12 Mine and thine? The Kantian state

For if justice goes, there is no longer any value in human beings living on the earth.

[Morals, 6:332, 105]

I

According to Kant, a condition of the individuals within a people in relation to one another is called a civil condition (status civilis), and the whole of individuals in a rightful condition, in relation to its members is called a state (civitas).

(Morals, 6:311, 89)

A fuller definition of such a state or civitas follows.

A state (civitas) is a union of a multitude of human beings under laws of right. Insofar as these are a priori necessary as laws, that is insofar as they follow of themselves from concepts of external right as such (are not statuary), its form is the form of a state as such, that is, of the state in idea, as it ought to be in accordance with pure principles of right. This idea serves as a norm (norma) for every actual union into a commonwealth [hence serves as a norm for its internal constitution].

(6:313, 90)

This state is formally republican, in that the sovereign acts in the name of all subjects, and it should consist of a separation of [but not a true balance of] powers. The state's main function is the protection of property rights and the regulation of disputes about property and contract, and its sovereignty is absolute [there is no "right of revolution"; revolution is always absolutely forbidden]. Finally, citizen participation is strictly limited to what Kant calls active citizens, adult male property owners, and not women, domestics, nor "anyone whose preservation in existence... depends not on his management of his own business but on arrangements made by another" [6:314, 92].

However extreme these last two conclusions now strike us, this account of the state fits into a recognizable liberal tradition. The familiar problem concerns the use of coercion (the threat of violence) against individuals presumed to be autonomous, or capable of self-determination. Kant's solution to that problem clearly follows one of the two familiar paths in liberalism designed to address it. As these quotations indicate, Kant does not directly link the state's function to the welfare, happiness, or security of its citizens, and does not link the claim to state authority to any implied or presumed act of consent. Instead he ties the justification of its authority to the protection of the basic entitlements shared by all free rational beings. Such a right or entitlement claim — or rather the "one innate" or natural right according to Kant, freedom in its "external" manifestations — is said to place all others under an obligation, and this fact will ultemately form the basis of the state's authority. That authority is to be the authority of a noninstrumental practical reason [a stateless condition is wrong because, in a way that needs to be specified, it is irrational for rational free beings to accept or contrary to the demands of pure practical reason], but, as the second passage indicates, a "rightful" condition is to be determined by pure practical reason with a priori necessity, and so does not appeal to an instrumentally rational goal that all must be presumed to seek.

Such an empirically unaided reason is supposed to be able to justify two claims: why there ought to be such a rightful or just "union," a state, and what character:istics it must have. That is, Kant does not argue merely that a civil order is morally permissible, considered perhaps as a rational cooperation problem consistent with one's moral standing as a free, rational being. Rather, anyone willing to remain in a pre-civil state is not just an irrational noncooperator, but thereby does "wrong in the highest degree" ("unrecht... im höchsten Grad") [6:308, 86] and such a civil condition must be understood as some sort of requirement of pure practical reason. (It is practically necessary, not just permissible.) The problem is: what sort of requirement is this? The duty to exit the state of nature (exevenendum e statu naturali) is said to be a distinct duty of right (Rechtspflicht),
solution is: mutually assured reciprocal observance of the boundary between mine and thine. [We will obviously require an account of why and how this reciprocal observance is to be assured.] The primary institution in modern bourgeois society as Kant sees it is private property, and the primary authority of the state stems from its role in securing property rights. But we cannot deduce a priori what is mine and what is thine, and that fact will lead Kant into some very interesting, speculative claims about not just property but our social or concretely practical identities as agents.

II

So Kant wants to claim that there is some condition under which the claims of right – the claims of each to an exercise of external freedom formally compatible with a like exercise by all – can be realized. This condition is in general “the exit from the state of nature” (ex eundo et statu naturali), the rule of law, ceding the right to decide in your own case to a public authority. In particular it involves the setting of the boundaries between mine and thine, or moving from a provisional claim to property to a settled and certain claim. As noted, his first problem is to make clear what sort of claim on each other a claim of right is, especially since Kant wants, on the one hand, to distinguish claims of right from general claims of moral entitlement and moral duty. Most obviously compliance with claims of right may and ought to be coerced, but: ethical duties to others cannot and ought not to be coerced. Coercing someone to adopt a morally obligatory end is to fail to treat him as an end in itself, and Kant makes clear frequently that he despises all forms of paternalism. But coerced compliance with claims of right involves no such lack of respect. Quite the contrary, as we have seen, failing to compel or to support a system of coerced compliance is a “wrong in the highest degree” and would be to fail to accord another her proper status as a rational and free being, entitled to an external sphere where that freedom may be exercised. And yet, on the other hand, despite this distinction between right and morality, the very form of the Metaphysics of Morals suggests that claims of right are in some sense a subset of our moral obligations to others, leading commentators to look for some way to understand claims of right as an “application” of Kant’s highest moral principle, the categorical imperative, or in some other
way derived from the requirements of Kant’s general moral theory. (Let us call these commentators the “derivationists.”)

Kant’s first official demarcation gives some comfort to the derivationists’ claims about legal duties. Kant contrasts “laws of nature” with all “laws of freedom,” and calls all of the latter “laws of morality.” He then classifies, as subcategories of such moral laws, “juridical laws,” those “directed merely to external actions,” with respect to their mere conformity to law [6:220; 14]. And this classification introduces the most familiar opposition that Kant almost always appeals to in distinguishing these kinds of claims – external versus internal “use of choice” (Gebrauche der Willkür). They [all laws of freedom] are distinguished by the kind of “law-giving” appropriate to each, outer or inner, and he suggests that this alone might demarcate the types. So-called external laws are those for which external law-giving [such as is created by the threat of punishment] is possible; in the case of moral or internally legislated laws, such external coercion is not possible [fulfillment of duties of virtue would not be fulfillment of the duty if motivated by fear of punishment, we would not have adopted the end]. So if we make a promise, we would be duty-bound, as a duty of morality, to keep the promise, even if there were no external constraint. But since such fulfillment involves actions in the “external domain,” coerced compliance here is also possible and so Kant even says that “It is no duty of virtue to keep one’s promises but a duty of right” [6:220; 21].

