

WIRTBARKEIT: COSMOPOLITAN RIGHT AND INNKEEPING

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Under the caption ‘Cosmopolitan right shall be limited to conditions of universal hospitality,’ Kant introduces the Third Definitive Article to the *Perpetual Peace* with the following words:

Here, as in the preceding articles, it is not a question of philanthropy but of right, so that *hospitality* (hospitableness) [*Hospitalität* (Wirtbarkeit)] means the right of a foreigner not to be treated with hostility because he has arrived on the land of another. The other can turn him away, if this can be done without destroying him, but as long as he behaves peaceably where he is [auf seinem Platz], he cannot be treated with hostility. What he can claim is not the *right to be a guest* [*Gastrecht*] (for this a special beneficent pact would be required, making him a member of the household [*Hausgenossen*] for a certain time), but the right to *visit* [*Besuchsrecht*]. . .¹

Although he does not use the term in his brief remarks on cosmopolitan right in the later *Doctrine of Right* – the most mature and comprehensive expression of Kant’s legal philosophy – the notion of ‘hospitality’ has nonetheless given rise to a small cottage industry among his students. No doubt this fascination is partly the result of waves of migration and other crises of contemporary globalization. Another is probably the terse and ‘enigmatic’ fashion in which it is described, despite its ‘obvious centrality’ to Kant’s general theory of law.² Amidst the many pages devoted to the topic, one thing seems to have largely escaped notice: Kant’s parenthetical inclusion – presumably for the reader’s elucidation – of the word ‘*Wirtbarkeit*.’ This paper focuses upon this neologism to suggest that Kant is referring to the situation of an innkeeper, such that cosmopolitan right and the corresponding obligation on the part of receiving states may usefully be explicated by reference to the private law of innkeeping.

Part I begins by reviewing a number of current discussions of the concept of hospitality, especially those considering the term *Wirtbarkeit*, and argues that they are incompatible with Kant’s fundamental commitments in his practical philosophy. Part II returns to the passage from the Third Definitive Article cited above, and demonstrates certain parallels to the sections of the *Corpus Iuris Civilis* dealing with the law of innkeeping, and to modern legal practice pertaining to the same. Part III then very broadly summarizes the basic structure of Kant’s legal philosophy as expressed in the *Doctrine of Right*. Part IV builds upon ideas from previous sections to stake a position on the central controversy surrounding the concept of cosmopolitan right: it argues that cosmopolitan right arises exclusively from the innate right to freedom, rather than from some additional entitlement to equal distributive shares of the earth’s resources, or from a right to be somewhere. Similarly, a receiving state’s

¹ Immanuel Kant, ‘Toward Perpetual Peace’ in Mary J Gregor (ed), *Practical Philosophy: The Cambridge edition of the works of Immanuel Kant* (9th edn, Cambridge University Press 2006) 328–29 (8:357–58). As is customary, references are made to the pagination Kant’s collected works as compiled by the Berlin-Brandenburg *Akademie der Wissenschaften*, as well as to Mary Gregor’s translation. Citations to the *Doctrine of Right*, *Doctrine of Virtue*, and the *Perpetual Peace* are denoted with ‘DR’, ‘DV’ and ‘PP’ respectively. The preparatory draft for the *Perpetual Peace* is denoted as ‘DPP,’ and may be found in the online ‘Korpora’ database maintained Universities of Duisburg and Essen.

² Peter Niesen, ‘Colonialism and Hospitality’ (2007) 3 *Politics and Ethics Review* 90, 90.

cosmopolitan obligation arises simply from its status as a public person, and not from any kind of ‘proprietorship’ over sections of the earth’s surface.

I. Hospitality as ‘Welcome’

An intuitive response is to imagine that ‘hospitality’ refers to some form of ethical sensibility, paradigmatically that of the welcome shown by hosts towards guests.³ This is for instance the interpretation given by Jacques Derrida, the only writer who appears to have paid much attention to the word *Wirtbarkeit*:

I would like to underline the German word *Wirtbarkeit*, which Kant adds in parentheses as the equivalent of the Latin *Hospitalität*. *Wirt...* is at the same time the patron and the host [*bôte*], the host who receives the *Gast*, the *Gastgeber*, the *patron* of a hotel or restaurant. *Wirtlich*, like *gastlich*, means ‘hospitable’, ‘welcoming.’ *Wirtsbaus* is the café, the cabaret, the inn, the place that accommodates. And *Wirt* governs the whole lexicon of *Wirtschaft*, which is to say, economy and, thus, *oikonomia*, law of the household.⁴

Similarly, Sarah Holtman argues that cosmopolitan right may be interpreted as connoting the ‘social graces’ of civility and hospitality, which may be thought of ‘as at once signs of, and helpmates to, moral virtue, which for the Kantian is itself a helpmate to justice.’⁵ For yet another example, Seyla Benhabib remarks that it is unclear whether hospitality ‘involve[s] acts of supererogation, going beyond the call of moral duty...’⁶ For Benhabib, this supposed lack of clarity arises from what she sees as ‘the tensions between the injunctions of a universalistic morality to offer temporary sojourn to all’ on the one hand, and ‘the legal prerogative of the republican sovereign not to extend such temporary sojourn to full membership.’⁷ Like Benhabib, Derrida too concludes that Kant’s notion of hospitality results in self-defeating othering: it envisages the reception of the visitor only ‘on the condition that the host, the *Wirt...* maintains his own authority *in his own home...* thereby affirm(ing) the law of hospitality as the law of the household, *oikonomia*, the law of his household, the law of a place (house, hotel, hospital, hospice, family, city, nation, language, etc.)...’⁸ Derrida develops upon this idea in a series of famous dialogues with Jürgen Habermas following the September 2001 attacks:

Pure and unconditional hospitality, hospitality *itself*, opens or is in advance open to someone who is neither expected nor invited, to whomever arrives as an absolutely foreign *visitor*, as a new *arrival*, nondentifiable and unforeseeable, in short, wholly other... The visit might actually be very dangerous, and we must not ignore this fact, but would a hospitality without

³ See Sarah Holtman, ‘Civility and Hospitality: Justice and Social Grace in Trying Times’ (2002) 6 *Kantian Review* 85, 100 (‘we often do think of those to whom we ascribe hospitality as having developed a set of appropriately welcoming practices towards strangers... We may attribute hospitality to the person who always seems to know just the way to make a stranger, whether the new colleague or the international visitor, feel welcome.’); Paul Formosa, ‘Kant on the Highest Moral-Physical Good: The Social Aspect of Kant’s Moral Philosophy’ (2010) 15 *Kantian Review* 1, 11 (‘To be hospitable is to invite the other into your home or country, to share your food and table, and to enter into peaceful social relations with him based on the respect and love due to all humans, wherever they come from.’)

⁴ Jacques Derrida, ‘Hostipitality’ (2000) 5 *Angelaki* 3, 4. *Grimm’s Dictionary* defines ‘Wirtbar’ as a poetic expression for ‘gastlich, einladend, freundlich’ from the early 18th century.

⁵ Holtman (n 3) 4. Holtman does not ascribe this view to Kant, but offers it as her own.

⁶ Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press 2004) 28.

⁷ *ibid* 42.

⁸ Derrida (n 4) 4.

risk, a hospitality backed by certain assurances, a hospitality protected by an immune system against the wholly other, be true hospitality?⁹

The first problem with these interpretations is that they are difficult to reconcile with the warning that he is talking about rights – *legal* rights – not ‘philanthropy.’ Kant reiterates this point in the *Doctrine of Right*, where he emphasizes that it is not ‘a philanthropic (ethical) principle but a principle *having to do with rights*.’¹⁰ Such attempts to sneak philanthropy through the back door do not just presume to rewrite Kant’s thoughts on cosmopolitan right over his repeated exhortations, they in fact contradict the core of his project in practical philosophy. Acts purporting to fulfil duties of virtue are worthless unless done purely for the sake of the moral end. A shopkeeper does not act fulfil any duties of virtue if he deals honestly with his customers only in order to retain their long-term patronage. For the same reason, laws compelling honest dealing on pain of sanction would do nothing to advance the virtue of honesty: any resultant honest dealing would be for the sake of complying with the law rather than for the sake of honesty in itself. Even less would Kant have argued that one ordinarily has a legal obligation to take in homeless persons who have nowhere else to go.¹¹ One should of course be charitable, but this is a duty of virtue; – philanthropy.¹² A *legal* obligation of welcome or graciousness simply does not make sense: it is hard to feel welcome if your host is legally required to be gracious. As a result, it has to be perfectly legal for your host to be rude to you.

As a fundamental matter, right is not concerned with the advancement of virtuous ends. Instead, the central principle structuring right is the idea of ‘external freedom’; that is, the ability to make choices with the means at your disposal in a manner compatible with a like ability on the part of all other persons to do the same.¹³ In contrast to duties of virtue, all that is needed to fulfil duties of right is compliance with *forms* of interaction compatible with all persons making choices for themselves using the means they rightfully have. Whether or not the *substance* of a choice is ethically commendable is for Kant a separate and subsequent question. This why the *Doctrine of Right* comes before the *Doctrine of Virtue*. for Kant, one must first envisage the conditions under which freedom is assured for all persons forever – *peace*. Only then can we even begin to talk about how to be a good person, because unless you are free, your choices are not your own to be praised or blamed for. Kant illustrates this for present purposes in his opening remark in the section on cosmopolitan right, which states that cosmopolitan right is simply the ‘rational idea of a *peaceful*, even if not friendly, thoroughgoing community of all nations on the earth...’¹⁴ In other words, peace is made between enemies, not friends. Afterwards, they may or may not go on to become friends. Only after peace is conceived of is

⁹ Giovanna Borradori, *Philosophy in a Time of Terror: Dialogues with Jurgen Habermas and Jacques Derrida* (University of Chicago Press 2013) 128–29.

¹⁰ *DR* 6:352, 489.

¹¹ *DR* 6:326, 468. (describing begging as ‘closely akin to robbery.’)

¹² *DV* 6:390, 521–22.

¹³ *DR* 6:230, 387. (defining the ‘Universal Principle of Right’ as ‘Any action is *right* if it can coexist with everyone’s freedom in accordance with a universal law, or it on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with a universal law.’)

¹⁴ *DR* 6:352, 489.

it worthwhile or even possible to think about friendliness, civility, and other supererogatory social graces between the nations of the earth. Justice is the helpmate to virtue, not the other way round.

A second problem is that the reliance upon the figure of a master of a household is difficult to reconcile with the distinction Kant generally draws between private and public. To be sure, in the *Doctrine of Right*, Kant likens the state to a parent, observing that

As natives of a country, those who constitute a nation can be looked upon analogously to descendants of the same *ancestors* (*congeniti*) even though they are not. Yet in an intellectual sense and from the perspective of rights, since they are born of the same mother (the republic) they constitute as it were one family (*gens, natio*)...¹⁵

This comparison, however, only demonstrates the difference between the republic and a private household. The former may be a *materfamilias* ‘in an intellectual sense’, but contrary to Derrida, there is no official language, religion, or even ethnicity in her household. His conception of hospitality as maintaining the ‘laws of a household’ is therefore alien to Kant insofar as it suggests the preservation of ethnic, religious, or cultural bonds to be a proper state function.¹⁶

Thirdly, to criticize Kant’s conception of cosmopolitan right as impoverished, othering, or exclusionary of visitors is to misunderstand his political commitments.¹⁷ Kant was an early and persistent opponent of European colonialism, and it is one of the crueler ironies of history that the figure of the refugee played a central role in justifying that enterprise. Grotius begins the *Free Sea* – a legal brief commissioned by the Dutch East India Company – with lines from the *Aeneid*:

What men, what monsters, what inhuman race,
What laws, what barbarous customs of the place,
Shut up a desert shore to drowning men,
And drive us to the cruel seas again?¹⁸

Vitoria had earlier used these same lines to defend the Spanish conquest of the Native Americans as a just war.¹⁹ For this reason, refugees play an increasingly marginal role as Kant develops his concept of cosmopolitan right: the *Draft for the Perpetual Peace* mentions shipwreck victims and sailors caught in storms in passing as having rights of refuge,²⁰ these specific examples are omitted in the final version, and the *Doctrine of Right* does not speak of them at all. In contrast, the critique of colonialism becomes increasingly prominent: he devotes more than a page to this topic in the *Draft*,²¹ which makes its way

¹⁵ DR 6:327, 469 (for a sovereign to establish an official religion would be ‘beneath its dignity’, because thereby ‘the monarch makes himself a priest.’)

