CHAPTER 9

Bridging the Juridical Gap
Ethical and Juridical Duties in the Absence of Political Institutions

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9.1 Introduction

The main question addressed in this article is how to understand duties and rights in the *transition* towards a juridical condition. Does the fact that we are 'in transition' impact or shape our duties and rights from a Kantian perspective?

According to Kant, we have a duty to bring about political institutions ('to leave the lawless state of nature and enter the civil condition with all others' (*exeundum esse e statu naturali*).[1] Although juridical in nature, this duty is necessarily pre-institutional, and thus *non-positive*. Kant's *exeundum* thus commands the transition from a lawless towards a (relatively) lawful condition.[2] The lawful condition is 'relative' because the state of nature needs to be overcome at different levels and a civil condition will be implemented in degrees.[3] Although Kant's ideal of a fully just civil condition (*respublica noumenon*) is unattainable, it does not undermine our duty constantly to strive towards it and approach the ideal.[4] Consequently, legal orders will be more or less developed depending on how close they are to embodying the Kantian principles of external freedom, equality, and independence. However, whatever civil condition happens to exist

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[1] RGV 6:97 footnote.

[2] The duty to leave the state of nature is juridical because it is based on external freedom and the inevitability of impacting each other externally. This calls for the regulation of external relations through positive public laws.

[3] Even if the state of nature is overcome between individuals in a particular geographical area or group, the state of nature still persists in regard to other areas and groups. Particular legal orders still need to be regulated externally in regard to each other. The Kantian ideal requires that all external relations between persons be regulated by external right.

[4] SF 7:91. See also RL 6:350.

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(*respublica phenomenon*) is legitimate and binding, regardless of its imperfection in regard to the normative ideal.

I will argue that when a duty is juridical in nature and yet must be discharged in the state of nature, this has significant *ethical* and *juridical* implications. Kant discusses the juridical implications in the private law section of the Doctrine of Right: although it is possible to acquire rights in the state of nature, the legal status of these rights must remain *indeterminate* until a condition of public (positive) law has been implemented.[5] In this chapter, I will stress two ethical implications, which I believe provide additional *ethical* arguments for Kant's *exeundum*: firstly, addressing wrongs (*Unrecht*)[6] as a matter of beneficence is incompatible with the dignity of the right holders; secondly, a civil condition is needed in order to avoid overburdening morally responsible agents and thus reconcile moral agency and the human need for happiness. Further, I will also criticize the way Kant's theory of acquired rights in the state of nature has been misrepresented into a theory of 'provisionality' or 'transitionality', able to guide us through messy political developments in the manner of non-ideal theory.[7] I argue that the way Kant connects provisional rights and permissive laws has little to do with non-ideal theory, and follows entirely from Kant's apagogical argument for acquired rights in the state of nature.[8]

9.2 Duties of Right in the Absence of Juridical Institutions: Three Problems

Although certain rights and their corresponding juridical duties can be said to be of a purely positive nature (their bindingness is wholly contingent upon the legal order under which they were posited), Kant argues that certain individual rights can be acquired in the state of nature and are to be

[5] RL 6:267.

[6] I will be using the idea of a 'wrong' (*Unrecht*) exclusively in the sense of a violation of a right, that is, in a juridical sense. Kant also uses *Unrecht* in the sense of injustice in a broad sense (6:223f). I do not refer to the failure to comply with an ethical duty towards another person as a wrong, although this imprecise use of the term is often found in the Kant literature.

[7] See for instance, Christoph Horn, 'Kant's Political Philosophy as a Theory of Non-Ideal Normativity', *Kant-Studien* 107 (2016), 89–110, and Christoph Horn, *Nichtideale Normativität: Ein neuer Blick auf Kants politische Philosophie*, Berlin: Suhrkamp, 2014.

[8] See Kant's argument in Private Right § 2, RL 6:246. Apagogical arguments are types of transcendental arguments in Kant's philosophy. An apagogical argument asserts that a premise must be accepted in order to avoid a contradiction. Ultimately the contradiction would undermine a required end of reason (practical or theoretical). The assumed premise is thus necessary for preserving a required end of reason.

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taken over into the civil condition.[9] Rights and corresponding duties which are not 'merely' created in the civil condition arise from private right (*Privatrecht*) in the state of nature. A defining feature of acquired rights in the state of nature is their *inconclusive* status, and I will argue that this is what Kant means by *provisional* rights. Rights in the state of nature are inconclusive by definition, since only a condition of public law can provide binding closure in the event of contestation, thereby rendering the right *conclusive*. 'Providing binding closure' presupposes the *authority* to issue a binding verdict and is not exhausted by a claim to truth or correctness about one's interpretation of rights (since disagreement about how rights should be interpreted lies at the root of bona fide rights disputes). In other words, authority to bind in Kant's framework is not grounded on an epistemic claim.[10] As we will see, it is precisely the indeterminate status of acquired rights in the state of nature that motivates the duty to leave that state.[11]

Because we can already identify rights in the state of nature, individuals will be called upon to satisfy their corresponding duties despite the absence of juridical institutions. For instance, if A and B have agreed to buy and sell with each other, A will acquire a duty of right towards B, while B acquires a right towards A.[12] Although A has a duty of right towards B (as the primary duty bearer), B is not able to claim her right in a proper manner in the absence of a court of justice; however, this leaves it unchanged that A has a duty of right against B. B's claim is *provisional* in the sense that it cannot be made determinate (*bestimmt*) unless certain external conditions obtain (namely, the existence of a legal order, rules of legal procedure, etc.). Until then, B can only hope that A will honour the terms of their agreement or attempt to enforce her right unilaterally (without authority to do so) in case A violates their agreement.[13]

[9] RL 6:256, 6:312.

[10] Elsewhere, I argued that, setting aside duties based solely on the positive laws of a given legal order, the difference between juridical duties in the state of nature and in the civil condition is a matter of the *modality* of these duties, which changes once under a public legal order. See Alice Pinheiro Walla, '*Honeste vive*: Dignity in Kant's *Rechtslehre*', in Adam Cureton and Jan-Willem van der Rijt (eds.), *Human Dignity and the Kingdom of Ends: Kantian Perspectives and Practical Applications*, London: Routledge, 2021, 109–31. See also Philipp-Alexander Hirsch, *Freiheit und Staatlichkeit bei Kant: Die autonomietheoretische Begründung von Recht und Staat und das Widerstandsproblem*, Berlin: De Gruyter, 2017, 210ff. and 248ff.

[11] RL 6:312–13, § 44.

[12] I will set aside the question of what is actually being acquired in a sales agreement according to Kant's theory of contracts (See RL 6:285). For the purposes of my argument it is sufficient to acknowledge that the voluntary agreement between two persons according to the principles of private right can give rise to rights and duties already in the state of nature.

