Legal Philosophy from Plato to Hegel

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CHAPTER XII

KANT

There is always something about Kant, as about Luther, which reminds one of a monk, who has indeed quitted his cloister, but who can never quite rid himself of its traces.

Schiller

In the realm of legal speculation Kant’s thought was no less influential than it was in philosophy generally. Through Austin, who studied his works in Germany, and also directly, he affected the current of nineteenth century English legal theory; on the Continent during the same period the power he exerted gave him a position of unique eminence. In the history of legal philosophy only one or two other thinkers can be placed beside him in the ascendency which he has exercised over the study of jurisprudence. If the aim which he held before himself had been fully realized the explanation of his influence could be accounted for on that ground alone. In the Preface to the *Critique of Pure Reason* he asserted the extraordinary claim “I have made completeness my chief aim, and I venture to assert that there is not a single metaphysical problem which has not been solved, or for the solution of which the key at least has not been supplied”; a similar claim, though more guardedly put, is made for his work in jurisprudence in the Preface to his *Philosophy of Law*. He there states, by

Kant’s principal work in the philosophy of law is his *Metaphysische Anfangsgründe der Rechtslehre* (2nd ed. 1798), translated by Hastie as *The Philosophy of Law* (1887) and cited here as *P. L*. Kant’s other legal works—*Idee zu einer allgemeinen Geschichten in weltbürgerlicher Absicht* (1784), *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis* (1793), and *Zum ewigen Frieden, ein philosophischer Entwurf* (1795)—were also translated by Hastie as *Kant’s Principles of Politics* (1891), and are cited here as *P. P.* The best exposition of Kant’s legal philosophy in English is 2 Caird, *The Critical Philosophy of Immanuel Kant* (1889) 315 et seq.; the best critical analysis is Cohen, *A Critique of Kant’s Philosophy of Law* in *The Heritage of Kant* (1999) ed. Whitney and Bowers.

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means of indirect assertions, that he has put forward a rational system of jurisprudence which is complete and comprehensive. That it to say, the system is complete from the point of view of principle; Kant expressly disclaims any suggestion that he made a practical application of the system to all cases. In its structure the Philosophy of Law follows the scheme of the Roman jurists, and no doubt Kant thought that this method afforded him an external measure of the persistent problems of law. It did not bring him to completeness, since even the vast experience that was classified in the Roman system failed by much to exhaust the legal possibilities of human conduct. However, it provided him with a view of many problems of universal currency and he was able to perceive the obstacles which must be overcome in the construction of a general theory of law. But his influence was due even more to the fact that he seized the principal threads of eighteenth century thought, particularly those which culminated in the French Revolution, and wove them into a pattern to which the mind of the nineteenth century was peculiarly sympathetic. He accepted the view of Aristotle that man was social by nature; he also believed with Hobbes that man was antisocial. Kant endeavored to find a place for these and related ideas, as they found expression in Rousseau and others, in a rational theory of society. In the view of the present day world his efforts led to some curious conclusions; but they also directed him to conclusions which are still unshaken.

Kant's theory of law is an application to the domain of jurisprudence of his general system of ethics. His declared aim was to establish a metaphysic of morality entirely divorced from empirical psychology, theology, physics and the hyper-physical. If such a system were constructed it would dispose of the eighteenth century dispute whether man as a natural being was guided by benevolent or selfish impulses, or whether as a rational being he was governed by the idea of perfection. His solution is as follows. "Nothing," he wrote, "can possibly be conceived in the world, or even out of it, which can
be called good without qualification, except a Good Will.”¹ Through the will we reach reality, a goal which the senses and the intellect cannot achieve; they are confined to the world of experience and thus we can never know “things-in-themselves,” but only the appearance of things under a priori forms of reason. However, when we will we are not contemplating phenomena under the inescapable limitations of experience. The rational will has freedom to legislate to itself; it is, in Kant’s phrase, autonomous. Thus the will takes us beyond experience into the realm of value. Man, as a part of the phenomenal world, is subject to the laws of cause and effect, and in that world things merely are; it is impossible at that level to talk of moral values and rational freedom. In the inner world of the moral Self, however, we are in the presence of the idea of “ought,” and this idea has no meaning in the empirical realm. “Ought,” Kant says, “expresses a kind of necessity which is found nowhere else in the whole of nature. We cannot say that anything in nature ought to be other than what it actually is. When we have the course of nature alone in view, ‘ought’ has no meaning whatever. It is just as absurd to ask what ought to happen in the natural world as to ask what properties a circle ought to have.”² But when we act we must determine if our choice is one that we ought to make, and in making that choice we ought not to act in accordance with our feelings, but upon a principle which we would admit as universally valid. Objective principles of this kind, which are obligatory for the will, Kant called commands, and the formula of the command he called an imperative. All imperatives are either hypothetical or categorical. A hypothetical imperative is a principle of conduct on which we act, not because of its intrinsic merits, but because of something else, such as an end which we wish to achieve. A categorical imperative we accept for its own merits and not as a means to something else. Thus he arrived at his famous conception that there is only

¹ Critique of Practical Reason (1898, trans. Abbott) 9.
one categorical imperative, namely: Act only on that maxim which will enable you at the same time to will that it be a universal law. Kant followed this with a second formula to determine the end of the moral law: Act so that in your own person as well as in the person of every other you are treating mankind also as an end, never merely as a means.

Kant's theory of law is also closely connected with his view of history. He held that whatever may be the metaphysical status of the freedom of the will, the manifestations of the will in human actions are determined like all other external events by universal natural laws. It may be hoped, therefore, that when these manifestations are examined on the great scale of universal history, a pattern will be discovered in their movements; in this way, what appears to be tangled and unregulated in the case of individuals, will be recognized in the history of the whole species as a continually advancing, though slow, development of the species' original capacities and endowments. Individual men, and even nations, in pursuing their own purposes are advancing unconsciously under the guidance of a purpose of Nature which is unknown to them; furthermore, if the purpose were known to them it might be held to be of no significance. Philosophy recognizes that no rational conscious purpose can be supposed to determine the actions of mankind as a whole; but philosophy can attempt to discover if there is a universal purpose of Nature in the paradoxical movements of humanity—that is to say, whether a history of creatures who proceed without a plan of their own may nevertheless be possible according to a determinate plan of Nature. Kant stated that if he found such a clue to history, he was prepared to leave the development of the idea to some future Kepler or Newton. Kant's argument is apt to appear obscured by the eighteenth century optimism and the Greek teleology which dominate it; but he is actually posing a problem which, as the labors of Spengler, Toynbee and others bear witness, still appears to be a legitimate one, i.e., is capable of a solution. In its simplest

\[ P. P. 3 \text{ et seq.} \]
terms the task is to ascertain whether the historical process is random or whether it falls into some kind of a pattern, and if the latter, to isolate the determinative elements.