¹⁶ Benhabib (n 6) 81 (‘To view peoples as homogeneous entities characterized by a clearly identifiable ‘moral nature’ and a source of ‘common sympathies’ is not only sociologically wrong; this view is inimical to the interests of those who have been excluded from the people because they refuse to accept or respect its hegemonic moral code.’)

¹⁷ See Niesen (n 2) 91 (stressing ‘the role of hospitality in the critique of European Colonialism, which [he takes] to be the central practical purpose of Kant’s discussion of cosmopolitan law.’)

¹⁸ Hugo Grotius, *The Freedom of the Seas, Or, The Right Which Belongs to the Dutch to Take Part in the East Indian Trade* (The Lawbook Exchange, Ltd 2001) 8.

¹⁹ Francisco de Vitoria, ‘On the American Indians’ in Anthony Pagden and Jeremy Lawrance (eds), *Vitoria: Political Writings* (Cambridge University Press 1991) 278.

²⁰ DPP 23:173.

²¹ See DPP 23:174-75.

into a blistering passage in the Third Definitive Article to the *Perpetual Peace*, where Kant observes that the practice of the ‘cruellest and most calculated slavery’ in the Sugar Islands by the European trading companies serves no conceivable commercial purpose, for they were somehow always teetering on the brink of insolvency. Instead, he speculates that their real utility was to train up sailors for wars back home in Europe, on behalf of princes who made ‘much ado of their piety... while they drink wrongfulness like water...’²² Finally, the short section on Cosmopolitan Right in the *Doctrine of Right* is almost entirely a critique of European settlement and colonisation.

Notice that Kant does not just condemn the enslavement of colonized peoples as wrongful in itself. Rather, he also argues that such faraway atrocities will eventually set the mother country ablaze.²³ While this argument tends to be associated with the political left today,²⁴ it was made most prominently during Kant’s time by Edmund Burke, who – in the course of what may have been the first campaign in history to prosecute a multinational corporation for extraterritorial human rights violations – addressed his fellow parliamentarians as follows:

In India all the vices operate by which sudden fortune is acquired; in England are often displayed, by the same persons, the virtues which dispense hereditary wealth.... They marry into your families; they enter into your senate; they ease your estates by loans; they raise their value by demand; they cherish and protect your relations which lie heavy on your patronage; and there is scarcely a house in the kingdom that does not feel some concern and interest, that makes all reform of our eastern government appear officious and disgusting; and, on the whole, a most discouraging attempt.²⁵

The ‘othering’ of foreigners is not a bug in Kant’s cosmopolitanism; it is the feature. There are very good reasons for Kant’s apparently ‘poor and minimal’²⁶ description of the content of cosmopolitan right. It is intended to break earlier writers who supplied the intellectual foundations for European colonialism by conceiving of ‘thick’ cosmopolitan rights to asylum, trade, and proselytization.²⁷ Kant’s famous statement that ‘a violation of right on *one* place of the earth is felt in *all*’²⁸ is not – as it is sometimes imagined to be – a justification of humanitarian intervention or the ‘responsibility to protect.’²⁹ Rather, it is meant to emphasize that colonialism always corrupts the colonizer.

²² *PP* 8:359, 330.

²³ *DPP* 23:175 (‘Ein Funke der Verletzung des Menschenrechts auch in einem andern Welttheil gefallen nach der Brennbarkeit des Stoffs der Herrschsucht in der menschlichen Natur vornehmlich ihrer Häupter die Flamme des Krieges leicht bis zu der Gegend verbreitet wo er seinen Ursprung genommen.’)

²⁴ Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Henry Holt and Company 2010).

²⁵ Edmund Burke, *Mr. Burke’s Speech, on Mr. Fox’s East India Bill* (L. White 1784) 32–33.

²⁶ Pavlos Eleftheriadis, ‘Cosmopolitan Law’ (2003) 9 *European Law Journal* 241, 245. Ironically, Kant faced the charge that the idea of cosmopolitan right was ‘fantastic and exaggerated.’ *PP* 8:360, 330.

²⁷ Arthur Ripstein, ‘Kant’s Juridical Theory of Colonialism’ in Katrin Flikschuh and Lea Ypi (eds), *Kant and Colonialism: Historical and Critical Perspectives* (OUP Oxford 2014) 145–46.

²⁸ *PP* 8:360, 330.

²⁹ For Kant, the responsibility to constitute a republic belongs to the people, and to no one else. In the fifth preliminary article, entitled ‘No state shall forcibly interfere in the constitution and government of another state,’ Kant states that if a state has broken into two factions, each of which claims authority over the whole, foreign powers may pick sides if called upon to do so. However, an internecine conflict that has not become ‘critical’ cannot justify such interference, because that would constitute a ‘violation of the right of a people dependent upon no other and only struggling with an internal illness; thus it would itself be a scandal given and would make the autonomy of all states insecure.’ *PP* 8:346, 319–20. This is of course not to deny that internecine conflicts

Accordingly, *Hospitalität* cannot mean ‘hospitableness,’ as Mary Gregor translates it, but must have recognisable *legal* content. In this regard, however, it is suggested that Derrida might be on to something nevertheless. Recall that Derrida notes that Kant’s language also suggests ‘the café, the cabaret, the inn...’ Perhaps a more direct and ready-made model may be found in the law of innkeeping.

II. *The Law of Innkeeping*

We begin with a caveat: the use of the language of modelling and analogy is not meant to suggest that Kant was merely rationalizing existing legal practice in a Dworkinian, interpretive fashion. As we shall see, such an ‘empirical’ approach is inimical to Kant’s legal philosophy. Instead, Kant develops his legal doctrines out of his moral premises. Whatever legal practices he calls upon or suggests in his writing is not used as evidence, much less as justification, but for illustration. The same applies for the legal materials discussed here. Reference is made interchangeably between Roman and English law, because the common law of bailment is almost wholly civilian in origin,³⁰ with the law of innkeeping in particular sharing a parallel development across England and the continent.³¹ That said, the two most important doctrinal principles to bear in mind for present purposes are, first, that innkeepers are *fiduciaries* of their guests; and second, that they *serve a public purpose*.

One immediate reason to think that Kant has innkeeping in mind, is the fact that Kant says he derives the title to the *Perpetual Peace* from a ‘satirical inscription on a certain Dutch innkeeper’s signboard.’³² However, the best evidence in this regard is the presence of striking parallels between the language from the Third Definitive Article, and the two sections in the Digest of Roman law dealing with innkeepers. Consider the passage by Ulpian on the *furtum adversus nautas caupones stabularios*, or the ‘Action for Theft Against Ships’ Masters, Innkeepers, and Liverymen’:

may be the *result* of external interference. On this point, *see* Niesen (n 2) 95–96; Ripstein, ‘Kant’s Juridical Theory of Colonialism’ (n 27) 165–66, n 14.

³⁰ *See* *Coggs v Bernard*, 92 Eng Rep 107 (1703) 109–14; William Jones, *An Essay on the Law of Bailments* (C Dilly 1781) 11 (‘I come to the second, or historical, part of my essay; in which I shall demonstrate, after a few introductory remarks, that a perfect harmony subsists on this interesting branch of jurisprudence in the codes of nations most eminent for legal wisdom, particularly of the ROMANS and the ENGLISH.’) Compare Joseph Story, *Commentaries on the Law of Bailments: With Illustrations from the Civil and the Foreign Law* (J Richards 1839) iv–v. Story criticizes Jones’s ‘extreme solicitude to make the principles of this branch of jurisprudence, as administered at Rome, appear in harmony with the common law, as administered in Westminster Hall,’ but concedes that Lord Holt’s foundational decision in *Coggs v Barnard* ‘was greatly assisted by Bracton, and still more by the civil law, from which Bracton had drawn his own materials.’ Finally, Holmes takes a different view, arguing that the English law of bailment remains fundamentally Germanic in origin, even if this has been occluded by the Romanist tendencies of Lord Holt and the *Coggs v Bernard* decision. *See* Oliver Wendell Holmes, *The Common Law* (Harvard University Press 2009) ch 5.

³¹ Reinhard Zimmermann, ‘Innkeepers’ Liability - Die Entwicklung Der Gastwirthschaftung in England’ in Andreas Heldrich, Jürgen Prölss and Ingo Koller (eds), *Festschrift für Claus-Wilhelm Canaris zum 70. Geburtstag (Volume 2)* (Beck 2007) 1437 (‘Interessant ist die Gastwirthschaftung auch als Zeugnis europäischer Rechtseinheit – sowohl historisch begründeter als auch durch moderne Maßnahmen der Privatrechtsharmonisierung jedenfalls teilweise wiederlangter.’).

³² *PP* 8:343, 317.

The innkeeper is answerable for the deeds of those whom he has in the inn to run the establishment as also of those who reside in the inn; he is not answerable for the acts of passing travellers. For an innkeeper or liveryman is not regarded as choosing his own traveller and cannot refuse those making a journey; but in a way, the innkeeper does select his permanent residents, since he does not reject them, and so should be answerable for what they do.³³

Ulpian's distinction between passing travellers whom the innkeeper cannot refuse, and permanent residents whom the innkeeper does select, seems echoed in Kant's contrast between the 'right to visit', which a receiving state cannot refuse, and the 'right to be a guest', which requires a 'special beneficent pact.' In addition, the innkeeper's inability to refuse travelers seems mirrored in a receiving state's compulsory obligation under cosmopolitan right to take in visitors who will be destroyed if turned away. There is of course an obvious difference. The obligation to receive arises only if turning the visitor away would result in her destruction. In all other cases, a state's obligation under cosmopolitan right is only to refrain from treating visitors with hostility. Except for this, it has the full discretion to turn visitors away. Oddly enough, this too has a parallel in the other passage in the Digest on innkeepers. In his comments on the *receptum nautarum cauponum stabulariorum*, the same jurist Ulpian appears to contradict his remarks in the *actio furtum*, stating that:

The praetor says: 'I will give an action against seamen, innkeepers, and stable keepers in respect of what they have received and undertaken to keep safe, unless they restore it.' This edict is of the greatest benefit, because it is necessary generally to trust these persons and deliver property into their custody. Let no one think that the obligation placed on them is too strict; *for it is in their own discretion whether to receive anyone*.³⁴ (emphasis added)

a. *Innkeeping – a legal history*

The *actio furtum* is designated in the Institutes as a quasi-delictual obligation; that is, arising 'as if' by delict.³⁵ It is not a delict proper, because whereas delictual liability is always premised upon fault or intention, liability under the *actio furtum* was strict – arguably the only instance of this form of liability in the Roman private law.³⁶ In contrast, the *actio de recepto* is not categorized as a quasi-obligation, presumably because it requires an underlying contract of carriage, lodging or stabling.³⁷ Nevertheless, an innkeeper's *receptum* liability also cannot be accounted for simply from within the four corners of the contract, or in terms of delict. If you transfer cloth to a tailor that then is destroyed or goes missing, you can sue in contract for failure to make the shirt, but to sue in delict you must demonstrate fault. In contrast, innkeepers liable the instant the chattels are taken into their custody, and this liability cannot be avoided even by express refusal to take care of the goods.³⁸ Moreover, as Oliver Wendell Holmes notes, the *actio de recepto* was a revolutionary development in that it went beyond noxal liability for losses caused by animals and slaves to recognize the first known form of

³³ D.47.5.1.6.

³⁴ D.4.9.1 pr – 1.