[13] Cf. RL 6:219–20. 'It can be seen from this that all duties, just because they are duties, belong to ethics; but it does not follow that the lawgiving for them is always contained in ethics: for many of

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However, addressing rights claims may be 'left to individuals' in a different way. This may be because the *content* or *matter* of individual rights can *overlap* with that of duties of beneficence. In this case, respecting rights (giving someone what is their due) and helping them (in Kant's terminology: 'adopting their happiness my end'[14]) may not be clearly differentiated in the agent's perspective, especially when agents must rely solely on internal motives to comply with duties of right.[15] As external duties, duties of right allow a wider range of motives for compliance than duties of virtue. Although duties of right do not require ethical motivation,[16] duties of right are nevertheless 'indirect-ethical', that is, virtue prescribes internal motivation for the compliance with right.[17]

In such a scenario, A could come to regard her contractual duty towards B as merely 'meritorious', since no one has the authority externally to coerce her to honour her agreement. Or if A defaults and B is left in a situation of need as a consequence, C could decide to help B and enforce B's right unilaterally. In another scenario, C could decide to provide materially for B, even though C is neither the primary duty bearer of her right nor responsible for her deprivation. In the latter case, C is addressing the *need* that results from A's violation of B's right and not the wrong as such. She is neither enforcing B's right unilaterally nor addressing the right as a right. She is simply addressing the need that results from B's deprivation of her right and I will assume she is acting from an ethical motivation, that is, out of respect for the moral law which commands one to take the permissible ends of others as one's own end.

From the above, it is possible to identify three distinct problems in the state of nature:

1. Individuals lack the *authority* to issue binding interpretations of what they take to be legitimate right claims and to coerce these rights (*unilaterality problem*);
2. Individuals may fail to uphold the *dignity* of others when they conflate the strict duties corresponding to their rights with meritorious ethical duties (*dignity concerns*);

them it is outside ethics. Thus ethics commands that I still fulfil a contract I have entered into, even though the other party could not coerce me to do so; but it takes the law (*pacta sunt servanda*) and the duty corresponding to it from the doctrine of right, as already given there.' The duty in question is thus still a duty of right, despite its lack of enforceability and the possibility of addressing it from an ethical perspective.

[14] TL 6:386.

[15] By internal motives I mean motives that are not also externally given (e.g. threats and sanctions). However, internal motives could be based on the agent's inclinations (her desires and impulses), and not only on the recognition of her duty.

[16] RL 6:219 and 231. [17] RL 6:220.

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3. Individuals may be badly positioned to discharge such duties, such that what seems right to do in the eyes of the agent may end up being *too demanding* for individuals (*demandingness problem*).

9.2.1 Unilaterality Problem

Even though persons can identify rights in the state of nature through reason (objectively), these judgements have private character and cannot authoritatively bind others externally.[18] Distinctive of Kant's legal theory is the idea that one's correct but *private* judgement about rights does not warrant the authority to decide and coerce others in matters of right. One may indeed do so (without authority), due to the normative *vacuum* of the state of nature, that is, the fact that there is no public enforcement of rights. However, in contrast to John Locke,[19] the unilaterality problem arises for Kant because even though one may have 'right on one's side', the authority to impose one's judgements about rights on others externally requires omnilaterality.[20] Omnilaterality is the condition of reciprocity in external relations. Therefore, the unilaterality problem in the state of nature concerns the *moral possibility* of binding others, which is also directly connected with the moral possibility of externally coercing them.[21] Although Kant derives the concept of rightful coercion analytically from the concept of a hindrance of freedom (which coercion then logically negates), the *authority* to coerce is not analytically derived from the concept of a 'negation of a negation' of external freedom.[22] Instead, the authority to coerce is derived synthetically from the united will of all under

[18] This means that they may choose to recognize these claims voluntarily (perhaps because they think they are justified), but cannot be externally coerced to do so (with normative authority, as opposed to mere violence).

[19] Locke in contrast argued that individuals have a natural right to execute the law of nature. John Locke, *Second Treatise of Government* (1689), ed. by Richard Howard Cox, Wheeling, IL: Harlan Davidson, 1982, ch. II, 8.

[20] Kant recognizes that one can have the 'prerogative of right' in regard to certain actions in the state of nature, namely when a deed is compatible with a future condition of public law or helps bring it about (RL 6:257). This however may still require a special 'power' to bind others by a permissive law of practical reason. Examples are the permission to coerce other individuals (albeit not nations!) to enter a civil condition (RL 6:264, 312; TP 8:349) and provisional acquisition in the state of nature (RL 6:257, 312). More on this last point in my discussion of provisional rights and permissive laws.

[21] See also Hirsch's contribution in this volume (Chapter 5), and Hirsch, *Freiheit und Staatlichkeit bei Kant*.

[22] While the concept of coercion is derived analytically from negation of a rights violation, it does not entitle one to *unilateral* coercion (RL 6:256).

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public law (instituted, not original).[23] The unilaterality problem thus arises because the normative condition for the enforcement of rights is not given in the state of nature and needs to be brought about in a condition of public law that has yet to be established.

9.2.2 *Dignity Concerns*

In certain passages, Kant expresses concerns about addressing the consequences of violations of rights as a matter of meritorious duty or virtue. Since it is possible to discharge duties of right from ethical motivation, the problem is not that relying on ethical motivational while discharging duties of right is problematic (since it is clearly *permissible* from a legal perspective and *required* from an ethical perspective). The difficulty arises from addressing the rights of others as if they were *only* matters of virtue, since this would be incompatible with the dignity of the right holders. There is something humiliating about someone's right claim being made into the object of another's beneficence, even though the line between moral concern for another's wellbeing and respecting the dignity of persons may not always be clear. Depending on the goodness of others to have one's right respected is problematic because beneficence is not something one can demand from others as a matter of right; one also becomes *indebted* to the benefactor since beneficence is freely bestowed.[24]

Even under a civil condition agents may tend to treat right claims as a matter of beneficence. Further, it is more convenient to regard oneself as doing something meritorious for others rather than giving others what is owed to them. Duties of right are strict, while duties of virtue are wide. Assuming a duty of virtue would allow the agent more flexibility for compliance and the possibility to do less than the duty of right would prescribe, not to mention the idea that one would be acquiring merit as a consequence of one's conduct (as opposed to doing one's strict duty). Although the possibility of genuine ignorance must be granted, *self-deceit* can also motivate such a *vitium subreptionis*. A vice of subreption is a mistake in cognition; in this case, in the recognition of the appropriate moral category (the type of duty in question). Self-deceit is a psychological mechanism allowing an agent to rationalize away her own awareness of

[23] TP 8:292. The exception is coercing another individual or individuals to enter a civil condition with oneself or to leave one's vicinity (TP 8:349 note).