Teleology and the idea that Nature does nothing superfluous are the concepts which dominate Kant's attempt to solve the problem. He holds that all the capacities implanted in a creature by Nature are destined to unfold themselves completely and conformably to their end, in the course of time. In man, as the only rational creature on earth, those natural capacities which are directed towards the use of his reason, can be completely developed only in the species and not in the individual. This is so because reason experiments in a multitude of ways, and the life of an individual is too short for him to learn by himself how to make a complete use of all his natural endowments. Since nature has provided man with reason, he must produce everything out of himself and is not to be guided by instinct, nor instructed by innate knowledge. All his material inventions, all the sources of delight which make life agreeable, including the goodness of his will, must be entirely his own work. The means which nature employs to bring about the development of all the capacities implanted in men, is their mutual antagonism in society, but nature employs this antagonism only so far as it becomes the course of an order among men that is regulated by law. The antisocial side of man's nature is exhibited in his disposition to direct everything merely according to his own desires. Thus arises the wish for honor, power, wealth and rank. Because of this impulse the first real steps are taken from barbarism to civilization. Without those qualities of an antisocial kind, men might have led an Arcadian shepherd life in complete harmony, contentment and mutual love, Kant observes with Rousseau's argument plainly before him; but in that case all their talents would have forever remained hidden. We owe thanks then to Nature for this unsociableness, for this envious jealousy and vanity, for this insatiable desire for possessions and power; without them all the excellent capacities implanted in mankind by Nature would slumber forever undeveloped.
Therefore the greatest practical problem for the human race, to the solution of which it is compelled by nature, is the establishment of a civil society, universally administering right according to law. Kant insisted that in only one type of society could the highest purpose of Nature, which is the development of all her capacities, be attained in the case of mankind. It is the society which possesses the greatest liberty, and which consequently involves a thorough antagonism of its members—with, however, an exact determination and guarantee of the limits of this liberty in order that there may be mutual freedom for all the members. Now Nature also wills, Kant says, that the human race shall attain through itself to this, as to all the other ends for which it was destined. Hence a society in which liberty under external laws may be found combined in the greatest possible degree with irresistible power, or a perfectly just civil constitution, is the highest natural problem, according to Kant, prescribed to the human species. This is so, because Nature can only by means of the solution and fulfillment of this problem, realize her other purposes with our race. Kant believed that this problem is also the most difficult of its kind and that it is the latest to be solved by the human race. Kant insisted that it was not easy to perceive how man could provide for a supreme authority over public justice that would be essentially just, whether such an authority was in a single person or in a group of persons. The highest authority has to be just in itself, and yet administered by a man. Kant indeed thinks that the perfect solution of this problem is impossible. He is certain, however, that any solution is dependent on the problem of the regulation of the external relations between States conformably to law. The same antagonisms which lead to the establishment of a single government are also present, he argued, in the international field and until a great International Federation regulated by law is established the ideal civil society is unrealizable.

Thus social conflict is the clue, in Kant’s eyes, to the historical process, and its goal the universal administration of right ac-
According to law. Right in the Kantian system comprehends the whole of the conditions under which the voluntary actions of any one person can be harmonized in reality with the voluntary actions of every other person, according to a universal law of freedom.\(^*\) That the historical process can be explained in terms of conflict is an idea that has often been proposed but never proved. Society is in a constant flux, and as Simmel was one of the first to point out, societary phenomena in that aspect are perhaps best interpreted through the concept of reciprocal action. In the hands of contemporary sociologists the idea is seen to consist of four elements—conflict, competition, combination, assimilation—which extend all the way from direct personal antagonism to the degree of cooperation manifested in the formation of a corporation, which involves the creation of a single entity to act for numerous separate personalities. All these elements are important in the social process, and it is conceivably possible that their relative importance may some day be measured; but today we have not the tools for that task.

Kant’s ideal of right under law has a great appeal, but here again no theory of values yet proposed will enable us to estimate its worth with any reasonable degree of confidence. Aristotle’s own teleological method led him to assert that the object of the State was to promote the good life. The Kantian system permits the pursuit of pleasure as the sole goal of the members of society, an end which Aristotle thought fit only for slaves and beasts; Aristotle’s system, however, allowed slavery, a condition which Kant condemned as immoral. However defective the ideals of Kant and Aristotle may be as ultimate standards it is significant that both philosophers built their conceptions upon the idea of law. The aim of legislation, Aristotle believed, was to make men good; in Kant’s opinion right could not be sustained without the force of law. Such an estimate of the importance of law should be a source of gratification to jurists; but it is well to remember that ethical systems other than legalistic ones are possible in theory.

\(^*\) P. L. 45.
On the basis of these general ideas Kant developed his philosophy of law. His purpose was to treat the subject as a system of principles that originate in Reason. He termed his main excursion into jurisprudence The Metaphysical Principles of the Science of Right, and he held that although the conception of right was purely rational in origin, it was also applicable to cases presented in experience. Nevertheless he held it was impossible to survey experience in all its details, and the empirical conceptions which embraced those details could not form integral elements of the system itself, but could only be introduced in subordinate observations, and mainly as furnishing examples to illustrate the general principles.

