PRIVATE PROPERTY IN KANT'S RECHTSLEHRE

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The dissertation is comprised of three separate papers and an appendix addressing Kant's social and political philosophy, especially the views in the first half of the Metaphysics of Morals. This part of the work is called the 'Doctrine of Right' (Rechtslehre), and it includes a description of a system of right based primarily in the idea of human freedom. The system of right itself is further divided along those rights which arise in the context of a civil union (public right), and those which exist prior to the development of any government, through the nature of humans alone (private right). It is in this latter kind of right that I am particularly interested, and which I spend most of my dissertation investigating.

Per Kant, humans have only two natural, 'private' rights. The first is the innate right to external freedom, according to which others may not interfere with our body or the discreet actions we perform with it– so long as those actions do not themselves interfere with the innate right of others. The second private right we can have is to property in things which are not our body, which we use to extend our powers and make a wider range of actions possible to us. Kant thinks that the things which we can use to extend our power (and have as our private property) can be divided into three categories. The first (and most familiar) kind of thing we can have as our property are corporeal objects in the world: tracts of land, books, apples, and so on. The second kind of thing we can have are the promises of others to give us some object or perform some service for us, as in the case of contracts. The final thing we can have is something which Kant refers to as the

‘status’ of others, and this is the kind of relationship we have (or have historically had) with certain members of our household, such as servants.

My dissertation is divided in accordance with these three classes, so that each paper takes analysis of a class of possession as entree into a discussion of Kant’s larger views. My first paper works through Kant’s deduction of merely rightful possession in the first chapter of the Rechtslehre, taking the corporeal object as the paradigmatic case of rightful possession. My second paper discusses the transformation of the property right from provisional to peremptory by means of the social contract. My third paper considers the case of the right to a person akin to a right to a thing through analysis of Barbara Herman’s 1994 paper “Could it be worth thinking about Kant on sex and marriage?”

BIOGRAPHICAL SKETCH

Erin Hyman Gerber was born in San Mateo, California, in 1994. She received her B.A. in philosophy with departmental honors from the University of California, Los Angeles in 2016. She moved to Ithaca, New York in the Fall of 2016 to begin studying as a graduate student in philosophy at Cornell University. She received her M.A. in philosophy from Cornell in 2019. From 2020-2021, Erin was a visiting scholar at the Johann Wolfgang Goethe-Universität in Frankfurt, Germany, through the DAAD. She received her Ph.D. in philosophy from Cornell in 2023.

For Ira.

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TABLE OF CONTENTS

Biographical Sketch iii
Dedication iv
Acknowledgements v
Table of Contents vi

1 Putting the Postulate in its Proper Place 1

2 Provisional Governance and Peremptory Rights 43

3 Marriage: Von Dem Dingliche Art Persönlichen Recht 84

A A Note on Land 120

PAPER 1

PUTTING THE POSTULATE IN ITS PROPER PLACE

It is not news to philosophers that a small change in the order of an argument can have a considerable effect on the conclusions that can be drawn from it. In this paper, I identify the source of a prevalent but unsatisfying interpretation of Kant's deduction of merely rightful possession in Bernd Ludwig's 1982 reorganization of its sections. In that year, Ludwig argued that the original order of the sections in the first chapter of the Rechtslehre was not the one that Kant intended, and was instead the result of a mistake at the hands of the printer.[1] On the basis of conjecture about the historical situation of the printing, as well as the presupposition that the argument does not make sense in its original order, Ludwig maintained that the second section of the chapter should be moved to the middle of the sixth.[2]

In this paper I will argue against the validity of Ludwig's text revisions, as well as the reading of Kant's deduction which they engender. I will begin by examining textual evidence to show that Kant was both aware of and untroubled by the order of his argument as it appeared in the 1797 printing. I will then address Ludwig's other main objection to the original order of the sections: that the deduction they produce does not make any sense. I respond to this claim by presenting a straightforward interpretation of Kant's deduction with the sections in their original order, and suggest that the success of this endeavor removes the argumentative ground for reordering the text. Finally, I will point

[1]Kant's Rechtslehre [MS AK 6:229-356; Appendix 6:356-373]. All references to Kant's works are to the Royal Prussian Academy edition (Immanuel Kant (1907). Metaphysik der Sitten. Ed. by Paul Natorp. Band VI von der ersten Abteilung (Werke) in Kants gesammelte Schriften. Berlin: Georg Reimer.) References will include the volume, the title of the work (abbreviated), and the page number.

[2]Ludwig 1982

out the presupposition which led to Ludwig's philosophical complaints against Kant's deduction, and show that it is actually the argument which results from the incorporation of that unwarranted premise which makes no sense. From this, I conclude that we cannot accept Bernd Ludwig's text revisions to the first chapter. The order in which the sections were originally presented is both the proper and the intended one.

1.

In 1982, Bernd Ludwig proposed that the order of the sections in the first chapter of the Rechtslehre be changed so that the second section (the 'jurisprudential postulate of practical reason') appeared in the middle of the sixth ('the deduction of merely rightful possession'). Ludwig's support for this relocation lay in historical accounts of the printing process of the Rechtslehre, as well as the belief that the deduction did not make sense in its original order. This claim of a printing mistake in the Rechtslehre was not without precedent: in 1929, Gerhard Buchda suggested that four paragraphs in the middle of section six in the same chapter were the result of an accidental insertion, and not part of Kant's argument.[3] These paragraphs have been removed from the main text in almost all modern editions of the Rechtslehre.[4] Bernd Ludwig's proposed revision was first incorporated in a 1986 reedition of the Metaphysische Anfangsgründe von der Rechtslehre published by Felix Meiner, for which he served as editor.[5] It

[3]This conclusion was reinforced by Friedrich Tenbruck's independent discovery of the same problem in 1949. While Buchda argued that paragraphs four through eight be moved to the end of the first chapter, Tenbruck argued that the paragraphs ought to be removed entirely, a suggestion which has been incorporated in most modern editions of the Rechtslehre. (Tenbruck 1949, p. 217)

[4]Given the longstanding philosophical consensus on the accuracy of this revision and constraints on space, I will proceed in accordance with Buchda and Tenbruck in this paper.

[5]The 1986 reedition includes fourteen major text revisions (all introduced by Ludwig), including reordering the sections of the introduction, removal of section three from the first chapter entirely, insertion of title pages where there were previously none, &c. For a more detailed description of the changes, see Ludwig 1986, pp. xxvii-xl.

was then included in the 1996 Cambridge Edition of the Metaphysics of Morals (translated by Mary Gregor), which has served as the English standard since its publication.[6]

In his 1988 book (where he explains his text revisions in greatest detail), Ludwig claimed, on the basis of circumstantial textual and historical evidence, that a mistake could have been made in the initial printing process of the Rechtslehre. Ludwig noted of thirteen defects in the text (ranging from 'minor' to 'serious') to argue that the editing and printing of the Rechtslehre was rushed and poorly supervised.[7] He took the existence of these mistakes to show that Kant was allowed only a cursory review of the text prior to its printing, which would have been consistent with eighteenth-century printing practices (which generally removed proofreading from the author's control.) Although Kant's publisher Nicolovius was located in Königsberg, the Rechtslehre was proofed and printed in Leipzig, where it had to be sent in multiple packages that could have

[6]The 1996 translation of the Metaphysics of Morals (which appears in the Practical Philosophy volume of 'The Cambridge Edition of the Works of Immanuel Kant', eds. Paul Guyer and Allen Wood) is actually a revised version of Gregor's 1991 standalone translation, also published by Cambridge. Gregor did not incorporate Ludwig's suggested relocation of the second section in the 1991 work. This is of particular note, because in 1988 Gregor authored a review of the Felix Meiner re-edition of the Rechtslehre which focused almost entirely on Ludwig's revisions— hence their absence three years later cannot be attributed to lack of awareness.(Gregor 1988b) The only explanation for the subsequent incorporation of Ludwig's changes came in Gregor's introduction to the 1996 translation, where she states that "the present translation follows the Academy edition text except for two points, regarding which, after consultation with the General Editors of the Cambridge edition, Ludwig's emendations have been adopted." (Kant 1996, p. 357) One of these points is, of course, the relocation to the second section to the middle of the sixth.

Although the fact that section two now appears in a different location is occasionally footnoted in English Kant scholarship, the closest thing to critical engagement with Ludwig's justifications for the transposition is Mary Gregor's short review of the reedition. In a later work on Kant's theory of property, Gregor also mentions the 'corruptness' of the text of the first chapter, but accepts Ludwig's revisions as a solution to this, and directs the reader to Ludwig's own explanation in the introduction to the Felix Meiner reedition.(Gregor 1988a, pp. 761-762n10) The relocation of section two and some of the related German discussion are also mentioned briefly by Katrin Flikschuh in her book Kant and Modern Political Philosophy, but she explicitly states that she will not discuss the relocation there and will proceed according to Ludwig's suggestions.(Flikschuh 2000, pp. 9, 116)

[7]For a full list and explanation of the defects identified, see Ludwig 1988, pp. 30–31.

been accidentally misarranged.[8]

Ludwig's excavation of Kant's text does reveal defects. It is clear that typographical errors made it into the first printing of the Rechtslehre, and Ludwig makes a compelling case that at least some of these errors were at the hands of printers, and not Kant himself. However, review of Kant's own claims in the Rechtslehre and its 1798 appendix reveal that these mistakes do not extend to rearrangement of his deduction.

In 1988, Burkhard Tuschling identified several key points in the Rechtslehre which indicate that Kant was aware that the jurisprudential postulate of practical reason was printed in section two.[9] Kant refers back to the postulate at several later points in the Rechtslehre, and consistently notes its appearance in section two.[10] Additionally, Tuschling noted that in the 1798 appendix to the first edition of the Rechtslehre, Kant referred to several sections of the first half of the work (Privatrecht) by page and section number.[11] Kant would have had to look up these citations in his earlier text, and it seems exceedingly unlikely that in that process he would have neither noticed nor commented on a major organizational mistake in the first chapter.[12]

[8]Ludwig 1988, pp. 33–34

[9]Tuschling 1988. "Das „rechtliche Postulat der Praktischen Vernunft“: seine Stellung und Bedeutung in Kants „Rechtslehre“".

[10]At MS AK 6:254, while Kant is discussing the possibility of continuous possession, he claims that "anyone…must either assert that it is not at all possible to have something external as mine (and this conflicts with the postulate of §2)…" and then again at MS AK 6:262, while discussing acquisition of land, Kant states that "[t]he first proposition [that land can be acquired originally] rests on the postulate of practical reason (§2)"

[11]The sections cited in the appendix come a little later in Kant's discussion of property, and concern disagreements in more specific cases like breaking a lease, inheriting, etc. c.f. [MS AK 6:361, 363, and 365].

[12]Tuschling 1988, p. 275. It is worth noting here that these textual points do not exhaust Tuschling's objections to Ludwig's edits, and the paper where he makes these points is actually primarily concerned with the argumentative failure of the reconstructed first section of the Rechtslehre. This paper falls into a somewhat larger discussion of the relocation which took place in the German scholarly community in the period between Ludwig's first suggestion of the relocation in 1982 and about 1996. This back-and-forth unfortunately did not get taken up in the contemporaneous English Kant scholarship, with the single exception being Mary

Tuschling's citations strongly suggest that Kant did not intend the second section to be in a different place, and that the original order of the first chapter is not the result of an unnoticed mistake at the hands of the printer. Accordingly, Bernd Ludwig's remaining case lies in the alleged argumentative deficiency of the argument in its original order. Ludwig suggests that, in its original order, the deduction of the possibility of merely rightful possession simply does not make sense, and cannot actually generate that possibility.[13]

As a rebuttal to this claim, in the following sections I will offer a reconstruction of Kant's deduction of the possibility of merely rightful possession proceeding through the sections in their original order. I will begin by situating the deduction in Kant's Rechtslehre and his larger system of private right. I will then draw attention to the schema which directs the progress of the deduction and explain its role in Kant's particular project. Finally, I will proceed through Kant's deduction of merely rightful possession in accordance with that schema, drawing particular attention to the role that the postulate of practical reason plays.

2.

In the introduction to the Rechtslehre, Kant explains that "[t]he sum of those laws for which an external lawgiving is possible is called the Doctrine of Right (Ius)."[14] The principle in accordance with which this external law-

Gregor's review of the Felix Meiner re-edition of the Rechtslehre in 1988. I also don't include the details of this discussion here, since a great deal of it is concerned with the way that parts of the text succeed or fail in matching Kant's description of them (e.g. whether or not a given result counts as 'immediate,' or as an 'extension' of practical reason), which I do not take to be the major bone of contention in understanding this chapter. For more information, see Saito 1996a, Saito 1996b, Hartmann 1994, in addition to the Tuschling and Ludwig texts already mentioned. Interestingly, the only explicit rejection of the relocation of section two I have found in the English literature is in Westphal 2002, p. 94n10, where he cites the same textual reasons, although doesn't refer to Tuschling.

[13] Ludwig 1982, pp. 60–62

[14] [MS AK 6:229]

giving is executed is the universal principle of right (UPR), which states that

> Any action is right if it can coexist with everyone's freedom in accordance with a universal law or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law.[15]

As a result, it is the general freedom of all which serves as the limiting factor on all possible external actions. Kant has already discussed the concept of freedom in the introduction to the Metaphysics of Morals, where he informs the reader that "we know freedom…only as a negative property in us, namely that of not being necessitated to act through any sensible determining grounds."[16] Freedom therefore consists in a kind of independent determination of action for the individual. Since the Rechtslehre is concerned only with the external relations of humans, the sensible determining grounds at issue will be those coercive forces that one person can apply to another. Putting all of these elements together, rightful actions are those which can coexist with (do not infringe on) others' independence of action in accordance with a universal law.

Since actions which can coexist with everyone's freedom in accordance with a universal law are right, we are permitted to perform them: they are actions to which we have a right. And if we have a right to perform an action, another person's interfering with our doing so is inconsistent with the freedom of all, and therefore wrong. Since another's interference with my rightful action is a restriction of my freedom, it is consistent with the freedom of all for me to hinder that interfering action. Coercive action which would otherwise violate

[15][MS AK 6:230]
[16][MS AK 6:226]

someone's rights (by interfering, for example, with their bodies) can therefore nevertheless be consistent with right, when the action hindered was itself wrong.[17]

Kant's idea of freedom is quite distinct from many other liberal accounts. Kant does not define freedom, for example, in terms of the number of ends available to a given agent, or the means available to achieve them. Accordingly, he does not define 'right' as maximizing or equalizing these. Instead, our freedom is defined negatively, as the capacity to act without the physical coercion of others around us. The person who independently chooses between two ends and the person who chooses between twenty can therefore count as making equally free choices.

The aim of the Rechtslehre is to identify all of those conditions, both permissions and obligations, under which "the choice of one can be united with the choice of another in accordance with a universal law of freedom."[18] The first of these conditions, Kant explains, is each person's innate right to freedom. This is the right that each has intrinsically, to "independence from being constrained by another's choice."[19] In external, person-to-person relations, however, the way that one person can control another's choice of action is by means of his body. No one has direct access to the internal, decision-making apparatus of another, so external interference must come from physical interventions.[20] A right to independence from this kind of constraint is therefore a right to a kind

[17][MS AK 6:231]

[18][MS AK 6:230]

[19][MS AK 6:237]

[20]People are "authorized to do to others anything that does not in itself diminish what is theirs, so long as they do not want to accept it— such things as merely communicating his thoughts to them, telling or promising them something, whether what he says is true and sincere or untrue and insincere...for it is entirely up to them whether they want to believe him or not." [MS AK 6:238] Kant follows this with a footnote giving more detail on the way that lying to others affects them externally.

of bodily freedom to perform those actions which are themselves consistent with the freedom of everyone else.

In chapter one, Kant turns his focus from actions which involve only my body to ones which also incorporate external objects. Humans are the kinds of beings that have the physical capacity to use objects entirely distinct from them as a means to their ends. From the material given in the introduction to the Rechtslehre, however, it is not yet apparent how these external objects fit into the system of actions which could be united with the freedom of others in accordance with a universal law. To determine how they might fit in to such a system, Kant uses the first chapter to give a deduction of "merely rightful possession." This deduction of the rightful use of objects proceeds in accordance with the way that humans physically use objects. In particular, Kant distinguishes three major steps in the process of coming to use an object, which he then evaluates in accordance with the universal principle of right. In this way, his answers to the questions of how humans use external objects and whether such use is consistent with the freedom of others unfold in parallel.

3.

Kant begins the first chapter of the Rechtslehre ('How to have something external as one's own') by stating that "[t]he subjective condition of any possible use is possession."[21] An answer to the question about the possibility of possessing objects should therefore begin with an examination of the possibility of using objects. Human beings use objects as a means to their ends; as tools they select in order to accomplish some aim. Humans make external objects into tools for

[21] [MS AK 6:245]

themselves (into things they could use as means) by making physical contact with those objects. In particular, for humans to use external objects with any proficiency, they take them into their hands to hold them.[22]

It is when I am in physical contact with an object that I am able to directly affect and therefore choose to use it. Kant explains that

> Insofar as [the faculty of desire] is joined with one's consciousness of the ability to bring about its object by one's action, it is called choice;[23] if it is not joined with this consciousness this act is called a wish.[24]

Only when I am conscious of my capacity to affect an object can it be possible for me to choose to use that object— otherwise I can only wish to do so. When I hold an apple in my hand, however, I am conscious of the ways that I can affect it, based on previous experiences with my hand and with apples. I am conscious of my ability to use the apple as a means to achieving certain ends, a consciousness which is rooted in my ability to affect external objects by means of physically interacting with them.

Accordingly, Kant calls an external object which I am holding an 'object of my choice': "something that I have the physical power to use," or something "whose use lies within my power (potentia)."[25] An external object is an object of choice when a subject (the holder) can choose to do something with that object, hence is in a condition of possible use of that object. The holder of an object

[22]"[T]he soul is analogous to the hand; for as the hand is a tool of tools, so the mind is the form of forms and sense the form of sensible things." (De Anima 432a2)

[23]Willkür

[24]Wunsch [MS AK 6:213]. Kant reiterates and slightly expands on this point in Kritik der Urtheilskraft AK 5:177-179, although the topic under discussion there (whether a wish should be counted as an act of the faculty of desire) is slightly tangential to the discussion here. For a more in-depth take on the subject, see Kohl 2015, pp. 691–694.

[25][MS AK 6:246]

can therefore be said to have physical possession of it, since it is the physical connection between him and his external object of choice which makes any use of it possible.

The object of my choice is one which is available for me to use, and which I therefore could make a choice to use. This is distinct from an object which I have already made a choice to use, which is "under my control…which presupposes not only a capacity but also an act of choice."[26] By picking an apple from a tree, I make it my object of choice. When I then choose to eat the apple (as opposed to smelling or throwing it), it becomes an object which is under my control. In order to choose to use an external object, it must first be made available for use: I must make it an object of choice. To make an object an object of choice, I must take it into my physical possession, so that I have some means of affecting the object. Hence the condition under which it is possible for me to make use of my object is my physical possession of it.

Kant addresses the rightfulness of using an external object with the introduction of the jurisprudential postulate of practical reason, in the second section.[27] This postulate states that

> [i]t is possible to have any outer object of my choice as that which is mine; that is, a maxim according to which, if it were law, an object of my choice must in itself (objectively) be ownerless (res nullius) is contrary to right.[28]

In other words, it could be consistent with the freedom of others for me to use an external object which I have physically connected myself with.[29] A law which

[26][MS AK 6:245]
[27]'Rechtliches Postulat der praktischen Vernunft'
[28][MS AK 6:246], translation mine.
[29]Kant is explicit throughout the text that an object in my physical (sometimes 'empirical')

unconditionally prohibited the use of these kinds of objects would therefore be inconsistent with the freedom of all.

Since I take an object of choice to be one which I am physically connected to, I take the postulate of practical reason to be referring only to objects in my physical possession. This reading of the postulate, as referring only to external objects which the user is physically connected to, is actually a rather rare one. Almost all modern interpreters accept that the postulate refers not only to objects in my grasp, but also those which I am not physically connected to at all. In addition to being textually unjustified, this majority interpretation interpretation makes supporting the postulate very difficult. A slightly more theoretical question commonly taken up in this literature concerns where the postulate of practical reason fits in the larger structure of the laws given in the Rechtslehre. Since Kant later refers to the postulate as a "permissive law (lex permissiva) of practical reason"[30], there is a discussion of what a means for a postulate to be lex permissiva.[31] I have tried to remain agnostic with regard to the nature of leges permissivae in this paper, since I take this question to be

possession is one which I am physically connected to. Some examples: "[s]o I shall not call an apple mine because I have it in my hand (possess it physically…" [MS AK 6:247]; "Empirical possession (holding) is then only possession in appearance…" [MS AK 6:249]; "An a priori proposition about right with regard to empirical possession is analytic, for it says nothing more than…that if I am holding a thing (and so physically connected with it), someone who affects it…affects…what is internally mine." [MS AK 6:250]; "Since the concept of right is simply a rational concept, it cannot be applied to objects of experience and to the concept of empirical possession…So the concept to which the concept of right is directly applied is not that of holding (detentio), which is an empirical way of thinking of possession, but rather the concept of having…" [MS AK 6:253]; "Here practical reason requires us to think of possession apart from possession of this object of my choice in appearance (holding it)…" [MS AK 6:253]; "This prerogative arises…from the capacity anyone has, by the postulate of practical reason, to have any external object of his choice as his own. Consequently, any holding of an external object is a condition whose conformity with right is based on the postulate…" [MS AK 6:257]; "The only condition under which taking possession (apprehension), beginning to hold (possessions physicae) a corporeal thing in space, conforms with the law…" [MS AK 6:263]; "The empirical title of acquisition was taking physical possession (apprehension physica)…" [MS AK 6:264] In all of the above quotes (and in general), Kant uses 'Inhabung' for 'holding.'

