

## KANT AND PROPERTY RIGHTS

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Kant's account of property rights is embedded within his general ethical system, centered on the Categorical Imperative described in the *Groundwork* and the second *Critique*.<sup>1</sup> Also, we must look to the account of teleology put forth in the *Critique of Judgment* and in his shorter political essays if we are to understand the ultimate ground of Kant's thinking on property rights.<sup>2</sup> Nonetheless, the *Metaphysics of Morals* provides the central details of Kant's account of property rights, and I will turn to sustained examination of this work to make clear the nature of *telos* that is connected with the move away from the state of nature and toward legitimization of property claims.<sup>3</sup>

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<sup>1</sup>Immanuel Kant, *Groundwork of the Metaphysics of Morals*, trans. and ed. Mary Gregor (Cambridge: Cambridge University Press, 1998); and Immanuel Kant, *Critique of Practical Reason*, trans. and ed. Mary Gregor (Cambridge: Cambridge University Press, 1997). The *Critique of Practical Reason* is commonly referred to as the second *Critique*.

<sup>2</sup>Immanuel Kant, *Critique of Judgment*, trans. Werner Pluhar (Indianapolis, Ind.: Hackett Publishing, 1987).

<sup>3</sup>This article will quote both from the German edition and an English translation of Kant's *Metaphysics of Morals*. Quotations in German are from Immanuel Kant, *Metaphysik der Sitten* [*Metaphysics of Morals*], in Immanuel Kant, *Hauptwerk*, electronic ed. (n.p.: Karsten Worm, 1998). Quotations in English are from Immanuel Kant, *Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1996). Citations to Kant, with the exception of the *Critique of Pure Reason*, are standardized according to their location in Immanuel Kant, *Kant's gesammelte Schriften* [*Kant's Collected Works*], ed. Royal Prussian Academy of Sciences (Berlin: Georg Reimer, 1900–), 29 vols., in 34 parts. This edition is generally called the “Akademie” edition.

I argue that, on Kant's account, property claims acquire legitimacy not through the fiat of the sovereign—whether sovereignty lies with a monarch or with the *demos*—but through a complex process of negotiation among private individuals, as adjudicated by public officials, where the starting points for such negotiations are determined by *Bemächtigung* or *occupatio* (“taking control” or “occupation”) of disputed land.

In approaching these issues, I make some effort to suggest why we would do well to focus on the centrality of *gradual* agreement in coming to understand how property claims are legitimized. The discussion initially centers on consideration of the teleological elements in Kant's political thought. I further attempt to work out what the nature of the property negotiations must be, given Kant's assumptions. My focus will be on the dynamic complexity of the multiparty communicative interaction that Kant's theory entails, a complexity heightened by the wide range of duties that parties have, in addition to the duty to develop agreements that secure a fully civil condition.

## GRADUALISM IN THE MOVE OUT OF NATURE

I begin by dwelling briefly on the general character of Kant's political thought. We must make sense of Kant's account of movement from the natural condition of a merely provisional ability to acquire, to the settled ownership possible in civil society. It is a juxtaposition of two kinds of progress: progress from the natural condition to the local civil condition on the one hand, and progress from the local civil condition to the global civil condition on the other. Once we have contrasted these two kinds of progress, we must conclude that progress toward a civil condition has to be understood as a gradual affair for Kant, so that ownership in the progressing state has ongoing, *but ever decreasing*, provisional characteristics. As time goes by, and further progress toward the potentially unattainable ideal of a fully cosmopolitan globe is judged to have occurred, ownership becomes more and more settled. However, questions of ownership are not fully settled until the ideal cosmopolitan condition is attained.

What follows from this conclusion is that we must struggle to ensure that questions of ownership become more and more fixed. We come to this point by analogizing from what Kant claims concerning progress toward cosmopolitan world order. His claim is that we must attempt to ensure that a situation of cosmopolitan order comes about. Thus, we must attempt to move toward a situation in which there is

a confederation of states that both properly preserve and respect the freedom of the individual through a right set of external laws, and also deal with each other as states bound by law, rather than as competing military powers.<sup>4</sup>

Note that Kant does not propose a world government:

[A] federation of this sort would not be the same thing as an international state. . . . We are here considering the right of nations in relation to another in so far as they are a group of separate states which are not welded together as a unit.<sup>5</sup>

He continues:

[A] particular kind of league, which we might call a *pacific federation* (*foedus pacificum*), is required. . . . This federation does not aim to acquire any power like that of a state.<sup>6</sup>

Kant argues that we must posit a natural condition and a civil condition, and hope that history continually moves us from the natural condition to the global civil condition of a cosmopolitan world order.<sup>7</sup> But we cannot in fact know that we are making such progress, or even where along the line from sheer natural deficiency to fully cosmopolitan order we are. The historical progress toward the truly civil condition that we judge history to somehow involve is neither confirmed nor disconfirmed by our cognition of what actually happens. At best, historical events merely support our hope that human history involves such progress toward local civil conditions and, ultimately, the cosmopolitan situation. Thus, we find Kant claiming that the French

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<sup>4</sup>See Immanuel Kant, “Perpetual Peace,” in *Kant: Political Writings*, ed. H. Reiss (Cambridge: Cambridge University Press, 1991), pp. 93–110. See, in particular, the “First Definitive Article: The Civil Constitution of Every State shall be Republican,” and the “Second Definitive Article: The Right of Nations shall be based on Federation of Free States.”