**The General Theory**

At the basis of Kant's thinking was the belief that we could attain to a knowledge of the principles of human conduct, and that from this science the principles of all positive law could be deduced by judges and legislators. This idea in its essence is not peculiar to Kant, but is the necessary presupposition of all efforts to discover in legal phenomena a system of ordered relationships. Stated simply, it is the attempt to ascertain the first principles of law. We may say that law has no first principles, that as it exhibits itself in society it is haphazard and fundamentally meaningless. In the long run we may be driven to this view. But over against it is the persistent hope that some form of order can be isolated in the multitudinous varieties of the legal process. It is customary to attack the problem in any one of three different ways. A special field of the law, the analysis of which would appear to yield a set of logically coherent principles, is studied by itself with little or no reference to other special fields. Products of this way of attacking the problem are the volumes on such subjects as tort, contract, and

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5 *P. L. 4*. Earlier he had expressed the hope that instead of the endless multiplicity of civil laws we should someday be able to fall back on their general principles. He insisted it was only in those principles that we could find the secret which would enable us to simplify legislation. *Critique of Pure Reason* 302.

6 *P. L. 43-44.*
criminal law. Their point of departure is the root idea of their special field: What is a tort? What is a contract? What is crime? A second way of attacking the problem is found in works on jurisprudence, which attempt to develop the principles underlying all the particular domains of positive law and to unite them in a systematic and non-contradictory manner. Their starting point is the idea of law itself, conceived as broad enough to embrace all its manifestations and at the same time framed with a definiteness that will permit it to be carried out in practical applications. The third way of attacking the problem is found in the investigations which originate in an area beyond the domain of law, but which are nevertheless regarded as containing the principles in accordance with which law is or must be fashioned. Theology, ethics, economics, anthropology, sociology, biology and numerous other areas have all been suggested as such points of departure. It is in this way that Kant, and all the systematic philosophers who have devoted themselves to law, approach the problem.

For the purposes of his jurisprudence Kant began with the idea of right, although the roots of his theory extend back to the heart of his metaphysical system. He saw at once that a solution in terms of the laws of some one country at a particular time would not be a solution of the general problem. He thought it was easy to say that what is right in particular cases is what the laws of a certain place and time may determine; but it is much more difficult to ascertain whether what they have enacted is right in itself, and to lay down a universal criterion by which right and wrong and justice and injustice in general may be recognized. The search for such a criterion must, in the Kantian theory, be conducted in the realm of pure reason and not in the empirical world. Kant agreed that empirical laws may indeed furnish excellent guidance; but a merely empirical system that is void of rational principles is, like the wooden head in the fable of Phaedrus, fine enough in appearance but unfortunately it wants brain.

Kant arrived at his basic conception through the process
of exclusion. As he defined it, the idea of right refers only to
the external and practical relations between individuals in so
far as their actions as facts can have a direct or indirect influ­
ence on one another; right does not indicate the relation of the
action of an individual to the wish or mere desire of another, as
in acts of benevolence or of unkindness. It indicates only the
relation of his free action to the freedom of action of another;
in this reciprocal relation of voluntary actions, the idea of right
does not take into account the matter willed, in so far as the end
which any one may have in view in willing it is concerned. In
other words, when the problem of right is involved the question,
for example, would not be asked whether a person who pur­
chased goods for his business realized a profit by the transaction
or not. Only the form of the transaction is taken into account
in considering the relation of the mutual acts of will. Further­
more, acts of will are thus regarded only in so far as they are
free, and so far as the action of one person harmonizes with the
freedom of others, according to a universal law. By these steps
Kant thus reached his famous definition of legal right, which
was held to consist of the totality of conditions under which the
will of one can be harmonized with the will of others according
to a universal law of freedom.

There are two objections to Kant’s theory that should be
noticed. His idea that there is a “law-giving faculty,” 7 and
his idea that in pure reason alone, altogether apart from ex­
perience, we can find the basis of all law, are not proved. In
the actual formulation of his theory of right he constantly
appeals to experience; and the final statement of his theory
signifies little until empiricism discloses its meaning. Further­
more, the theory ignores, or rather fails to meet, the problem
of ends. In Kant’s theory the social ideal is security of freedom
of will to each person limited only by the like freedom of will
of all other persons. This formula represents perhaps the
ultimate possible statement of the idea of freedom in society.
However, notwithstanding Hegel’s famous statement that

7 P.L. 13.
history is the history of liberty, different ages and different societies insist upon striving for other ends and even for varying ideals of liberty. From the year 1000 to the year 1500, from the Emperor Henry II to the Emperor Maximilian, the ideal was one of right embodied in law; from 1500 to the French Revolution it was one of force, power and the supremacy of dynasties; from the French Revolution to the present day the ideal has been one of ideas—liberty, nationalism, self-government, among others. Kant’s formula would have been unworkable in the achievement of such ends or, if applied, its results we would hold undesirable today. In the medieval period the idea of right was exemplified on a wide scale in private warfare, a practice consistent with Kant’s rule, but which we would hold intolerable. In the same period the different classes of society were ruled by different laws and, as Holdsworth observes, “even at the present day, when the equality of all men and women is an accepted political fiction, we find that the law must draw distinctions between different classes and between different professions and trades.” The Statutes of Labourers, enacted after the Black Death had eliminated nearly half the population, even in their beneficial provisions were violations of the Kantian rule, e.g., they permitted only the impotent poor to solicit alms. Today we have the application of Kant’s standard to the same circumstances. “The law,” as Anatole France observed, “in its majestic equality forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.” The twentieth century ideal of a welfare state requires the recognition of classes needing special treatment from the legal point of view, as certainly as the medieval ideal demanded it. Further, the rise of vast cities makes the application of Kant’s formula impossible. State regulated mono-

8 Stubbs, Lectures on Medieval and Modern History (1887) 239 et seq. 9 2 Hist. Eng. Law (1923) 464. Patterson has pointed out that Kant’s principle, that a human being should treat both himself and others as an end and not a means, has found expression in the abolition of slavery, and in the hostility of American courts to any legal arrangement which makes possible coerced labor or peonage. See Pollock v. Williams (1944), 322 U. S. 4; Patterson, An Introduction to Jurisprudence (2nd ed. 1946) 182.
polies, such as electric light and telephone companies, which possess exclusive franchises, but whose rates are fixed in the public interest, are impossible in the Kantian system since everyone would have the same right to conduct those businesses. Kant’s ideal of freedom is a noble one, but we possess no yardstick to measure it against other ideals equally noble. There is no international state or court, Hegel observed, which passes judgment upon the peoples, and none is possible; the judgment of the nations is found in the fate which awaits them in the process of world-history.\textsuperscript{10}