By saying that it is not a duty of virtue, he means that it is not a duty to adopt an end “internally,” such as the perfection of our talents, or beneficence. But he still appears to have confused things by not noting that duties of virtue and enforceable rights claims do not exhaust all categories of obligation. There are, for example, perfect duties to oneself that need not involve such end-setting, but which are also forbidden by their very nature or form – such as suicide – compliance with which would still count as compliance even with no such internal motivation. Yet they do not seem a fit subject for criminalization. Likewise, there are some perfect duties to others that are forbidden by their very form, do not require the adoption of an end, but do not seem violations of juridical right. The cases of promising and truth-telling are the most obvious. I may refrain from lying when I could have lied, but from a nonmoral motive, with no internal legislation, and I would still have conformed to

duty. And Kant himself admits that not all broken promises or lies are violations of right.10 He notes that lies to others do not automatically count as violations of right because the addressee can choose to believe them or not, and we do not want a paternalistic state making those decisions for you. (It is when you count on a promise and suffer some harm from its nonfulfillment that the violation is a violation of right.) He thus admits in a footnote that there is indeed a boundary problem in drawing what he calls a “borderline” (Grenzlinie) between what belongs to hus or right, and what to ethics.

It would take a separate article to sort out these various uses of “external” and “internal,” but all we need to note here is that in this discussion of when lying should count as a violation of right, Kant points us in the important direction suggested earlier. He makes use of an interesting criterion in setting off as allowable an authorization “to do to others anything that does not in itself diminish what is theirs” [6:238; 30, my emphasis]. This suggests again that if we want to know which sorts of claims on others are fit subjects of legislation, we will learn more from the concrete problem of determining the boundary between “mine and thine in the external sphere” than we will be able to see from the principle of right itself.

III

But the initial problem still remains: what sort of normative claim on others is a rights claim? There are three alternatives in the most recent literature, and I pause to summarize them here, mostly because I think they will again suggest that the alternative strategies all introduce more questions than they answer and so indirectly suggest that there might be much more to be learned from what I will call the “core” argument in the Doctrine of Rights: about why it is “wrong” for free rational beings not to cede to a public authority the power to decide what is mine and thine.

As mentioned, there is first the direct “derivation” view, and we have already seen passages where Kant seems to subsume his principle of right under moral law and freely to apply moral notions of imperative and obligation in a political context.11 Kant’s moral theory defends the categorical imperative as the highest moral principle, and the very formulation of the Universal Principle of Right (with its reference to a universal law of freedom) strongly suggests that Kant
is thinking of some derivation from that principle. And most of the standard commentaries on the Doctrine of Right defend some view of the claim that the highest principle of justice is derived in some way from the basic elements of Kant’s moral theory. Otfried Höffe has argued that Kant’s moral theory rests on a “general” categorical imperative, which then can be shown to have specific, demarcated forms: a formal rule of impermissibility in ethics, a “material” use in the specification of obligatory ends, as in the doctrine of virtue, and a juridical form, manifested in Kant’s doctrine of Private Right and Public Right. And so he claims that “however Kant separates Law from Ethics, he does not separate it from the moral point of view.” Wolfgang Kersting insists that “the justification of Kant’s philosophy of right depends on his moral philosophy” and speaks regularly of “the categorical imperative of reason in the realm of right.” Mary Gregor has reasonably claimed that the central notion of Kant’s political theory, right, since it means “capacity to place others under obligation,” relies in a foundational way on a general moral notion of obligation. Leslie Mulholland makes frequent, explicit use of the language of derivation and regularly invokes phrases like a “moral title to obligate others” when analyzing Kant on rights. And there are many other such interpretations. (One might add to this list Ernd Ludwig, H.-F. Fulda, Roger Sullivan, Onora O’Neill, and Paul Guyer.)

Now, as far as I know, none of the major commentators who take this line make the mistake of thinking that the way in which the principle of right depends for its normative, binding status on moral principles means that Kant, in accounting for the obligatory character of right, is relying on some theory of moral motivation or requiring some moral acknowledgment of the claims of others. Everyone seems well aware of Kant’s claim that no “internal legislation” is needed to account for our obligation to enter a civil order or to obey public law. The state makes no moral claim on its citizens, and the claim of right that is made must be accounted for as a distinct claim, even while still a binding rational requirement. Moreover, aside from Kersting, no one seems to think that Kant’s position is like the one defended by Fichte in his 1793 remarks on the French Revolution—that, given our general moral obligations, we must do what we can to make the realization of our moral vocation more empirically, socially realizable, and that no one should be indifferent to the social conditions necessary for us to be able to do our duty more—rather than less—effectively. (We certainly have such duties for Kant, but in his account they are clearly imperfect ethical duties, not duties of right.)

But what is troubling for this position is that Kant nowhere argues for any such even indirectly moral status for principles of right. It appears that he attempts no derivation, works through no “application,” and even though the Groundwork is supposed to be laying the foundation for the entirety of the Metaphysics of Morals, he suggests no direct route from the former to the latter. If we are supposed to think of the moral law as being “applied” to a sphere of human activity distinct enough to yield specific principles of right, our options seem quite limited. If the sphere is external exercises of will (the domain where my exercise of freedom restricts what you would otherwise be able to do), it would appear that such an application would just yield a prohibition on actions whose maxims cannot be universalized and a general imperfect duty not to ignore but to aid our fellow man. We might add a general right of self-defense, an “authorization” to resist those who illegitimately “hinder” permissible exercises of freedom, but we will have thereby not generated any requirement of public law.

