achenwall says regarding the contract of guarantee (*cautio*): "One who warrants (namely one who provides security) is the promisor in this contract; in contrast, one who receives the warrant (namely one who requires security) is the promisee." (*Qui cavet (cautionem praestat) est in hoc pacto promittens; acceptans contra is, qui cavetur (qui cautionem exigit).*) Kant means the same because in the table of contracts Kant refers to pledging and *taking* of a pledge. The person pledging is the one who provides security and the person *taking* the pledge is the person who requires and receives security, AA VI, §31, p. 286, l. 4. The contract between the promisor under the primary contract and the warrantor, which Kant mentions in AA VI, §31, p. 284, ll. 30–31, is not the contract of security itself, but instead a prerequisite for the contract of security. This prerequisite is the contract through which the warrantor agrees with the promisor under the primary contract to close the contract of guarantee with the warrantee, or promisee under the primary contract. For a security

the point of view of the warrantee, whose security is to be protected. The warrantor assumes responsibility for the promisor's performance under the primary contract. Accordingly, the warrantor is (a) the person who owns the object pledged and transfers it to the warrantee, (b) the person who vouches for the promisor to the warrantee, or (c) the person who gives himself up as a hostage to the warrantee.<sup>42</sup>

Group C. can be explained in terms of the progression of security attained through each of the arrangements. When the warrantor gives a pledge, he gives the warrantee a right *in rem* to the pledge, which Kant calls a *Recht in einer Sache* or a *ius in re*.<sup>43</sup> When the warrantor vouches for the promisor under the primary contract, the warrantor gives the warrantee a right *in personam*, which Kant calls a *persönliches Recht* or a *ius personale*.<sup>44</sup> When the warrantor gives himself up as a hostage, the warrantor places himself under the warrantee's physical control. The warrantor thus treats himself as a pledge and is likewise so treated by the warrantee. The right the warrantee acquires is "a right to a person akin to a right to a thing" (*ein auf dingliche Art persönliches Recht*),<sup>45</sup> or a *ius realiter personale*.<sup>46</sup> This third type of contract of guarantee is not simply a combination of the first two. A thing is not pledged as in the first type of contract, but instead the warrantor in the third type of contract vouches for someone else's promise as in the second type of contract. In the third type of contract, although he *remains a voucher*, in addition he is treated by all parties, including himself, in some respects as a thing.

Applying the last remaining class of categories, namely modality (possibility, existence, necessity), to this group of contracts, we take the

contract we thus have the following situation. *A* promises *B* to deliver a horse to *B* next Monday, but *B* wants some form of security for the deal. *A* then asks *C* to enter into a security contract with *B*, securing *A*'s debt under the primary contract. If *C* agrees, then *A* and *C* have closed their own contract whereby *C* is now obliged to enter into a security contract with *B*. It is the agreement between *B* and *C* that Kant has in mind when speaking of "pledging and taking of a pledge."

<sup>42</sup> In the case of pledging and taking of a pledge the warrantor and the promisor under the primary contract can be one and the same person, but for the other two contracts of security they cannot.

<sup>43</sup> We do not mean to exclude pledges of something other than a physical thing from this type of contract. The warrantor could also give a legal claim the warrantor has against a fourth party as a pledge to the warrantee.

<sup>44</sup> *Ius in re*, e.g. at AA VI, §11, p. 261, l. 16; see too the juxtaposition in the Annex to §10, p. 260, ll. 1–2. Achenwall, *I.N.I.*, §227, p. 199, also distinguishes between the *ius in rem* to the thing pledged and the *ius in personam* for the vouch.

<sup>45</sup> In the terminology Kant uses to refer to this type of right, see, e.g., AA VI, §22, p. 276, l. 17.

<sup>46</sup> See, AA VI, Annex to §10, p. 260, ll. 1–4. "When, e.g., I give myself as a hostage (to secure the rights of others), then this constitutes a right to a person akin to a right to a thing. This [right] is always based on a prior contract," AA XX (*Comments DoR*), p. 458, ll. 18–21.

standpoint of the warrantee, as does Kant. The warrantee asks himself whether, and if so to what extent, “security for one’s own” is guaranteed through a particular contract of guarantee. The main question for the warrantee is thus whether he can be *certain* of collecting his claim.<sup>47</sup> For the categories of Group C. in the table of contracts, we therefore suggest they concern the *certainly* acquired through the contracts of guarantee in relation to the primary contract.

In the first *Critique*, Kant says the categories of modality concern the *cognition* of an object.<sup>48</sup> The implications among the three categories of modality are that (1) necessity implies existence, and (2) existence implies possible existence.<sup>49</sup> The same implications can be drawn from the three categories of guarantee in the table of contracts. When the warrantor gives himself up as a hostage to the warrantee, the warrantee acquires not only community with the warrantor but also full rights of disposition over the warrantor’s choice to act. When the warrantor vouches for the promisor, the warrantee acquires full rights of disposition over the voucher’s assets. When the warrantor gives the warrantee a pledge, the warrantee acquires full rights of disposition over one specified piece of the warrantor’s property. With full rights of disposition over the hostage, the warrantee can order the hostage to turn over one or all of his assets (and perhaps his work effort) to satisfy the debt. The warrantee thus has access to everything the hostage has and can produce. This level of certainty implies the certainty of the vouch, where the warrantee has access to all of the voucher’s assets. Furthermore, the level of certainty attained with the vouch implies the certainty of the pledge, because having all of the voucher’s assets includes having one of them as a pledge.

### 3. The completeness of the table of contracts

If we combine our ideas above we can see why Kant’s table of contracts is complete. Group A. answers the question what rights to a thing which belongs to me I can transfer to another through contract. The answer is that one can contractually transfer (1) physical possession of the thing, (2) physical possession of the thing and a right to use the

<sup>47</sup> Kant speaks of certainty (*Gewißheit*) in this context in AA VI, §31, p. 284, l. 26.

<sup>48</sup> AA III, p. 186, ll. 4–7 (B 266); see full quote in Chapter 2, section 3, text at note 64.

<sup>49</sup> “Necessity” here means substantive necessity in existence and not logical necessity; see Chapter 2, section 3, text at note 62.

thing, and (3) ownership of the thing (intelligible possession). Further possibilities for transferring a thing to another do not exist.

Group B.I. answers the question what payment can look like if the contracting parties have agreed on a payment. The payment can consist of (1) delivery of goods with intrinsic value, (2) payment of money, whereby money is seen purely in terms of its form as a thing without intrinsic value, and (3) delivery of things, which have intrinsic value, but are treated as if they had no intrinsic value. There are no further possibilities for agreeing on a payment.

Group B.II. answers the question what the subject matter of a contract can be. It can be: (1) the transfer of physical possession of a thing, of physical possession of a thing combined with the right to use the thing, of ownership of a thing, (2) the transfer of my choice with respect to specified acts I have to perform, and (3) the transfer of my person into community with another person. Further possibilities for transferring something to another person do not exist. This division of contracts of transfer follows *a priori* principles, which ensures the division is complete. Contracts of transfer can be closed only regarding persons or things, because there is nothing in the world other than persons and things.<sup>50</sup>

Group B.II. is the core of the table of contracts, with groups A. and B.I., regarding the quantity of rights transferred and the quality of payment for this transfer, acting as modifiers of the contracts in group B.II. Group A. completely represents the quantity of rights to a *thing* that can be transferred and modifies the contract of transfer of a thing in group B.II.α. Group B.I. completely represents the quality of payment for any onerous contract and thus modifies the contracts in group B.II., which can be either gratuitous or onerous. The possible contracts regarding *persons* are in Groups B.II.β and B.II.γ. There are no other possible contracts regarding persons.<sup>51</sup> Just as “besides quantity, quality, and relation there is nothing more that constitutes the content of a judgment,”<sup>52</sup> so too there are no other contracts of transfer that are conceivable in addition to those in groups A. and B.<sup>53</sup>

<sup>50</sup> See Chapter 14.

<sup>51</sup> One could think of selling a person into slavery, which is not contained in the table of contracts. The table of contracts, however, includes only lawful and not unlawful contracts.

<sup>52</sup> AA III, p. 89, ll. 28–29 (B 100).

<sup>53</sup> Family law contracts are also represented in the table. A contract of marriage corresponds to a reciprocal mandate whereby rights to a person akin to rights to a thing are established. Kant's table includes transfers of such rights, e.g. through the contracts of authorization and

The table of contracts of transfer is supplemented by the three security arrangements. The hostage is liable for a debt with his person and all his assets. The voucher is liable only with his assets, which are assets with money value or money itself. The pledgor is liable only with a specified part of his assets. Limitations can be placed on any of these security contracts. The hostage could be liable with his person but not with all of his assets. The voucher could be liable only with a part of his assets. Thus many variations of the three security arrangements are possible, but these three are the three pure forms.<sup>54</sup>

We have concluded our examination of Kant's theory of contract. We have argued that Kant bases his theory of contract on his theory of property law, with contractual claims more closely resembling rights *in rem*, or more appropriately universal rights against everyone that they not interfere with the contractual claim, rather than rights *in personam* in the traditional sense. We have also argued that Kant's table of contracts is really a table of aspects of possible contractual agreements and represents the categories of the first *Critique*. As is true of the table of categories, the table of contracts is complete. In the next chapter we return to public law and in particular to criminal punishment.

of personal surety. The marriage contract is one example of this type of transfer of a right to a person akin to a right to a thing. The table cannot be complete unless it includes the transfer of this sort of right, and thus must come after all three types of rights (*ius reale*, *ius personale*, and *ius realiter personale*) have been discussed. Accordingly, Ludwig's placement of §31 directly after §21 (Ludwig (ed.), *Rechtslehre*, p. 84) seems incorrect.

<sup>54</sup> Kant's table of contracts had an interesting historical effect. Following Kant, Hegel formulates a similar table of contracts, claiming that his table corresponds by and large to Kant's (Hegel, *Grundlinien*, §80, pp. 138–141). Hegel does not seem to see the connection between Kant's table of contracts and his table of categories. See too the tables by Bendavid, *Versuch*, pp. 93–96 and P. Jochims, *Aphorismen als Materialien zum Bau eines Systems des absoluten Naturrechts*, Itzehoe (1835), pp. 40–41, as cited by Krug, "Vertrag."

## Criminal punishment

In his review of the *Doctrine of Right*, Bouterwek critically notes that Kant first discusses the law of state before discussing criminal law.<sup>1</sup> Yet, Kant cannot discuss criminal law elsewhere because for Kant punishment is inconceivable without a state. In the state of nature, attacks against another person can be warded off, but they cannot be punished. They cannot be punished because there are no external (positive) laws, no judge to impose punishment, and no executive officer to execute the punishments imposed.<sup>2</sup> Similarly, a “punitive war” waged by states which are not yet in a juridical state of nation states is a “self-contradictory notion.”<sup>3</sup> In their mutual relations, the states are still in the state of nature. They too have no external laws or judge to impose punishment, and no “commander,”<sup>4</sup> to execute the punishment imposed.

Bouterwek’s misunderstanding of Kant’s theory of criminal punishment is matched by current trends in German legal theory insisting that Kant is a pure retributivist. Kant, in the Achenwall tradition, understands criminal law as a device the state uses to ensure individual rights by threatening punishment for their violation. Retribution is the standard for determining how much punishment may be threatened to deter crimes and executed in case of violation of the law. The retributive idea functions simply to protect a criminal offender from being used merely as a means to the goal of deterrence. The purpose of the criminal law for Kant is thus deterrence, with retribution playing a regulatory role.<sup>5</sup>

<sup>1</sup> AA XX (Bouterwek), p. 453, ll. 29–31.

<sup>2</sup> “Injuries to a person are warded off but not punished *in statu naturalī* [in the state of nature], because there is no external law,” AA XIX, R.8026, p. 585, ll. 30–31; cf. R.7677, p. 486, l. 6.

<sup>3</sup> AA VI, §58, p. 348, ll. 24–25; see too §57, p. 347, ll. 10–13.

<sup>4</sup> AA VI, General Comment E, p. 331, ll. 4–5. Achenwall also presupposes a superior to impose punishment in connection with the right to punish. See notes 6 and 7.

<sup>5</sup> On the relation between deterrence and retribution in Kant’s theory of punishment, see Byrd, “Kant’s Theory of Punishment,” *passim*; Hill, Jr., *Human Welfare*, pp. 340–361; Hill, Jr.,

In this chapter, we first examine Achenwall's theory of criminal punishment to provide a backdrop for understanding Kant's. We show that Achenwall distinguishes between the deterrent force of threatening punishment and the attributive effect of executing punishment (section 1). We then argue that Kant's theory of criminal punishment is based on the state's duty to secure rights by deterring their violation through threatening punishment (section 2). Section 3 dispels myths surrounding Kant's statement that a criminal law is a categorical imperative. In particular, we disclaim that the statement has any retributive connotation whatsoever. Section 4 examines criminal law in the juridical state and explains what duties the three state powers (legislative, executive, judicial) have to ensure punishment justice. In section 5, we argue that the principle of retribution is the standard for the amount of punishment threatened and executed. Finally, in section 6, we examine Kant's arguments for the death penalty and against Beccaria.

## 1. Achenwall's theory of criminal punishment

Fundamental to Achenwall's theory of criminal punishment is his differentiation between the *threat* and the *execution* of punishment. Achenwall defines juridical law as law which comes from a superior (the lawgiver) and binds or obligates the subjects through the superior's threat of punishment for violation of his law.<sup>6</sup> Juridical laws are thus connected to the threat of a sanction.<sup>7</sup> The superior uses the subjects' fear of his threat of punishment to keep them from undertaking prohibited acts. Laws in a juridical sense are laws precisely because they are connected to the threat of punishment to deter their violation. Furthermore, Achenwall defines "punishment" in the juridical sense as an evil the superior inflicts on a subject because the subject is guilty of having committed an unlawful act. Punishment is threatened to deter crime and executed if and because a subject has violated the

"Kant on Punishment," *passim*; Ripstein, "Hindrance to Freedom," *passim*. The tide seems to be turning in Europe toward a split theory as well, see Altenhain, "Begründung der Strafe," Mosbacher, "Kants präventive Straftheorie," Tafani, "Strafrecht."

<sup>6</sup> *I.N.I.*, §44, pp. 25–26: "Laws in the juridical sense, i.e. [laws] which are given by a superior and under the threat of punishment, develop a binding effect for the subjects." (*Leges sensu iuridico tales (iuridicae), hoc est a superiore latae et sub comminatione poenae . . . subditos obligantes.*)

<sup>7</sup> *Prol.*, §63, p. 58: "The author of these laws is our superior; he issues them and they bind us under the fear of punishment, i.e. they are ensured through a sanction." (*Hae leges . . . auctorem habent superiorem nostrum, et sub metu poenae ab ipso constitutae nos obligant seu sanctione poenali munitae sunt.*) See too *I.N.II*, §191 (AA XIX, p. 411, ll. 26–33).

law. Achenwall's concepts of law and legal obligation are indeed inconceivable unless one distinguishes between the threat and the execution of punishment.<sup>8</sup>

For Achenwall, the *threat* of punishment is central. In his chapter on external obligation (*obligatio externa*), meaning the binding nature of positive laws for human beings,<sup>9</sup> Achenwall writes:

The primary and final goal of all external law is that each is given his right by the other: The means to attain this goal, however, consist in the fear of force which is simultaneously a motive through which everyone feels obligated to refrain from [interfering with] anything that does not belong to him. If, however, fear is insufficient to bring about this effect, [the means consist of] undertaking the act of force itself or [in other words] exercising the right to coerce so that the other satisfies his obligation to give my right to me.<sup>10</sup>

The first means (causing fear) is primary, while the second (undertaking a coercive act) is subsidiary to the first. Achenwall calls the binding effect of external laws their "principal force" (*vis principalis*), and the attributive effect of these laws, meaning the attribution to the offender of the evil connected to the act, their "subsidiary force"

<sup>8</sup> Achenwall calls the threat *comminatio* (see note 6). On the execution, see *Prol.*, §63, p. 60: "Punishment is an evil that the superior inflicts on the subject guilty of committing an act in violation of the superior's law." (*Poena [est] malum quod a superiore infligitur subdito suo facti contra legem suam admissi reo.*) In fact the text in *Prol.*, §63 uses the word "instigate" (*instigatur*) instead of the word "inflict" (*infligitur*). The word *instigatur* means "is instigated"; but *instigatur* does not exist. *Instigatur*, however, makes no sense in connection with the definition of punishment. Instead of *instigatur* we read *infligitur*, which otherwise also appears in definitions of punishment in natural law theory, particularly in the famous definition Grotius provides: "Punishment, in the general meaning of the word, indicates an evil suffered which is inflicted because of an evil committed." (*Poena generali significatu [est] malum passionis, quod infligitur ob malum actionis*), Grotius, II/XX/§1, no. 1/p. 462. The printing mistake in Achenwall's *Prol.* – *instigatur* instead of *infligitur* – is easy to explain, because the old types for the ligatures "st" and "fl" look similar. The word is correctly typed (*infligit*) in *I.N.II*, §40 (AA XIX, p. 347, ll. 15–17): "Punishment thus consists (if 'punishment' is understood to mean the effect of punishment and not the act of punishing) of an evil that the superior inflicts upon the subject because of his crime." (*Consistit igitur poena (si non pro actu puniendi, sed eius effectu sumitur) in malo, quod superior infligit inferiori ob eius maleficium.*)

<sup>9</sup> *Prol.*, §111, p. 108: "A perfect natural obligation has in common with a human positive obligation that in both cases the obligation is juridical. If the obligation is violated, then another person has the [moral] capacity to permissibly use force against the violator." (*Obligatio naturalis perfecta habet hoc commune cum obligatione positiva humana, quod utraque consistat in obligatione iuridica, qua violata alteri homini competit facultas, vim licite adhibendi contra eum, qui violat.*)

<sup>10</sup> *Finem omnis Iuris Externi primum et ultimum in eo positum esse, ut ius suum cuique a quoque tribuatur: medium vero ad hunc finem consequendum consistere in metu coactionis tamquam motivo, quo quisque obligatur ad abstinendum ab alieno; tum vero, si hic metus non suffecerit ad hunc effectum producendum, in ipso actu coactionis seu usu iuris cogendi, ut alter obligationi erga me suae satisfaciatur, utque mihi ius meum tribuatur*, *Prol.*, §129, pp. 121–122.