Nevertheless, Kant’s formula has proved useful and has exerted an immense influence on nineteenth century legal thinking. At the outset, it eliminated the idea, which was dominant in the eighteenth century, of immutable, eternal natural rights. Next, as Pound has shown, “the metaphysical element was decisive in the doctrine of the historical school. For the idea which it found was the idea of right held by and as formulated by the metaphysical jurists. In fact the historical method in jurisprudence was a historical verification of that idea.”\textsuperscript{11} Savigny translated the Kantian formula of right into a theory of law which was to prevail for several generations: “Man stands in the midst of the external world, and the most important element in his environment is contact with those who are like him in their nature and destiny. If free beings are to co-exist in such a condition of contact, furthering rather than hindering each other in their development, invisible boundaries must be recognized within which the existence and activity of each individual gains a secure free opportunity. The rules whereby such boundaries are determined and through them this free opportunity is secured are the law.”\textsuperscript{12} In the view of the thinkers who succeeded Kant the end of the law was visualized as the effort to secure the maximum amount of liberty to each individual. In Herbert Spencer’s\textsuperscript{13} hands the Kantian rule

\textsuperscript{10}Stace, \textit{The Philosophy of Hegel} (1924) 438.
\textsuperscript{11}\textit{Interpretations of Legal History} (1923) 23.
\textsuperscript{12}\textit{System des heutigen römischen Rechts} (1940) § 52. Quoted, Pound, \textit{op. cit.} 29n.
\textsuperscript{13}\textit{Justice} (1891) § 27.
became the celebrated injunction: “Every man is free to do that which he wills provided he infringes not the equal liberty of any other man.” As a force the idea in the United States reached what was perhaps its apogee in *Lochner v. New York* in which the Supreme Court invalidated a statute establishing hours of labor for bakers. Mr. Justice Holmes, dissenting, quoted Spencer’s injunction, remarked that the citizen’s liberty was interfered with by school laws, by the Post Office, by every State or municipal institution which takes his money for purposes thought desirable, whether he likes it or not, and denounced the rule as a “shibboleth.” To secure the point he then added what has since become one of his most famous aphorisms: “The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.” Holmes’ opinion has been termed “the most famous dissent in all legal history.” Whether Kant’s theory is dead or only stunned it is too early to say; but at least its capacities for concrete application have been fairly tested.

From his conception of right Kant next developed what he termed the Universal Law of Right: “Act externally in such a manner that the free exercise of thy Will may be able to co-exist with the Freedom of all others, according to a universal Law.” His argument in support of this law is as follows: Every action is right which in itself, or in the maxim on which it proceeds, is such that it can co-exist along with the Freedom of the Will of each and all in action, according to a universal Law. Kant called this the universal Principle of Right. Hence, I am wronged when any one interferes with actions of mine conducted in accordance with this definition; for such an interference cannot co-exist with Freedom according to a uni-

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14 198 U. S. (1905) 45, 74. Earlier, in *The Path of the Law*, 10 Harv. Law Rev. (1897) 457, Holmes had remarked that Spencer’s rule was not “self-evident.” Patterson interprets Holmes’ “bad man” theory of law as a rejection of the Kantian view that morality depends upon motives. However, he thinks that Kant is not at variance with Holmes in his position that law imposes duties of external conduct motivated by the fear of consequences. *Op. Cit.* note 9 at 186.


16 *P. L.* 46.
versal law. However, it cannot be demanded that I make this universal Principle of Right the maxim of my actions. The freedom of other persons is indifferent to me, even to the extent of wishing in my heart to infringe it, so long as I do not actually violate that freedom by my external action. It is here that Kant makes a sharp distinction between ethics and law. Ethics, as distinguished from law, does impose upon me the obligation to make the fulfillment of Right a maxim of my conduct. By these steps Kant thus arrives at his universal law of Right as a rule of external action. There is no question in Kant's mind that this law imposes obligation upon me; but it does not at all imply and still less command that I ought, merely on account of this obligation, to limit my freedom to these very conditions. Reason here says only that it is restricted thus far by its Idea, and may be likewise thus limited in fact by others; and it lays this down as a Postulate which is not capable of further proof. Furthermore, Kant's argument to the present point has not been to teach virtue, but to explain the nature of Right. The Law of Right as thus laid down is therefore not to be understood as a motive principle of action.

Kant's attempt to confine the sphere of law to actions manifested in the external world touched off a debate which has continued to the present day. At the end of the Middle Ages we find Brian, C. J., remarking "The thought of man shall not be tried, for the devil himself knoweth not the thought of man." 17 Similarly, Hale, in speaking of witchcraft, asserted "it cannot come under the judgment of felony, because no external act of violence was offered whereof the common law can take notice, and secret things belong to God." 18 Nevertheless, in the fourteenth century we find the lawyers appealing to the maxim, *Voluntas reputabitur pro facto.* 19 A test case in English legal history is the statute of Edward III which


18 1 P. C. 429. Quoted ibid. 475.

19 Maitland regards the maxim as but a "momentary aberration" (ibid. 477 n5.) but Holdsworth disputes this (3 *Hist. Eng. Law* 373 n4.).
made treason not the killing of the king, but the compassing or imagining his death, i.e., the intention to kill him. However, it was obvious that an intention to kill the king had to be proved from overt acts, which showed that the person doing them had such an intention. This was Coke's view: "This compassing, intent, or imagination," he said, "though secret, is . . . to be discovered by circumstances precedent, concomitant, and subsequent." But the facts of the legal process are much more complicated than these few examples indicate. The statement that "a mere mental condition unaccompanied by any external act is, legally speaking, nullius momenti, and produces no legal result whatever," is contrary to certain medieval English precedents which seem to show that mere words displaying such an intention were treasonable. In modern juristic thought it is argued that when it is said that an act of thought is not punishable it means only a known act of thought, for otherwise the statement is senseless. In truth, the law does take notice of psychic acts, as in the punishment of certain religious beliefs which may be proved by confession. Kant's doctrine is really a political one, and had its origin in the effort to prevent the State's exercise of coercion over intimate individual beliefs. The proposition that law cannot invade psychic life and is by its nature indifferent to developments within the consciousness is an untenable one. If the law does not attempt to encompass that area it is because that is its choice and it is not due to an inherent limitation. Moreover, assuming Kant's distinction to be a valid one we still must ask: What is an external act? The life of the law is complex, and has been confronted with numerous situations which Kant apparently did not contemplate, e.g., a landowner neglects to warn an invitee of a hidden danger not created by the landowner; a man perceives the mistake of another who is about to

