

What is Provisional Right?

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[Forthcoming in *The Philosophical Review*, January 2022]

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Kant maintains that while claims to property are morally possible in a state of nature, such claims are merely “provisional”; they become “conclusive” only in a civil condition involving political institutions. Kant’s commentators find this thesis puzzling, since it seems to assert a natural right to property alongside a commitment to property’s conventionality. We resolve this apparent contradiction. Provisional right is not a special kind of right. Instead, it marks the imperfection of an action (that of acquiring ordinary rights) where public authorization is lacking. Provisional right thereby functions as a methodological device in a sequential elucidation of the moral basis of public law. To develop this reading, we first explain Kant’s two-step account of property rights—his division between ‘having’ and ‘acquiring.’ Then we explain what is involved in a sequential exposition of “right” more generally.

Keywords: Kant, Right, Property, Provisional, Sequence

In a state of nature something external can actually be mine or yours but only provisionally.

—Kant, *Metaphysics of Morals*²

I. Introduction

In his *Doctrine of Right* Kant maintains that while property rights are morally possible in a state of nature, such rights are merely “provisional”; they become “conclusive” only in a civil condition, where they are authorized and enforced by political institutions.³

Ideologically, this thesis faces in two opposing directions:

¹ We are indebted to audiences at Purdue University (2018), the North American Kant Society (Vancouver, 2018), University of Chicago (2018), and Forschungskolleg Analytic German Idealism (University of Leipzig, 2018) for helpful discussions of this paper. A special thanks also to Colin Bradley, James Conant, Sophie Cote, Chris Essert, Micha Gläser, Louis-Phillipe Hodgson, Andrew Israelsen, Frederick Neuhouser, Arthur Ripstein, Nicholas Sage, Ernest Weinrib, and two anonymous reviewers and an editor at *The Philosophical Review*, for valuable comments on earlier drafts.

² Kant 1996b 6:256 (hereafter, *MM*).

³ See *MM* 6:257, 6:264, 6:267, 6:312, 6:329, 6:341, 6:350.

—It rejects the Lockean doctrine that political institutions are required only to make natural property rights effective, not to make them morally valid. (Political institutions merely “remedy those inconveniences of the state of nature” which arise from each person being both claimant and judge of her own rights.)⁴

—It rejects the Hobbesian doctrine that property rights are entirely products of political institutions. (In the state of nature “there be no Propriety, no Dominion, no *Mine* and *Thine* distinct.”)⁵

The doctrines Kant rejects comprise the poles of a familiar debate. One party regards property as a prior constraint on legitimate state power, the other, as the malleable creation of the state in furtherance of its economic and distributive agendas. For the one, ownership is a relation (to things or to other people) antecedent to its protection through positive law; for the other, it is a product of that law.

In rejecting both of these doctrines, Kant also finds something right in each of them. With Locke, he stresses that in a state of nature “something external can actually be mine or yours.”⁶ Indeed, any political institution of property rights “*presupposes* what belongs to someone (to whom it secures it).”⁷ However, with Hobbes, Kant avers that “*only* in a rightful condition, under an authority giving laws publicly” is it “possible to have something external as one’s own.”⁸ These twin assertions have proved perplexing. Kant’s commentators speak of an apparent contradiction or antinomy, for Kant seems to be saying that property is

⁴ Locke 2003, 138; see also 105, 155.

⁵ Hobbes 1994, 78. Our shorthand use of ‘Hobbesian’ is not meant to imply fidelity to views of the historical Hobbes, which are more ambiguous. Hobbes’ “laws of nature” include respect for “first possession” and even anticipate Kant’s “provisional right” in some respects: i.e., these laws are only binding *in foro interno* until they are politically commanded. But Hobbes has no room in his state of nature for a right in Kant’s sense, a “capacity for putting others under obligation” (*MM* 6:239). Hobbes’ “right of nature” amounts only to the liberty of each to do what they judge conducive to their own survival.

⁶ *MM* 6:256.

⁷ *MM* 6:256. More generally, the civil condition “contains no further or other duties of men among themselves than can be conceived in the former state [of nature].” *MM* 6:306; cf. 6:267, 6:291, 6:313.

⁸ *MM* 6:255. See also 6:263-6, 6:307-8.

possible in a state of nature and that it is impossible, that there *are* and there *aren't* natural rights to property.⁹

We seek to resolve this antimony. To resolve an antinomy, Kant teaches, you must identify the presupposition its two sides share in common.

Here both parties presuppose that the moral basis of the state can be fully specified independently of it. For the Lockean, self-standing property rights comprise this basis, and the state appears as an instrument for securing the holdings of rightful proprietors. For the Hobbesian, self-standing values (bare life or commodious life) comprise this basis, and the state (which creates property) appears as an instrument for securing these values. On either account, the state and its laws serve to secure more basic items—basic in the sense that they don't intrinsically require political association or positive laws. Given this presupposition, these accounts do contradict each other, for property rights can't both be and not be among the basic items of pre-political association. *Provisional right*, it follows, must be a kind of confusion.

We start from the contrapositive of this point. The existence of provisional right implies that the Lockean and Hobbesian accounts aren't contradictory but rather contrary—they can't both be true but they can both be false. Kant rejects their common presupposition: the purely instrumental role of the state. The rights from which Kant's account begins are not basic or self-standing, and the state and its laws are not mere instruments for securing them; they are conditions of their possibility. As we will explain, provisional right expresses the intrinsic connection between rightful relations and political association by marking the defective character of rights where a state is absent. A defect is an internal shortcoming: the defective thing falls short by its own standard. Accordingly,

⁹ According to Ryan (1984, 79-80), “we find Kant both asserting...that men only have property in external things when a legal order gives them that property...and asserting that we have to assume a 'natural right' to appropriate unowned things and make them our property in a state of nature.” Tierney (2014, 342) identifies a similar contradiction: “[R]ights to property must exist before a civil condition...and a civil condition must exist before there could be rights to property.” Commentators often try to prioritize one or the other of Kant's putatively conflicting theses (see Hasan 2018b). In contrast, we read these theses as ordered expressions of a single idea.

provisional right functions, in Kant's argument, as part of a sequential exposition of right in terms of its progressively more adequate conditions of possibility.¹⁰

Section 2 sets the stage for this argument by discussing some misunderstandings of provisional right. Kant's theory of property, and the role of provisional right within it, are developed in sections 3 and 4. On our view, an adequate account of provisional right must connect it to Kant's sequential form of argument; it must show what work provisional right is required to do within the sequence of right's conditions. Accordingly, Section 5 enlarges the focus. It describes the sequential form of explanation which is at work throughout the *Doctrine of Right* and of which the provisionality of acquired rights in a state of nature is a central instance.

Our aim throughout this essay is broadly interpretive. If the question were asked whether we seek to explicate Kant's own views or to investigate the juridical matter itself, the answer would have to be: *yes*. What follows is an attempt to think *with* Kant and thereby, we hope, to illuminate the place of property within a wider order of juridical concepts.

2. Provisional Right and the State of Nature

Is provisional right a right (or quasi-right) people 'have' in the state of nature, or is it part of a strategy, as we have begun to suggest, for explaining right—i.e., through a progressively more adequate exposition? On the later view, provisional right would be an instance of a concept, which, standing alone, has no application in juridical experience but is in service of elucidating a concept that does. Consider a parallel. When Kant famously says that “concepts without intuitions are empty...,”¹¹ he presents a concept of a ‘concept’ that is

¹⁰ A note on notation. Following Kant, we use “right” to denote either (a) the juridical domain (right vs. virtue), (b) this domain's unifying principle (“the universal principle of right”), or (c) “the totality of conditions” that articulate this principle (*MM* 6:230). In contrast, “rights” are powers to obligate others. For Kant, right (b) is the ground of rights.

¹¹ Kant 1933 A51/B75 (hereafter CPR).

defective with respect to cognition, for concepts alone do not put us in touch with objects. This presentation belongs to a certain stage of philosophical reflection. But Kant is not suggesting that, in the course of experience, we have practical concourse with “concepts” apart from their employment in empirical judgments. On our reading, “right without public institutions” (i.e., provisional right) is similarly ‘empty’ or at least defectively incomplete.

In contrast, treating provisional right as a normative status people ‘have’ ‘in the state of nature’ creates an exegetical problem. Just what powers and entitlements does this status involve? Kant glosses the concept of a right as a moral capacity to put others under coercible obligations.¹² Yet the mark of provisional right is its lack of correlative obligation: in a state of nature, “no one is bound to refrain from encroaching on what another possesses,” and indeed “human beings do one another no wrong at all when they feud among themselves.”¹³ Obviously, it is a funny kind of right that doesn’t actually constrain anyone. Kant’s main gloss on this state of affairs, as we shall see, is that while right involves reciprocal restrictions on everyone’s freedom, in the cases called “provisional” would-be proprietors purport to constrain others through unilateral acts of acquisition, though no unilateral act could accomplish this.¹⁴ But if this is so, and if rights are powers to constrain others, shouldn’t it follow that provisional rights aren’t really *rights*, properly speaking, at all?

Some commentators try to meet this difficulty by fitting provisional right into a juridically familiar series of qualified rights—e.g., defeasible rights, conditional rights, and the like. But, unlike provisional right, such rights *do* constrain others—they can be infringed. ‘Defeasible rights’ are rights vulnerable to competing considerations, as when the right to free speech is ‘outweighed’ by public danger; yet such rights hold perfectly good when they do hold. A ‘conditional right’ likewise holds good once some future contingency is satisfied—e.g., your right to insurance proceeds after your house burns down. If

¹² *MM* 6:237; cf. 6:230, 6:231-2.

¹³ *MM* 6:307; cf. 6:255-56.

¹⁴ *MM* 6:256.

provisional right were understood as a qualified right of this sort, the *Doctrine of Right* would contain a triad of inconsistent claims:

- (1) Rights are correlative to obligations.
- (2) Provisional right is a type of morally valid right.
- (3) You do no wrong in interfering with my provisional right.

We drop (2).¹⁵ Kant's philosophical aim is (as usual) not to discover previously unknown normative entities but to elucidate matters with which we are already familiar: here, right in juridical experience, "right in its ordinary and practical use."¹⁶ We approach provisional right as a device in such an elucidation, not as a strangely anemic kind of ownership.

But what is to be made, then, of Kant's talk of "the state of nature" and of our having provisional rights there? Kant's point is best understood, we think, by reflecting on the adverbial use he sometimes makes of "provisional"—e.g., "in a state of nature" things "can be acquired, but only provisionally."¹⁷ Here, "provisional" seems to designate the incompleteness of an action (*viz.*, of acquiring ordinary rights), not some special type of right. As for the state of nature, Kant inherits this political idiom, but he makes an original use of it. His topic is the rational (a priori) structure of the political state, not its genesis through the acts of dissociated individuals. Hence he cautions against taking "state of nature" in an existential or historical sense: "In itself, the *status naturalis* does not exist at all, and never has; it is a mere Idea of reason, containing judgment of the private relationship of men to one another."¹⁸ Philosophy's interest in "the state of nature," on this account, is an

¹⁵ Might one instead modify (1) to say only that "juridically *conclusive* rights are correlative to obligations"? This is correct, but it renders mysterious why provisional right should be considered a type of right. Correlativity-to-obligation marks the *concept* of right (*MM* 6:230, 6:237), and Kant presents no other account of the concept that would allow for "right-without-obligation" as one of its species. Attempting to describe provisional right as a normative status, Ripstein notably falls into contradiction ("titles to coerce that nobody is entitled to enforce coercively": 2009, 165) before affirming that provisional right isn't really a right "properly speaking"—i.e., he also drops (2).

¹⁶ *CPR* B61. Similarly, Kant's *Groundwork* seeks to vindicate "common" moral intuition. See Kant 1996a 4:393.

¹⁷ *MM* 6:264.