³⁵ J.4.5.3.

³⁶ Peter Birks, *The Roman Law of Obligations: The Collected Papers of Peter Birks* (Eric Descheemaeker, Oxford University Press 2014) 213. See also Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press 1996) 1121–22.

³⁷ Zimmermann, *The Law of Obligations* (n 36) 517.

³⁸ Jones (n 30) 95.; Story (n 30) 307 (s 470).

vicarious liability; that is, for the act of another free person.³⁹ The peculiar historical reasons why innkeepers (alongside ships' masters and stablekeepers) were singled out for such onerous treatment have to do with social snobbery. A Roman inn or *caupona* was little more than a brothel, with its staff often doubling up as prostitutes.⁴⁰ As Reinhard Zimmermann notes, its 'reputation was so bad that it was regarded as degrading for a senator to lunch or dine in a *caupona*.'⁴¹ Not surprisingly, people operating such businesses were considered deeply unsavoury, so much that their guests were given particularly solicitous legal protection even (or perhaps especially) if they were accommodated for free.⁴²

These peculiarities of Roman social life did not transfer entirely onto the mediaeval and modern context, particularly following the end of the Black Death, which caused an explosion of intra-continental travel for the purposes of pilgrimage. From as early as the 13th century, English law required innkeepers to provide surety for the good behavior of foreign travelers, meaning that innkeepers had to be 'good and sufficient persons' – a far cry from the *caupo*.⁴³ Consider the curious, schizophrenic treatment of innkeepers in the *Canterbury Tales*: while the Parson sneers at 'folk of lowe degree, as thilke that holden hostelries' and 'sustenene the thefte of hire hostilers',⁴⁴ he does so in the comfort of the Tabard Inn, a 'gentil hostelrye' whose proprietor Harry Bailey is described in glowing terms as the fairest burgher in Cheapside, and well-educated enough to stand in judgment of the Parson's and the other pilgrims' storytelling abilities.⁴⁵ Over time, Harry Bailey's personal commitment never to refusing a pilgrim if a bed was available hardened into a legal obligation. In *White's Case*, the English Court of Common Pleas upheld a private cause of action against an innkeeper who turned a guest away despite having room.⁴⁶ Shortly thereafter, a French royal ordinance explicitly prohibited innkeepers from refusing travellers without cause.⁴⁷ According to David Bogen, the aim of the regulation was not so much about ensuring accommodation for travellers, but about enforcing a public purpose of setting prices for meals at inns and taverns.⁴⁸ It must be emphasised that this was a

³⁹ Holmes (n 30) 16–17.

⁴⁰ Reinhard Zimmermann, 'Die Geschichte der Gastwirthschaftung in Deutschland' in Hans-Peter Haferkamp and Tilman Reppen (eds), *Usus modernus pandectarum: Römisches Recht, Deutsches Recht und Naturrecht in der Frühen Neuzeit; Klaus Luig zum 70. Geburtstag* (Böhlau Verlag Köln Weimar 2007) 274.

⁴¹ Zimmermann, *The Law of Obligations* (n 36) 516, n 51.

⁴² D.4.9.1.6.

⁴³ David S Bogen, 'The Innkeeper's Tale: The Legal Development of a Public Calling' (1996) 1996 Utah Law Review 51, 60–61.

⁴⁴ Geoffrey Chaucer, 'The Parson's Tale', *The Canterbury Tales* 1 440.

⁴⁵ Geoffrey Chaucer, 'Prologue', *The Canterbury Tales* 1 754–56.

A fairer burgeys is ther noon in chepe —
Boold of his speche, and wys, and wel ytaught
And of manhod hym lakkede right naught.

See also Zimmermann, 'Die Geschichte der Gastwirthschaftung in Deutschland' (n 40) 281. (observing that innkeeping in Germany after the 11th century was 'nicht mehr suspekt und sozial minderwertig; die Inhaber der führenden Herbergen konnten zum Patriziat ihrer Stadt gehören und öffentlicher Ämter bekleiden.')

⁴⁶ 73 Eng Rep 343 (1558). See also *R v Ivens*, 7 Car & P 213, 173 Eng Rep 94 (1835); *Fell v Knight*, 8 M & W 269, 276; 5 Jur 554 (1841).

⁴⁷ See Bogen (n 43) 84 and sources cited therein.

⁴⁸ *ibid.*

wholly modern development: a Roman *caupo* was entitled to refuse travellers at will.⁴⁹ Although this was generally known, a number of jurists attempted to reconcile the modern practice with the old Roman texts by emphasizing Ulpian's remarks in the *actio furtum* and denigrating those in the *actio de recepto* in various ways, ranging from speculating that mistakes were made during the compilation of the latter, to supposing that the discretion referred to therein was about entering the profession rather than about receiving individual travelers.⁵⁰ In any event, by Kant's time, it was trite that innkeepers and other common carriers exercised a specifically *public* employment, and were therefore not free to refuse guests who could afford a reasonable sum for their lodgings.⁵¹ As the leading American textbook on the law of innkeeping observes, this 'duty is symbolised by the traditional ceremony at the dedication of a new hotel or motel of throwing away a key to the inn, thus proclaiming to the world that the door to the hospitality of the inn will never be locked and that all weary travelers will always be welcome.'⁵²

Notwithstanding their vastly improved social prestige, and their new onerous public duties, the ancient rule of the strict liability of innkeepers for loss or damage to goods in their custody is to this day still good law.⁵³ For a while, the old 'innkeeper-as-scumbag' theory proved remarkably resilient in justifying this obligation: Sir William Jones repeats it in the first book expounding the English law of bailment, published in 1781:

For travellers, who must be numerous in a rich and commercial country, are obliged to rely almost implicitly on the good faith of innholders, whose education and morals are usually none of the best, and who might have frequent opportunities of associating with ruffians and pilferers, while the injured guest could seldom or never obtain legal proof of such combinations, or even of their *negligence*, if no actual fraud had been committed by them.⁵⁴

Nevertheless, it was abundantly evident that such historical memories of social opprobrium could no longer supply a convincing basis for the special burdens placed upon innkeepers.⁵⁵ Instead, as Jones also indicates, the doctrine may alternatively be grounded in the fact that travelers are 'obliged to rely almost implicitly on the good faith of innholders.' From the fact that travelers have no choice but to 'trust these persons and deliver property into their custody,' it follows that they and their 'property are

⁴⁹ Story (n 30) 307 (s 470) ('... by the common law (which in this respect differs from the civil law) an innkeeper is not, if he has suitable room, at liberty to refuse to receive a guest, who is ready to pay him a suitable compensation). See also Bogen (n 43) 353–34.

⁵⁰ See Bogen (n 43) 355–57, and sources cited therein.

⁵¹ See *Coggs v. Bernard* (n 30) (defining a category of bailees as exercising 'a publick employment', and who were by law required to 'carry goods, against all events but acts of God, and of the enemies of the King.');

Sir Matthew Hale, 'De Portibus Maris' in Francis Hargrave (ed), *A Collection of Tracts Relative to the Law of England (Volume 1)* (E Lynch, W Colles et al 1787) 77–78 ('... the wharf and crane are affected with a publick interest, and they cease to be *juris privati* only; as a man set out a street in new building on his own land, it is now no longer a bare private interest, but is affected with publick interest.')

⁵² John H Sherry, *The Laws of Innkeepers: For Hotels, Motels, Restaurants, and Clubs* (John EH Sherry ed, Cornell University Press 1993) 39.

⁵³ See, e.g. German Civil Code s 701.

⁵⁴ Jones (n 30) 96. See also Zimmermann, *The Law of Obligations* (n 36) 516.

⁵⁵ Zimmermann, *The Law of Obligations* (n 36) 521 ('Carriers by sea, innkeepers and stable keepers may, of course, still be individually unreliable; but it can hardly be maintained that in their collectivity, as members of the respective professions..., they are particularly disreputable. After all, hotels without bawdyhouses are no longer that exceptional.')

exposed to dangers emanating from a sphere which only the other party is able to organize and control.⁵⁶

The history of the law of innkeeping thus perfectly illustrates the difference between what Kant calls ‘empirical’ and ‘metaphysical’ reasoning about law, and his claim that an empirical account would be empty without metaphysics.⁵⁷ As a matter of empirical history or ‘blackletter’ legal knowledge, the innkeeper’s liability may have arisen out of the professional disreputability of innkeepers.

Metaphysically, however, the innkeeper’s liability is expressed rationally as a *fiduciary* obligation arising from the systematic vulnerability inherent in the *form* of the guest-innkeeper relation. In a 1921 case before the Supreme Court of Appeal of South Africa, an innkeeper invoked the maxim *cessante ratione cessat lex* to argue that the rule on the strict liability of innkeepers was obsolete, given that Ulpian’s characterization of innkeepers had long ceased to be accurate.⁵⁸ He lost.

III. Private Law Foundations of Kant’s General Theory of Law

The paragraphs that follow are intended to provide a brief synopsis of themes from Kant’s general theory of law as are pertinent to the present argument. Readers familiar with these may safely skip to the next section.

a. The innate right to freedom and its expressions

In the ‘Introduction to the Doctrine of Right,’ Kant defines rights in *relational* terms as a ‘(moral) capacities to put others under obligations.’⁵⁹ As such, right is ‘always connected with an authorization to use coercion.’⁶⁰ For your claim to be legal rather than merely ethical, it must envisage your addressee potentially getting beaten up for refusing it.

On this basis, he stipulates the ‘highest division’ of rights as between *innate* and *acquired* rights. An ‘innate right is that which belongs to everyone by nature, independently of any act that would establish a right,’ while ‘an acquired right is that for which such an act is required.’⁶¹ Thus defined, there is only *one* innate right – that is, a dignity inhering in us purely by virtue of being human – which consists of ‘independence from being constrained by another’s choice...’⁶² Kant’s valuable insight here is that dignity does not consist in being supplied with things necessary for the satisfaction of interests or needs: a slave lacks dignity even if master cares for her welfare and is extravagantly generous to this end. Because Kant’s legal theory is fundamentally indifferent to questions of interest or need, a

⁵⁶ *ibid.* Zimmermann puts this point in strikingly Kantian terms elsewhere: ‘Hätte [der Gast] ‘regelmäßig den Beweis einer dem Gastwirthe zur Lastfallenden Verletzung einer kontraktlichen Pflicht’ als Ursache für den eingetretenen Schaden zu führen, *so wäre er weithin rechtlos.*’ Zimmermann, ‘Innkeepers’ Liability - Die Entwicklung Der Gastwirthshaftung in England’ (n 31) 1435.

⁵⁷ DR 6:229-30, 386-87.

⁵⁸ *Davis v Lockstone*, 1921 AD 153, 159–60.

⁵⁹ DR 6:237, 393.

⁶⁰ DR 6:231, 388.

⁶¹ DR 6:237, 393.

⁶² *ibid.*

Kantian theory of global justice will necessarily differ from the prevalent mode of treating it as a question of arriving at some ideal distribution of resources or holdings. Such approaches invariably result in individuals being treated as passive consumers, rather than agents in charge of their own lives.⁶³ For this same reason, neither does dignity consist in freedom understood in ‘liberal’ terms as the ability to do whatever one wants to do without constraint, for this would simply be a roundabout way of describing interest-satisfaction. The well-kept slave would still be lacking in dignity even if the kindly master went on permanent holiday after telling her she could do anything she liked. The reason behind these intuitive responses is because the slave remains in formal terms an object at her master’s arbitrary choice, notwithstanding her substantive license and welfare. As per another fundamental distinction in Kant’s legal philosophy, a person is ‘a subject whose actions can be imputed to him,’⁶⁴ while a *thing* is an ‘object of free choice’ to which ‘nothing can be imputed.’⁶⁵ Being treated ‘rightly’ as a person – that is, in accordance with one’s nature as a person – means being recognized as subject to no other laws than those you give yourself, rather than as a thing at the disposal of others.