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20 8 Holds. 311.
21 3 Inst. 6.
22 Markby, Elements of Law (6th ed. 1905) 123.
23 3 Holds. 393.
24 Del Vecchio, The Formal Bases of Law (1914) 139 et seq.
build on the former's land, but stands by in silence. Instances such as these, as well as estoppel from silence, admissions from silence, tacit ratification, negligence by omission and so on have resulted in formidable schemes of classification in an effort to rationalize a juristic theory of acts. Thus we have positive and negative acts, the latter divided into omissive and commissive acts, and the latter again divided into direct and indirect acts, plus even further divisions. In this department, Kant started a hare which neither he nor his successors have run to earth. It may well be that the whole concept of action is an unnecessary one for jurisprudence in the sense that its validity has not been established empirically; nor does it seem to be formally necessary.

Right is not self-executing, even in the rarified atmosphere of the Kantian system, and it was therefore necessary for Kant to associate it with compulsion. In accordance with his approach his argument for the necessity of authority is a purely logical one, and it was therefore unnecessary for him to turn either to sociology or to ethics for support, as is the present-day practice. The resistance which is opposed to any hindrance of an effect, he said, is in reality a furtherance of this effect, and is in accordance with its accomplishment. He had already shown that everything that is wrong is a hindrance of freedom, according to universal laws. Therefore, compulsion of any kind is a hindrance to freedom. Consequently, when the exercise of freedom is itself a hindrance of the freedom that is in accordance with universal laws, it is a wrong; and the compulsion which is opposed to it is right, as being a hindering of a hindrance of freedom, and as being in accord with the freedom which exists in conformity with universal laws. Hence, according to the logical principle of contradiction, all right is accompanied with an implied title or warrant to bring compulsion to bear on any one who may violate it in fact. This is a neat solution, for the task Kant had in hand, of the problem of

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25 Kocourek, Jural Relations (1927) 239 et seq. These pages represent about the best that has been done with the matter.

26 P. L. 47.
authority; but it is valid only within the formal juristic system Kant was in process of constructing. If we do not accept his theory of right—he never shows logically or empirically how it is possible for a society of completely free-willing individuals to exist—his theory of compulsion is without force. In the absence of the acceptance of his premises we are free to view authority from the position of individualists like Max Stirner: "Away: you deprive me of sunshine."

Rights in the strict legal sense, Kant further insisted, may also be represented as the possibility of a universal reciprocal compulsion in harmony with the freedom of all according to universal laws. The external is the sole measure of a right in the strict legal sense, as it is of right in general. Strict legal rights are no doubt founded upon the consciousness of the obligation of every individual according to law; but to be taken in its pure form it must not refer to this consciousness as a motive to determine the free act of will. It must be grounded upon the principle of an external compulsion, such as may co-exist with the freedom of every one according to universal laws. As an illustration Kant pointed out that where it said that a creditor has a right to demand from a debtor the payment of his debt, this does not mean merely that he can bring him to feel in his mind that reason obliges him to do this; but it means that he can apply an external compulsion to force any debtor to discharge his debt, and that this compulsion is quite consistent with the freedom of all, including the parties in question, according to a universal law. Right and the title to compel thus indicate the same thing. The law of right thus amounts to a reciprocal compulsion necessarily in accordance with the freedom of every one, under the principles of a universal freedom. This formulation of the rule is regarded by Kant as an ideal, and not an empirical, statement, and is to be understood as a pure intuitive perception a priori analogous to Newton's physical law of the equality of action and reaction. This law asserts that reaction is always equal and opposite to action; that is to say, a body that pulls or presses another
body is pressed or pulled in exactly the same degree by that other body. Hence, ideally we are to conceive of individuals as reacting upon each other under a reciprocal compulsion within the framework of the principle of freedom. Kant's mechanistic interpretation of the idea of right was probably suggested by the great social physics movement of the seventeenth century, among whose chief exponents were Descartes, Hobbes, Spinoza, Leibniz, Grotius, Pufendorf, Malebranche and Berkeley. This movement, which gave social expression to the Newtonian ideas of inertia, gravitation, equilibrium and dynamics, attempted to create a social mechanics founded on a mathematical method, and purported to perceive in societary phenomena the type of mechanistic analogy put forward by Kant. Further, in the ideal constructions of mathematics only one solution is possible for certain types of problems, and on this analogy Kant held that the science of right aims at determining what every one shall have as his own with mathematical exactness. This aim is not possible in ethics, Kant recognizes, because there must be a certain latitude for exceptions. However, are not the so-called equitable rights and the right of necessity comparable to the exceptions demanded by ethics? Kant disposes of this point by excluding both cases from the realm of law.

He argues, in the case of equitable rights, that the necessary conditions are not present to enable a judge to determine the proper satisfaction to be accorded such claims. He cites two examples. In the first, one of the partners of a mercantile company formed on the basis of equal profits, has, however, done more than the other members, and in consequence has also lost more. Kant thinks that it is in accordance with equity that he should demand from the company more than merely an equal share of advantage with the rest. But from the point of view of strict legal right he can furnish no definite data to establish how much more belongs to him by the contract. In the second case, a servant is paid his wages at the end of a

\[\text{27 For a summary of the movement see Sorokin, *Contemporary Sociological Theories* (1928) 5 et seq.}\]
year of service in a coinage that became depreciated within that period. Kant holds that since there was nothing bearing on this point in the contract a court could not give a decree on the basis of vague or indefinite conditions. His holding in both cases represents the result which English and American courts would reach, though not necessarily on the ground which he proposed. To reach a different result would require a departure from the terms of the contract; but assuming such a departure, and the presence of other factors, a court would not be powerless to determine the proper satisfaction. With respect to the first case, the customary action for work and labor is, of course, in *quantum meruit*, a procedure which the courts have not found difficult to apply. Where currency depreciation is involved the courts have not been inclined to substitute a commodity or other measure for the monetary measure expressed in the contract, which they must necessarily do if they recognize a currency depreciation. But this is a matter of policy, and does not rest on an inability of the court to ascertain a satisfactory measure. "An obligation in terms of the currency of a country takes the risk of currency fluctuations," Holmes observed, "and whether creditor or debtor profits by the change the law takes no account of it." 28 Moreover, the so-called "escalator contracts" now in use today, which make express provision for currency depreciation, are presumably regarded by their draftsmen as presenting enforcement problems not beyond the competence of the judiciary. Kant’s cases actually involve difficulties of much less moment than the attempt to value the feelings or honor of an injured person. As Pound has pointed out, in words quoted from Kipling, the common law’s solution of this task passeth the understanding of the Oriental: "Is a man sad? Give him money, say the Sahibs. Is he dishonored? Give him money, say the Sahibs. Hath he a wrong upon his head? Give him money, say the Sahibs." 29 Kant’s main points are nevertheless well taken.