¹⁸ Kant 1997 27:589 (hereafter, *LE*).

interest in the morality of external interaction, apart from what might be contingently laid down by public institutions. Kant also calls this topic “private right.”¹⁹

Given what Kant means by “a right” (the correlate of an obligation) and by “the state of nature” (private right), we say that provisional right denotes no normative status at all. Rather, it marks an argumentative impasse, the impossibility of comprehending property purely as private right. The point emerges in three steps, which we will develop in the following sections. First, something *does* suggest that an external thing could belong to someone just as a matter of “the private relationship of men to one another.” (To anticipate: your having an external thing as your own is not, just as such, a wrong to me.) Yet, second, something also suggests that no one could, just by themselves, make a particular thing their own. (To anticipate: unilateral acquisition would lack the reciprocal form of right.) Overcoming this impasse requires further reflection on the conditions of the possibility of acquisition, a reflection that establishes, third, that acquisition is possible “only...under an authority giving laws publicly.”²⁰ On this reading, objections to provisional right as an incoherent status are beside the point—for that *is* the point.

3. The First Step: “Having”

Kant presents the first step under the chapter title “How to *Have* Something External as One’s Own.”²¹ This is followed by a second chapter, “How to *Acquire* Something External.”²² To ‘have as one’s own’ means to be the master of a thing, to subject it to one’s purposes. To ‘acquire’ means to become the master of *this* or *that* thing.²³ ‘How to...’ in each title asks what having or acquiring consists in (its concept) and whether it is justified. As will

¹⁹ “Conceivable a priori,” “in the state of nature” and “private right” are co-explanatory. See *MM* 6:242, 6:291, 6:297, 6:301, 6:302, 6:306-07; *LE* 27:590. They express Kant’s commitment to leave “empirical principles behind for a while and [seek] the source of judgments [about right] in reason alone” (*MM* 6:230; cf. 6:291, 6:216).

²⁰ *MM* 6:255; cf. 6:263.

²¹ *MM* 6:245.

²² *MM* 6:258.

²³ *MM* 6:258.

emerge, Kant's first chapter, an account of the concept and justification of ownership, is not without implications for the topic of his second, but neither does it tell the whole story.

Why are there *two* chapters? Locke introduces property in terms of a distinctive act—"the labor of a man's body and the work of his hands"—that makes some particular thing yours.²⁴ He answers both of Kant's questions (rightful having and determinate acquiring) at once. Or rather he seems to see only a single question: how does one manage to remove something from the common stock where everyone can make use of it?²⁵ Kant's division of questions accords with H. L. A. Hart's instruction to distinguish (in considering punishment and property) between questions of definition, justification, and distribution.²⁶ In these terms, it may be said that Locke's identification of a distinctive act of making a thing yours presupposes your entitlement to apply the concept (of a thing's being somebody's) which informs your idea of what you are doing. Why, after all, isn't your labor simply wasted if it is expended on a thing that doesn't belong to you?²⁷ Whatever the relevant acquisitive act may be, it can succeed only if external things *can* rightfully be yours or mine; and that, for Kant, is the prior question of 'having.'

It has become standard to say that Kant's discussion of property justifies only some form of proprietorship but not necessarily a right of *ownership* as Kant and the legal tradition understand it: a right to use a thing at one's pleasure and to exclude others.²⁸ This view is mistaken. To see why Kant regards purely private right as 'provisional,' we must show that it entails ownership in its classical sense—ownership as dominion. For the problem to which provisionality is a response arises through claims to dominion.

²⁴ Locke 2003, III.

²⁵ On some readings (e.g., Shiffrin 2001 and Simmons 1994), Locke does distinguish between property's justification and acquisition. At the very least, the distinction is more sharply drawn by Kant; it organizes his entire discussion.

²⁶ See Hart 1968, 4. Kant's justification of property does not accord with Hart's further view that the questions of justification and distribution might receive entirely independent answers, resulting in an ununified plurality of principles. See Sec. 5 below.

²⁷ Cf. *MM* 6:253-257. For an account of Kant's objections to Locke in these terms, see Ripstein 2009, 96-105.

²⁸ Westphal (2002, 90-91) argues that Kant justifies only the "owner's personal use and enjoyment of a thing in question," not the right to "exclusive physical control of a thing." To similar effect, see Westphal (1997, 141-194, 150), Guyer (2002, 58), Hodgson (2010, 62), James (2016, 314-316), and Korsgaard (2009, 238 n.7).

3a. *Set-up: The Basis of Rights*

Property arises in the *Doctrine of Right* as a specification of the “Universal Principle of Right”: “Any action is right if it can coexist with everyone’s freedom in accordance with a universal law....”²⁹ The Universal Principle of Right states what the book is about: the conditions under which free beings (those with the power to choose ends) can exercise their power of choice consistently with the like power of others. Kant’s treatment of property asks about the conditions under which people’s choices can co-exist when these choices involve a use of *things*.

A first condition of people’s co-existing choices is that each has an “innate right to freedom,” conceived of as “independence from being constrained by another’s choice.”³⁰ This describes what must be true of anyone who falls under the Universal Principle of Right: if the mutual exercise of choice is to be possible, each person must have the right not to have her power of choice interfered with. ‘Power of choice’ denotes, at this stage, bodily powers, the basic means of action. Kant calls this “internal possession.”³¹ The question of property is the question of whether there can be “external possession”—external means of choice—as well.

To be a chooser is to occupy space and interact with things. Hence innate right is more than a right to wiggle your limbs in a vacuum chamber; it is already a right to occupy space and make use of objects, on condition that you do not thereby infringe the rights of others.³² (This condition will usually be satisfied when the spaces you occupy aren’t already occupied, or the objects you use aren’t already in use.)³³ But no one has an innate right to anything as *property*. Any external thing that is yours might have been mine as well, and

²⁹ *MM* 6:230.

³⁰ *MM* 6:237.

³¹ *MM* 6:248. We take Kant’s “innate right” to involve a right regarding one’s own body as the basic means of action. But see Flikschuh 2017, ch. 3 for a different view.

³² “[B]efore [you] perform any act affecting rights [you] have done no wrong to anyone”: *MM* 6:238.

³³ “Usually”: The law of negligence represents ways you can wrong others by using only what belongs to *you*.

anything that is potentially yours-or-mine cannot fall under innate right. Such rights must be acquired.

Against this background, it makes sense that Kant introduces the concept of property by contrasting two kinds of interference with someone's power of choice, an interference: **(1)** "with regard to what is *internally mine*" (e.g., your wrenching the apple from my hand) and **(2)** "with regard to what is *externally mine*" (e.g., your taking the apple after I have set it down). My claim that **(1)** is a wrong to me does not require property in the apple, for it falls under the aforementioned principle of occupying spaces and using things. The wrong here consists in the displacement of my body—a 'battery' as lawyers say—not what happens to the apple. But my claim that **(2)** is a wrong to me—a 'theft'—requires that I be able to assert "possession of the object" even when I'm not holding it.³⁴ Possession of an object without holding it is just what it means for something to be *externally mine*, and the question of Kant's first chapter is just whether this is possible at all. Can I be wronged by your taking the apple I've set down, or by your using the bed I'm no longer lying in, even though you haven't interfered with *me*?

That I can be wronged in this way is, Kant says, a synthetic a priori proposition—unlike innate right, it is not conceptually contained in the Universal Principle of Right.³⁵ This is because it presupposes a capacity for extended engagements with objects—an anthropological fact not derivable from the bare idea of an agent or chooser. (If there were rational jellyfish—creatures that did not so engage with objects—they would fall under the Universal Principle of Right, but principles of property would not apply to them.) Moreover, the Universal Principle of Right alone says only that an exercise of my object-using power is not, just as such, wrongful. 'Having as my own,' however, involves an extraordinary exercise of this power: its unlimited and perpetual exercise, as it were, notwithstanding my separation from the object.

³⁴ *MM* 6:248.

³⁵ *MM* 6:250, 6:255.

So much for the set-up of Kant's argument for property. We find it instructive to approach the argument through a common misreading of it: *the usufruct argument*. On this misreading, Kant does not actually reach his target. He does not succeed in justifying classical property but only a more limited use-right in objects. Seeing where the usufruct argument goes wrong points the way to the right reading: *the property argument*.

3b. *The Usufruct Argument*

Kant's Postulate of Practical Reason with Regard to Rights [hereafter "postulate"] states:

It is possible for me to have any external object of choice as mine, that is, a maxim by which, if it were to become a law, an object of choice would in itself (objectively) have to belong to no one (*res nullius*) is contrary to rights.³⁶

As a synthetic proposition, this requires justification (a "deduction"):

For an object of my choice is something that I have the physical power to use. If it were nevertheless absolutely not within my rightful power to make use of it, that is if the use of it could not coexist with the freedom of everyone in accordance with a universal law (would be wrong), then 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 if in the use of things choice were formally consistent with everyone's outer freedom in accordance with universal laws.³⁷

³⁶ *MM* 6:250.

³⁷ *MM* 6:250. Kant's argument for the postulate grounds three species of right, corresponding to three external "objects of choice": property rights regarding (corporeal) things, contractual rights regarding others'

An inconsistency, Kant claims, ensues from the postulate's denial. The denial is stated as the antecedent of a conditional—"if it were...not within my rightful power to make use of [an object of choice]"—and the inconsistency is expressed both as a restriction of agency ("freedom would be depriving itself of the use of its choice") and as an incoherent conception of an object ("putting usable objects beyond any possibility of being *used*"). This double expression is a clue to Kant's thought: self-consistent freedom and the usability of objects go together. As will emerge, the usufruct argument fails to bring the usability of objects into proper view.

The usufruct argument has Kant saying something like this:

1. I have the physical power to make use of unoccupied objects.
2. Assume I did not have the rightful power to make use of unoccupied objects.
3. My freedom of choice is restricted. (1,2)
4. Freedom of choice can be restricted only on the basis of consistency with everyone's outer freedom in accordance with universal laws (Universal Principle of Right).
5. In making use of an unoccupied physical object, I do nothing inconsistent with another's right to freedom: I do not interfere with what is *theirs*.
6. The restriction on my freedom of choice is not based on the rights of others. (5)
7. Objects are *usable* (def).
8. The restriction on my freedom of choice is not based on the nature of objects.
(7)
9. Restrictions of my freedom of choice based on another's right or on the nature of objects are the only notionally possible restrictions based on everyone's outer freedom in accordance with universal laws.
10. So the restriction on my freedom of choice is not based on everyone's freedom in accordance with universal laws. [6, 8, 9]

performances, and rights regarding "another's *status* in relation to me" (*MM* 6:247). Our exposition focuses only on property rights, but could, with modifications, be extended to the other acquired rights.

11. But my freedom of choice cannot be restricted on other grounds. (4)
 12. So I do have the rightful power to make use of unoccupied physical objects.

That (4) follows from the Universal Principle of Right is especially clear once this principle is spelled out in terms of innate right—a right to freedom limited only by the freedom of others.³⁸ (5) reflects the implication of innate right noted earlier: the rightfulness of using unused things. (7) is perhaps obvious, but Kant often emphasizes that, apart from special cases, it lies in the nature of objects to be subject to the purposes of free beings.³⁹ Similarly, (9) reflects Kant’s well-known division of beings into ‘persons’ and ‘things.’⁴⁰

Yet if this argument works, what actually follows from it? It is easy to agree with commentators who say that it fails to support the postulate, “It is possible for me to have any external object of choice as mine.” To reach that conclusion an additional premise would apparently be needed—

13. I could only make use of an object if I had it as *mine*
 —but this is false. I make use of the hiking trail, the park’s basketball court, the library’s books, and so on, though they are not *mine*. Since (13) is false, the argument supports only the weaker conclusion that unoccupied objects must be available for people’s use.

One reason to doubt that the usufruct argument is *Kant’s* argument is simply that this conclusion—the usability of objects—seems patently feeble. Innate right already establishes as much. So the argument offers no extension of the Universal Principle of Right beyond the right in one’s own person.