This idea of an ‘innate’ right of freedom can be expressed in a number of different ways. One of these is the concept of ‘rightful honor,’⁶⁶ which is explicitly repurposed from the first of Ulpian’s three precepts of law.⁶⁷ This is a command to be a juridical person, and means simply ‘Do not make yourself a mere means for others but be at the same time an end for them.’⁶⁸ It does not mean that you cannot pursue shameful purposes, but only that you may not coherently do anything that effectively surrenders your ability to make purposes. You cannot for instance contract to enslave yourself. Such a contract envisages you assuming an obligation to become a slave, which, as a thing, cannot have obligations. It would therefore be a juridical nonsense: any attempt to perform on your contractual obligation automatically releases you from it.⁶⁹ Another expression of the right to freedom is what Kant calls the quality of being ‘*beyond reproach*,’ or of never being required to clear your own name.⁷⁰ If another accuses you of wrong, *they* must prove it, not you. This basic case gives rise to one exceptional case: if someone wrongs you by spreading defamatory rumors about you, you do not need to prove the falsity of the rumor. Rather, your defendant has the burden of proving that her allegation is true. If the burdens were otherwise, you would potentially have to spend your entire life putting out any and all small fires others might start, thus rendering yourself a thing at the disposal of all others. Yet a third way of expressing the innate right to freedom is as the ‘original common possession of the

⁶³ See Jakob Huber, ‘Theorising from the Global Standpoint: Kant and Grotius on Original Common Possession of the Earth’ (2017) 25 *European Journal of Philosophy* 231, 2, 11 (arguing that prevalent Grotian approaches to global justice purport to assume an ‘Archimedean ‘view from nowhere’ from which supposedly fair and equitable distributions of resources can be made.)

⁶⁴ DR 6:223, 378.

⁶⁵ *ibid.*

⁶⁶ DR 6:236, 392.

⁶⁷ J.1.1.3. The three precepts are ‘*honeste vivere, alterum non laedere, suum cuique tribuere.*’

⁶⁸ DR 6:236, 392.

⁶⁹ Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Harvard University Press 2009) 135–36.

⁷⁰ DR 6:238, 394.

earth,' and Kant describes the cosmopolitan right to visit in terms of this particular expression. We return to this in Part IV.

b. Acquired right, or private right

Thus stated, the innate right to freedom gives rise to three kinds of 'acquired' rights: 'a right to a thing (*ius reale*), or a right against a person (*ius personale*), or a right to a person akin to a right to a thing (*ius realiter personale*), that is, possession (though not use) of another person as a thing.⁷¹ This crucial passage can be explicated as follows: a thing can potentially be both used and possessed at the same time.⁷² Your dignity lies in being treated as a person and not as a thing; that is, as *mere* means. As such, this does not mean that you can never be possessed or used as means, but only that you cannot be possessed and used *at the same time*. From this arise three possible categories of *legal* rights – that is, entitlements that may legitimately be enforced through violence. These are:

- (1) 'rights to things': These entitle one person to prevent all other persons from interfering with the things she is rightfully controlling in pursuit of her purposes — her *property* and *body*.⁷³ This distinction becomes relevant in the final section, when we discuss the concept of original common possession of the earth.
- (2) 'rights against persons': These entitle one person to *use* another person. For instance, your employer gets to use you in pursuit of her purposes. If she uses you, however, she cannot also possess you. You must have signed up for the job, and you can always quit. These rights are to *performances*; to delivery, rather than title.⁷⁴
- (3) 'rights to persons akin to rights to things': These entitle one person to *possess* another. If a child, your mother can tell you to eat your vegetables, and you must do it. If your attorney accepts a settlement offer, *you* did it. They 'bind' you by their decisions. However, if they possess you in this manner, they cannot also *use* you. Whatever decisions they make in respect of you have to be consistent with your purposes, never theirs.⁷⁵ This works the other way as well: because they possess you, you can use them. Their 'status' in relation to you is an 'external object of choice' in your possession, just like a performance promised to you by contract, or a thing in your rightful control.⁷⁶ For the sake of convenience, these rights are scripted as *fiduciary*. The term as used here has nothing to do with equity, or with differentiated and limited property titles associated with trusteeship in English law. Instead,

⁷¹ DR 6:260, 412.

⁷² See DR 6:270, 421 ('An external object which in terms of its substance belongs to someone is his property (dominium), in which all rights in this thing inhere (as accidents of a substance) and which the owner (dominus) can, accordingly, dispose of as he pleases (ius disponendi de re sua).')

⁷³ Ripstein, *Force and Freedom* (n 69) 66–69 (on the category of rights as 'property,' paralleled by similar rights against interferences with one's person).

⁷⁴ DR 6:274, 424.

⁷⁵ Ripstein, *Force and Freedom* (n 69) 70–76 (describing 'status' relations, of which, the 'legal relation between a fiduciary and a beneficiary is one such case.')

⁷⁶ DR 6:247, 402. (enumerating three categories of external objects of choice as '1) a (corporeal) thing external to me; 2) another's choice to perform a specific deed (praestatio); and 3) another's status in relation to me.')

the concern is with obligations arising from another's 'possession' of you' that is, their entitlement to determine your rights and obligations regardless of your choice.⁷⁷

These basic categories reflect those of delict, contract, and quasi-obligation in the Roman law of obligations. Because they are the only three ways in which violence may be used consistently with freedom from domination, they are not limited to private law, but animate *all* claims of right, be it at public law, international law, and cosmopolitan law. Moreover, the categories are not mutually exclusive – the same set of facts may give rise to legal implications under all three categories. For instance, a fraud gives rise to liability in tort, a violation of the contract, as well as a duty to account for profits as a constructive trustee/*gestor*. Also, the same factual matrix may be characterized differently: if someone farms your land without your permission, you can either sue in delict/trespass, or seek a disgorgement under *negotiorum gestio*/constructive trust. As a person empowered with rights, you are the master of your claim, and can characterize it as you please.

c. Public right

As a social contractarian, Kant argues that none of these rights cannot be achieved in a condition of pure private interaction; that is, a state of nature. Unlike liberal Grotian and Lockean social contract theories, however, Kant's republicanism commits him to a much more radical position on the impossibility of rights in a state of nature. On a liberal conception of freedom as 'negative freedom' or non-interference, the commands of political authorities are always necessarily restrictions upon freedom, even if their ultimate effect is to increase the scope of unconstrained action or the range of interests satisfied.⁷⁸ If, however, freedom is understood as being assured that no other person will dominate or instrumentalize you, then it cannot exist without a set of political institutions authorized to posit your rights in laws and enforce them by violence.⁷⁹ Authority is not just compatible with freedom, but necessary for it.⁸⁰

Crucially, Kant inverts the order of Grotian and Lockean natural rights theories, which in various ways justify the existence of the state as being for the protection or more efficient enjoyment of full-

⁷⁷ See Paul B Miller, 'A Theory of Fiduciary Liability' (2010) 56 McGill Law Journal 235, 278 (defining a fiduciary relationship as one in which one person 'exercises discretionary authority to set or pursue practical interests (including matters of personality, welfare or right) of another.'). *Frame v Smith*, [1987] 2 SCR 99 [60]. (dissenting opinion, Wilson J) (defining a fiduciary relation as one where: '(1) the fiduciary has scope for the exercise of some discretion or power; (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and (3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power').

⁷⁸ See, e.g., Isaiah Berlin, 'Two Concepts of Liberty', *Four Essays on Liberty* (Oxford University Press 1969) 123 n 2. ('Law is always a fetter, even if it protects you from being bound in chains that are heavier than those of the law, say, some more repressive law or custom, or arbitrary despotism or chaos.')

⁷⁹ DR 6:316, 459 ('One cannot say: the human being in a state has sacrificed a part of his innate outer freedom for the sake of an end, but rather, he has relinquished entirely his wild, lawless freedom in order to find his freedom as such undiminished, in a dependence upon laws, that is, in a rightful condition, since this dependence arises from his own lawgiving will.')

⁸⁰ DR 6:242, 397 ('a state of nature is not opposed to social but to a civil condition, since there can be society in a state of nature, but no civil society (which secured what is mine by public laws)').

fledged property rights already existing in the state of nature. Instead, Kant claims that the lawful condition precedes conclusive property rights.⁸¹ A conclusive right to use and possess an external thing to the exclusion of all others requires nothing less than the individual consent of everyone in the political community. However, since the process of obtaining such consent would place you at the mercy of everybody, there instead has to be an institution capable of expressing the individual consent of all the members of the political community in the form of a single, ‘omnilateral’ will. The institution manifesting this omnilateral will is the representative legislature.⁸² There is no property without law: the state is so much not ‘founded’ on property rights, but arises out of the (metaphysical, not historical) process of persons trying to make external objects their own to the exclusion of all others.

This has two implications. First, the social contract, by which you submit to political authority, resembles all other contracts in that it binds upon you only with your consent. The catch is that consent is *mandatory*. This is not because the welfare benefits of being in the civil condition are so great that your consent is presumed. Such a ‘hypothetical’ consent would not be worth the paper it isn’t written on. Rather, it is because entering the civil condition is a prerequisite for freedom: you *become* free by submitting to authority. If you decline to consent to the original contract, you are choosing to be unfree. This is juridically nonsensical, because choosing is only for the free. Rightful honor therefore compels you to choose to join the rightful condition. This is why it is the ‘original’ contract – it is the choice that makes choosing even possible. Put differently, by staying outside the original contract, you are reserving for yourself the arbitrary choice to use violence against all others as and when you please. Others need not abide this. Indeed they must not, for if they did they would violate their own dignity by rendering themselves subject to your arbitrary choice.⁸³ Nor would they wrong you by using violence against you. Outside the original contract you are unfree, and so can be forced—forced to be free.

Second, the state is an extension in public right of the idea of a fiduciary in private right.⁸⁴ Because it claims *authority* over you – that is, claims an entitlement to determine your legal rights and obligations – its powers with respect to you are compatible with your dignity only if exercised on a fiduciary basis.⁸⁵ We saw earlier that Kant describes the republic as the common mother. Kant utilizes precisely the example of parenthood to explicate the concept of ‘a right to a person akin to a right to a thing’,

⁸¹ DR 6:255-56, 409. (‘It is possible to have something external as one’s own only in a rightful condition, under an authority giving laws publicly, that is, in a civil condition.’).

⁸² See DR 6:258-59, 411-12.

⁸³ PP 8:349, 322.; DR 6:307, 452.

⁸⁴ The notion of the state as a trust is an ancient republican principle. *Stone v Mississippi*, 101 US 814 (1879) 820. (‘The power of governing is a trust committed by the people to the government... The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights.’); *Black River Regulating District v Adirondack League Club*, 121 NE2d 428 (NY 1984) 433. (‘... the power conferred by the Legislature is akin to that of a public trust to be exercised not for the benefit or at the will of the trustee but for the common good.’)

⁸⁵ See Paul B Miller, ‘Justifying Fiduciary Duties’ (2013) 58 McGill Law Journal 969, 1012–13. (‘fiduciary power is not properly understood as connoting relative strength, ability, or influence... [but] ought to be understood as a form of *authority*,’ or the ability to ‘render rightful conduct that would otherwise be wrongful.’)

which he also describes as ‘an acquisition of a human being *as of a thing*.’⁸⁶ The argument is modeled upon *negotiorum gestio*: parents are obligated to care for their children because they decided to bring it into the world without its consent. This obligation of care, however, gives rise to rights against the child: ‘they also have a right to constrain it to carry out and comply with any of their directions that are not contrary to a possible lawful freedom...’⁸⁷ The same rationale of the beneficiary’s incapacity to consent, and fiduciary’s obligation of good faith applies with respect to the state-subject relations.⁸⁸ Most human beings do not choose their political communities any more than they choose their parents. Just as a beneficiary requires the intercession of her trustee in order to enjoy her trust property, neither can an individual enjoy her innate right to freedom without the state.