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29 *Social Control Through Law* (1942) 60.
Courts are constantly confronted by well-founded moral claims for which the law can provide no remedy; further, in numerous situations the legal mechanism necessarily offers only rough tools with which to grasp the delicate insubstantialities of human association, so that social and ethical ideals frequently fail of realization. Kant thinks that the doctrine of equitable rights may be summarized as "the more law, the less justice" (*summum jus, summa injuria*). Parallel with this is the rule of the right of necessity: "Necessity has no law" (*necessitas non habet legem*). In its general aspect the right of necessity raises the question whether I may use violence against one who has used none against me. Concretely, may a man who is shipwrecked, and struggling in extreme danger for his life, in order to save it thrust another from a plank on which he had saved himself.30 This is not the case of a wrongful aggressor making an unjust assault upon my life, and which I anticipate by depriving him of his own. Kant holds that the case put is beyond the reach of the criminal law, inasmuch as the punishment threatened by the law could not possibly have greater power than the fear of the loss of life in the case in question. Such a penal law would fail altogether to exercise its intended effect; for the threat of an evil which is still uncertain—such as death by judicial sentence—could not overcome the fear of an evil which is certain, as drowning is in such circumstances. An act of violent self-preservation of this kind is not beyond condemnation; it is only exempt from punishment. Moreover, there cannot be a necessity that could make what is wrong lawful. Thus, the law is confronted with rights which cannot be enforced and with enforcement which is without right.

Kant's final step in laying down his general theory was the establishment of the classifications of his subject. In his eyes the philosophy of law consisted in the determination of its fundamental principles, which in turn were regarded as an expression of the science of right. Kant divided the science of

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right into a "General Division of the Duties of Right" and a "Universal Division of Rights."\(^{51}\) In the first category he put the three formulae of Ulpian—*honeste vive, neminem laede, suum cuique tribue*—as the basis of a division of the system of juridical duties. Kant regarded Ulpian's formulae as merely devices of convenience to be taken in a general sense, perhaps not fully realized by Ulpian, but a sense which the formulae could receive. He translated the formulae into the following propositions: "Do not make thyself a mere means for the use of others, but be to them likewise an end; do no wrong to anyone, even if thou shouldst be under the necessity, in observing this duty, to cease from all connection with others and to avoid all society; enter, if wrong cannot be avoided, into a society with others in which every one may have secured to him what is his own." At the same time the formulae suggest to Kant a division of the system of juridical duties into Internal Duties, External Duties and Connecting Duties.

As a scientific system of doctrines, the system of rights is divided into natural right and positive right. Natural right rests upon pure rational principles *a priori*; positive or statutory right is what proceeds from the will of the legislator. However, the system of rights can be regarded from another point of view. Society is composed of individuals who possess implied powers of dealing morally with each other on the basis of obligations; that is, each person possesses a legal foundation for his actions in relation to the other members of the society. In this aspect, the system is divided into innate right and acquired right. Kant defines innate right as that right which belongs to everyone by nature, independent of all juridical acts of experience. Acquired right is that right which is founded upon such juridical acts. Innate right may also be called the "Internal Mine and Thine"; for external right must always be acquired.

However, Kant maintained that there was only one original inborn right that belonged to every man in virtue of his humanity. This is the right of freedom, which Kant defined as

\(^{51}\) *P. L.* 54.
independence of the compulsory will of another. It is an inborn right in so far as it can co-exist with the freedom of all according to a universal law. This conception enabled Kant to dispose of a series of rights or qualities regarded as innate by seventeenth and eighteenth century thought—equality, justice, common action—on the grounds that they are included in the principle of innate freedom and are not easily distinguishable from it even as divisions under a higher species of right. Kant claimed that his classification of rights served a practical purpose. He thought that it would assist in the ready determination of controversies over acquired rights; for the party repudiating an obligation, and on whom the burden of proof might rest, would be able to point to his innate right of freedom as specified in a particular right, which would be the warrant for his action.

Up to this point Kant has classified rights from two points of view—the general division of the duties of right, and the universal division of rights. He now added a final classification—the methodical division of the science of right. He rejected the not uncommon division into natural and social right, and put in its place the classification natural right and civil right. By the first, he meant private right, and by the second, public right, and it is under these two headings that his treatise is divided. He argued that it is the "civil state," and not the "social state," that is opposed to the "state of nature"; for a society of some sort may exist in a state of nature, but there is no civil society as an institution securing property by public laws. Right when considered with respect to the state of nature thus involves the conception of private right, that is, the system of those laws which require no external promulgation. Under the conception of public right is to be considered the system of those laws which require public promulgation.