All of which is grist for the mill of the “separationists.” There are passages that seem to argue strongly for some sort of complete methodological autonomy for principles of right. Commentators like Allen Wood and Marcus Wissaschk have noted that Kant (a) holds that the principle of right is analytic, which seems to mean that Kant is trying to present only the necessary form of rational free wills in external relations and is arguing that the authority to coerce compliance with this form follows analytically from the notion itself (that any “hindrance to the hindering” of freedom is permissible). And (b) Kant calls the universal law of right a “postulate that is incapable of further proof” (6:231; 25), also suggesting he has no derivation in mind, despite his occasional “deduction” language. Finally, Kant says that the universal law of right,

is indeed a law that lays an obligation on me, but it does not at all expect, far less demand, that I myself should limit my freedom to those conditions just for the sake of this obligation; instead, reason says only that freedom is limited to those conditions in conformity with the idea of it and that it may also be actively [tätliche] limited by others. (6:231; 25)
Claims like this have led Willaschek to argue that the realm of right is an “expression of human autonomy akin to, but independent of, the moral domain,” and so that the principle of right is an “independent, basic law of practical rationality,” a different sort of “expression of human autonomy.”\textsuperscript{18} And Wood has argued that, with this claim of analyticity, Kant seems “explicitly to discredit the whole idea that the principle of right is derived from the fundamental principle of morality”\textsuperscript{19} with his claim about analyticity, and that juridical duties “belong to a branch of the metaphysics of morals that is entirely independent of ethics and also of its supreme principle.”\textsuperscript{20}

However, in the first place, the claims of analyticity and claims about postulates are not decisive evidence, as Paul Guyer has already shown. Analytic results based on spurious or arbitrary concepts do not establish anything of importance, and so Kant must understand his analysis of right to depend on what is already presumed in the “legitimate” concept of human freedom, namely, that we are subject to the requirements of pure practical reason, which is itself a synthetic claim.\textsuperscript{21} Likewise, Kant does not claim that postulates require no proof, but that their proof is “constructive” (as in mathematics) rather than deductive, or, in the practical case, as making disputable claims about the conditions that, according to Guyer, are “necessary for the possibility of fulfilling a moral command.”\textsuperscript{22} Indeed the passage itself says that the law of right is a postulate incapable of further proof, implying that presenting a postulate is a proof of some kind. (Kant also says clearly that the authorization to acquire property and so impose an obligation on others that they would not otherwise have “could not be got from the mere concept of right as such” and for this reason is a “postulate” [6:347; 41; my emphasis].

Moreover, the passage quoted earlier [6:231] does insist that the law of right lays an obligation on me [something that would have ultimately to presuppose some synthetic claim] and carefully qualifies what is not laid on me by simply saying that duties of right do not, as moral duties do, require of us that we obey “for the sake of this obligation.”\textsuperscript{23} There is nothing surprising in such a claim. And in the light of all this it is hard even to understand Willaschek’s position. It costs Kant no small amount of trouble to show that we are unconditionally obligated to the requirements of pure practical reason. If the principle of right is likewise such a rational requirement but not “covered” by that general argument, we would then face the task all over again, presumably in some completely independent, nonmoral way, of “deducing” or showing through the “exposition” of some new “fact of reason” that those requirements must also be conformed to.

This leaves us in a troubling aporia. The derivationists are right to insist that the principle of right be connected in some way with Kant’s overall moral theory. Kant after all not infrequently notes that “all duties [Pflichten], just because they are duties, belong to ethics [Ethik]” [6:219; 21], and he says this a few pages before he introduces what he explicitly calls “duties of right” [6:336–7; 29]. But such proponents cannot provide passages or reconstruct arguments that state and defend such a connection or subsumption [at least not without making political duties something like imperfect duties of virtue]. The separationists, who want Recht and Moral strictly separate, are right that our obligation to leave the state of nature and our absolute duty to obey rightly constituted law are not moral duties as Kant normally understands them, and they make no appeal to “internal” legislation. Kant does after all also say, in glossing what he calls “strict right,” that it “is not muddled with anything ethical” [6:232; 25]. But that position still leaves us wondering what sort of claim on us is made by the rational form of free wills in external relations. Too much connection and derivation, and duties of justice look too much like moral duties or imperfect duties of virtue; too much distinctness and there seems to be no basis for Kant’s claims about the “bindingness” [Verbindlichkeit, to use his explicit claim] of “duties of right.”

Third, I note briefly one other, final variation on this theme, that suggested by Guyer in the article already noted, and in several others. (It is also exemplified in an interesting early article by Thomas Pogge.)\textsuperscript{24} We might be going off track in this investigation of the normative authority of claims of right by trying to track exclusively the implications of the requirements of pure practical reason, by concentrating only on how our obedience to a moral law might be said to cover in a distinct way special cases where coercive compliance is warranted and required. We might do better by noting that it is essentially the rule of law that allows us to engage at all in an activity that Kant at least once defines as the distinguishing mark of humanity itself: the setting and pursuit of our own ends.\textsuperscript{25} The argument might
Such nonmoral freedom is actually such an “expression” or “part” of our moral capacity to act on the dictates of pure practical reason, and thereby anywhere near as valuable for Kant as moral autonomy, is another story. It is hard to see how the often banal and ordinary exercise of the freedom of choice alone is of the requisite Kantian awe-inspiring dimensions. And how can a nonautonomous exercise of Willkür be a “part” or “expression” of pure self-legislation or autonomy? The doctrine of right can then on this account be connected with the moral theory, but only if we interpret that theory as a substantive value theory and only secondarily as a deontology. This would give us a much easier way of seeing what is our intrinsically valuable capacity and why it would be irrational not to secure the minimal conditions that would allow its exercise in a shared, finite world.