[24] Beneficence is freely bestowed in the sense of non-coercively bestowed; from a Kantian perspective beneficence is still obligatory and never supererogatory, although it allows latitude for choice.

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possibly objectionable conduct and thus to stop scrutinizing her motivations. Since complete honesty with oneself would require recognizing oneself as morally unworthy, which is painful, self-deceit allows agents to believe that they are being moral when they are not, which feels better than acknowledging blame and taking full responsibility for one's conduct.[25]

Rights preserve an important sphere of external freedom that (in principle) allows right holders to pursue ends, including providing for themselves, to a certain extent independently of constraints imposed by the arbitrary choice (*Willkür*) of others; having their rights violated means that they may be in a position where they will need the beneficence of others to satisfy their needs. Kant identifies two ethical dangers in this scenario: the humiliation of the helped and the self-glorification of the helper.

1. *Humiliation of the helped*: Beneficence *binds* the beneficiary towards the benefactor. Kant acknowledges that being indebted towards one's benefactor can be humiliating to a certain extent, and may cause resentment towards the benefactor as a result of one's hurt pride.[26] While the duty of gratitude is a means to counteract the tendency of beneficiaries towards resentment, benefactors are required to be beneficent in ways that do not cause the beneficiary to feel humiliated, since this would be incompatible with adopting the happiness of others as one's end. For instance, Kant acknowledges that it is better to practise beneficence in secret or anonymously than to let one's identity be known.[27]
2. *Self-glorification of the helper*: The benefactor, who may be in a position to do beneficence with no considerable cost to herself, may revel (*schwelgen*) in moral feelings at the thought of her beneficent action. Whatever the source of the need, if the benefactor is well situated to help another at no significant cost to herself, Kant suggests that she should not regard her action as meritorious, but in the manner of strict duty instead.[28] A further reason for Kant's claim that one should treat beneficence subjectively as a strict duty, this time specifically under a civil condition, is that systemic injustice through the shortcomings of

[25] GMS 4:405. The moral law 'strikes down self-conceit' and humiliates it. This is why it is painful to recognize one's moral shortcomings. See KpV 5:73. For work on Kant and self-deception, see Laura Papish, *Kant on Evil, Self-Deception, and Moral Reform*, New York: Oxford Academic, 2018; Martin Sticker, 'When the Reflective Watch-Dog Barks: Conscience and Self-Deception in Kant', *The Journal of Value Inquiry* 51 (2017), 85–104; and Maria Eugênia Zanchet, 'Towards a Holistic View of Self-Deception in Kant's Moral Psychology', *Con-Textos Kantianos* 16 (2022), 194–219.

[26] TL 6:458. [27] TL 6:453. [28] TL 6:453.

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existing governments may be at the root of the poverty individuals are addressing through beneficence. Since wealthier individuals may be indirectly benefiting from the injustice of their governments and society, their merit is questionable.[29]

9.2.3 *Demandingness Concerns*

Rights preserve the individual sphere of external freedom that allows persons to set and pursue their own ends by providing them with *immunity* from the arbitrary interference of others.[30] Therefore, thwarting this sphere of freedom can bring about material dependence on the means of others. Although as finite beings we are by nature vulnerable and mutually dependent on each other, rights violations can be a cause of human dependence on the charity of others.

If an agent takes seriously Kant's admonitions about avoiding humiliation to others and treating wide duties as if they were strict ones (given the possibility of systemic injustice), she may find herself in a situation that is extremely morally demanding. Since the acute needs of others would trigger a duty of beneficence (to which morally conscientious agents are more responsive than other, less morally attuned agents), morally conscientious agents would find themselves in a situation in which they would bring it upon themselves to compensate for these needs. Since we can assume that morally conscientious agents constitute a minority of all agents who are actually under the duty, depending on the degree of deprivation, the help required to bring about a satisfactory level of support would require such agents to weigh beneficence against the promotion of their own ends and happiness. A paradox arises from this scenario. A morally good agent is actually *worthy* of happiness.[31] However, being a morally good agent, especially under *acutely* demanding scenarios, would mean that precisely these agents may need to sacrifice their own happiness to address need. Therefore, the best moral agents may be less likely to enjoy the happiness they morally deserve.

Elsewhere I argued that moral overdemandingness is not intrinsic to Kant's moral theory, but contingent upon external circumstances.[32]

[29] TL 6:454.

[30] Immunity is here understood as a legal *title* to protection from interference. It does not entail *actual* protection in the lack of public legal orders.

[31] KpV 5:130; TP 8:278.

[32] Alice Pinheiro Walla, 'Kant's Moral Theory and Demandingness', *Ethical Theory and Moral Practice* 18 (2015), 731–43. See also Alice Pinheiro Walla, 'Kant and the Wisdom of Oedipus', *Jahrbuch*

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Injustice and lawlessness do not only bring about need but also directly contribute to moral demandingness. This means that protecting moral agents provides an additional ethical argument for Kant's *exeundum*, which I take to imply not a mere 'one off' move out of a state of nature. As stressed earlier, the state of nature is a matter of *degree*: although a group may have left the absolute state of nature by entering a legal order, they are still in a *relative* state of nature in regard to other polities, towards whom their external relations remain unregulated. Further, their internal public institutions will be still very far from the rational ideal of a Kantian *res publica*, according to which the principles of external freedom and equality before the law are the basis of legislation. There is thus a duty continually to improve this legal order in order to bring it closer to the rational ideal. The *exeundum* is thus an ongoing obligation to transition towards a more *inclusive* condition of public law, both domestically and internationally. It is inclusive because arbitrary discrimination and interference must be gradually abolished and the scope of those included in the juridification of external relations is enlarged, compatible with hierarchies of legal orders, at different levels.[33]

The argument presented above lends support to the idea that Kant's legal-political thought has a *transitional* character. It enables us to address real-world politics and institutions with the guidance of pure principles derived from *Vernunftrecht*, or Right of Reason. There is something very appealing about this picture. It allows us to dismiss the cliché of Kant's theory as empty formalism; we find instead a versatile theory that can guide us through the messiness and complexity of real political practice. It is thus not surprising that Kant's theory was recently rediscovered and celebrated as a promising theory of *transitionality*.[34]

While I do not dismiss the potential of Kant's legal theory, which proponents of a Kantian theory of transitionality are very correct to stress, in Section 9.3 I will address what I take to be a misunderstanding of Kant's theory in the recent literature: the conflation of 'transitionality' with what Kant scholars have referred to as 'provisionality'. While there is a sense in

Praktische Philosophie in globaler Perspektive/Yearbook Practical Philosophy in a Global Perspective 3 (2019), 126–44.