Commentators who attribute this argument to Kant are, however, prepared to derive a beefier conclusion from it, though one that still falls short of a classical property right. Based on innate right alone, they observe, the right to use a thing would be limited to

³⁸ Later stages of the *Doctrine of Right* will introduce other grounds for restricting freedom (and institutions authorized to do so), but at this stage—private right—there are none such.

³⁹ See e.g., Kant 2016 27:1335, 23:213, and esp. 23:288. The special cases—e.g., sacred objects, works of art, and books—prove the general principle: like the human body, such objects embody personality. Cf. *MM* 6:290.

⁴⁰ See e.g., Kant 1996a 4:428 and Kant 2011 7:127.

present contact with it. A particular pen would be mine to use while I am holding it, for example, but it would lie open to you to snatch it up and commence your own use of it the moment I put it down. ‘Proprietorship’ has no application here. In contrast, the usufruct argument would allow for some kind of proprietorship, if it is allowed that a person’s ‘use’ of an object can extend beyond merely episodic contact with it. For example, it seems plausible to say that I’m still *using* this pen to write this paragraph, though I’ve momentarily put it down to sip a cup of tea, or that I’m *using* this cup, even when not touching it, to keep my tea at hand. Obviously, people’s object-involving choices would come under massive restriction if the right to ‘use’ a thing required continuous contact with it. Making a simple salad for dinner would be beyond my power of choice, even after I gathered all the ingredients, if you could come and grab the lettuce while I was cutting the onions.

Read step 1, then, more robustly, as befits people’s actual projects like paragraph-writing and salad-making: “Suppose I could not make *some appropriately extended* use of objects (i.e., beyond continuous ‘holding’).” Now the argument’s conclusion will be more robust as well: It will support some kind of proprietorship.

But just what kind? A classical right of ownership—a right to have an object unconditionally at one’s disposal and to exclude others—isn’t the only option. And that is the point that commentators are eager to make. Property expands our freedom by liberating object-involving choices from the bounds of continuous contact. But Kant’s argument for this, it is widely held, proves less than Kant thinks: it is consistent with both a system of classical ownership and a system of *usufruct* or limited use-rights in objects.⁴¹

3c. *The Property Argument*

The usufruct argument points in the right direction, but it also involves a basic

⁴¹ As a way of closing the putative gap in Kant’s argument, it might be argued that the most effective way to make objects useful is to make people full owners of them. Cf. Guyer 2002, 58: Kant “makes the major assumption that the usefulness of objects presupposes long-term individual control or intelligible possession of them, which he never spells out.” As the next section explains, however, Kant’s argument is not based on the *usefulness* of objects of at all.

misunderstanding. To see this, consider that the argument depends on a notion of using an object, which, though not restricted to physical contact, is also not, as yet, positively defined. The type of property rules we end up with will depend on how appropriate using is further defined. But how is this to be done? Where do people's uses of objects begin and end?

Suppose I say: "I've been using this pen for months (to write my novel), and I don't expect to finish till late next year." You might allow this boldly possessive claim of mine (it makes sense), but what if I add: "And when I'm finished writing, I plan to resume my main use of the pen, as part of the shrine to the muses I keep in my study"? Well, that makes sense too. So does every other claim I might make about my agenda with the thing. In light of this, what allows us to say (i.e., once we've put aside the simple criterion of physical contact) that anyone has ever stopped using anything, as long as they evince an intention to go on using it in one way or another?

Reflection on cases where objects are successfully shared—where episodes of 'using' come to an end—reveals the answer. It is a matter of some standard set of purposes associated with a thing. Any system of object-sharing will give determinate contours to 'use' by specifying: object types (e.g., pens, bicycles, a basketball court), conforming uses for these types (e.g., I can use one of New York City's shared bicycles *as a bicycle*, but I can't make a sculpture out of it), and norms concerning the continuity of uses (e.g., I don't need to maintain contact with a bike to exclude others, but leaving it alone long enough will constitute abandonment). Such determinations are based on a thing's *usefulness-for-a-purpose*. For example, the city's bike rules address the question, "How can these things be made useful for short trips around town?"; and the rules can be criticized, among other ways, if they aren't effective for this purpose.

Now, some things might be most useful when they are privately owned, while others (like bicycles for some purposes) might work better being shared. Whether a thing is one or the other is an empirical question of what will lead to what. But Kant isn't endeavoring to

argue for property as a condition of making things *useful* or of enlarging the range of achievable ends. ‘Usefulness-for-a-purpose’ is a material principle; it refers to people’s interests and needs. In contrast, the Universal Principle of Right is a principle for unifying choices without regard to the “*matter* of choice,” i.e., “the end each has in mind.”⁴² Kant’s argument for the postulate does say that “usable objects” will otherwise be put “beyond any possibility of being *used*.”⁴³ But given the Universal Principle of Right’s formality, Kant’s meaning cannot be that, without ownership, objects couldn’t be used for some purposes, but that they wouldn’t be, as we will put it, *utterly usable*. Formal or utter usability not material usefulness, is the key idea here.⁴⁴

Kant’s continuation of the passage aims to clarify this:

— But since pure practical reason lays down only formal laws as the basis for choice and thus abstracts from its matter, that is, from other properties of the object *provided only that it is an object of choice*, it can contain no absolute prohibition against using such an object, since this would be a contradiction of outer freedom with itself.

— But an object of my *choice* is that which I have the physical capacity to use as I please, that whose use lies within my *power (potentia)*. This must be distinguished from having the same object under my control (*in potestatem meam redactum*), which presupposes not merely a *capacity* but also an *act* of choice. But in order to *think of* something simply as an object of my choice it is sufficient for me to be conscious of having it within my power.⁴⁵

Three related distinctions appear here: **(1)** formal vs. material principles, **(2)** capacity vs. act of choice, and **(3)** having an object in my power vs. under my control.

(1) Principles of right are *formal* ones: they abstract from the “matter” of choice,

⁴² *MM* 6:230.

⁴³ *MM* 6:250: “...*ausser aller Möglichkeit des Gebrauchs setze*.”

⁴⁴ See Weinrib 2018, 123-138 and Ripstein 2013, 156.

⁴⁵ *MM* 6:246.

from people's particular purposes. This means that they also abstract from the "properties of the object." After all, the object's properties—e.g., its having wheels, a seat, a stable structure, etc.—are functions of our purposes. As a formal principle, the Universal Principle of Right relates choosers to one another not by harmonizing their purposes, but by entitling each to decide what purposes to pursue with her own means or possessions.⁴⁶ This remains true when the Universal Principle of Right is extended to the case of external possessions.⁴⁷ The question is not how external objects might become materially useful (that would depend on people's purposes and on the properties of the object), but whether I can have an object "in my power" to use for whatever purposes I please.⁴⁸

(2) The formal and material questions concerning objects are of course related, since a formally usable object is one that can be used for *this* or *that* material purpose. The relation is that of a general *capacity* to its specific exercise or act. Hence we "must distinguish," Kant says, a "capacity to use as I please" from an object-involving "act of choice." We must distinguish these (presumably) because someone might think the argument for the postulate was about the conditions under which objects could be serviceable for material choices. After all, "an object of my choice" is ambiguous: *qua act*, it denotes my using an object for a particular purpose; *qua capacity*, it denotes only the possibility of my so using it. (3) Kant resolves this potential ambiguity in favor of formality: an "object of choice" is an object "within my power," whether or not I am employing it in any particular act of choice.

⁴⁶ Cf. *MM* 6:230: "All that is in question is the *form* in the relation of choice on the part of both." For further development of this thought, see Stone 2017.

⁴⁷ Contemporary philosophy raises the question of whether the mind is embodied in external things ("the extended mind hypothesis"). Analogously, Kant's treatment of property might be said to present an extended *body* hypothesis when it asks whether things I'm not holding can be in my possession, or whether I can be "so connected" to an external object that "another's use of it without my consent would wrong me" (*MM* 6:245). This doesn't mean that interferences with property are interferences with my body. But for practical thought, the body is nothing other than a person's own means of choice, and the question of property, for Kant, is just whether the practical relation to others that first comes into view regarding the body can rightfully be extended to objects.

⁴⁸ The juridical conception of the person as a *chooser* (a center of purposiveness without determinate purposes) thus corresponds to the conception of the object as a *thing* (an object of choice without "other properties"). These conceptions express, from the poles of subject and object, the same abstraction from material purposes.

In essence, these distinctions spell out what it is to think of a thing, like my tea cup, as utterly or formally usable. This is to think of it as subject to my choices: not just when I am *holding* it (a restriction of choice to bodily right), and not just when I am *using* it in an appropriately extended sense (a restriction of choice to some standard set of material purposes), but rather *wherever the thing is* (so my choice regarding the thing is unrestricted). In these terms, Kant's justification of property is a matter of three points. First, it lies in the nature of a thing to subject to my choices without restriction—i.e., regardless of what my ends might be. Second, the personality of others affords no ground for restriction: by having a thing unrestrictedly subject to my choices I do not, just as such, interfere with what is yours. Third, any principle that renders things less than unrestrictedly usable therefore involves an unexplained, external restriction of choice.⁴⁹

The usufruct argument was on the right track, but it failed to justify the postulate because it focused on using qua *act*, using for some material purpose. Focusing the argument on using qua *capacity* (the power to subject a thing to one's purposes) requires two revisions:

2*: Assume I did not have the rightful power to use unoccupied objects as I please.

5*: In having an unoccupied physical object in my power to use as I please, I do nothing inconsistent with another's right to freedom: I do not interfere with what is *theirs*.

Is (5*) true? It must be. For in having, say, a cup at my disposal even when I am not holding it, I do not restrict you to any greater extent than I already could just by continuing to hold the cup.⁵⁰ (5)—the non-wrongfulness of *using* a thing—was an implication of the Universal Principle of Right. By observing that (5*)—the non-wrongfulness of having a thing in my power—restricts others no more than (5), we can see that (5*) must be consistent with the

⁴⁹ A premise here is that nothing other than persons and things themselves could comprise an internal restriction on object-using choices. This expresses the practical division of beings derived from Roman law: personality is not *usable*; things are usables without *personality*. See *MM* 6:223 and Kant 1996a 4:428.

⁵⁰ See Hodgson (2010, 62) for a similar point.

Universal Principle of Right as well. Thus revised, Kant's argument does not stop short of the postulate. It exhibits the postulate ("It is possible for me to have any external object of choice as mine") as a condition of the usability of things, not their usefulness for people's projects, like bike-riding or drinking tea.

What to say about usufruct is also now clear. Unlike classical ownership, usufruct does not put usable things at anyone's disposal. It permits specific (conforming) uses only by restricting other (non-conforming) ones. It conditions everyone's right to use things by a purposive scheme that involves the equally conditioned choices of others. The formal or utter usability of a thing appears only with ownership.

Indeed, a stronger point may be added. Because usufruct works out the ways things can be useful-for-a-purpose, it presupposes the conceptual point Kant seeks to establish. Suppose we share a bike. This is possible only if the kind of thing it is (its purposive agenda, its functionality as a bike) has been antecedently determined; otherwise you might decide that the thing makes for the perfect garden ornament. Usufruct, in short, attaches to *artifacts* and *equipment*, things with constitutive purposes. It makes no sense, in contrast, to imagine a usufructual scheme in mere things, because everything would depend on what people purposed to do with them, and those purposes might conflict. (This is a grammatical remark about what a *thing* is: a formal *usable*, without purposes of its own.) Hence, any scheme of usufruct or object-sharing presupposes the normative power of ownership—the right to determine a thing's use—that Kant wishes to elucidate. Hence also, it is a mistake to think of usufruct as a less demanding alternative to ownership, something on a spectrum of proprietorship involving some of the incidents of ownership (e.g., the right to use) but lacking others (e.g., the right to exclude others). A right of usufruct is not a self-standing or atomic part of ownership, but a privation or diminution of it.⁵¹ Its condition of possibly is

⁵¹ Reflecting this classical understanding, Pufendorf (1934, 363-64) speaks of "usufruct" as a "diminution" of dominion, conceived as a power "to dispose of things, which belong to us as our own, at our pleasure, and to keep all others from using them."

that someone had the right to set a thing's agenda.⁵² The bearer of this right is an owner. If there were no owners, object-sharing would be impossible.⁵³

4. The Second Step: "Acquiring"

Kant's first step defines and justifies the capacity for ownership, but it says little about how one might begin to exercise this capacity. In general, it is exercised by using a thing as you please (where allowing the thing to gather dust, loaning it, selling it, etc., count as modes of using it). But for any of this to be possible, a thing must first become yours rather than mine; it must be acquired.⁵⁴ Unlike one's body, no external thing is naturally assigned to you or me. Kant's account of acquisition details (a) the nature of the acquisitive act, and (b) a further (reciprocity) condition for such an act to succeed.