There is not much textual evidence for this view in the Doctrine of Right, and most of its official formulations refer insistently, as we shall see, to the formal problems of rational consistency in the acquisition of rights and so to the formal requirements of law. There is very little evidence for much beyond such formulaic claims, and these alone do not get us very far. Geyer’s reasonable point is that we will not understand what is wrong with ignoring such constraints unless we are able to see that adhering to them is the essential “means” for keeping faith with an intrinsic, supreme value. This all might lead one to think that Geyer has in mind a reconstruction of some Kantian, nonempirical case for this claim that freedom is an absolutely superordinate value, but Geyer honestly admits (i) that what looks like Kant’s argument—that we can determine freedom (as the exercise of our rational capacities) to be the ultimate end or purpose “given” by nature to man—is unacceptable, and (ii) that there is, finally, no case at all in Kant for such a claim about freedom. The ultimate value of freedom is simply indemonstrable. He does say that Kant believes that “only by seeing ourselves as free can we import a source of unconditional value into the world,” but wishing there were such an unconditional value, or noting what would be the case if there was not such a value, does not make it so.

Moreover, it is quite possible to summarize Kant’s position by saying that human beings are the subjects of their own lives, and so cannot be objects in ours; they are ends in themselves and therewith possess “inestimable,” incomparable worth. But what that means in the practical context—what it means that they have such worth—is
just that one may not act in a way that arrogates to oneself a unique, exceptional status that cannot be accorded to all equally. And all that means is that we must adopt no maxim that could not be willed simultaneously by all or serve as a universal law of nature. It sends us in an ultimately non-Kantian direction to claim that a course of action is our duty because fulfilling that duty is a "means" to respect and realize freedom, primarily because it is already the case for Kant that we stand in an obligatory relation to such a status - we are duty bound to respect the status of each as an end in itself, a free being. So Guyer's formulation would require that we say: we are obligated to the categorical imperative because it is the effective means to fulfill our obligation to the categorical imperative.

Finally, it is not at all clear whether this language of ultimate value and means to realize it can return us somehow to Kant's strict distinction between duties of right (which may be coercively enforced) and imperfect duties of virtue. It is quite reasonable to argue that we must not only exercise our own capacity of choice and do nothing to prohibit others from exercising theirs, but that we must do what we can to ensure the "conditions" under which all of us can so exercise our entitlement. And we could add that anyone hindering our exercise of such a right may be permissibly resisted, but we have yet no argument for the *exsequium et statu naturali* that Kant's case requires, and in form we seem to be arguing again only for imperfect duties, duties of wide latitude to do what we can to ensure that all may have a chance at securing their ends.

IV

One reason that it is so difficult to find an adequate account of the normative legitimacy of the state's monopoly on coercive violence is that Kant packs much more of his answer to this question deep in the details of his argument than he ever states programmatically. His "answer" is essentially contained not in the introductory material but in two dense paragraphs of the Private Right section, §8 and §9. These contain the core of his case. It amounts to: the unacceptability to free rational beings of *res nullius* (objects treated as if not capable of being property), and the claim that the state or the public rule of law is the "only" way (as he says in the title to §8) to ensure such intelligible possession, or "possessio noumenon." (Kant is here making an unusual use of the distinction so important to the *Critique of

Pure Reason*. In that work, Kant had, he believed, fatally criticized the assumption on which all rational metaphysics had been built: that unaided pure reason is capable of determining the true nature of things as they are in themselves. He did not deny that reason could formulate a determinate view of how the world must be, or could not be, but he denied we could make defensible cognitive claims about these determinations. We know only "phenomena," objects subject to our cognitive conditions, namely, space and time and the pure categories of the understanding. However, this also meant that human reason was not capable of refuting, of adjudicating at all, theoretical claims about the nature of things. There might then be purely practical reasons for assuming something about the nature of things, which theoretical reason could neither refute nor confirm. In this case, Kant is pointing to the difference between physical possession, confirmation of which is simply a matter of empirical fact, and a relation to objects secured through a relation between rational wills. There is no possible empirical or metaphysical confirmation of such a property claim (and so it is "noumenal," a determination of pure reason), but according to Kant's critical philosophy, there could be a case made by pure practical reason for the possibility and even the practical necessity of such a relation, which case need fear no theoretical refutation. That is what he proposes to do next.)

So the unacceptability of *res nullius* and the state alone making possible *possessio noumenon* are the claims that reveal how Kant thinks his theory of justice relates to his moral theory, and why he thinks he can make this connection but yet still introduce the requirement of coercion for rights claims and so can defend the distinctness, the nonmoral yet "binding" status, of duties of right.

On the latter issue, it is useful to note first how different the formulations in the *Doctrine of Right* sound from Kant's earlier formulations. The key difference has to do with Kant's earlier (or *Groundwork*) position on the radical independence of the moral point of view and his later position on the social conditions necessary for an effective fulfillment of our general obligations to self and other. In the *Groundwork* (1785), writing about the end-in-itself formulation of the moral law, he had claimed,

But a rational being, though he scrupulously follow this maxim, cannot for that reason expect every other rational being to be true to it, nor can he expect the realm of nature and its orderly design to harmonize with him as a
fitting member of a realm of ends which is possible through himself... Still the law: Act according to the maxims of a universally legislative member of a potential realm of ends, remains in full force, because it commands categorically. And just in this lies the paradox that merely the dignity of humanity as rational nature without any end or advantage to be gained by it, and thus respect for a mere idea, should serve as the inflexible precept of the will.  

The overall drift here is clear. Respect for a "mere idea," obedience to the moral law, might mean you are the only rational being so constraining his will, and that might mean you are pretty badly off. But life is tough, and therein lies the glory of obedience anyway.