[33] I take hierarchies of legal orders to be required if we are to avoid a world state. Further, the ethical argument I have sketched is an imperfect duty of individuals, which must be subordinated to perfect ones, therefore, no 'conflict of duties' follow from this argument. As stressed earlier, the fact that an existing civil condition does not correspond to the perfect ideal of justice of the *respublica noumenon* does not undermine its legitimacy as *respublica phenomenon*.

[34] See Claudio Corradetti, 'Kant's Legacy and the Idea of a Transitional *Jus Cosmopoliticum*', *Ratio Juris* 29 (2016), 105–21.

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which provisional rights are rights under transitional circumstances (i.e. in the development towards a condition of public law), I argue that talking about 'provisionality' in general, or applying this notion to duties, misses the point. Kant restricts the attribute 'provisional' to acquired rights, and for a good reason: it is the indeterminate status of acquired rights in the state of nature that compels us to leave that state.[35] Once we understand why acquired rights in the state of nature are deemed 'provisional', it becomes clear that it does not make sense to talk about provisional *duties* or 'provisionality' in general. While there is indeed a connection between 'transitionality' and 'provisionality', this relation pertains exclusively to provisional *rights*.

9.3 The Meaning of 'Provisional'

Kant's conceptions of provisional rights and of permissive laws have received growing attention in recent Kantian philosophy and Kant scholarship. Although Kant himself reserves the attribute 'provisional' (*provisorisch*) to rights, Kantians have extended the attribute 'provisional' also to duties. It has also become common to refer to 'provisionality' in general.[36]

In her article 'Kantian Provisional Duties', Heather Roff argued that in the state of nature we can identify duties that are 'provisional', that is, 'conditional' upon the agent's ability to act. In the state of nature, duties of justice are thus 'conditional duties'. According to Roff,

> 'conditional' or 'provisional' duties are conditioned by structural requirements, i.e. they have *enabling* conditions. As long as people are enabled, then they are under a strict necessitation to act. But if some people are disabled or disempowered, then there is (or at least might be) no duty for those agents. If it is determined that an agent has a duty, then that duty still stands as a necessitation to act. Thus *provisional here means limited by some special nullifying hindrance of a temporary nature*, e.g. the hindrances of a

[35] 'Determined' means *morally necessary*, namely conclusively binding. Unilaterally acquired rights to external things are 'indeterminate' in the sense of 'morally contingent', that is, insufficient to impose an external obligation. See RL 6:256–7 (§9) and RL 6:267. Since innate right is *original* and a *liberty* ('no duty not to'), and by definition not a unilaterally acquired right to something *external*, its content does not need to be 'determined' by an omnilaterally binding authority; the distinction provisional/peremptory does not apply to innate right. See Pinheiro Walla, '*Honeste vive*: Dignity in Kant's *Rechtslehre*' in Adam Cureton and Jan-Willem van der Rijt (eds.), Human Dignity and the Kingdom of Ends: Kantian Perspectives and Practical Applications, London: Routledge.

[36] See for instance J. P. Messina, 'Kant's Provisionality Thesis', *Kantian Review* 24 (2019), 439–63; Rafeeq Hasan, 'The Provisionality of Property Rights in Kant's *Doctrine of Right*', *Canadian Journal of Philosophy*, 48 (2018), 850–76; Christopher Yeomans, 'Kant and the Provisionality of Property', in Ansgar Lyssy and Christopher Yeomans (eds.), *Kant on Morality, Humanity, and Legality: Practical Dimensions of Normativity*, Cham: Palgrave Macmillan, 2021, 253–78.

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> state of nature, civil war, civil breakdown during a natural disaster, or anything *which makes some incapable of fulfilling duties of justice*. In the absence of an authoritative neutral judge and the rule of law backed by a coercive force, duties of justice are provisional. Some examples might be helpful here. Looking solely at Kant's works, four provisional duties are easily identifiable: initial acquisition of property, initial institution of civil society, autocrats governing in accordance with republican principles, and sovereigns delaying preliminary articles 2, 3 and 4 of *Perpetual Peace*.[37]

The idea that certain duties have 'enabling conditions', that is, that they may only apply to agents who are *materially* able to discharge them, is barely something that applies only to duties of justice in the state of nature. Latitude in general signalizes that practical reason is taking into account the limitations of finite rational agents for discharging a duty. All imperfect duties, insofar as they are *wide duties*, allow agents some latitude in deciding how to discharge the obligation, permitting them to circumvent material limitations (temporary or otherwise) or to reconcile the duty in question with other indirect duties that also require the agent's time and resources. In the *Groundwork*, Kant refers once to strict duty as allowing 'no exceptions to the principle of duty', indirectly suggesting that wide duties would allow such 'exceptions'.[38] However, the idea of a duty allowing an 'exception' is misleading (and Kant himself acknowledges this later on, appearing to contradict himself).[39] It is not the case that a duty 'ceases' to apply to the agent if she is incapacitated; it is only a determinate act token or course of action which is ruled out as an option for the agent if she is incapable to act in a specific way. The view that the duty 'ceases to apply' is due to a confusion between the principle of duty (the ground of obligation) and particular actions that would discharge the obligation.[40] From a Kantian perspective, the obligation lies in the *principle* of duty, and not in the token actions we consider required by the principle. Actions are *applications* of maxims of duties to the particular circumstances of a concretely situated agent. They result from our judgement or interpretation of what we are required to do in a specific scenario, or from what is generally considered to discharge or comply with a certain obligation.

[37] Heather Roff, 'Kantian Provisional Duties', *Jahrbuch für Recht und Ethik* 18 (2010), 533–62, at 547, emphasis in original.

[38] In GMS 4:421n, Kant states: 'I here understand by a perfect duty the one that allows of no exception to the advantage of inclination.' I adopted the translation by Timmermann in Immanuel Kant, *Groundwork to the Metaphysics of Morals: A German–English Edition*, Cambridge: Cambridge University Press, 2011. See also RL 6:232–3.

[39] GMS 4:424. See also TL 6:390.

[40] See RL 6:224 and Hirsch, *Freiheit und Staatlichkeit bei Kant*, 373ff.

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Paradigmatically, imperfect duties are derived from second-order moral ends that all agents are required to adopt.[41] If a specific act-token that would fall under the description of the duty must be *contingently* discarded as an option for discharging the duty, this does not extinguish the duty itself, but only a possible way of complying with the duty. The agent can discharge the duty in other ways or at a later time, although she may feel sorry or even guilty that she cannot act when *prompted* to. This is especially the case when the need of specific persons must go unattended, since agents who are genuinely committed to a moral end will *particularize* moral requirements: concrete external circumstances may trigger a specific duty (say of beneficence or justice). Responding to these external circumstances is thus considered in the agent's judgement as her *moral task* (what she is required to do under the circumstances). Not being able to comply with one's moral tasks of the moment will be perceived by conscientious moral agents (i.e. agents who genuinely *care*) as a moral failure and a reason for regret, although this may not be *objectively* the case.