[30][MS AK 6:247]

[31]c.f. Brandt 1982, pp. 255–256, Flikschuh 2000, pp. 134–143, and Hruschka 2004.

orthogonal to the one I am trying to answer here. Since Kant calls the postulate a lex permissiva, I am inclined to think that it is one, but make no further claim as to what that entails.

Kant follows the jurisprudential postulate of practical reason with a kind of reductio argument in support of it. The reductio demonstrates the truthfulness of the postulate by identifying the contradiction implied by its negation. While I will interchangeably refer to this reductio as 'support', 'argumentation for', or 'proof of' the jurisprudential postulate of practical reason, I do this only casually. There is a large secondary literature about Kant's views on postulates and, in particular, the possibility of their being subject to proof.[32] For the purpose of this paper, I don't think it necessary to take a stand on this. I maintain only that the reductio holds some kind of proof-like explanatory relationship to the postulate (at least that things which cannot hold according to the reductio cannot be true of the postulate), but don't mean to claim that postulates in general are the kinds of things which can be subject to or require proof.

The following is a more formal representation of the argument which is given in paragraph form immediately following the postulate.

[32]c.f. Kuehn 2001, p. 398, Guyer 2002, and Flikschuh 2007

Indirect proof of the juridical postulate of practical reason by reductio:

1. Indirect Assumption: It is not possible for my to have any external object of my choice as mine.
   (a) That is, my use of an object could not coexist with the freedom of everyone in accordance with a universal law.
2. An object of my choice is something in my physical power to use.
3. If (1) holds, then freedom would be depriving itself of the use of its choice with regard to an object of its choice.
   (a) Freedom would be putting usable objects beyond any possibility of being used (and would thereby annihilate them in a practical respect and make them into res nullius.)
4. But formally, choice was consistent with outer freedom in accordance with universal laws.

Conclusion: Pure practical reason can contain no absolute prohibition against using an object of my choice, since this would be a contradiction of freedom with itself.[33]

Premise (1) is our antithesis: a direct negation of the postulate. Its explanation in (1a) clarifies what is contained in the use of 'mine,' i.e. that it would not be possible for me to rightfully make use of an object of my choice (since we

[33] [MS AK 6:247]; In his 1997 paper, Do Kant's Principles Justify Property or Usufruct?, Kenneth Westphal also formalizes the reductio in a way that relies on premises which are quite different from the ones I identify above, and also arrives at a markedly different conclusion. In particular, he maintains that the reductio argument clearly refers to non-physical possession of objects, which is the exact opposite of the conclusion I come to. c.f. Westphal 1997, pp. 152–156.

are not concerned here with the physical capacity to make use of objects.) Something about making use of an object of my choice would have to be inconsistent with the freedom of everyone in accordance with a universal law for it not to be possible to have an external object of my choice as mine.

In premise (2), Kant draws attention to the special feature of an object of my choice which makes it potentially subject to my choice: that it is an object which I am physically connected to, hence capable of affecting. The question about rightful use of external objects of my choice is therefore one about objects which are in my physical possession.

In premise (3), Kant begins to tease apart the mechanisms which stand behind the claim in (1a.) Since the negation of the postulate (1) claims that making use of an object is inconsistent with the freedom of others, it is their freedom which restricts the possibility of my making rightful use of an object of my choice. This means that my action of taking an object into my physical possession in order to make use of it would wrong those around me. If the freedom of others restricts the possibility of making rightful use of an object of my choice, it restricts the possibility of using external objects at all (since all external objects must be objects of my choice before I can make use of them.) Were we not able to use external objects at all, as a class of things they would become 'res nullius' (ownerless) since there could be no possible possession of them. Hence the freedom of others would be what was responsible for the total prohibition on taking objects into our physical possession and then choosing to use them.

If we could independently determine that our use of objects of choice was consistent with the freedom of others and therefore did them no wrong, then the negation of the postulate would make a rather peculiar claim. The antithesis

asserts that the freedom of others is what prevents us from making rightful use of an object of our choice (freedom as a limiting factor). Our independent determination about using objects would show that using an object was consistent with the freedom of others (freedom as a permission). Put together, the negation of the postulate claims that it is the freedom of others which limits our ability to perform an action which was independently determined to be permitted by the freedom of others. Freedom would thereby be depriving itself of the choice to use an object.

Is using an object of my choice consistent with the freedom of others? When I take an object, out in the world and connected to no one, into my grasp, does this affect others around me? An object of my choice is an object which I could choose to use, but for which I have not yet settled on any specific choice. The specific use to which I eventually put my object of choice couldn't be what made using an object of choice inconsistent with the freedom of others since, when it is only an object of choice, no such use yet exists. If it couldn't be the specific use I put my object of choice to which made doing so inconsistent with the freedom of others, then the source of possible wrongfulness must instead lie in the object. There would have to be something about objects of choice in themselves which made their use inconsistent with the freedom of others. If this were the case, then external objects of choice would, as a class of objects, become unavailable for rightful use. While we could still have, for example, spatial relationships with these objects, we could not rightfully incorporate them into our available practical means—hence they would be 'annihilated' in a practical respect.

We must therefore turn to external objects of choice themselves: objects which we have taken into our physical possession. Is there something intrinsic

to these objects which would make their use inconsistent with the freedom of others? Others' freedom consists in their independence from being determined to act and, at this point in the Rechtslehre, Kant has only introduced one way that others can externally interfere our actions: by interfering with our bodies. We can certainly imagine individual cases where using an object of choice is inconsistent with others' free bodily activity: using an object to hit someone, or restrain someone, or otherwise make unwelcome physical contact with them. But in these cases, the innate right of others is violated as a result of the specific use the objects of choice have been put to, and not an intrinsic feature of the objects of choice themselves.

The question of whether external objects of choice carry some feature which makes their use inconsistent with the freedom of others is a question about what external objects of choice are like. Since these are physical objects we hold or connect to ourselves, they are easily subject to direct observation. And direct observation of a physical object I have connected myself to reveals that there is nothing about the object per se which would make using it inconsistent with the freedom of others. Because objects of choice are not themselves free nor necessarily connected to free beings, they carry no intrinsic feature which necessarily affects the freedom of anyone else at all.

A fact about a given object of choice which would seem to bear on whether our use of it affects the freedom of others is the possibility of it having a pre-existing connection with someone else. If an object were already in someone else's physical possession, it might seem as though there was a fact about that object which made my attempting to use it inconsistent with the freedom of another. But this presupposes the possibility that someone else could have already rightfully connected themselves to an object of choice. This possibility requires

that external objects be the kinds of things we could rightfully choose to use. The question at hand is whether external objects can be taken into our physical possession and made subject to our choices, or whether there is some intrinsic feature of these objects which would make attempts to form a practical relationship with them necessarily violate the freedom of others.

So, Kant points out that

> [w]hoever wants to assert that he has a thing as his own must be in possession of an object, since otherwise he could not be wronged by another's use of it without his consent. For if something outside this object which is not connected with him by rights affects it [the object], it [the affecter] would not be able to affect himself (the subject) and do him any wrong.[34]

In order for some third party to be affected by someone else's use of an object, that party must have already connected themselves to that object (by taking it into their grasp and choosing to use it.) We are not necessarily affected by others' use of objects which we are not connected with, and therefore are not necessarily wronged by such use.

The determination that there is no feature of physical objects which prevents us from rightfully using them leads naturally into the final claim of the reductio, (4). Here, Kant asserts that using an object of choice can be consistent with the freedom of others. This confirms the antecedent in the conditional from (3): if using an object of my choice actually is consistent with the freedom of others, then the negation of the postulate would restrict an action which was consistent with freedom on the basis of its not being consistent with freedom.

[34][MS AK 6:247]

The negation of the postulate thereby entails a contradictory conclusion and cannot be an accurate description of the possibility of rightful use of external objects. Instead, we can accept the postulate of practical reason itself as true and see that it really can be consistent with the freedom of all for us to take into our grasp and use physical objects.

4.

Up until this point, I have only been considering physical objects which are used by being physically directed in some manner. However, in section five, Kant points out that "[e]mpirical possession (holding) is…only possession in appearance (possessio phaenomenon)"[35] The real definition of merely rightful possession is a relationship such that "I would be wronged by being disturbed in my use of it [the object]even though I am not in possession of it (not holding the object)."[36] An object is my merely rightful possession just in case I am connected to it in such a way that others restrict my freedom by using it without permission, even when I am no longer physically connected to it.

Since we have determined that it can be consistent with the freedom of others (right) for me to use an object in my physical possession, when someone interferes with that object, they interfere with a rightful use of my body and therefore violate my innate right. The wrong that they do me does not imply any special relationship with an object at all: the wrong would be the same whether or not there was some other physical object involved. Kant confirms that my right with regard to empirical possession can be analytically derived from the Universal Principle of Right— it is just an instance of my innate right. The transition away from mere innate right must therefore be a transition away

[35][MS AK 6:249]
[36][MS AK 6:249]

from my physical person. What happens if the use I want to put my object to involves detaching it from my person?

In sections four and five of the first chapter, Kant adds more detail to a concept of possession which does not rely on physical connection with its object. In particular, he shows how removing consideration of our physical relationship to objects broadens the range of things we can use as means to our ends. In addition to the more familiar case of corporeal objects, Kant identifies two other classes of possession in the concept of external objects that could be mine.

In section four, Kant introduces the possibility of possessing another's choice to perform some action.[37] Because humans are able to alienate certain choices, those choices can come to be means to others' ends. Kant calls the transfer of a choice to perform some action a contract for that choice. Were people only able to possess things by having them in their empirical possession, he maintains, we could only say that we are in "possession" of another's choice at the moment when the good or service is being transferred or performed. This means we couldn't contract for future choices. The possibility of possession which is independent of my empirical relationship to the object (non-physical possession), however, allows for me to contract for a service to be performed at a later time, and in the interim still be able to say that the choice belongs to me.[38]

Following his discussion of contracts, Kant introduces an entirely new class of possession: the right to a person akin to a right to a thing.[39] This right is to the general status of others in one's household: spouse, children, and servants.

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[37] [MS AK 6:248]

[38] [MS AK 6:248]

[39] 'Von dem dingliche Art persönlichen Recht.' Also sometimes translated as 'the right to a person of a 'thing-ly' kind.' [MS AK 6:248 & 6:276]

The possibility of this kind of possession certainly requires more than what is been argued for in the reductio, since it couldn't be the case that these kinds of relationships require me to keep others in my physical possession at all times.[40]

In section five, Kant unites these three classes of possession under the single idea of 'that which is externally mine or yours.' Kant reiterates that for corporeal objects, the choices of others, and the status of others to be mine merely rightfully, it must be the case that "I would be wronged in my use of [them]…even though I am not in possession of [them] (not holding the object.)"[41] Sections four and five dramatically expand the concept of possession being used in the argument. A statement about possession which follows this expansion, therefore must be able to account for all three classes of possession (corporeal objects, choices, and the status of others). In particular, when the postulate of practical reason appears in section two, it does not refer to the latter two classes; when it appears in section six, it does. Ludwig's relocation of the postulate therefore changes its meaning, and in particular makes it accountable for a much broader use of the word 'mine' than when it appears earlier.

In order for me to be wronged by someone else's use of my object even when I am not physically connected to it, there must be some other relationship I can have with that object through which what affects it also affects me. The key to deducing the concept of merely rightful possession lies in identifying this new, non-physical relationship which I can have with my object— a relationship which Kant calls "intelligible possession."[42]

[40]Kant's category of 'rights to persons akin to rights to things' is one of his entirely original contributions to political philosophy, and hence takes much more space to discuss than can be offered in this paper. For two enlightening and interrelated accounts of this kind of property, see Ripstein 2009, pp. 70–77 and Pallikkathayil 2017.

[41][MS AK 6:249]

[42][MS AK 6:249]

Kant opens the deduction of merely rightful possession at the beginning of section six with three questions that guide the progress of the argument to come. He explains that "[t]he question: how is it possible for something external to be mine or yours? resolves itself into the question: how is merely rightful (intelligible) possession possible? and this, in turn, into the third question: how is a synthetic a priori proposition about right possible?"[43] These questions narrow the target of inquiry: for merely rightful possession to be possible, there must be a kind of intelligible possession which ties us to objects independent of our physical relationship to them. And for intelligible possession to be possible, we must be able to find some kind of proposition about right which is simultaneously synthetic and a priori.

Why does Kant introduce a question about synthetic, a priori propositions? In the second paragraph of section six, Kant explains that "all propositions about right are a priori propositions, since they are laws of reason (dictamina rationis)."[44] He goes on to explain that a proposition about right which referred only to empirical possession (as the postulate does) could be analytically derived from the concepts of right given earlier in the Rechtslehre. However, "a proposition about the possibility of possessing a thing external to myself, which puts aside any conditions of…space and time…is synthetic."[45] That is, a proposition of right about possessing an object I am not physically connected to requires something in addition to the concepts we have already gotten in the introduction of the Rechtslehre and the earlier parts of the chapter. This new synthetic concept is one which puts aside the empirical conditions of merely physical possession

[43][MS AK 6:249]

[44][MS AK 6:249-250] Note that not every proposition which refers to right will itself be about right— hence propositions which merely do the former can be a posteriori.

[45][MS AK 6:250]

and thereby extends our concept of right.[46]

According to Kant's descriptions, then, it seems as though the deduction of the possibility of merely rightful possession begins with finding a proposition about possessing objects, which does not take spatiotemporal facts under consideration. By producing such a proposition, we can begin to locate the possibility of intelligible possession and, in turn, merely rightful possession.

Consider a proposition about physical possession which we can determine (analytically) to be true. For example, it seems that certain kinds of uses of an apple (ones which don't interfere with the freedom of anyone else) can be right. We might, perhaps, pick an apple from a tree on a piece of unclaimed land in order to eat it. We can see that this activity is consistent with the freedom of others through the kind of analysis already practiced in the reductio: in particular, we look to the apple in our physical grasp and see that choosing to use it could be consistent with the innate right of others, since there is no feature of physical objects in themselves which make our using them affect others. Accordingly, it seems like we could say that it was right for me to eat the apple I have taken into my grasp. I am physically connected to the apple while I eat it, and so another person's interference with that activity would violate my

[46]How could a proposition about an object which is 'external to me' also set aside conditions of space and time? At the beginning of the first chapter, Kant actually gives us two ways of conceiving of an object's "being external to me." The first kind of externality is of an object that is "found in another location (positus) in space" from me.[MS AK 6:245] Up to this point, we have taken this distinction in spatial location between us and our external object of choice for granted. But Kant also maintains that there is another sense of an object's being external to me, in which the object is "merely distinct from me (the subject)."[MS AK 6:245] This kind of externality is captured in the distinction between myself and an object which results from my perceiving it as not included in my own subjectivity. Since certain kinds of metacognition are not subject to the a priori intuition of space (such as apperception), it is possible for me to conceive of an object's being distinct from me in this way, without having to evoke empirical considerations. This is the kind of externality which is invoked in the concept of merely rightful intelligible possession.

innate right and wrong me. Eating the apple is consistent with the freedom of everyone else, so I am permitted to hinder another person's attempt to interfere with my body while I do so.

In addition to being physically connected to the apple of my choice, I am also connected to it via my choice to use it as a means. When someone grabs the apple out of my hand, they interfere with my plan to eat it, in addition to my free exercise of my body. When the apple is being wrestled from me, I can no longer use it as a means to my end: I am prevented from performing the action of bringing the apple to my mouth to take a bite of it. In addition to affecting my body, the apple-grabber affects my ability to realize the choice I have made with my apple. This double-interference results from a double-connection to the object. I am physically connected to the object by attaching it to my person, and I am intelligibly connected to the object by attaching it to my will.

To form an intelligible connection with my object, I must incorporate it into my practical reasoning. I do this by choosing to employ it as a means to achieve some end; by taking the object under my control. In order for me to choose to use an object (take it under my control), that object must first be available for me to use: it must be an object of my choice. For an object to be an object of choice, it must be possible for me to affect that object. The way humans can affect objects is through physical interaction with them. An object must be in my physical possession for it to be an object of my choice which I could then take under my control and form an intelligible connection with by choosing to use it. Hence intelligible connection and intelligible possession of an object will only be possible after I have taken it into my physical possession.

After I have taken an object into my physical possession and started to

use it, my choice to continue using that object is not necessarily dependent on my continued physical possession of it. My intelligible connection with the object is based on my using it as a means to my ends, and though that process must be initiated by physical connection to the object, there are many ends I could continue to use the object as a means toward which do not depend on the continuation of that connection. Once I have grabbed my apple and decided to eat it, I may set it down while I get a knife to cut it. Despite the disruption in my physical relationship with the apple, I am able to continue my intelligible relationship with the apple so long as I continue to conceive of it as a means to my end. I could even choose to use my apple in a way that requires my physical separation from it: for example, storing it to use at a later time. Since I continue to conceive of my apple as a means, it remains in my intelligible possession. This intelligible possession is subject to disturbance when someone interferes with the apple, even if such an action does not affect my physical relationship with it.

The possibility that I can be disturbed in my use of an object, even when not physically connected to it, is not identical to the possibility of someone wronging me by using my object, even when I am not physically connected to it. The question remains whether my intelligible use of an object (use which can include but does not rely on physical connection with the object) is consistent with the freedom of others in accordance with a universal law. Hence the final step of the deduction of merely rightful possession is evaluation of the way one person's intelligible possession of an object interacts with the freedom of everyone else.

Let's turn to a specific case: I grab an apple off of a tree, and choose to eat it. The jurisprudential postulate of practical reason says that it is possible for

me to have a object of choice as mine, and therefore rightfully use it. Grabbing an apple off of a tree in order to eat it can therefore be right. More specifically, choosing to use the apple, when that choice co-occurs with my physical possession of the apple, can be right. In order to eat the apple, I set it down to get a knife and cut it. I continue to plan to use the apple, and hence hold it in my intelligible possession, even as it leaves my physical possession. Can this merely intelligible possession of the apple be consistent with the freedom of others?

The question is how the act of letting something out of my physical possession could transform the status of the intelligible possession which persists. For the status of my choice to use the apple to change, it would have to be the case that letting something out of my physical possession interfered with the freedom of others (and so made an action which was previously right, wrong). But there is no reason to think that letting something out of my physical possession is the kind of action which need affect others at all. The mere act of letting my apple out of my physical possession is not sufficient to transform my choice from one which was consistent with the freedom of others to one that interfered with the freedom of others. Since my choice to use the apple when it was in my physical possession was right, and letting the apple out of my physical possession doesn't transform the status of that choice, my use of the apple when it is out of my physical possession is still right. When I continue to use my apple even after I have set it down, I hold it in my intelligible possession. Hence intelligible possession of my apple can be consistent with the freedom of others, and therefore right.

The case above can be broken down in the terms Kant himself uses. We begin with an object in our empirical possession, the rightfulness of which is

determined by the postulate. We then remove the spatiotemporal conditions of empirical possession (holding the object) in order to identify the intelligible possession present in the case. We then extend the ruling of the postulate of practical reason to the case of intelligible possession of our object by determining that the intelligible possession of the object continues to be consistent with the freedom of others. As a result, we are able to isolate a kind of possession which occurs independent of the individual's physical relationship with the object, and determine that that possession can be consistent with the freedom of others and therefore right. Our end product is, then, merely rightful possession.

While the jurisprudential postulate of practical reason plays an important role in the deduction of merely rightful possession, it and its reductio occur quite early in the process. The postulate makes a claim about a specific use of a specific object, which is then used as a foothold when the time comes to answer questions about intelligible possession. The early role of the postulate is mirrored by its early presence in the first chapter. The argument here not only uses the sections in their original order but depends on their being in the original order. I take the existence of such an argument to cast doubt on Bernd Ludwig's claim that sense cannot be made of the first chapter when the jurisprudential postulate of practical reason occurs second, and to assert the opposite: that sense of the argument can only be made in the original order.

5.

Bernd Ludwig argued that Kant's deduction did not make sense in its original order because he believed that the postulate played a very different role

than the one I assign it. In the last part of this paper, I will turn to Ludwig's reconstruction of Kant's argument. I will identify an underlying (false) presupposition in his reconstruction which explains why he maintained that the deduction of the possibility of merely rightful possession is not completed in the sixth section unless the postulate of practical reason is moved there. Finally, in order to show why Ludwig's presupposition cannot be a part of an accurate reconstruction of the first chapter, I will turn to a highly influential modern interpretation of Kant's argument which also relies on this premise. This interpretation is especially enlightening, because it takes as its source material the 1996 Cambridge Edition, which incorporated the rearrangement of the first chapter.