Twelve years later, Kant would write that, without the mutual assurances a state provides, each person or people or state "has its own right: to do what seems right and good to it and not to be dependent upon another's opinion about this" [Morals, 6:312; 90]. And in the state of nature, "human beings do one another no wrong at all when they feud among themselves" [6:308; 86; my emphasis]. These are remarks that rest on Kant's original claim about external relations among free beings, that "I am not under obligation to leave external objects belonging to others untouched unless everyone provides me assurance that he will behave in accordance with the same principle with regard to what is mine" [6:255–6; 44]. The gist here is clear too. Pure practical reason may be able to formulate the rational form of relations holding between free wills in external relations, but these cannot obligate me unless precisely that condition that, in the Groundwork quotation, Kant said we could not count on — that every other rational being would act likewise — be in fact made something we can count on. The principle of all external relations among rational wills is clear enough — respect the distinction between mine and thine — but its binding force is conditional: I will respect yours only if I can be assured that you will respect mine. (And this of course requires some reliable determination of what counts as mine and thine.)

But Kant has not really changed his mind about anything, just shifted emphasis. Consider the two parts of his case. First, he claims that objects belonging to no one would be "contrary to right" [6:351; 41]. This is so because "freedom would be depriving itself of the use of its choice with regard to an object of choice." Objects that could be used in a way appropriate for beings responsive to reason, not just sensible determinations, would arbitrarily and irrationally not be so used. This would in effect "annihilate objects in a practical respect," and since there is nothing "in" objects that could be said to justify such a restriction, freedom would be denying its own capacity to make use of material objects, especially land, as rational means in the furtherance of its ends. It would be accepting a restriction — that nothing can be held in exclusive possession — that there is no reason, given the sort of being we are, for us to accept.

Further, a free being must be able to exercise this capacity as such a free being.  

Not only must exclusive possession be possible for such a being, but nonphysical exclusive possession must be possible. This is possession not limited by the physical properties of nature, and this is necessary because acquisition and use of objects "has to do with a determination of choice in accordance with laws of freedom" [6:253; 43]. Limiting rightful use to actual possession would also be to accept a limitation there is no reason to accept, one that unjustifiably contravenes the fact that agents can establish intelligible relations with one another (relations based on common recognition of an idea) and thereby intelligible relations with natural objects. The demonstration proceeds exactly in the unusual way Kant describes at the end of §7, that practical reason in this case — our attempt to determine what ought to obtain in the accomplishment of my ends, given that I am a being responsive to reasons — "extends" itself "without intuitions," simply by dropping or leaving out "empirical conditions" not appropriate as restrictions of a free rational being. By doing so, we end up with the social form that free beings must adopt in their pursuit of ends.

Such beings must be able to avail themselves of exclusive possession in the accomplishment of their ends, and that possession need not be restricted to the empirical conditions of physical possession or proximity. Given that I am a being that can institute rational relations with others, I ought to be able to secure such nonphysical ownership by such relations with others. But, Kant points out, I can not do that by a mere decree.

Now a unilateral will cannot serve as a coercive law for everyone with regard to possession that is external and therefore contingent, since that would infringe upon freedom in accordance with universal laws. So it is only a will
putting everyone under obligation, hence only a collective general [common] and powerful will, that can provide everyone that assurance. \(6:256; 45\)

Thus, Kant concludes with what is in effect the thesis of the work itself: “only in a civil condition can something external be mine or yours” \(6:256; 45\).

This then all amounts not to a shift in Kant’s basic position, as if he is now arguing for empirical conditions of the possibility of moral duty as such. That remains unconditioned and categorical. But it is in effect Kant’s way of addressing, avant la lettre, one of the oldest criticisms of his moral theory, that it is an empty formalism, and cannot be action guiding. Kant is here himself emphasizing that, on the one hand, pure practical reason can determine the necessary form of the relation of free wills in external relation – they must exercise their freedom in a way consistent with a like exercise of all. Then, with a wholly uncontroversial empirical addition – that the human world is finite – we can also stipulate that there will be actions that unavoidably limit what another would otherwise be able to do, and so the principle of right is a general, formal principle for resolving the unavoidable conflict between claims of mine and thine. And so we can rationally determine the general conditions of rightful acquisition, or what Kant calls original acquisition. Thus, we can conclude,

All men are originally in common possession of the land of the entire earth \(communio fundi originaria\) and each has by nature the will to use it \(lex iusti\) which, because the choice of one is unavoidably opposed by nature to that of another, would do away with the use of it if this will did not also contain the principle for choice by which a particular possession for each on the common land could be determined. \(6:267; 54\)

This principle of choice must be a fully general will [not the will of one of the parties], powerful enough to establish the assurances that make any agreement to cede the right in one’s own case actually reciprocal.

So far so good, but it is also now clear that Kant is insisting that in effect pure practical reason on its own is powerless to determine the content of any such resolution according to principle, and that that too has rational implications. The [rational] unacceptability of the state of nature is that it is a state of indeterminacy, that while we can clearly state that we are bound to respect the boundary between mine and thine, we have no way of deducing from our rational principle what in concreto is rightfully mine and thine. There may be minimal requirements for original acquisition [the land must not yet be claimed, for example, temporal priority gives title according to Kant \(\$14\)], but any determinate acquisition can only be “provisional” and must be acquired in some “anticipation” of an eventual resolution of claims by a general will.