At this point, another stark difference arises between Kant’s republicanism and liberal theorists. The latter tend variously to conceive of the state as an aggregation of natural persons to celebrate their common sympathies, protect their property rights,⁸⁹ or serve as a clearing house ‘mediating’ between them with respect to their basic needs.⁹⁰ In contrast, Kant pictures the state as a moral person in its own right, with purposes separate and distinct from those of its subjects. This is, for instance, is the basis for Kant’s argument that extracting reparations from the population of a defeated enemy ‘would be robbery, since it was not the conquered people who waged the war; rather, the state under whose rule they lived waged the war *through the people*...’⁹¹ The separate personalities of sovereign and subject is in fact inescapable on the fiduciary model of authority advocate here. If states-fiduciaries were one and the same as their subjects-beneficiaries, it would become impossible to judge and criticize the former’s treatment of the latter. Subjects-beneficiaries disagreeing with the directives of the state-fiduciary would effectively be contradicting themselves. This is why, in Peter Birks’s excellent phrase, the fiduciary obligations of competence and disinterestedness are ‘inseparably compound’⁹²; they contemplate one person taking ‘positive steps in the interest *of another*.’⁹³

The distinctness of the state’s purpose is illustrated by Ronald Dworkin’s metaphor of an orchestra. An orchestra is more than just an aggregation of individual musicians playing particular notes on particular instruments at particular times.⁹⁴ Moreover, the orchestra’s members ‘do not suppose that the orchestra also has a sex life, in some way composed of the sexual activities of its members, or that it has headaches, or high blood pressure, or responsibilities of friendship, or crises over whether it

⁸⁶ DR 6:360, 495.

⁸⁷ *ibid.*

⁸⁸ See Evan Fox-Decent, *Sovereignty’s Promise: The State as Fiduciary* (OUP Oxford 2011) 44–47, 121–25.

⁸⁹ John Locke, *Second Treatise of Government* (CB Macpherson ed, Hackett Publishing 1980) s 120 (‘By the same Act therefore, whereby any one unites his Person, which was before free, to any Commonwealth, by the same he unites his Possessions, which were before free, to it also; and they become, both of them, Person and Possession, subject to the Government and Dominion of the Commonwealth, as long as it hath a being.’)

⁹⁰ Henry Shue, ‘Mediating Duties’ (1988) 98 *Ethics* 687.

⁹¹ DR 6:348, 485.

⁹² Peter Birks, ‘The Content of Fiduciary Obligation’ (2000) 34 *Israel Law Review* 3, 33.

⁹³ *ibid* 37–38 (emphasis added).

⁹⁴ Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2000) 226.

should care less about music and take up photography instead.⁹⁵ Instead, the orchestra has just one purpose: making music. Accordingly, the difference between private fiduciaries and sovereigns, is that the set of purposes which the latter can act on is much narrower. Private persons can set and pursue private purposes, such as the celebration of religious rituals. States can do no such thing because as public fiduciaries, they have just one *public* purpose: to guarantee the equal freedom of the people.⁹⁶

As persons, states also have a natural right to freedom, which is unachievable in an international state of nature. Equally for states, law is not compatible with freedom, but necessary for it. However, the distinction between private persons and public persons gives rise to a second trichotomy of legal categories: that of constitutional, international, and cosmopolitan right.⁹⁷ Unlike the first trichotomy of private right, which arises from the possible combinations of possession and use between persons and things, the second trichotomy is explained in terms of whether the interacting persons are public or private.⁹⁸ Constitutional right covers legal relations (1) between a state and its subjects, and (2) between subjects of the same state. As for international right, Kant departs from both his contemporaries (and ours) to argue that it covers only relations between states.⁹⁹ Finally, cosmopolitan right covers legal relations (1) between sovereigns and non-subjects, and (2) between subjects of different sovereigns. Taken together, they form the complete concept of public right: if any one is missing, ‘the framework of all the others is unavoidably undermined and must finally collapse.’¹⁰⁰

Again, the categories are fluid. International human rights treaties, by which states parties give one other standing to enforce norms regarding the treatment of their own subjects, have the nature of both international law and of constitutional law.¹⁰¹ Investment treaties, by which states agree to protect investments made within their jurisdiction by each other’s subjects, give rise to legal implications under international and cosmopolitan right: they create rights and obligations between the state parties, as well as between individual investors and their host states that are not derivative of their national state’s rights.¹⁰² Delictual, contractual, and fiduciary claims arise across all three categories of constitutional, international, and cosmopolitan right.

⁹⁵ *ibid* 227.

⁹⁶ *DR* 6:318, 461.

⁹⁷ *DR* 6:311, 455.

⁹⁸ *ibid*, at §43 on ‘The right of a state.’ See also *PP* 8:349, 322.

⁹⁹ *DR* 6:311, 455 at §43 on ‘The right of a state.’ See also *DR* 6:343, 482.

¹⁰⁰ *DR* 6:311, 455.

¹⁰¹ The development of the legal practice of human rights reveals a symbiotic relationship between domestic constitutional law and international law: the then existing constitutional bills of rights served as inspirations for the major post-WWII international instruments, which in turn inspired the bills of rights and constitutional jurisprudence of newly independent states. See Stephen Gardbaum, ‘Human Rights as International Constitutional Rights’ (2008) 19 *European Journal of International Law* 749, 752.; Samantha Besson, ‘Human Rights and Constitutional Law: Patterns of Mutual Validation and Legitimation’ in Rowan Cruft, S Matthew Liao and Massimo Renzo, *Philosophical Foundations of Human Rights* (OUP Oxford 2015) 288.; Johan Karlsson Schaffer, ‘The Point of the Practice of Human Rights: International Concern or Domestic Empowerment?’ in Reidar Maliks and Johan Karlsson Schaffer (eds), *Moral and Political Conceptions of Human Rights: Implications for Theory and Practice* (Cambridge University Press 2017).

¹⁰² Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press 2009) 10–38.

IV. *Explicating Cosmopolitan Right*

We are now in a position to explain the content of cosmopolitan right and the meaning of hospitality. The relevant scholarly literature divides into two camps. One argues that cosmopolitan right may be explained solely in terms of *innate* right. While not exactly claiming cosmopolitan right to be an *acquired* right *per se*, the other camp envisages it nevertheless as a sort of ‘proto-property’ right. This paper ultimately advocates the argument from innate right: cosmopolitan right has nothing to do with property, proto- or otherwise. An innkeeper’s obligation of hospitality results not from her ownership of real estate, but from her status as a public fiduciary. The same applies to states. Demonstrating this requires an examination of the concept of the ‘original common possession of the earth.’

a. *Common Possession of the Earth’s Surface: The Innate Right to take up Space*

To recall Part I, the situation of a refugee is merely the exceptional case of cosmopolitan right. Instead, the basic case of is that of a visitor who has a state to return to. Moreover, the visitor cannot claim the right to be a guest, because that requires a contract. All she has is the right to ‘to present oneself for society.’¹⁰³ This, the receiving state can decline outright; the only thing it cannot do is ‘punish’ the visitor simply for appearing at the border. This right, Kant says in the *Perpetual Peace*, ‘belongs to all human beings by virtue of the right of possession in common of the earth’s surface on which, as a sphere, they cannot disperse infinitely but must put up with one another; but originally no one had more right than another to be on a place on the earth.’¹⁰⁴ He develops upon this in the section on cosmopolitan right the *Doctrine of Right*, in a passage that bears repeating in full:

... since possession of the land, on which an inhabitant of the earth can live, can be thought only as possession of a part of a determinate whole, and so as possession of that to which each of them originally has a right, it follows that all nations stand *originally* in a community of land, though not of *rightsful* community of possession (*communio*) and so of use of it, or of property in it; instead, they stand in a community of possible physical *interaction* (*commercium*), that is, in a thoroughgoing relation of each to all the others of *offering to engage in commerce with any other*, and each has a right to make this attempt without the other being authorized to behave toward it as an enemy because it has made this attempt.¹⁰⁵

Thus, cosmopolitan right is ‘grounded’ upon original common possession of the earth.

What, however, does this vague formulation of ‘grounding’ mean? We may illustrate this idea as follows. Recall that the most basic category of private right is delict, which essentially envisages two free persons interacting as strangers in an arms-length relation to one another. This formal relation is disturbed when one party wrongfully interferes with the other’s means, in which case an award of damages must be given to restore the original estrangement.¹⁰⁶ This ‘interference’ does not have to be dramatic or impactful: a stranger who merely runs their fingers through your hair is liable to you in

¹⁰³ *PP* 8:358, 329.

¹⁰⁴ *ibid.*

¹⁰⁵ *DR* 6:352, 489.

¹⁰⁶ Andrew S Burrows, *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution* (Hart Publishing 1998) 10–11.

battery. Though substantively harmless, this is nevertheless an actionable wrong because by messing with your hair without your permission, the stranger has formally treated you as a plaything at his disposal. This contravenes your innate right to freedom as manifested in your rightful honor.

However, that same stranger does you no wrong by tapping you on the shoulder, say, to ask you for directions, or even to sell you something. This is because his ‘use’ of your body is for the purpose of communicating with you, and this is a purpose which you simply *must* share. To deny this would be to presume that everything he might wish to say to you must be wrongful, thereby turning him – quite literally – into an untouchable. This contradicts *his* innate right to freedom, this time, however, in its manifestation as the right to be beyond reproach.¹⁰⁷ Innate right ‘grounds’ acquired rights in this way: it is not itself the entitlement being claimed, but which informs and structures the claim in delict, contract, or unjust enrichment actually made.

Similarly, the arms-length relation between the visitor and the receiving state envisaged under cosmopolitan right is premised upon and structured by deeper, more fundamental entitlements. These are, namely the visitor’s right to make an *offer* to contract, which the receiving state is entirely free within *its* innate right to reject.¹⁰⁸ As the cited passage from the *Doctrine of Right* indicates, the right of the visitor not to be treated as an enemy seems to be grounded partly in the entitlement of merely ‘communicating his thoughts.’¹⁰⁹ However, that passage also indicates that the right arises from the *fact* that as embodied agents, persons exist in space. As Arthur Ripstein explains,

... your body just is your person. You do not occupy your body; your person occupies space. Your body enables you to set and pursue purposes in space and time, but you must do so in a way that is consistent with the ability of other embodied rational beings to set and pursue their purposes in time and space.¹¹⁰

The fact that human beings are agents, and the fact that they take up space combine to mean that they must have an entitlement to take up space in the particular spot where they happen to be at any particular moment, which by definition cannot be taken up by anyone else. To wit, the earth – which represents the sum total of space we can occupy given currently available technology – happens to be round. Therefore, we cannot disperse infinitely, but must bump into each other. This in turn means we must postulate an ‘original possession in common’ of the earth, which ‘precedes any acts [by human beings] that would constitute rights.’¹¹¹ This ‘disjunctive common possession’ is not *rightful* possession; persons in this state ‘are in a position neither to authorize anything nor to bind anyone.’¹¹² All they can do is to offer to engage in commerce, which is not binding unless accepted. The visitor

¹⁰⁷ Persons may of course be prohibited from communicating with others by retraining orders. In these instances, the person subject to the order is arguably not trying to communicate, but to harass, which is a purpose the victim cannot share.

¹⁰⁸ See *PP* 8:359, 329-30. (approving the Chinese and Japanese policies of denying or severely restricting entry to European traders). See also *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v US) 1986 ICJ 14 (June 27) [276] (‘A State is not bound to continue particular trade relations longer than it sees fit to do so, in the absence of a treaty commitment or other specific legal obligation.’)

¹⁰⁹ *DR* 6:238, 394. See also Niesen, ‘Colonialism and Hospitality’ (n 2) 92.

¹¹⁰ Ripstein, *Force and Freedom* (n 69) 372.

¹¹¹ *DR* 6:262, 415.