(*vis subsidiaria*).<sup>11</sup> He thus distinguishes the sovereign's right to emphasize respect for his laws through threatening punishment from the right to actually punish a violator.<sup>12</sup> Moreover, he draws a parallel distinction between two of the sovereign's responsibilities, namely the responsibility to ensure that no offenses are committed and the responsibility to ensure that committed offenses are punished.<sup>13</sup> Unsurprisingly, he indicates that the goal of exercising the right to threaten punishment is deterrence: "so that they are *deterred* by the evil they know comes with violation of the law."<sup>14</sup> In contrast, execution of punishment occurs if and because the subject has committed an evil act.<sup>15</sup>

## 2. Kant's reasoning behind the criminal law

Kant's theory of criminal law and punishment reflects Achenwall's but defines the issues more precisely. Kant's theory begins with the state of nature, where we have the same rights we have on entering the juridical state. Each of our rights is connected to the authority to exercise coercion to defend that right, without which authority any talk of a "right" would be empty.<sup>16</sup> The principal problem in the state of nature is that without a court each individual must judge for himself whether his rights are endangered. Consequently, we have a potential war of all against all. Although we may not be constantly exposed to enemy attack, still we can never be certain about when an attack is

<sup>11</sup> *Prol.*, §129, p. 122.

<sup>12</sup> In *I.N.II*, §40, Achenwall distinguishes between "the right to establish punishment so that his laws will be observed" (*ius poena sancienti legum suarum observantiam*) and "the right to punish a subject who has violated those laws" (*ius puniendi subditum maleficum*) (AA XIX, p. 347, ll. 13–14). Also in *I.N.II*, §118 he discusses "the right [of the superior] to add [to his laws] punishments such as are large enough to be sufficient to inhibit subjects from transgressing the laws," (*ius, legibus suis tales tantasque addendi poenas, quae ad cohibendam earum transgressionem sufficiunt*) (AA XIX, p. 383, ll. 14–16). When Achenwall speaks of the right to execute the punishment, he speaks of a "right to assign a punishment to the subjects" (*ius poenam irrogandi subditis*), *I.N.II*, §194 (AA XIX, p. 412, ll. 12–13) or of the "right to inflict punishment on the delinquents" (*ius, infligendi delinquentibus... poenam*), *I.N.II*, §195 (AA XIX, p. 412, ll. 25–26).

<sup>13</sup> *I.N.II*, §199 (AA XIX, p. 414, ll. 7–8). The superior has the responsibility *curare, ne delicta committantur, utque commissa puniantur*.

<sup>14</sup> *I.N.II*, §40 (AA XIX, p. 347, ll. 14–15): *ut nempe proposito malo a transgressione legum absterreantur*; see too §118 (AA XIX, p. 383, l. 13), where he writes: "that they are deterred sufficiently from violating the laws" (*ut ab earum transgressione sufficienter deterreantur*).

<sup>15</sup> *I.N.II*, §40 (AA XIX, p. 347, ll. 15–17): "Punishment consists of an evil which the superior inflicts on the inferior because of the inferior's evil deed." (*Consistit... poena... in malo, quod superior infligit inferiori ob eius maleficium.*)

<sup>16</sup> AA VI, Introduction DoR §§D, E, pp. 231–233; see too Kaufmann, "Right and Coercion," *passim*.

imminent.<sup>17</sup> Accordingly, the postulate of public law tells us to move to a juridical state where our rights are protected.

When we enter the juridical state, we cease using private force to maintain our rights and transfer the authority to coerce connected to our rights to the state.<sup>18</sup> The state in turn provides security for our rights, which is the juridical state's primary responsibility. If the juridical state did not provide security for our rights, we would have no reason to enter it. Achenwall also discusses security for our rights and connects it to the third Ulpian formula (*suum cuique tribue*): "The primary and final goal of all external law is that each is given his right by the other" (*ut ius suum cuique a quoque tribuatur*).<sup>19</sup> Kant also connects the third Ulpian formula to security for our rights, but disagrees somewhat with Achenwall. Since for Kant I have rights in the state of nature, the point of the formula cannot be to *give* each his own. "One can give no one something he already has."<sup>20</sup> Kant thus provides a formulation of the postulate of public law in his own interpretation of the third Ulpian formula: "Enter a state where everyone's own can be secured against everyone else."<sup>21</sup>

The purpose of the original contract is ensuring the "right of human beings under *public coercive* laws, through which each person's own can be determined and secured against any attack by another."<sup>22</sup> It is these coercive laws that give effect to the unification of a people in a state.<sup>23</sup> The major means of securing mine and everyone else's rights in the state is criminal law.<sup>24</sup> When speaking of criminal laws, Kant also speaks of "public coercive laws." Coercive laws are promulgated to secure the rights of the "beneficiaries of state protection."<sup>25</sup>

<sup>17</sup> AA VI, §42, p. 307, l. 27 – p. 308, l. 2; §44, p. 312, ll. 2–28; §54, p. 344, ll. 8–10; AA VI (*Religion*), p. 97 n., ll. 25–38.

<sup>18</sup> This transfer of the right to exercise coercion to the state does not exclude the right to exercise self-defense in case of imminent attack. The attack returns me to the state of nature, where I do have the right to exercise coercion. See AA XXIII (*Preparatory DoR*), p. 343, ll. 14–16, where one finds that "the right to exercise self-defense (*ius inculpatæ tutelæ*)" arises when "the state cannot provide me with protection." See too AA XIX, R.8034, p. 587, ll. 23–26.

<sup>19</sup> See text at note 10. <sup>20</sup> AA VI, Division DoR A, p. 237, ll. 5–6.

<sup>21</sup> AA VI, Division DoR A, p. 237, ll. 7–8.

<sup>22</sup> AA VIII (*TøP*), p. 289, ll. 22–28. See too AA VI (*Religion*), p. 95, ll. 12–14: "A juridically civil (political) state is the interrelation of persons to the extent that they are all subject to public juridical laws (which are all coercive laws)."

<sup>23</sup> AA VI, §51, p. 339, ll. 15–17.

<sup>24</sup> See too AA XIX, R.8026, p. 585, ll. 29–31: "Punishment is the means to coerce respect for the [external] laws."

<sup>25</sup> The expression "beneficiary of state protection" (*Staatsschutzgenosse*) is in AA XXIII (*Preparatory DoR*), p. 292, ll. 27–28. In Kant's lectures, he says: The sovereign (*summus imperans*) "must punish to bring about security." *Feyerabend*, AA XXVII.2.2, p. 1390, ll. 35–36.

Accordingly, Kant characterizes a “crime” “as violation of state *security* in possession of what is everyone’s own,”<sup>26</sup> whereby “state security” means the security the state provides for our rights.

Kant says that criminal laws with their threat of punishment are intended to have an effect.<sup>27</sup> That effect is *detering* future crimes.<sup>28</sup> It is precisely because criminal laws prevent crimes that I enter the juridical state. State prevention of crimes that could be committed against me substitutes for my authority in the state of nature to enforce my rights as I judge them to be with whatever means I have available. As Kant states: “The mere idea of a state constitution among *human beings* includes the concept of criminal justice which the supreme state power is entitled to exercise.”<sup>29</sup> Indeed criminal justice is one aspect of the juridical state’s crowning feature, namely the *iustitia distributiva*, or the institution of courts to secure rights in case of dispute.<sup>30</sup> “Criminal justice” is Kant’s expression for the criminal judiciary.

Kant’s discussion of the right to pardon indicates the function of the criminal law particularly clearly. Pardons generally are “wrong to a high degree,” meaning a wrong committed *against the subjects*.<sup>31</sup> The postulate of public law obligates me to leave the state of nature and enter a juridical state, where alone rights can be secured. The security of rights in a juridical state occurs in part through the threat of punishment, and if the criminal laws are violated, through the imposition and execution of punishments. If the state does not observe its own criminal laws, then it does not fulfill its responsibility to secure our rights and we slide back toward the state of nature. Every pardon thus weakens the juridical state. Kant allows pardons only rarely, namely when the crime was committed against the (pardoning) sovereign *unless* the pardon could “mature into danger for the security of the people.”<sup>32</sup>

<sup>26</sup> AA VI, Annex of Explanatory Comments 5, p. 362, ll. 34–35 (emphasis added).

<sup>27</sup> AA VI, Annex Introduction DoR II, p. 235, ll. 30–35. See Kant’s position on the right of necessity (*Notrecht*) in AA VI, p. 235, l. 13 – p. 236, l. 16. If, as Kant describes in the Plank of Carneades case, a criminal law providing for the death penalty “cannot possibly have the intended effect” and that is the reason why a court of law cannot apply this law, then the law cannot be based on anything *else* other than on the theory of deterrence.

<sup>28</sup> See too *Powalski*, AA XXVII.1, p. 150, ll. 20–22: “For politics, the punishments have no other necessity than to the extent they deter evil acts.”

<sup>29</sup> AA VI, Annex of Explanatory Comments 5, p. 362, ll. 31–33. <sup>30</sup> See Chapter 1.

<sup>31</sup> AA VI, General Comment E, p. 337, ll. 9–15.

<sup>32</sup> AA VI, General Comment E, p. 337, ll. 17–19.

### 3. "The criminal law is a categorical imperative"

This statement<sup>33</sup> has made Kant the victim of gross misinterpretation. The statement is often misunderstood to mean punishment is categorically required. Yet that is not what Kant says. Instead, Kant's statement presupposes that a lawgiver has promulgated a criminal law, and means: "If a criminal law has been violated, then punishment is categorically required." The statement is not *prescriptive*, commanding us to punish people who commit crimes, but instead *descriptive*, characterizing the relevant system of criminal laws and the consequence of their violation.

"One who has killed another human being shall be punished"<sup>34</sup> is an imperative addressed directly to the organs of criminal justice, and only indirectly to the citizens. Kant's understanding of criminal laws corresponds to Hobbes' description: "Penal [laws] are those [laws] which define what penalties are to be inflicted on violators of the law and they [the penal laws] address only the ministers who are responsible for executing the penalties."<sup>35</sup> In keeping with Hobbes' statement, the criminal laws in the Prussian code of 1794, which were applicable in Königsberg in 1797, are formulated as categorical imperatives, whose addressees are the civil servants of the state. Under the title "Murder," for example, one finds: "One who commits a homicide with premeditation *shall* be punished as a murderer" with the wheel.<sup>36</sup> Kant is thinking of such provisions, which express unconditional oughts, when he characterizes the criminal laws, as all other "moral practical laws,"<sup>37</sup> as categorical imperatives.<sup>38</sup>

<sup>33</sup> AA VI, General Comment E, p. 331, ll. 31–32.

<sup>34</sup> Cf. StGB, §212.

<sup>35</sup> Hobbes, *Leviathan*, Cap. XXVI, p. 207: [*Leges*] *poenales sunt, quae poenas violatoribus legum infligendas definiunt, quaeque ministros, quorum officium est poenas exequi, solos alloquuntur.*

<sup>36</sup> ALR II 20 §826: *Derjenige, welcher mit vorher überlegtem Vorsatze zu tödten einen Totschlag wirklich verübt, soll als ein Mörder mit der Strafe des Rades von oben herab belegt werden.*

<sup>37</sup> AA VI, Introduction MM IV, p. 227, ll. 10–11: "A (moral practical) law is a proposition which contains a categorical imperative (command)."

<sup>38</sup> One needs to distinguish between hypothetical and categorical imperatives, and for the latter between *the* Categorical Imperative, of which there is only one (in different "formulae") and other categorical imperatives. All imperatives prescribe something. Hypothetical imperatives prescribe something "conditionally." Hypothetical imperatives represent the practical necessity of an act under the condition that the imperative's addressee wants to attain something else (e.g. "If you want to drive a nail into the wall, you have to hold the point of the nail toward the wall"). A categorical imperative represents the objective necessity of an action unconditionally, AA IV (*Groundwork*), p. 414, ll. 12–17. Many categorical imperatives (in plural) are possible. As noted in note 37, Kant defines a moral practical law as a proposition containing *a* categorical imperative. The prescription in a traffic law

The state, represented by the courts and law enforcement organs, is obligated by the criminal law once it has been promulgated and a crime has been committed. The state does not have *discretion* to apply the criminal law. In particular, the utility of imposing punishment is irrelevant. Punishment must be imposed on the criminal "because he committed the crime."<sup>39</sup> This duty follows from the criminal laws themselves. The statement "the criminal law is a categorical imperative" simply refers to this duty.

The reasoning behind this idea is that (lawful) threats must be carried through, just as (lawful) promises must be kept, when their prerequisites have been fulfilled.<sup>40</sup> The state would be involved in a self-contradiction if it did not execute the punishment threatened when the criminal laws are violated. In his lectures, Kant considers whether a lawgiver could threaten punishment "without being serious" and still maintain the threat of punishment as a means "of deterring people from committing crimes." "The punishment itself, however . . . would be a farce, because its full execution would not be connected to it." Kant determines that one could "not assume" such a thing.<sup>41</sup> A legal system cannot be based on deception.

Accordingly, the state may make no exceptions to the rule that threatened punishments must be imposed and executed if a crime is committed. Kant discusses the example:

What should one think of the proposal: To keep a criminal offender who has been awarded the death penalty alive if he agrees to allow dangerous medical experiments to be conducted on him and is lucky enough to survive them so that the doctors could gain knowledge to improve the common weal? A court would disrespectfully dismiss a medical college that made this proposal, because justice stops being justice when it gives itself away for a price.<sup>42</sup>

Kant accepts no utilitarian calculus when it comes to the criminal law as a categorical imperative.<sup>43</sup>

requiring driving on the right side of the road, for example, is a categorical imperative. The criminal law, e.g. "One who kills another human being shall be punished," is also a categorical imperative.

<sup>39</sup> AA VI, General Comment E, p. 331, l. 25. In Germany this idea is expressed as the *Legalitätsprinzip* (principle of legality), *StPO*, §§152, 160. The principle of legality requires the state organs involved in the administration of criminal justice to prosecute those who commit crimes.

<sup>40</sup> More arguments are in Byrd, "Strafgerechtigkeit," pp. 151–158.

<sup>41</sup> *Vigilantius*, AA XXVII.2,1, p. 554, ll. 26–32.

<sup>42</sup> AA VI, General Comment E, p. 332, ll. 3–10. "An offender to death" (*ein Verbrecher auf den Tod*) means that the death penalty has been incurred.

<sup>43</sup> Hüning, although accepting that the criminal law is addressed to state organs, nonetheless reads a retributive idea into Kant's statement that the criminal law is a categorical

In the *Doctrine of Right*, the idea that the state has a duty to impose and execute the punishment it threatens for violating a law trumps another idea to which Kant occasionally alludes prior to this work, namely that executing state punishments has a *warning* nature. In his *Reflections*, Kant sometimes distinguishes between “warning” and “revenging” punishment.<sup>44</sup> Punishments executed by the “authorities” are warning punishments.<sup>45</sup> They are warning examples in order to deter *others* from committing criminal offenses.<sup>46</sup> At first blush, this idea of warning is quite compatible with the idea of general deterrence coupled with the threat of punishment. Still, punishing one person simply to warn others not to commit crimes uses the person as a mere means to the end of crime prevention, which the Categorical Imperative prohibits. In the *Doctrine of Right*, Kant thus replaces the warning nature of punishment execution with the purely formal idea that the criminal law is a categorical imperative.