V

It is important to stress here that the unacceptability of the pre-civil situation is not discussed as a strategic or broadly pragmatic problem. The claim is that it is not in principle possible to establish unilaterally the intelligible possession that is a necessary condition of the exercise of our rational agency in a finite world populated by other agents. It is not that it is a practically difficult or insecure task without mutual assurance, or that it is simply not prudent for me to trust you until I can be assured you will respect what is mine. The problem lies much deeper – there can be no “actually” determinate mine/thine distinction to protect in the first place, about which to be prudent, without a genuinely “omnilateral” \(allseitiger, \$14\) resolution of the merely provisional status of property claims. However, this resolution too would only be provisional and subject to constant challenge if we could not be supposed to have completely ceded our right to decide in our own case to such a general will, and that means granting such a sovereign real enforcement power and absolute sovereignty. The “assurance” required is thus necessary for any putative resolution of this indeterminacy actually to be a resolution of the rationally unacceptable condition of indeterminate property claims. That is, resting content with this indeterminacy would be inconsistent with our status as free rational beings and with the minimum necessary condition for the actual exercise of agency consistent with this status. It would thereby be, as Kant so explicitly insists, “wrong in the highest degree” \(6:308; 86\), not imprudent.\(36\)

[In an unusual expression, Kant says that failing to institute rightful relations would be to “take” the “validity” away from right \(Gültigkeit nehmen\) and so act as if “savage violence were lawful” \(gesetzmäßig\) \(6:308n; 86n\). I note too that it is here that Kant could]
of, Kant immediately admits, Ulpianus “may not have thought distinctly in them but which can be explicated from them” or, moving now to quite a radical hermeneutical principle, may be “put into them” (6:236–7, 29).31 The “formulae” consist in (i) Honeste vive, or be an honorable human being, by which Kant means “assert your worth as a human being, never make yourself a means for others”; (ii) Neminem laede, wrong no one, to which Kant adds the unusual qualification, “even if, to avoid doing so, you should have to stop associating with others and shun all society”; and (iii) Stum quique tribue, or, if you cannot help associating with others, “enter into a society with them in which each can keep what is his.” This is of course the core thesis, the unacceptability of remaining in a pre-civil world or the “exequandum” claim.32

The argument Kant seems to have in mind is best viewed as a kind of progression and it will immediately call to mind the argument just addressed in §8 and §9. His claim about “being the self-determining being you are” first appears to be simply a perfect duty to oneself, a sort of duty of moral integrity, and it is not immediately clear why it is included in the list of “duties of right.” But as we have already seen, his main purpose appears to be to clarify the general “principle” on which political duties will eventually be derived. And this general requirement was indeed at work in the property argument – do not rest content with merely physically determined possession, or do not act as if you were the sort of being who could use property only while physically possessing it. Honeste vive will begin as: always act in a way consistent with the status of a being responsive to the demands of pure practical reason, and so in the “external” sphere, let no one take what is provisionally yours. However, to remain consistent, honeste vive will also have to end up as: in order to comply with this duty, establish the intelligible possession consistent with your status as a free rational being. Or it will have that meaning once we introduce the condition mentioned by the second duty.

This social dimension enters in the second duty, neminem laede. Wrong no one, even if you must shun society to do so. Clearly, Kant is implying [in a Rousseauian tone] that without a civil order, it will be difficult if not impossible to fulfill this duty with any determinacy. The only chance in the pre-civil world to keep faith with it is to shun society altogether – not a real alternative. The hypothetical is clearly unrealizable, just as it was for the Rousseau of the Second
Mine and thine? The Kantian state

This position still faces many objections. Indeed we can now see that it is because of this continual adherence to the authority of the formal dictates of pure practical reason that Kant is stuck with his “absolute sovereignty/no right of revolution” thesis. The solution to the problem of intelligible possession is not in the slightest substantive or dependent on some thesis about what by nature or by some other substantive standard you are entitled to. The problem is partly generated because reason has no insight into any such principle and therefore must opt for the formal solution of a final common will whose only function is to be final, to settle the boundary between mine and thine in ways that cannot be challenged. To reserve a right of revolution is thus formally and in effect to have refused to leave the state of nature. Or, in the words of Perpetual Peace, “Any legal constitution, even if it is only in a small measure lawful, is better than none at all.”

This form of reasoning is also partly why Kant faces so many other objections. Since the solution essentially amounts to there being a drawing of the mine/thine boundary, and since there is no substantive standard for doing this, Kant concludes that the sovereign has no choice but to start from the positions established provisionally in the state of nature. But since there can be no rational principle either provisionally or substantively guiding such acquisitions, Kant has to rely on a wholly empirical determination: you may acquire as much as you can defend. Your control of the ocean off your shore extends “as far as a cannon shot may reach” (6:265; 52). This is surprising since the unacceptability of res nullius and merely provisional possession was supposed to be the result of their inconsistency with our status as free rational beings. If the core argument rests on a claim that physical possession should not be a decisive criterion for rational beings, why allow the criterion of physical defensibility to set the extent of property for generations to come?

VI

These problems can be multiplied and there are Kantian responses to many such charges, but I want to close by noting a few unusual features that distinguish Kant’s “core” position, as laid out here. First, the narrative he sketches is in effect a narration of the transition from
a merely empirical/sensible human status to “actual” status as an intelligible being located in a finite, unavoidably conflicted world. The latter is a status we must in some sense achieve and then sustain. [In the Doctrine of Virtue, Kant says that “a human being has a duty to raise himself from the crude state of his nature, from his animality [quoad actum], more and more toward humanity” [6:387; 151].] Of course, according to Kant’s practical metaphysics, we simply are such intelligible, or reason-responsive beings, but this narrative suggests that such a capacity can also exist in an unrealized state, or in more speculative terms, that what it means to be such a subject is also to be able to fail to take up such a status, to fail to be one. Not acting to resolve provisional property claims is one such possibility. And what is especially interesting is that in this account, this dimension of that status – intelligible possession of property – is “actualized” in a distinctly social way as a result of the determinations of a general or common will and not a private, even privately rational [unilateral] will. There is something dramatically Rousseauian in the claim that our status as intelligible and even concretely free beings is a social achievement of some sort, that without this social determination, we are only “provisionally” and “anticipatorily” such intelligible subjects, subjects who, because of our deeds, can transcend what would otherwise be the empirical conditions and limitations of action.