4a. *The Acquisitive Act*

"The act required to establish a right is taking control (*occupatio*)." This presupposes that the object was previously masterless, *res nullius*.⁵⁵ I can't take control of an object, consistently with your freedom, if you have already done so. Prior possession is property's own-most principle of acquisition; other ways of acquiring property (e.g., by contract or gift) presuppose it.

Kant's rationale for this principle is extremely simple. If it is possible for an external object to *be* mine (as the postulate says), there must be some way it can *become* mine. *Being*

⁵² On the idea of "agenda setting," see Katz 2008, 277.

⁵³ To be clear, Kant's argument remains formal: it establishes the moral possibility of classical ownership (ownership as dominion), but it does not require that owners be individual as opposed to collective agents. As we read it, Kant's argument can countenance collective ownership ("community of what is mine and yours": *MM* 6:258) coming about through either collective acquisition (i.e., people acquire together) or contract among individual owners (see 6:265-66) or a state's exercise of eminent domain. Such cases will involve arrangements for sharing what is collectively owned. Nonetheless, they remain instances of 'dominion,' whereby an owner (individual or collective) gets to set a thing's agenda. (Communism, on this conception, would be a scheme of classical ownership, in which the state gets to determine how things are used.) On the formality—and hence capaciousness—of 'property as dominion,' see the helpful remarks by Messina (2020). We thank an anonymous referee for the question to which this footnote is a response.

⁵⁴ See *MM* 6:258.

⁵⁵ *MM* 6:263; see also 6:258, 6:259.

mine means that the object is subject to my purposes. Accordingly, an object can become mine, on Kant's thesis, by *my subjecting it to my purposes*—i.e., taking control of it. In other words, objects are acquired by doing what a proprietor does with them.

Three conditions or *momenta*, Kant says, are implicit in this idea of the acquisitive act.⁵⁶ (The first two will be described here; the third, which is of a different kind, will receive a lengthier discussion below.)

First, since my acquisition of an object is to exclude others from doing the same, my act must involve some *real* relation to the object (touching it or otherwise affecting it), not merely an intentional relation (wishing, striving, or expecting to affect it).⁵⁷ No purely intentional relation commences a subjection of the object. Indeed, purely intentional relations are not affected by the object's non-existence.⁵⁸ So we might both wish to capture an object, and even believe we have succeeded, without affecting each other's normative position. *Second*, and by the same token, my act of acquiring must be recognizable by others, not a private affair: I must "*give a sign* of my possession of this object and of my act of choice to exclude everyone else from it."⁵⁹ Social convention will need to say what constitutes such a sign, and different answers for different cases are only to be expected—this is a matter of judgment.⁶⁰

Summarizing these two conditions, what a would-be proprietor must do comes to this: she must legibly comport herself as a proprietor.

The shallowness of this account reflects Kant's initial division of questions. Given the postulate, the very possibility of constraint by another's external possession doesn't need to be explained by any special acquisitive achievement—e.g., mixing one's labor or one's will with a thing. So the acquisitive act can be completely generic. As Kant remarks,

⁵⁶ See *MM* 6:258-59.

⁵⁷ See *MM* 6:258-59, 6:263.

⁵⁸ E.g., "I *expect* my friend to arrive soon," may be true, even when, unbeknownst to me, my friend has died. Indifference to an object's non-existence is a distinguishing mark of intentional relations.

⁵⁹ *MM* 6:258.

⁶⁰ With *Pierson v. Post* (capture of a fox needed to establish property), 3 Cai R. 175; 2 Am. Dec. 264; 1805 WL 781 (N.Y. Sup.) (N.Y. 1805) compare *Gben v. Rich* (mere harpooning of a whale is sufficient), 8 F. 159 (D. Mass. 1881).

“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.”⁶¹ The principle of first possession is a consequence of the postulate because the capacity for property would come to naught without some way of exercising it. And since this capacity has already been established, exercising it need be nothing other than being the first, with respect to some object, to manifest possession. Cultivating or improving the object can of course be *a* way of doing this, but this is only because these are signs of possession, not because they mix the object with something from the subject; there are other signs as well.⁶²

4b. The Reciprocity Condition

This shallow account of acquisition is not, however, a complete account. Kant’s third condition reads: “*Appropriation*, as the act of a general will (in idea) giving an external law through which everyone is bound to agree with my choice.”⁶³ This is a *meta*-condition: it refers to the act of possession —“my choice”—described by the previous conditions. When Kant speaks of “provisional right,” it is always with reference to this meta-condition.

The meta-condition does not describe anything more a would-be proprietor needs to do beyond manifesting possession. Rather, it addresses the question of how it is morally possible for her to do *that* at all. “It is not easy to see,” Kant warns, “how an act of choice of that kind could establish what belongs to someone.”⁶⁴

This remark will seem surprising, unless we again recur to Kant’s division of topics. My having an external object as mine is not, as such, wrongful (not any more than my having this body as mine): thus, the postulate. It doesn’t follow, however, that my bringing it about

⁶¹ *MM* 6:263; see also 6:252.

⁶² See *MM* 6:265; see also 6:269. Immediate inference from the postulate to property’s principle of acquisition explains Kant’s representation of the postulate as a “permissive law” authorizing us to “put all others under an obligation...to refrain from using certain objects...because we have been the first to take them into our possession” (*MM* 6:247). Kant’s “permissive law” sets out the principle—first possession—for the exercise of the capacity to ‘have’ described by the postulate.

⁶³ *MM* 6:259; see also 6:263, 6:258, 6:267.

⁶⁴ *MM* 6:259.

that an external object *becomes* mine is unproblematic as well. For my acquisitive choice, besides disabling your own power of acquiring the thing, would impose a new obligation on you—an obligation to forbear from using the thing wherever I may be.⁶⁵ How can I change your normative position—e.g., putting the apple tree off-limits to you—simply by my own act of choice? Whence comes my authority to create new rules about what you can do? Kant is as clear as any writer who has called property a “usurpation” or “deception” that I have no such authority: “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.”⁶⁶

The problem Kant has in mind here can be made clearer by considering how acquisition differs from the complementary case: possession that is *internal* and therefore not contingent. Even when I move around in space, my unilateral choices determine how you are constrained. For example, either of us might have been the first to stand *here* (under the shady tree), but the right to the spot is mine if I occupy it first. Now someone might say: “Property is no more problematic than this. Each of us can constrain the other through prior occupancy, just as we could before. The acquisitive act, although unilateral, is not intrinsically subordinating of others. If it were, the mere occupation of spaces would likewise be subordinating, since unilateral prior occupancy operates here too.”

Of course, it would be absurd to think that occupation of space, a basic incident of innate right, is inconsistent with the co-existing freedom of all. But the relevant difference between the two cases—the occupation of spaces and the acquisition of property—must be articulated if we are to understand Kant’s point about the problematic character of the later. This is a matter of two points.

First, with internal possession, my obligation to you is explained by the same rule that explains your obligation to me. We fall under this rule (of non-interference with the

⁶⁵ *MM* 6:255. cf. 6:253 and 6:247.

⁶⁶ *MM* 6:255-56; cf. 6:257, 6:259, 6:261, 6:263, 6:264.

other's person) together. In occupying the shady spot, for example, my exclusion of you is an instance of the rule by which you symmetrically exclude me. As Kant says, "the universality, and with it the reciprocity, of obligation arises from a universal rule."⁶⁷

Second, my change of place is not juridically innovative: it does not create *another* obligation for you or extend my dominion. To avoid an absurdity (of obligations continuously created and lapsing as I move about the world), we can distinguish between our obligations under the rule of occupied spaces and the circumstances in which those obligations apply. In changing places, I impose no further obligation on you but merely alter the circumstances in which your antecedent obligation applies.⁶⁸ The way we constrain one another remains perfectly reciprocal.

These two points explain why the innate right of each "is not really distinct," as Kant puts it, from an "innate *equality*"—understanding "equality" as "independence from being bound by others to more than one can in turn bind them."⁶⁹ As bearers of innate right, our normative positions are mirror images of one another. Each of us has just what the other has.

Acquisition threatens to disrupt this equality, for it is different on both of the foregoing counts.⁷⁰ First, our new obligations would not be reciprocal ones. True, we have a reciprocal *power* to place others under obligations—i.e., you can acquire just as I can—but this is not reciprocity of obligation itself. For (second) every acquisitive act creates *further* obligations for others, obligations "no one would have were it not for this act...to establish a right."⁷¹ While our respective powers to acquire are instances of the same practical law, the content of the power in question is clearly one of unilaterally binding others in non-reciprocal ways.

⁶⁷ *MM* 6:256.

⁶⁸ Here we follow Ripstein 2009, 151.

⁶⁹ *MM* 6:237-38.

⁷⁰ As should be clear, this does not mean that acquisition might make us *materially* unequal. It surely will, but this is not Kant's concern.

⁷¹ *MM* 6:253.

In sum, unlike occupying spaces, acquisition of property would be both unilateral and legislative for others. And the fact that I have this power *and* you do too doesn't resolve the problem but only multiplies its instances.⁷² (The problem lies in the very nature of such a power, not whether one person or many people exercise it.) Kant trusts his readers to recognize the problem by its very description: "A unilateral will cannot serve as a coercive law for everyone." Apart from special cases of legal dependency (e.g., immaturity), there are in fact no juridical powers to unilaterally bind others.⁷³ But if someone wanted to press further and ask why this is juridically impossible, the answer, in Kant's terms, would be its inconsistency with reciprocal freedom under universal laws. If could legislate for you, I would be your master.

Acquisition in the state of nature is thus problematic. It comprises a struggle over the boundaries of 'yours' and 'mine', one might say, where the only possible positions are those of master or slave.⁷⁴ My assertion that an object is mine is a gambit of mastery, but so is your refusal to credit my claim since it is no less unilateral: you have "as little lawful force in denying [me] possession as [I have] in asserting it."⁷⁵ Moreover, this state of affairs is metaphysically paradoxical, for it implies that the capacity set out in the postulate has no act by which it can rightfully be exercised. It involves a permission to do what cannot be done, or a condition of the possibility of property—viz., unilateral prior possession—that is at once the condition of its *impossibility*.

Or its impossibility, anyway, as a matter of *pure* private right.

For Kant is moving step-wise. His procedure requires both acceptance of an initial description of private right at the first step *and* recognition of that description as juridically defective at the second. The structure of Kant's sequence becomes clearer if we ask how

⁷² Sage 2012 attempts to resolve the problem in this way.

⁷³ Even a gift or inheritance, which might create obligations for its recipient (e.g., to protect a work of art) requires at least a bi-lateral will: a giving and acceptance of the object. Cf. *MM* 6:293-4.

⁷⁴ See Pippin 1999, 78.

⁷⁵ *MM* 6:257. This is why "men do one another no wrong at all when they feud among themselves" in the state of nature (*MM* 6:307-308). Where the only options are for someone to subordinate someone, claims of 'wronging' do not apply.

such a combination of acceptance and recognition is possible. How can one's commitment to the initial description survive the subsequent recognition of this description as defective? What propels Kant's argument forward, beyond private right, instead of backward to the rejection of the postulate and the conclusion that property is impossible among equally free persons?