Another problem confronting Kant’s interpretation in this context is his often-quoted island example. Kant uses the example to emphasize the categorical nature of the state’s duty to execute the punishments imposed. A civil state may not retract itself from the responsibilities it has. Thus it cannot simply dissolve without first fulfilling its duties – all of its duties. Consequently, a criminal offender who has been sentenced to death must first be executed before the state may dissolve. Kant uses the language of his time when, in discussing this example, he refers to “blood guilt.”<sup>47</sup> A person bears “blood guilt” if that person is responsible for not executing an imposed sentence of death.<sup>48</sup> Blood guilt is paid through executing the criminal offender.<sup>49</sup> Kant, therefore, is not using the expression to emphasize the retributive nature of criminal law (blood for blood). Far from supporting any claim that Kant is an absolute retributivist, the island example in fact supports the interpretation that Kant sees the purpose of punishment to be securing individual rights through a system of deterrent threats. To avoid

imperative: “Crimes must be punished without exception because the offender has incurred blameworthiness [*Schuld*] through his unlawful act and thus deserves [*verdient*] punishment as compensation [*Ausgleich*] for his violation of the law,” “Kants Strafrechtstheorie,” pp. 350–351. Kant says nothing about blameworthiness, desert, or compensation in connection with his statement that the criminal law is a categorical imperative. Instead, he uses the statement to warn the state organ responsible for punishment that it cannot deviate from the requirements of the criminal law for utilitarian reasons.

<sup>44</sup> AA XIX, R.6526, R.6527, p. 56, ll. 7–8, 11. <sup>45</sup> AA XIX, R.6681, p. 132, ll. 4–7.

<sup>46</sup> AA XIX, R.8035, p. 587, l. 34 – p. 588, l. 1.

<sup>47</sup> “Such that the blood guilt does not cling to the people which did not insist on the execution of an imposed death penalty,” AA VI, General Comment E, p. 333, ll. 22–23.

<sup>48</sup> Walch/Hennings, vol. I, col. 454. <sup>49</sup> AA VI, General Comment E, p. 333, ll. 17–25.

self-contradiction, the state must execute all punishments, even the death penalty and even if society is in the process of dissolving.

In light of Kant's clarity of position, it is surprising that anyone has ever claimed he is an absolute retributivist for punishment imposed by finite human beings. He does say in the *Doctrine of Virtue*: "Every act in violation of a person's rights deserves to be punished, whereby *revenge* for the crime is exacted from the offender (not merely compensation for the injury inflicted)."<sup>50</sup> Still, Kant adds that "no one has the authorization" "to impose punishment and revenge a wrong done to a human being except He who is the highest moral lawgiver (namely God), and He alone can say: 'Vengeance is mine; I will repay.'"<sup>51</sup> If *revenging* punishments are imposed, they cannot and may not be imposed by human beings. State punishment is not to repay and not for revenge. Punishment is *threatened* to secure the mine and thine in the juridical state in order to avoid the state of nature as a state of war. Punishment is *imposed and executed* if the law is violated because the criminal law is a categorical imperative.

#### 4. Punishment in the juridical state

Kant assumes criminal laws have dual effects. The first effect is deterrence aimed at each member of the general public. The second effect is aimed at the criminal law authorities, whom the criminal laws obligate to impose and execute the punishments threatened when a violation occurs. This second effect is a necessary consequence of the mere existence of the criminal laws, which is why Kant says the criminal law is a *categorical* imperative. Thus Kant fleshes out Achenwall's distinction between a primary (*vis principalis*) and a subsidiary (*vis subsidiaria*) effect of the criminal laws.

As can be expected from Kant's ideas on the division of powers, Kant replaces Achenwall's two-part distinction between the threat and the execution of punishment with a *three-part* distinction: (1) the "lawgiver's"<sup>52</sup> issuing a "criminal law"<sup>53</sup> "combined with a punishment the law threatens," which the lawgiver "intends" to have an "effect,"<sup>54</sup>

<sup>50</sup> AA VI (*Virtue*), §36, p. 460, ll. 23–25.

<sup>51</sup> AA VI (*Virtue*), §36, p. 460, ll. 30–34. The Bible quote is from Romans 12:19. See too Deuteronomy 32:35; Hebrews 10:30.

<sup>52</sup> E.g. AA VI, Annex Introduction DoR II, p. 235, ll. 26–27; p. 331, l. 31.

<sup>53</sup> Cf. AA VI, General Comment E, p. 331, ll. 20–22, where it is stated that the lawgiver takes no account of natural punishment (*poena naturalis*) associated with crime.

<sup>54</sup> AA VI, Annex Introduction DoR II, p. 235, ll. 30–32.

namely the prevention of criminal offenses; (2) the “judicial punishment (*poena forensis*)” “imposed” on the offender;<sup>55</sup> and (3) the execution of punishment by the executive. Both the lawgiver and the judge “impose” punishments,<sup>56</sup> the lawgiver by promulgating law, the judge by applying the law in individual cases. The court “gives” the lawgiver’s “laws” “effect”<sup>57</sup> for all those subject to the law. Finally, the executive is the “power”<sup>58</sup> which executes the punishments the judge imposes. Kant speaks of the executive when he says: “The right to punish is the right the commander has against the subject to cause him pain because of his criminal offense.”<sup>59</sup> Each of the three powers in the state thus plays a role in punishment justice.

On the judge’s imposition of punishment, Kant comments: “All punishment is coercion, but not all coercion is punishment. Punishment is coercion under the authority of a law.”<sup>60</sup> This is an early formulation of the principle: “No punishment without a law” (*nulla poena sine lege*), a variation of which is commonly known in the Anglophone world as the *ex post facto* prohibition. Generally, Paul Johann Anselm Feuerbach, an early nineteenth-century German criminal law scholar, is credited with the first formulation of this principle,<sup>61</sup> but Kant states its essence one-and-a-half decades earlier.<sup>62</sup> Kant’s views on the separation of powers indeed dictate this principle. Neither the judge nor the executive decides when punishment is appropriate or what punishment to impose, but instead they are *subject* to the law and give the law effect in the individual case.<sup>63</sup>

It is in this light that one must understand Kant’s statement, for which he has been severely though unjustifiably criticized: “Judicial punishment (*poena forensis*) . . . may be imposed on the criminal

<sup>55</sup> AA VI, General Comment E, p. 331, ll. 20–25.

<sup>56</sup> *Verhängen*, for the lawgiver, AA VI, General Comment E, p. 334, ll. 17–18; for the judge, p. 331, ll. 20–25.

<sup>57</sup> AA VI (*Virtue*), §36, p. 460, ll. 25–28.      <sup>58</sup> AA VI, §43, p. 312, ll. 20, 33.

<sup>59</sup> The German reads: *Das Strafrecht ist das Recht des Befehlshabers gegen den Unterwürfigen, ihn wegen seines Verbrechens mit einem Schmerz zu belegen*, AA VI, General Comment E, p. 331, ll. 4–5. Here *Recht in Strafrecht* refers to a right and not to a law. Kant’s definition corresponds to Achenwall’s definition of punishment. See note 8.

<sup>60</sup> *Feyerabend*, AA XXVII.2.2, p. 1333, ll. 19–21.

<sup>61</sup> The Latin *nulla poena sine lege*, which became a legal adage in Germany, can be found first in: Feuerbach, *Lehrbuch*, §24, p. 20. In Feuerbach, *Revision*, p. 63, one finds: “Where there is no law there is also no civil punishment.”

<sup>62</sup> Kant has his own models, see Romans 4:15 “Where no law is, there is no transgression”; Hobbes, *Leviathan*, Cap. 27, pp. 210–211, e.g. “Where there is no law there is no sin . . . If civil laws cease, crimes cease.” (*Ubi lex non est, peccatum non est . . . Cessantibus legibus civilibus cessant crimina.*) See too Achenwall’s definition in note 65.

<sup>63</sup> AA VI (*Virtue*), §36, p. 460, ll. 25–28.

offender only *because he has committed a criminal offense*." Judicial punishment can never "be employed as merely a means to someone else's goals." The judge thus may never impose punishment simply because its imposition would be useful at the moment. Instead the criminal offender must "first be found *punishable* before one can consider attaining some advantage for the offender himself or for his fellow citizens."<sup>64</sup> Two requirements must be fulfilled before one can say the offender is punishable: (1) The act for which he is to be punished must fulfill the definition of a criminal offense; it must be a crime, meaning a "transgression of a public law."<sup>65</sup> (2) The act must be proven, because otherwise the presumption of innocence would bar punishment.<sup>66</sup> Achenwall too requires proof of the act,<sup>67</sup> and Kant comments: "No one can be punished unless his criminal offense has been proven."<sup>68</sup> Kant's requirement that the offender be punished only because he has committed a criminal offense accords with the fundamental rights of the criminally accused; it does not indicate that Kant is a pure retributivist.

### 5. The amount of punishment: the principle of retribution

Kant requires the lawgiver to establish the type and degree of punishments for crimes.<sup>69</sup> The lawgiver in turn binds the judge to award the punishment the law establishes; the judge is required "to apply the law."<sup>70</sup> The judge's decision then binds the executive to execute the punishment awarded. Kant's idea is that the law specifies precisely

<sup>64</sup> AA VI, General Comment E, p. 331, ll. 20–31.

<sup>65</sup> AA VI, General Comment E, p. 331, ll. 7–9. Here, Kant refers to Achenwall's definition of a crime when on p. 331, ll. 7–11, Kant distinguishes between public and private crimes, a distinction he takes from Achenwall, *I.N.II*, §192 (AA XIX, p. 411, l. 37 – p. 412, l. 2). Achenwall defines a crime in the broad sense (*delictum (crimen latius)*) as "intentional transgression of a penal law, i.e. [a law] to which an express punishment is attached in case of disobedience, or [in other words] which is protected by a penal sanction" (*transgressio dolosa legis poenalis, hoc est, cui in casum inobedientiae adiecta poena expressa, seu quae sanctione poenali munita est*), *I.N.II*, §191 (AA XIX, p. 411, ll. 29–31).

<sup>66</sup> See Chapter 3, section 1B; Chapter 9, section 1A.

<sup>67</sup> "Since the right to punish can be exercised only against an offender, it cannot be presumed that someone is an offender. Moreover, no one can be punished unless the offense has been sufficiently proven" (*Cum ius puniendi exerceri nequeat nisi in delinquentes, nemo autem naturaliter praesumendus delinquens; nemo etiam puniendus sine delicto sufficienter probato*), *I.N.II*, §198 (AA XIX, p. 413, ll. 28–30).

<sup>68</sup> AA XIX, R.7491, p. 413, ll. 3–4.

<sup>69</sup> AA VI, Annex of Explanatory Comments 5, p. 362, ll. 33–34.

<sup>70</sup> AA VI, §49, p. 317, ll. 32–33.

what punishment is appropriate.<sup>71</sup> The amount of punishment is determined by the principle of retribution.

In response to Bouterwek, Kant writes that he himself “considers the *ius talionis* [law of retribution] according to its form still to be the only *a priori* determining . . . idea as the principle of criminal law.”<sup>72</sup> Kant does not pick the law of retribution as the principle of criminal law arbitrarily. The law of retribution is a purely formal principle because it is based on equality.<sup>73</sup> According to Kant, it appeals to everyone’s reason. Of the murderer, Kant says: one “never heard a person condemned to death complain that the punishment was too much and thus he was done wrong; everyone would laugh in his face if he said that.”<sup>74</sup> The decisive criterion for the punishment (to be set by the lawgiver), therefore, is whether the criminal offender can complain that he was done wrong when the punishment is executed. If the offender experiences “what he has done to another” he cannot be done wrong.<sup>75</sup>

Still, the law of retribution has its limits. Kant realizes that a punishment which does the offender no wrong can be wrong nevertheless. In his discussion of the postulate of public law, he considers the example of an “enemy, who instead of honestly carrying out his surrender agreement with the garrison of a besieged fortress, mistreats them as they march out or otherwise breaks the agreement.” He says, the enemy “*cannot complain of being wronged* if his opponent plays the same trick on him when he can. But on the whole they do *wrong in the highest degree*.”<sup>76</sup> The distinction between wrong *to another* and wrong *in the highest degree* also applies to the right to punish. What may be no wrong to the criminal offender under the principle of retribution nonetheless may be wrong in the highest degree if one considers human dignity. If a criminal offender killed his victim in a cruel manner, the principle of retribution would permit a cruel execution. The offender could not complain that he was being wronged, but one “must also take account of the idea of respect for the humanity in the person of the offender

<sup>71</sup> AA XIX, R.7995, p. 576, ll. 8–11: “The punishment must be determined in the law itself, not for the offender’s but for the *publici* [public’s] and its freedom’s sake with respect to the judge’s choice.” Kant is not thinking of modern criminal law which often specifies a range of possible punishment and leaves the precise amount for the judge to determine.

<sup>72</sup> AA VI, Annex of Explanatory Comments 5, p. 363, ll. 2–5.

<sup>73</sup> AA VI, General Comment E, p. 332, ll. 11–15.

<sup>74</sup> AA VI, General Comment E, p. 334, ll. 12–15.

<sup>75</sup> AA VI, Annex of Explanatory Comments 5, p. 363, ll. 16–20.

<sup>76</sup> AA VI, §42, p. 307, l. 34 – p. 308, l. 5 (emphasis added).

(meaning for his kind), and indeed out of pure principles of right."<sup>77</sup> Kant states that one can

not deny even the most depraved person respect as a human being, which is owed to him at least in his quality of being human even though he has made himself unfit for such respect through his act. Thus there can be abusive punishments disgraceful to humanity itself (such as quartering, throwing to be torn by dogs, cutting off nose and ears), which are not only more painful for the honorable person . . . than the loss of goods and life but also make the observer blush to think he is a member of a kind that can be treated in this manner.<sup>78</sup>

Although the idea of human dignity limits the principle of retribution, still the principle itself limits the type and amount of punishment by excluding punishments more painful in type or higher in amount than the amount of wrong inherent to the crime. Assume that illegal parking could be stopped if those who parked illegally knew they would have to serve long prison terms. The mere goal of stopping illegal parking cannot be decisive. *Punishment* can never be imposed as "merely a means to promote another good for the offender himself or for civil society."<sup>79</sup> Thus, the lawgiver cannot promulgate a law threatening long prison terms for illegal parking because the judge would have to take the law seriously ("The criminal law is a categorical imperative") and impose the threatened punishment. The executive in turn would have a duty to execute the punishment imposed and if he did, the offender could complain he was done wrong because the punishment was disproportionate to the amount of wrong inherent in the offense.

Kant's discussion of the Plank of Carneades case runs in a similar vein, illustrating the interaction between the state's duty to deter crime and the constraints retribution imposes on what can be used as a deterrent. As Kant notes, a criminal law threatening the death penalty in a situation of necessity cannot "possibly have the intended effect, because the threat of an evil which is still *uncertain* (death through judicial decision) cannot outweigh the fear of an evil which is *certain* (namely, drowning)."<sup>80</sup> Consequently, the judge may not impose

<sup>77</sup> AA VI, Annex of Explanatory Comments 5, p. 362, l. 35 – p. 363, l. 2. The German word *bloß* can be translated either as "pure" or as "mere." When Kant speaks of *bloßen Rechtsgründen*, he means pure reasons of law.

<sup>78</sup> AA VI (*Virtue*), §39, p. 463, ll. 12–21. One needs to see this statement against the backdrop of the highly brutal executions still performed in the eighteenth century.

<sup>79</sup> AA VI, General Comment E, p. 331, ll. 20–25.

<sup>80</sup> AA VI, Annex Introduction DoR II, p. 235, ll. 32–35.

the death penalty in the necessity case because the law could not have the effect it was intended to have, namely deterring people from committing homicide. Furthermore, no punishment can be threatened that exceeds the death penalty (such as also punishing the offender's family or subjecting the offender to a cruel and slow death), even though it might be effective as a deterrent. The legislature cannot threaten it, because judicial imposition and executive enforcement of any punishment in excess of death would do wrong to the criminal offender (not to mention his family). Accordingly, there is no possible threat of punishment for homicide in the plank case and the offender cannot be punished. If the punishment the state threatens cannot possibly be effective as a deterrent because of the circumstances, then the judge cannot impose that punishment. The state has failed to fulfill its duty to deter – indeed is doomed to fail in the plank case with the threat of the death penalty – and thus the judge is constrained not to impose the punishment threatened. If the state threatens a punishment that extends beyond the evil inherent to the criminal offender's act, then the judge cannot impose that punishment either, because if the punishment were executed, the criminal offender could complain that he was done wrong. Thus in this case, even without relying on the principle of human dignity, one sees that deterrence and retribution play interacting roles in Kant's theory of criminal law.