Secondly – and this seems to me the most interesting result from what we have looked at – it is clear from this argument that the rule of law is not supposed to simply guarantee or secure what is mine and thine, given that Kant keeps insisting that without a legal order, or the institution of a genuinely common will, there is no conclusive mine and thine at all. Kant is supposed to be a liberal philosopher, constraining state activity for the sake of a private realm that is to be interfered with only to ensure a like domain for all, with state power limited by what all would rationally will, consent to, and so forth. But mine and thine, the basic boundaries of the private, are not treated as original starting points by Kant but as secondary and as some sort of socially mediated achievement. And this suggests that mine and thine are not properly descriptive terms but more like ascriptions of normative statuses, that they are not merely assured by a legal order but can finally only be said to exist within such a legal system of recognition, enforcement, and resolution of disagreement.

Now, at this point, we may seem to be drifting off here far too easily into the non-Kantian realms of Fichte’s Grundlage and Hegel’s Phenomenology, texts where the non-original and socially achieved status of individuality get their first truly modern [i.e., non-Aristotelian] hearing. Consider Fichte’s famous claim from his Grundlage, where he says that

the concept of individuality is a reciprocal concept, can exist in a rational being only if it is posited as completed by another rational being... is never mine, rather it is... mine and his, his and mine; it is a shared concept within which two consciousnesses are unified into one.43

These are consistent with other claims like “the human being... becomes a human being only among human beings,”44 and of course with very similar, more famous claims that Hegel makes in the Phenomenology, such as “self-consciousness achieves its satisfaction only in another self-consciousness,” “A self-consciousness exists for a self-consciousness,” and his introduction of Spirit as an “I that is We and We that is I.”45

Methodological individualism, rational egoism, and “rational will” theories of the state like Rousseau’s and Kant’s [in the official classification] are all supposed to be challenged by such accounts, and it might seem perverse to link them with Kant’s Doctrine of Right. But I would note only that nothing said so far has shifted any significant distance from Kant’s text. Kant too is treating “what is mine,” what in effect counts as the actual or determinate me, and “what is thine,” what counts as the actual or determinate you, not as some matter of independent fact, from which political reasoning begins. It is a socially dependent, variable, and negotiable boundary which exists by virtue of the mutual acknowledgment of both parties.

Of course, Kant is talking about property rights, not conditions for the possibility of any content for self-understanding, or for a “practical identity,” and certainly not about the conditions for the possibility of determinate “self-consciousness,” and so forth. Yet, given that for Kant my basic moral identity, my status as a rational free being, is an anonymous identity, essentially and indistinguishably one among many, Kant seems to realize that he also requires some sort of morally relevant account of “what we owe each other” [to coin a phrase] qua the determinate concrete individuals we are, or
what we must “become” if such a mine-thine boundary is to be possible. The fact that he extends his moral theory in the way suggested by the Ulpian principles seems to me evidence of this concern.

The obvious question to ask about such claims for fundamental social dependence is: must we not already be determinate, self-aware rational beings in order to engage each other as such, to hear and properly respond to what Fichte called the demand or summons (Herausforderung) from an other? How can such claims for such dependence ever “get off the ground” if we can only be such subjects as a result? And yet here again, Kant’s answer coincides with the way that question would be answered later in idealism – with this quasi-Aristotelian distinction between what is only provisionally (potentially) and so uncertainly posited as an identity or claim to “mine,” open immediately to challenge and thus defeasible, and what can be mutually resolved and recognized as mine and thine. This is all admittedly speculative, builds on only a thin layer of Kant’s ethical theory, and seems open to numerous qualifications. And, as indicated, Kant’s formal conception of practical rationality and his general conception of practical philosophy will limit what he can say about all this, but it is not a wild stretch to say that Kant’s Doctrines of Right might be characterized as post- or proto-Fichtean or proto-Hegelian in this (non-historical) sense, and thus suggestive of an alternative form of liberalism, one in which rational individuality is not ultimate, but derivative and an achieved social status.

4. Kant's position is sometimes called “contractarian,” but empiricist or instrumentalist notions of original contract would not thereby be clearly enough distinguished. (I mean by the latter, Locke, Hobbes, Gauthier: people who believe that the interests satisfied by the rule of law, by giving up the right to decide in your own case, are so clear that one could never be said to exempt oneself from an implied agreement to satisfy those interests.) Kant appeals to an original contract only as an “idea” (§47), not an originating source of obligation. (And so Kant does not rely on claims like: “The law must be obeyed because we can be presumed to have consented to its enforcement.”) Such a contract cannot be the source of legal obligation because, as noted below, Kant states clearly that we have a duty to exit the state of nature and form a civil condition (a duty “to contract,” as it were). The lex iustitiae or third “duty of right,” to enter the civil condition, is an obligation that obviously binds independently of the resulting contract itself. So, while Kant can state his basic notion of justice as having to do with the adoption of no law that “could not be willed by each,” that is mostly a façon de parler. What effectively excludes a putative law on this principle is a familiar Kantian inconsistency in its universalized form, not an attempt to determine “what each would will.” It would be clearer and more correct if Kant and the contractarians were classified as all “rational will” theorists of obligation, but that still leaves a lot unclear with regard to “rational.” See the discussion in Leslie Mulholland, Kant’s System of Rights [New York: Columbia University Press, 1990], pp. 278–80; pp. 280–93; and p. 318ff.