<sup>5</sup>Kant, “Perpetual Peace,” p. 102.

<sup>6</sup>Kant, “Perpetual Peace,” p. 104.

<sup>7</sup>See *Metaphysik der Sitten*, Ak. vol. 6, pp. 306, 252–55. See also Immanuel Kant, “Idea for a Universal History with a Cosmopolitan Purpose,” Seventh Proposition, in *Kant: Political Writings*, pp. 41–53. For discussion of Kant’s account of historical progress in “Ideas for a Universal History with a Cosmopolitan Purpose,” see Rudolf Makkreel, *Imagination and Interpretation in Kant: The Hermeneutical Import of the Critique of Judgment* (Chicago: University of Chicago Press, 1990), pp. 131–33, 169.

Revolution indicates a progressive tendency in human history, without necessarily being part of the chain of events that actually involves progress toward a more ideal condition.<sup>8</sup>

Moreover, we are not to violate valid, positive law in moving toward either a perfect civil condition in a given state, or a confederation of such “perfect” states (the movements necessarily going hand-in-hand for Kant).<sup>9</sup> When it comes to property rights, even if the scheme of ownership endorsed by the ruler of a state is wildly at odds with the true facts of ownership, this, for Kant, is not reason enough to disobey the ruler. One must clearly establish that theft is occurring before disobedience is potentially permissible.

Further, the type of disobedience permitted would seem to be limited in nature. It is not at all clear that Kant would ever allow for more than passive opposition to the ruler. Kant never endorses active attempts to overthrow a ruler who is deemed unjust.<sup>10</sup> And since the jurists of the very state that the ruler heads are the ones who must settle conflicting claims to ownership, establishing that theft has occurred may be very problematic, so long as one is not a jurist authorized to rule on such matters by the constitution that undergirds the state.<sup>11</sup>

Worse yet for the Kantian social actor who wishes to oppose a scheme of ownership imposed by a ruler deemed unjust, we are to expect, if we follow Kant, that much of the progress toward an ideal civil condition will come about from possibly immoral actions of

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<sup>8</sup>See Makkreel, *Imagination and Interpretation in Kant*, pp. 130–52.

<sup>9</sup>For a discussion of the need to obey the law, see Immanuel Kant, “Beantwortung der Frage: Was ist Aufklärung?” [“What is Enlightenment?”], in Kant, *Hauptwerk*, Ak. vol 8, pp. 35–79.

<sup>10</sup>See the Postscript in Kant: *Political Writings*.

<sup>11</sup>“Ein jeder Staat enthält drei Gewalten in sich, d.i. den allgemein vereinigten Willen in dreifacher Person (trias politica): die Herrschergewalt (Souveränität) in der des Gesetzgebers, die vollziehende Gewalt in der des Regierers (zu Folge dem Gesetz) und die rechtsprechende Gewalt (als Zuerkennung des Seinen eines jeden nach dem Gesetz) in der Person des Richters (potestas legislativa, rectoria et iudiciaria).” [“Every state contains three powers, which are a threefold personification of the universal united will. First, there is the controlling power (sovereignty) of the lawgiver. Second, there is executive power of the ruler, as bound by law. Third, there is the judicial power found in the person of the judge—the power to give to each what is due to them under the law (potestas legislativa, rectoria et iudiciaria).”] Kant, *Metaphysik der Sitten*, Ak. vol. 6, p. 313, translation mine.

social antagonism. Kant emphasizes the role of “asocial sociability” repeatedly, thereby interfering with individuals’ ability to plan for and thereby achieve the settled ownership situation. This would be a situation where all agree upon who owns what, and all respect this ownership by dealing with each other only in peaceful ways.

## THE SITUATION OF THOSE FAVORING SECURE PROPERTY RIGHTS

To encapsulate Kant’s account, I consider three central points concerning the depressing social existence we face. This is a social existence in which:

- 1) We cannot know whether we are progressing toward a settled ownership situation.
- 2) It is extraordinarily difficult to establish grounds for disobeying state rulers who impose illusory schemes of ownership.

Given the logic of Kant’s arguments concerning the way in which ownership is established through initial physical control of land, followed by landowners consenting to contracts that are intended to preserve what each already has, these merely imposed schemes nonetheless must inevitably obstruct movement toward the situation of settled ownership. Obstruction results because such imposed schemes of ownership do not respect individual original holdings, which were provisionally acquired through occupation or taking control, rather than through the actions of the sovereign.<sup>12</sup> As I will show, individuals enter into civil society in order to secure their person and these holdings from violence.<sup>13</sup> Thus, the sovereign’s failure to secure individual consent for the use of such holdings constitutes an assault on the basis of the sovereign’s authority (the individual’s agreement to be bound by civil laws enforced by the sovereign). Interference

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<sup>12</sup>“Die ursprüngliche Erwerbung eines äußeren Gegenstandes der Willkür heißt Bemächtigung (occupatio) und kann nicht anders, als an körperlichen Dingen (Substanzen) statt finden.” [“The original acquisition of an external object of choice is called taking control (occupation) and must involve the taking control of a corporeal thing (substance).”] Kant, *Metaphysik der Sitten*, Ak. vol. 6, p. 259, §14, translation mine.