The answer lies in the fact that the steps of the argument do not comprise a contradiction. The first step, the postulate, permits me to make a thing mine. The second step—the impossibility of unilaterally making it mine—does not negate the postulate but marks a condition of its possibility. This condition is, as yet, only a negative one: “A unilateral will cannot serve as a coercive law for everyone....” But the postulate can be redeemed if this condition can be characterized positively—as something attainable. What is needed is a united will that can properly bind everyone. Recall Kant's remark, “It is not easy to see how an act...[of prior possession] could establish what belongs to someone.” Within the horizon of private right, prior possession *can't* establish this, for private right knows only the acts of disassociated individuals, not a united will. In the previous social contract tradition, the absence of a united will is represented as frustrating either to the security of rights or to the prospects of a happy life. Kant's point is different. Constituted by a permission to do what cannot be done, private right isn't self-standingly intelligible. Private right is a *privation* of right.

4c. The Transition to Public Right

Kant spells out the postulate's further condition of realization—property's meta-condition—as follows: “By my unilateral choice I cannot bind another to refrain from using a thing, an obligation he would not otherwise have; hence I can do this only through the united choice of all who possess it in common.”⁷⁶ The solution described here—a “united

⁷⁶ *MM* 6:261; see also 6:259. “All who possess it in common” refers to the disjunctive right of each to use things, prior to institutions of property.

choice of all”—is determined by the set-up of the problem.

Right requires reciprocity in the way we constrain one another. This amounts to a proviso on acquisition, one that is satisfied not when others can acquire “enough and as good” but when no one acquires *just on their own*.⁷⁷ Accordingly, acquisition is possible only if it can be understood as a joint, relational act, something we do together, not severally or successively. This doesn’t mean that the principle of prior possession is cancelled in favor of some other route into property. To the contrary, an individual’s choice to possess is property’s only innate principle of acquisition or distribution. But the acquisition of property requires *mutually related* acts of choice.

To see what this means, consider that a model for the requisite acquisitive act is partially available in the derivative acquisition of a thing by means of a bi-lateral contract. Here we each acquire new rights *together*, in a sense not reducible to a sum or succession of independent acts. A contract isn’t just a matter of my promising *and* your promising, but rather these acts in a certain relation to each other, each the ground of the other: I promise you *because* you promise me, and vice versa. Of course, distinctive parts are related here—I offer and you accept—but the whole is intrinsically dyadic and conceptually prior to those parts. My offer refers to the prospect of your acceptance, just as your acceptance refers to my offer. Similarly, when we conclude our deal by shaking hands, our respective thoughts about what we are doing—“I am shaking your hand”—will be apprehensions of a single reality (viz., what *we* are doing) not of two independent facts.⁷⁸

Acquisition by contract thus points to how acquired rights might be reciprocally grounded. But contract is not a fully general solution to the problem of reciprocity in acquired rights. For one thing, my contractual acquisition of a thing from you presupposes

⁷⁷ Locke 2003, 112. Locke’s proviso is a material one: it refers not to what others already *have*, but to what they want or need. Public authority may indeed qualify ownership on the basis of need, but such qualifications are not, for Kant, intrinsic to property or its acquisition. See sec. 5 below.

⁷⁸ Kant mentions “shaking hands” as the parties’ way of expressing the reciprocal grounding (or “simultaneity”) of their contractual acts: *MM* 6:272. Cf. 6:274: “...that which transfers what is mine to the other is not one of the two separate wills...but their united will.” We have benefitted in this paragraph from Michael Thompson’s reflections on the dyadic structure of right in Thompson 2006.

your prior acquisition of it: by force of regress, it therefore presupposes non-derivative or original acquisition. Further, my contractual acquisition of a thing effectively binds *everyone* (as a right *in rem*), not just you, my contractual counterpart (a right *in personam*), and this is possible only through property's own acquisitional principle. To explain: Prior to your contractual performance—i.e., your delivery of the thing to me—I had only a contractual claim against you, a right *in personam*. If delivery gives me a new right in the thing itself, this is because by taking delivery, I take *possession* of the thing: as Kant says, the “thing *is brought under my control* so that I make it mine.”⁷⁹ This is property's principle. Of course, unlike original acquisition, no one else could have taken possession of the thing. Delivery involves your prior and my subsequent possession, with no break between the two—no moment when the thing is *res nullius*.⁸⁰ Still, the explanation of my coming, by this means, into a new right *in rem* is not just a matter of contract. Derivative acquisition rather presupposes property's principle: both in your having a thing of your own to give me and in my coming to be a new owner through an act of possession.

This was only to be expected. If a merely unilateral will can't put *all* others under an obligation, it must be mysterious how a bilateral will or contract can do this.⁸¹ To understand how a thing can be derivatively acquired, it is incumbent first to understand how original acquisition (by taking possession of a thing) is possible.

The nature of the solution is now at hand, however. Just as my acquisition of a thing through contract is a non-additive part of a reciprocal act, so my original acquisition of a thing, if it is possible, must be a non-additive part of a reciprocal act that includes *everyone*: a unilateral will “can justify an external acquisition only in so far as it is included in a will that is united a priori (i.e., only through the union of the choice of all who can come into

⁷⁹ *MM* 6:274. See also 6:275 (“a right to the thing” contracted for requires “physical possession.”)

⁸⁰ *MM* 6:274, 6:271.

⁸¹ Cf. *MM* 6:263: “For a unilateral will (and a bilateral but still *particular* will is also unilateral) cannot put everyone under an obligation that is in itself contingent.” As background, consider that Pufendorf (1934, 539) identified the problem of unilateral acquisition—“it is impossible to conceive how the mere corporal act of one person can prejudice the faculty of others”—but reasoned that “pact” provided a solution. Even a multi-lateral pact is as problematic as a unilateral will, however, given that property is a right *in rem*: a pact binds only the parties to it.

practical relations with one another).⁸² We will say more momentarily about what it means for a unilateral will to be “included in” a united will. The basic meaning of this condition is that coming into property is something we can only do together. We come into property together when our acts are grounded in the same totality. This totality is not some third entity (it’s just you and me here), but rather our acts conceived as parts of a nexus that isn’t merely additive: I acquire *because* you acquire and *vice versa*.⁸³

Kant calls this totality “the state,” and the act by which it is formed “the original contract.” Or rather, “the original contract is only the *idea* of this act.”⁸⁴ Any actual contract would bind only its present parties and would therefore also carry a maturity date; it couldn’t bind *all* parties in *perpetuity*. As *omni*-lateral and perpetual, the state is all rightful relations between individuals conceived as a whole: “This condition of the individuals within a people in relation to one another is called a civil condition, and the whole [*das Ganze*] of individuals in a rightful condition, in relation to its own members, is called a state.”⁸⁵ The concepts of public right—e.g., a people, civil condition, state—emerge here as the conditions under which right-with-its-postulate can be coherently realized. This doesn’t mean that some familiar bureaucratic entity is a solution to the reciprocity problem, but that any agency which did overcome the unilaterality of coercive claims in favor of *systemic reciprocity* of rights would be ‘a state.’

We needn’t go further here into the nature of the civil condition and the state. This much is sufficient to return to our question: what is provisional right?

4d. “Provisional” as an Expression of Privation

The pairs of statements from which we first took our bearings seemed paradoxical. Here is another example: “*Conclusive* acquisition takes place only in the civil condition,” yet

⁸² *MM* 6:263.

⁸³ This is Ernest Weinrib’s (forthcoming, chapter 3) helpful formulation.

⁸⁴ *MM* 6:315.

⁸⁵ *MM* 6:311.

“provisional acquisition is true (*wahre*) acquisition.”⁸⁶ Our question was: How are we to think the provisional/conclusive relation, such that both statements can be affirmed?

“True acquisition” means that provisional acquisition is acquisition in the true and full meaning of the word; as we have stressed, Kant is not introducing an exotic juridical status. The term “provisional,” however, expresses defect or internal incompleteness. Acquisition becomes what it is—it becomes “conclusive”—only when it is an exercise of a publicly conferred power to acquire, a power conferred “omni-laterally” and therefore capable of binding all others. This is what it means for a unilateral acquisitive will to be “included in” a politically united will. Provisional acquisition is acquisition plain and simple, but it is partial or incomplete.

A repeated figure in the *Doctrine of Right* makes this idea vivid. Kant glosses provisional acquisition as acquisition “in anticipation,” “in view of,” “with a view to,” “in preparation for,” “leading to,” or “bringing about” a civil condition.⁸⁷ How should these terms be understood? Apparently, they express the part-whole relation that pertains to *action*, as if “provisional” marks the partial or progressive (in contrast to the whole or perfective) aspect of an act—as if, prior to public right, acquisition could only be an incomplete act-in-progress.

Let us try to take this at face value.

You see me leaving the house and ask what I am doing. “I’m seeing the dentist,” I say. Here, I describe what I’m doing (or what comes to the same thing, *why* I’m doing it) in terms of my further end. And what I say may be perfectly true, notwithstanding that no dentist is presently in sight. I’m presenting my act as a phase or part of a larger conceptual unity, which binds together any number of such phases or parts.⁸⁸ However, my claim that I’m *now seeing the dentist* places me in a normative arc, a series of things I must do in order to do *that*. For example, I must get on the subway, exit at the right station, and then walk up

⁸⁶ *MM* 6:264.

⁸⁷ *MM* 6:257, 6:257, 6:264, 6:267, 6:306.

⁸⁸ See Moran and Stone 2009.

Clinton Street. And I must judge that I've acted in error if I fail to do these things; or else my failure will show that my claim wasn't sincere or that I've changed my mind: I *was* seeing the dentist, but this never came to fruition.

Now you see me moving some boulders around and ask what I'm doing. "In the sacred name of right," I say, "I hereby make this land *mine*, to have at my disposal, wherever I may be." My claim that I'm acquiring property may be perfectly true. But this claim places me in a normative arc, a series of things I must do in order to do *that*. I must, on Kant's thesis, comport myself toward creating a civil condition: I must join with others into a reciprocal nexus of obligations, a public system of property rights. My commitment to doing this inheres in the significance I claim for my act, just as my taking the appropriate dentist-reaching steps inheres in my description of what I'm doing. Hence I must judge that I have acted in error if I fail to do these things; or else my failure will show that my claim wasn't sincere (I was only engaging in the general struggle for advantage) or that I've changed my mind: I *was* acquiring land, but this never came to fruition.

Can 'provisional acquisition' be understood thus, in terms of the progress and perfection of a deed? Yes, up to a point. "Provisional acquisition" would be imperfect acquisition, in the manner of an action that has not reached its end; and it would be something to be "included in" a politically united will in the way that the self-same deed can have (as we have just seen) various descriptions, each of them perfectly true, but some more inclusive than others. Yet this analogy should be taken with two qualifications.

First, with most ordinary actions ('leaving the house'), the actor may have various ends in view: seeing the dentist, taking fresh air, etc. But no act could be significant as one of *acquiring a right* except with a view to a reciprocal system of rights. Reciprocity is internal to claims of right. To claim an object as mine just *is*, in part, to intend a further distinctive end, without which this claim could not make sense—a political system of property rights.⁸⁹

⁸⁹ Our argument for what Kant calls an obligation to "proceed with [others] into a rightful condition" (*MM* 6:307, 6:306) is a version of what Flikschuh (2017, 57) calls a "regress from an experiential condition": the obligation applies only where there are claims to property. Kant has a further thesis—that one may coerce

Second, Kant is not describing a temporal progression. True, he uses the traditional idiom of “leaving the state of nature.” But whether there is actually a temporal interval during which merely ‘provisional rights’ await a legal order to become ‘conclusive rights’ is irrelevant to his philosophical purposes. His inquiry concerns not the history of property but the moral capacity for it, where unilateral first possession and its (‘subsequent’) omnilateral authorization are related as less and more complete accounts of this capacity. To elucidate this, Kant uses a *deed*—a conceptual unity of its parts or phases—as a figure for the unity of the private and public “moments” of acquisition.⁹⁰ If these moments—unilateral possession and omnilateral authorization—can be represented in terms of the further end of someone who claims property, this is just because (and this is the point that matters) the capacity to acquire new rights refers to a public system of right as an internal condition of its possibility. Of course, acquiring an object is an act in time. But Kant’s moments describe only, as we might say, the *form* of this act. And a temporal ordering of these moments is not part of this form. The *Doctrine of Right’s* sequence—from private to public right—does not imply that I *first* take control of an object and *then* the state ratifies what I have done, in the way that I *first* get on the subway and *then* get to the dentist. The sequence describes an order of essential juridical concepts, not an order of acts that instantiate them.⁹¹

To summarize, three main points explain how property rights are both natural and conventional:

(I) “In a state of nature something external can actually be mine or yours....”⁹² This says that the concept, justification, and distributive principle of property, are matters of private right, as are therefore the forms of wrongs to owners —e.g., interference with their

others to fulfill this obligation (see *MM* 6:256, 6:264, 6:267, 6:313)—but this is not, we think, an upshot of provisional right; it rests simply on the premise that people may do what is needed to bring about a rightful condition.