The comparison with wide duties of virtue seems to beg the question, since Roff is talking about duties of *justice* in the state of nature as being 'conditional duties'. These are not duties involving latitude; paradigmatically they are strict and in principle externally coercible. However, there are cases in which a duty is *objectively* strict and yet must be treated *subjectively* as wide. Kant's ethical and legal-political works are strewn with examples of objectively strict duties that are treated subjectively as wide ones.[42] Consider the examples mentioned by Roff, namely, preliminary articles 2, 3, and 4 of *Towards Perpetual Peace*. In Kant's own words, these are laws that:

> taking into consideration the circumstances in which they are to be *applied, subjectively* widen his authorization (*leges latae*) and contain permissions, not to make exceptions to the rule of right, but to postpone putting these laws into effect, without however losing sight of the end; he may not *postpone* to a nonexistent date (*ad calendas graecas*, as Augustus used to promise) [. . .] For the prohibition here concerns *only the way of acquiring*, which from now on shall not hold, but not the *status of possession*.[43]

Under the wide laws (*leges latae*) mentioned above, we see not an 'exception' to the principle of right, but the preservation of an acquisition title

[41] See TL 6:390–5.

[42] For examples of such ethical duties see for instance the duty to cultivate morality in oneself (TL 6:392–3) and Kant's discussion of one's perfection as a moral end (TL 6:446).

[43] ZeF 8:347, my emphasis.

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together with the commitment to refrain from a specific *mode of acquisition* in the future. The title of acquisition is not deemed invalid, although its mode of acquisition is now considered prohibited. The wide law thus allows states of affairs to be brought gradually in line with the rule of right, as opposed to being retroactively corrected.[44] This case in which a strict duty (to abstain from certain modes of acquisition) is treated subjectively as wide is what I will call a matter of *moral prudence* (when being too strict or too hasty in its implementation would result in undermining the moral end altogether). True, moral prudence enables a transition towards a more just legal order by allowing gradual change. But does it mean that we are dealing with a 'provisional' duty?

Roff argues that provisional *duties* are strict duties turned wide, thus enabling postponement. Roff's interpretation is a clear response to the demandingness problem I sketched before. Because compliance with juridical duties can be extremely burdensome on individuals in the state of nature, those duties must allow for leniency. This point, she states, is not merely that 'ought implies can', but that there is something 'distinctive about provisional duties that deserves attention'.[45]

However, identifying wide principles of duty (*leges latae*) with 'provisionality' ultimately obscures the reason why we should leave the state of nature in the Kantian framework. The rationale behind the duty to 'bridge the juridical gap' becomes unintelligible, if not circular. While latitude may be understood as a policy of 'moral prudence' by allowing us to protect the moral ends reason commands us to realize and avoid being overly demanding on individuals, the attribute 'provisional' refers to the conditions required for the possibility of obligation. At stake in the case of provisional *rights* is precisely *their capacity to bind*, that is, the moral faculty of the right holder to impose a duty on others. As I will explain, duties corresponding to acquired rights in the state of nature are possible due to permissive laws of practical reason. In contrast to the acquired rights to which they correspond, corresponding duties need not be deemed 'provisional'.

The interpretation I defend in this chapter is that provisional rights are rights whose status is still indeterminate; provisional rights are thus still

[44] Does Kant's view not allow for a theory of reparation for past wrongs? It certainly does. However, it may be the case that rectifying past wrongs retroactively may be 'too messy', since, for instance, ongoing possession or occupation of territory creates a rightful title over time. The way forward is thus to implement the new principle forbidding previously accepted modes of acquisition (say, through marriage, as usual among royal houses in Europe, or through colonial rule) while accepting as valid past acquisition.

[45] Roff, 'Kantian Provisional Duties', 548.

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vulnerable to *contestation* by competing rights claims. Peremptory rights, in contrast, have a *conclusive* status. All other competing rights claims are thus ruled out. Provisional (*provisorisch*) alludes to the *modality* of a right. Provisional rights are rights in *expectation* of a future civil condition, under which they can become peremptory or conclusive, that is, morally *necessary*.[46] It is thus imprecise to think about provisional rights as being 'temporary' as opposed to 'permanent', although these meanings may seem very close to the idea of a modality of rights.

9.3.1 Acquired Rights and Permissive Laws of Practical Reason

Before developing my argument in more detail, I will point out a related problematic interpretation, this time focusing on the notion of *permissive laws*.[47] Permissive laws are directly connected to provisional rights. It is thus not surprising that the way 'provisionality' has been constructed in the secondary literature has direct implications for the interpretation of permissive laws, namely as principles that *temporarily permit the morally impermissible*.

Lea Ypi, in her influential article 'A Permissive Theory of Territorial Rights', offers the following interpretation of permissive laws:

> A permissive law, according to Kant, is 'necessitation to an act such that one cannot be necessitated to do it' (8:348; 321 fn). This apparently obscure definition is meant to introduce a third kind of norm (in addition to commands and prohibitions) required to exceptionally justify acts that we would ordinarily consider incompatible with principles of right. The Kantian idea that an action is incompatible with principles of right if it cannot coexist with everyone's freedom in accordance with universal law (6:231; 387) has already been discussed by other authors [. . .]. What bears emphasis is the relationship of this definition to permissive principles, i.e. their employment to assess normatively relevant circumstances in which a course of action incompatible with the idea of equal freedom is pursued.[48]

According to Ypi, permissive principles justify states of affairs incompatible with the idea of right 'only provisionally and conditionally'. They are thus

[46] §9 and §15 of Private Right (RL 6:256–7 and 6:264–6 respectively) deal with the distinction provisional/peremptory. 'Possession in anticipation of and preparation for the civil condition, which can be based only on a law of common will, possession which therefore accords with the possibility of such a condition, is provisionally rightful possession, whereas possession found in an actual civil condition would be conclusive possession.'

[47] For the concept of a permissive law, see also Brecher in this volume (Chapter 8).

[48] Lea Ypi, 'A Permissive Theory of Territorial Rights', *European Journal of Philosophy* 22 (2014), 288–312, my emphasis.