<sup>13</sup>See Kant, *Metaphysics of Morals*, Ak. vol. 6, pp. 307–8. See also the last section of this article, “Bases for the ‘Gradual Negotiations’ View in Kant’s Account of the Duty to Leave the State of Nature.”

with established schemes of ownership—for example, through taxation—must therefore be halted before a fully settled ownership situation is reached.

Nonetheless, we must accept such interference to a variety of degrees. First, taxes meant to maintain order—e.g., for military defense—constitute interferences that aim at securing one's person and property from violence, and so is in keeping with individuals' agreement to be bound by a civil legal structure with a sovereign. Therefore, such interference ought to be accepted. Second, other kinds of interference in property—e.g., taxes for non-defensive military actions—ought also be accepted, as the alternative is anarchy, under which neither one's person nor one's property would be at all secure. (The difference between the first and second cases, as we will see, is that interference of the first kind usually ought to be willed by republican legislators, while interference of the second kind is merely borne as an evil, but is never rightly willed by legislators.)

- 3) We are to expect that much of the progress away from wrongful societal circumstances comes from unplanned activity, often of an "asocially social" immoral nature.

The advocate of respect for property rights—as opposed to respect for rulers' claims about these rights—is therefore entangled in a somewhat gloomy scenario. In order to be secure against violence, one must submit to the potential, even probable, violence of the sovereign, where one's only comfort is the thought that anarchy would leave one even less secure.

Luckily, however, if we consistently follow the train of thought by which we construct this depressing dilemma, we also have to understand Kant to allow that there are some means by which we can work toward a situation in which questions of ownership are settled and property rights are respected. First, although we must generally obey the ruler, Kant advocates the right of the citizen, as a public intellectual, to question the activity of the ruler.<sup>14</sup> Second, Kant argues that every state must ultimately be bound by a republican constitution. This is significant, as a limited democracy is the prototypical republican state, and a limited democracy allows the citizen to advocate

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<sup>14</sup>See Kant, "What is Enlightenment?" See also the discussion of the philosopher-scholar in Immanuel Kant, *Der Streit der Facultäten in drei Abschnitten* [*Conflict of the Faculties*], in Kant, *Hauptwerk*, Ak. vol. 7, pp. 1–115, esp. pp. 28–29.

changes in the law and in the behavior of the state ruler (here understood as a “moral person” rather than a particular, living human being). There is also the possibility of influencing the judiciary, even if this branch of government is meant to be above the power of the *demos* in some significant ways—where this applies even to the upper-echelons of the *demos*. Therefore, in esteeming the republican state, Kant allows for further means by which the individual can act as a citizen to bring about a settled ownership situation, conjoined with full respect for individuals’ property rights.

### THE PROPER COURSE OF ACTION FOR THE FRIEND OF SECURE PROPERTY RIGHTS

What, though, is the wise citizen to advocate? For that matter, how is the wise ruler, legislator, or jurist to reason concerning matters of ownership and the establishment of settled ownership? Clearly, following the logic of the account I have been suggesting, the citizen or state official is to endeavor to transform the substance, administration, and interpretation of the law in ways that will allow the achievement of three crucial goals:

- bringing about a settled ownership situation within civil society;
- having the state recognize and protect this settled scheme of ownership (which is a true scheme of ownership, not merely another illusory interpretation enforced by a given ruler); and
- creating a world confederation of states, all of which share these conditions of settled, recognized, and protected ownership, and all of which agree about the scheme of ownership.

Beyond this, we can say that the Kantian citizen or state official is to be bound by the need to balance movement toward the settled ownership situation against the need to respect conditions of right (*Recht*) generally. For example it would be wrong to violate a citizen’s right to free speech if such violation was grounded on the idea that this might be thought to advance the cause of settled ownership. Likewise, violating property rights in a situation of only partially settled ownership is at odds with conditions of right, which Kant defines in terms of the compatibility of the freedom of each with each under external laws.<sup>15</sup> So, for example, taking away a good from an individual who has at least some kind of ownership claim to the good would only

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<sup>15</sup>Kant, *Metaphysics of Morals*, Ak. vol. 6, pp. 230–31.

be justified if there exists some other individual with at least as valid an ownership claim.

Kant thus rejects state policies that have the ultimate goal of reducing social inequality, even if he might endorse some such policies that use such reductions as a *means* (for example, to the end of property-protecting social order). Kant is a classical liberal in that, when it comes to acquired rights (including all rights to property), the state is to act only to protect negative rights—in other words, that state is to act only to keep improper interference from occurring, and *not* with the ultimate aim of supplying external things (for the development of personality, freedom, or what have you).<sup>16</sup>

It has been traditionally recognized—even if generally bemoaned—that Kant does not anticipate the socialist politics that arose as a response to visions of capital accumulation and market investment as harming agrarian (Hegel *et al.*) and labor (Marx *et al.*) interests; or that, insofar as Kant does anticipate such politics, he rejects them. For example, there is the “Conjectural Beginnings” praise of “exchange” and “inequality” as the handmaidens of progress in culture, art, and politics.<sup>17</sup>

This reading of Kant as a classical liberal—a reading particularly dominant in the German-speaking world—seems to me the only one that is credible *insofar as one wishes to remain true to both the spirit and letters of Kant’s writings*. However, it should be noted that, in the English-speaking world, there have been numerous attempts to reconstruct more socialist-friendly versions of Kant’s account of property rights.<sup>18</sup>

In any event, the only exception to this balancing that Kant mentions are taxes for “reasons of state,” which presumably include state

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<sup>16</sup>For some concurring readings, see the Postscript in *Kant: Political Writings*; and Wolfgang Kersting, “Politics, Freedom, and Order: Kant’s Political Philosophy,” in *The Cambridge Companion to Kant*, ed. Paul Guyer (Cambridge: Cambridge University Press, 1992).