Kant's principle of right thus turns out to be the rule in terms of which legal principles are to be measured. He has not attempted to determine the basic principles of jurisprudence applicable to all conscious law-making in its various applica-
tions. That task he will take up immediately. His present principles are anterior to such an inquiry. He has attempted to establish the formal principle by which the first principles of jurisprudence may be tested. To dismiss the principle of right as merely formal is, therefore, to misunderstand Kant's argument. Kant expressly pointed out that in pure mathematics we cannot deduce the properties of its objects from a mere abstract conception, but can only discover them by figurative construction. Thus it is, he says, with the principle of right. It is not so much the mere formal conception of right, but rather that of a universal and equal reciprocal compulsion as harmonizing with it, and reduced under general laws, that makes representation of that conception possible. Thus, the relation of the principle of right to particular rights, such as the right of parents to the management and training of the child, is not regarded by Kant as similar to the relation that obtains between the law of gravitation and Kepler's laws of planetary motion. The relationship is rather more like that which exists between the principle: "all arguments of the form 'all M is P and all S is M entail all S is P' are valid" to the specific case of "all men are mortal and all Greeks are men, therefore all Greeks are mortal." As Broad observes, it is impossible to deduce any particular argument from the general principle of the syllogism; but, if any particular argument in syllogistic form claims to be valid, its claim can be tested by seeing whether it does or does not have the formal structure required by the general principle. However, as Aristotle saw, logical principles express the general nature of things; that is to say, while logic, through its investigation of being as being, achieves the utmost generality in its principles, it nevertheless has an empirical reference. If the principle of identity were not applicable to statesmen, and to telegraph operators, to ships and to chemical elements, to concepts and to emotional states it would be defective in a necessary requirement. But Kant's

32 P. L. 49.
33 Broad, Five Types of Ethical Theory (1930) 122.
34 See P. L. 72.
principle of right fails at just this point. He has abstracted the individuals that compose society to identical points in motion in space, and in that sense his principle no doubt possesses validity. But it appears to be of the essence of a sound social and legal theory to take account of the individual differences of the classes that constitute society. All the classes are not equally weighted in strength, and the law has always found it desirable to adjust those differences through the mechanism of special protection and privilege, as in the labor laws and the rules for the protection of minors. Kant's principle, as we have seen above, ignores those differences and to that extent at least does not have an empirical reference. As a rule of thumb, however, in the framing of general legislation it possesses some merit. It warns us against the promulgation of rules that benefit powerful classes in society which do not stand in need of special protection.

**The Principles of the External Mine and Thine**

Although Kant occasionally employed the term "property" and, in fact, gave the idea specific consideration,\(^35\) his theory of the "mine and thine" embraced a much wider area than the customary judicial conception of property as rights or interests attaching to whatever may be the subject of ownership. Anything is "mine" by right, Kant says, when I am so connected with it, that if any other person should make use of it without my consent, he would do me an injury.\(^36\) He defines possession as the subjective condition of the use of anything. However, for an external thing to be mine I must assume it to be possible that I can be wronged by the use which another might make of it when it is not actually in my possession. Consequently Kant assigns to the term possession two meanings: sensible or physical possession, which is perceived by the senses, and rational or juridical possession, which is perceivable only by the intellect. To describe an object as external to me may mean either that it is different and distinct from me as a

\(^{35}\) P. L. 98.  
\(^{36}\) P. L. 62.
subject, or that it is a thing placed outside of me, and to be found elsewhere in space or time. In the first sense the term possession means rational possession, and in the second sense, empirical possession. Rational possession, if it is possible, is possession viewed apart from physical holding or detention. Kant holds that it is an assumption a priori of the practical reason to regard and treat every object within the range of my free exercise of will as objectively a possible mine or thine. He terms this postulate a "permissive law" of the practical reason, since it gives us a special title which cannot be deduced from the mere conception of right generally. This title permits us to impose upon all others an obligation, to which they are not otherwise subject, to refrain from the use of certain objects of our choice, because we have already taken them into our possession. Finally, any one who would assert the right to a thing as his, must be in possession of it as an object; otherwise he would not be wronged. On the basis of this theory Kant held that there can only be three external objects of my will in the activity of choice: a corporeal thing external to me; the free-will of another in the performance of a particular act; and the state of another in relation to myself.

Little reflection is needed to perceive the acuteness of this analysis. It represents the most finished proprietary theory advanced by any philosopher of the first rank up to the time of its promulgation. Its central idea—the exclusion of other persons from the thing appropriated—has become a commonplace of juridical thought, and has established itself as a workable idea for both text writers and judges. Thus Wigmore writes, "The Property-Right is essentially a guarantee of the exclusion of other persons from the use or handling of the thing. Its most absolute form amounts to no other than that. The common mode of definition, therefore, as a right of use by the owner himself, is fallacious." Holmes' theory of property is just as close to Kant's conception, and possesses the same reservations Kant entertained in his view of the labor theory.

37 2 Select Cases on the Law of Torts (1912) 858.
“Property, a creation of law,” Holmes held, “does not arise from value, although exchangeable,—a matter of fact. . . . Property depends upon exclusion by law from interference, and a person is not excluded from using [it] . . . merely because . . . it took labor and genius to make it.” 38 But Kant, notwithstanding his enthusiasm for the principles of the French Revolution, did not hesitate to extend his theory to situations to which it appeared applicable, although in the process he ran counter to many of the ideals of his time and our own. His first extension presented no difficulty from this point of view, and represents in fact a position to which the courts are beginning to give increased adherence. Kant held that one of the external objects of the will covered by the conception of the external mine and thine was the free-will of another in the performance of a particular act. To enforce this right the holder of it must be able to assert, “I am in possession of the will of the other, so as to determine him to the performance of a particular act, although the time for it has not yet come.” 39 This principle plainly covers all types of property which depend for their being upon the existence of a promise or grant, such as the property evidenced by certificates of stock, bonds, promissory notes and franchises. But it goes further, and embraces such matters as the property interest of the plaintiff in Lumley v. Gy., 40 where it was held that the defendant, in enticing an opera singer not to carry out her contract with the plaintiff to sing at his theatre, had interfered with a property interest in a manner that was actionable. However, Kant’s extension of the proprietary idea to domestic and other relational interests presents an obvious difficulty which has troubled his commentators. Is it possible to say in modern times that the head of the household has a “property” interest in the wife, child, or domestic? The action of the parent in the instance of sexual intercourse with his child developed as trespass or case for loss

39 P. L. 65.
40 2 El. & Bl. 216 (1858).
of services—a proprietary interest—which apparently was the most convenient device available. This idea has now almost vanished, so that any trivial service, such as making a cup of tea for the parent, or even the mere right to service, is sufficient. Some courts have recognized that loss of services is an obsolete fiction and is no longer necessary to maintain the action. What, then, is the basis for an action for interference with family relations? It is asserted that the harm is not done to person or to property but rather to rights incident to them. However, as has been pointed out, this is not true historically. Criminal conversation and alienation of affections, the two best-known marital causes of action, are both based upon the proprietary interest of the husband in the body and services of his wife. Moreover the adoption of the theory of incidental rights by the courts has led to unfortunate results. When there is a change in the marital relationship, as through judicial separation, the guilty party may lose the right to the custody of the child. But the same party does not lose the right to sue for criminal conversation. In the first case the right is an incidental one which is lost when the relationship changes; in the second case the proprietary right to exclusive sexual intercourse persists. This distinction had important consequences in the interpretation of women’s enabling acts. The first view led to the extension of the action to the wife; the second would have resulted in its extinction. As the result of the absence of a sound theory “consortium has been thrown into hopeless confusion.” Whatever may be the drawbacks of Kant’s theory, it has at least the merit of avoiding logical dilemmas of this kind.