Ludwig's claim that the second section of Kant's deduction should be moved to the middle of the sixth section is grounded in his presupposition that the postulate of practical reason is the product of that deduction—that it is a statement of the possibility of merely rightful possession. If the postulate is the product of the deduction of merely rightful possession, then it doesn't make much sense for it to appear four sections before the completion of the deduction which ought to produce it. It would make even less sense because, as Ludwig correctly noted, Kant continues to speak as though the deduction of merely rightful possession has not yet been completed in sections three, four, and five.

The relocation of the second section to the middle of the sixth therefore serves to support and encourage a reading of Kant's argument in which the postulate of practical reason is the product of the first chapter's deduction. Since this reading suggests that the postulate of practical reason is equivalent to the possibility of merely rightful possession, I will refer to it as an 'equivalence'

view of Kant's deduction. In his arguments for the reorganization of the first chapter, Ludwig consistently cites the ways that the original order doesn't seem to fit (or even make sense with) an equivalence view reading of Kant's deduction.

It is therefore no surprise that a reconstruction based on Ludwig's revised text would also embrace an equivalence view of Kant's deduction. One of the most prominent and well-developed examples of an equivalence view reading of Kant's deduction based on post-revision text is given by Arthur Ripstein in his 2009 book Force and Freedom. Because of the great detail given to the argument there, it is to this text that I will now turn in order to provide a more thorough examination of the mechanisms of the equivalence view. After reviewing Ripstein's argument, I will suggest that there are strong textual as well as argumentative reasons to think that neither it, nor the equivalence view in general, could be an accurate reconstruction of Kant's deduction.

In Force and Freedom, Ripstein begins his reconstruction of Kant's deduction of merely rightful possession by identifying the need for a new kind of right, beyond just innate right. He notes that Kant's claims in the introduction to the Rechtslehre about the right to bodily freedom are silent with regard to external objects humans might use.[47] The right to bodily freedom alone will therefore be insufficient to determine the rights surrounding the use of objects. Accordingly, Ripstein argues, we require a further principle about rights which extends rights beyond our body to external, 'acquired' rights (rights that require some extra act of acquisition to be realized, of which rightful possession is paradigmatic.) Ripstein calls this principle the "principle of acquired rights."[48]

[47]Ripstein 2009, p. 55.
[48]Ripstein 2009, p. 58.

According to Ripstein, the introduction of new rights regarding external objects, however, creates new ways "in which my choice and yours with respect to some object can be incompatible." "The potential incompatibilities," he continues, "are introduced by acquired rights…in addition to the constraints of innate right."[49] So Ripstein identifies the problem associated with having external objects as our own as one of negotiating between one person's possession of an object, and the freedom of everyone else.[50]

Ripstein does not see the establishment of the 'principle of acquired rights' as the central activity of Kant's argument, because he takes that principle to be postulated directly. He claims that Kant postulates this principle of acquired rights so that moral concepts regarding right can be extended to address external objects. Further, the principle must be postulated, because it cannot be proven by facts about external objects in the world, or the concept of right itself.[51] Ripstein claims that we must presuppose that there is a principle of acquired rights which makes it possible for rights to be extended beyond the body to external objects. This postulated principle of rights appears, according to Ripstein, under the name 'the postulate of practical reason.'[52]

Ripstein points out that because the principle of acquired right is postulated, its validity can be assumed without the requirement of proof. However, he does offer a 'normative argument' in support of the principle; an argument which suggests that if people really are able to incorporate external objects into their means, then the way that they do so must be consistent with right.[53] Rights to

[49]Ripstein 2009, p. 60.
[50]Ripstein 2009, p. 58.
[51]Ripstein 2009, p. 58.
[52]Ripstein 2009, p. 363.
[53]Ripstein 2009, p. 61.

the exclusive use of external objects would only threaten the freedom of others if they somehow deprived them of something that they already have. But external objects in the world, Ripstein claims, are not the kinds of things which people have intrinsically. Instead, they are merely "parts of the context in which they choose." To restrict the possibility of being able to use such objects rightfully would thereby limit possible free action on the basis of something other than the freedom of all.[54]

According to Ripstein, however, with the postulation of a principle of acquired rights comes a new possibility of conflict. "[T]he distinctive feature of acquired rights," Ripstein explains, is that "unlike your own body, the object of an acquired right could, in principle, belong as a matter of right to someone else."[55] This is captured in Kant's characterization of objects we can use as those which could be mine or yours.[56] Ripstein points out that this 'could be mine or yours' structure does not apply to bodily rights: "your right to your own person…could not, as a matter of right, belong to anyone other than you."[57] Rights to objects, on the other hand, could be mine or yours.

If an object is my possession, then it seems like I should be able to prevent others from using it. But, Ripstein notes, since those around me have the physical capacity to use my object, it seems as though my preventing them from doing so might be a restriction of their freedom. Our commensurate capacities to use objects in the world thereby set up "a potential further incompatibility between my deeds and your rights."[58] Since external objects could be mine or yours, it is possible for either one of us to make them ours. When I take an ob-

[54] Ripstein 2009, pp. 63–64.
[55] Ripstein 2009, p. 59.
[56] Ripstein 2009, pp. 58–59; [MS AK 6:246]
[57] Ripstein 2009, p. 59.
[58] Ripstein 2009, p. 61.

ject into my possession, I can thereby prevent you from using it— which seems to subtract a genuine possibility for you (namely, that you would make the object your possession and thereby prevent me from using it.)

How can this potential incompatibility be resolved? Ripstein claims that Kant answers this question in his "systematic account of the structure of the rightful relationship."[59] In this system, Kant shows how questions about who has the right to an object are answered by historical facts about actions taken with regard to the object.[60] In particular, the person who acts first to take an object into their possession is the one who gains a right to it and can prevent others from using it. Because an acquired right could be mine or yours, something is required beyond its mere possibility: the right "must be established through an affirmative act…[s]o long as the object of the right is something that can be acquired rightfully, and it has not already been acquired by another…"[61] The possible incompatibility of rights is resolved through the introduction of the acquisitive act: the action I take to use an object, when that object is the kind of thing that can be acquired rightfully.

In his analysis, Ripstein claims that the questions about objects in Kant's deduction of merely rightful possession are ones about coordination of use. Once it is determined that people could have rightful possession of object, new problems arise about which person can use what object rightfully, and when. The coordination discussion, however, relies on the possibility of merely rightful possession having already been established— or, as Ripstein sees it, having already been postulated. Ripstein takes the 'principle of acquired rights,' or the principle asserting the possibility of rightful possession, to be postulated in

[59] Ripstein 2009, p. 59.
[60] Ripstein 2009, p. 59.
[61] Ripstein 2009, p. 60.

the jurisprudential postulate of practical reason. Hence, his reading of Kant's argument is an equivalence view.

There are two connected reasons why I think we should reject Ripstein's reading of Kant's argument, and the equivalence view more generally. The first is textual: throughout the first chapter, Kant repeatedly characterizes merely rightful possession in ways which diverge from the postulate of practical reason. The second reason is argumentative: Kant characterizes the concept of merely rightful possession in ways that are distinct from the postulate because the claim made in the postulate has a much smaller scope than the concept of merely rightful possession.

At the beginning of the deduction of merely rightful possession in section six, Kant tells us that

> The possibility of this kind of possession [merely rightful], and so the deduction of the concept of nonempirical possession, is based on the postulate of practical reason with regard to rights…together with the exposition of the concept of an external object that belongs to someone, since that concept rests simply on that of nonphysical possession.[62]

But the postulate of practical reason cannot be both the conclusion of our deduction and also the basis of it; that would be no deduction at all. Since Kant refers to the postulate by name in section six,[63] there is no question that he takes the postulate to be the beginning of the deduction of the concept of merely rightful possession, and therefore not the end.

[62] [MS AK 6:252]

[63] „Die Möglichkeit eines solchen Besitz, mithin die Deduktion des Begriffs eines nicht-empirischen Besitzes gründet sich auf dem rechtlichen Postulat der praktischen Vernunft…“ [MS AK 6:252]

Kant's quote also brings into question the role of nonphysical (or intelligible) possession in Ripstein's equivalence view. If merely rightful possession and the postulate of practical reason are identical, then one of two things must be true. Either the concept of nonphysical possession is some kind of non-entity (and hence adds nothing to the postulate when combined) or the concept of nonphysical possession is somehow implicitly contained in the postulate of practical reason itself (hence there is a sense in which nonphysical possession served as partial basis of the deduction of merely rightful possession.)

Neither of these options seem particularly appealing. The claim that nonphysical possession doesn't add anything in the deduction of merely rightful possession is clearly a non-starter. This leaves us with the claim that the concept of nonphysical possession is somehow implicitly contained within the jurisprudential postulate of practical reason (which I take to be Ripstein's actual view). This position is also difficult to accept in light of Kant's quote: if the concept of nonphysical possession is implicitly contained in the postulate of practical reason, it is not clear why it would have to be brought together with the postulate in order to serve as the basis of the deduction. Even without Kant's explicit claim, however, review of the postulate of practical reason, its reductio, and the concept of intelligible possession reveal that the postulate cannot contain the concept of nonphysical possession.

According to Ripstein, the postulate of practical reason claims that it is possible for a person to have a right to some object such that another person can wrong him by interfering with it, even when the possessor isn't holding it. Although Ripstein takes the postulate to be 'incapable of further proof,' he also claims that

> The impossibility of further proof does not mean that Kant gives

> no argument for the postulate or reduces it to a stipulation. The normative argument is supposed to show that acquired rights are the only possible extension of the Universal Principle of Right to the situation in which there are external things that can be used by free persons in setting and pursuing ends.[64]

He argues that

> [T]he exercise of acquired rights is consistent with the freedom of others, because it never deprives another person of something that person already has. So anything less than fully private rights of property, contract, and status would create a restriction on freedom that was illegitimate because based on something other than freedom.[65]

Because external objects in the world are not the kinds of things that people are necessarily connected to (as they are their bodies), use of those objects doesn't deprive anyone of something that they 'already had.' Instead, other's rightful possessions (and their associated restrictions on our own actions) are just the context in which we make our own decisions. Restricting the possibility of possessing external objects would therefore have to be done on the basis of something other than the freedom of others. This restriction would be arbitrary, and therefore illegitimate.

In section three of this paper, I argued that we can make an independent determination that the use of external objects can be consistent with the universal principle of rights by means of direct observation. In Ripstein's language,

[64]Ripstein 2009, p. 61.
[65]Ripstein 2009, p. 62.

these objects are, perhaps, just part of the context in which everyone acts. I suggested that through direct observation of these objects, we can see that there is no feature intrinsic to them which makes their use inconsistent with the freedom of others.

In addition to addressing corporeal objects, however, Ripstein wants to make a similar kind of determination about Kant's two other classes of acquired right: contracts and status. He must do this, because Kant claims that the possibility of merely rightful possession includes possible ownership of these things. If the postulate is supposed to exhaust the possibility of merely rightful possession, it must also address the cases of contract and status. Since Ripstein's support for the postulate relies on the determination that use of a certain kind of object is consistent with the freedom of others, such a determination will need to be extended to contracts and the status of others.

The only way others can interfere with our freedom, Ripstein explains, "is by interfering with either the capacity to set or the capacity to pursue [our] ends."[66] If the objects we seek to possess are neither the capacity to set nor the capacity to pursue ends, our possessing them need not affect the freedom of others nor deprive them of what was already theirs at all. But Ripstein does want the range of possible objects to include others' capacity to set and pursue their ends— these capacities are just what we use when we contract with them or acquire their status. It is not entirely clear, then, whether using others' choices or status would be consistent with the freedom of others, and, in particular, consistent with the freedom of the individual in which such status or choices were instantiated.[67] After all, if our own choices and our body are not

[66]Ripstein 2009, p. 77.

[67]Kant himself thinks that it is not possible for us to directly evaluate the use of the choices or status of others, due to the epistemic opacity of the freedom on which they are based.[MS AK 6:252] I think, however, that this claim is intuitive even without reference to Kant's larger metaphysics.

part of our capacity to choose or set ends, then what is?[68]

This problem for Ripstein is a problem for the equivalence view more generally. If the postulate of practical reason is to capture merely rightful possession, it must speak about contracts and status, in addition to physical objects. If merely rightful possession is to be deduced and not merely stipulated, the argument in the first chapter needs to support it. However, a key element of that argument is the independent determination that having something as mine does not intrude on the freedom of others. Not only is there no way to form this kind of determination about the status and choices of others, but actually the opposite of this claim seems true: that having another's status or choice as our possession is just the kind of thing that would affect their freedom.[69]

The discovery that the support for the postulate cannot address all the

[68]I am not the first person to point out that the argument which supports the postulate of practical reason is insufficient to support the property classes of contract and status. For example, both Westphal 1997 and Mulholland 1990 observe that the independent determination that the choices and status of others can be had rightfully actually requires the presupposition of the possibility of merely rightful possession. Neither of these authors, however, take this as grounds to change the scope of the postulate (as I have.)

[69]Some proponents of the equivalence view take the independent assertion of consistency with the freedom of others from a different source. They maintain that Kant's later claims in sections eight and nine suggest that it is the entrance into a civil union with others that independently makes it possible for our use of the status and choices of others (and also physical objects) consistent with the freedom of others. According to this argument, if it is the common will of all which asserts an individual's right to use some object or choice or person, they aren't violating the freedom of anyone by doing so. Interestingly, Tuschling also seems to hold a view like this, not because he takes the postulate to be equivalent to the possibility of merely rightful possession, but rather because he takes the former to be analytically contained in the latter, and hence a synthetic proposition remains in need of an additional element.(Tuschling 1988, pp. 286–288) I am not certain if this argument works or not. However, in this paper I am looking at the deduction of the concept of merely rightful possession as it occurs in section six. A basic assumption that I make in order to progress is that Kant's own description of his section is accurate: that he actually deduces the concept in section six. Accordingly, the resources available to complete the deduction are only those which come before section six, which do not include the idea of the civil union or the common will. It also strikes me as strange that Kant would discuss the "[a]pplication to objects of experience of the principle that it is possible for something external to be mine or yours" in section seven, if he didn't finish deducing that principle until section nine. For some examples of an argument which appeal to the creation of the civil union, c.f. Guyer 2002 and Hasan 2018.

elements of merely rightful possession need not, however, distress us. The fact that the postulate might fall short makes space for a substantive contribution from the concept of nonphysical possession. And this is consistent with Kant's own account of how the deduction of merely rightful possession goes, because if the postulate can't address the entire range of things that merely rightful possession does, it is natural that a deduction based on it would require that something else be added.

Since there is insufficient textual ground to justify the relocation of the postulate of practical reason, and since the philosophical view which supports such a relocation (the equivalence view) is not the one Kant seemed to hold, we lose all reason to accept Ludwig's change. Instead, the reordering of the first chapter seems to only obfuscate Kant's actual deduction, which can only occasionally peek out from behind the equivalence view.

6.

Bernd Ludwig's relocation of section two into the middle of section six clearly encourages an equivalence view reading of Kant's deduction of merely rightful possession. After all, it was Ludwig's own acceptance of the equivalence view which served as a major motivation for his relocation in the first place. But, as I have argued in this paper, the equivalence view is not an accurate reconstruction of Kant's own deduction. Kant states clearly that he takes the postulate of practical reason to be a basis of the possibility of merely rightful possession, which rules out the possibility that it could be equivalent to it. Since the preponderance of exegetical evidence verifies the 1797 (consecutive) order of the first chapter, there is no remaining case available for the relocation.

When section two comes in its original location, between sections one and three, the scope of the claim in the postulate is reduced. It is only later (in sections four and five) that Kant brings the choices of others and their status into the realm of possible property. In the second section of the chapter, the reader does not expect the reductio to address anything other than the most straightforward use of an object. When the scope of the postulate's claim is reduced to physical possession of empirical objects, we then have sufficient resources to make a reductio argument in support of it. This reduction in the scope of the postulate of practical reason makes space for work to be done by a concept of intelligible possession. It is the postulate in combination with the concept of intelligible possession which extends the application of right to cases where the object of choice is not in our physical possession. The combination of these elements produces a synthetic, a priori principle according to which "any external object of my choice can be reckoned as rightfully mine if I have control of it."[70]

[70][MS AK 6:252]

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PAPER 2

PROVISIONAL GOVERNANCE AND PEREMPTORY RIGHTS

One of the key results of a community's transition from a state of nature to a civil union is a change in the nature of the property rights they enjoy. In the Rechtselhere, Kant tells us that, prior to entering into a civil union with those around us, our property rights are merely provisional. After we have joined together with our neighbors however, these rights become peremptory. The aim of this paper is to provide an analysis of Kant's account of provisional and peremptory rights, focusing especially on the restrictions of the merely provisional right, and the way that the transition into the civil union can transform it into a peremptory one.

Kant's reference to the state of nature and the social contract in his political works is not meant to be a historical account of the progress of human society. Instead, the function of the discussion is meant to consider what the laws of a civil union would have to be like if they had been created as a result of a social contract which brought us out of a state of nature.[1] One of the features of our modern state is the presence of property which we are allowed to exclude others from using. Where did all of this property come from? One story is that the property we have now is the result of the state dividing everything up amongst us. Another story is that we have property in virtue of our nature, and the state's job is to protect and coordinate our actions with regard to that property. The ways that a state can rightfully restrict us in our use of property is answered very differently depending on its role in that property's genesis, and different property systems seem more or less right depending on which origin story we accept.

[1] On the common saying... AK 8:297

The question about provisional rights in the state of nature is a question about the origin story of property in the civil union, and has great effect on our understanding of Kant's larger political philosophy. In this paper, I will begin by looking to Kant's description of provisional rights in the Rechtslehre, and identify a key difficulty in understanding the strength of these rights. After examining some modern efforts to diffuse this difficulty, I will offer a new reading of Kant's description of the state of nature which, I believe, ameliorates the apparent conflict. I will offer a new picture of provisional property rights in the state of nature, and then explain what makes these rights merely provisional, and not peremptory. Finally, I will discuss which elements of the social contract transform our provisional rights into peremptory ones, and describe the resulting peremptory rights which we then carry into the civil union.

1.

While in the state of nature, Kant claims that the rights individuals have to their property are merely provisional; once in the civil union, the same rights become peremptory. These merely provisional rights have an important role to play in the transition from the state of nature to a civil union. Kant claims that "[i]f no acquisition were cognized as rightful even in a provisional way prior to entering the civil condition, the civil condition itself would be impossible...So if external objects were not even provisionally mine of yours in a state of nature, there would also be no duties of right with regard to them and therefore no command to leave the state of nature."[2] Provisional rights in the state of nature, therefore, seem to be an important condition of the possibility of later peremptory ones. Later in the Rechtslehre, Kant argues that entry into the civil union doesn't actually

[2][MS AK 6:312]

change any of the rights that we had prior to it: all of the property rights we had in the state of nature carry through into the civil union. Instead, the civil union only changes the way that people relate to each other regarding these pre-existing rights.[3]

So what are these elusive rights, whose existence is so necessary for the establishment of the civil union, but who also must be transformed when they enter it? In the first half of the Rechtslehre, Kant introduces a distinction between having a peremptory right to an object and having a merely provisional right to it.[4] In the section titled 'In a state of nature something external can actually be mine or yours but only provisionally,' he asserts that

> Possession in anticipation of and preparation for the civil condition, which can be based only on a law of a common will, possession which therefore accords with the possibility of such a condition is provisionally rightful possession, whereas possession found in an actual civil condition would be peremptory possession.[5]

What is the actual character of this distinction? Kant explains that the possibility of peremptory possession

[3] [MS AK 6:306]

[4] provisorisch-rechtlicher Besitz and peremtorisher Besitz. 'Peremtorisch' is more commonly translated into English as 'conclusive' (see Kant 1991 for numerous examples), perhaps due to the obsolescence of the word 'peremptory' in English. However, the use of the more archaic term seems important here. 'Peremptory' better mirrors Kant's own language, and the word has a rich history in Roman jurisprudence which Kant was likely aware of when employing its German cognate. A peremptorium edictum (from the root peremptor) is an edict which 'destroys or precludes all debate, i.e. decisive, final.' See Dig. 5, 1, 70. Freund, 1879.

[5] [MS AK 6:257]

> can lie only in the idea of a will of all united a priori…which is here tacitly assumed as a necessary condition (conditio sine qua non); for a unilateral will cannot put others under an obligation they would not otherwise have. -But the condition in which the will of all is actually united for giving law is the civil condition…Hence original acquisition can only be provisional. -Peremptory acquisition takes place only in the civil condition.[6]

The difference between provisional and peremptory rights to an object seems to be importantly related to the fact that, prior to the union of our wills in the civil condition, possession of an object could only be an instance of my unilateral will putting all others under an obligation which they would not have otherwise had.[7] However, "my unilateral choice…cannot bind another to refrain from using a thing, an obligation he would not otherwise have; hence I can do this [possess an object] only through the united choice of all who possess it in common."[8] Once I enter the civil condition with those around me, we can choose to all put each other under the obligation to refrain from using objects which others possess, and the right that we have to those possessions becomes a peremptory one.