¹¹² Ripstein, *Force and Freedom* (n 69) 156.

may not be treated with hostility so long as he behaves peaceably 'where he is.'¹¹³ These elemental considerations reveal why cosmopolitan right plays an essential role in Kant's general theory of law, even though he devotes less than two pages to it. Nevertheless, his anti-colonialism makes him contemplate even this minimal right with distaste. He observes that 'visits' were historically often accompanied by attempts to establish colonies connected with the mother country, which then provided 'the occasion for troubles and acts of violence in one place on our globe to be felt all over it.'¹¹⁴ Nonetheless, this is as far as he will go: 'this possible abuse cannot annul the right of citizens of the world *to try to* establish community with all and, to this end, to *visit* all regions of the earth.'¹¹⁵

Up to this point, there is no conceptual difference between the visitor's right to approach the receiving state, and her right to approach a private person. The state, like a Roman innkeeper, has the full discretion whether or not to receive a visitor/guest. This changes once the receiving state accepts the visitor's offer to engage in commerce and brings the visitor *infra hospitium*. The receiving state now wields authority over the foreigner, for visitors must obey the receiving state's laws. As a result, its relationship with the visitor becomes more than just delictual or contractual. Not only must the receiving state not itself interfere with the person and property of foreigners through its officials, it must also ensure that the *Hausgenosse* refrain from the same, and punish them if they do not. The international law concerning the 'due diligence' obligations owed by states to other states with respect to the treatment of aliens in their territory can be accounted for in this way. A state bears a 'negative obligation to abstain from directly taking measures (through actions of its own organs) aimed at attacking the security of aliens,' as well as a 'positive obligation to protect aliens from harmful activities carried out by third persons (private individuals or the organs of other international entities) on its territory,' which entails 'both an obligation to prevent harmful activities and an obligation, if such activities have occurred, to punish the persons responsible for the wrong suffered by the alien.'¹¹⁶

The fiduciary relationship between the receiving state and visitor arises much more quickly – in fact immediately – in the case of a stateless person who has no state to return to. In this regard, the receiving state's obligation toward the stateless person mirrors those corresponding to its citizens' rights to socio-economic guarantees, for instance, to adequate housing and food. On a Kantian rationale, constitutional rights to socio-economic provision are grounded not in interests or needs, but in the sovereign's purpose of ensuring the equal freedom of all subjects.¹¹⁷ A homeless person may not

¹¹³ *PP* 8:358, 329.

¹¹⁴ *DR* 6:353, 489.

¹¹⁵ *ibid.*

¹¹⁶ Riccardo Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States' (1992) 35 *German Yearbook of International Law* 9, 22. *See also* Joanna Kulesza, *Due Diligence in International Law* (Brill 2016) 224–26.

¹¹⁷ Kant argues that the moral obligation to enter into an original contract implies that the State must provide 'the means of sustenance to those who are unable to provide for even their most necessary natural needs.' *DR* 6:326, 468. This and the surrounding passages are unusual and differ from the general tenor of his legal theory. Instead, contemporary interpreters largely reconstruct the Kantian argument from more typical freedom-based premises. *See generally* Ripstein, *Force and Freedom* (n 69) ch 9; Evan Fox-Decent and Evan J Criddle, 'The

sleep on the streets without making a public nuisance of herself. Nor may she sleep on the property of another without committing the wrong of trespass. As such, she is systematically dependent upon the kindness of strangers for her occupation of space. If this is not forthcoming, her very existence becomes illegal. Nobody could consent to such conditions consistently with rightful honor, which means that the provision of adequate affordable housing must be a clause of the mandatory contract creating the constitutional order.¹¹⁸ Similar considerations of self-respect mean that a state's obligation under the right to adequate food is not primarily to feed you, but to ensure that food is available and accessible so that you can independently feed yourself.¹¹⁹

In exactly the same way, a refugee fleeing a war has no rightful condition back home, nor can she live on the high seas, because these are meant for travel. What Kant means by *Untergang* is not physical destruction, but civil death. Authority is necessary for freedom, so human beings left without it will be destroyed as persons. Because it would otherwise be inconsistent with innate right, the refugee's offer cannot be understood other than as one seeking to join a rightful condition, which in turn means that it *must* be met with acceptance. The receiving state's discretion 'runs up against its own internal limit.'¹²⁰ It can no more turn a refugee away than an innkeeper may refuse an infant.¹²¹ Moreover, a receiving state's cosmopolitan obligation is not to offer 'world citizenship, but [to ensure] the division of the world into states in a way that guarantees that each person has a home state to return to.'¹²² If there is no such place, the officials of the receiving state 'have to let you stay, simply in your capacity as a citizen of the world.'¹²³ Thus, the 'innate human right to freedom is all one needs to back up the

Fiduciary Constitution of Human Rights' (2009) 15 *Legal Theory* 301, 330–32.; Ernest J Weinrib, 'Poverty and Property in Kant's System of Rights' (2002) 78 *Notre Dame Law Review* 795, 810–821.

¹¹⁸ Ripstein, *Force and Freedom* (n 69) 279–81.

¹¹⁹ Katarina Tomaševski, 'Human Rights Indicators: The Right to Food as a Test Case' in Katarina Tomaševski and Philip Alston (eds), *The Right to Food* (1984) 148 (interpreting the right to food as a right to be fed 'implies a humiliation of those who are being fed'); Robert E Robertson, 'The Right to Food - Canada's Broken Covenant' [1989] *Canadian Human Rights Yearbook* 185, 188 ('... the right to food is not synonymous with the right to be fed, for that implies an unhealthy dependence upon others.');

Wary Holdings (Pty) Ltd v Salvo (Pty) Ltd, 2009 (1) SA 337 [85] (Kroon AJ) (citations omitted):

... the content of the right to food has twin elements of availability and accessibility. The first element refers to a sufficient supply of food and requires the existence of a national supply of food to meet the nutritional needs of the population generally... The second element requires that people be able to acquire the food that is available or to make use of opportunities to produce food for their own use.

¹²⁰ Ripstein, *Force and Freedom* (n 69) 298.

¹²¹ *Watson v Cross*, 63 Ky (2 Duv) 147 (1865). A minor who had stayed at a hotel after absconding from the Kentucky Military Academy disputed his charges, on grounds that he lacked capacity to contract with the innkeeper. He left behind without paying after two weeks, and sent afterwards for his things. The Court held that the hotel was entitled to retain the applicant's luggage in order to cover the cost of necessities consumed, on the grounds that an innkeeper 'was legally bound to receive and entertain all guests apparently responsible and of good conduct, who might come to his house; and, if he refused to do so, he was liable alike to an indictment and an action by the party aggrieved; and the mere fact of infancy alone in the applicant would not justify him in any such refusal.' *ibid* 148. See Sherry (n 52) 40–41 (on the duty of innkeepers to receive persons incapable of contracting.)

¹²² Ripstein, *Force and Freedom* (n 69) 297.

¹²³ *ibid* 298.

principle of hospitality.¹²⁴ It explains both the basic case of visitors with a rightful condition to go back to, and the exceptional case of refugees with nowhere to go.

b. Rights to an Equal Share of the Earth, or to be Somewhere

In contrast to the above 'austere' rationale from innate right alone, others argue that cosmopolitan right requires and depends upon knowledge of further and better 'facts about the world.'¹²⁵ One proponent of this view is Peter Niesen, who argues that cosmopolitan right results from 'the normative fallout from *acquired* rights to property.'¹²⁶ To the extent that the civil condition and consequently all positive law are 'fallouts' of the original acquisition of external objects, this is unobjectionable. However, Niesen goes further in conceiving original common possession not as a pre-political moral entitlement merely to take up space, but as an entitlement to some form of equal share of the earth's resources. He begins with the premise that 'unilateral acquisition obligates individuals and nations towards each other,'¹²⁷ and proceeds to observe that the carving up of the world into separate plots and territories 'has causally shaped the life chances of our fellow cosmopolitan residents.'¹²⁸ Accordingly, unilateral appropriations – even where blameless and not a result of colonial crimes - have nevertheless 'resulted in a distribution of property that can be challenged and will have to be either ratified or corrected in a cosmopolitan condition.'¹²⁹

Similarly, Claudio Corradetti views the cosmopolitan right to visit 'as a limitatory clause to peremptory appropriation, that is, as a generalised guarantee of non-exclusion from territorial accessibility.'¹³⁰ Corradetti opines that 'from the acceptability of an original appropriation... it follows that those who are excluded by territorial seizure must be compensated through the allocation of a qualified right – the right to visit – in order to respect their original right to have a place on earth.'¹³¹ In explaining this compensatory principle, Corradetti refers to the 'Lockean proviso,' or the principle by which Locke limits enclosure of land in the state of nature only to where there is 'enough and as good left in

¹²⁴ Pauline Kleingeld, 'Kant's Cosmopolitan Law: World Citizenship for a Global Order' (1998) 2 *Kantian Review* 72, 79. This article departs from her in one regard. In her view, the obligation not to refuse visitors when it would lead to their destruction also applies to individuals. A refugee's or homeless person's innate right is not to a place to rest their feet, but to a *civil* guarantee of such a place. Private persons are in no position to offer this, and so are free to be heartless towards refugees. They may, of course, also be 'heartful,' but such philanthropy will be of compromised worth as a matter of fulfilling duties of virtue by virtue of the fact that its recipients are systematically dependent upon the givers. They would therefore be being used as mere learning aids for the moral education of philanthropists.

¹²⁵ Niesen, 'Colonialism and Hospitality' (n 2) 90.

¹²⁶ *ibid* 100. At certain points, Niesen seems to suggest that cosmopolitan right is an acquired right. *See ibid* 105 ('... there are several reasons why the derivation of cosmopolitan law from acquired rights to property is more plausible than its derivation from the innate human right to external freedom.')

¹²⁷ Niesen (n 2) 102, *citing* Katrin Flikschuh, *Kant and Modern Political Philosophy* (Cambridge University Press 2000) 152.

¹²⁸ Niesen, 'Colonialism and Hospitality' (n 2) 103.

¹²⁹ *ibid* 104.

¹³⁰ Claudio Corradetti, 'Constructivism in Cosmopolitan Law: Kant's Right to Visit' (2017) 6 *Global Constitutionalism* 412, 414 (citations removed).

¹³¹ *ibid* 421.

common for others.¹³² In contrast to Corradetti, Alice Pinheiro Walla ropes in Grotius, who – as we saw from his invocation of the *Aeneid* – claims that established property rights may be rendered defeasible in cases of necessity. From the premise that property ownership is created out of common possession for the greater welfare of human beings, it follows that property rights become defeasible when (1) the thing can be enjoyed by others without any cost to the owner,¹³³ or (2) excluding others would result in general disaster. On these lines, Pinheiro Walla argues that ‘cosmopolitan right in Kant’s theory has a similar function to the right of necessity in Grotius and imperfect rights in Pufendorf’s theory.’¹³⁴

One immediate problem is that these approaches seem to smuggle ‘internal’ considerations about the substance of choices into Kant’s purely formal theory of law. For instance, Niesen sometimes seems to justify cosmopolitan right explicitly upon empirical considerations such as needs and history.¹³⁵ Corradetti, for his part, tries to avoid this, stating that his reliance upon the Lockean proviso ‘reformulates’ it to pay no heed to questions of need.¹³⁶ The problem is that this does not change anything, because for Kant, leaving behind enough and as good would be neither good nor enough to *justify* excluding others. For Kant, land before original acquisition is not *res nullius*.¹³⁷ Others have just as good a claim to it, and this claim cannot be extinguished simply by unilateral occupation or specification. If you try to exclude others from a plot of land on the basis that you have labored on it and grown enough apples to feed them, they may justifiably reply that they do not care for apples, and – even if they did – that it was not *your* place to decide that they should have apples. Nor, from the opposite direction, does Kant accept a *right* of necessity. Instead, necessity enters Kant’s general theory not as a justification but as a defense, and even then only against criminal, rather than civil liability.¹³⁸

¹³² Locke (n 89) s 27, *cited at* Corradetti (n 130) 421–22.

¹³³ Grotius (n 18) 38 (‘If any person should prevent any other from taking fire from his fire or light from his torch, I should accuse him of violating the law of human society. . . . Why then, when it can be done without any prejudice to his own interests, will not one person share with another things which are useful to the recipient, and no loss to the giver?’)