⁹⁰ This is not the only place where Kant employs an analogy to practical purposiveness to represent a unity that is *not* the unity of practical purposiveness. Of the purposiveness of nature, Kant (2001 5:181) writes: “This concept is entirely distinct from that of practical purposiveness....although it is certainly conceived of in terms of an analogy with that.”

⁹¹ This is not to deny that ‘provisional acquisition’ can be applied in historical descriptions, but this is not Kant’s primary concern.

⁹² *MM* 6:256.

possession or use. What it is for an object to *be* and to *become* mine is “conceivable a priori in the state of nature” and does not await the public policy of a state.⁹³

(2) “It is possible to have something external as one’s own only in a rightful condition, under an authority giving laws publicly....”⁹⁴ This is the meta-condition. It reflects the requirement of reciprocity in the realization of rights. Outside this condition, unilateral acts of acquisition are essentially fragments. They express claims of right, and not mere dominance, only as they are “included in” a politically united will.

(3) It follows that the concept and justification of property is prior to political association, but its actuality is not. This is why the Lockean thesis that the state only enforces pre-existing property rights and the Hobbesian thesis that the state creates them from the raw cloth of policy do not exhaust the philosophical options.

5. The Sequential Form of Kant’s Account

We have argued that provisional right links private and public right (the *Doctrine of Right’s* main divisions) by marking private right as a defective or incomplete stage of right. As such, provisional right is a central instance in a sequential exposition of right: The Postulate of Practical Reason (authorizing “having” an object as one’s own) specifies the Universal Principle Right in light of our powers to make use of external objects; the Postulate of Public Right (requiring a civil condition) spells out a further condition—that of systemic reciprocity—for external objects to be acquired. In this final section, we broaden our focus beyond provisional right and consider the nature of sequential exposition. Specifically, we address three interconnected questions.

First, what is the structure of Kant’s sequence? What relations between parts and whole does it involve?

⁹³ *MM* 6:291.

⁹⁴ *MM* 6:255.

Second, what is the status of Kant's starting point? If later steps in the sequence result from earlier ones, what, if anything, grounds or supports the first step?

Third, why a sequence? So far, we have argued *that* provisional right functions within a sequential form of account. A deeper understanding is available by asking *why* an account of this form is appropriate to right, as Kant understands it. Obviously, philosophical explanations of our concepts do not always take this peculiar form. Is the sequential form of account just a rhetorical device for presenting a doctrine that might be presented, perhaps more perspicuously, in some other way? Or does sequential exposition (along with provisionality) rather befit the very matter of right as Kant conceives it? A contrast with the different starting point and manifestly *non-sequential* procedure of the utilitarian, we will suggest, helps to clarify the matter.

5a. *The Doctrine of Right as a "Totality of Conditions"*

Kant's argument unfolds as a sequence of steps where the relation between any step and its successors is that of a formal and abstract articulation of a concept to a more concrete specification of it. The most abstract articulation is 'right' itself—the non-subordinative co-existence of choices. Acquired right is a specification of this, and the divisions of acquired right—property, contract, and status—are further specifications for different kinds of interaction.⁹⁵ The method at each step is to ask after the conditions of possibility for a consistent realization of what came before. At crucial points, the attempt to comprehend an earlier concept apart from its further conditions of possibility leads to *aporia*. Further steps are then in the service of showing that the meaning of what came before can be redeemed from its apparent difficulties once it is seen as an abstraction which

⁹⁵ Cf. *MM* 6:238 ("innate right...specified in its various relations"). Ripstein (2009, 66) helpfully suggests that the divisions of acquired right present an exhaustive typology of interaction: i.e., agents might pursue their own ends independently (the rights of person and property) or co-operatively (contract rights), or one might be charged with pursuing the ends of another (status rights).

carries with it further conditions.⁹⁶ In this way, right is “the totality of the conditions”—conditions regarding both private interactions and public institutions—“under which the choice of one can be united with the choice of another.”⁹⁷

“Can be united” means united in practice, not just in theoretical contemplation. The point of right is to be actual—a “practical reality,” as Kant puts it—even if it is practiced only imperfectly.⁹⁸ The *Doctrine of Right’s* “totality of conditions” are therefore an account not merely of a concept but also of a practical capacity: the capacity to live on terms of equal freedom with others.⁹⁹

For right to be actual, infringements of it must be righted; everyone must be able, as Kant says, to *enjoy* their rights.¹⁰⁰ This cannot be left to depend on the sound judgment and good will of each. If it were, the actuality of your rights would ultimately depend on *me*, and—in light of right’s basic requirement of non-unilaterality—that wouldn’t be right. To be actual, right must be laid down, specified, and enforced through public institutions.¹⁰¹

This is why a doctrine of right has two parts, a metaphysical and a positive part.¹⁰² Right’s positive part is a matter of legal expertise (“jurisprudence”): local knowledge of positive law and skillful classification of particulars under these laws.¹⁰³ Right’s metaphysical part, the subject of the *Doctrine of Right* itself, concerns the a priori *form* of such laws and classifications. The metaphysics of right regards right as something to be made actual—so it

⁹⁶ Two *aporias* have figured in our discussion. First, right without property finds aporetic expression as “freedom...depriving itself of the use of its choice with regard to an object of choice” (*MM* 6:250). Second, property without public right finds aporetic expression as a capacity to acquire property that cannot be exercised. A third *aporia* (touched on below) finds “concepts of right” inapplicable where “each has [his] own right to do what seems right and good to [him]” (*MM* 6:312).

⁹⁷ *MM* 6:230 (translation modified).

⁹⁸ See e.g., *MM* 6:205, 6:252.

⁹⁹ In addition to such headings as “How to have...” and “How to Acquire...,” right is ubiquitously associated with a capacity (*Vermögen*): e.g., *MM* 6:237, 6:239, 6:257, 6:267, 6:268, 6:314

¹⁰⁰ *MM* 6:306; cf. 6:236.

¹⁰¹ We are sympathetic to the view that considerations like these offer a broader grounding of public right, one that does not depend on property. See e.g., Pallikkathayil 2017 and Stilz 2013; but cf. Ripstein 2017 for a contrasting view.

¹⁰² *MM* 6:229–30.

¹⁰³ *MM* 6:229.

exhibits positive law as a condition of right's actuality—but it does not thereby purport to offer a substitute for, or an alternative way of reaching, the judgments of legal practice.¹⁰⁴

We have described two moments of Kant's sequence. First, the postulate authorizing external appropriation arises because the Universal Principle of Right must be further specified in light of object use. Second, the postulate requiring a civil condition arises because appropriation is possible only through systemic reciprocity. From here, Kant's sequence deals with the public powers needed for the enjoyment of rights.¹⁰⁵ The generative principle of the whole sequence is well described by Kant's phrase, "freedom is limited to those conditions in conformity with the idea of it."¹⁰⁶ The sequence spells out the realization conditions of its initial idea of freedom as the com-possibility of choices.

What more can be said about the structure of this form of explanation and about how its stages are related to the whole? Our answer refers to three principles: *order*, *holism*, and—as a further implication of order—*non-reductivism*.

5b. Order, Holism, and Non-reductivism

Sequential explanation involves a determinate *order* among various questions concerning right, law, and the state. The general mandate of the state is posterior to private right, from which it is derived. The state's more specific powers are still 'later' questions, which presuppose its public mandate. The Universal Principle of Right is prior to all of these questions. Sound jurisprudence is oriented by this conceptual order. For example, the existence of public powers to regulate property does not show that property is 'really' only a construct of the state's economic policies. It might *seem* that way if the description of property were confined to its late stage. But taken sequentially, public regulation shows only

¹⁰⁴ Cf. *MM* 6:205.

¹⁰⁵ Arguably, Kant's sequence ends in cosmopolitan right (cf., *MM* 6:341; Messina 2019; Ellis 2005, 135), which presents a parallel problem concerning the defective character of acquisitive claims absent a shared will. See, e.g., *MM* 6:350: Without a "universal association of states," "any rights of nations, and anything external that is mine or yours which states can acquire or retain by war, are merely provisional."

¹⁰⁶ *MM* 6:231.

that later stages may introduce modifications of the principles on which they are based. In short, the *Doctrine of Right's* sequence is *non-reductive*. (We return to this below.)

Holism is the second principle of sequential explanation: the full import of earlier stages comes out only through later ones. Later stages are not merely added onto earlier ones, taken as self-standing 'elements.'¹⁰⁷ Rather, as the conditions of possibility of earlier stages, later stages touch their internal character; earlier stages depend on their relation to later ones to be fully what they are. This means that Kant's account of innate right does not furnish the full story about innate right, his account of acquired right does not furnish the full story about acquired right, etc. One way to misunderstand the *Doctrine of Right* is to overlook this and treat its earlier stages in isolation.

Here is a simple illustration of the *Doctrine of Right's* holism (or of an isolative misunderstanding of its sequence), followed by a slightly more complex one.

Illustration 1: Kant introduces innate right as the quality of "being one's own master (*sui iuris*)": each is in charge of herself; no one is in charge of anyone else.¹⁰⁸ Treating this in isolation, someone might think that Kant's doctrine is that of political *anarchism*. After all, to have a state is to have someone in charge. An *aporia* would now arise, either exegetically (how can Kant embrace the state?) or conceptually (are all states illegitimate?). Of course, this difficulty is easily dissolved. It arises only if we think we can fully grasp the meaning of the person as *sui iuris* apart from its further conditions of possibility—conditions which, on Kant's argument, include the state and legally established rights. What it is to be a bearer of innate right emerges fully only through the *Doctrine of Right's* sequence as a whole.

Illustration 2: Kant introduces property as dominion: you get to use your external possessions as you please. Treating this in isolation, someone might think that Kant's doctrine is that of political *libertarianism*. After all, modern states tax and restrict the use of property in various ways. An *aporia* would now arise, either exegetically (how can Kant

¹⁰⁷ In its central applications (e.g., a treatise on geometry), 'elements' denotes items atomically immune to modification through any further combinations into which they might enter.

¹⁰⁸ *MM* 6:238. We borrow the gloss "being in charge" from Ripstein 2016.

embrace a public duty to the poor?)¹⁰⁹ or conceptually (are all state ‘welfare’ provisions illegitimate?). Again, the difficulty arises from an isolative reading, one which has people *first* acquiring property and *then* becoming subject to an authority in charge of the system of property, conceived as an aggregate of antecedently conclusive acquisitions.¹¹⁰ To the contrary, property requires a public standpoint as a condition of its possibility, and a public standpoint introduces new requirements.