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provisional in the sense that they temporarily permit an unrightful state of affairs 'as long as principles of right are not in place'. Therefore,

> it might be possible that, at T1, an action is incompatible with principles of right but justified because it is the only way through which those principles could be realized. This does not mean that the same permission is also required at T2, where other avenues might be available. Hence, permissive principles are principles of transition: they apply to past actions but not necessarily to future ones.[49]

This reading presupposes the idea that an unrightful state of affairs must precede the implementation of a condition of public justice. Violence is nothing other than coercion without law, the difference being that under the circumstances specific coercive acts may actually be conducive to the institution of a civil condition. As necessary means to a morally required end, violence and thus injustice must be tolerated, but only 'conditionally', that is, as long as required to further the moral end. The problem with this view is the idea that something incompatible with right is permitted for the sake of right itself, a view that may sound strikingly consequentialist to Kant's stunned readers. As Bernd Ludwig observed, although Kant did express this view earlier[50] (and we also see it expressively formulated in 1795 in *Towards Perpetual Peace*),[51] Kant seems to have abandoned the 'experimental' idea that violence must necessarily precede Right before the creation of a civil state.[52] How should we thus understand the idea of a permissive law in the absence of a condition of public law? Ludwig suggests that the use of coercion must be *already rightful* from the very beginning, but does not elaborate the claim further.[53]

In Section 3.2, I will develop the idea that permissive laws enable certain legal positions in the state of nature. It is not that something unrightful must be accepted as a necessary bridge towards a rightful condition, but that rightfulness must be established *ex-ante* as a *precondition* to a future civil condition. The reasons for this are not empirical considerations about implementing ends in transitional scenarios but a *rational requirement* to adopt certain normative assumptions. Therefore, while the idea of permissive laws as principles of transitionality indeed applies to *Perpetual Peace*,[54]

[49] Ypi, 'A Permissive Theory of Territorial Rights', 290. [50] V-MS/Vigilantius, 27:515.
[51] ZeF 8:371 [52] Bernd Ludwig, *Kants Rechtslehre*, Hamburg: Meiner, 1988/2005, 157, fn. 123.
[53] Ibid.
[54] Here is a perfect example of Kant's position in *Perpetual Peace*: 'These are permissive laws of reason that allow a situation of public right afflicted with injustice to continue until everything has either of itself become ripe for a complete overthrow or has been made almost ripe by peaceful means; for some rightful constitution or other, even if it is only to a small degree in conformity with right, is

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it cannot be conflated with the concept of provisional rights. As already pointed out by Joachim Hruschka, we are dealing with two distinct meanings of permissive laws in *Towards Perpetual Peace* and the *Doctrine of Right*.[55]

9.4 Permissive Laws as Power-Conferring Norms

Joachim Hruschka argued that in order to understand permissive laws in the Doctrine of Right one must distinguish between two meanings of permitted actions: actions that are 'allowed' (*erlaubt*) and actions that are 'merely allowed' (*bloß erlaubt*).[56] The actions and states of affairs that are the subject matter of permissive laws are 'merely allowed': they are neither prohibited nor commanded. One is at liberty to perform or not perform them. For instance, all things equal, I am at liberty to touch the tip of my nose with my finger. I am neither obligated to nor prohibited from touching the tip of my nose. What is distinctive of permissive laws in general is therefore not that they turn the prohibited into permitted, but that they turn the *morally indifferent* into a *morally relevant* action or state of affairs.

Drawing upon Achenwall, Hruschka's insight is that permissive laws transform mere liberties (i.e. actions that are morally indifferent) into *moral faculties*, that is, into morally relevant actions with the power to bind others, giving rise to a proper *individual right*. The permissive law in the Doctrine of Right should be thus understood as a *power-conferring norm*.[57] Its role is to create obligations from deeds or states of affairs that

better than none at all, which latter fate (anarchy) a premature reform would meet with. Thus political wisdom, in the condition in which things are at present, will make reforms in keeping with the ideal of public right its duty; but it will use revolutions, where nature of itself has brought them about, not to gloss over an even greater oppression, but as a call of nature to bring about by fundamental reforms a lawful constitution based on principles of freedom, the only kind that endures.' ZeF 8:373 note.

[55] Joachim Hruschka. 'The Permissive Law of Practical Reason in Kant's "Metaphysics of Morals"', *Law and Philosophy* 23 (2004), 45–72, and Joachim Hruschka. 'Das Erlaubnisgesetz der praktischen Vernunft und der ursprüngliche Erwerb von Stücken des Erdbodens', in *Kant und der Rechtsstaat und andere Essays zu Kants Rechtslehre und Ethik*, Freiburg im Breisgauand Munich: Karl Alber, 2015, 48–88. See also Reinhard Brandt. 'Das Erlaubnisgesetz, oder: Vernunft und Geschichte in Kants Rechtslehre', in Reinhard Brandt (ed.), *Rechtsphilosophie der Aufklärung*, Berlin: De Gruyter, 1982, 233–85.

[56] 'An action is allowed (*licitum*) which is not contrary to obligation. [. . .] An action that is neither required nor prohibited is merely allowed.' Introduction to the Metaphysics of Morals, RL 6:222 and 223. I follow Hruschka in using 'allowed' as the translation of 'erlaubt', as opposed to 'permitted' as used in Immanuel Kant, *Practical Philosophy*, ed. and trans. by Mary Gregor, Cambridge: Cambridge University Press, 1996.

[57] Hruschka. 'The Permissive Law of Practical Reason in Kant's "Metaphysics of Morals"', 47.

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otherwise would not give rise to rights. Note that this takes place outside a condition of public law (i.e. in the state of nature).

> This postulate can be called a permissive law (*lex permissiva*) of practical reason, which gives us an authorization that could not be got from mere concepts of right as such, namely to put all others under an obligation, *which they would not otherwise have*, to refrain from using certain objects of our choice because we have been the first to take them into our possession. Reason wills that this hold as a principle, and it does this as practical reason, which extends itself a priori by this postulate of reason.[58]

Kant claims that 'reason wills that this holds as a principle'. What does it mean to say that 'reason wills' *x*? Provisional rights are acquired rights in the state of nature. As acquired rights, they rely on the notion of a permissive law of reason for their bindingness. In contrast to Achenwall, who believed that self-preservation provided the moral basis for certain moral faculties,[59] Kant thought that only an act of choice (*Willkür*) that also had *universal* character (i.e. not contingent, not unilateral) could be the basis of a moral capacity to coerce others externally. Since these conditions are only fulfilled in a condition of public right, and yet acquisition must take place *before* the implementation of a condition of public right, the permissive law is called upon to create a moral faculty in the state of nature. The permissive law turns a mere liberty ('no-duty') into a moral faculty, which creates rights and corresponding obligations. Provisional rights are thus *ex ante* rights.