## 6. The death penalty and Kant's position on Beccaria

Kant's attitude toward the death penalty is consistent with his ideas on punishment in general. The principle of retribution dictates the death penalty for murder, and that is the punishment Kant requires for this crime. Far more important than the principle of retribution, however, is Kant's reaction to Beccaria, who speaks out against the death penalty.<sup>81</sup>

Generally, Kant would accept as a valid type of critique the argument that the legislative power in the state contradicts itself when it threatens the death penalty.<sup>82</sup> Beccaria does not make this argument, but one can piece it together from his comments. Beccaria's brief

<sup>81</sup> Beccaria published his ideas in 1764 in a short book entitled *Dei delitti e delle pene*, which circulated quickly throughout Europe. We used Hommel's German translation, which was available in Kant's time.

<sup>82</sup> AA VI, General Comment E, p. 334, ll. 15–19.

argument consists of two parts: (1) It is not the case that individual persons who form a society could have intended to vest the right to kill themselves in the universal will (of the society), which is the lawgiver. (2) Assuming the people did vest such a right in the universal will, then that investment would contradict the principle that no one has a right to kill himself. If the individual person does not have this right then he cannot vest such a right in society.<sup>83</sup> Kant, who repeats both of Beccaria's claims,<sup>84</sup> discusses only the first, which he characterizes as follows: "The death penalty cannot be contained in the original civil contract because then everyone would have had to consent to lose his life if he murdered another (of the people)."

Kant's first argument is that Beccaria errs when assuming that everyone consented to his own punishment. An offender cannot logically consent to his own punishment, because the concept of punishment excludes the idea of consent to be punished. "It is not punishment if something happens to a person which he wills to happen." It is thus "impossible to *will* to be punished."<sup>85</sup>

Kant's second argument is that Beccaria errs when assuming the criminal offender is the co-lawgiver of the criminal law. Kant returns to his distinction between the *universi* and the *singuli*<sup>86</sup> in his response to Beccaria. The *universi* are the co-lawgivers;<sup>87</sup> the *singulus* is called either "every individual in a people" or "subject."<sup>88</sup> Kant also uses the distinction between *homo noumenon* and *homo phaenomenon*.<sup>89</sup> The *homo noumenon* is the person as an intelligible being, a being with reason,<sup>90</sup> in whom pure juridical-lawgiving reason speaks. In contrast, the *homo phaenomenon* is the person as a rational natural being,<sup>91</sup> an *animal rationale*.<sup>92</sup> The *homo phaenomenon* can let himself be determined by his reason to act in the world of sensation,<sup>93</sup> but he is also capable of committing crime.<sup>94</sup> Both of these distinctions (*universi* – *singulus*, *homo noumenon* – *homo phaenomenon*) point in the same direction. The *universi* represent the *homo noumenon*; a *singulus* is a *homo phaenomenon*. For Kant, the lawgiver is pure practical reason (*homo noumenon*). He is

<sup>83</sup> Beccaria, Cap. XVI, "On the death penalty," Hommel, pp. 131–132.

<sup>84</sup> AA VI, General Comment E, p. 334, l. 37 – p. 335, l. 6.

<sup>85</sup> AA VI, General Comment E, p. 335, ll. 8–10. The German word for "consent" is *einwilligen*, which focuses directly on the consenting party's *will*.

<sup>86</sup> AA VI, §47, p. 315, ll. 34, 36. See too Chapter 8, section 1A.

<sup>87</sup> AA VI, General Comment E, p. 335, l. 14.

<sup>88</sup> AA VI, General Comment E, p. 335, ll. 15, 22–23.

<sup>89</sup> AA VI, General Comment E, p. 335, ll. 17–22. <sup>90</sup> AA VI (*Virtue*), §3, p. 418, l. 8.

<sup>91</sup> AA VI (*Virtue*), §3, p. 418, ll. 14–15. <sup>92</sup> AA VI (*Virtue*), §11, p. 434, ll. 22–23.

<sup>93</sup> AA VI (*Virtue*), §3, p. 418, ll. 15–16. <sup>94</sup> AA VI, General Comment E, p. 335, l. 20.

“holy.”<sup>95</sup> The individual human being, in contrast, is “unholy enough” for the desire to violate the law to overcome him.<sup>96</sup> Both are *numero idem* (identical in number), but *specie diversus* (different in kind).<sup>97</sup> Accordingly, they are *different* persons. Thus, the criminal offender is not, and cannot be, the giver of the criminal laws.

Kant’s third argument is: Assume the original or social contract<sup>98</sup> contained the contracting parties’ declaration to perform an act in the future if certain conditions are fulfilled, namely to let themselves be killed. That assumption, however, cannot be correct. “The promise to let oneself be punished and thus to dispose of oneself and one’s life” cannot be “contained in the social contract.”<sup>99</sup> A promise to perform in the future implies the promise to *will* to perform at the time performance is due, because without a corresponding will I cannot perform any act promised. Since I need perform only at the time performance is *due*, my will to perform presupposes my judgment that the conditions have been fulfilled and thus that the time of performance has come. It follows that the offender, if one assumes his *will* to be punished, must determine whether the time when punishment is due has come. In other words, the offender must judge himself whether he has become *due* for punishment. That in turn means the offender would be judge in his own case, which cannot be. Beccaria’s reasoning leads to an absurdity.<sup>100</sup>

Beccaria’s main mistake lies in seeing the *judgment* of practical reason regarding which punishment should be imposed on a murderer (*and this judgment must be ascribed to the criminal offender’s reason*) as “a determination of the *will* of the criminal offender” to impose the punishment on himself. Here, legal judgment and legal execution are conflated.<sup>101</sup> Beccaria’s argumentation is too meager to cast a negative light on Kant’s claims regarding the threat and execution of the death penalty.

In this chapter we have argued that Kant is not a pure retributivist. For Kant, the lawgiver threatens punishment to deter individuals

<sup>95</sup> AA VI, General Comment E, p. 335, l. 17.

<sup>96</sup> AA VI (*Virtue*), Introduction I, p. 379, ll. 20–23.

<sup>97</sup> AA VI (*Virtue*), §13, p. 439, ll. 27–31.

<sup>98</sup> “Social contract,” AA VI, General Comment E, p. 335, l. 24.

<sup>99</sup> AA VI, General Comment E, p. 335, ll. 22–30.

<sup>100</sup> See AA XIX, R.7916, p. 552, l. 29: “It is also absurd for someone to bind himself to be punished.”

<sup>101</sup> AA VI, General Comment E, p. 335, ll. 30–35.

from committing crimes and thereby secure the rights of all citizens. Nonetheless, the lawgiver is constrained in its threat by the principle of retribution. Since the punishment threatened must be imposed and executed, the lawgiver may threaten no more than the judge may impose and the executive may execute in light of the criminal offender's human dignity. The offender must never be treated as a mere means to some other social goal. Therefore the punishment threatened and executed must match the wrong inherent to the offense. Toward the end of this chapter we introduced the two terms *homo phaenomenon* and *homo noumenon*. This distinction is one of the foundations of Kant's moral theory that he did not fully develop until the *Metaphysics of Morals*. In the next chapter we shall explore these two concepts, particularly in regard to the issue of responsibility and human dignity.

## The human being as a person

In the eighteenth century, Swedish natural scientist Carl von Linné wrote his seminal *Systema Naturae* (*System of Nature*), transforming biology into a systematic scientific discipline, much like Newton systemized the laws of physics. Next to the *homo troglodytes*, or the orangutan, and under the name *homo sapiens* Linné includes the human being in his highest category of mammals, the primates. Linné writes the line from the pronaos in Delphi: “Know thyself”<sup>1</sup> next to the *homo sapiens*. In a footnote, Linné says that such self-awareness is the highest level of wisdom.<sup>2</sup>

Linné is not the first to regard human beings as animals. In Antiquity, the human being was called a rational animal (*animal rationale*). Still, Linné’s placement of the human being within a biological system changes attitudes fundamentally. Linné converts the human being into an object of empirical observation by analyzing and comparing him to other animals. The human being’s nature as a moral being with duties, rights, and moral faculties thus becomes separated from, indeed irrelevant to, his nature as just one more of the animal species. Since a natural scientist (*qua* natural scientist) can neither understand nor sensibly discuss duties, rights, and moral faculties, Linné’s comment “Know thyself” (a *moral* imperative) seems misplaced in *Systema Naturae*. Still, it reminds us that moral philosophy remains relevant in studying human conduct.

Throughout this *Commentary* we have simply assumed that duties, rights, and moral faculties are possible, but this assumption now cries out for foundation. In the *Doctrine of Right*, Kant sees the human being as a *person*, in contrast to the animal in Linné’s system. Only a person has duties, rights, and moral faculties. But what is a person and how is

<sup>1</sup> Pausanias, Bk. X, Chap. 24, 1 (Meyer, vol. 2, p. 504).

<sup>2</sup> Linné, *Systema Naturae*, pp. 14, 20, 24. Cf. Goerke, *Linné*, pp. 118–120.

the human being as a person to be conceived? In this chapter we first discuss the human being within the system of nature, namely the *homo phaenomenon* (section 1), which we follow by considering the human being as an intelligible being, or as a *homo noumenon* (section 2). Section 3 considers the relationship between the *homo noumenon* and the *homo phaenomenon*, and section 4 considers why human beings, as persons, can be held responsible for their actions.

### 1. The *homo phaenomenon*

Kant expresses his position on the human being in Linné's *Systema Naturae*:<sup>3</sup>

The human being within the system of nature (*homo phaenomenon*, *animal rationale*) is a being of little import and shares a common value (*pretium vulgare*) with the other animals as products of the earth. Even though he is ahead of them in understanding and his ability to set himself goals, still that gives him only an *external* value of his utility (*pretium usus*), namely of one human being over the other, i.e. a *price* as a good in exchanges with these animals as things, whereby he still has a lower value than the universal means of exchange, money, whose value is called eminent (*pretium eminens*).<sup>4</sup>

The human being in the system of nature is, as are the other animals, nothing more than a thing. He has a price, or a merely relative value, which permits comparing him to other animals. One human being can be more valuable than another or than an ox, and all are replaceable because “whatever has a price can be replaced by something else as its equivalent.”<sup>5</sup> That the human being has the quality of reason in its *theoretical* capacity does not change his basic nature as an animal.<sup>6</sup> The human being as a (merely) rational natural being is intelligently productive. He uses reason in its theoretical capacity when he busies himself with science, mathematics, logic, or the metaphysics of nature.<sup>7</sup> He also uses his theoretical reason in his actions when

<sup>3</sup> In AA VIII (*Teleological Principles*), p. 164, ll. 34–37, Kant speaks of the “Linnéan system.” One also finds references to Linné's *Systema Naturae*, e.g. in AA XX (*First Introduction*), p. 212, ll. 32–34; p. 214, ll. 21–32; p. 217, ll. 18–23; p. 218, ll. 14–16.

<sup>4</sup> AA VI (*Virtue*), §11, p. 434, ll. 22–31 (emphases in the original).

<sup>5</sup> AA IV (*Groundwork*), p. 434, ll. 32–33.

<sup>6</sup> AA VI (*Virtue*), §3, p. 418, ll. 8–10.

<sup>7</sup> See AA VI (*Virtue*), §19, p. 445, l. 11. In the *Critique of Pure Reason*, Kant differentiates “theoretical” from “practical” cognition in that through the former “I cognize what exists” whereas through the latter “I represent what ought to exist,” AA III, p. 421, ll. 17–19 (B 661). Through theoretical cognition our *knowledge* is increased, whereas practical cognition affects our *actions*. Theoretical cognition includes, for example, Newtonian physics and Linné's system of nature, which are predicated on empirical experience. In the *Metaphysics of Morals*,

calculating the best means to attain his ends. Still, the ends he sets are given to him by his animal nature. His sensual drives and desires thus determine him when selecting his ends. He is an animal through and through and differs from other intelligent animals only in gradation. Thus unsurprisingly Kant equates the human being in the system of nature to the *animal rationale* of Antiquity. Kant notes that one can see one human being killing another as if it were brought about only by laws of nature:

Merely the end he [the perpetrator] hopes to attain through the killing, e.g. the victim's money, guides him. He uses his reason in line with this end. The cause of his action is thus merely physical stimulus and the effect is simply like the effect of its cause to the extent his physical energy concurs and is put into motion by greed, poverty, etc.<sup>8</sup>

Kant also calls the human being in the system of nature a "rational natural being"<sup>9</sup> or a "human animal,"<sup>10</sup> but most importantly a *homo phaenomenon*,<sup>11</sup> meaning a human being as he appears to us. *Homo phaenomenon* is Kant's name for Linné's *homo sapiens*. The *homo phaenomenon* is locked in the sensual world. He is immersed in the connections of the sensual world through which he is driven on the basis of his talents and environment. The circumstances of his today are the causes of his tomorrow. If one changes the circumstances, one makes the *homo phaenomenon* an object of manipulation.

As a thing, the *homo phaenomenon* has no duties,<sup>12</sup> which in turn means that he has no rights or moral faculties. As we argue in the next section, duties are based on categorical imperatives, which stand in direct contrast to hypothetical imperatives. Hypothetical imperatives, such as the imperative to avoid punishment ("If you do not want to be punished, do not steal!"), are commands under a condition. If the condition (in our example: the threat of punishment) provides a sufficiently strong motive, it will cause the *homo phaenomenon* to follow

Kant also includes within theoretical cognition "mathematics, logic, and the metaphysics of nature," which are not philosophy in the narrower sense but rather "only science." Still, mathematics, logic, and the metaphysics of nature are not "drawn from experience but rather derived *a priori* from principles" (AA VI (*Virtue*), §19, p. 445, ll. 8–15). Practical philosophy, in contrast, is philosophy in the narrower sense, which transcends the theoretical sciences but nonetheless comprises them because all theoretical sciences themselves are practice, namely human action. (The distinction between "theory" and "practice" in AA VIII (*T&P*), p. 275, ll. 1–7 deviates from Kant's normal usage of these terms elsewhere.)

<sup>8</sup> *Vigilantius*, AA XXVII.2.1, p. 502, ll. 16–22.     <sup>9</sup> AA VI (*Virtue*), §3, p. 418, l. 14.

<sup>10</sup> AA VI (*Virtue*), §11, p. 435, l. 14.     <sup>11</sup> E.g. AA VI (*Virtue*), §11, p. 434, l. 22.

<sup>12</sup> "It is irrational to conceive of a person's obligation to a thing and *vice versa*." AA VI, §11, p. 260, ll. 29–30.

the imperative. In contrast, a categorical imperative, which commands *without* adding any condition and thus *without* any sanction ("Thou shalt not steal!"), does not provide the *homo phaenomenon* with any motive to follow the imperative. In the *homo phaenomenon*'s world there are only hypothetical imperatives and with them physical and psychological forces and the stimulus–reaction mechanism on which natural science focuses when studying the human being.

## 2. The *homo noumenon*

Scientific descriptions, however, do not exhaustively account for human nature. To explain human nature in terms of duties, rights, and moral faculties, Kant posits a world transcending the *homo phaenomenon*. This world is founded on the Categorical Imperative and the imperatives that can be directly or indirectly derived from it. Categorical imperatives command categorically without any added condition providing a sensual motive to encourage adherence to their commands. Beings who observe categorical imperatives commit or omit the actions these imperatives require or prohibit simply because the imperatives tell them to do so. Categorical imperatives thus provide the foundation for our duties, which are the acts we are obligated to commit or omit regardless of what our sensual drives and desires might encourage us to do. Kant: "Obligation is the necessity of a free action under a categorical imperative of reason."<sup>13</sup> The action is *free* if and because the human being's sensual drives and desires do not determine, albeit they may affect, his choice to act.<sup>14</sup> If human choice were determined solely by sensual drives and desires, then the human being would not be able to follow categorical imperatives. Consequently such humans, as the *homo phaenomenon*, have no duties.

The world of the Categorical Imperative (and derived categorical imperatives) is the world of moral practical reason. Kant calls the human being in the world of moral practical reason the *homo noumenon*. Although Kant contrasts *phaenomena* to *noumena* as early as in the *Critique of Pure Reason*, he does not contrast *homo phaenomenon* to *homo noumenon* until the *Metaphysics of Morals*.<sup>15</sup> Kant contrasts these expressions in reaction to the *homo phaenomenon*'s (as a *homo sapiens*)

<sup>13</sup> AA VI, Introduction MM IV, p. 222, ll. 3–4. <sup>14</sup> See Chapter 3, section 2.