To make this last point clearer, consider a basic requirement that is *not* intrinsic to the concept of property but that bears on property as a public system of rights: who owns what must be easily ascertainable. That is, a system of property would be defective—it would fail to make property actual and effective—if proprietorship were hidden rather than manifest. Kant’s example involves the good faith purchase of a stolen horse. Has the purchaser acquired a property right in the horse? From the point of view of private right or “right in itself,”¹¹¹ the answer must be *no*: no one can transfer to another a title they do not possess. But, as Kant notes, a *court*—“public justice”¹¹²—acts properly when it upholds the purchaser’s title. The alternative rule would create pervasive uncertainty about present titles, exposing them to the standing possibility of counter-claims based on irregularities of transmission. Without a rule insulating present possession against historical claims, who owns what would not be manifest.¹¹³

In this and other instances, private and public right diverge. Principles of public right presuppose the concept of property but do not simply ratify what is “right in itself.”¹¹⁴

¹⁰⁹ Cf. *MM* 6:326.

¹¹⁰ Kant explicitly rejects this conception when he speaks of property rights as authorized *divisions* (not a sum of acquisitions) and of the state as the “supreme proprietor of the land.” *MM* 6:323; cf. 6:324.

¹¹¹ *MM* 6:302.

¹¹² *MM* 6:297.

¹¹³ The rule of “adverse possession”—permitting acquisition through unchallenged possession—operates to similar effect. See *MM* 6:292-3.

¹¹⁴ A further basic concern of a public standpoint is the consistency of rights. A system of property would be defective if exercises of your rights were somehow infringements of my own. But what if our preferred uses of our property conflict? Or what if in order to protect or recover my property I need to make use of yours? In such cases, property rights must be qualified by norms of equality among interacting owners: e.g., ‘reasonable use’ by local standards and the conditional privilege to use another’s property in conditions of ‘necessity.’ See, e.g., *Appelby v Erie Tobacco Co.* (1910), 22 O.L.R. 533 (Div. Ct.) and *Vincent v. Lake Erie*, (1910) 109 Minn. 456, 124 NW 221. For an insightful account of Kant’s idea of a public standpoint, see Weinrib 2011.

Similarly, a state's provision of welfare is a requirement that arises with a public standpoint.¹¹⁵ On Kant's account, poverty comprises a relation of dependence on others (for the means to life), a relation that owes its existence, just as wealth does, to the system of property.¹¹⁶ Such dependence cannot be a matter of indifference from a public standpoint because it is inconsistent with the requirement that acquired rights become conclusive only on terms that overcome the subordinative aspect of acquisition. Property is something we must come into together, through a general will. But no one could count as participating in a general will that makes the usable things and places of the world available for their use only via other people's beneficence. In sequential terms: A systemic division of property is a condition of the possibility of acquisition. But such division cannot itself be consistent with the regulative principle of public right (a general will) except by means of a further condition: a public obligation to protect against poverty, conceived as a form of subjection inherent to property *as a system*.

Given the *Doctrine of Right's* sequential *holism*—its later stages completing the story of earlier ones—it becomes significant to stress that its sequential order is *non-reductive*: the principles of private right do not dissolve into what succeeds them. It may be tempting to think that since the existence of property depends on the state, and since the state can modify and redistribute property for public purposes, property is, in the end, nothing other than whatever bundles of rights and powers the state chooses to enforce. The two antecedents of this thought are Kantian but the conclusion is not. Kant's sequence is an alternative to such reductive understandings of property. Reduction makes order superfluous. If property and other principles of private right are really “public law in disguise,” as some have said,¹¹⁷ it hardly matters where jurisprudential inquiry begins. It

¹¹⁵ The present paragraph offers a brief interpretation of Kant's remark that “for reasons of state” the state may provide for those who are unable to provide for themselves. *MM* 6:326. For more developed accounts, see Varden 2006, Weinrib 2012, 263-297; Ripstein 2009, 267-287; Hasan 2018a; and Wood 2014, 84-89.

¹¹⁶ See e.g., *LE* 27:416, where Kant emphasizes the common origin of poverty and wealth. Harsh nature might make it difficult for people to get what they need, but no one is dependent on others in this respect until there are rights to exclude others from the means and places otherwise available.

¹¹⁷ Green 1960.

might as well start with the bottom line: the state's use of its power for some notionally good purpose or other.

Kant knew that jurisprudence was prone to reductive conceptions. In his discussion of divergences between private and public right, he comments on “a common fault of experts on right” that “it is...of no slight importance to recognize.” Experts “misrepresent” as an account of “what is right in itself” what are really only further requirements of a public standpoint.¹¹⁸ They are apt to move from the sound thought that a good faith purchaser gains title against the rightful owner to the reductive conclusion that property rights are ultimately only what public authorities, on grounds of expediency, say they are. Lawyers, one might say, tend to see only the bottom line.

To similar (anti-reductive) effect is Kant's remark that while public right introduces new requirements, “the matter of private right is the same in both.”¹¹⁹ This does not mean that the state is constrained by what is pre-politically right. It means, rather, that the state is bound to go beyond what is pre-politically right because, where this conflicts with principles of public right, reductive resolutions are not available. In other words, while private right might be outweighed by public considerations, it is not thereby altered. Given the dysfunctional effects of the system of property, a state might decide to hold the means of production in common, to create ownership rights for workers, or to guarantee everyone a universal basic income. None of this would alter “the matter of private right.” On Kant's account, property is a matter of private right: it concerns the bilateral relation between persons with respect to things. As such, property has its own-most principles of ownership and acquisition. It doesn't follow that all *public* questions about the distribution and use of property can be determined by property's own principles.¹²⁰

¹¹⁸ *MM* 6:297. Kant's account of the “right of necessity” (*MM* 6:235-36) involves a similar anti-reductive point.

¹¹⁹ *MM* 6:306.

¹²⁰ Since private right functions neither as a side constraint on, nor a mere instrument of, public order, the question arises: Just what is the practical upshot of Kant's anti-reductive point that “the matter of private right remains the same” in a public order? What force do “property's own principles” continue to have if they are not actually dispositive for public questions about the distribution and use of property? Here we can only indicate Kant's general answer: within a public order, private right operates as a “rightful presumption.” (See,

In sum, *order* means that questions of public right are to be considered only as they arise through private right; otherwise, normative orientation by the *Universal Principle of Right* will be missing. *Holism* means that private right is to be understood only through its public realization; otherwise, it remains merely abstract. Private right without public law, one might say, is *empty*; public law without private right is *blind*. Emptiness means neglecting right's public conditions of realization; blindness means neglecting the formal principle (the co-existence of freedom) which is to be realized.

Isolative misunderstandings of right are the opposite of reductive ones. Isolation of early sequential stages does not respect *holism*; reduction to later stages does not take *order* seriously. On isolative readings, private right comprises a side constraint on public law; on reductive readings, private right is only “public law in disguise.” Perhaps just one stage of Kant's sequence is immune to isolative misunderstandings: provisional right. Qualified as ‘provisional’, right wears its incompleteness—it displays sequential structure—on its face.

5c. *The Doctrine of Right's Starting Point*

Once the Universal Principle of Right is posited, Kant's sequence can commence. But Kant offers no direct argument for the principle, and even disavows arguing for it, remarking that it is “a postulate incapable of further proof.”¹²¹ This threatens to make the ensuing sequence ungrounded.¹²² The Universal Principle of Right is introduced as the culmination of several demarcations of “the concept of right”: “right” concerns “an external and practical relation,” “the form in the relation of choice,” etc.¹²³ If these remarks cannot

e.g., *MM* 6:257.) A constitutional translation of this principle might say that a public order can modify or override property rights only (1) to the extent necessary for (2) a legitimate public purpose. It bears emphasizing that here, as elsewhere, Kant's principles are formal ones: they do not themselves decide between different property regimes but merely “establish the [a priori] basis for any possible giving of positive laws” (*MM* 6:230).

¹²¹ *MM* 6:231.

¹²² Some commentators maintain that the Universal Principle of Right is to be derived from Kant's Categorical Imperative. But the “further proof” Kant rejects appears to be just this derivation. The difficulty is that the Categorical Imperative is a principle of rational self-constraint, operating through your conception of what you're doing, whereas the Universal Principle of Right involves coercive constraint by *others* and makes no demands on your maxim. (Cf. *MM* 6:218-20: morality admits of no “pathological” incentives; right depends on them.)

¹²³ *MM* 6:230.

be exhibited as conclusions of some prior argument, the question naturally arises: what kind of remarks are they? Self-evident truths? Exercises of a priori intuition (like ‘a triangle is a three-sided figure...’)? Stipulations? Empirical generalizations?

None of these: they are a *definition* of right.¹²⁴ In a reflection on his philosophical procedures, Kant writes:

Whereas . . . mathematical definitions *make* their concepts, in philosophical definitions concepts are only *explained*. From this it follows . . . that in philosophy we must not imitate mathematics by beginning with definitions, unless it be by way simply of experiment. For since the definitions are analyses of given concepts, they presuppose the prior presence of the concepts, although in a confused state; and the incomplete exposition must precede the complete one. Consequently, we can infer a good deal from a few characteristics, derived from an incomplete analysis, without having yet reached the complete exposition, that is, the definition. In short, the definition in all its precision and clarity ought, in philosophy, to come rather at the end than at the beginning of our enquiries.¹²⁵

An accompanying footnote indicates the relevance of these points to the *Doctrine of Right*: “Jurists are still searching for a definition of their concept of right.”

There are three main points here. First, philosophical definitions are not *constructive*: they do not “make” concepts but elucidate ones already in use. Second, philosophical definitions are *results*, not, as with constructive (mathematical) definitions, “the beginning of our enquiries.” Third, philosophical definitions result from an expository progression: “the incomplete exposition precedes the complete one.”¹²⁶ Applying these points to right, we

¹²⁴ For Kant, a ‘definition’ is a distinctive type of explanation, which “exhibits...the exhaustive concept of a thing” (CPR A727/ B755); cf. A730/ B758.

¹²⁵ CPR A730/B758. Conant (2016) insightfully highlights the significance of this passage.

¹²⁶ Cf. CPR A731/B759: in philosophy “definition belongs....*ad melius esse*.”

may say that its philosophical exposition presupposes a concept that is known, however fragmentarily, in juridical experience—right “in its ordinary and practical use.”¹²⁷ Jurists use this concept, but they lack a definition of it: they do not grasp its universal principle. That principle is not, *more geometrico*, a starting point but rather a *conclusion*: “definition ...ought, in philosophy, to come...at the end.” Or it is a starting point, Kant allows, “by way... of experiment.” The experiment consists in seeing whether the starting point can be unfolded as a complete exposition.

Thus, even if the Universal Principle of Right is not derived from anything more basic, it is not unsupported. Support for the Universal Principle of Right consists in the experiment’s success: i.e., in giving normative unity to the myriad juridical doctrines and institutions that the exposition of the Universal Principle of Right traverses.¹²⁸ The experiment could also fail. If the exposition did not coherently conjoin settled points in the juridical tradition—e.g., the juridical impossibility of slavery, the body as a normative limit for others, the capacity to acquire rights in objects, the legislative and adjudicative powers of the state—this would comprise an objection to its starting point. One of Kant’s best readers developed this point. The philosophy of right, Hegel says, cannot begin with “definitions”; but its undemonstrated starting point is, circularly, also its result, where the sequential “route by which it has become a result is its proof and deduction.”¹²⁹ The Universal Principle of Right, as Kant says, has no “*further proof*”—i.e., no further proof than *this*.¹³⁰

5d. *Why a Sequence?*

¹²⁷ See *CPR* B6r: “No doubt the concept of ‘right’ in its common-sense usage, contains all that the subtlest speculation can develop out of it, though in its ordinary and practical use we are not conscious of the manifold representations comprised in this thought”; cf. *MM* 6:205.

¹²⁸ We return to sequential exposition as a device of unification in sec. 5d below.

¹²⁹ Hegel 1991, §2.

¹³⁰ To be clear, these points do not eliminate the need for an explanation of the unity of morality’s two divisions, right and virtue. They do defuse the need to think that this explanation must *derive* right from morality, on pain of leaving the *Doctrine of Right’s* starting point unsupported.