The way Kant connects permissive laws and provisional rights follows from his apagogical argument for acquired rights in the state of nature.[60] An apagogical argument is an indirect proof of a proposition (from the Greek *apagein,* 'to lead away'). Something must be assumed to be true given another proposition, whose truth cannot be denied.[61]

> 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* [*sollte es nun doch rechtlich schlechterdings nicht in meiner Macht stehen*] 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

[58] RL 6:247, my emphasis.
[59] Gottfried Achenwall and Johann Stephan Pütter, *Anfangsgründe des Naturrechts (Elementa Iuris Naturae)* (1750), ed. and trans. by Jan Schröder. Frankfurt am Main: Insel, 1995, § 182, p. 63.
[60] RL 6:246.
[61] Eugen Bucher, 'Der von den Juristen verkannte apagogische Beweis – dazu auch Kant und Kelsen', in Andreas Heldrich et. al. (eds.), *Festschrift für Claus-Wilhelm Canaris zum 70. Geburtstag*, Munich: C. H. Beck, 2007, 991–1016.

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> depriving itself of the use of its choice with regard to an object of choice, by putting usable objects beyond any possibility of being used; in other words, *it would annihilate them in a practical respect and make them into res nullius*, even though in the use of things choice was formally consistent with everyone's outer freedom in accordance with universal laws. – But since pure practical reason lays down only formal laws as the basis for using 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.[62]

It is possible to think of each person making use of objects of choice (whatever these are) as mutually compatible with the freedom of everyone else. But how can we be sure that it is *rightful* to make use of objects of choice? For the sake of the argument, we could try to imagine what would be the implications of deeming the use of objects of choice *impossible* from the perspective of right. We do not need to assume that using these objects is *prohibited* by reason; our assumption is instead that objects of choice are beyond the scope of the principles of right. They cannot belong to anyone because the juridical concept of possession (as something that belongs to another as a matter of title), cannot apply to any external objects. In this case, we would need to assume that all objects of choice are *res nullius*, that is, things that cannot possibly be or become the Mine or Thine of any person. A *res nullius* is not merely a *res vacua* (a 'vacant' object which contingently happens to have no possessor); it is something that *in principle* cannot belong to anyone, that is, *out of reach* from the perspective of rights. However, if we take into account the very concept of practical reason, we realize that the fundamental end of practical reason itself must be *Willkür* or choice. Choice is about setting and pursuing ends for ourselves. It follows that if we assume, at the same time, that objects of choice (the very matter of choice) are outside the scope of Right, this would amount to denying choice as the fundamental purpose of practical reason. It would imply a contradiction.

Apagogical arguments are often identified with *reductio* arguments (*reductio ad absurdum*). However, this comparison is not very helpful for understanding how apagogical arguments can function as indirect proofs in Kant's theory. Kant makes wide use of apagogic argumentation in the *Groundwork*, more precisely, in the way duties are derived from the categorical imperative. For instance, the prohibition against suicide arises from the insight that universalizing a maxim of taking one's life whenever

[62] RL 6:246.

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one is distressed would be incompatible with 'the end of nature'; similarly, a false promise, when universalized, would contradict the very end of communication and speech. The opposite maxim of veracity must be thus adopted as a duty. Similarly, we must admit the possibility of acquired rights in the state of nature (i.e. provisional rights) because assuming the contrary would lead to a contradiction of practical reason with itself: freedom would be depriving itself of its own rationale, that is, its exercise of choice in regard to external objects (the objects of *one's choice*). Therefore, it must be possible to make use of external objects (they must be included within the scope of rights) and a permissive law must be posited to confer persons a power to bind others that they could not otherwise have (i.e. unilaterally).[63]

Which kind of contradiction does Kant identify in his argument for the possibility of possessing objects of choice? Comparing the above *Doctrine of Right* passage with the *Groundwork*, it is not a contradiction in thought or in conception, but a contradiction in *the will*.[64] We cannot *will* that such a state of affairs (external objects as *res nullius*) be the case. Why not? The assumption is a *substantive* one: it presupposes a *conception* of the nature of practical rationality in its external orientation. Reason 'wants' objects of choice to become the objects of choice of *someone*. Given the end of practical reason, it is therefore fundamental to assume that we can incorporate our use of objects under the scope of external freedom and thus of rights.

If so, why are rights to objects of choice 'provisional' in the state of nature? Why can't reason also fully settle their status as the *conclusive* rights of someone in the state of nature? This is because even though it is possible to have objects of choice, *acquiring* specific objects in such a way as to *enable* the exercise of choice also entails an entitlement against arbitrary interference from others; my immunity from interference requires an ability to impose a corresponding liability on all others not in possession of my object not to interfere with my exercise of choice. I must thus be able to *bind* all others to respect my possession. The right is provisional because I can only bind under universal conditions (omnilaterality), and these conditions are not given in the state of nature.

A possible objection to the interpretation of permissive laws as power-conferring norms in the *Doctrine of Right* would be the idea of *natural*

[63] RL 6:247.

[64] The distinction was introduced by Onora O'Neill in her 'Consistency in Action', in Nelson T. Potter and Mark Timmons (eds.), *Morality and Universality: Essays on Ethical Universalizability*, Dordrecht: Reidel, 1985, 159–86.

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permissive laws. These appear in his discussion of personal rights akin to rights to things.[65] I have argued that the role of permissive laws in the case of provisional rights is creating a moral faculty, not turning the morally impermissible into the morally permissible. At least in the case of sexual/marital relations, Kant did seem to think that the permissive law would be turning something prohibited, namely, enjoying another person as an object, into something permissible, that is, an exclusive and reciprocal personal relationship in which the partners mutually acquire each other (Kant's conception of marriage). Kant postulates that sexual relations between persons of the opposite sex are permitted by a 'natural' permissive law.[66] One may wonder why the permissive law is deemed 'natural' in this and in the other two types of personal rights. For the sake of brevity, I will focus on marital rights.

As Kant explains, in the state of nature 'there can be societies compatible with rights (e.g. conjugal, paternal, domestic societies in general, as well as many others); but no law "you ought to enter this condition" holds a priori for these societies'.[67] There is thus *no duty* to enter such personal relations. And yet, there is something about our human nature that makes these personal relations both *unavoidable* and *morally problematic*. They have to do with facts about the human species (sexual desire, procreation, the need to form a household). While biological facts *per se* do not give rise to rights, we see the rational need to bring personal relations that are shaped by these fundamental biological facts under the scope of Right. The permissive law is 'natural' in this case because it involves empirical aspects of human life that would not automatically involve rights; however, these relations must nevertheless be brought into the sphere of right for their very moral possibility.[68] And this seems to contradict my previous interpretation of permissive laws.

Unlike external objects of choice, there would be no contradiction of practical reason with itself in depriving oneself of sexual relations with

[65] RL 6:276–84.