But this remains an account only of what provisional possession is not: it is possession which has not been ratified by the united will of a civil union. The question, then, is what provisional possession actually is: what are the permissions granted with regard to an object I only provisionally possess, and what features

[6][MS AK 6:264]

[7]"But the will that a thing (and so too a specific, separate place on the earth) is to be mine, that is, appropriation of it (appropriato) in original acquisition can only be unilateral [einseitig] (voluntas unilateralis s. propria). Acquisition of an external object of choice by a unilateral will is taking control of it." [MS AK 6:263]

[8][MS AK 6:261]

of this kind of possession correspond to its provisionality? These questions prove much harder to answer, in part because of an apparent tension between the descriptions Kant gives of provisional possession. On the one hand, he seems to claim that such possession is still 'real', that we really can bind others not to use our objects prior to our entry into the civil union. On the other hand, he often seems to claim that having a right to an object prior to a social contract would count as an impermissible, unilateral constraint on everyone else around me. In this paper, I give an account of provisional rights: the permissions they accord and the nature of their provisionality. I will begin by briefly turning to Kant's account of possession in the first chapter of the Rechtslehre, paying specific attention to the role of the postulate of practical reason as lex permissiva which makes rights to objects possible. I will then turn to the current scholarship on provisional rights in the Rechtslehre in order to show the approach taken there to negotiate the relationship between the postulate of practical reason and the problem of unilateral obligation. I suggest that this kind of view finds the wrong source of the provisionality of property rights in the state of nature. Instead, I will suggest an alternate account of provisional right according to which all of the features required for it to be a true right are met. The source of provisionality of the right instead lies in its being potentially subject to revision in order to fulfill our duty to enter into a civil union with those around us. This sense of provisionality is drawn out by its counterpart right being peremptory, as in no longer subject to debate or revision.

2.

In §6 of the first chapter of the Rechtslehre, Kant deduces the 'possibility of merely rightful possession.' Kant explains that "that is rightfully mine (meum iuris) with

which I am so connected that another's use of it without my consent would wrong me."[9] He continues by explaining that "something external is mine if I would be wronged by being disturbed in my use of it even though I am not in [physical] possession of it (not holding the object)."[10] The question becomes one of how a relationship with right can be established with an object, even when we are not in physical contact with it.

Kant's methodology in his deduction is to combine two elements: the first is the postulate of practical reason, a lex permissiva whose truthfulness he examines in §2 of the chapter.[11] The second is the concept of intelligible possession, whose possibility and nature he analyzes in §5 and §6 of the chapter.[12] The postulate of practical reason with regard to rights states

> [i]t is possible to have any outer object of my choice as that which is mine; that is, a maxim according to which, if it were a law, an object of my choice must in itself (objectively) be ownerless (res nullius) is contrary to right.[13]

Since, according to Kant, "an object of my choice is something that I have the physical power to use," the postulate means that it is possible for another person to wrong me by using an object which I have physically connected myself to (in order to use).[14] If someone were able to wrong me by attempting to use an object

[9] [MS AK 6:245]

[10] [MS AK 6:249]

[11] §2. Postulate of practical reason with regard to rights. [MS AK 6:246-247]

[12] §5. Definition of the concept of external objects that are mine or yours. [MS AK 6:248-249] and §6. Deduction of the concept of merely rightful possession of an external object (possessio noumenon). [MS AK 6:248-252]

[13] [MS AK 6:246]

[14] [MS AK 6:246]

which I had already begun to try to use, it must be the case that my taking something into my physical power (connecting myself to the object physically so that I might subject it to my choice) was itself right.[15]

I have offered extensive analysis of the meaning of the postulate of practical reason, its truthfulness, and its role in the deduction of merely rightful possession in other writing. For the purpose of this paper, therefore, I will only draw out a few points which I take to be highly relevant to the future discussion and set aside any further investigation. The first point I would like to draw attention to is the exact nature of the claim Kant is making in the postulate. In the first place, since the objects mentioned are ones which I have the physical power to use, the claims are restricted to ones in my physical control. This means that the kind of object is constrained: I cannot have an intellectual object in my physical control (as in ideas), and I cannot have another's choice in my physical control (as in contracts). The kinds of things I can exert physical control over are those I can make physical contact with, and this category seems to be largely filled by physical (corporeal) objects in the world, like apples or pens or books. So the postulate makes a claim about a very limited range of objects which might be mine,

The second point is that the postulate rejects the rightfulness of a law which says that an object in itself would have to be ownerless. That is, that there is some feature of an object which I could have in my physical possession which would itself make it contrary to right for me to have as mine. Kant expands on this point a bit more in the section following the postulate of practical reason, where he maintains that

[15] This is captured in a later definition Kant gives of what is externally mine, as that "which it could be a wrong (an infringement upon my freedom which can coexist with the freedom of everyone in accordance with a universal law) to prevent me from using as I please." [MS AK 6:248-249]

> [w]hoever wants to assert that he has a thing as his own must be in possession of an object, since otherwise he could not be wronged by another's use of it [the object] without his consent. For if something outside this object which is not connected with it by rights affects it, it [the third thing] would not be able to affect himself (the subject) and do him any wrong.[16]

In order for something which affects an object to affect someone else, that object must be externally connected to that person– either physically, or by right (by being their possession). There is nothing internal to a corporeal object which necessarily connects it with other people, meaning there is nothing internal to a corporeal object which necessarily affects other people. This, in turn, means that there is nothing internal to a corporeal object which necessarily affects the freedom of those around me were I to affect the object by choosing to use it. Because of this, it is possible that my taking an object into my physical possession (and thereby making it subject to my physical power) can be consistent with the freedom of others in accordance with a universal law.

Kant continues the deduction of merely rightful possession in the first chapter of the Rechtslehre by introducing the concept of intelligible possession. By abstracting away from the empirical conditions of physical possession, one can come to see that, in choosing to use an object I have physical power over, I also attach that object to my will. Insofar as my will employs the object as a means to my end, it has a continuous connection with that object independent of my physical relationship to it. Kant calls this connection between the object and the will that employs it 'intelligible possession' of the object.[17] The possibility of intel-

[16] [MS AK 6:247]
[17] [MS AK 6:250-252]

ligible possession of an object has two further implications: the first is that my connection to an object does not end with my physical connection to it, since I can continue to employ an object as a means to my end without needing to have physical power over it. The second is that I can be affected by something which affects the object even when I am not physically connected to it, since another's affecting the object can disturb my use of it to achieve some end– hence Kant often refers to the wrong that another does me in interfering with my possessions as interfering with my use of them.[18]

Kant deduces the rightfulness of intelligible possession (which he sometimes calls 'merely rightful possession') from the permission in the postulate of practical reason. If it was consistent with right for me to use an object in my physical possession, then the part of that use which consists of attaching my will to the object must have also been right. That is, since intelligible possession is implicitly present in "hav[ing] any external object of my choice as that which is mine" the possibility of intelligible possession's being consistent with right is also secured by the truth of the postulate of practical reason.[19] While the postulate of practical reason does not itself consist in the possibility of merely rightful possession, it is clear that as a permissive law it is an essential and central condition of such a possibility.

In the introduction to the Rechtslehre, Kant explains the concept of a right contains a permission to coercively enforce that right. He explains that "[s]trict right rests…on the principle of its being possible to use external constraint that can coexist with the freedom of everyone in accordance with universal laws."[20] It would ordinarily be inconsistent with the freedom of another for me to physically

[18]"that outside me is externally mine which it could be a wrong…to prevent me from using as I please." [MS AK 6:248-249]

[19][MS AK 6:252]

[20][MS AK 6:231-232]

interfere with an action they were trying to perform. Were I to wrench an apple out of someone's hand, I would be violating their freedom– wronging them. However, when I have a right to that apple, this interference with the other's action is no longer wrong. My right to the apple permits me to use otherwise impermissible force to bring my possessions back under my control. The deduction of merely rightful possession therefore shows that it can be consistent with right to physically prevent others from using my possessions without my permission, since such a use of my objects would itself be a wrongful act. This permission corresponds to the obligation that all others have not to use what is mine (not to wrong me), since I exercise the constraint in such an obligation when I prevent another from performing an action they otherwise could have.

3.

All the same, the possibility of merely rightful possession of an object in the state of nature will only ever be the possibility of a provisional right to an object. Now that we have a sense of the right which is being modified by provisionality and peremptorality, we can turn to the question of what such a modification actually amounts to. The problem we encounter here, however, is that Kant seems to say a number of apparently contradictory things about provisional right in the state of nature.

On the one hand, it seems as though provisional right must carry the permissions identified in the deduction of merely rightful possession, since neither element of this deduction (the postulate of practical reason and the concept of intelligible possession) seem to refer to the presence of a unified will. Indeed, Kant says that

> provisional acquisition is true acquisition;[21] for, by the postulate of practical reason with regard to rights, the possibility of acquiring something external in whatever condition people may live together (and so also in a state of nature) is a principle of private right.[22]

He also says that

> there is also a rightful capacity of the will to bind everyone to recognize the act of taking possession and of appropriation as valid, even though it is only unilateral. Therefore, provisional acquisition of the land, together with all its rightful consequence, is possible.[23]

But it also seems as though provisional right in the state of nature is in some sense a restriction of the right described in the deduction of merely rightful possession. Per the quotes in the first section of this paper, this seems to be related to the fact that in taking an object into my possession, I unilaterally authorize myself to coercively prevent others from using that object. By taking an object into my possession, I make another's use of it, which previously could have been consistent with right, wrong. This obligation (which, according to Kant, is necessarily connected to and even contained in the concept of a right) might be a problem in the state of nature, because others' actions are restricted based on my arbitrary choice, which makes it seem as though such an arbitrary choice could not be consistent with the freedom of others. Indeed, Kant points out that

[21] eine wahre Erwerbung

[22] [MS AK 6:264]

[23] [MS AK 6:267]

> [A] unilateral will cannot serve as a coercive law for everyone with regard to possession that is external and therefore contingent, since that would infringe upon freedom in accordance with universal laws. So it is only a will putting everyone under obligation, hence only a collective general (common) and powerful will, that can provide everyone this assurance.[24]

And Kant continues on to say that this unilaterality might interfere with the entitlement one has to acquire objects in the state of nature:

> But the rational title of acquisition can lie only in the idea of a will of all united a priori (necessarily to be united) which is here tacitly assumed as a necessary condition (conditio sine qua non); for a unilateral will cannot put others under an obligation they would not otherwise have.[25]

So we seem to find ourselves at a kind of impasse in understanding provisional right: on the one hand, the right is deduced from the postulate of practical reason and seems to permit possession of objects without any reference to a universal will. On the other hand, Kant clearly thinks that when we exercise this right in a state of nature, we put others under an impermissible unilateral, unidirectional obligation. What to do?

4.

[24] [MS AK 6:256]
[25] [MS AK 6:246]

It seems as though the meaning of 'provisional' can fall between two extremes. On one extreme, the provisionality of a right might totally deprive it of the compulsory (obligating) force which usually backs a right, since that force would be applied unilaterally. On the other extreme, the provisional right might have just as much compulsory force as any 'non-provisional' right, since that seems to be contained in the possibility of merely rightful possession. Since the former seems to eliminate the possibility that the provisional right could really be a right, and the latter the possibility that it was really provisional in some sense, modern interlocutors have worked toward identifying middle points (some stronger, some weaker) at which they claim there is textual justification to believe the strength of the provisional right ends.

In his 2018 paper, "The Provisionality of Property Rights in Kant's Doctrine of Right," Rafeeq Hasan offers a rather neat way of dividing up the views in the current secondary literature. He takes arguers to generally fall into either 'weak' or 'strong' provisionality camps, based on the degree to which they take the 'provisionality' of the right to limit its effectiveness.[26] 'Weak provisionality' means that the provisionality of the right in the state of nature is weak, and therefore the restrictions placed on the permissible use of force are small. The advocate for weak

[26]Hasan uses this analysis in his paper as part of his case for rejecting this kind of 'polar' approach more generally. Indeed, he suggests that one feature of the positive view of provisionality which he offers in his paper is that it escapes a form of argumentation which has led, so far, only to impasse. This is a creative move which results in a creative view, but I am not sure that such a goal is necessary, nor that Hasan achieves it. True, Hasan defines 'strong' and 'weak' provisionality in such a way that the technical details of his view do not fall under either description– although some of these distinctions miss some of the nuances in the works placed on either side, and the reader suspects that they may be there more in order to meet Hasan's structural goals rather than his argumentative ones. On the more general reconstruction of Hasan's playing-field given above, his 2018 view would clearly fall on the 'weak provisionality' side of the argument, and the view given in Stone and Hasan 2022 is a clear example of strong provisionality. For my part, I don't take this to be a true defect in Hasan's 2018 argument– I will argue for a view which Hasan might consider an 'extremely weak' form of provisionality. Moreover, I don't regret that Hasan framed his argument as he did, since it is a very helpful way to give an overview of the dialectic.

provisionality therefore argues that the provisional right carries much of the force of a peremptory one. 'Strong provisionality' is its opposite– the provisionality of the right in the state of nature has a great deal of effect on it, largely constraining the possibility of the right placing an obligation on others.[27] Actually, some of the authors in the 'strong provisionality' camp take provisional rights to not really be rights at all, but instead outlines of the structure property rights might have at a future (post-social contract) time.[28]

In addition to the quotes pointed out earlier, supporters of the 'null-hypothesis' (that provisional rights are not really enforceable rights at all) often point to the following place in Kant's text

> No one is bound[29] to refrain from encroaching on what another possesses if the other gives him no equal assurance that he will observe the same restraint toward him. No one, therefore, need wait until he has learned by bitter experience of the other's contrary disposition; for what should bind him to wait till he has suffered a loss before he becomes prudent, when he can quite well perceive within himself the inclination of human beings generally to lord it over others as their master (not to recognize the superiority of the rights of others when they feel superior to them in strength or cunning)? And it is not nec-

[27]Hasan 2018, pp. 2–4

[28]For examples of this kind of view, see Waldron 1996, Ripstein 2009, Flikschuh 2000, or Stone and Hasan 2022. The shared conclusion is summarized well in Ripstein's words: "[i]t is in this sense [as an idea of reason] then, that property can be understood in terms of the state of nature: both its relation to freedom and the characteristic violations of it can be explicated without reference to positive legislation. That does not mean that property can be acquired, or its norms be applied to particulars or enforced in the absence of a rightful condition. It means only that the form of interaction in which property rights constrain the conduct of others does not depend on positive law." Ripstein 2009, p. 87.

[29]Niemand ist verbunden...

> essary to wait for actual hostility; one is authorized to use coercion against someone who already, by his nature, threatens him with coercion.[30]

It seems extremely plausible that, by this quote alone, Kant means that no one is bound by the wrongfulness of their action not to interfere with others' possessions in a state of nature (where no general laws are known to be followed which could give parties assurance of how their neighbors would act).[31] To have a right to an object makes others' unpermitted encroachment on that object wrong, so it seems as though, in a condition where no one's unpermitted encroachment on that object is wrong, no one has any rightful possession of things. Kant's claims here could be part of a powerful case against the strength (or reality) of provisional rights.

I maintain that we should reject this reading of Kant's claim. I believe that this quote can be made sense of best in Kant's discussion of the necessity of the transition from the state of nature to the civil union. In particular, I take him to be making a point about certain necessary practical features of human freedom in individuals, and not about the strength of rights in the state of nature. I will offer a fuller explanation of this interpretation a little later in the paper, when I discuss the transition from the state of nature to the civil union. However, I do think that there are additionally several substantial textual considerations which suggest that we should be suspicious of the 'self-evident' nature many readers seem to attribute to the quote.

[30] [MS AK 6:307]

[31] This seems to be the major positive argument against the reality of provisional rights in Stone and Hasan 2022, combined with a rather confusing and uncharitable reading of Kenneth Westphal's analysis of the postulate of practical reason in Westphal 2002. Indeed, for an account of the postulate of practical reason which bears more resemblance to the one addressed in Stone and Hasan 2022, see Gerber 2019. This paper also includes an analysis of the postulate that is clearly not harmed by the kind of objection Stone and Hasan seem to lob at it.

There are two strong textual reasons to be circumspect in reading Kant's claim about the impossibility of binding others in a state of nature as being about provisional right. First, Kant does not mention provisional or peremptory right in this paragraph or the surrounding ones. Indeed, this paragraph appears at quite a distance in the text from the discussion of provisional rights. Kant introduces the topics of unilateral obligation and provisional rights in §§8 and 9 [MS AK 6:255], and then continues to refer to and discuss them regularly through to the end of the first section of the Privatrecht, at MS AK 6:270. He then discusses contract right, the rights to a person akin to a right to things, money, books, 'ideal acquisition of an object of choice' (like inheritances), recovery of lost things, acquiring guarantees by oath, and the transition to discussion of a 'rightful condition generally'– none of which make reference to provisional or peremptory rights. It is only after all of this, in the second to last paragraph of the entire Privatrecht [§42; MS AK 6:307] that Kant returns to the discussion of rightful possession. And the sections following the quote also don't refer to provisional or peremptory right; the topic doesn't come up again until 6:312 (now in the second part of the Rechtslehre: öffentliches Recht) where Kant asserts that "if external objects were not even provisionally mine or yours in the state of nature, there would also be no duties of right with regard to them…" [32]

Instead of appearing in his analysis of private and peremptory rights, the discussion of being bound by another's action appears in a short section on the distinction between formal and material wrongs in interpersonal relationships. Kant gives two other example actions in the section: people who fight amongst one another in a state of nature, and armies which try to trick their enemies by violating the norms

[32] [MS AK 6:312]

of warfare to gain the upper hand.[33] In these cases, Kant argues that the actions can really be described as both right and also, at the same time, wrong. They can be viewed as right insofar as the relevant actors hold themselves and others to the same set of (wrong) principles. But the actions are wrong, and more seriously wrong (indeed, "wrong in the highest degree"), because in using the principles that they do, the actors "take away any validity from the concept of right itself and hand everything over to savage violence, as if by law, and so subvert the right of human beings as such."[34] If we take the case of encroaching on others' land to be like the cases it appears next to, then it seems as though Kant might be saying that doing so is 'wrong in the highest degree', or at least not right in the sense that the action conforms with the universal principle of right.[35]

5.

The 'null-hypothesis' view lies at the extreme end of the 'strong provisionality' pole of the argument. There are, however an even greater number of views which fall at different points along the scale, differentiated by the degree of restriction they take the claim of 'provisionality' to exercise on merely rightful possession.[36]

[33] [MS AK 6:307-308]

[34] [MS AK 6:308]

[35] Hasan 2018 is one of the few writers who engages with this quote in context, and he uses the discussion surrounding it to support his own view, which is certainly not a 'no-right' view. Instead, he sees the material as substantiating his claim that the obligation which corresponds to the provisional right is first to enter into a civil condition with those around you, and only second to refrain from using a particular object.

[36] The degrees of strength naturally get cashed out in different ways by different authors. For example, both Guyer 2002 (weak provisionality) and Hasan 2018 maintain that the right to possession of property in the state of nature is conditioned by its being "one that could be agreed to through a common or united will by all who could also claim it" Guyer 2002, p. 62 or when "agents are acting in such a way as to bring about a public condition" Hasan 2018, p. 18. The effects of this play out in slightly different ways: Hasan thinks that the permission to coerce others not to infringe on our property rights is only given in the case where they refuse to enter a civil union with us, whereas Guyer thinks we can coerce others not to use our property if our rights are "claimed with an eye to the creation of the civil condition" Guyer 2002, p. 63.

What these views have in common is the underlying thought that Kant generates a proof about the possibility of using objects vis a vis their status as such, and then subsequently amends that proof when it is considered from the perspective of interpersonal obligations.

I would like to suggest that it is a mistake to think that the 'provisionality' of property rights in the state of nature arises directly from a constraint on our capacity to coerce those around us. I think that this point can be made in two ways. First, I want to suggest that the proof of the postulate of practical reason and the deduction of merely rightful possession are a kind of 'all-or-nothing' deal. That is, if taking possession of objects in the state of nature were to place problematic demands on those around us, then such possession would not be possible at all– possession would not even be provisionally possible. Since Kant says that provisional possession in a state of nature is possible, and that it corresponds to true acquisition, I take this to be a highly unsatisfactory result. Instead, I will offer an alternate resolution to the difficulty of unilateral obligation, one which can take place in the state of nature. This means that although there may be attempts to take possession of objects in the state of nature which place unilateral obligations on others, such an attempt need not necessarily do so, and when it does not, it can be an instance of provisional possession. The upshot of this view is that the provisionality of possession in the state of nature does not lie in its being restricted by the problem of unilateral obligation of those around us.