The conception of philosophical method Kant rejects—philosophy as beginning with definitions as self-standing elements from which further truths can be demonstrated¹³¹—can be found in Bentham’s contemporaneous proposal to theorize all juridical materials as instruments for promoting happiness. Bentham calls his “principle of utility” an “axiom,” and its application in determining right and wrong the “hedonic or felicific calculus.”¹³² Besides reflecting the traditional prestige of mathematics as a model for philosophy, these terms imply that starting with a definition of “right” (as what maximizes happiness) and bringing to bear sufficient empirical information, one may derive all further moral truths, including the best design of right’s positive part, by theoretical inferences alone. Such inferences require that the definition of the theory’s key term (“utility”) be fixed from the start and not, as Kant says, achieved “at the end.”

To Kant’s sequential argument the principle of utility offers two informative contrasts: (1) a contrast concerning the *self-standingness* of a practical principle versus its dependency on further specifying principles; and (2) a contrast concerning the kind of *unity* a practical principle gives to the juridical domain. We conclude our discussion by developing these contrasts. They shed light on our question—*why* a sequence?—for they bring out the sense in which sequential exposition is not an optional methodological choice for Kant but rather something integral to the principle of right itself. They bring out the sense in which the *Doctrine of Right*’s method is integral to its matter.¹³³

(1) *Self-standing vs. dependent principles.* The Universal Principle of Right and the principle of utility can be informatively compared because they are structurally similar, at least up to a point. Both are universal moral principles: i.e., both exhibit the normative ground of all further juridical principles and thereby also their normative unity. Both, for

¹³¹ Cf. CPR A726-27/B75455: “Mathematics is thoroughly grounded on definitions, axioms and demonstrations....[N]one of these elements in the sense in which the mathematician takes them, can be achieved or imitated by philosophy.”

¹³² Bentham 1988, Preface, §2.

¹³³ These contrasts between right and utility serve an expository function: they help to show Kant’s sequence as serving a distinctive kind of moral-theoretic unity. We are indebted to Rawls (1996, 259-262), who makes a similar contrastive use of utilitarianism in his remarks on “unity by appropriate sequence”—a feature of his own theory of justice. Some aspects of the contrast we draw are further developed in Stone 2011.

example, tell us why property rights matter, and both locate property among other legal principles that matter for the same reason. Both show how the diversity of juridical principles is more than a mere hodgepodge.

However, the principle of utility is not only universal but also self-standing: it orients action toward an end, where this end is fully graspable without further practical specification or articulation of it. Otherwise put, one need take no account of any further practical principles to understand what it is, in various situations, to maximize happiness—what that comes to must stand on its own, after happiness has been defined. Of course, theoretical reasoning—"calculation" of what will lead to what—is needed to determine which further derivative principles will be optimal. Such calculations might support institutions of property, the punishment of wrongdoers, and a progressive income tax; or they might call for the replacement of these arrangements with more felicitous alternatives. The essential point is just that whatever arrangements the principle of utility ends up supporting won't affect our understanding of the principle itself. This is part of what it means to say that its meaning is fixed from the start.¹³⁴

The principle of utility's self-standingness can be seen in two of its further familiar features. First, the principle is by no means proprietary to legal institutions; it applies also to character traits, etiquette, practices of praising and blaming, and indeed to any individual action or social form that might further or hinder utility.¹³⁵ Second, the desirability of legal institutions is a contingency from the utilitarian point of view; as with everything else the principle of utility might support, the case for legal institutions depends on whether their benefits outweigh their costs.

¹³⁴ Someone might worry: Don't the subordinate principles that the principle of utility recommends show what it "means"? The word "meaning" isn't a technical term; it certainly lends itself to such broad uses. But our point remains and might be expressed thus. No subordinate principles explicate or interpret the concept of utility. They merely say how utility is to be brought about and thus presuppose that "utility" has been fully defined.

¹³⁵ See Rawls 1996, 260.

While the Universal Principle of Right, like the principle of utility, is a universal principle, it is not self-standing: its meaning is spelled out through the various further principles that explicate it, as we have stressed. A contrast with the forgoing features of the principle of utility follows from this. The principles that explicate the Universal Principle of Right pertain only to right, morality's juridical domain. And no sense can be given to the question of whether the Universal Principle of Right is furthered by legal institutions: private and public law institutions are, on Kant's argument, conditions of the possibility of 'co-existing freedom,' not means of bringing it about.

(2) *Kinds of Unity*. All this entails a second contrast—and it is here that the need for sequential order in an explication of right comes, by way of the contrast, into sharper view. The principle of utility unifies any further principles and rules derived from it without sequential ordering; it unifies them as a 'bundle,' as we will say. By contrast, the unity of the juridical domain, conceived under the Principle of Right, is essentially a unity by appropriate sequence.

To explain, we return to our previous examples of potential conflicts between property and other legal principles.¹³⁶ Consider whether an owner's right to exclude is consistent with her conditional privilege to make use of another's property, or whether acquisition of title through purchase of stolen goods is consistent with the usual principles of property and its transfer.

The principle of utility grounds and unifies such collections of principles in terms of their contribution to utility, the theory's normative bottom line. Thus an owner's right to exclude might be considered productive of a socially optimal use of resources, while the privilege to use another's property in cases of necessity might be considered an efficient refinement of this principle, at least where a condition for the exercise of the privilege is that the value of the property preserved exceeds the prospective damage to the property

¹³⁶ See sec. 5b, n. 114.

used.¹³⁷ In this way, the principle of utility grounds both an owner's right to exclude and an owner's privilege to make use of another's property. But it does so without representing any intrinsic connection between these two principles; it is only calculation in light of the end of utility that brings them together. So within this framework, such principles comprise an optimizing 'bundle,' not an intrinsic unity: i.e., the desirability of any principle can always come into question without prejudice to any other principle.

It is easy to see why this must be so. No subordinate legal principle is internal to the principle of utility's meaning—no principle explicates or interprets the concept of utility. So the case for any particular legal principle can always come into question without affecting our understanding of the end from which other principles are to be derived.

Conceived under the Principle of Right, the unity of the juridical domain cannot be that of a uniformly derived bundle. If it could be, then Kant's sequential procedure would obviously be only a rhetorical flourish. But an argument for an appropriate bundle of principles requires a self-standing end (such as 'utility') from which to derive the relevant items, and the Universal Principle of Right affords nothing that can play this role. That principle is formal. As Kant says, it abstracts from all ends—"from the matter of choice"—and describes only "the *form* in the relation of choice, insofar as choice is regarded merely as *free*."¹³⁸ Without an end to serve as a starting point for calculative reasoning (reasoning towards appropriate means), accessing the requirements of right can only be a matter of its practical specification through further principles—and ultimately through determinate judgments applying those principles in particular cases.

The sequential exposition of right is really nothing other than the practical specification of right's formal principle ('co-existing choice'). Its result is a holistic order of principles: order, because specifications of the principle are posterior to it; holistic, because practical specification, unlike the calculation of external means, affects the understanding of

¹³⁷ For an explanation of this kind, see Bohlen 1926, 315.

¹³⁸ *MM* 6:230; cf. 6:250

what is specified. Further, when the juridical domain is understood as such an order, its unity is of an intrinsic kind: its principles are mutually dependent. (In the present example, an owner's right to exclude emerges as a condition of co-existing choice, while ownership itself calls for modifying principles of public right—e.g. publicity principles and norms of equality among owners—as a condition of *its* possibility.) Correspondingly, the 'universality' of the Universal of Principle of Right comes to this: the principle grounds and unifies the domain of juridical principles by exhibiting them as stages of its own explication.

One special achievement of Kant's method is implicit in these points. As our discussion stressed, Kant's sequence preserves—and even highlights—a familiar feature of juristic experience, namely its plurality of practical principles. (Recall Kant's discussion of the divergences between the requirements of private right—"right in itself"—and those of a public standpoint.)¹³⁹ Again, utilitarianism offers an instructive contrast. Theoretical unity is an easy, top-down matter for the utilitarian, but, as is often noted, such unity stands in tension to the everyday or common-sense pluralism of moral and juridical experience.¹⁴⁰ Since all further principles appear, in relation to utility, as theoretically derivable means, they remain only markers of utility, expressing no genuine normative requirements of their own. In contrast, Kant's principles of private and public right are, as practical determinations of right, normatively significant *sui generis* and, as such, capable of genuine conflict. In this light, one may say it is a task of the *Doctrine of Right* to give an account of the juridical domain that both respects its apparent plurality but nonetheless exhibits its unity. No self-standing principle establishes theoretical unity at the outset. How can a genuine plurality of principles comprise a juridical unity? How, in particular, can private and public right have their own internal requirements yet together form an integrated whole? Sequential exposition—exhibition of the principles of right in step-wise relation to each

¹³⁹ See sec. 5b above.

¹⁴⁰ See, e.g., Sidgwick (1901, 421).

other—solves this problem. It is a way of exhibiting the unity of the legal order without normative reduction of the different principles that inform it.

6. Conclusion

We have argued that right’s formal principle and its sequential exposition—the *Doctrine of Right’s* matter and its method—go together; that sequential exposition exhibits the unity of the further principles that give content to right; and that provisional right is a central moment of sequential exposition, marking the incompleteness of private right.

That right is subject to ‘provisionality’ distinguishes it within Kant’s division of morality, no less so than right’s focus on external relations or its dependence on coercive incentives. For the source of right’s ‘provisionality’ lies in this, that by its very concept (the non-subordinative co-existence of choices), right’s precepts are not properly binding unless they are publicly posited or instituted; this condition has no application to ethics.¹⁴¹ Right requires a public condition—the negation of the juridical state of nature—to be fully what it is. And this requirement sets the contours of the problem of right’s unity, for the precepts of right in its *private* aspect (“the private relationship of persons to one another”)¹⁴² and in its *public* aspect (the relation of “individuals within a people...to one another,” as well as that of “the totality of individuals...to its own members”)¹⁴³ are not only different but potentially divergent. Because right depends on being publicly posited to be what is, and because its public position involves new normative requirements, Kant’s exposition of right exhibits its unity by traversing a sequence from “private” to “public,” or rather, as Kant characterizes it, a three-stage sequence from “what...is intrinsically right” to “rightful” forms of possession to “what is laid down as right.”¹⁴⁴

¹⁴¹ This is not to deny that forms of individual and social positivity help make ethical obligations more determinate. See Ebels-Duggan 2009.

¹⁴² *LE* 27:589.

¹⁴³ *MM* 6:311. The quoted phrases are Kant’s glosses on “civil condition” and “state” respectively.

¹⁴⁴ *MM* 6:306. For related descriptions of the *Doctrine of Right’s* sequence, see 6:267 and 6:297.

Within this sequence, the middle stage—rightful possession—is pivotal, for this has a foothold in both private and public right. Property’s concept (dominion with respect to an object) and its intrinsic principle of acquisition (first possession) are matters of private right; but the latter is subject to the meta-condition concerning its own systemically reciprocal character. Provisional right finds application just here. It results from an attempt to think private right apart from its further condition of possibility, a civil condition. It marks the impossibility of *pure* private right and thus opens property to requirements other than its own—requirements concerning ownership in relation to the whole system of rights.

Could there be right without provisional right? Certainly the *word* ‘provisional’ is optional. But two of the *Doctrine of Right’s* main lessons are these. (1) *Contra Hobbes*: right is the moral ground of our rights, not some other self-standing value. (2) *Contra Locke*: The legal right of the citizen is right’s fully realized expression, not merely an instrument for making pre-legal rights more secure. Unless one of these theses is rejected, there will be cause to say that those living without political institutions *do* have rights (not just that rights should be granted to them), but to qualify this by applying some term of privation. “Provisional” is such a term. To have such rights *provisionally* means that when they are publicly and politically recognized, this is neither the creation of a right where there was none before, nor merely a decision to enforce a self-standing moral claim. Instead, it is the full realization of that moral claim.¹⁴⁵

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¹⁴⁵ Our formulation here has benefited from Korsgaard (2018, 27-30).

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