<sup>15</sup> Kant seems to use the term *homo noumenon* only once earlier, namely in AA VIII (*End*), p. 334, l. 24. Otherwise, the expressions *homo noumenon* and *homo phaenomenon* are located only in the *Metaphysics of Morals*.

placement in Carl von Linné's system of nature. Kant distinguishes the *homo noumenon* from the *homo phaenomenon* to show that one can, and indeed must be able to, sensibly discuss the human being differently from the natural scientist's conception of him. The *homo noumenon*<sup>16</sup> is the human being as an "intelligible being,"<sup>17</sup> a "moral being,"<sup>18</sup> in contrast to the human being (the *homo phaenomenon*) as (merely) a "being with reason."<sup>19</sup> The human being as an intelligible being is the human "as the subject of moral practical reason,"<sup>20</sup> whereas the human being as a being with reason is viewed simply in light of his having the quality of reason in its *theoretical* capacity. The *homo noumenon* is characterized by the "nature of his capacity for freedom"<sup>21</sup> (meaning internal freedom)<sup>22</sup> and thus by his ability to follow the Categorical Imperative and adopt ends the moral law requires independently from the human being's animal nature.<sup>23</sup>

Awareness of the moral law (the Categorical Imperative) lifts the curtain to the world of moral practical reason. We experience the moral law as "given." Kant calls the moral law's being given to us a "deed [*Factum*] of pure reason"<sup>24</sup> or a "dictate of pure reason."<sup>25</sup> Through this deed, pure reason announces itself as "originally legislating."<sup>26</sup> This deed of pure reason is comparable to the deeds of pure understanding through which we experience the rules of logic and geometry as standards.<sup>27</sup> Kant calls subjecting acts we consider committing or omitting to the rules of reason "premonitionally

<sup>16</sup> Literally *nous* means "intellect."

<sup>17</sup> Kant sometimes says "intelligible human" (*Vernunftmensch*) in contrast to the "human animal" (*Tiermensch*), AA VI (*Virtue*), §11, p. 435, ll. 14–15.

<sup>18</sup> See, e.g. AA VI (*Virtue*), §9, p. 430, l. 14; Introduction I, p. 379 footnote, l. 26 – p. 380, l. 28 and §9, p. 429, l. 5 where "moral being" is equated to "humanity" (*Menschheit*).

<sup>19</sup> This contrast is expressed in AA VI (*Virtue*), §3, p. 418, ll. 7–10. Here, Kant distinguishes between *Vernunftwesen* and *vernünftiges Wesen*. We are translating *Vernunftwesen* as "intelligible being" and *vernünftiges Wesen* as "being with reason." The *homo noumenon* is an intelligible being; the *homo phaenomenon* is a being with reason. Unfortunately, Kant does not always use the terms consistently. In AA VI (*Virtue*), §34, p. 456, ll. 27–28, Kant contrasts *vernünftiges Wesen* to *mit Vernunft begabtes Tier*. From the context, Kant means the *Vernunftwesen*, or the intelligible being, and not the being with reason, as the term *vernünftiges Wesen* would otherwise indicate.

<sup>20</sup> AA VI (*Virtue*), §11, p. 434, ll. 32–33. See too AA VI (*Virtue*), §13, p. 439 footnote, ll. 27–30 where Kant says the *homo noumenon* is "the subject of moral legislation, where the human is subject to a law that he gives himself."

<sup>21</sup> AA VI, Introduction MM II, p. 239, ll. 23–26. <sup>22</sup> See Chapter 3, section 2.

<sup>23</sup> AA VI (*Virtue*), Introduction III, pp. 384–385; AA VIII, p. 392, ll. 1–3. In AA VI (*Virtue*), §4, p. 420, ll. 17–18, the human being as a moral being has the advantage of "acting according to principles."

<sup>24</sup> AA V (*Practical Reason*), p. 31, ll. 25–34; AA VI, §6, p. 252, ll. 26–30.

<sup>25</sup> AA VI, §28, p. 280 footnote, l. 30. <sup>26</sup> AA V (*Practical Reason*), p. 31, ll. 33–34.

<sup>27</sup> For a comparison to the rules of geometry, see AA V (*Practical Reason*), p. 31, ll. 2–10.

warning (*praemonens*) conscience,"<sup>28</sup> meaning prospective as opposed to retrospective conscience. "Conscience" in this context does not denote a psychological phenomenon but instead "is practical reason...confronting the human being with his duty whenever a law is applicable"<sup>29</sup> (just as "logic" does not designate a psychological phenomenon but is another expression for human understanding).<sup>30</sup> Although human beings experience the moral law as "given," they nonetheless are autonomous beings because their own pure practical reason imposes the Categorical Imperative on them (just as their own pure understanding imposes the rules of geometry on them). The *homo noumenon* is pure legislating reason itself.<sup>31</sup>

With my awareness of the moral law, I see myself as free.<sup>32</sup> Awareness of the moral law is not awareness of an abstract system of rules, but rather awareness of duty (my duty) in a concrete situation. The categorical imperatives are called "imperatives" because they prescribe or proscribe in *concrete situations*. They confront the human being with a duty *whenever* a law is applicable. Prospective conscience is always a conscience in concrete situations. With my awareness of duty, I see myself as free because awareness of an "ought" implies awareness of a "can." Since reason says that actions in accord with moral laws ought

<sup>28</sup> AA VI (*Virtue*), §13, p. 440, l. 11.

<sup>29</sup> AA VI (*Virtue*), Introduction XII, p. 400, ll. 27–28.

<sup>30</sup> Accordingly, Kant can claim that "an *erring* conscience is nonsense," which many lawyers have misunderstood. Of course one can "occasionally err in making the objective judgment as to whether something is a duty or not." I cannot, however, err as to whether I have compared that something to my practical (here judging) reason to make that (objective) judgment, "because then I would in fact not have judged at all." AA VI (*Virtue*), Introduction XII, p. 401, ll. 3–10.

<sup>31</sup> Cf. AA VI, General Comment E, p. 335, l. 19.

<sup>32</sup> Let us assume I am about to act. As an intelligible being, so Kant says, I cannot "act otherwise than under the idea of freedom" because as an intelligible being I conceive of "reason that is practical," meaning I conceive of reason that can act through me. I cannot "possibly conceive of reason that in its own awareness received guidance in its judgments from *elsewhere* because then the subject would not attribute determination of [his] judgment to his own reason, but instead to some drive." Reason – my reason – must see itself "as author of its principles, independent of foreign influences." Consequently practical reason must see itself as free, AA IV (*Groundwork*), p. 448, ll. 4–19. It is impossible for me to see myself as an intelligible being and *simultaneously* as determined by my sensual drives. A comparison to the rules of geometry is again helpful. I cannot possibly imagine understanding the rules of geometry and *simultaneously* imagine that I am exclusively determined by my sensual drives and desires when I calculate the width of the banks of the Nile, meaning the rules of geometry have no influence on my calculations. Either the rules of geometry influence my calculations or my action is determined from elsewhere. Similarly, I must assume that moral-practical reason can determine my action or I cannot assume that I am an "intelligible being." (We here are translating Kant's *vernünftiges Wesen* as "intelligible being." In the *Groundwork*, Kant does not yet distinguish between *Vernunftwesen* and *vernünftiges Wesen*, which we discuss in note 19.)

to occur, these actions must also be able to occur, meaning I must be free to commit them.<sup>33</sup> Accordingly, duties should

not be assessed in terms of the human capacity to follow the law, but conversely: Moral capacity must be assessed in terms of the law that commands categorically, meaning not in terms of the empirical knowledge we have of what the human being's nature is like, but instead in terms of rational knowledge of how the human being should be according to the idea of humanity.<sup>34</sup>

Seeing the human being as a *homo noumenon* removes him from Linné's system of nature to which the *homo phaenomenon* belongs. Although Kant does not dispute the human being's animal nature, he posits an aspect of human nature that natural science cannot explain. Kant's viewpoint lays the foundation for the human being's subjection to the moral law and thus for his internal freedom. The human being as a *homo noumenon* becomes the bearer of duties, which in turn provide the bases for the rights and moral faculties he has.

### 3. On the relationship between *homo noumenon* and *homo phaenomenon*

We have explained Kant's dual concept of the human being as (1) a being with reason, a rational animal, a *homo phaenomenon*, and (2) as an intelligible being, a being subject to the moral law, a *homo noumenon*. In this section we focus on three aspects of the relationship between the *homo noumenon* and the *homo phaenomenon*: (A) the *homo noumenon*'s transcendence over the *homo phaenomenon*, (B) the effect this transcendence has on the concept of humanity, and (C) the causal relationship between the *homo noumenon* and the *homo phaenomenon*.

#### A. The *homo noumenon*'s transcendence over the *homo phaenomenon*

The distinction between *homo noumenon* and *homo phaenomenon* in part replaces the traditional Roman law distinction between a person and a thing. The *homo phaenomenon* as such is not, and cannot be regarded as, anything other than a thing. It is the *homo noumenon* that is a person. Since "person" and "intelligible being" mean the same, the human

<sup>33</sup> AA III, p. 524, ll. 18–23 (B 835).

<sup>34</sup> AA VI (*Virtue*), Introduction XIII, p. 404, l. 23 – p. 405, l. 2. The logic underlying "ought implies can" will be discussed in Appendix I to this chapter.

being is a person by virtue of his practical reason, meaning by virtue of his awareness of the moral law.

Kant distinguishes two types of persons, holy beings and human beings. A holy being is an intelligible subject who is "internally accompanied" by the necessity of committing actions required by the law. For the human being, in contrast, committing actions according to the law is contingent.<sup>35</sup> Holy beings necessarily act according to the law. Human beings do not. Consequently, moral practical laws evolve into imperatives for human beings, and a human is thus "a person who has duties,"<sup>36</sup> meaning a person who is subject to the imperatives derived from moral practical laws. This idea of duty is the decisive aspect of the *homo noumenon's* transcendence over the *homo phaenomenon*.

### B. Change in the concept of humanity

The transition from the *homo phaenomenon* to the *homo noumenon* changes the concept of humanity. "Humanity," according to Achenwall, denotes "the nature of the human being in terms of his species, meaning what all human beings have in common."<sup>37</sup> If we first consider the *homo phaenomenon*, then the expression "humanity" indicates the essential characteristics of the natural human being. In contrast, the *homo noumenon* is the idea of a human being "as such (as a moral being)."<sup>38</sup> The human being's nature as a *homo noumenon* transforms him into a being different from all other animals. Correspondingly, humanity becomes an "ideal,"<sup>39</sup> a "duty"<sup>40</sup> we all have. The name "humanity" thus no longer designates the human being *as he is*, but rather the human being *as he should be*.<sup>41</sup>

That the human being has duties means that the *homo noumenon* transcends the *homo phaenomenon*. That the human being imposes these duties on himself means that he has dignity. The expression

<sup>35</sup> AA VI, Introduction MM IV, p. 222, ll. 5–15. On holy beings, AA VI (*Virtue*), Introduction II, p. 383, ll. 20–23.

<sup>36</sup> AA VI (*Virtue*), §11, p. 435, ll. 12–13.

<sup>37</sup> *Prol.*, §10, p. 9: *Natura hominis generica, hoc est, quae omnibus hominibus est communis, HUMANITAS appellatur*. During the eighteenth century, *Menschheit* (humanity) is used to designate what all human beings have in common. Friedrich August Müller uses the expression when he attributes the same "humanity" to a king as to a beggar, or to a master as to his servant. Müller, *Einleitung*, Part III, pp. 190, 521; see too, Hruschka, "Person als Zweck," p. 9.

<sup>38</sup> AA VI (*Virtue*), §39, p. 464, ll. 1–2.

<sup>39</sup> AA VI (*Virtue*), Introduction XIII, p. 405, l. 34. See too Introduction V, p. 386, ll. 30–31.

<sup>40</sup> E.g. AA VI (*Virtue*), Introduction V, p. 386, l. 30 – p. 387, l. 23.

<sup>41</sup> AA VI (*Virtue*), Introduction XIII, p. 404, l. 23 – p. 405, l. 2; §52, p. 480, ll. 10–13.

“humanity” becomes an honorary title. “Humanity itself is a dignity.”<sup>42</sup> The *homo noumenon*’s dignity is analogous to the state dignities we discuss in [Chapter 7](#). Just as the lawgiving power in a state has dignity by virtue of its power to legislate, so too each human being has dignity because he himself gives the moral law.<sup>43</sup> Achenwall sees the concept of dignity in connection with (relative) perfection: “What is judged to be more perfect than something else excels above the latter. The excellence of a person in comparison to other persons is called ‘dignity.’”<sup>44</sup> Kant’s idea of human dignity does not permit a comparison of one person to others, but rather a comparison of human beings to “other beings in the world,” as Kant calls them. The human being’s dignity results from the fact “that he stands above all other beings in the world, which are not human . . . and thus above all things.”<sup>45</sup> By not being relative, dignity distinguishes itself from price. A price determines the relative value of a thing, whereas dignity means “absolute internal value.”<sup>46</sup> As noted in [section 1](#), the *homo phaenomenon* has a relative value and thus a price, but the *homo noumenon* has no price because of his absolute internal value, or dignity.

The right to freedom<sup>47</sup> is attributed “to every human being by virtue of his humanity.”<sup>48</sup> The right to freedom follows from our all having the same responsibility, namely to observe the moral law. This sameness of responsibility indicates all human beings are morally equal. Everyone can “measure himself with every other one of his kind and evaluate himself on the basis of equality.”<sup>49</sup> Moral equality, however, means that every human being has a right to self-determination against every other human being, which is the same as the right to freedom. I cannot make a claim to a right to freedom and bodily integrity against a wild

<sup>42</sup> AA VI (*Virtue*), §38, p. 462, ll. 21–32; similar comments in AA VI (*Virtue*), §9, p. 429, l. 16; AA IV (*Groundwork*), p. 435, ll. 7–9: “Morality and humanity to the extent humanity is capable of morality is what alone has dignity.” On the concept of dignity in Kant’s work, see Christiano, “Dignity of Persons.”

<sup>43</sup> Through the fact “that we are capable of . . . internal legislation” the human being has “inalienable dignity (*dignitas interna*),” AA VI (*Virtue*), §11, p. 436, ll. 7–13. See too AA IV (*Groundwork*), p. 440, ll. 10–13: “The dignity of humanity indeed consists of the capability to give . . . universal law.” Analogously, Kant speaks of the “dignity of a law” in contrast to mere custom (*mos*), AA VI (*Virtue*), §40, p. 464, ll. 16–20.

<sup>44</sup> *Praeclit id, quod aliis perfectius iudicatur, praecllentia personae respectu aliarum personarum est dignitas. I.N.II*, §122 (AA XIX, p. 385, ll. 14–15).

<sup>45</sup> AA VI (*Virtue*), §38, p. 462, ll. 24–26.

<sup>46</sup> AA VI (*Virtue*), §11, p. 435, l. 2. The expressions “person” and “personality” (*Persönlichkeit*) are additional designations for human dignity, cf. e.g., AA VI (*Virtue*), §38, p. 462, l. 24, where Kant equates “dignity” to “personality.”

<sup>47</sup> See [Chapter 3](#).

<sup>48</sup> AA VI, Division DoR B, p. 237, ll. 29–32. <sup>49</sup> AA VI (*Virtue*), §11, p. 435, ll. 2–5.

animal that attacks me. A human being who attacks me, however, violates my right to freedom precisely because he is a human being and *not* a thing.

Humanity is also the basis for my moral faculty to be the owner of things, such as a piece of land. Granted this faculty does not follow directly from the humanity in my person as does my right to freedom. My faculty to be the owner of things follows directly from the responsibility of the human race to divide the land.<sup>50</sup> Still my faculty to be the owner of things follows indirectly from the humanity in my own person because this humanity makes me a member of the human race and thus subject to the duty to divide the land.

### *C. Causal relationship between the homo noumenon and the homo phaenomenon*

The *homo noumenon* is the human being “as the subject of moral legislation proceeding from freedom, whereby the human being is subject to a law he gives himself.” The *homo phaenomenon* is the “sensible human being endowed with [theoretical] reason.” The *homo noumenon* and the *homo phaenomenon* are one and the same human being (*numero idem*), i.e. one single human being in terms of their number. Still “in practical respect,” the *homo noumenon* and the *homo phaenomenon* are *specie diversus*, i.e. different in kind. The two are related and Kant calls the relationship the “causal relationship of the intelligible to the sensible” for which there is no theory, meaning the causal relationship is not accessible to natural scientific cognition.<sup>51</sup>

A comparison to the rules of logic and geometry elucidates what Kant means. Natural science can evaluate stimulus–response mechanisms only in the relationship of empirically given causes to empirically given effects. The rules of logic and geometry, however, are not empirically determinable occurrences that can release stimulus–response mechanisms. The natural scientist thus cannot explain how these rules influence human understanding and the actions this understanding brings about.<sup>52</sup> The same is true of the categorical

<sup>50</sup> See Chapter 6. <sup>51</sup> AA VI (*Virtue*), §13 footnote, p. 439, ll. 27–34.

<sup>52</sup> The following hypothetical imperative provides an example: To divide a line into two equal parts you must make two intersecting arcs from its ends (cf. AA IV (*Groundwork*), p. 417, ll. 18–21). The imperative evolves from the rules of geometry, which in this way affect the world of facts without being facts themselves.

imperatives of practical reason. How these imperatives influence our reason and the actions reason brings about remains obscure to the scientist.