If Kant's claims about the unilaterality of obligation in the state of nature are meant to bear on the postulate of practical reason, they would actually entirely undermine the truth of the postulate. Kant says that the postulate of practical

reason is true because, otherwise, "freedom would be depriving itself of the use of its choice with regard to an object of choice, by putting usable objects beyond any possibility of being used; in other words, it would annihilate them in a practical respect and make them into res nullius, even though in the use of things choice was formally consistent with everyone's outer freedom in accordance with universal laws."[37] This means that denying the postulate of practical reason would mean that we could not use objects of our choice, on the hypothesis that such a use would conflict with the freedom of others. But this denial of the postulate is met with contradiction through the actual fact that use of objects of our choice need not conflict with the freedom of others. The denial of the postulate therefore directs us to act in a contradictory manner: to treat something whose use was consistent with the freedom of others as though its use were not consistent with the freedom of others.[38]

For this argument to go through, it must be a matter of fact that using some objects of choice need not interfere with the freedom of others. However, if acquiring an object in a state of nature placed a unilateral obligation on those around us, it seems as though it isn't true that using an object of choice need not interfere with the freedom of others. In fact, the opposite would seem to be the case: that any attempt to use an object of our choice would necessarily restrict the freedom of others, by unilaterally placing an obligation on them which they would not have otherwise had. In denying the possibility of having an object as mine, freedom would therefore not be constraining itself from performing an action which was in fact consistent with the freedom of others– freedom would be instead constraining itself from performing an action that was inconsistent with the freedom of others. But this is exactly the way that the freedom of others is supposed to constrain

[37][MS AK 6:247]

[38]For a more detailed explanation, see Gerber 2019, pp. 13–16.

us, and no contradiction is generated. We would have no reason to reject a denial of the postulate; instead, denial of the postulate would seem to capture real facts about the world.

But it is evident from the text that Kant does not think the postulate of practical reason ceases to be true in the state of nature. For example, at §13, Kant says that "any piece of land can be acquired originally," a proposition which "rests on the postulate of practical reason (§2)."[39] He continues by asserting that "[i]n original acquisition, the act required to establish a right is taking control (occupatio)...No insight can be had into the possibility of acquiring in this way, nor can it be demonstrated by reasons: its possibility is instead an immediate consequence of the postulate of practical reason."[40] Kant continues to treat the postulate of practical reason as applicable through the remainder of the Privatrecht; in §15 he maintains that "provisional acquisition is true acquisition; for, by the postulate of practical reason with regard to rights, the possibility of acquiring something external in whatever condition people may live together (and so also in a state of nature) is a principle of private right..."[41] And in the 'deduction of the concept of original acquisition,' Kant asserts that "possession is nothing other than a relation of a person to persons, all of whom are bound, with regard to the use of the thing, by the will of the first person, insofar as his will conforms with the axiom of outer freedom, [and] with the postulate of his capacity to use external objects of choice..."[42]

In addition to Kant's specific references to the postulate in the Privatrecht, we have to consider the way he chose to structure the Rechtslehre as a whole. If

[39] [MS AK 6:262]
[40] [MS AK 6:263]
[41] [MS AK 6:264]
[42] [MS AK 6:268]

the postulate of practical reason's argument is only valid once people have joined together in a civil union, why place that argument in the very beginning of the Privatrecht? Why include a deduction which depends on the truth of the postulate of practical reason in a section where that truth cannot yet be shown? Indeed, why spend two of the three chapters in the Privatrecht explaining all of the different applications of the postulate and the deduction it enables, prior to being able to prove any of it?

The postulate of practical reason, the deduction of merely rightful possession, and the acquisition of external things all have to be included in the Privatrecht because they are the basis on which the necessity of öffentliches Recht arises at all. In the 'transition from what is mine or yours in a state of nature to what is mine or yours in a rightful condition generally,' Kant describes public justice as including

> [F]irst, merely what conduct is intrinsically right in terms of form (lex iusti); second, what [objects] are capable of being covered externally by law, in terms of their matter, that is, what way of being in possession is rightful (lex iuridica); third, what is the decision of a court in a particular case in accordance with the given law under which it falls...The first and second of these conditions can be called the condition of private right, whereas the third and last can be called the condition of public right. The latter contains no further duties of human beings among themselves than can be conceived in the former state; the matter of private right is the same in both. The laws of the condition of public right, accordingly, have to do only with the rightful form of their association (constitution), in view of which these laws must necessarily

be conceived of as public.[43]

He elaborates on this at the beginning of Öffentliches Recht, where he claims that

> If no acquisition were cognized as rightful even in a provisional way prior to entering the civil condition, the civil condition itself would be impossible. For in terms of their form, laws concerning what is mine or yours in the state of nature contain the same thing that they prescribe in the civil condition, insofar as the civil condition is thought of by pure rational concepts alone...So if external objects were not even provisionally mine or yours in the state of nature, there would also be no duties of right with regard to them and therefore no command to leave the state of nature.[44]

Possession of objects is made possible by the postulate of practical reason, and we must have possessions prior to entering into the civil union because otherwise, according to Kant, it would be impossible to do so. A conception of the problem of unilateral acquisition which undermines the postulate of practical reason therefore simply cannot accurately describe the provisionality of property rights in the state of nature.

[43] [MS AK 6:306]

[44] [MS AK 6:312]; – Es würde also, wenn es im Naturzustand auch nicht provisorisch ein äußeres Mein und Dein gäbe, auch keine Rechtspflichten in Ansehung desselben, mithin auch kein Gebot geben, aus jenem Zustand herauszugehen. Note here that the duty of right arises from the provisional mine or yours in the state of nature, which suggests that they must impose some form of obligation there.

6.

I think that there is a way of reading Kant's claims about provisionality that does not involve some kind of restriction on the permissive principle in the postulate of practical reason. While it is true that some instances of taking possession in the state of nature would impose a unilateral obligation on others, it turns out that such an act need not do so. It is possible, while still in the state of nature, to take possession of an object in a way that counts as an instance of a preexisting omnilateral obligation. In order to see this, we will need to return to Kant's original discussion about possession and provisional rights in the second chapter of the Rechtslehre.

In §17. Deduction of the concept of original acquisition, Kant claims that

> [P]ossession is nothing other than a relation of person to persons, all of whom are bound, with regard to the use of a thing, by the will of the first person, insofar as his will conforms with the axiom of outer freedom, with the postulate of his capacity to use external objects of choice, and with the lawgiving of the will of all thought as united a priori.[45]

When we disregard the corporeal object which is being possessed, we can better see the nature of the interpersonal relationship which constitutes rightful possession of objects. And this relationship consists in the binding of all others by means of three connected components: first, the choice of the individual to use an object in accordance with the axiom of outer freedom. Second, the postulate of practical

[45] [MS AK 6:268]

reason, which posits the possibility of an individual's using an external object, and, finally, the "lawgiving of the will of all" which is thought of, a priori, as united. A complete understanding of the possession therefore requires understanding not only of these three separate elements, but also the way that they interrelate to create something entirely new. In order to bring these specific interrelations to the fore, I will actually address these elements in the reverse order: first, the lawgiving will of all united a priori, second, the constraint that the postulate of practical reason places on this will, and finally, the way the individual can realize this will of all in their individual choice to take some object as their own.

What is the lawgiving will of all which can be thought of as united, a priori? It cannot be the general will created in some actual civil union, since the existence of that will is subjectively contingent on historical events in the world. But here, Kant explains, "the rational title of acquisition can lie only in the idea of a will of all united a priori (necessarily to be united.)"[46]

In the Kritik der reinen Vernunft, Kant offers an extended analysis of what kind of thing should count as an idea. There, he points out that "[a] concept is either an empirical or pure concept. The pure concept, in so far as it has its origin in the understanding alone (not in the pure image of sensibility) is called a notion. A concept formed from notions and transcending the possibility of experience is an idea or concept of reason."[47] He encourages us to follow Plato's use of the term, pointing out that "[f]or Plato, ideas are archetypes of the things themselves...In his view they have issued from the highest reason."[48]

Kant (following Plato) emphasizes that the ideas we form of things are not

[46][MS AK 6:264, emphasis mine]
[47][KrV AK A320/B377]
[48][KrV AK A313/B370]

derived from our experiences of them; instead, they are the products of reason against which we can evaluate given experiences. The idea of the will of all united a priori, therefore, is not some imaginary representation of a specific civil union in the future, since this could only ever be an example of a united will, and not the idea of it. Answering the question of what could be contained in the idea of the united will of all (the kind of will through which a group of people could give themselves their own laws) is therefore an activity of conceptual analysis, and not predictions about group psychology.

Insofar as the united will of all is a kind of will, the laws which hold for the will (practical reason) must hold for it. The laws described in the first half of the Rechtslehre (Privatrecht) therefore continue to apply after the community transitions into a civil union. These laws would include, for example, the Universal Principle of Right, according to which any action is right if it can coexist with everyone's freedom in accordance with a universal law. The Universal Principle of Right holds for actions occurring outside the civil condition: those which are consistent with the freedom of others are right. But the Universal Principle of right also applies to the actions in the civil condition: the actions of a citizen which are not consistent with the freedom of others are not right. The lawgiving in the civil condition, which is there administered by the united will of the citizens, is itself constrained by the principles of correct lawgiving– such as the Universal Principle of Right. The united will of the civil union could not, for example, call right everything which arose from people's needs (the right of necessity), since that law would conflict with the Universal Principle of Right. The united will of the civil union could also not call it wrong for an individual to exercise their innate right to free use of their body, when such a use is consistent with the freedom of others.

But the innate right to the use of our bodies is not the only principle of right

which constrains the will. As shown earlier, there is a also the postulate of practical reason, a permissive law according to which we could “put all others under an obligation…to refrain from using certain objects of our choice.”[49] Kant explains further that “[r]eason wills that this [the postulate of practical reason] hold as principle, and it does this as practical reason, which extends itself a priori by this postulate of practical of reason.”[50]Any individual will is constrained by the postulate of practical reason, and therefore so must any larger, united will (since such a will remains similarly bound by the constraints of practical reason). Moreover, since the postulate of practical reason applies to the will a priori, it will be a priori true of the united will of all that it is constrained by the postulate of practical reason. We could therefore know that the idea of a united will of all carries with it the constraint on action which arises from the postulate of practical reason.

In §6 of the first chapter of the Rechtslehre, Kant deduces the possibility of merely rightful possession from the postulate of practical reason combined with the concept of intelligible possession. Neither the concept of intelligible possession nor the postulate of practical reason carries features which would restrict their applicability only to the will of the individual. Instead, both apply to a united will of all as an instance of practical reason. Hence merely rightful possession can be deduced, a priori, as possible for the united will of all. We can therefore know, a priori and from the idea of a united will alone, that such a will would be constrained by the possibility of merely rightful possession (that is, treat merely rightful possession as possible), since that possibility holds axiomatically for practical reason.

[49][MS AK 6:247]
[50][MS AK 6:247]

7.

With this, we have two of the three elements Kant stipulates as necessary for the possibility of acquiring objects. The lawgiving will of all thought of as a priori carries with it, when examined, the constraint of the postulate of practical reason to act as though it were possible for an object to become mine or yours. The final element required is the actual choice of some individual to take something as their own: without such a choice, the constraint of the postulate of practical reason on the idea of a united will will never be made real in the world. This choice could be made by a citizen in a civil union, but it can also be made by an individual who still resides in a state of nature because they have not yet joined together with those around them. The presence of the idea of the united will of all is not contingent on historical facts about the activities of some specific group of people at some specific location; it is a necessary fact which holds true for practical reason regardless of context.

When the individual makes the choice to acquire some object in accordance with the idea of a united will of all, those around him are placed under an obligation not to use whatever object was just acquired. However, this obligation is placed omnilaterally: its source is the idea of the united will of all. While it is true that the choice designates the specific object to which the possibility of merely rightful possession (and its associated obligations) applies, this is only the realization of an obligation which preceded any choice that he made. The postulate of practical reason holds independently of anyone's private choice to acquire something, and so obligates independently of that choice as well. Since our obligation only arises from the idea of the united will of all, and not the individual's choice to acquire some specific object, we can see why Kant would claim that the idea of the united

will is the only one which is truly lawgiving.

Taking possession of an item in accordance with the idea of a united will will change our external actions with regard to objects. When an individual unilaterally imposes an obligation on others not to use his possessions, he conceives of everyone else as bound, and of himself as the binder. When the obligation not to use others' possessions issues from an omnilateral will, the individual conceives of himself and everyone else as bound, and of the idea of a united will as binder. While he still gains a permission to use those objects he acquired in the latter case, he also takes on an obligation to refrain from using anyone else's possessions. This is realized externally in those cases where he is confronted with others' possessions and refrains from using them without permission. The unilateral-willer does not accept this obligation when taking a possession of his object, and so does not refrain from using the possessions of those around him.

8.

If it really is possible for someone to take rightful possession of an object in the state of nature, we may begin to wonder about the necessity of the civil union at all, and the 'peremptory' nature of the rights therein. Since we are able to act in accordance with a united will only in idea, what is the importance of its (merely conditional) realization, and what could that realization possibly add to the right at hand? At the beginning of §42, Kant introduces his 'postulate of public right'

> From private right in the state of nature there proceeds a postulate of public right: when you cannot avoid living side by side with all oth-

> ers, you ought to leave the state of nature and proceed with them into a rightful condition, that is, a condition of distributive justice.– The ground of this postulate can be explicated analytically from the concept of right in external relations, in contrast with violence[51] (violentia).[52]

What can Kant mean by 'violentia' here, such that its consideration can shed light on the analytic necessity of the transition to a civil condition? For those who subscribe to a kind of 'null-hypothesis' or restricted reading of provisional right, it seems like this violence will be enforcement of one's provisional property rights in the state of nature. On these views, there is either no real (enforceable) right to property in the state of nature, or our capacity to exert rightful force on those around us in protection of our property is restricted. Because of this, an individual's attempt to prevent others from interfering with items he has taken for private use would count as impermissible restrictions of their freedom. The would-be owner would be in the wrong, and his actions construed as violence.

If enforcing one's provisional property right in the state of nature would count as violence, a cursory reading of the Universal Principle of Right would suggest that such an action should simply be prohibited. However, the postulate of practical reason and the deduction of merely rightful possession suggest that the concept of right can be extended to include the possibility of possessing something external to ourselves, and so for the sake of consistency, right cannot also prevent such possession. Instead, the context in which such possession occurs must be transformed, so that the obligation to respect others' possessions is not placed unilaterally (wrongly) on those around us, but instead omnilaterally, by means of

[51]Gewalt

[52][MS AK 6:307]

a social contract to form a civil union.[53]

This reading finds the theoretic necessity of the civil condition in the possibility of merely rightful possession itself. That the conditions of merely rightful possession require people in a community to join together and give themselves an obligation omnilaterally, combined with the fact that merely rightful possession counts as a genuine extension of the concept of right, means that right (the external freedom of all) requires entry into the civil condition. This argument ticks all of the boxes: strong necessity for entry into the civil condition which clearly comes from consideration of freedom and the concept of right. Indeed, the success of this side of the argument is itself a persuasive reason to accept a null-hypothesis or restricted reading of provisionality.

I, or course, will be able to help myself to none of this excellent argument. I have already maintained that the conditions of omnilaterality can be met while in the state of nature, so cannot appeal to that necessity as explanation of the postulate of public right. Since I think the theoretical conditions of rightful possession can be met without entrance into the civil condition, theoretical necessity as an explanation in general seems off the table for me. Instead, I would like to suggest that the requirement of entry into the civil condition arises from a kind of practical or natural necessity, which Kant describes in more detail in his 'Idea for a Universal History with a Cosmopolitan Aim.'[54]

[53] Of course, the exact mechanics of this argument vary from view to view, especially between 'null-hypothesis' views and restricted views. Waldron 1996, who holds what I have called a 'null-hypothesis' view, makes an argument very similar to the one outlined above. On the other hand, Guyer 2002, who holds more of a restriction view, considers entrance into the civil union to be the final step in Kant's argument for the possibility of rightful possession.

[54] Consideration of this essay was inspired by Waldron's use of it in Waldron 1996. Since he advocates in this work for a kind of null-hypothesis, he uses Kant's claims in the 'Idea…' to illustrate practical consequences of the theoretical necessity of the civil condition, and not the source of the necessity itself.

The 'Idea for a Universal History with a Cosmopolitan Aim'[55] is a 1784 essay in which Kant examines natural teleology in its relation to the species-level development of humans as rational creatures. There, he maintains that nature has instilled humans with instincts which lend themselves to their development as reasoners. For example, humans have few of the natural protections that other animals do, such as thick fur to protect from the cold, or claws to defend themselves from predators. Lack of such features pushes humans to use their reason to find ways of protecting themselves and furthering their individual ends.[56]

Kant maintains that nature has similarly instilled humans with instincts which push them to join together in the civil condition. He describes this as a natural 'antagonism' individuals have toward one another, or a kind of "unsocial sociability."[57] Kant explains that

> [t]he human being has an inclination to become socialized, since in such a condition he feels himself as more a human being, i.e. feels the development of his natural predispositions. But he also has a great propensity to individualize (isolate) himself, because he simultaneously encounters in himself the unsociable property of willing to direct everything so as to get his own way, and hence expects resistance everywhere because he knows of himself that he is inclined on his side toward resistance against others.[58]

This sort of psychological explanation seems to underlie one of Kant's first claims in the second section of the Rechtslehre, where he moves from discussion of the

[55] Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht, AK 8:17-32
[56] [IG AK 8:19-20]
[57] ungesellige Geselligkeit; [IG AK 820]
[58] [IG AK 8:20-21]

individual in the state of nature to that of the citizen in the civil union. There, he claims that

> [i]t is not experience from which we learn of the maxim of violence in human beings and of their malevolent tendency to attack one another before external legislation endowed with power appears, thus it is not some deed that makes coercion through public law necessary. On the contrary, however well disposed and law-abiding human beings might be, it still lies a priori in the rational idea of such a condition (one that is not rightful) that before a public lawful condition is established individual human beings, peoples and states can never be secure against violence from one another, since each has its own right to do what seems right and good to it and not be dependent on another's opinion about this.[59]

Kant claims that it lies a priori in the idea of the state of nature that individuals cannot be secure against the violence of others. The a priority here lies in the individual's reflection on his own nature. That is, the possibility of violence in the state of nature is not the a posteriori product of peoples coming near each other and then happening to have disagreements regarding their property. Instead, it is a basic fact about the nature of humans that, when they come together, they will want to impose their own conception of the world (and their rights in) on others, by force if necessary.[60] One's rights are necessarily threatened by the presence of

[59] [MS AK 6:312]

[60] This seems the best opportunity to reach for Kant's claim that "[n]o one...need wait until he has learned by bitter experience of the other's contrary disposition...it is not necessary to wait for actual hostility; one is authorized to use coercion against someone who already, by his nature, threatens him with coercion." [MS AK 6:307] I have made claims earlier in the paper about

others near him, and so he must join together with them in a way that protects his pre-existing rights.[61]

This explanation of the necessity of entering a civil condition with those around us relies on the provisional rights in the state of nature being real rights which carry the full weight of obligation on others. The source of the necessity of transition lays in the strength of the right itself, insofar as its practical integrity is necessarily at risk when others come near one another. The resolution of this conflict is not the institution of an entirely new system of property rights, but instead establishing mechanisms of publicly indicating and enforcing those rights. This seems much more consistent to me with Kant's claim that the condition of public right "contains no further or other duties of human beings among themselves than can be conceived in the former state [the state of nature]; the matter of private right is the same in both. The laws of the condition of public right, accordingly, have to do only with the rightful form of their association (constitution), in view of which these laws must necessarily be conceived of as public."[62]

At first blush, practical necessity might not seem to be a very pressing motivation to enter the civil union, especially in comparison to the force of Kant's claim that people living near another are required to do so. This opinion, however, results from a substitution of our own impressions about the security of our property in place of Kant's claims. The question of whether or not our property rights are jeopardized by those living near us might seem to depend on a lot of

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the trickiness of this assertion but am tempted to read it in connection with the points made about unsocial sociability because of its location right at the transition in the Rechtslehre from discussion of the state of nature to that of the civil union.

[61]For more thorough accounts of unsocial sociability, including its relation to Kant's claims about radical evil, see Wood 1991 and Schneewind 2009.

[62][MS AK 6:306]

contingent facts: whether my neighbors actually desire my property, my predictions about my ability to defend my property against the intrusion of others, and so on. If, for example, I live near people who I strongly suspect have no interest in my property, then it seems as though the practical threat to my rights is very low, and the necessity that I change my current relationship with neighbors essentially nonexistent.

However, Kant simply does not accept the claim that the threat others pose to our property rights in the state of nature is contingent. As noted above, he maintains that it is a part of human nature (therefore necessarily present in all humans) to want to impose our conception of what is right (and to what we have rights) on others. The individual can become aware of this part of his nature through introspection and has no reason to believe that the conception of right which he has (and the individual objects to which that conception applies) is the same as those near him. The only way to truly secure his rights is to join with those near him in public acceptance of a shared conception of rights.[63]

9.

The 'provisionality' of the provisional right is a result of the relationship of the right to the necessity of entering into the civil union. This, in a way, might amount to a kind of restraint which the right exerts on itself in the state of nature. In the state of nature, we take (or try to take) any number of objects into our possession. The security of these possessions is in principle threatened by those around us, whose nature threatens our continued use of our possessions (this is true even though we are permitted to forcibly prevent others from using our objects, since

[63] As Rawls aptly puts it: a well-ordered society is one in which "everyone accepts and knows that others accept the same principles of justice." Rawls 1971, p. 5.

success is not guaranteed). In order to secure our property rights, we must enter together into a condition of distributive justice (public right) so each can have what is his secured for him. However, facts about our possessions in the state of nature may come to interfere with the possibility of entering into a civil union with those around us, and it is the necessity of changing these facts about our possession which grants us only provisional possession of them.