¹³⁴ Alice Pinheiro Walla, ‘Common Possession of the Earth and Cosmopolitan Right’ (2016) 107 *Kant-Studien* 160, 176.

¹³⁵ In a conference paper, Niesen writes that ‘the normative basis of Cosmopolitan right lies in the territory-based nature of human lives: in the fact that we need to be somewhere rather than nowhere, and that we need to use and appropriate territory and territorially based stuff, and have done so. Call this predicament ‘Earth citizenship.’ Peter Niesen, “‘Regardless of Frontiers’: A Cosmopolitan Right to Free Transnational Communication’ (2015) 28

<http://www.gsao.fudan.edu.cn/_upload/article/11/c3/d3c1160a4605aad4427c12fbf8bc/2336c65b-094f-4090-9353-b87b635d0fae.pdf> accessed 16 January 2018.

¹³⁶ Corradetti (n 130) 421.

¹³⁷ *DR* 6:265, 417, *cited at* Corradetti (n 130) 418.

¹³⁸ See *DR* 6:235–36, 391–92 (the concept of a ‘right of necessity’ confuses the possession of a right, or ‘objective impunity’, with ‘subjective impunity.’)

The most interesting problem for present purposes, however, lies in their common assumption that territory is akin to *property*.¹³⁹ This in turn arises from the deeper assumption that ‘states and peoples’ take ‘an active part in the process of unilateral appropriation’ of their territory.¹⁴⁰ Certainly, it is an undeniable historical – in Kantian language ‘empirical’ – fact that states historically appropriated territories. ‘Metaphysically’ speaking, however, states do no such thing: they come into existence at the same time as their territory. Territory is not acquired, but innate.

Recall that innateness means being able to say that something is yours independently of any act you did to get it, while acquiredness implies some such act. Your sunglasses are acquired: you bought them from the shop. This implies, however, that if someone else had snapped them up before you, they could very easily have been that other person’s.¹⁴¹ Thus, property has the aspect of being ‘mine or yours.’¹⁴² This in turn means that property is by default *transmissible*, because ‘what is yours might as well be, and might come to be, not only mine, but his, hers, theirs, and so on.’¹⁴³ Bodies stand in stark contrast to all these. You do not have to account for how you came to possess it, because if you didn’t have your present body, there wouldn’t have been a *you* to acquire it.¹⁴⁴ Moreover, if you and a friend were to exchange all your belongings, your lifestyles would be transformed – perhaps immeasurably – but the two of you could still carry on with the identities you ordinarily present to the world. Not so if you exchanged bodies. Bodies have neither the ‘mine or yours’ quality, nor are they transmissible: instead, they are by default *inalienable*.

All of these are also true of territory. Acquiring territory is not something a state can ‘do,’ because before it has territory, there is no state to do any acquiring. Certainly, a state’s territory may increase through silting or volcanic activity, but this is analogous to you growing a beard or having a heart transplant. Taken as a ‘totality’ – a plurality considered as a unity – the state simply *is* the territory. Ruritania and Cagliostro would not simply be altered if they exchanged their territory, natural endowments, and people. They would cease to exist. This is Kant’s precisely point in the Second Preliminary Article, where he observes that

¹³⁹ See Pinheiro Walla (n 134) 174 (cosmopolitan right ‘presents itself under two different modes: (1) as basis of the *acquired* right of host peoples to their territory, enabling them to decline voluntary interaction...’); Niesen, ‘Colonialism and Hospitality’ (n 2) 105. (‘... the most plausible justification for legal rights and obligations under hospitality lies in their enmeshment with the logic of first appropriation of territorial property.’). Niesen has softened but not fundamentally altered this position in recent work, in which he claims that ‘Like the innate right of a person to freedom, states’ rights under natural international law are determinate in advance and abstract away from all questions of acquisition. Any form of territorial re-assignment of political dominion must therefore cut across the systematic integrity of natural international law...’ Peter Niesen, ‘Restorative Justice in International and Cosmopolitan Law’ in Katrin Flikschuh and Lea Ypi (eds), *Kant and Colonialism: Historical and Critical Perspectives* (OUP Oxford 2014) 181.

¹⁴⁰ Niesen, ‘Colonialism and Hospitality’ (n 2) 103.

¹⁴¹ Ripstein, *Force and Freedom* (n 69) 59–60.

¹⁴² DR 6:246, 401.

¹⁴³ James Penner, ‘On the Very Idea of Transmissible Rights’ in James Penner and Henry Smith (eds), *Philosophical Foundations of Property Law* (OUP Oxford 2013) 256.

¹⁴⁴ Arthur Ripstein, ‘Property and Territory: How to Tell the Difference’ (May 2017) 11 (manuscript on file with author).

a state is not (like the land on which it resides) a belonging (*patrimonium*)... Like a trunk, it has its own roots; and to annex it to another state as a graft is to do away with its existence as a moral person and to make a moral person into a thing, and so to contradict the idea of the original contract, apart from which no right over a people can be thought.¹⁴⁵

The distinction Kant seems to draw between the state and its 'land' must not be taken to mean that the territory might be patrimony, even if the state is not. While Kant states that title to territory is held by the head of state acting as 'Supreme Proprietor,' he defines that function solely as organizing the 'division' of land among subjects, and emphatically not as an aggregation of private ownership claims.¹⁴⁶ The latter would be inimical to Kant's plan for eternal peace, because, as Kant knew from experience, the proprietary model of the state and territory is a source of incessant war. Writing in the context of the Austrian Wars of Succession – essentially a dispute over Silesia arising from Maria Theresa's succession to the Habsburg Throne – Kant remarks that

Everyone knows into what danger the presumption that acquisition can take place in this way has brought Europe, they only part of the world in which it is known... that states can marry each other, partly as a new industry for making oneself predominant by family alliances even without expending one's forces, and partly as a way of extending one's possession of land.¹⁴⁷

This is why the Second Preliminary Article bears the title 'No independently existing state (whether small or large) shall be acquired by another state through inheritance, exchange, purchase or donation.' Contrary to Derrida, neither the state nor its head can be treated as a master in his own home, for 'if the head of state is not a member of the state but is proprietor... he can decide upon war, as upon a kind of pleasure party...'¹⁴⁸ To treat their territory as property to be bought and sold is to render the human beings on it into things to be bought and sold; in effect, civil death.

Importantly, Kant extends these principles to 'savages' as well: a people's territory cannot be treated as a contingent acquirable property just because they lack a republican constitution. Even though such peoples do wrong in the highest degree by not entering a rightful condition, *others* are in no place to hold this against them; 'whatever uncertainty there is with respect to *who* may act on behalf of this people, the visitor must accept that the *visitor* itself is not so charged, and so must not take it upon itself to make arrangements for the inhabitants.'¹⁴⁹ Kant specifically denies the relevance of the Lockean proviso in his argument that while colonies may be established on land truly far away from any indigenous populations, they are not allowed if the 'people are like shepherds or hunters (like the Hottentots, the Tungusi, or most of the American Indian nations), who depend for their sustenance

¹⁴⁵ *PP* 8:344, 318.

¹⁴⁶ *DR* 6:323-24, 466.

¹⁴⁷ *PP* 8:344, 318.

¹⁴⁸ *PP* 8:351, 324. See also Arthur Ripstein, 'Just War, Regular War, and Perpetual Peace' (2016) 107 *Kant-Studien* 179, 188. ('If states are essentially private and subject to the claims of private right, disputes about them will multiply, and war becomes a means of acquisition.')

¹⁴⁹ Ripstein, 'Kant's Juridical Theory of Colonialism' (n 27) 165. See also Martin Ajei and Katrin Flikschuh, 'Colonial Mentality: Kant's Hospitality Right Then and Now' in Katrin Flikschuh and Lea Ypi (eds), *Kant and Colonialism: Historical and Critical Perspectives* (OUP Oxford 2014) 246. ('For all [visitors] know, stateless peoples do in fact possess political institutions... This stance expresses an epistemic modesty against which the cautiously formulated right to *attempt* contact makes good sense. In our dealings with distant strangers... should accept that they are agents in their own right, with reasons for action, about which we are likely to know and understand very little.')

on great open regions...¹⁵⁰ This is clearly intended to contradict Locke's infamous argument that because all persons have a right to *terra nullius* — defined broadly as not just unoccupied but also uncultivated land — attempts by native peoples to prevent European settlement are in violation of natural law, which then requires such those peoples to 'be destroyed as a *Lion or a Tyger*, one of those wild Savage beasts, with whom Men can have no Society or Security.'¹⁵¹

Interestingly, Kant goes on to say that a settlement may be established with such peoples by contract, but specifies that any such contract has to be one 'that does not take advantage of the ignorance of those inhabitants with respect to ceding their lands.'¹⁵² As we have seen, Kant envisages a spectrum of contracts. At one end, there is one type of contract that are mandatory: the original contract. At the other end, there are contracts that are prohibited: contracts for slavery. In the middle, most contracts are voluntary and their validity does not depend on their substance. It may be ethically foolish of you to sell your Maserati for a peppercorn, but you have the legal right to accept such an offer, and the obligation to deliver if you do. Evidently, a contract for settling in the proximity of native peoples is not such an ordinary contract for buying and selling property. Rather, in its onerous requirement of informed consent, it is reminiscent of the curious passages in the *Doctrine of Right* concerning contracts for sexual intercourse. In these, Kant begins by observing that because a 'human being cannot have property in himself, much less in another person,' making use of another's body consistently with rightful honor requires a 'morally necessary' purpose such as procreation.¹⁵³ Engaging in intercourse for the mere carnal enjoyment of another 'as a thing' is a 'cannibalistic' form of 'use by each of the sexual organs of another,' whereby 'each is actually a *consumable* thing (*res fungibilis*) with respect to the other, so that if one were to make oneself such a thing by *contract*, the contract would be contrary to law.'¹⁵⁴ Now, the legal systems the reader may be familiar with likely will not follow this rationale to its fullest. Nevertheless, something of it is reflected in laws concerning commercial prostitution and other bodily alienations such as organ transplantation, and euthanasia. These alienations are often prohibited, but if permitted, not on commercial terms. Finally, if permitted commercially, pains are taken to reduce vulnerability and exploitation and to ensure genuine and informed choice. The same principles apply to the territory of a people — civilized or no — because it is the body of their state.

The history of the international law of territory illustrates a dawning realization of this logic. While early case law allowed for 'acquisitive prescription' of territory through *effectivités* (effective administration) on a rationale developed explicitly by analogy to prescription of land,¹⁵⁵ current practice has completely reversed this, and in principle allows transfers of territorial sovereignty only

¹⁵⁰ DR 6:354, 490.

¹⁵¹ Locke (n 89) s 11.

¹⁵² DR 6:354, 490.

¹⁵³ DR 6:359, 494-95. The rule that no free person can be viewed as owning his limbs is yet another legal principle Kant takes from Ulpian. D.9.2.13.8 ('... *dominus membrorum suorum nemo videtur.*')

¹⁵⁴ DR 6:359-60, 495.