<sup>17</sup>See Immanuel Kant, *Muthmaßlicher anfang der Menschengeschichte*, in *Kant’s gesammelte Schriften*, Ak. vol. 8, p. 119. A translation can be found in Kant, *Political Writings*, p. 230.

<sup>18</sup>See, e.g., Alexander Kaufman, *Welfare in the Kantian State* (Oxford: Clarendon Press, 1999); and Paul Guyer, *Kant on Freedom, Law, and Happiness* (Cambridge: Cambridge University Press, 2000). These attempts aim *not only* at reconstruction, but also at interpreting certain passages in ways that are problematic for the traditional reading of Kant as a classical liberal.



taxes for defense and police functions, but which might also include poor relief in some cases.<sup>19</sup> For example, when it is thought that government poor relief is needed to maintain order or a good stock of potential soldiers who are truly needed for defensive purposes, taxes on the wealthy (*Vermögen*) might be justified. However, Kant specifies that the general purpose of the civil condition—the reason we are to enter into it—is so that we can associate with others while still having it be the case that “what belongs to each can be secured to him against everyone else.”<sup>20</sup> As such, we must understand Kant’s point about taxing the wealthy not in terms of contemporary notions of a social justice that seeks to secure positive rights to some alleged set of basic goods, but in terms of a duty on the part of the wealthy to contribute to a situation in which their property rights can be properly protected against vandalism, theft, looting, enemy military attacks, etc.

Kant’s point is that something might have to be done in the way of allocating funds for military defense, the police, or poor relief, if such protection is, in fact, to occur. Kant seems to understand the wealthy to be precisely those people who have the material resources that might be needed, and the poor to be those people who do not have such resources (or, one might suppose, who have the needed resources only in such limited quantities that their role as a tax base is not worth considering). As such, Kant does not allow for state redistribution of property for the sake of social equality, and does not claim that it would actually be wise for the government to ever redistribute property. Kant merely allows that those with wealth might be required to give up some of their wealth in order to continue to enjoy the civil condition that makes their ownership of the wealth at all non-provisional, and which allows for the protection of the wealth under laws that, potentially, all other residents of the globe can and must rationally accept (at the least, the civil condition is to allow for a legal protection that one’s fellow citizens can and must respect, even if they are working to change the very legal structure in question).

## NEGOTIATING TO FINALIZE PROPERTY CLAIMS AFTER INITIAL ACQUISITION

Because adjudicating competing claims to ownership involves examining prior provisional ownership, we need to ask what establishes

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<sup>19</sup>Kant, *Metaphysics of Morals*, Ak. vol. 6, p. 326.

<sup>20</sup>Kant, *Metaphysics of Morals*, Ak. vol. 6, p. 237.

provisional ownership for Kant. The answer would seem to be that provisional ownership is based on priority in time, and on control. If I am the first person to occupy unowned land, and if I establish control of the land, then the land is provisionally mine.<sup>21</sup> All other goods are initially possessed in this way as well; one must first own the land upon which they are located, thereby coming into ownership of all the goods located on the land.<sup>22</sup> There is no need to work the land or “mix one’s labor” in order to establish ownership.<sup>23</sup>

What is it to establish control? Kant is very clear here. To control land is to have the capacity to defend the land. Kant writes that it is “as if the land were to say, if you cannot protect me, then you cannot command me.”<sup>24</sup> What he has in mind is, prototypically, the ability to defend land militarily, whether through fists, clubs, rocks, or cannons.

In conjoining his points about priority in time with his points about control, what Kant seems to mean is that there is at least a limited obligation not to interfere with land over which others have established some degree of control, without making some effort to reason with them about establishing a shared civil condition, and, thus, making good laws to adjudicate the interaction.<sup>25</sup> However, if the other party is not willing to be reasonable—that is to say, is not willing to enter into a civil condition with one—then it is not necessarily unjust to occupy land over which the other party has some degree of control, even if this involves the use of violence.<sup>26</sup> One way to put this would be that one is defending the land for the coming cosmopolitan civilization, keeping irrational foes of this civilization at bay.

Where this account becomes problematic is when we imagine two individuals coming together, both of whom having some willingness to enter into civil bonds and move toward cosmopolitan civilization,

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<sup>21</sup>Kant, *Metaphysics of Morals*, Ak. vol. 6, pp. 264–66.

<sup>22</sup>Kant, *Metaphysics of Morals*, Ak. vol. 6, p. 269.

<sup>23</sup>Kant, *Metaphysics of Morals*, Ak. vol. 6, pp. 268–69.