5. Kant even goes so far as to say that reason, “by a categorical imperative, makes it obligatory for us to strive after” a civil condition (Morals, 6:318; 95), and he explicitly lists a “duty of justice” (lex iustitiae) to enter a civil society (6:237; 29). He does not appear to be referring to a separately classifiable moral duty to obey principles of right (although there is one). At 6:220–1, 22, Kant notes that ethics “has duties in common with right” and that we have an ethical obligation to do our duty “wherever that duty comes from.” So duties of right are also “indirectly ethical” duties as well.

6. Kant can be understood to be asking, “Exactly why must I restrict exercises of external freedom in consideration of the like exercise of external freedom by others?” The structure of the Metaphysics of Morals suggests right away that this restriction is not only our moral obligation (although it is also that), but a distinct and unique requirement of pure
practical reason. Indeed, it must be unique enough to permit and to require a collective attempt to enforce compliance by threat of punishment, something wholly inappropriate in the moral domain.

7. So Kant can certainly be enlisted in that rational natural right tradition that includes Rousseau, Fichte, and Hegel, as well as its most influential contemporary defender, John Rawls. But this is neither a contractarian tradition, as normally understood [see note 4], nor "rationalist" in the natural law sense— that pure reason can detect the order of normative nature. Kant believes that we are obligated only to what we obligate ourselves to, that the moral law is "self-legislated," a metaphor that has produced an endless stream of commentaries. See my "Über Selbstgesetzgebung," in Deutsche Zeitschrift für Philosophie, Bd. 6 (2003).


9. He also suggests here a puzzling claim about moral duties: they always come in a dual form, commanding us both to obey the law and to make respect for the law itself our ground for action [a proposal that suggests an odd regress]. See Morals, 6:391; 154 on the "universal ethical command" to "act in conformity with duty from duty."


11. Perhaps the clearest passage is at Morals, 6:339; 31: "we know our own freedom [from which all moral laws, and so all rights as well as duties proceed] only through the moral imperative, which is a proposition commanding duty, from which the capacity for putting others under obligation, that is the concept of a right, can afterwards be explicated [entwickelt]." ["entwickelt" is also often translated as "developed"; my emphasis].

23. These two claims — that the universal law of right does "lay an obligation on me [welches mir eine Verbindlichkeit aufgelegt]" and that its command is a command, but requires only obedience, not obedience from the motive duty — are, it seems to me, neglected in Wood's reading of the passage, with misleading consequences. See Wood, "The Final Form," p. 9.

24. Thomas Pogge, "Kant's Theory of Justice," *Kant-Studien*, 79 (1988): 407-33. The similar general claim proposed as a way of making duties of right clearer is what Pogge calls a principle that the state must also be understood as a "system of constraints" that are "optimally to promote the development and flourishing of reason." Even on its face, this clearly calls to mind an imperfect duty of virtue and there is little textual evidence to support any extension of the rights-protection function of the state into a "promoting the flourishing of reason" function.

25. "The capacity to set oneself an end — any end whatsoever — is what characterizes humanity (as distinguished from animality)" (Morals, 6:392; 154).


28. Ibid., p. 240.


31. This sort of issue is also quite important in Wood's account. See my discussion in "Kant's Theory of Value: On Allen Wood's *Kant's Ethical Thought*," *Inquiry*, 43 [Summer, 2000].


33. I am only repeating here Kant's canonical formulation of what he calls this apparent "paradox" that "the concept of good and bad is not defined prior to the moral law, to which, it would seem, the former would have to serve as foundation; rather the concept of good and evil must be defined after and by means of the law" (5:62-3). English translation in *Critique of Practical Reason*, trans. L. W. Beck [Indianapolis and New York: Bobbs-Merrill, 1956], p. 65.

34. *Groundwork*, 4:438–9; 57.

35. Jay Wallace has pointed out to me that there is no particular reason that this *exequum* argument should be tied tightly to the property issue. Any imagined situation in which rational beings do not establish with others the rational relations they are capable of would be a violation of the "honeste vive" requirement discussed below and thus unacceptable.

36. And again, this unacceptable is not said to be based on the inestimable "value" of "humanity," namely, our capacity to set ends for ourselves, as if security in property claims were a necessary practical condition for such a capacity (even though in some sense it clearly is). But the problem Kant is pointing to is the problem of *incompatible commitments* — on the one hand, inescapably, to intelligible possession, and so a solution to the mine/thine indeterminacy, but, on the other hand, to a restriction in the state of nature to a unilateralism that cannot establish this intelligible possession. Hence the *exequum* claim.

37. Ulpians [d. 228] is now mostly known because his commentaries on the civil law, *Libri ad Sabinium*, and his books on the praetorian edicts, *Libri ad editum*, ended up forming the basis for about a third of Justinian's later [533] *Pandects*.

38. For a more detailed discussion of this passage, see my "Dividing and Deriving in *Kant's Rechtslehre*," in *Immanuel Kant, Metaphysische Anfangsgründe der Rechtslehre*, ed. Otfried Höffe [Berlin: Akademie Verlag, 1999], pp. 63–85.

39. He then adds that this list divides duties into internal and external duties and "duties that involve the derivation of the latter from the principle of the former by subsumption." He appears to mean that there are perfect duties to oneself [something like: be the self-determining being that you are] and perfect duties to others [harm no one, do not act as if others are not also such beings] and then a further class of external duties to others that are derived by subsuming this general duty to others, given a specific condition [the inescapability of contact with others] under the principle of the former, or honeste vive duty. That general principle would have to be the moral law in some form.


42. It is true, as Mulholland points out (*Kant's System*, p. 294), that the sovereign is given extraordinary leeway in redistributing originally acquired property once provisional becomes certain title, but it is an exaggeration to suggest that Kant's position is compatible with a radically redistributive politics. The necessity of moving from provisional
to certain title would be hard to understand if one could not assume that the sovereign would be in some sense guided by the results of original acquisition.


44. Ibid., p. 37; English, p. 39.