Not every arrangement which we make with those near us counts as a civil union. Kant explains that "in the state of nature, too, there can be societies compatible with rights (e.g. conjugal, paternal, domestic societies in general, as well as many others); but no law "You ought to enter this condition," holds a priori for these societies."[64] Instead of merely a society which is compatible with rights, we are obligated to enter a rightful condition, which is

> that relation of human beings among one another that contains the conditions under which alone everyone is able to enjoy his rights[65], and the formal condition under which this is possible in accordance with the idea of a will giving laws for everyone is called public justice.[66]

As has been much discussed in this paper, the will which gives laws for everyone is the united will of all. To enter the civil union with those around us is to unite our wills with them so that we are ruled by an actual united will, and not just the idea of one. However, not every social arrangement of persons is one in which they are all united in a single, lawgiving will. Kant explains that "the members of such

[64] [MS AK 6:306]

[65] jeder seines Rechts theilhaftig werden kann

[66] [MS AK 6:305-306]

a society who are united for giving law (societas civilas), that is, the members of a state, are called citizens of a state (cives)."[67] "The only qualification for being a citizen is being fit to vote. But being fit to vote presupposes the independence of someone who, as one of the people, wants to be not just a part of the commonwealth but also a member of it."[68] People who are dependent for their livelihoods on others (such as a child is to their parent, a servant is to his master, and, at the time, a wife was to her husband) will not have the independence needed to count as an active citizen.

In order to join together to form a civil union all parties to the contract must be made active citizens by its terms, or they would not be obligated to join together in this particular union. Therefore, the terms of the contract cannot be such that they would deprive the members of the independence which is a precondition of that status. It is obvious that certain pre-existing (provisional) property rights could interfere with this possibility– if one party had a provisional right to the only water source in the area, everyone else would be dependent on that individual for their livelihood. Parties who do not have sufficient property prior to the union might have to be given more and, depending on geographical facts, this might in turn require some parties to give up property they previously held.

Provisional acquisition of objects is therefore a real, rightful acquisition which is nevertheless subject, at some future time, to the compatibility of such possession with the possibility of entering into a civil union. Peremptory possession, however, is no longer subject to such a possibility: there is no overriding duty which might later obligate a proprietor to give up what was his. This transformation is suggested in Kant's use of the word 'peremptory' in particular, since that description

[67] [MS AK 6:314]
[68] [MS AK 6:314]

applies to things which are no longer up for debate. Apart from this, I contend, the provisional right carries the full force of its peremptory counterpart– in particular the permission to use force, if necessary to prevent others from interfering with one's possessions. That a provisional version of a thing would have the same powers (at least for some period of time) as its non-provisional version is not entirely foreign. A provisional governor acts with the force of an elected one, at least until a new election can be held. A provisional patent prevents others from copying your work, but only for twelve months (pending application for a non-provisional patent.) Provisional drug approval allows medication to be prescribed while further research is conducted on its safety and efficacy.

Observation and enforcement of one's provisional rights are practiced in situations where parties are near one another but not yet in a civil union. This can happen as a result of the length of the process required to arrange the terms of the future civil union: negotiating and implementing the terms of a contract can be time-consuming affairs.[69] Per Kant's discussion in §19 of the Rechtslehre, "[f]or every contract there are two preparatory and two constitutive rightful acts of choice. The first two (of negotiation) are offering (oblatio) and assent (approbatio) to it; the two others (of concluding) are promise (promissum) and acceptance (acceptatio)."[70] One of the ways of showing good faith in contract proceedings is by taking the time to go through the process slowly and carefully. There is also the question of how a civil union should react to the property claims of a nearby non-citizen, or how two civil unions (such as two states) should treat the property claims of another, if they are not part of a larger set of united nations. Since the countries of the earth for example, are not united under some common

[69]For example, it took Cyprus and Malta fourteen years each to join the European Union.
[70][MS AK 6:272]

government, it seems that the question of how they should relate to one another's property claims is answered by the permissions and obligations contained in the provisional rights that they have to their respective lands.

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PAPER 3

MARRIAGE: VON DEM DINGLICHE ART PERSÖNLICHEN RECHT

In this paper, I plan to develop an understanding of Kant's views on marriage using his legal framework as a guide. The aim of this project is primarily to show that the descriptions of marriage offered in both the Metaphysics of Morals and Lectures on Ethics depict a unified, coherent institution. I believe that this project can be achieved by extending the principles of jurisprudence that Kant introduces in the Rechtslehre as well as by cleaving to the exact language which Kant uses in his description of marriage. Through this analysis, I hope to show that Kant's account of marriage is one which can be celebrated as an instance of his work's incredible ability to transcend contemporaneous thought and interject equality and autonomy in an institution often defined by the opposite. For this reason, I consider the view offered here to be a feminist interpretation of Kant's claims, not because I would twist his work to fit a feminist preconception, but rather because I highlight the ways that Kant's view addresses ethical and legal questions about gendered violence in the context of marriage.

In the Doctrine of Right (Rechtslehre), Immanuel Kant gives a protracted analysis of the legal institution of marriage, under a unique category of contracts called the 'right to persons akin to rights to things'[1] This category is one of Kant's original contributions to political and legal philosophy. It is through the lens of this larger category that I offer a detailed explanation of marriage; one which both identifies the legal necessity for the contract as well as the particularities of its content.

[1]'Von dem dingliche Art persönlichen Recht' Also translated as 'rights to persons of the thingly kind,' and 'rights to persons according to their analogy with a thing.'

A fair amount of modern work has been done on Kant's account of marriage in the Rechtslehre and Lectures on Ethics. While some of this work touches on the legal elements of Kant's view, the canon is primarily driven to understand how marriage fits into Kant's larger ethical theory. Some of the work even goes so far as to entirely ignore the location of Kant's account (in the philosophy of law) and instead argues that, as an institution, marriage is most similar to the later account of friendship– a relation introduced in the moral philosophy and which Kant maintains is an entirely moral one.[2] As a result of this approach, there has been much difficulty in analyzing and, indeed, a general rejection of the accuracy of Kant's views on marriage among modern scholars.

It is my hope that an examination of Kant's view on marriage which is primarily driven by his legal theory can offer us greater insight into the nature of the institution described there. Kant discusses marriage in his section on contracts, which is in turn couched in his larger analysis of private property. Using the location of the discussion as an initial clue to unraveling its contents, I hope to begin by examining marriage as a contract, and therefore a form of property relation. Zeroing in on my target, I explore the specific category of 'rights to persons akin to rights to things' to better understand how marriage operates as a specific instance of this contract. Fortunately, Kant lists two other relations as falling under this category: the relationship between parents and their children, and the relationship between a master and his servant. We can therefore use information about these other two relationships to former a clearer picture about the relationship created by the marriage contract between two spouses.

[2]I do not mean to claim that Kant's ethical framework will be irrelevant to understanding his section on marriage; on the contrary, I think it will be essential in order to clarify many elements of the relationship. Rather, insofar as Kant does not take ethical problems to be the ones which primarily necessitate a marriage contract, it seems to me a mistaken interpretive move to attempt to understand the foundations of the institution using only (or primarily) ethical tools.

1.

In the first chapter of the Rechtslehre, Kant explains what it is to have a property right to something, and how these kinds of property rights are possible. In particular, he points out that it is possible for us to have property in things (to have them as our own, to the exclusion of others) in a way that is nevertheless consistent with the freedom of all. Indeed, the fact that having objects can be consistent with the freedom of others is what makes possessing them right, and which thereby gives us a right to them.

Kant says that there are three kinds of things which we could have property rights to. The first kind of thing is corporeal objects in the world, like apples and chairs. The second kind of thing we can have a right to are the choices of others, as in contracts. The final thing that we can have a right to is another person's status (Zustand).[3] It is this final category of right which he calls a right to a person which is like a right to a thing (von dem dingliche Art persönlichen Recht.) Kant also explains this right as "possession of an external object as a thing and use of it as a person."[4]

In the section on rights to persons which are like rights to things, Kant begins by pointing out that

> since this kind of right is neither a right to a thing nor merely a right against a person but also possession of a person, it must be a right lying beyond any rights to things and any rights against persons. That is to say, it must be the right of humanity in our own person, from which there follows a natural permissive law, by the favor of which

[3][MS AK 6:248]
[4][MS AK 6:276]

this sort of acquisition is possible for us.[5]

To have a right to a physical object is to have a use of it which permits the exclusion of others, even when that exclusion is coerced. This is the most familiar kind of possession that we have. I have a right to this computer, meaning that I have a right to type on the keyboard and turn up the volume and clean (or not) the screen. No one is allowed to take my computer from me or use it without my permission. Should someone interfere with my use of my computer, I have a right to retrieve it and thereby restore my use of it.

To have a right against a person is to have a right to their performance of some action. This kind of right is acquired through contract, and Kant also refers to it as a possession of another's promise. When I lease my apartment for a year, I have a right against my landlady that she not kick me out after six weeks. She, on the other hand, has a right against me that I pay rent to her on an agreed-upon schedule. A right to something is a right with regard to an object, and a right against something is a right with regard to a choice (or the kind of thing which can make choices).

Usually in Kant, when we talk about people, we talk about them qua beings with the capacity to make choices (as in, the kind of thing that we have a right against). Kant famously thinks that we are morally required to always conceive of those around us as the kinds of things which are making their own choices and setting their own ends. For the purpose of this paper, when I want to refer to people as choice-makers, or to the choice-making capacity itself, I will use the term 'practical reasoners' or 'practical reason.' [6]

[5][MS AK 6:276]

[6]The reader will observe that this is not strictly consistent with Kant's own language: in the sections referenced throughout this paper, (indeed in the title of the section itself) Kant often uses

However, it is also true that human beings are, in another respect, corporeal objects. We have physically extended bodies which move around in space and which affect and can be affected by other corporeal things in the world. It is to these specific things, namely human bodies (or the bodies occupied by practical reasoners) to which we would have a right in the right to persons akin to rights to things.

Of course, this is a rather peculiar relationship I would find myself in with someone else. It seems like most of the time that I need to use someone else's body, I don't need to have a property right to it at all. If I need to take a jar down from a high shelf, I might ask a taller friend to do it for me. I don't need some kind of property right to her long arms, instead, all I need is for her to agree to help me. Or, I might need my tall friend to help me, but only after she gets done with work. She might promise to come to my home in a few hours, but, at most, it seems like I might have a right to her choice that she come help me later, as in a contract. What characterizes these (and most other) interactions is the additional element of choice. In many cases, I will be able to interact and plan with others by means of their choice to do so with me. The case of the right to a person which is akin to a right to a thing will be the one in which there is no choice which mediates the use of the other person.

It is only very rarely that I find myself in a circumstance where the choice of another person cannot mediate my use of their body. Indeed, Kant only identifies three relationships: the relationship between spouses in a marriage, the relationship between a servant and their master, and the relationship between a child and its

'persons' to refer to what I want to call 'practical reasoners'. I use 'practical reasoners' instead of 'persons' in this discussion because it is helpful to have the rational capacity disambiguated through a naming convention– I personally always have to double-check whether 'persons' is being used in a way that refers to rational agents or just the bodies that those agents operate in. Additionally, I find 'practical reasoners' to be a more natural construction than 'will-ers' or 'things with wills.'

parents.[7] It is only really in the last case where we can easily see the lack of a mediating choice. The relationship between a child and its parents is one in which the child is brought into the world by its parents, who then must take care of it. The child cannot accept or refuse its role in this venture, since it does not exist while the plans are being made. Accordingly, parents have children with no regard for that child's choice, and the rightful relationship that they have with that child is, at least at first, only to its body and not to its practical reason.[8]

If use of a person as though it were a thing requires that that person did not choose to participate, it seems as though such use could not be consistent with their freedom. If it were possible to avoid situations in which such use was necessary, then we would not need a right to persons akin to a right to things. However, as exemplified in the case of the child, there are circumstances which we are naturally thrust into which preclude the possibility of choice by all parties. The purpose of this paper is to understand marriage as an instance of the right to a person which is akin to a right to a thing. The first question which must be answered is: what is the natural circumstance which forces the members of marriage into a relationship in which one or both parties are precluded from choosing? Only after identifying this can we turn to the marriage itself and ask– how does the right to a person which is akin to a right to a thing resolve the problematic relation?

2.

Before we dive into marriage, though, I think it will be helpful to turn to the

[7] [MS AK 6:277]

[8] "For the offspring is a person, and it is impossible to form a concept of the production of a being endowed with freedom through a physical operation. So from a practical point of view it is a quite correct and even necessary idea to regard the act of procreation as one by which we have brought a person into the world without his consent and on our own initiative..." [MS AK 6:280]

last, yet-unmentioned right to a person akin to a right to a thing: the relationship between the head of a household and his servant. Little modern attention has been paid to Kant's analysis of this relationship (perhaps because of its apparent anachronism), but I think a closer look at the relationship sheds a useful light on the larger juridical category, and, by application, the relationship created in the institution of marriage. By comparing the relationship between a servant and his master with a similar relationship one might have against another, we can throw into relief the elements of a right to a person which are uniquely suited to solving the social problems to seek to address.

What exactly does Kant mean by a servant, here? According to Kant, a servant in a household is entirely different from a contracted professional who comes to complete a distinct job. Instead, he says

> [w]hat distinguishes such a contract [the servant contract] from letting and hiring is that the servant agrees to do whatever is permissible for the welfare of the household, instead of being commissioned for a specifically determined job, whereas someone who is hired for a specific job (an artisan or day laborer) does not give himself up as a part of the other's belongings and so is not a member of the household.[9]

The agreement to let and hire some professional for a specific job establishes a right to that individual's choice that he complete some task, or a right against that person. The contract with made with a servant does not reference some specific choice, and so instead establishes a right to that person.

[9] [MS AK 6:361-362]

The contract with a servant is not directed at him as a practical reasoner. This, it turns out, is a result of an essential underspecification of the tasks required of a servant at the time of contracting. Indeed, it is this underspecification alone which designates the servant as such, and which renders his tasks uniquely important to the household. This underspecification is distinct from the latitude a professional has in choosing the means to the task he has been hired for (for example, whether to install an incandescent or a fluorescent light). Unlike a contractor, who is hired to perform some specific job, the servant is hired to generally help around the house as jobs and needs for him arise.

At the time of contracting with a servant, the head of the household does not know everything the servant will be required to do in order to meet the needs of the household. What he requires instead is simply that the servant be there, at the house, and be willing to take on tasks as they eventually arise. Accordingly, the needs of the household are directed initially at the servant's body, and his most basic task seems to be defined first in terms of where his body is. The contract of servitude is best understood, therefore, as a contract placing restrictions on the servant's body, so that it may serve as a means to the household's later projects. While it is true that there can be no contract to a person's body that doesn't, as it were, bring their practical reason along, the priority of the body in the case of the servant is what radically differentiates his role from that of the electrician. The contract with a servant will be a contract to his body, which is the element of him most analogous with a thing. Though the servant's body is always connected with his practical reason (so a contractor could never have a right to a person merely as a thing) the focus on the use of the body in particular changes the scope of the contract to subvert the normal order of things (person brings body) and introduce the possibility of a kind of treatment which more resembles the use of

objects (body brings person).

If all of this is right, it seems as though servitude might not be the kind of contract which we can actually enter into— that it might violate duties to regard other people (and ourselves) as a certain kind of being. The contract of servitude focuses on the body of the servant over his practical reason, and this is a prioritization which fails to afford practical reason its rightful dignity and role. The practical reason of the servant is not relevant insofar as it 'goes along with' his body; instead, the practical reason of the servant should be of primary importance and directing his body. How could it be permissible for an individual to enter a contract that allows for a kind of objectification ordinarily outlawed in Kant's philosophy?

Kant resolves this apparent conflict by imposing a restrictive condition on the contract of servitude. He claims that there can be no contract of servitude which does not permit exit by either party: that there can be no contract to lifelong servitude. The contract must therefore either include a definite timeline of employment, or it must stipulate mechanisms for termination of employment (by either contractor).[10] Whether the term of employment does, in fact, turn out to be lifelong is only incidental; the important part is that the continuation of the contract is constantly subject to the choices of either party.[11]

While the duties of the servant prioritize his body over his practical reason, the servant's choice to continue in that employment reinstates his practical reason as the highest condition of contracting. If the servant can choose to end the contract, then the use of his body is constantly conditioned on his choice to continue in the contract. The servant's choice of action is therefore restored to its rightful place

[10] [MS AK 6:280]

[11] "The contract of the head of a household with servants can therefore not be such that his use of them would amount to using them up; and it is not for him alone to judge about this, but also for the servants (who, accordingly, can never be serfs)..." [MS AK 6:284]

in restricting the activity of the body (instead of vice versa).

3.

The right to a servant akin to a right to a thing (established in a contract between a head of household and a servant) creates space for the otherwise problematic need for paid domestic help. It does this by finding a higher-order choice to which the potential servant could agree or not, thereby re-introducing that individual to the relationship as a practical reasoner, and not just a body.The right to a spouse which is akin to a right to a thing should also follow that same structure: we must begin by locating a relationship in which one or both partners are deprived of the opportunity to act as practical reasoners. Only once we have identified such a relationship can we begin to search for another, higher-order choice which, in constraining the original relationship, makes it possible for the parties to engage with each other as reasoners again.

The problematic relationship which must be corrected by the introduction of a marriage contract is that of sexual regard and gratification between two parties. The sexual relationship, Kant claims, requires those involved to participate in an action which it will be impossible for them to freely choose to do. Kant explains that

> Sexual union (commercium sexuale) is the reciprocal use that one human being makes of the sexual organs and capacities of another…For the natural use that one sex makes of the other's sexual organs is enjoyment, for which one gives itself up to the other. In this act a human

> being makes himself into a thing, which conflicts with the right of humanity in his own person.[12]

Further,

> The desire of a man for a woman is not directed to her as a human being; on the contrary, the woman's humanity is of no concern to him, and the only object of his desire is her sex.[13]

The sexual impulse (the desire to engage in sexual intercourse with another human) is directed toward the body of another (their sexual organs), and not their personality. Sexual arousal and the possibility of engaging in sexual intercourse therefore rely on a kind of regard for another human which does not appreciate their capacity for free choice, but only the body in which that capacity is instantiated. The individual who intends to engage in sexual intercourse with another person therefore attempts to satisfy their desire through use of the object at which it is directed, a satisfaction which is not arrived from appreciation of that object's attending personality.

According to Kant, the desire to engage in sexual intercourse with another person is the desire to engage in an activity with that person's body; it is a desire which does not consider the fact that said body is occupied and directed by an individual with the capacity to make free choices. Hence when two parties sexually desire or engage in sexual intercourse with another, they engage in an activity in which each must objectify the other. That is, each party takes the other's body as

[12] [MS AK 6:277-278]

[13] [LE AK 27:385]

a means to their end, without at the same time regarding them as an individual capable of setting their own ends— treats them as a 'mere means.'

The reader may worry that Kant's account of the sexual relationship smacks of a kind of Puritanical prudishness which we need not bring with us into modern accounts of marriage. Barbara Herman, in her paper 'Could it be worth thinking about Kant on sex and marriage?' challenges that worry. In particular, she takes the time in the paper to point out the similarity between Kant's views on sexual intercourse and Andrea Dworkin's (modern) claims on the same subject. In explicating that similarity, Herman expands on the idea of objectification as a necessary result of the sexual gaze. For example, she points out that

> Kant says the sexual regard is for the body or body part, not the person. The voice of erotic language often speaks of love for the beloved's body: lips, eyes, ears, feet— whatever. But must it? Is there room in sexual language for the terms of moral regard? It is a little odd to imagine sexual arousal at a moral deed...Certainly the language and imagery of pornography supports Kant's view, especially if one holds with those radical feminists who see pornography as an accurate expression of sexual reality.[14]

Indeed, one need only think of the volume of artificial body parts produced and purchased for private sexual gratification to see that the sexual desires of many do not require consideration of an attached personality.[15] But the fact that the sexual appetite takes the body as its object does not necessarily mean it can't take

[14] Herman 1993, p. 62

[15] For more information, see N. Döring and S. Pöschl (2018). "Sex toys, sex dolls, sex robots: Our Under-Researched bed-fellows". In: Sexologies 27.3, e51–e55.

anything else. Why couldn't it be true, at least in some cases, that we are sexually attracted to the body and mind of our partner? Herman replies that

> [w]e have, one would suppose, an appetite for food per se that can be transformed into a taste for and appreciation of fine food. But the structure of an appetite for food remains: hunger and satiety marking its boundaries and, as we might say, the appetite itself remaining an appetite for food...So the appetite for sex can develop into an appetite for refined or exotic sex, but it is still an appetite for sex in the sense that its object is pleasure of a certain sort to be had from sexual use of someone's body.[16]

So the problem seems to be that the sexual appetite takes the body, and only the body, as its object. Engaging in the activity of sexual intercourse, then, seems to be a problematic case of my prioritizing use of the body of my partner over their capacity as a practical reasoner.

But this problem– of sexual objectification of the partner– seems almost trivially rectified. The individual is treated problematically when their body is given priority without regard for them as a practical reasoner. So, let's reintroduce a choice for them to make: I will constrain myself from participating in an activity directed primarily at the body to just those times that my partner freely chooses that I do so. In other words, consent: I introduce the option of my partner's choosing to

[16] Herman 1993, p. 63. Herman also notes Kant's claim that "'[s]exual love can, of course, be combined with human love and so carry with it the characteristics of the latter, but taken by itself and for itself, it is nothing more than appetite" (Lectures on Ethics 163)." Herman 1993, p. 64

participate in sexual interaction with me, so that even though the interaction itself takes the body as its object, the possibility of such an interaction is conditioned on the assent of the practical reasoner.