Kant characterizes the causal relation between the intelligible and the sensible as “necessitation” and “constraint,” or better “self-constraint.”<sup>53</sup> The *homo noumenon*, and only the *homo noumenon*, is “a being capable of obligation”<sup>54</sup> in both the active and passive senses.<sup>55</sup> Accordingly, the *homo noumenon* is both the human being who authors and imposes a concrete obligation and also the human being who is obligated (passively) through the (active) obligation.<sup>56</sup> The *homo phaenomenon* cannot obligate anyone and he himself has no obligations. Still, the *homo phaenomenon* can be determined by reason “as a cause of actions in the sensible world,”<sup>57</sup> and in case of duty (for the *homo noumenon*), the *homo noumenon* can determine the *homo phaenomenon* to commit actions that are a duty to commit. This determination is constraint that affects “human beings as rational natural beings who are unholy enough that desire can induce them to break the moral law, even though they recognize its authority, and when they do obey the law, they do so *unhappily* (with opposition from their inclinations) whereof the *constraint* in fact consists.”<sup>58</sup> This constraint is “self-constraint,” the only type of constraint compatible with the human being’s freedom of choice. Any other type of constraint would negate this freedom.<sup>59</sup>

<sup>53</sup> AA VI (*Virtue*), Introduction I, p. 379, l. 15 – p. 380, l. 6.

<sup>54</sup> AA VI (*Virtue*), §3, p. 418, ll. 17–19.

<sup>55</sup> AA VI (*Virtue*), §1, p. 417, ll. 7–22; §16, p. 442, ll. 16–18, where Kant relies on the traditional distinction between active and passive obligations. Cumberland was the first to focus on the concept of an active obligation (without actually using the expression). According to Cumberland’s definition, an (active) obligation is “the act of a lawgiver, who shows those subject to the law that actions according to his law are necessary” (*actus Legislatoris quo actiones Legi suae conformes eis quibus lex fertur necessarias esse indicat*, *De Legibus*, Cap. V, §27, p. 241). In contrast, Pufendorf says in reference to the passive obligation: “An obligation is that whereby one is required under moral necessity to do, or admit, or suffer something” (*Obligatio est, per quam quis praestare aut admittere vel pati quid necessitate morali tenetur*). *De Jure*, I/I/§21/p. 25. Pufendorf cites Cumberland, thus contrasting the two concepts (I/VI/§5/p. 72). The expressions – *obligatio activa* and *obligatio passiva* – seem to come from Wolff, *PhPrU*, §118, p. 103.

<sup>56</sup> The concept of a duty to oneself is only an apparent contradiction. The “I” in the obligating I and the obligated I are not the same “I.” Kant avoids the self-contradiction by distinguishing between the human personality, i.e. a being endowed with internal freedom (the obligated I), and the humanity in my own person (the obligating I), AA VI (*Virtue*), §1, p. 417, ll. 5–9 and §3, p. 418, ll. 17–21.

<sup>57</sup> AA VI (*Virtue*), §3, p. 418, ll. 14–16.

<sup>58</sup> AA VI (*Virtue*), Introduction I, p. 379, ll. 17–25.

<sup>59</sup> AA VI (*Virtue*), Introduction I, p. 379, l. 25 – p. 380, l. 5.

#### 4. Imputation of human actions

The *homo noumenon* is a person and thus a bearer of (legal) duties, rights, and moral faculties. Being a bearer of duties, rights, and moral faculties means *inter alia* that human actions can be legally relevant. The commission of a legally relevant action, for Kant (and Achenwall), marks the transition from the original to the adventitious state.<sup>60</sup> When a lion kills a gazelle, we do not consider the lion's act legally relevant. In contrast when a human being kills another human being, we do consider the human being's act legally relevant. The act is legally relevant because the human being is a person by virtue of his humanity whose actions are "deeds," meaning they are free actions and subject to the law.<sup>61</sup>

The judgment that an action is a deed, meaning a free action, is traditionally called "imputation." We impute an action to a human being when we perceive that the action "originated in [internal] freedom."<sup>62</sup> Kant's definition of imputation is: "*Imputation (imputatio)* in the moral sense is the *judgment* through which someone is seen as the author (*causa libera*) of an action which is then called *deed (factum)* and is subject to the laws."<sup>63</sup> One should emphasize two aspects of this definition: (1) imputation is a judgment (in the logical sense of "judgment").<sup>64</sup> With this judgment one determines that a human being was the free cause (*causa libera*) of an action. Consequently, (2) the imputed action

<sup>60</sup> See Chapter 2, section 1.

<sup>61</sup> One should remember that Kant uses the wide concept of action common in the eighteenth century. A human "action" is any bodily movement in which a human being is involved (see Chapter 3, section 1, note 4).

<sup>62</sup> AA XIX, R.6775, p. 157, ll. 20–22.

<sup>63</sup> AA VI, Introduction MM IV, p. 227, ll. 21–23. Kant's definition is of "imputation in the moral sense," whereby the expression "moral" must be understood as explained in our Introduction. "Moral" describes human actions and not scientific events. Here, Kant uses the distinction between "physical" and "moral" imputation as used by Wolff, *PhPrU*, §642, p. 470 and Daries, obs. XLII, §17, p. 72 footnote. According to Daries, physical imputation relates to the causal connection between a person's existence and the occurrence of an event. Moral imputation relates to whether an event can be seen as proceeding from human will. Kant is interested in moral and not in physical imputation.

<sup>64</sup> "Judgment" is the translation of the Latin *iudicium*. In the eighteenth century, *iudicium* had various meanings, two of which we would like to emphasize here. One must distinguish between *iudicium* in the procedural sense and *iudicium* in the logical sense. In the procedural sense, *iudicium* is the judge's decision, which is also the original meaning of the word. At the latest starting with Wolff, the word *iudicium* is used in a logical sense. In this sense, *iudicium* is a mental act through which we attribute one thing to another distinct thing; cf. Gabriel and Zantwijk, "Urteil." When Kant uses "judgment" in his definition of "imputation" he means such a mental act. Similarly, Pufendorf calls imputation a *declaration*, using the verb *declarare* (*De Jure*, I/IX/§3/p. 102).

is subject to practical laws, meaning the action must be judged according to practical laws.

The imputability of actions follows from the actor's freedom. Accordingly when I impute an action to another human being, I assume he was the author of this action – and not merely an intermediate cause in an (endless) causal chain. I see the human being not simply as a *homo phaenomenon*, but instead also as a *homo noumenon*. When I impute an action to another human being, therefore, I see that human being as a co-subject and thus as a *person*.

Imputation is for practice what natural scientific (empirical) experience is for theory. Imputation is the basis of our associations with other human beings, just as empirical experience is the basis of scientific theory. If I cannot impute actions to other human beings, interaction with them would be impossible. A scientist also imputes actions to other human beings. Science itself is a practice, at least with respect to interaction among scientists. As interaction, science too presumes the imputability of actions. The scientist sees other scientists as scientists, and thus as human beings who are responsible for their actions. He does so in part because he presumes that other scientists will observe the command to be truthful and not falsify the results of their observations. If he did not so presume, he could not take them seriously. Here too, one must draw the simple distinction between primary and meta- or secondary levels. The subject of science is nature, which is the primary level. The scientist's language, which he employs to communicate about nature, does not lie on this primary level. Instead this language belongs on the meta-level because the observed (nature), on the one hand, and the observer and the observation, on the other, cannot be collapsed without making the language senseless.

Imputation can lead to cognizing a human being as an intelligible being. Of course this cognition is not the same as scientific cognition. Cognizing another human being as an intelligible being who is subject to the moral law (the Categorical Imperative) occurs only "in morally practical relations where the incomprehensible characteristic of freedom reveals itself through reason's influence on the internal lawgiving will."<sup>65</sup> Let us consider one of Kant's own examples: *A* rescues a total stranger, *B*, in a grave emergency and under considerable sacrifice of *A*'s own interests.<sup>66</sup> We can imagine *A*, who commits an act we posit

<sup>65</sup> AA VI (*Virtue*), §3, p. 418, ll. 5–13.

<sup>66</sup> AA VI, Introduction MM IV, p. 228, ll. 16–17.

as required by duty, committing that act solely *out of duty*.<sup>67</sup> When we see *A* in this way, we consider *A* to be an intelligible being. The *prerequisite* for such cognition is that we impute the act of saving *B* to *A* as *A's* action.

When Kant connects the *homo noumenon* to the *homo phaenomenon*, he does so for the whole human species.<sup>68</sup> Accordingly, Kant takes the “we” viewpoint:<sup>69</sup> “We cognize *our* own freedom (from which all moral laws . . . proceed) only through the *moral imperative*.”<sup>70</sup> “Because we cognize freedom (as it is first cognizable for *us* through the moral law) only as a negative characteristic we have, namely not to be necessitated to act by any sensual grounds of determination.”<sup>71</sup> “With all *our* experience we know no other being capable of obligation (active or passive) than simply the human being.”<sup>72</sup> When we consider (internal) freedom and the moral law, we see human beings, not as a scientist from the external perspective, but rather from the internal perspective. Human beings – all human beings – are then not objects, but the subjects (co-subjects) of our considerations. The logical starting point is the question how *human beings* come to have duties, rights, and moral faculties. Kant’s ideas on this issue begin with the *homo phaenomenon* and consequently end with the *homo phaenomenon*.

Because all human beings are co-subjects, discrimination violates the Categorical Imperative. Kant rarely discusses discrimination as it has existed throughout human history, and indeed continues to exist. On the question of discriminating against human beings based on the level of their physical development, Kant notes that every human being is a person from the moment of conception onwards. Its parents can “not destroy it as their own product (because a product cannot be a being endowed with freedom) or as their property, indeed cannot even leave

<sup>67</sup> “Duty” is the action (AA VI, Introduction MM IV, p. 222, ll. 31–34) which the Categorical Imperative requires in a concrete situation, and I fulfill the duty and act, as Kant says, “out of duty” when the Imperative gives me the motivation to fulfill the duty. In Kant’s example, *A* sacrifices significant interests to save *B*, we are presuming that *A* would do that only if he were motivated by the moral law more than by his own personal interests.

<sup>68</sup> Kant indicates that the “idea of humanity” includes *the entire species*, AA VI (*Virtue*), §27, p. 451, ll. 12–14, and again elsewhere he says “respect for humanity” means respect *for the species*, AA VI, Annex of Explanatory Comments 5, p. 362, l. 36 – p. 363, l. 1.

<sup>69</sup> Kant does not consider practical egoism. The Categorical Imperative excludes practical egoism because it presupposes universalization of the maxim of action in question and thus a multitude of persons. See Kant’s comments on practical or moral egoism in AA VII (*Anthropology*), p. 128, ll. 28–30; p. 130, ll. 3–11. On the terminology, and particularly the contrast between “egoism” and “solipsism,” see Gabriel, “Solipsismus.”

<sup>70</sup> AA VI, Division MM I, p. 239, ll. 16–18 (emphasis on “we” and “our” added).

<sup>71</sup> AA VI, Introduction MM IV, p. 226, ll. 16–19 (emphasis added).

<sup>72</sup> AA VI (*Virtue*), §16, p. 442, ll. 16–18 (emphasis added).

it to its own fate.”<sup>73</sup> Although we cannot derive a notion “of the creation of a being endowed with freedom through a physical process” (namely conception),<sup>74</sup> still this inability reflects nothing other than the theoretical inconceivability of freedom, of which we have spoken throughout this chapter. If any human being is a *homo noumenon* and thus a bearer of rights, then every human being (including the human embryo) is a *homo noumenon* and a bearer of rights.

In this chapter, we have explained Kant’s foundation for duties, rights, and moral faculties human beings have by virtue of their being persons. As a person, or intelligible being, Kant characterizes the human being as *homo noumenon* in contrast to the *homo phaenomenon*, the rational animal, the *homo sapiens* of Linné’s system of nature. The *homo noumenon* is characterized by his capacity for freedom and thus his ability to follow the moral law, independent from the drives and desires determining the *homo phaenomenon*. Furthermore the *homo noumenon* is the autonomous giver of the moral law, actively obligating himself to do what the moral law commands and necessitating the *homo phaenomenon* to act accordingly. The *homo noumenon*’s autonomy as a lawgiver gives him dignity, rather than the relative price paid for the *homo phaenomenon* as an animal being with reason. Kant’s concept of the human being as a *homo noumenon* elevates him above all other animal beings as a person is elevated above things. This concept changes the meaning of humanity from a designation of how the human being is to how the human being should be. Humanity becomes a responsibility for all of mankind. This chapter is followed by two Appendices. One of them is on the principle “ought implies can” and the other contains more specific comments on Kant’s theory of imputation.

<sup>73</sup> AA VI, §28, p. 281, ll. 6–8.

<sup>74</sup> AA VI, §28, p. 280, ll. 23–25.

## On the logic of “‘ought’ implies ‘can’”

In [Chapter 14](#) we established the foundation for the human being’s duties, rights, and moral faculties. Having a duty means that one is required to commit or omit a specified action. “Duty is that action to which someone is bound.”<sup>1</sup> Duty is predicated on the presumption that the individual who has the duty also has the ability to fulfill its requirements. In this Appendix we briefly discuss the well-known “‘ought’ implies ‘can,’” which, although often attributed to Kant,<sup>2</sup> is indeed older.

The implication contained in “‘ought’ implies ‘can’” can be seen from both a prospective and a retrospective view of the actions we commit or omit. We begin with the prospective and consider rules of conduct functioning to model behavior. From this point of view, a rule tells us what we ought to do in the future ([section 1](#)). Inextricably connected to this function is the rule’s function to evaluate behavior. In the retrospective, the rule sets the standard for evaluating our past conduct<sup>3</sup> ([section 2](#)). From either point of view, when we *apply* a rule to an act we assume that the actor can act, or could have acted, according to the rule’s requirements.

### 1. “‘OUGHT’ IMPLIES ‘CAN’” IN THE PROSPECTIVE APPLICATION OF A RULE

We begin with an ought-rule, which can express a prescription or proscription. Let us take the rule: “You ought to render first aid in an emergency.” We can apply the rule prospectively in a concrete case in which all of the rule’s

<sup>1</sup> AA VI, Introduction MM IV, p. 222, l. 31.

<sup>2</sup> In the poem “Die Philosophen” written in 1796, Schiller ironically reformulates Kant’s “‘ought’ implies ‘can’” to *Du kannst, denn Du sollst!* (“You can ‘cause you ought!”).

<sup>3</sup> The claim one occasionally confronts that some systems of rules function to model but not to evaluate behavior is absurd. If a system of rules contained only rules to model behavior but none to evaluate it, then we could tell the virtual actor in the prospective what he should and should not do, but afterwards could not say whether he acted in accord with the rules – in accord with duty – or not, even with knowledge of all the relevant facts. Conversely, if a system of rules contained only rules to evaluate conduct and none to model it, then we could say in the retrospective whether an action was committed in accord with the rules but we could not say in advance, and thus in time to make any difference to the virtual actor, what he is supposed to do and not do under the applicable system of rules. Both claims are equally absurd.

elements are fulfilled, namely we have an emergency with someone endangered and the tools for rendering first aid are available. In such a situation, if I call to *A* “You must render first aid!” (an application of the ought-rule), then it follows that in *my* opinion *A* is able to render first aid. This implication is exactly what “‘ought’ implies ‘can’” means. My application of the rule in the concrete situation implies that I think *A* can render aid. Otherwise it would be senseless for me to call to *A* and tell him to undertake this act.

As is apparent from our example, the “ought” in “‘ought’ implies ‘can’” is not the general “ought” of a rule, but rather a *concrete* “ought” in the (prospective) *application* of a rule in a particular situation. It is thus not the rule, but rather application of the rule that implies “can.”<sup>4</sup> It may be the case that the rule and its application can be formulated in identical language. I may use the commandment from the Decalogue “Thou shalt not steal!” in a concrete situation in order to restrain a potential thief from committing theft. Nonetheless, the difference between the rule and its application remains, and it is not the rule itself, but rather application of the rule that implies “can.”

When Kant speaks of “‘ought’ implies ‘can’”<sup>5</sup> he means precisely this implication. To illustrate further, suppose I observe an accident. In this situation I give myself, meaning my practical reason gives me, a rule<sup>6</sup> which tells me that I ought to help the victim of an accident and simultaneously tells me to apply the rule in this specific situation. When my reason gives me such a rule and tells me to apply it, my reason also tells me that I *can* help the victim. In the language of *Perpetual Peace*, it would “obviously be illogical once one had given the concept of duty its authority to still want to say that one indeed *cannot* follow it. Then the concept would inescapably cease being a moral concept (*ultra posse nemo obligatur*).”<sup>7</sup>

When he uses the legal adage *ultra posse nemo obligatur* – “No one is obligated beyond ability”<sup>8</sup> – Kant is referring to the foundation for “‘ought’ implies ‘can.’” *Ultra posse nemo obligatur* formulates “can” as a necessary condition for

<sup>4</sup> In Hare, *Freedom*, p. 53 footnote, one finds: “The sense of ‘imply’ in which ‘ought’ implies ‘can’ is not that of logical entailment. It is a weaker relation, analogous to that which Mr. Strawson has claimed to exist between the statement that the King of France is wise, and the statement that there is a King of France. If there is no King of France then the question whether the King of France is wise does not arise. And so, by saying that the King of France is wise, we give our hearers to understand that we think, at least, that the question arises to which this is one possible answer, and that, accordingly, there is a King of France. And similarly, if we say that somebody ought to do a certain thing, and ‘ought’ has its full (i.e. universally prescriptive) force, then we give our hearers to understand that we think that the question arises to which this is a possible answer, which it would not be, unless the person in question were able to do the acts referred to.” Problematic here is the designation of “ought” as having a “universally prescriptive force” because one cannot speak of a universally prescriptive force when applying a rule.