<sup>24</sup>Kant, *Metaphysics of Morals*, Ak. vol. 6, p. 265.

<sup>25</sup>In Kant, *Metaphysics of Morals*, Ak. vol. 6, pp. 268–70, he describes acquisition and occupation in a state of nature. The discussion at Kant, *Metaphysics of Morals*, Ak. vol. 6, pp. 307–8, makes clear the character of permissible violence toward others who occupy land, and the unwillingness to leave the state of nature.

<sup>26</sup>Kant, *Metaphysics of Morals*, Ak. vol. 6, pp. 307–8.

but who have *de facto* irreconcilable differences over which particular laws are to define the extent of each other's property, and over which state mechanisms are to be put in place to decide such issues. Both parties are, as it were, equally willing to hold the land for civilization. Here is where we must return to the issue of control. If one party is stronger, then that strength must be respected in this scenario; one has a moral obligation to do so. Unless some additional factors become relevant—for example, the other party wrongfully attacks one of your relatives in some other area of land, gives aid to a third party who aggresses against you, etc.—then one has no right to try to occupy the land claimed by the other party.

It might be asked: “What if the other party starts making outrageous claims to land, such that none is left for you whatsoever?” A point that immediately suggests itself is that this is *prima facie* evidence that the other party is, in fact, *not* interested in entering into the civil condition. If the other party is not willing to respect the degree of control over land that you can exert, and does not refrain from claiming all the land that you claim, then, assuming that you have given proper indication of your willingness to enter into civil bonds, it is hard to see how the other party could truly have an intention to enter into civil society. Also relevant is the issue of whether the other party is, in fact, able to properly defend all the land that he or she claims. Obviously, there are many complex issues here about how one is to properly indicate an intention to enter into civil society, and about the degree to which one can ever make one's ultimate intentions transparent, particularly given Kant's account of the unknowable nature of noumenal character. But it is not clear how these complications would obviate the validity of Kant's account of right, which concerns external freedom, rather than the whole of what we are morally required to do, or how we ascertain this full complement of duties.

Keeping the forgoing discussion in mind, the best metaphor for Kant's account of movement out of the state of nature is one of disarmament—staged, negotiated disarmament. We are all duty-bound to reduce violent conflict and the potential for violent conflict by moving toward a scenario in which ownership disputes are decided by the rule of right law, rather than ongoing, competing military power. But prior to full disarmament—the fully cosmopolitan globe—military force plays a significant role in setting the bounds of right ownership. It does this by setting parameters for what the individual of cosmopolitan intent can claim both from “brutes” and, as we have seen, from other individuals of cosmopolitan intent who happen to be militarily

weaker. More generally, military force plays a role in setting the initial stakes from which competing parties are to negotiate. Further, since military force is to play a role in setting the partially civilized or cosmopolitan stakes, while also playing the central role in setting the initial stakes, military force is of enduring significance in setting the bounds of right ownership, such that not even the cosmopolitan situation is wholly removed from its effects.

### **BALANCING “CIVIL AND COSMOPOLITAN DUTIES” AGAINST OTHER DUTIES**

The task of the friend of settled ownership is to see that negotiations continue to be productive. Beyond this, we can point to the need to virtuously fulfill one's full array of duties under the moral law as one attempts to bring about progressively further agreement about who owns what, and the need to fully respect that ownership.

So, for instance, if a particular agreement meant to bind a group of landowners is likely to severely reduce the amount of property controlled by an individual whom one has a duty to protect, this certainly might count as a reason to oppose the agreement, even though the agreement might very well move the society closer to the fully settled ownership situation, and the attendant respect for property rights that allows for it.

Let us imagine that there is a dispute about the ownership of land in a certain region, because the original occupants of the land had all been killed in a war a decade ago, and the justness of the war is still under debate. Let us further imagine that an agreement is being proposed that would cost one's parents most of their property, which happens to be located in the disputed area. Even if one finds the agreement otherwise generally acceptable and likely to move the society toward settled ownership, the harm to one's parents gives one grounds for opposing the agreement because of one's duties to one's parents. At the same time, a disinterested stranger viewing the agreement would have no such obligation to oppose the civil agreement, since the stranger has the same degree of obligation toward all who will be directly affected by the agreement.

How can this be, given the universal nature of Kant's ethics? The morality of this opposition of interests results from the fact that ethics gives laws only for the *maxims* of one's actions, and not for the actions themselves. Hence, every individual has a *Spielraum* within which

they must decide how best to pursue their “wide obligations,” such as the obligation to show love for one’s parents.<sup>27</sup> So even if every individual must choose and pursue ends in a manner compatible with membership in the universal kingdom of ends, this does not mean that every individual must act from the same maxim at the same time in the same way.

Hence, pursuit of the goal of settled ownership is likely to be a rather Byzantine affair, even assuming that everyone is interested in achieving this goal. For given the “crooked timber” with which we have to work, properly binding ownership under civil law is going to be a process involving much competition, conflict, and compromise. Things become more complex still when we consider that, until the cosmopolitan globe is achieved, there will always be a provisional character to civil laws, so that, even if they must be obeyed, the property scheme they imply at any given time is only one factor at play in competing claims to ownership. Laws can be changed, and local agreements can be renegotiated to make way for a globally settled ownership situation.