In this way, sexual intercourse seems, at first, rather different from the other types of rights to a person akin to rights to a thing. The child can't make a choice to participate because it doesn't exist yet. The servant can't make a choice to participate because there is no definite thing for it to participate in. But the sexual partner exists prior to our engaging in sexual intercourse, and the choice of activity is plain: so why do we need a right to a person akin to a right to a thing?

Let us return to the claim that we could allow our use of our sexual partner to be conditioned on a choice that they could freely make to participate in that activity. This choice would be to permit another person to use me as a thing in order to achieve sexual gratification. But how could I freely choose to permit this action? The natural function of sexual desire takes the body as its object, so the choice to be made would be to allow another to use us as an object in order to achieve sexual gratification. But achieving sexual gratification (either my own or my partner's) is not an activity that we could freely choose to engage in. The source of the end (achievement of sexual gratification) is not reason, but instead an instinct of nature present in any species. When we choose to engage in sexual intercourse, we do not act in accordance with a principle of reason (act freely), but instead allow ourselves to be ruled by instinct. Kant explains that by engaging in sexual intercourse, "the human being surrenders his personality (throwing it away), since he uses himself merely as a means to satisfy an animal impulse."[17] Because the choice to engage in sexual intercourse is not one which could be made

[17] [MS AK 6:425]

freely, we cannot use it as a legitimating constraint on our sexual activity. Were we to constrain our sexual activities to only those times that the participants chose to do so, we would be constrained by the sexual instinct in each of those individuals, and not practical reason itself.

We therefore find ourselves back in the cart with children and servants. This time, the lack of a sufficient choice to regulate our activity arises from the grounds on which such a choice would be made: mere animal instinct. Accordingly, we must search for a resolution analogous to the one found for the head of household and the servant: a higher-order choice which could effectively constrain entry into the relationship itself.

4.

At this point in the text, Kant has introduced two primary rights. The first he calls 'innate' right, and it is the right to bodily integrity– no one can interfere with your use of your body, so long as that use is consistent with other people's rights. This is the right that would be violated in the sexual relationship: one partner would violate the other's innate right by interfering with their body in the way that the other partner could not consent to. The legal problem which the institution of marriage resolves, then, is the violation of innate right which necessarily accompanies sexual intercourse.[18] The second right that Kant has discussed is what he calls 'acquired' right, and this is the right to external property, of which the right to the person akin to a right to a thing will be an instance.

[18]The interrelation between law and ethics becomes more hazy when we consider the explanation for the insufficiency of consent. The problematicity of the individual being ruled by instinct instead of reason is itself not a legal one, but instead an ethical one– law only addresses external relations between parties. As we will see, qua legal personality, the partners actually will be able to grant one another a right to use their person. However, the way that this right can be granted is so restrictive that I think it really cannot be construed as mere 'consent'.

Since the legal problem is that each party would violate the innate right of the other by using their body in sexual intercourse, we must find some way that each could acquire a right to the other's body which would permit use of it. So Kant suggests

> There is only one condition under which [sexual intercourse] is possible: that while one person is acquired by the other as if it were a thing, the one who is acquired acquires the other in turn, for in this way each reclaims itself and restores its personality.[19]

The only right that I have innately is my right to my own person. Any other right I want will have to be acquired. Most familiarly, this might be the acquisition of some object so that I might have a right to use it. However, Kant seems to suggest that one person could acquire another, and thereby gain a right to use that person (a right against a person which is like a right to a thing). Were I to gain a right to my partner by acquiring them, then it seems that there would be no legal conflict in my using their body as a means to sexual gratification. So it seems as though the choice which is going to rectify the relationship between sexual partners will have to somehow involve them acquiring each other, and thereby each gaining a right to use the other.[20] The question now becomes: what on earth could it mean to acquire another person and thereby gain a right to them? and further: how could such acquisition possibly be consistent with the freedom of the acquired person?

[19]"Nur unter der einzigen Bedingung ist diese möglich, daß, indem die eine Person von der anderen gleich als Sache erworben wird, diese gegenseitig wiederum jene erwerbe; dann so gewinnt sie wiederum sich selbst und stellt ihre Persönlichkeit wieder her."[MS AK 6:278]

[20]That they would have to acquire each other and gain a right to use each other is here only meant as a reflexive description of the process of acquiring the right above. In other words, since each person, from their point of view, wants to use the other, each will have to acquire the other and thereby gain a right to such use.

Before we acquire a right to someone else, we might begin by wondering whether we have a right to ourselves. On the one hand, our innate right seems to grant us the freedom to use our body in a large number of ways, so long as that use is consistent with the freedom of others (e.g., not interfering with their innate right to the use of their body). However, Kant clearly thinks that the use we are permitted to make of our body is not identical to ownership of it, because

> [a]n external object which in terms of its substance belongs to someone is his property (dominium), in which all rights in this thing inhere (as accidents of a substance) and which the owner (dominus) can, accordingly, dispose of as he pleases (ius disponendi de re sua). But from this it follows that an object of this sort can only be a corporeal thing (to which no one has an obligation). So someone can be his own master (sui iuris) but cannot be the owner of himself (sui dominus) (cannot dispose of himself as he pleases)– since he is accountable to the humanity in his own person.[21]

It seems, therefore, that there are a number of things one could do with a corporeal object that was their property that they could not do with their own body out of respect for the humanity in their person. For example, one of the rightful actions I can take with a piece of my property is to abandon or dispose of it. However, I am not similarly permitted to dispose of myself, as in suicide. I am also permitted to damage or maim my property, even to the point of it becoming functionally unusable. I have none of these permissions in the use of my body, and hence

[21][MS AK 6:270]

my relation to it is really more one of usufruct, instead of true property.[22] Since the use of the body we are considering here does not involve killing, maiming, or otherwise damaging it, these reservations on our ownership of it will not greatly affect the institution of marriage.[23]

Could another person acquire this right that I have to myself, namely to the use of my body as a means to their end? It seems as though Kant thinks this is true, and that this is the only condition under which another person could have a right to use my body and thereby make me their sexual partner. And how could one person acquire the right to use another? Only if the first gives that person such a right– their right to use themselves. Since the right that the partner acquires was first the right in the person, the nature of that right must be identical. Hence Kant explains that

> [w]hat is one's own here [in marriage] does not, indeed, mean what is one's own in the sense of property in the person of another (for a human being cannot have property in himself, much less in another person), but means what is one's own in the sense of usufruct (ius utendi fruendi), to make direct use of a person as of a thing, as a means to my end, but still without infringing upon his personality.[24]

[22][MS AK 6:359]

[23]Of course, there are kinds of sexual interactions, like sadism and masochism, which might involve damaging or maiming the participants. If sadistic or masochistic preferences are separable from the sexual appetite directly (as is suggested in Barbara Herman's discussion about taste) then marriage is meant only to address the question of the partner's sexual use of each other, and not the permissibility of sadism or masochism. If these preferences are not separable from the sexual appetite, the moral or legal permissibility of such forms of intercourse will likely not be resolved through the marriage contract. My suspicion is that Kant would say that sexual interactions which involve deliberate damage to any of the parties is not going to be legally permissible, since it is not clear to me how one party could gain permissions to do to the other what he could not do to himself, especially for the purpose of sexual gratification.

[24][MS AK 6:359] This quote strikes me as resolving a great deal of the tension which Lina Papadaki 2010 finds in the entire category of the right to a person akin to a right to a thing. There, she points to a section in the Lectures on Ethics, where notes on Kant's class on moral

5.

The choice to exchange one's person with another (to allow another person to acquire you as though you were a thing) doesn't sound like the kind of choice we could make freely. Letting a person treat you as though you were a thing doesn't seem consistent with appropriate respect for the human capacity for freedom. The resolution to this apparent inconsistency, however, lies in the details of the contract and the relationship it produces. It will turn out that, although the choice to exchange persons refers to treatment of someone as though they were a thing, it does not amount to such treatment itself.

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philosophy record "[m]an cannot dispose over himself, because he is not a thing. He is not his own property– that would be a contradiction, for so far as he is a person, he is a subject, who can have ownership of other things. But now were he something owned by himself, he would be a thing over which he can have ownership. He is, however, a person, who is not property, so he cannot be a thing such as he might own; for it is impossible, of course, to be at once a thing and a person, a proprietor and a property at the same time." [LE AK 27:387] This seems to be an entirely different explanation of why the relationship between spouses is not, strictly speaking, one of property. In particular, Papadaki worries about the claim that a person cannot be proprietor and property at the same time, a tension which she resolves in her paper by arguing that the respect in which a person becomes a possession (in marriage) is different than the respect in which they are a possessor of another. In the former, one is considered qua corporeal object, in the latter, qua practical reasoner.Papadaki 2010, pp. 283–284. It is not clear to me that such a great deal should be made of Kant's claim in the Lecture on Ethics, for a few reasons. On the one hand, it strikes me as possible to explain Kant's claim about being possessor and possessed at the same time through the restriction of our relation to ourselves as being one of mere usufruct. On the other hand, I am generally ambivalent about the degree to which Kant's claims in the Metaphysics of Morals should be held hostage to those in the Lectures on Ethics, especially when the two seem not to agree. It seems to me that the claim that a person could not ever be possessed because he is always at the same time a subject would conflict with the entire category of the right to a person as though they were a thing, since Kant says that "[t]his right is that of possession of an external object as a thing and use of it as a person." [MS AK 6:276] If these two claims really are in conflict, it seems relevant to me that the former didn't make it into the Metaphysics of Morals, and the latter did. The claim about subjecthood comes from notes that Herder took on Kant's lectures in moral philosophy sometime between 1763 and 1765 (i.e. over thirty years prior to the publication of the Metaphysics of Morals). It is therefore entirely possible that Kant's view changed in the intermediary years (as his view on property certainly did in the thirteen years between Feyerabend's lecture notes on natural right and the publication of the Rechtslehre), or that Herder misunderstood Kant's view to begin with.

To acquire an object and thereby have it available for me to use is to have that thing as an object of my choice. An object of my choice is one which I am capable of making the choice to use: to employ as a means to some further end. To have my partner as my possession is to have the (rightful) power to choose to use her as a means to my end, even if such a choice involves treating her as a mere means.

Obviously, Kant thinks that one of the primary ends we are able to use our partner towards is sexual gratification by means of intercourse with them. And it seems to be the case that, having rightfully acquired our partner, we are permitted to use her in this way even though it is not possible for her to freely choose (choose in accordance with principles that reason alone gives itself) to be used this way. But it is the other ways that we are permitted to use our partner on acquiring her that make it possible for us to choose to exchange persons, because it is "in this way [the exchange of persons] that each reclaims itself and restores its personality."[25]

Kant explains the exchange of persons more comprehensively in the Lectures on Ethics. There, he explains that

> If only one partner yields to the other his person, his good or ill fortune, and all his circumstances, to have a right over them, and does not receive in turn a corresponding identical right over the person of the other, then there is an inequality here. But if I hand over [weggebe] my whole person to the other, and thereby obtain [gewinne] the person of the other in place of it, I get myself back again, and have thereby regained possession of myself; for I have given myself to be the other's property, but am in turn taking the other as my property, and thereby

[25][MS AK 6:277]

regain myself, for I gain the person to whom I gave myself as property.[26]

I give myself to my partner, which would be a problem if she doesn't also give herself to me, since there would be an inequality between us. But my partner does give herself to me, this inequality is avoided, and I have myself 'restored' to me.

In her 1993 paper, Could it be Worth Thinking About Kant on Sex and Marriage?, Barbara Herman explains Kant's description: "I give myself (or rights over myself) and you give yourself, but since you have me, in giving yourself to me you give me back to me."[27] She offers the following analogy: "[s]uppose I give you every pencil I own or will come to own knowing that (or on condition that) you will give me every pencil that you own or will come to own. One could say that we thereby create a community of pencil ownership— a unity of will about pencils."[28]

On Herman's view, Carol comes to possess John, who already possessed Carol, and so Carol is able to come back into possession of herself again. Herman uses an analogy about two people who exchange pencil collections with one another: each promises the other that they may have all of the pencils they own now and will come to own, and in doing so are promised ownership of their own pencils again. Accordingly, "[m]arriage solves the problem [of sexual intercourse] because each grants the other 'equal reciprocal rights' and no one loses anything."[29]

Herman's view is appealing because the result- a "community of pencil ownership"- seems to bear a strong similarity to the pencil-ownership relations we were in be-

[26] "den ich habe mich dem andern zum Eigenthum gegeben, ich nehme aber wieder den andern zu meinem Eigenthum, so gewinne die Person, der ich mich zum Eigenthum gegeben habe."[LE AK 27:388] While this quote is technically Herder's language and not Kant's, the use of Eigenthum to mean 'property' here is of some interest, as it is the same word Kant uses in the Rechtslehre to refer to the external property the postulate of practical reason permits us to possess.

[27] Herman 1993, p. 66

[28] Herman 1993, p. 66

[29] Herman 1993, p. 66

fore. Despite their back-and-forth, each pencil-partner ends up with their own pencils back, and seems to have capacities identical to the ones at the outset. So with married partners, each has her own person back and seems to thereby be in restored possession of the same things she came to the contract with in the first place.[30] However, while Herman can make practical sense of restored ownership of each's original pencils through shared ownership of the entire pencil collection, she is unable to extend that understanding to the case of married spouses. In particular, she claims that the human product of such an exchange would be two individuals who "become parts of a new self that has two bodies," a metaphysical state of affairs which she argues no sense can be made of.

6.

I would like to step in at this point with a slightly different reading of Kant's account, one which, I suggest, results in a relationship between the spouses which can be made sense of. To return to Kant's description from the Lectures on Ethics, we can identify the following steps in the contract of marriage " [1] If I hand over my whole person to the other, and thereby [2] obtain the person of the other in place of it, [3] I get myself back again, and [4] have thereby regained possession of myself..."[31] This process occurs in parallel for my partner: she hands her person over to me, she obtains my person in place of it, she gets herself back again, and she therefore regains possession of herself. At the conclusion of this transaction, I have regained possession of my person, and she has regained the same over hers.

I propose we once again model this transaction in the exchange of pencils between two individuals. We begin where Barbara Herman does, with each person

[30]This account is the generally accepted reconstruction of Kant's view here, c.f. Papadaki 2010
[31][LE AK 27:388]

in possession of her respective, original pencils. In Herman's pencil example, she draws attention to certain features of the pencils, such as their original owner, present location, and so on. However, I would like to draw out several other features of the pencils here, attendance to which will allow us to later pivot more easily from a discussion of pencils to a discussion of people.

When you and I combine our pencils, the pencils are transformed when you give them to me: the change from being your pencils to being my pencils. In this respect, my new pencils share an important feature with the pencils which were previously mine. While my new pencils have different physical features than the ones I had before, they share a similar normative status to them. Prior to the exchange of pencils, you and I each had a set of pencils we could use as a means to write, draw, etc. The fact that my pencils were mine made it permissible for me to use these pencils, and restricted others from unpermitted intervention with my use of the pencils. When I give my pencils to you (and you give yours to me) we each thereby forfeit the right to write and draw with the pencils we originally own– our permission to use that set of pencils is revoked. Yet, at the same time, we are each restored our means to write and draw through the acquisition of pencils that were previously our partners. When I give you every pencil I own or will come to own, and you give me every pencil that you own or will come to own, the pencils are transformed: pencils that I previously had no right to use as a means to my end are now available to me to do so. The pencils are normatively transformed and now, from the point of view of permissions and restrictions, identical to the pencils that I had previously. Moreover, insofar as I track the change in normative status of the pencils through correct application of 'mine', the pencils which you just gave to me, after only one exchange are now my pencils. From a normative perspective, I don't need to own the set of pencils you own when it includes my

original pencils in order to own my pencils again, it is sufficient to own only those pencils which were originally yours in order to be put in possession of my pencils.

The reader might be concerned about my earlier bracketing of the physical and historical features of the pencils. Having pencils with identical permissions doesn't seem sufficient to say that they are my pencils again; we don't use normative permissions as the primary means of picking out or identifying pencils, including our own. The fact that my new pencils have physical and historical features which are distinct from those in my earlier set seems to place the claim that the new pencils are my pencils received back again in considerable doubt. We may wonder on what grounds we can ignore the need for numerical identity between my old pencils and my new, and instead focus only on a kind of normative identity between the two. It is the exclusive focus on normative identity, however, which allows the case of exchanging pencils to become analogous to Kant's discussion of exchanging persons.

In what context can the normative status of our pencil become of primary importance to us? Consider the following: my friend and I are taking a standardized test which requires the use of a very specific kind of pencil to be scored. We are taking the test next to one another and, at the same moment, each drop our pencil on the ground. We each reach to retrieve our own pencil and, due to our focus on the test, accidentally grab the other person's pencil. My friend and I are close enough that each can know, without asking, that the other would be happy to share her pencil with her for the duration of the test. Each of us finish taking our test with the partner's pencil. When the time for the exam is up, the proctor announces that everyone must put down their pencil. At this moment, my friend

and I don't each reach for the pencil in the other's hand, even if it is visibly identifiable as the pencil we were originally using. Instead, we put down the pencil we completed the test with, because our permitted use of that pencil has allowed it to become, at least temporarily, our own. For the period of time from picking up the pencil until (at least) the proctor asks me to put it down, the pencil that I picked up off the floor was my pencil. The relevant features of the pencil became first, its being the one I was holding, and second, that it was permissible for me to use it in this way (as a result of the nature of my friendship). In the context of the standardized test, the picked-up pencil is the same as the old, and so the result of the accidental switch is that both my friend and I, in picking up a pencil, receive our own pencil back again.

How do the changing normative features of pencils in exchange relate to those of persons in exchange? When my partner gives me herself in marriage, I acquire her whole person, since, according to Kant, a person is an absolute unity. This would include, in addition to her physical features, her normative or legal features. At the same time, I give my whole person to my partner, which includes my own normative or legal features. Prior to the exchange, I had a number of normative permissions with regard to my person which directed the way I could interact with others, and they with me. For example, I had an innate right to the determination of my body, and possibly property rights to items outside my body. When I give my person to my partner, she now holds these rights. When my partner gives herself to me, I take hold of her rights: right to use of her body, and right to whatever property she owned. I am thereby restored my capacity to act in the world as I had prior to our marriage, even if the specific tool I use is not numerically identical

to the one I had before.[32] Since marriage is a legal relation, it is natural that the exchange should be of legal entities. If I am given possession of a legal entity which has identical legal and normative permissions as the entity which I had previously referred to as 'my self', it is natural to say that the receipt of this new entity is a restoration of what had previously been mine.

Kant's solution to the problem of use of another person towards sexual gratification is the exchange of normative permissions between those parties. Of course, the way that I use my permissions when they are associated with the body in which my will is located will have to be different from the way I use the permissions associated with a body in which my will is not located. For example, when I decide to sell off some of my property, I usually don't need to announce to myself such an intention, or generally make public my plans to do so. My faculties of judgment and understanding have direct access to the practical reason in my own body, while they do not in the body of my partner. Hence the necessary intervention of dialog and other means of communication between the two partners in order to come to decisions.

7.

How do the married couple appear before us now? Each spouse now has the permission to use the other's person and property as means to their ends. In this way there has been, in a normative sense, an exchange: I traded myself for your self,

[32]Indeed, Kant points out one of the most basic ways that the rights we come to have over our partner are a direct translation of the rights we had to our selves in the permission to control physical location. Prior to our marriage, I have the right to control my own physical location, but not that of my partner's. After the exchange of our persons, however, "if one of the partners in marriage has left or given itself into someone else's possession, the other partner is justified, always and without question, in bringing its partner back under its control, just as it was justified in retrieving a thing." [MS AK 6:278]

and you did the same for me. Each of our resultant reward is inextricably tied up with that of the others. Unlike with pencils, I cannot walk away with what is mine and thereby leave you with what is yours. Whereas prior to our contract what was mine and what was yours were separable entities, they are now interpenetrated and tied together in a permanent way. My reason, my judgment, my understanding, my will, remain in the body that was originally mine, but which now is entirely yours. Nevertheless, it is with these faculties that I direct the person that I came to be in possession of: you. My possessed partner now belongs entirely to me, and yet they must use some of what has become mine in order to direct their new person. Our persons, our selves, cannot be separated from each other going forward.

Kant explains that

> the relation of the partners in a marriage is a relation of equality of possession of each other as persons (hence only in monogamy, since in polygamy the person who surrenders herself gains only part of the man who gets her completely, and therefore makes herself into a mere thing), and also equality in their possession of material goods.[33]

Each partner receives the person of the other, and therefore does not make herself into a thing when used by that partner in sexual intercourse. This is the abstract unity that is formed between the partners in marriage– the permeation of being in a way that prevents either from expressing them self without the other also participating in it. The partners form a unity with regard to one another, since the rights of each become embedded in the person of the other, and therefore only

[33] [MS AK 6:278]

expressible through them.