<sup>5</sup> E.g. in AA III, p. 524, ll. 18–23. Since reason requires that actions in accord with the moral laws ought to occur, it also must be that they can occur.

<sup>6</sup> Cf. the formulation in AA VI, Introduction MM IV, p. 224, l. 21, where Kant speaks of “a subject and the rule which he gives himself.”

<sup>7</sup> AA VIII (PP), Annex I, p. 370, ll. 7–10.

<sup>8</sup> This legal adage is a popular version of Celsus’ *Impossibilium nulla obligatio est!* – “There can be no obligation to do the impossible!” *Digests* 50.17.185.

"ought." If, however, "can" is a necessary condition for "ought," then "ought" is a sufficient condition for "can." Stated differently: If one can speak of "duty"<sup>9</sup> only when the person obligated can commit the required act, then assuming a duty includes assuming that the person obligated indeed is capable of performing the act. In yet other words: Assuming a duty implies assuming the person who is obligated is free to undertake the act which he is required to perform.

## 2. "‘OUGHT’ IMPLIES ‘CAN’" IN THE RETROSPECTIVE APPLICATION OF A RULE

The same considerations apply to the retrospective as to the prospective. To see a rule as a standard for evaluating conduct, we must reformulate the prospective rule in [section 1](#) – "You ought to render first aid in an emergency" – into a retrospective rule: "One who failed to render aid in an emergency violated the relevant system of rules." Regardless of this reformulation, we are obviously dealing with the same rule. If the relevant system of rules is a system of legal rules, then the application of this retrospective rule could be formulated as "*X* acted illegally." Retrospectively applying such a rule assumes and implies that the person (*X*) to whom the rule is applied was able to follow the requirements of the rule. This implication corresponds to the implication in the prospective "‘ought’ implies ‘can.’"

Christian Wolff formulates the retrospective implication as follows: "From the application of the law to a deed it is clear that the act is such that it can be imputed."<sup>10</sup> In this quote, "law" means the retrospectively formulated rule; "deed" is a person's act that can be imputed to that person. Thus Wolff's statement means that retrospectively applying a rule to a deed implies that the judge applying the rule assumes the act can be imputed to the actor. For Wolff, this imputation is the same as assuming that the person to whom an act is to be imputed was the free cause of that action.<sup>11</sup> Accordingly, Wolff's statement is nothing other than the retrospective formulation of the prospective "‘ought’ implies ‘can.’" The idea behind "‘ought’ implies ‘can’" thus precedes Kant, who simply takes it from tradition.<sup>12</sup>

<sup>9</sup> For Kant, and in the tradition in which he writes, duty is always a concrete action (or the omission of a concrete action), AA VI, Introduction MM IV, p. 222, l. 31.

<sup>10</sup> Wolff, *PhPrU*, §598 Schol., p. 440: *Ex applicatione legis ad factum intelligitur, actionem esse talem, quae imputari possit.*

<sup>11</sup> Wolff, *PhPrU*, §527, p. 394: "Imputation of an action, be it the commission or omission of an action, is called the judgment whereby the actor is declared to be the free cause of what follows from the action, be it good or bad for himself or for another." (*Imputatio actionis, sive positivae, sive privativae, dicitur iudicium, quo agens declaratur causa libera ejus, quod ex actione ipsius consequitur, boni malique vel sibi, vel aliis.*)

<sup>12</sup> We find "‘ought’ implies ‘can,’" for example, in Turnbull and Reid. Turnbull, p. 18: "With respect to our natural disposition to approve or disapprove actions, or our sense of good and ill desert, it necessarily implies in it, or carries along with it, a persuasion of its being in the power of the person blamed or commended, to have done, or not done the action approved or disapproved." Reid, *Intellectual Powers*, p. 447: "When we impute to a man any action or omission, as a ground of approbation or of blame, we must believe he had power to do otherwise. The same is implied in all advice, exhortation, command, and rebuke,

The relationship described above between “ought” and “can” is also valid for the retrospective correspondents of “ought” and “can.” The retrospective correspondent of “ought” is the application of the law to a deed. The retrospective correspondent of “can” is the imputation of the act to which the law is applied. If imputation of an act is a necessary condition for retrospectively applying a law, then applying the law to an act is a sufficient condition for imputing the act. It thus follows that whenever a law is applied, it is applied to an act that can be imputed to someone as that person’s act.

and in every case in which we rely upon his fidelity in performing any engagement or executing any trust.” Reid, *Active Powers*, p. 517: “All our volitions and efforts to act, all our deliberations, our purposes and promises, imply a belief of active power in ourselves; our counsels, exhortations, and commands, imply a belief of active power in those to whom they are addressed.”

## The system of rules of imputation

According to Kant's definition, imputation is the judgment through which someone is seen as the author, namely the free cause, of an action "which is *then* called deed (*factum*) and is subject to the laws."<sup>1</sup> This definition is not simply a repetition of Wolff's claim that the application of a law to an act implies imputation of this act.<sup>2</sup> Instead Kant surpasses Wolff by saying that imputation of an action as a "deed (*factum*)" *subjects the action to the law*. Imputing an action to another person means I not only see the action as freely undertaken, but also evaluate the action under moral laws.<sup>3</sup> Wolff sees applying the law as a sufficient condition for imputing an action and Kant agrees. Still, Kant also sees imputing the action as a sufficient condition for applying the law. Freedom cannot be conceived other than as freedom subject to the rules of practical reason (morality), or laws of freedom.

The relevant laws to which actions are subjected are not only prescriptions and proscriptions ("You should render first aid!", "You should not steal!"), but also permissive laws,<sup>4</sup> and primarily the permissive law in §2 of the *Doctrine of Right* with its extensive consequences for property, contract, and family law. Let us consider legal possession of things, meaning ownership of those things. This legal possession is different from merely physical possession,<sup>5</sup> which belongs to the sensible world and to theoretical cognition of this sensible world. Kant emphasizes that the legal concept of possession is a pure concept of reason.<sup>6</sup> As a pure concept of reason, legal possession of things belongs to the intelligible, not to the sensible, world. The intelligible world, however, is based entirely on the freedom of persons who live in this world, or as Kant says,

<sup>1</sup> See our discussion of this passage in [Chapter 14, section 4](#).

<sup>2</sup> See Appendix I to [Chapter 14](#), text at note 10.

<sup>3</sup> What Kant means is moral laws, which include legal and ethical laws, rules of decorum, or any rule on the permissibility of actions. "A gave me a gift," for example, means that not only did A undertake a series of bodily movements in the sensible world, but also that those bodily movements are to be interpreted according to a law, meaning here a legal provision on the relevance of handing a thing over to me indicating the intent to pass ownership of the thing without remuneration.

<sup>4</sup> See [Chapter 4](#) for a discussion of permissive laws in the context of the *Doctrine of Right*.

<sup>5</sup> Merely physical possession includes both empirical possession and possession as a pure concept of the understanding ("having"), AA VI, §7, p. 253, l. 10; see our discussion in [Chapter 5](#).

<sup>6</sup> AA VI, §1, p. 245, ll. 25–26; §7, p. 253, ll. 4–5, and elsewhere.

“the *right*” (meaning the right to the external mine and thine) “is a . . . pure practical *concept of reason* for choice under laws of freedom.”<sup>7</sup> Accordingly, legal rules on original or derived acquisition of ownership rights are laws of freedom. Furthermore, legal acts of acquiring property must be seen as the free acts of persons who undertake them. The assumption that an action is a free action, however, is a judgment of imputation.<sup>8</sup>

Kant then considers the concepts “merit” and “moral culpability” as consequences of the imputation of actions (section 1), the imputation of the “consequences” of actions (section 2), and the degree to which meritorious and morally culpable actions can be imputed (section 3).

### 1. “MERIT” AND “MORAL CULPABILITY”

The paragraph following Kant’s definition of imputation reads as follows:

What one does in accord with duty *beyond* what one can be constrained to do under the law is *meritorious (meritum)*; what one does only *in accordance* with the latter [i.e. what one can be constrained to do under the law] is indebtedness (*debitum*); finally what one does *less* than the latter [i.e. indebtedness] requires is *moral culpability (demeritum)*. The legal effect of culpability is punishment (*poena*); of a meritorious act *reward (praemium)* (assuming that the reward set by the law was the motive for the act); the accordance of the process with indebtedness has no legal effect.<sup>9</sup>

If we compare this passage with a passage from Pufendorf’s *Elementa* then it appears that the Pufendorf passage was a model for Kant. It reads:

The substantive effect of a good and useful action but one that is not owed is called “merit”; of a bad action “demerit.” The former is met with remuneration or reward. The latter is followed by punishment. . . . Undertaking an action that is owed does not result in any merit.<sup>10</sup>

Pufendorf distinguishes among (1) a good and useful action that is not owed, (2) an action that is owed, and (3) a bad action. Kant distinguishes among (1) an action beyond what one can be constrained to do under the law, (2) an action that is exactly in accord with what one can be constrained to do under the law (namely, an action that is owed), and (3) an action whereby the actor does less than what he can be constrained to do under the law. Under the law

<sup>7</sup> AA VI, §5, p. 249, ll. 21–22.

<sup>8</sup> Our interpretation that also those actions are free actions and thus “deeds (*facta*)” which do not fall under the prescriptions and proscriptions but under permissive laws, does not contradict the statement at AA VI, Introduction MM IV, p. 223, ll. 18–23. This statement does not contain a definition of “deed,” but instead connects to the previous definition of “obligation” (p. 222, ll. 3–4) and says that actions which fall “under laws of obligation” are called “deeds.”

<sup>9</sup> AA VI, Introduction MM IV, p. 227, l. 30 – p. 228, l. 2.

<sup>10</sup> Pufendorf, *Elementa*, Lib. I, Def. XIX, §§1, 2; Def. XX, §1, p. 111: *Effectus materialis actionis bonae proficuae, & quidem indebitae est Meritum; malae Demeritum; quorum illud pensatur per mercedem & praemium, hoc consequitur Poena . . . Ex actione debita nullum est meritum.*

an actor can be constrained to perform only those actions that fulfill a legal duty.<sup>11</sup> Accordingly, Kant focuses on what one does beyond, in accord with, or less than the *law* – external law – requires. In contrast, Pufendorf does not draw any distinction between duties of law and duties of ethics.

Regardless of the differences between these two passages, still Pufendorf's trichotomy and Kant's are obviously parallel. Using his trichotomy, Pufendorf explains that the good and useful actions that are not owed, on the one hand, and the bad actions, on the other, have something that Pufendorf calls a "substantive effect." The substantive effect of good and useful actions that are not owed is called "merit," and of bad actions "demerit." Performance of an action that is owed, in contrast, has no merit.

Kant also writes that an action which accomplishes more than what the actor can be constrained to do under the law is meritorious, adding the Latin *meritum*, apparently in reference to Pufendorf. An action that is less than what the actor can be constrained to do under the law is morally culpable, which is explained with Pufendorf's *demeritum*. Without saying so in the passage above, Kant shares Pufendorf's opinion that merely undertaking an action which is owed is not meritorious. Still, Kant draws a distinction to Pufendorf, albeit not in the passage quoted above. Although an action according to the law is not meritorious, still, if the actor undertakes the action because of his respect for the law then it is meritorious. Another person can demand that the actor perform actions according to the law but not that the law is also the motivation for the act. Consequently fulfilling my legal duties out of respect for the law extends beyond merely fulfilling them, or as Kant says, the actor extends "his concept of duty beyond what is owed (*officium debiti*)."<sup>12</sup> Accordingly, such an act becomes meritorious.<sup>12</sup>

Kant and Pufendorf agree on the central issue that only an action which does more, and an action which does less, than required by the law have (in Pufendorf's terminology) a "substantive effect." Pufendorf's influence is revealed in Kant's comments on remuneration and punishment. On remuneration and punishment, Kant speaks of the "legal effect," clearly in analogy to Pufendorf's "substantive effect." We postpone discussion of the problems surrounding remuneration and punishment and first discuss the differences between Pufendorf and Kant in relation to meritorious actions.

With respect to meritorious actions, Kant and Pufendorf face the same problem of having to determine when an action that is not owed is to be regarded as a "good" action. Pufendorf's solution to the problem is what one can call

<sup>11</sup> On the nature of external law and the threat of punishment as a motivation attached to the duty expressed in the law, see [Chapter 2, section 2](#) and [Chapter 13, section 2](#). It is not only the threat of punishment within the criminal law that constrains individuals to act as the law requires. Kant also sees the constraint inherent to a judicial judgment in a private lawsuit and the threat of enforcement of that judgment by the executive as a means of forcing individuals to do what the law requires. For ethical duties, in contrast, there is no external motivation forcing an actor to do what the laws require. Instead, the actor must act out of a sense of duty to fulfill the requirements of ethical laws.

<sup>12</sup> AA VI (*Virtue*), Introduction VII, p. 390, l. 30 – p. 391, l. 7.

“utilitarian,” because an action is “good” if it is “useful.”<sup>13</sup> Kant, however, calls a “good” action an action that does more “in accord with duty” than the actor can be forced to do under the law. Since “in accord with duty” cannot mean in accord with the actor’s legal duties without self-contradiction, then an action “in accord with duty” can only be one through which the actor fulfills an ethical duty. For this reason, Kant can speak of “meritorious duties” the performance of which, in contrast to the “owed duties,” cannot be coerced.<sup>14</sup>

For meritorious actions one must again draw Kant’s distinction, namely between actions in accord with duty committed out of duty and actions in accord with duty committed out of inclination, such as because of the reward expected. An action of the latter sort has a “legal effect” if the reward was announced in the law, namely the reward itself. Such a reward is on the same logical level as the punishment imposed for moral culpability. Punishment according to the law, which is the “legal effect” of culpability, is imposed because the actor failed to refrain from committing an illegal act, even though he had the motivation provided by law to refrain, namely fear of the punishment threatened. If the actor performed a good act, not because of the reward offered for performing it but instead out of duty, then no reward will be given. Virtue is its own remuneration.<sup>15</sup>

## 2. THE CONSEQUENCES OF MY ACTION

One must distinguish between imputing an action and imputing the “consequences” of this action, regardless of whether the consequences are good or bad. Regarding the consequences, Kant distinguishes between the “physical” and the “legal” consequences of an act.<sup>16</sup> The physical consequences are the effects of the action in the sensible world; the legal consequences are the effects of the action in the intelligible world. When imputing the consequences of an action, we tend to first think of imputing the *physical* consequences. We impute to the automobile driver who has intentionally or negligently run over another human being not only the action of running someone over but also the resulting death of the victim. We think about imputing the *legal* consequences of an action when, for example, we say: “He alone is responsible for being criminally punished.” When considering imputation of the consequences of an action it is easier to consider the issue of imputing the physical consequences first. The results we reach can be transferred to imputation of the legal consequences.

Kant’s ideas on the imputation of the consequences of actions are critically oriented toward what today is called the *versari* rule: “To one who involves

<sup>13</sup> We are not using the word “utilitarian” in the sense of John Stuart Mill’s utilitarianism.

<sup>14</sup> AA VI (*Virtue*), §23, p. 448, ll. 10–14; §31, p. 453, ll. 17–20. See too AA IV (*Groundwork*), p. 424, l. 11; p. 430, l. 10; p. 429, l. 29; p. 430, l. 34.

<sup>15</sup> AA VI (*Virtue*), Preface, p. 377, l. 22; Introduction X, p. 396, ll. 28–34; XIII, p. 406, ll. 4–8.

<sup>16</sup> On the legal consequences of an action, see AA VI, Introduction MM IV, p. 227, l. 24; §16, p. 267, ll. 23–24; §27, p. 280, l. 4; on the physical consequences of an action see §31, p. 284, ll. 23–24; AA VI (*Virtue*), before §32, p. 455, l. 2. One can also think of the moral consequences of an action, analogous to the legal consequences, see AA VI (*Virtue*), §13, p. 439 footnote, l. 37.

himself in a prohibited matter every consequence of the offense is imputed."<sup>17</sup> This proposition, which is a legal adage, originates in medieval canonical law.<sup>18</sup> According to the *versari* rule, the (physical or legal) consequences of a prohibited act are always to be imputed to the actor regardless of whether the consequences were foreseeable for the reasonable person or for the actor himself.<sup>19</sup> For the Anglo-American system of law, the felony murder rule is based on the idea behind the *versari* rule, namely that if you commit a felony (you are involved in a prohibited matter) then any death resulting from that act will be imputed to you as murder even though you acted neither intentionally nor negligently in bringing about the victim's death.<sup>20</sup>

It is not self-evident that imputation of an action implies imputation of the consequences of the action. The *versari* rule connects imputation of the consequences of an action to the fact that the action is a "prohibited matter." Kant replaces the *versari* rule with two rules of his own. They are:

- (1) "The good or bad consequences of an action which is owed, just as the consequences of omitting a meritorious action, cannot be imputed to the subject."
- (2) "The good consequences of a meritorious, just as the bad consequences of an unlawful action can be imputed to the subject."