There is a great fluidity to property law under the interpretation of Kant’s thought that I have been giving, even as I have been emphasizing that Kant is arguing for an on-going duty to reduce this fluidity globally. And there is a good deal of redistributivist-egalitarian potential inherent in this notion of fluid property law, of a kind that might be useful for socialist or Rawlsian theories of property rights. However, in my view, the more-or-less strict Kantian (as opposed to the “looser” socialist or Rawlsian appropriator of Kant), will stay focused on the following issues in deciding questions of ownership:

- who controls and has controlled a given parcel of property;
- the extent of their control;
- under what conditions that control was obtained; and
- the nature and validity of any property exchanges or other contractual agreements involving the property in question that might have been made.

At the same time, the strict Kantian will acknowledge that the precise character of these factors will often be very murky, to say nothing

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<sup>27</sup>See Kant, *Metaphysics of Morals*, Ak. vol. 6, pp. 152–53. See also the discussion below wherein I argue that the duty to leave the state of nature is an ethical duty, rather than a duty of right.

of the potential opacity of their import for questions of right. Again, compromise will be necessary. Deciding which ownership claims to recognize will quite often leave some individuals believing they have been robbed, even if they accept that the procedure used to arrive at the decision was as fair as could be hoped for in the given situation. More often still will be cases in which the party feeling wronged makes clear that it is not happy with the decision, but where the other parties in question believe the best thing to do is to enforce the compromise.

The strict Kantian has wide latitude in deciding which compromises to support regarding competing ownership claims, and which to reject as involving too great a proportion of unfairness and harm to his or her interests (such as the duty-derived interest to protect one's parents). There is some question as to whether the duty to be willing to leave the state of nature is a duty of ethics or right. One would imagine that it is a duty of right, since it concerns the foundation of a rightful situation, and not of what is ethically good in a broader sense. However, since we are speaking of an *intention*, a *willingness*, it must in fact be the case that the duty is an ethical one: "Ethics does not give laws for *actions* (*ius* [right] does that), but only for *maxims* of actions."<sup>28</sup> The duty to leave the state of nature is a claim about one what should *intend*; it does not specify how one should *act*. Hence, it is a duty of ethics, not right, because it concerns one's maxim of action.

However, this would be an ethical duty whose failure to be fulfilled properly involves "culpability." Kant writes that culpability attaches to all failures of ethical duties where one "should make it his principle not to comply with such duties."<sup>29</sup> This culpability is that attached to failures of duties of right. "Willing to be and to remain in a condition that is not rightful" involves taking such a hostility toward duty into one's principles of action (maxims), and is therefore culpable.<sup>30</sup> As such, the duty to leave the state of nature in some ways lies between a duty of right and an ethical duty.

Regardless, such latitude in no way elevates questions of personal interest, however altruistically directed, to principles that *define* the justness of a compromise.

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<sup>28</sup>Kant, *Metaphysics of Morals*, Ak. vol. 6, p. 389.

<sup>29</sup>Kant, *Metaphysics of Morals*, Ak. vol. 6, p. 390.

<sup>30</sup>Kant, *Metaphysics of Morals*, Ak. vol. 6, p. 308.

## BASES FOR THE “GRADUAL NEGOTIATIONS” VIEW IN KANT’S ACCOUNT OF THE REPUBLICAN IDEAL

One counter-argument here might be that Kant did *not* have a gradualist view of the exit from the statue of nature, but in fact embraced an all-or-nothing view, such that civil society is meant to allow one to keep what one had in the state of nature, but where additional functions of achieving social equality may be superadded to the original property-rights protective function as the legislature deems appropriate.

However, for one, the limits that Kant places on proper uses of government weigh against such a reading. Kant clearly thought that the aristocratic rulers of a society could err in how they commanded the commoners, even if their valid commands are to be obeyed.<sup>31</sup> Kant abhors democracy, moreover, favoring instead a republican constitution that protects the freedom of all members of society, and which is to make it impossible for the people to use an executive power against “the single individual without his consent.”<sup>32</sup> And, of course, Kant has taken great pains to emphasize the need to respect the individual’s right to property, if the external freedom of each is to be made compatible with that of all others. (Indeed, the doctrine of right, which deals with external freedom, has its entire, rather lengthy first part devoted to explaining what right to property the individual has.)

One wonders why Kant put such emphasis on the despotism associated with rule by the *demos* if it were not the case that Kant is greatly concerned to have the state protect the right of each to keep what is his own in a more than formal way. If both the aristocratic ruler and a ruling *demos* can go wrong in its use of civil law, it must be the case that there are *a priori* standards that define what are proper applications of external law. It cannot be the case that the majority’s views of what constitutes the correct scheme of ownership simply *define* who owns what, even if this view is expressed through some representative, deliberative body, as in a republic. Rather, Kant’s desire to see such a body rule must be understood as a belief in the superior ability of such a body, relative to an aristocrat or to the *demos*, to arrive at a proper interpretation of who owns what. In this case, since we are dealing with a moral issue, the ability in question is that of seeing a

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<sup>31</sup>See Kant, “What is Enlightenment?”

<sup>32</sup>Kant, “Perpetual Peace,” p. 101.

noumenally grounded situation. “Who owns what” is ultimately determined by *a priori* laws, and not just any set of empirical decisions made by legislatures. All empirical decisions must be in keeping with the *a priori*.