[66] Several Kant scholars have criticized Kant's exclusion of same-sex relationships from permissible sexual relations. For a criticism of Kant's position given his own theoretical commitments, see Martin Brecher, 'Animal Desire and Rational Nature: Kant's Argument for Marriage and the Problem of "Unnatural" Sex', in Pärttyli Rinne and Martin Brecher (eds.), *Kant on Sex, Love, and Friendship*, Berlin: De Gruyter, 2023, 35–61 and Martin Sticker, 'The Case against Different-Sex Marriage in Kant', *Kantian Review* 25 (2020), 441–64. For a revised Kantian account of sexual relationships see Helga Varden, 'A Kantian Conception of Rightful Sexual Relations: Sex, (Gay) Marriage and Prostitution', *Social Philosophy Today* 22 (2006), 199–218, and Helga Varden, *Sex, Love, and Gender: A Kantian Theory*, Oxford: Oxford University Press, 2020.

[67] RL 6:306.

[68] For an alternative interpretation of 'natural' permissive laws, see Martin Brecher, *Vernunftrecht und Verdinglichung: Eine Rekonstruktion von Kants Eherecht*, Berlin: De Gruyter, 2025.

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another person. In fact, Kant is puzzled about the idea of enjoying another person sexually; he suggests that sex is the most objectionable way in which one could instrumentalize another rational being. However, Kant is ambivalent about why one should nevertheless allow heterosexual sexual relations between consenting adults. While he argues that reproduction of the species requires sexual relations (and this is his argument for rejecting same-sex sexual relations and bestiality) he nevertheless does not restrict heterosexual sexual relations to reproduction; surprisingly, a possible motivation he acknowledges for engaging in sexual relations is not the intent to procreate but the enjoyment of each other's sexual organs for the sake of pleasure.[69]

> The end of begetting and bringing up children may be an end of nature, for which it implanted the inclinations of the sexes for each other; but it is not requisite for human beings who marry to make this their end in order for their union to be compatible with rights, for otherwise marriage would be dissolved when procreation ceases.
>
> Even if it is supposed that their end is the pleasure of using each other's sexual attributes, the marriage contract is not up to their discretion but is a contract that is necessary by the law of humanity, that is, if a man and a woman want to enjoy each other's sexual attributes they must necessarily marry, and this is necessary in accordance with pure reason's laws of right.[70]

For Kant, sexual relations must be regulated by Right not because they promote external freedom, but because only exclusive rights to each other can ensure the reciprocity required for sexual relations to qualify as compatible with the right of humanity in our persons. The argument seems to be the following: since engaging in sexual relations amounts to enjoying a person similarly to a *thing* and threatens to reduce them to their sexual organs, *mutually acquiring* each other (possessing each other as a *whole* person) to the exclusion of others from the same relation, is necessary for restoring the spouses' status as *complete* persons within their sexual relationship with each other. Does the natural permissive law turn a morally 'abhorrent' state of affairs into a morally acceptable relationship in the case of marriage?

Again, the permissive law plays a power-conferring function, this time within a personal relationship. It is the permissive law that creates the moral faculty that enables the spouses to possess each other in the first place. Note that the claim goes beyond the mere consent of the involved

[69] RL 6:277. [70] RL 6:277–8.

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parties to be in such a relationship. Sexual relations *per se* do not give rise to any claims to exclusive possession of one's partner; only a permissive law can do that. There is something a spouse can claim against the other spouse even if she is no longer invested in or committed to the relationship.

The difference between a natural permissive law and the permissive laws I discussed before is that a natural permissive law does not need to give rise to *provisional* rights; the duties and rights arising from marriage do not *commit us* to entering a civil condition for their bindingness as does possession of external objects in the state of nature. This is because we are dealing with claims to *persons*; no possession of external things is involved.[71] Despite Kant's claim that one can fetch a partner who ran away[72] similarly to the way one would recover a lost thing, 'possession' in that case is a metaphor for the *privilege* spouses have over each other and in regard to everyone else. Although marriage benefits from the existence of a civil condition, the obligations marriage impose on other people (their lack of privilege in regard to one's spouse) does not require omnilaterality conditions to be in place in the way possession of external objects does.

9.5 Conclusion

Kant's apagogical argument is driven by the rational requirement to avoid a contradiction of reason with its own fundamental assumptions. *Rechtswidrig* (what is 'against Right') is thus defined as what would be self-contradictory, given fundamental, *Kantian* assumptions about the nature of practical reason and external freedom. The postulate thus *extends* practical reason by creating a moral faculty to bind.[73] Provisional rights are rights in expectation of a future civil condition.

According to the transitionality reading sketched before, Kant's concern in formulating his legal-political theory is to account for the implementation of principles of justice under non-ideal conditions: the imperfection or complete absence of political institutions, the messiness of politics, the frailty of human nature, the need to overcome past practices that are incompatible with right and to progress gradually towards a condition that is closer to rational ideals. My criticism is aimed at accounts that identify or conflate 'transitionality' with 'provisionality'. I have argued that Kant's

[71] In the case of external objects, one must assume a common possession of all things in order to derive the idea of a division (acquisition) of the earth's resources. No such presupposition is required in the case of personal rights, which are merely 'akin to rights to external objects', but actually involve persons.

[72] RL 6:278. [73] RL 6:247.

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account of provisional rights is based on the avoidance of contradiction; the argument is thus purely formal ('rational' in Kant's sense of the term). This does not mean that his theory does not have the advantages highlighted by the proponents of the transitionality reading. But in the spirit of *Theory and Practice* and of transcendental idealism, the view I defended in this article is that Kant's theory can be applied to the real world primarily because it is rational, not because it is sensitive to 'non-ideal' conditions. *Prima facie*, the requirements of reason stand in a strong contrast to the complexity and messiness of reality. In order to be feasible and realistic, it seems intuitive to expect normative theories to be able to be sensitive to the particularities of a world in transition, and to allow for flexibility and a certain degree of compromise in the implementation of its goals. This is certainly true of some aspects of Kant's political thought, namely, the *leges latae* (the imperfect, wide principles) discussed in *Towards Perpetual Peace*. In their case, a permissive law is a principle of moral prudence, allowing the postponement of reforms to a later, more opportune moment. In regard to provisional rights, however, Kant's message is instead that reason itself must interpret the world as a normative landscape, structured into a coherent system by rational principles. Where coherence is not given within the system, it must be *brought about as a matter of duty*. In this case, it is our task to change the world to conform to the requirements of reason, and not the other way around. My recommendation is thus to keep what can be rightly identified as Kant's theory of transitionality apart from his theory of provisional rights, and not to confuse the two.

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