In addition, Kant connects Latin expressions to the two rules. Following the first rule he adds *modus imputationis tollens*, and following the second *modus imputationis ponens*.<sup>21</sup>

<sup>17</sup> *Versanti in re illicita imputantur omnia quae sequuntur ex delicto*. This formulation is used in the nineteenth century (Löffler, p. 139), but is older. In 1759, German criminal law academic, Boehmer, wrote the following: "A negligent homicide is committed when one without the intent to kill involves himself in a prohibited matter, or acts in a prohibited place, or acts at a prohibited time, or finally acts in a prohibited manner." *Homicidium . . . culposum toties committitur, quoties sine animo occidendi versatur in re illicita, aut illicito loco, aut illicito tempore, aut denique illicito modo* (*Observationes Selectae*, obs. II ad quaestionem XXVII N. 49, p. 62). Decisive here is not that Boehmer uses the phrase *versari in re illicita* to define negligent homicide, but that he uses the phrase at all. That Kant was familiar with the *versari* rule is apparent from AA XIX, R.8067, p. 600, ll. 18–19, where it says: *die belligerantes versiren immer in re illicita* (the belligerent are always versed in a prohibited matter), where *versiren* is a Germanization of the Latin *versari*.

<sup>18</sup> Kuttner, pp. 185–247. The canonist Johannes Andreae (ca. 1270–1348) writes: "If someone commits a prohibited matter then everything following there from will be imputed to him." *Ex quo quis rem illicitam facit, omne id, quod sequitur, imputatur* (citation according to Müller, *Ethik und Recht*, pp. 101–102).

<sup>19</sup> In contrast, *StGB*, §18 provides that the consequences of an act can be imputed to the actor only if he "at least negligently" caused them.

<sup>20</sup> In the *MPC* §210.2, murder is defined *inter alia* to be when "it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape." The rule was abolished in England in 1957 and has been criticized and limited in many jurisdictions in the United States.

<sup>21</sup> AA VI, Introduction MM IV, p. 228, ll. 4–10.

By using the expressions *modus imputationis ponens* and *modus imputationis tollens*, Kant is alluding to two concepts commonly used in the logic of his time: *modus ponens* and *modus tollens*. Both concepts assume the truth of the implication  $p \rightarrow q$ . For *modus ponens* we also assume the truth of  $p$ , from which it follows that  $q$  is true. For *modus tollens* we assume that  $q$  is false, from which follows that  $p$  is also false. Kant:

The forms of connection in hypothetical judgments are two: the *positing* (*modus ponens*) or the *annulling* (*modus tollens*). (1) If the antecedent (*antecedens*) is true, then the consequent (*consequens*) determined by it is also true; it is called *modus ponens*. (2) If the consequent (*consequens*) is false, then the antecedent (*antecedens*) is also false; *modus tollens*.<sup>22</sup>

If we consider what we have said, we see that the expressions *modus imputationis ponens* and *modus imputationis tollens* are not simply names for the rules on the imputation of consequences Kant gives us. Instead the names require us to draw the conclusions corresponding to the *modus ponens* and the *modus tollens*. In what follows, our goal is to determine when the consequences of an action are imputable (and not when they are non-imputable). Although the first rule with its *modus imputationis tollens* relates to when consequences are non-imputable, Kant's focus through the entire endeavor is to specify the rules for imputing and not for not imputing the consequences of actions.

As Kant, we begin with rule (1) and construct a *modus imputationis tollens*. Since the rule contains two implications, one can draw two conclusions, and thus construct two syllogisms, which we label (A) and (B). The first is:

(A) Major premise: Committing an action owed under the law implies the non-imputability of the consequences of the action.

Minor premise: We have a case in which the consequences are imputable (negation of the consequent in the implication).

Conclusion: Therefore, we have a case of a non-owed action.<sup>23</sup>

A non-owed action is either a legally indifferent or a wrongful action, as one can see from the following logic. In relation to any law whatsoever, every action is either permitted (*licitum*) or prohibited.<sup>24</sup> A permitted action (*licitum*) is required or indifferent. In the context of syllogism (A), the required actions are called "actions owed under the law." The remaining permitted actions (*licitum*) that are not required are legally indifferent actions. A prohibited action is a wrongful action. Accordingly there are only three types of actions each of which excludes the other two: actions owed, legally indifferent actions, and

<sup>22</sup> AA IX (*Logic*), §26, p. 106, ll. 9–14.

<sup>23</sup> Not committing an action prohibited by the law, i.e. omitting that action, is to be treated the same as committing an action owed under the law.

<sup>24</sup> AA VI, Introduction MM IV, p. 221, ll. 25–28; p. 222, ll. 27–30. Kant uses the expressions *erlaubt* and *unerlaubt* (permitted and non-permitted), which are contradictories linguistically as well. We translate *erlaubt* with "permitted" and *unerlaubt* with "prohibited." On the terminology, particularly *licitum*, see Chapter 4, section 1.

wrongful actions. Therefore, if we have a case of a non-owed action, then the action must be either legally indifferent or wrongful.

According to syllogism (A), a necessary condition for the imputability of the consequences of an action is that the action is not owed. If an action is not owed, then the action is a wrongful or a legally indifferent action. It follows that a necessary condition for the imputability of the consequences of an action is that the action is a wrongful or a legally indifferent action. In addition, one should note that a legally indifferent action is either a meritorious action or a non-meritorious action.<sup>25</sup> Therefore: It is a necessary condition for the imputability of the consequences of an action that the action is a wrongful or a meritorious or a non-meritorious action. Consequently, we have a tripartite disjunction as a necessary condition for the imputability of the consequences of actions. This statement is correct, however, only if we consider syllogism (A) in isolation from syllogism (B).

We can consider the omission of a meritorious act in a similar light:

(B) Major premise: Omitting a meritorious action implies the non-imputability of the consequences of the omission.

Minor premise: We have a case in which the consequences are imputable (negation of the consequent in the implication).

Conclusion: Therefore, we have a case of a non-omission of a meritorious act.

From the conclusion of syllogism (B) it follows that a necessary condition for the imputability of the consequences of an action is that the action is the non-omission of a meritorious action. The non-omission of a meritorious action is the same as the commission of a meritorious action. Thus a necessary condition for the imputability of the consequences of an action is that the action is a meritorious action. Here, one must also note that this result depends on our viewing syllogism (B) in isolation from syllogism (A).

If we combine our results from syllogisms (A) and (B) we see that (A) defines a set of three disjunctively joined actions: (i) wrongful actions, or (ii) meritorious actions, or (iii) non-meritorious actions. Under (A), this set is the necessary condition for the imputability of the consequences of an action. The major premise of syllogism (B) tells us that omitting a meritorious action is a sufficient condition for the non-imputability of the consequences of the action. When Kant speaks of the omission of an action he means the non-commission of that action. The non-commission of a meritorious action, however, amounts to the same as the commission of a non-meritorious action because a legally indifferent action which is not the commission of a meritorious action necessarily is the commission of a non-meritorious action.<sup>26</sup> It follows that

<sup>25</sup> On the concept of a meritorious action, see [section 1](#).

<sup>26</sup> Today's reader could interject that the omission of a meritorious action presupposes the possibility of committing a meritorious action in the given situation. Still, just as Kant has a broad concept of action (see [Chapter 3](#), note 4), he also has a broad concept of omission.

committing a non-meritorious action is a sufficient condition for the non-imputability of the consequences of the act. Consequently, committing a non-meritorious action cannot be an element of a disjunction expressing the necessary condition for the imputability of the consequences of the act. Syllogism (B) thus excludes from the indifferent actions in (A) the non-meritorious actions. We are left with the final conclusion that a necessary condition for the imputability of the consequences of an action is that the action is either a wrongful action or a meritorious action.

To summarize our line of thought: Syllogism (A) gives us the disjunction of three elements as a necessary condition for the imputability of the consequences of an action. The major premise of syllogism (B) removes the third element (the non-meritorious actions) from the disjunction. What remains is the disjunction of two elements (wrongful actions or meritorious actions) as the necessary condition for the imputability of the consequences of an action.

Assuming the truth of a necessary condition for imputing the consequences of an action is insufficient for imputing the consequences in concrete cases. Rule 2 above provides the sufficient conditions for the imputability of the consequences. Kant does not simply assume that the necessary condition is also a sufficient condition. Instead he distinguishes between the good and bad consequences of an action or omission. Only the bad (and not also the good) consequences of an unlawful act and only the good (and not also the bad) consequences of a meritorious act are imputable.

Kant connects his ideas to the *versari* rule when he says that the consequences of an unlawful act can be imputed to the subject. Kant, in line with the *versari* rule, does not differentiate between consequences that were intended or negligently brought about and consequences that were not. Kant, however, modifies the rule by limiting the consequences that can be imputed to the “bad” consequences. To impute the good consequences of an unlawful act to the actor seems inappropriate. Pufendorf had criticized the idea with his example of one person lancing another person with the intent to kill him but as a result opening a tumor (otherwise incapable of treatment) and saving the victim’s life.<sup>27</sup> In this type of case one would not want to say that the actor “saved” the victim’s life, but instead simply that the actor attempted to kill the victim. Kant tacitly agrees with Pufendorf’s criticism and excludes from the *versari* rule imputability of the “good” consequences of an unlawful act.

Kant gives us no reason for his rule, but as we have indicated imputing the good consequences of an unlawful action would be counter-intuitive. Similarly counter-intuitive would be imputing the bad consequences of a meritorious action. If A saves child C from drowning at great risk to himself and far beyond anything the law would require him to do, he commits a meritorious

According to this concept it is not true that the omission of an action presupposes the possibility of the commission of that action, but instead “omission of action *a*” means the same as “non-commission of action *a*” regardless of whether action *a* is possible in the concrete situation or not.

<sup>27</sup> Pufendorf, *De Jure* I/IX/§4/p. 103.

action. If *C* later develops into a mass murderer, one would not impute the bad consequences of *A*'s act to *A*.

The comment Kant makes by using the expression *modus imputationis ponens* at the end of the second rule indicates that one should draw the implications in the rule. Doing so, however, leads to no new results. The *modus imputationis ponens* corresponds to the practical syllogisms we discussed in [Chapter 7, section 3A](#). All told, Kant's discussion of the rules on the imputation of the consequences of an action contains a critique of the traditional *versari* rule and a counter-proposal.

### 3. THE DEGREE OF IMPUTABILITY TO MERIT OR TO DEMERIT

Kant also discusses the *degree* of imputability of meritorious or demeritorious actions. The merit one attains for performing an action in accord with duty that cannot be coerced (i.e. in accord with an ethical duty) and the demerit one attains from performing an unlawful action (an action contrary to a legal duty) can be smaller or larger compared to other actions of the same kind. The relevant passage is as follows.

*Subjectively* the degree of *imputability* (*imputabilitas*) of actions is to be evaluated according to the size of the barriers that had to be overcome. – The larger the natural barriers (of sensuality), the smaller the moral barrier (the duty), all the more will the *good act* be counted as merit, e.g. when I save a total stranger from great danger by making a large personal sacrifice.

In contrast: the smaller the natural barrier, the larger the barrier from the duty, all the more will the violation be imputed (as culpability). – Therefore, the emotional state of the subject, whether the subject committed the act under extreme emotional distress or with calm premeditation makes a difference in imputation that has consequences.<sup>28</sup>

Kant formulates four rules, two for the imputation of merit and two for the imputation of demerit:

- (1) The larger the natural sensual barriers, all the more will the good act be imputed to merit.
- (2) The smaller the duty that is fulfilled through the meritorious action, all the more will the good act be imputed to merit.
- (3) The smaller the natural sensual barriers, all the more will the act in violation of a legal duty be imputed to demerit.
- (4) The larger the duty that is left unfulfilled through violating the law, all the more will the act in violation of a legal duty be imputed to demerit.

The first and third rules relate to the barriers from the sensual world interfering with performing the meritorious action and to the barriers from the sensual

<sup>28</sup> AA VI, Introduction MM IV, p. 228, ll. 11–22.

world interfering with fulfilling the requirements of the law. The rules say that merit is relatively high in comparison to other similar acts when the action according to (ethical) duty was confronted by large natural barriers and that the moral demerit is relatively high in comparison to other similar acts when fulfillment of the law was confronted by relatively low (or no) natural barriers.

Kant continues to explain the rules with examples. For the “good” action, which will be imputed to my merit, Kant uses the example that “I save a total stranger from great danger by making a large personal sacrifice.” The barriers from the sensual world to committing the meritorious act are clear. When I have to make a large sacrifice, meaning I have to undertake all kinds of personal efforts to save someone who is not a friend, indeed not even an acquaintance of mine, then my sensual desires push me away from saving him. I would strongly prefer not to make the sacrifice. Committing the action in accord with (my ethical) duty will require me to strongly work against my own desires. Accordingly, the merit I would attain from committing the action would be correspondingly large.

For the “bad” actions, Kant has a homicide in mind which the perpetrator either commits “under extreme emotional distress” or instead “with calm premeditation.” The emotional distress is a natural barrier to fulfilling one’s (legal) duty, meaning not to kill the victim, whereas in the case of homicide with calm premeditation such a barrier does not exist. Consequently in the latter case the act will be imputed with more demerit than the act committed under extreme emotional distress.

The second and fourth rules relate to the (ethical) duties which are fulfilled (for the meritorious act) and to the (legal) duties that are not fulfilled (for the demeritorious act). The rules say that the merit in comparison to other similar actions is to be relatively high when the (ethical) duty that is fulfilled is relatively insignificant, and that the demerit in comparison to other similar acts is to be relatively high when the (legal) duty that is violated is relatively significant. Again we can use Kant’s examples. If I save a complete stranger, I do so in fulfillment of the duty to love my neighbor, which requires me to save the stranger, especially if the emergency is grave, but still, compared to other duties I might have, such as the duty to love my parents,<sup>29</sup> is relatively small. If I do fulfill the duty to save the stranger then the merit I attain is relatively large. For the case of a violation of (a legal) duty, the duties can be compared resulting from the prohibition against murder and from the prohibition against shoplifting. A murder clearly violates a larger duty than the commission of shoplifting and thus a murder is more demeritorious than shoplifting.

Kant compares the duties which he calls “moral barriers” in this context to the natural barriers. The natural barriers are barriers in the sensible world, whereas the duties are moral barriers in the intelligible world. The natural barriers limit my internal freedom. The duties as moral barriers limit my external freedom (my right to external freedom). To use the old metaphor (which Kant

<sup>29</sup> In AA VI (*Virtue*), Introduction VII, p. 390, ll. 9–14, Kant discusses the fact that the maxim of “love of parents” can limit the maxim of “neighborly love.”

also uses when he writes that duties are those actions which I am *obligated* to perform)<sup>30</sup> duties create a bindingness, which hinders me in moving as I would like,<sup>31</sup> for which reason Kant elsewhere compares duties to “foothooks.”<sup>32</sup>

In the case of a meritorious act the natural barriers hinder me in *committing* the action, whereas duty as a moral barrier hinders me in *not committing* the act. In the example of saving someone in an emergency, in order to actually save the person I have to conquer my desire to avoid the effort as a natural barrier to my committing the action. If I fail to commit the action, then I have to overcome my duty to save the person (as a moral barrier). In the case of a demeritorious act, on the other hand, the natural barriers hinder me in *not committing* the act, whereas duty (which I violate) is a moral barrier that hinders me in *committing* the action. In the case of homicide, the perpetrator must overcome the duty not to commit the act in order to commit it. If someone does not commit a homicide then he has to overcome the emotional distress encouraging him to commit it as a natural barrier.<sup>33</sup>

<sup>30</sup> AA VI, Introduction MM IV, p. 222, l. 31. The words “obligate” or “oblige” come from the Latin *obligare*, meaning “to bind.”

<sup>31</sup> In the *Institutions*, 3.13.pr, we find the comment that an obligation (*obligatio*) is “a legal bond whereby a necessity is imposed on us to accomplish something” (*vinculum iuris, quo necessitate adstringimur alicuius solvendas rei*).

<sup>32</sup> AA VI (*Virtue*), Introduction XVII, p. 409, ll. 15–16.

<sup>33</sup> A contrary interpretation of the last discussed passage by Joerden, “Zwei Formulae,” has the distinct disadvantage that it implies Kant makes a self-contradictory conceptual error.

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