The representative body is to legislate in accordance with the principle of not hindering my actions, or my condition generally, that “can coexist with the freedom of everyone in accordance with a universal law.”<sup>33</sup> The body is not merely to legislate in accordance with any non-arbitrary set of principles that reflects majority feeling. Neither is it appropriate to legislate based on deliberative discovery of *a priori* laws of morality generally. These laws are not always about what all individuals can be made to accept (through coercion), but are usually about what all individuals can *choose* to accept (through the free exercise of the will). In contrast to these two scenarios of “enlightened” majority rule and “enlightened” paternalism, the scenario Kant recommends is one in which the representative body strives to properly interpret the nature and *in situ* application of the *a priori* laws that specifically govern questions of “what is mine or thine.”

Concerning these *a priori* principles, we must notice that it is a maximal amount of freedom that is not to be infringed: “one’s freedom which *can* coexist. . . .” Whatever freedom one happens to have that *could* properly coexist with whatever freedom others happen to have is not to be restricted. It is not a question of each individual being made to have equal external freedom. Kant’s point is that it is never just for either private individuals or agents of the state to use coercion against one, unless doing so is necessary to protect the freedom that others possess, or to maintain the apparatus that is necessary to protect my own freedom (generally: the state).

Since we are dealing with freedom that could potentially be restricted—otherwise, it would hardly need legal protection—we have to conclude that Kant is referring to freedom that could, at least theoretically, be possessed to different degrees by different individuals. Obviously, we could not conclude any such thing if we were talking about our freedom as beings who are rational and thus free to act from reason instead of mere inclination. Such coexistence of the noumenal freedom of human beings must be thought always to be possible regardless of empirical circumstances. Otherwise, the categorical imperative would have to be only a hypothetical imperative, and this is

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<sup>33</sup>Kant, *Metaphysics of Morals*, Ak. vol. 6, p. 230.



a contradiction in terms. It is clear, then, that the external freedom with which coercive laws deal is of a very different character than is our noumenal freedom, despite the fact that the latter kind of freedom founds the former.<sup>34</sup> And so we must ask: What sort of freedom is it that, despite having a noumenal foundation, will vary in extent from individual to individual, and that can be restricted by coercion? This must be a freedom to make use of what is mine.

Something can be mine either innately or externally.<sup>35</sup> Although it is empirically possible for another to restrict my right to make use of what is innately mine, such a restriction is never just. We all must be empirically free to make use of what we possess *a priori* and innately. Here we have a case in which different individuals could have different degrees of freedom—for example, if one individual rules over the other as a master rules over a slave—but where it is never in itself unjust to use coercion to correct such inequalities. These innate freedoms cannot justly be restricted; all are to possess them equally. Thus, it would be incorrect to claim that it is unjust to use violence against the slave owner in order to free the slave on the grounds that the freedom of the slave owner to make use of his own body, and of that of his or her slave, would be violated.<sup>36</sup> Of course, freedom from slavery is not the only kind of freedom we are to possess equally. Kant lists a number of “authorizations” or inalienable rights that flow from the lack of injustice attached to coercively correcting limitation on innate freedom. For example, all are to enjoy freedom from any type of coercion that one is not oneself authorized to employ against all others, regardless of the circumstances of one’s birth. Also, all are to be free to interact with others in all ways that do not diminish what is theirs; this freedom includes, notably, freedom of speech.<sup>37</sup>

However, when it comes to that which is externally mine, it is necessary for the individual to perform an act to establish his or her right to the external thing.<sup>38</sup> This necessity obtains despite the fact that human beings can be said to originally own the whole of the globe in common.<sup>39</sup> Thus, different individuals will have different

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<sup>34</sup>Kant, *Metaphysics of Morals*, Ak. vol. 6, pp. 236–37.

<sup>35</sup>Kant, *Metaphysics of Morals*, Ak. vol. 6, p. 237.

<sup>36</sup>This is not to say that such violence might not be unjust on some other grounds.

<sup>37</sup>Kant, *Metaphysics of Morals*, Ak. vol. 6, p. 238.

<sup>38</sup>Kant, *Metaphysics of Morals*, Ak. vol. 6, p. 258.

<sup>39</sup>Kant, *Metaphysics of Morals*, Ak. vol. 6, p. 267.

rights depending on what acts they have performed, and under what conditions. Insofar as having a right implies a degree of freedom, different individuals will have different degrees of freedom.

It might be asked: On Kant's account, does one have the inalienable right to acquire external things, and, thus, an inalienable "right to acquire rights"? Certainly, no is one authorized to use coercion to keep you from having property *simpliciter* (as opposed to this or that particular property). For, given the kind of equality that humans possess, this would mean that all had a right to use such coercion. As rights to things are really rights against others (to keep them from using what is yours without your consent), such coercion of a communist social order would involve a contradiction of the will. The only justification for limiting an individual's ownership is to allow a second individual to have ownership. Willing coercive communism, however, is to will limitations on ownership for the imagined rights of mere things, but mere things have can have no rights.<sup>40</sup> Thus, we might say that all individuals have an *a priori* right to acquire private property. Still, insofar as the property available for acquisition is of a finite character, such as, for Kant, follows from the spherical nature of the globe, this right to acquire property must remain strictly negative in character. Just as the right to free speech does not give the mute license to talk, just as little does any Kantian right to property give the property-less inhabitant of the globe license to claim as his or her own what another has already come to possess in accordance with the principles of first control and willingness to adjudicate conflicts civilly (where we must continue to keep in mind that this willingness need not be infinite in scope).