In addition to the new, more private, relationship between the spouses, there is a second sense of the unity created out of the marriage contract. Under the law, what ordinarily separates two individuals are the rights which come between them. The legal line between myself and another is marked at the line between our physical bodies, because I am legally permitted to use my own as a means to my end, and not the body of another.[34] The line between my spouse and I, however, is dissolved by the contract of marriage. Prior to the contract of marriage, each party stands on either side of the wall of the other's right to their freedom. After the the contract, however, no such right separates them: each is permitted to use the other just as they would have earlier used themselves. The legal barrier that previously indicated the presences of two individuals (two legal entities) is gone, and instead the parties are surrounded as a pair by the protection of their contract.

This unity is, contra Herman, not a 'community' of ownership– it is not the case that everyone owns everything, that there is some pool of persons that we both jointly own. While what we each own is equal to what our partner owns, it is not the same as that thing. If I come to jointly own two selves, it would seem odd for Kant to note only that I got my self back again, and not mention my second, bonus self.[35]

[34]This point about legal permissions and the use of the body is drawn out and examined more closely in Pallikkathayil 2017, which is itself a response to some of Arthur Ripstein's claims on the same topic in Ripstein 2009.

[35]Papadaki 2010, p. 284 seems to come to a similar conclusion in her own paper. She asks "[b]ut what does it mean, more specifically, to say that the spouses have unified their wills? As Korsgaard explains: [...] "When we interact with each other what we do is deliberate together, to arrive at a shared decision. Since the conduct of practical syllogism is an action, the result is an action that we perform together, governed by a law we freely choose together" (Korsgaard n.d., 15) As a unity of will, then, the spouses engage in shared deliberation and decision-making. Each spouse is able to make decisions for the other spouse and to direct his or her conduct. Since each spouse has the right to direct the conduct of each, they must now make their decisions together." I agree that this is likely true, but take it to be the result of the marriage, and not the

This is happy news, however, because Herman herself claims that

> [A] unity of will out of two persons or a "union of human beings" does not [make sense]. Although one sees what Kant may have wanted– a kind of romantic blending of self into a new and larger self– it is not possible for him to get what he wants. If the problem with sex is that we are embodied selves, and use of the body implies title over a self, things are not greatly improved if we become parts of a new self that has two bodies (and then sex would be what?). The threat to the autonomous agent would seem to be increased rather than resolved in the surrender to the new union of persons...[36]

Indeed, the amalgamation of two people into one is difficult to understand at all, let alone see how it could resolve the problems Kant identifies in sexual objectification. However, Kant does not take possession of another person as though they were a thing to be a kind of subsumption of that person into oneself. The master's relationship to his servant is not the subsumption of the servant into himself, although there are times when the servant has to do what the master wants, and not what he would prefer to do. So neither of the spouses is subsumed into the other, though they may sometimes have to do what the other wants, instead of

marriage itself. In the marriage contract, the partners each give themselves to the other to have as their property. The spouses are not permitted to make decisions for one another because they have blended their wills, but because they own the person of the other and can use it as they see fit. The property and contractual elements are entirely lost in Papadaki and Korsgaard's views; indeed, the latter suggests that the marriage relationship is really most akin to the moral friendship which Kant defines late in the Tugendlehre.

[36]Herman 1993, p. 66

what they would have preferred to do.[37] Indeed, it is the nature of the relationship of the right to a person akin to a right to a thing which seems to prevent this kind of problematic subsumption. The servant is not simply absorbed into his master's tools just because of the contract which necessarily asserts his (the servant's) control over the tenure of his employment. Just so the spouse is not absorbed (or, per Kant 'consumed'[38]) in sexual activity with her partner, just because of the contract which asserts that such an action can only occur when she gets a self in replacement for the one she has given up.

This description of marriage may seem like a rather radical departure from previous or current institutions of the same name. However, I think that the picture offered above bears several strong similarities to the Prussian institution of marriage contemporaneous to Kant's writing. It was, for example, commonly accepted that the product of a marriage was a single legal person. This was a result of the wife's loss of legal personhood: the husband was given total possession of his wife, body and will. The husband was encouraged to think of his wife as an extension of himself, and the wife encouraged to think of her own person as a tool for her husband's use.[39] Kant's account of marriage could be seen as requiring something similar to this, but of both parties: each bears the relationship to the other that the husband would have borne to his wife. Not only is the husband

[37]This claim bears some resemblance to Arthur Ripstein's rather brief account of marriage in Ripstein 2009, pp. 74–75. There, he maintains that in marriage, "each spouse is entitled to make arrangements for the other," which could be a description of the kind of permeation of selves without community ownership mentioned above. However, I do not think that Ripstein can mean something like this, since he explains earlier that "[m]arriage is a more general unity of two persons, so that each spouse's person becomes the other's. Thus everything they do is an exercise of their joint purposiveness." If everything the spouses do is an exercise of joint purposiveness, it seems unclear to me how one spouse could make arrangements for the other, as opposed to making arrangements for the unity.

[38]eine verbrauchbare Sache, [MS AK 6:260]

[39]For an example of a view containing some of these elements, see Fichte's Foundations of Natural Law (1797)

encouraged to think of his wife as his tool, the wife is encouraged to think of the husband as her tool, and each has total possession of the other, body and mind.[40]

8.

The interpenetration of persons that results from the contract of marriage may leave the reader apprehensive about the resulting relationship between the parties. The concern is that the single legal unit created, in bringing the partners therein close enough to permit the sexual use of each other, is too close to legally define and prevent sexual misuse. Insofar as each party has rightful possession of the other's person, we may what grounds either individual has to refuse sexual intercourse on, should the other party desire to engage in it. The marriage contract permits my partner rightful use of me, and it seems as though it does so in a way which obviates my need to consent in the matter (since such consent might require me to will a problematic maxim). If the marriage contract itself permits my partner use of me, how could such permission, in the marriage itself, be temporarily rescinded?[41]

Let us take the example of Carol and John. Carol and John are married in the Kantian sense, meaning that they have both agreed (via the marriage contract) to acquire their partner to have as their own. They then engage in intercourse, in which they realize this agreement through actual use of their partner's person as their own.[42] However, their life together progresses, and there comes a time at

[40]For a fascinating and thorough account of conventions regarding marriage during this time, see Isabelle V. Hull (1996). Sexuality, State, and Civil Society in Germany, 1700-1815. Ithaca: Cornell University Press, especially chapters nine and ten.

[41]I say temporarily here because Kant thinks that a marriage in which the parties intentionally never engage in sexual intercourse (either as a result of choice or physical incapacity) is not a real instance of the contract. [MS AK 6:269]

[42]Per Kant: "Acquisition of a wife or of a husband therefore takes place neither facto (by

which, say, John would like to engage in sexual intercourse with Carol, but Carol is not especially interested in doing so. On what grounds would it be wrong for John to persist in his attempt to engage in sexual intercourse with Carol? John wants to use the body and person of Carol as a means toward his end of sexual gratification. John has rightful use of Carol's body and person, she agreed to give him those in their marriage contract. In the context of that contract, John is permitted to use what is his as means to the end of sexual gratification. How could we say that John interferes with anyone's freedom– or, put another way, how would the question of Carol's willingness or lack thereof substantially affect the permissions John has with respect to her body?

Of course, per the case description, at the same time that John wants to use Carol's body to engage in sexual intercourse, Carol does not want her body to be used in such a way. But the body which counts as Carol's is the one that previously belonged to John. So Carol wants to use John's body to avoid engaging in sexual intercourse. Insofar as Carol has rightful use of John's body and person, it is permissible for her to use both, and therefore permissible for her to want to use John's body to not engage in sexual intercourse. Just as use of Carol's body and person was an expression of John's freedom, use of John's body and person will be an expression of Carol's.

Were John to persist in trying to engage in sexual intercourse with Carol, he will have denied her the use of his body and person to which she is entitled. After all, Carol wants to use John's body and person to not engage in sexual intercourse. When he does not allow his body to be used in such a way, he deprives Carol of what is rightfully hers, and thereby violates the terms of their marriage contract.

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intercourse) without a contract preceding it nor pacto (by a mere marriage contract without intercourse following it) but only lege, that is, as the rightful consequence of the obligation not to engage in sexual union except through possession of each other's person, which is realized only through the use of their sexual attributes by each other." [MS AK 6:280]

John wrongs Carol by breaking the contract and using what is hers without her permission. Moreover, insofar as the marriage contract is a public and legal entity, the wrong which John does by depriving Carol of her use of him is one which John might be coerced by the state to resolve.

Why is it the case that John wrongs Carol by depriving her use of his body, and not the other way around? When Carol abstains from sexual intercourse, doesn't she prevent John from using her body, which he has a right to do? In other words, what distinguishes Carol and John's actions such that John is prohibited from engaging in sexual intercourse, but Carol is permitted to refrain? The fact that John's attempted action is a joint one, whereas Carol's action is individual. Carol can refrain from having sexual intercourse using John's body and John's body alone. The choice to refrain from sexual intercourse does not require her to use her own body, since it is sufficient that one partner not have intercourse for them both to not have intercourse with each other. However, John's action requires both his and Carol's body as a means to his end. It is not enough that he use Carol's body, he must also use his own body to engage in sexual intercourse. Use of Carol's body alone would not be sufficient to realize the act.

To illustrate this difference, it might be helpful to look at a different case of joint action. We might imagine that John has a sofa that he would like to take up a set of stairs, an action which he is incapable of performing alone. In order to carry the sofa up the stairs, he will also need Carol's help lifting and maneuvering it. However, Carol may not want to help John carry the sofa up the set of stairs. Carol doesn't need anyone else's participation in order for her to realize the aim of not carrying the sofa up the stairs; all she has to do is refrain from acting herself and she will not be helping with the sofa. The maxim of non-participation in a joint project requires the use of only one person, the maxim of participation

requires two.

When both Carol and John choose to engage in sexual intercourse, they will have both of their bodies available as a means to that end. When only John chooses to engage in sexual intercourse, he will only have Carol's body as a means to his end; without Carol's ratification, he will not have rightful use of his own as a means. Should John nevertheless attempt to continue to try to achieve his aim, he will use something which he has no right to: namely the body which used to be his, but which now belongs to Carol. However, Carol is able to achieve her end of not participating in sexual intercourse only using the body to which she has a right. If Carol chooses that John's body should not participate in sexual intercourse, that is sufficient to prevent such intercourse from occurring, without her requiring use of her own body. Hence Carol's choice can be made using only what is hers, but John's requires using something which no longer belongs to him.

This analysis will fit any form of joint action which the bodies of both parties would be required to participate. Accordingly, unwanted violence directed at one spouse by the other will also be wrong, because that violence requires its inflictor to use something which he has no right to: his own person. Moreover, since the marriage contract is legal and publicly enforceable, violation of its terms will be subject to the same kind of coercive intervention as we would expect in the case of any other contract.

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APPENDIX

A NOTE ON LAND

It may already seem apparent why Kant thinks the individual's choice to acquire some object, absent a general agreement to adhere to others' property rights (as in a state of nature) would place an obligation on others that was imposed entirely unilaterally. However, in light of some of Kant's own claims earlier in the Rechtslehre, a more in-depth discussion is required to clarify the phenomenon and in particular, what kind of property Kant is speaking about there.

The postulate of practical reason in §2 of the Rechtslehre (i.e., six sections prior to any of Kant's claims about provisional or peremptory acquisition) claims that it is possible for me to have an external object as my own, on the basis that "pure practical reason…can contain no absolute prohibition against using such an object, since this would be a contradiction of outer freedom with itself."[1] Here, Kant asserts that pure practical reason must accept the rightfulness of possession of objects (generally), since that possession does not necessitate interference with the rights of everyone else. He therefore points out that

> [s]omeone, who wants to claim a thing as his own, must be in possession of that object, because, were he not so, then he could not be damaged through the use which another made of it [the object] without his agreement; because, if something external to it [the object] affects this object, which he is not connected rightfully with at all, he himself (the subject) is not affected and therefore a wrong cannot be done to

[1] [MS AK 6:246]

him.[2]

When someone is not connected to an object physically (by holding it) or rightfully (by having it as their possession), then something which affects that object doesn't affect the unconnected person at all. This claim strikes me as at least prima facie plausible: if I don't own an object, and am not physically holding it, it doesn't seem that something which affects that object thereby affects me (although it could, perhaps, start a chain of events which eventually affected me, by first affecting something connected to me.)

But since someone is not affected by another's use of an object that he isn't connected with, then it seems as though he is also not put under any obligation by that other person's use. When I am not connected to an object physically or rightfully, then I have no means of using that object. Kant claims that "[t]he subjective condition of any possible use is possession."[3] People can either be in physical possession of objects (connected to them physically) or intelligible possession of objects (connected to them by their will). If a person is not connected to an object physically or through the choice to use it, they cannot be placed under an obligation not to use that object, since the imperative of an obligation of right requires the possibility that they might act otherwise (that they might use the object).

The reason we are put under unilateral obligation by others' choice to acquire objects in a state of nature is that they choose to acquire something which, it turns out, actually is our possession. At §12, Kant explains that "[f]irst acquisition of

[2] [MS AK 6:247]

[3] [MS AK 6:245], emphasis mine.

a thing can be only acquisition of land" because "land…is to be regarded as the substance with respect to whatever is movable upon it…so in a practical sense no one can have what is movable on a piece of land as his own unless he is assumed to be already in rightful possession of the land."[4] While Kant's early suggestions might remain agnostic about the kind of object which is being claimed as one's own, by the time he is discussing provisional and peremptory rights, there can be no question that the acquisition here is of pieces of land on the Earth's surface.[5]

The distinctive nature of people's existence on land means that their relationship to it is different than the relationship that they have to other objects, in a few ways. In the first place, it seems as though I need use of a piece of land in a way that is not true of almost anything else in the world. Kant is quick to point out in the introduction to the Rechtslehre that the necessity of an action to preserving one's life is not a potential source of a right to that action. Hence we wouldn't have a right to food that wasn't previously ours, even if not having it meant that

[4][MS AK 6:261]. Kant first introduces possession of land in particular at 6:250; the first discussion of the unilateral will putting everyone under obligation occurs two sections later, at 6:255. Conversely, Kant's claim about not being affect by objects we aren't connected to appears at 6:247.

[5]Kant's views on the metaphysical relationship between land and the movable objects on it are matters of considerable complexity which cannot be addressed here. All I would like to draw from them for now is the insight that understanding of Kant's views on possession of external things generally requires a prior understanding of his views on possessing land specifically. Analysis of possession of land is therefore not an application of Kant's views on possession generally, but instead a necessary part of those views. This suggestion has effects in addition to those noted in the argument of the paper. For example, it has been generally agreed among Kant scholars that the middle four paragraphs of §6 in the first chapter of the Rechtslehre have been placed there as a result of a publishing error (c.f. Buchda 1929 and Tenbruck 1949) The justification for this claim lies in an apparent incontinuity of subject between those paragraphs, which concern possession of land, and the rest of of the section, on the possibility of merely rightful possession. If possession of land is the condition of possibility of possessing all of those movable objects on it, however, then the question about original acquisition and possession of an object generally is one of possession of land specifically (since the later acquisition of movable objects on the land would presumably be derivative from the earlier acquisition of that land). In this paper I will treat the four paragraphs as appropriately occurring in §6, not only for the argumentative reasons mentioned, but also because similar paragraphs consistently appear in Kant's drafts of the deduction of merely rightful possession in the first chapter of the Rechtslehre. c.f. [VMS AK 23:281-292; 23:311-324]

we would starve to death. However, the necessity for humans to use a piece of land cuts metaphysically deeper than the necessity for food: insofar as humans are embodied creatures which exist in space, it is unclear how any person could not use some piece of land, just to exist on. The physical aspect of the human being therefore requires that we each use a piece of land, but this use is not one which we are capable of abstaining from. We are each, through no choice of our own, put on some part of the Earth from the moment of our birth. Our physical connection with that piece of land allows us to use it as a place to exist, and hence that land is in our possession, even though no one made that first choice to come into existence somewhere on the Earth. Because it occurs innately and prior to any choice we might make, Kant calls this first possession that each person has of their piece of the Earth original possession.

This original possession that each has of the land is different from any other possession that we might have of an external object. Possession of an object is, in every other case, an acquired right: a separate, external action is required for us to have the right. In the case of normal first acquisition of external objects, this action is taking control of the object to be acquired: taking an apple into my hand, or deliberately placing myself on a piece of land. Taking control of an object is the action by which it becomes subject to my choice. Once I have the apple in my hand, I can choose to eat it or throw it away; once I am on a specific piece of land, I can choose to set up camp or continue moving. In the case of the land that I am originally placed on, there is one possible use of it that I could make prior to taking control of it— existing on it. We do not need to consciously choose to exist, and so do not need to choose to use those things which allow us to exist. Nevertheless, insofar as we make use of that piece of land, we must be in some kind of possession of it.

This original possession of the Earth is also different from other forms of possession in that it is not just an instance of private, individual possession, but instead of communal possession of the entire surface of the Earth. Each person on the surface of the Earth has an original possession of the piece of land they originally occur on, and therefore have that piece of land potentially subject to their will to use it. However, since the entire surface of the Earth is connected, the Earth as a whole is possessed by a single, united will, capable of determining what might happen on those parts of the globe where no one yet is.

The total, common original possession of the Earth is a result of each person's individual original possession of the Earth and the unity of its surface. This is perhaps easier to get a grasp on by looking at a smaller-scale analogy. We could imagine, for example, that 28 families spontaneously appeared in a 30-unit apartment building which wasn't owned by anyone else. Perhaps each family will choose to use the apartment which they spontaneously appeared in as their residence, and thereby each be in private possession of their apartment. When it comes to resolving questions about the use of their apartment (where to put the furniture, what color to paint the walls), the decision is entirely theirs. However, when it comes to questions about the use of the apartment building as a whole, it seems as though the decision might lie with the tenants as a community. The tenants may wonder what to do with the two empty units in the building. If the units are habitable, they may remain empty, or they may be filled by new occupants. If everyone in the building is conscious of the two empty units (they are all informed that it is a 30-unit building), then they all make some choice with respect to the units. Some tenants might not care what happens to the units, and so choose to defer

to the other residents of the building. The units may remain empty if enough of the tenants choose that they should remain so, they may be filled if enough choose otherwise. In this way, the outcome of of what happens to the the building as a whole (new tenants move in, units stay empty) is determined by the united will of all.

There are, of course, a number of ways that this united will may come to execute the choices and desires of the individual residents. If they are very lucky, then each member might have an equal say in determining what will happen in the building. Equally likely, however, is that some tenants will have disproportionate power to determine the united will, perhaps as a result of money, or size, or something else. In this case, it might turn out that one family's opinions regarding the matter of who occupies the empty units is determinative of what ends up happening. But insofar as the other residents capitulate to this choice, and don't resist it, they participate in the choosing of the united will.[6] If the other residents do resist moving new tenants in, the united will of all may be a kind of will that has a great deal of difficulty making choices.

Part of what makes the building, and its empty rooms, subject to the united will of everyone in the building, is everyone's (stipulated) awareness of all of the units of the building. If the size of the building were indeterminate or infinite, or the inhabitants ignorant of its size, there may be units in the building which remain empty just because no one knows of their existence, not as a result of the positive choice of all. Additionally, there may be units known to some but unknown or unknowable to others and in that case the size of the community that chose what

[6]This requires that we conceive of refraining from interfering with another's use of something that we might have also used as an active choice. Hence, insofar as I do not work to prevent new tenants from moving into the building, I choose that such people should be permitted to move in. This conception is implicit in a large number of U.S. property laws: if I am aware (or ought to be aware) of someone using my property and do nothing to resist it, then they are often permitted to continue use of it, and can sometimes even eventually acquire exclusive property rights to it.

happens to any given part of the building may vary.

The finite, spherical surface of the earth is to the original possessors of land as the 30 unit apartment building is to its original occupants. Each may have rightful control of the original location on which they arrived, but they also participate in the communal will which dictates what happens in other places. Many, perhaps, will not care about parts of the Earth which they don't see or which they don't think they could reach, but in doing this they defer that the general will should, in those cases, be determined by others.[7] So Kant explains that our first possession of the land of the Earth, in addition to being original (requiring no action to establish) is also communal and total.[8] And insofar as any person (a priori) could choose to use or refrain from using any place on the Earth, another person's choice to use one place restricts everyone else's capacity to choose to do the same, a capacity which they already had in virtue of their original, total, common possession of the Earth.

[7]It is, of course, also the case that there are many places on the Earth which, as a result of technological deficiencies, are inaccessible to all or most people on the Earth. But Kant explains that this original common possession of the earth is "not empirical and dependent on temporal conditions...Original possession in common is, rather, a practical rational concept which contains a priori the principle in accordance with which...people can use a place on the Earth." [MS AK 6:262] So the question is not whether people can, as a matter of empirical fact, arrive at and choose to live in any given place on earth, but rather that any point on a closed geometric surface can be connected by a line over that surface to any other point.

[8]Kant refers alternately to the ursprüngliche Gemeinschaft des Bodens [251], gemeinsamer Besitz [262], and ursprünglicher Gesammtbesitz [262], among other cognates. Because it seems to me that there can only be one thing which is the 'original' possession, and because these names occur in such close proximity to another (sometimes in the same sentence), I have chosen to treat them as all referring to a single phenomenon. The change in language I therefore attribute to Kant's desire to draw attention to different features of the original possession in explanation of it.