¹⁵⁵ *Island of Palmas* (Netherlands v US) 2 RIAA 829 (1928) 867-69.

on the positive acquiescence of the transferor.¹⁵⁶ The animating rationale for the new rule is peace: no matter how poorly drawn by former colonial powers, existing borders must be respected in order ‘to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers...’¹⁵⁷ Finally, the International Court of Justice has twice rejected ‘Lockean proviso’-style arguments for borders to be adjusted for a more equitable distribution of natural resources. The reasoning is impeccably formal: Tunisia’s borders with oil-rich Libya may not be altered just to give Tunisia a more equitable distribution of oil, because natural resources are ‘variables which unpredictable national fortune or calamity... might at any time cause to tilt the scale one way or the other. A country might be poor today and become rich tomorrow as a result of an event such as the discovery of a valuable economic resource.’¹⁵⁸

Some have taken these departures from the principles of property to argue against the entire venerable tradition of developing international law by analogy to private law.¹⁵⁹ A less drastic response would have been to consider that property might perhaps be the wrong comparator, and that the correct one was body. It would, however, be premature to claim that the international law of territory has drawn this conclusion. For starters, the standards for proving acquiescence are quite lax: in *Pedra Branca* the International Court held that sovereignty over a disputed island had passed from Malaysia to Singapore effectively by silence.¹⁶⁰ There are, however, good reasons to make this final leap, even if refugees and migration crises take up more attention than colonialism. If territorial rights are acquired rights in things or property, then territories may not just be bought and sold, but also leased, held in condominium, granted in perpetuity, subjected to international mandate, and acquired by prescription.¹⁶¹ To wit, leased territories like Guantanamo Bay and Diego Garcia are bywords for lawlessness, desperation, and torture and forced migration.¹⁶² Vanuatuans apparently joke that the former British-French system of joint rule of their islands was not so much ‘condominium’ as ‘pandemonium.’¹⁶³

¹⁵⁶ *Frontier Dispute* (Burkina Faso v Mali) 1986 ICJ 554 (Dec 22) [63–67]; *Land, Island and Maritime Frontier Dispute* (El Salvador v Honduras, Nicaragua intervening) 1992 ICJ 351 (Sept 11) [223–24].

¹⁵⁷ *Frontier Dispute* (n 160) [20].

¹⁵⁸ *Continental Shelf* (Tunisia v Libya) 1982 ICJ 473 (Feb 24) [107]. See also *Land, Island and Maritime Frontier Dispute* (n 160).

¹⁵⁹ Roger O’Keefe, ‘Legal Title versus *Effectivités*: Prescription and the Promise and Problems of Private Law Analogies’ (2011) 13 *International Community Law Review* 147, 187–88.

¹⁶⁰ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia v Singapore) 2008 ICJ 12 (May 23) [121] (‘... silence may also speak, but only if the conduct of the other State calls for a response.’) Three judges dissented in strident terms, with one essentially accusing the majority of sneaking the old rule of acquisitive prescription through the back door. See the joint dissenting opinion of Judges Simma and Abraham, at [11–13], and the separate dissent of Judge *ad hoc* Dugard, at [31–33].

¹⁶¹ Hersch Lauterpacht, ‘Property Relations Between States. State Territory’ in Eli Lauterpacht (ed), Hersch Lauterpacht, *International Law: Volume 1, The General Works: Being the Collected Papers of Hersch Lauterpacht* (Cambridge University Press 1970) 370.

¹⁶² See Laura Jeffrey and David Vine, ‘Sorry, Sadness, and Impoverishment: The Lives of Chagossians in Mauritius’ in Sandra Evers and Marry Kooy (eds), *Eviction from the Chagos Islands: Displacement and Struggle for Identity Against Two World Powers* (Brill 2011) 83. The authors interview a displaced Chagos Islander, who characterizes the ‘deal’ by which Mauritian politicians agreed to the hiving off and retention by the UK of the Chagos Islands in exchange for Mauritian independence as one where ‘Mauritius got independence because it sold my mother’s land.’

¹⁶³ Michelle Bennett and Jocelyn Harewood, *Vanuatu* (Lonely Planet 2003) 14.

All this and more, it would appear, stand to be found in Australia's policy of sending all asylum seekers to 'offshore' Refugee Processing Centres (RPCs) set up in Nauru and Papua New Guinea. A recent study by Madeline Gleeson paints a picture of these places as carefully constructed states of nature. In Gleeson's telling, administrative procedures in the RPCs were deliberately designed to ensure that 'it would never be entirely clear who was really making the decisions.'¹⁶⁴ All the better, then, for frustrating journalists' and official scrutiny into conditions in the camps, or for claiming plausible deniability for the horrific rumors of abuse by camp guards and self-mutilation by psychologically scarred inmates.¹⁶⁵ Whatever investigations of the RPCs tended to be by the for-profit private security companies running those camps on incredibly lucrative taxpayer-funded contracts. For the states receiving hosting the RPCs, asylum seekers were essentially chips to be bartered in exchange for developmental aid and other priorities.¹⁶⁶ Finally, there is the suggestion of the corruption of the body politic: a competition to be crueler than the circumstances from which refugees are running from inevitably ends with the political discourse 'becoming crueller and crueller and crueller...'¹⁶⁷ Even if some (or all) of Gleeson's factual claims are questioned, a policy of intercepting and turning back asylum seekers on the high seas remains indefensible in principle, because for the public person of the receiving state to turn refugees away just is to treat them as things. It remains indefensible even if the supposed motivations of discouraging human traffickers and/or preventing more deaths by refugees attempting perilous journeys are genuine, because the refugee just is being wholly instrumentalized for a purpose they do not share. Policymakers must simply find some other way to achieve these goals.

Another feature of the policy that seems objectionable is the blanket rejection of a certain type of asylum applicants – all who came by sea – on the basis that there are other states with land and resources to take them. An innkeeper may not systematically turn away a certain class of travelers just because there are other 'separate and equal' establishments nearby to serve their kind. However, it would be difficult to account for this intuition on a conception of a refugee's rights as resting upon a right to a fungible share of the earth's land and resources. It would be difficult even that right was expressed in a more 'stripped down' fashion as simply a 'right to be somewhere.' In a recent piece correctly critical of the 'distributive' approaches also rejected here, Jakob Huber nevertheless claims a difficulty with the pure innate right approach advocated here, on the grounds that if original common possession is a 'right to be granted a place *somewhere* on the earth such that the conditions of agency

¹⁶⁴ Madeline Gleeson, *Offshore: Behind the Wire on Manus and Nauru* (NewSouth 2016) __. See generally *ibid* ch. 5.

¹⁶⁵ The author was herself barred from visiting the RPCs personally. Gleeson (n 164) __.

¹⁶⁶ *ibid* __. ('Refugees could be a resource too, the small nation [Nauru] would soon discover.... Despite the MOU's emphasis on 'joint cooperation' to combat people smuggling, it was a commercial transaction – not a regional responsibility-sharing arrangement.')

¹⁶⁷ *ibid* __.

are fulfilled,' it simply cannot be an innate right.¹⁶⁸ Rather, it would have to be an acquired right displaying the 'mine and yours' quality: a 'right to be somewhere' could be provided for by the ground beneath your feet here, somewhere else, or in Timbuktu.

But that is not what Kant says: the *Perpetual Peace* speaks not of a visitor's right to be somewhere, but to be 'where he is;' or alternatively, of 'a right to be wherever nature or chance (apart from their will) has placed them.'¹⁶⁹ This is not a right to *some* spot on earth, but to *the* spot where you are, and cannot help but be. Viewed thus, the ground beneath your feet becomes as inseparable from you as your shadow. The forms of coercive interactions you can have with other persons will be structured by this inescapable fact; they cannot use violence against you in any way that contradicts the fact that your agency is exercised in space. Consider in this regard the contemporary law of trespass. In English law such conduct is treated as a violation of property rights,¹⁷⁰ and often (mistakenly) said to be actionable '*per se*'; that is, the moment you set foot on another's land, even if you were under a mistake as to whether it was your land.¹⁷¹ Nevertheless, liability is not strict, trespass does not lie if you were involuntarily carried onto another's land,¹⁷² or if you traversed it only because the public roads were flooded.¹⁷³ You may not be held liable for simply being there. This is even more evident in Roman law. The Roman law views them as *iniuria*; that is, wrongs against *personality* rights, akin to invasions of privacy. You do not wrong another simply by wandering into their land. If they tell you to leave, you must do so within reasonable delay. You wrong them only if you stick around, because this expresses contempt for their *dignitas* as owner of their land.¹⁷⁴

In essence, cosmopolitan right is not a claim to a thing (*vindicatio*), but to a standard of treatment (*conductio*). That standard is hospitality; another may not treat you with hostility simply because you are *there*.¹⁷⁵ A receiving state can tell you to go away if you have somewhere else to go to, and must

¹⁶⁸ Jakob Huber, 'Cosmopolitanism for Earth Dwellers: Kant on the Right to Be Somewhere' (2017) 22 *Kantian Review* 1, 8.

¹⁶⁹ DR 6:262, 414.

¹⁷⁰ *Entick v Carrington*, Howell's St Tr 1029 (1765) 1066 (Lord Camden CJ) ('By the laws of England every invasion of private property, be it ever so minute, is a trespass.')

¹⁷¹ *Basey v Clarkson* (1681) 3 Lev 37 (Plaintiff given judgment for 2 shillings against adjoining neighbor who mistakenly mowed grass on plaintiff's land); *Severn Trent Water Ltd v Barnes* [2004] EWCA Civ 570, [2004] EGLR 95 [5] (damages awarded for 'trivial, accidental and unintentional' entry onto land).

¹⁷² *Smith v Stone* (1647) Sty 65.

¹⁷³ *Taylor v Whitehead* (1781) 99 ER 475.

¹⁷⁴ See William W Buckland and Arnold D McNair, *Roman Law and Common Law: A Comparison in Outline* (CUP Archive 1965) 102 (trespass actionable only if the owner 'had expressly forbidden entry or if it was an enclosure, such as a dwelling-house, into which everyone knew that free entry would be forbidden. . . .'); David L Carey Miller, 'Public Access to Private Land in Scotland' (2012) 15 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 119, 120 ('... the landowner has an enforceable right to require a trespasser to leave but there is no civil claim for the act of trespass *per se* as there is, on the basis of the 'tort of trespass,' in English law.')

¹⁷⁵ See DPP 23:172-73 ('So erkennt der beduinische Araber bey einem vor seinem Zelt sich einfindenden Fremden die Pflicht der Wirthbarkeit selbst wenn er nach dem friedlichen Empfang ihn von sich abweiset. Auf diese Wirthbarkeit kann der Fremdling Anspruch machen (nicht aber auf ein Gastrecht als wozu ihn sein Wirth besonders einladen müßte) als auf ein Besuchsrecht welches allen Menschen vermöge der Freyheit des ihnen von der Natur angewiesenen Raumes zukommt.') In the published version, Kant removes these approving

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give you reasonable time to leave. If, however, you have nowhere else to go, *Wirtbarkeit* implies an obligation to take you in. This cosmopolitan obligation is a personal one, arising out of the receiving state's *status* as a sovereign; that is, as a public fiduciary. Fiduciaries may not get others to fulfil their obligations,¹⁷⁶ because their status is just as much a part of their person as their body or reputation.¹⁷⁷ These considerations together mean that a receiving state may not sub-contract out of its obligations of asylum, any more than it may farm out its territory or sell its people. The reason why one state may not offshore its asylum obligations is the same reason why another state may not onshore them.

Conclusion

Explicating hospitality by analogy to the private law of innkeeping helps clear up a number of mysteries regarding cosmopolitan right. First and foremost, when Kant says it has nothing to do with philanthropy, he really means it. Second, it is properly categorized under public right, because it entails onerous public, fiduciary obligations no private person can or should bear. Third, the cosmopolitan obligations receiving states have nothing to do with their acquisition or ownership of property, but obtain solely in virtue of their public role and the form of relationship *vis-à-vis* any particular visitor. Where the visitor is peaceable, capable of supporting herself, and has the capacity to return to her own political community, all she has is a right to present herself for society. Where the visitor does not have a political community, such that turning her away would bring about her civil death, the receiving state must take her in simply because otherwise, she has no way rightfully to occupy the spot on earth where she cannot help but be.

remarks and casts Bedouins as exemplars of 'Unwirtbarkeit' who regard every 'approach to nomadic tribes as a right to plunder them.' *PP* 8:358, 329.

¹⁷⁶ *Procuratorem alium procuratorem facere non posse*. D.49.1.4.5. The equivalent maxim of the common law is *delegata potestas non potest delegare*.

¹⁷⁷ *DR* 6:328-29, 470-71. Ulpian enumerates personality rights as comprising *corpus, fama, dignitas*. D.47.10.1.2.