Of course, one may have a duty as private citizen to gift property to the property-less. Such would follow from one's wide duty to help those in need.<sup>41</sup> But such gifts may not be coerced. Again, the only forcible transference of wealth that might be permissible is that done for reasons of state, and so to allow the possessor of wealth to keep what wealth remains to him or her.

Thus, not even a representative legislature may enact policies of wealth redistribution whose real goal is to bring about social equality, even if these policies are thought to flow from *a priori* principles governing moral actions. Such policies would be examples of the

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<sup>40</sup>See Kersting, "Politics, Freedom, and Order," p. 349.

<sup>41</sup>See the *Groundwork of the Metaphysics of Morals*, sect. 2, Ak. vol. 4, p. 423.

will of the people being opposed to the will of an individual who is part of the people, thereby leading to a contradiction in the general will and a state of nature (i.e., a state of wrong). A representative legislature is to be preferred to a democratic one because it will involve additional checks against the use of the executive power to engage in such abuses of the social contract. In rule by the *demos*, there is little possibility of respecting the rights of each and every individual, since there is no way to distinguish proper representation of the will of each and every citizen from the executive decisions that result from the shifting arrays of power present in the mob.<sup>42</sup>

As such, unless Kant's account of republican state is simply dismissed, one has little ground to stand on in claiming that the Kantian civil condition is one in which ownership is simply to be determined by democracy or the republicanism of representational, deliberative democracy. Of course, Kant's account of the superiority of the republican state might very well be dismissed, or at least downgraded, owing to the vagueness of its presentation.

### **BASES FOR THE “GRADUAL NEGOTIATIONS” VIEW IN KANT’S ACCOUNT OF THE DUTY TO LEAVE THE STATE OF NATURE**

Still, we can find some additional support for the claim that the state cannot determine property-ordering by fiat, democratic or otherwise. The following passage from the *Metaphysics of Morals* is key to understanding Kant's account of the gradualist nature of the move out of the state of nature:

No one is bound to refrain from encroaching on what another possesses if the other gives [one] no equal assurance that he will observe the same restraint toward [one]. . . . [It is] not necessary to wait for actual hostility; one is authorized to use coercion against someone who already, by his nature, threatens [one] with coercion. (*Quilibet praesumitur malus, donec securitatem dederit oppositi.*<sup>43</sup>)

Given the intention to be and to remain in [the] state of externally lawless freedom, human beings do *one another* no wrong at all when they feud among themselves; for what holds for one holds also in turn for the other, as

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<sup>42</sup>See Kant, “Perpetual Peace,” p. 101.

<sup>43</sup>“One is presumed evil who threatens the safety of his opposite.”

if by mutual consent (*uti partes de iure suo disponunt, ita ius est*).<sup>44</sup> But in general they do wrong in the highest degree by willing to be and remaining in a condition that is not rightful, that is, in which no one is assured of what is his against violence.<sup>45</sup>

This *Metaphysics* passage is fascinating in that we find Kant allowing for the use of violence against the other even before violence has been initiated against one. The view is conjoined with the Latin motto: “The party who displaces another’s right, has the same right himself.”

But more central are Kant’s emphases that:

- 1) it is the intention to remain in the state of nature that is wrongful, and not necessarily the use of violence against threatening agents; and
- 2) one’s motive for leaving the state of nature is to assure a situation where “what is one’s own” can be protected against unjust coercion.

From these points, we see that it is not rational or just on Kant’s account to give up one’s property claims merely for the sake of having external laws in place. The rationality of such a “bargain”—submitting to state adjudication of property claims—hinges on the claim that this is the only way to keep what property one controls. The justness of this bargain follows from this claim, and the corresponding claim concerning the property of all others. As such, it is evident that the duty to move away from the state of nature does not end the very moment that external laws are in place. We are all duty-bound to continue with an ongoing project, one which has *telos* of peaceful, cosmopolitan society. Before this goal is reached, it is always the case that one might have reason to question the justness of the property arrangements forced upon one by the sovereign.

Even apart from the details of Kant’s account of the republican ideal, we have to allow that some rulers and forms of rulership will

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<sup>44</sup>“The party who displaces another’s right has the same right himself.”

<sup>45</sup>Kant, *Metaphysics of Morals*, Ak. vol. 6, pp. 307–8. Here we find Kant’s account of what he terms “distributive justice”: a situation in which property is distributed in such a way that all can keep what is their own [*was eigen ist*]. This is the situation to which we are to move, according to Kant. Any other explanation of Kantian distributive justice, in terms of needs or the like, involves a massive modification of Kant’s own view.

better approximate the civil condition than others, with movement toward such better kinds of rule being possible as gradual improvements. Greater movement toward a civil condition occurs as a republican ideal is achieved, where this republican ideal is to allow for a government that never sacrifices the property of the individual citizen for the sake of other citizens.

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