In order to make his theory formally complete Kant had some further difficulties to explain, some raised by the theory itself and some by his own philosophy. His theory assumed that every object within the range of the free exercise of his will was objectively a possible mine or thine. Consequently,

41 Prosser, Law of Torts (1941) 933.
42 Street, Foundations of Legal Liability (1906) 264.
44 Ibid. 672.
since this assumption applied to things which I may not be physically holding, things located outside of me in space or time, I must be in some kind of possession of an external thing, if the thing is to be regarded as mine. A rational possession must therefore be assumed as possible if there is to be an external mine and thine. But this at once raises the question: How is a merely juridical or rational possession possible? Here, however, Kant encountered a difficulty created by his own philosophy. He had defined an analytic proposition as one in which the predicate was contained in the subject, and on the basis of which, through an application of the principle of contradiction, we could make further statements independently of additional knowledge. "A black book is black" is such a proposition. But the predicate of a synthetic proposition is not contained in the subject, and must be derived from other sources, as in the proposition, "The book is on the table." Kant held that all propositions of right, as juridical propositions, are propositions a priori. A proposition a priori with respect to empirical possession is analytic, since it implies nothing beyond the right of a person in reference to himself. But a proposition with respect to rational possession, since it asserts a possession even without physical holding and therefore looks beyond the subject to experience, is synthetic. How is this possible a priori?

Kant's attempt to answer this question led him to his important conception of an original community of the soil, as distinguished from the idea of a primitive community which he regarded as a fiction. He argued that the first possessor of a portion of the earth's surface based his claim to it upon an innate right of common possession of the earth's surface, and also upon the universal will that corresponded a priori to it, and which allows a private possession of the soil. If this were not so, freedom would deprive itself of the use of its voluntary activity in thus putting useable objects out of all possibility of use. It would annihilate the objects by making them res

45 P. L. 66. 46 P. L. 68.
nullius, notwithstanding the fact that acts of will in relation to such things would formally harmonize, in the actual use of them, with the external freedom of all according to universal laws. Thus a first appropriator acquires originally by primary possession a particular portion of the ground; and by right he resists every other person who would hinder him in the private use of it. However, his resistance during the continuance of the "state of nature" would be extra-juridical, because public law does not yet exist. Kant therefore laid down the postulate that every external object of the free activity of my will, so far as I have it in my power, although not in the possession of it, may be reckoned as juridically mine. This postulate, in turn, was founded upon the postulate: It is a juridical duty so to act towards others that what is external and useable may come into the possession or become the property of someone. The conception of possession as embracing the non-physical is to be understood in conjunction with this latter postulate. But the conception of non-physical possession cannot be proved or comprehended in itself, because it is a rational conception for which no empirical perception can be furnished. However, if we follow the dictate of the postulate, the rational condition of a purely juridical possession must also be possible.

At this point Kant introduced his important idea of "having." This was a necessary conception in order to account for the application of the principle of the possibility of an external mine and thine to objects of experience. A purely juridical possession is not an empirical conception dependent on conditions of space and time. Since the conception of right is contained merely in the reason, it cannot be immediately applied to objects of experience, so as to give the conception of an empirical possession, but must be applied directly to the mediating conception in the understanding of possession in general. Therefore the mind, in place of physical holding as an empirical representation of possession, substitutes the formal conception of "having" abstracted from all conditions of space

\[\text{P. L. 62-63.}\]

\[\text{P. L. 72.}\]
and time, and only as implying that an object is in my power and at my disposal. This conception has certain significant consequences. The term "external" carries no significance of existence in another place than where I am; my acceptance refers to no other time than the moment in which I have the offer of a thing; "external" signifies only an object different from or other than myself. When I say that I possess "Whiteacre" although I am in a different place, I do not mean that there is an intellectual relationship between myself and "Whiteacre," but that I have "Whiteacre," as a practical matter, in my power and at my disposal, a meaning which is independent of space; it is also mine, because my use of it in accordance with the determination of my will is not in conflict with the law of external freedom. The mode then, of having something external to myself as mine, consists in a specially juridical connection of the will of the subject with that object, independently of the empirical relations to it in space and time, and in accordance with the conception of a rational possession.

Civil society alone furnishes a common, collective, and authoritative will, that can furnish a guarantee of security to all. Kant therefore held that to have anything external as one's own is only possible in a civil state of society under the regulation of a public legislative power.\textsuperscript{49} In the state of nature, if anything external is held as one's own, it is mere physical possession, with a presumption of right that eventually it will be made juridical. It amounts, in other words, to a kind of potential juridical possession.\textsuperscript{50}

Since Kant is sometimes criticized for failing to offer a justification of private property it seems advisable to consider the specific theory he advanced on this question. His defence of property was a highly refined version of the occupation theory, which held that the act of taking occupancy of things without an owner, with the intention of making them one's own property, was the principal method by which title was originally acquired. From the Roman jurists to Kant the theory had been

\textsuperscript{49} P. L. 76.  \textsuperscript{50} P. L. 79.
an influential one. Kant’s justification, which has been discussed from another point of view above, is that if the will is not exercised with respect to external objects in accordance with a universal law the objects are thereby annihilated by making them *res nullius*.

But this negation of the will is not possible. The pure practical reason lays down only formal laws as principles to regulate the exercise of the will. In this process all qualities of the object are ignored except the single one of being an object of the activity of the will. Hence the practical reason cannot contain, in reference to such an object, an absolute prohibition of its use, because this would involve a contradiction of external freedom with itself. Kant’s attempt to establish a formal proof of the proposition that everything ought to have an owner is an important illustration of the power of philosophical analysis in legal theory. In the efforts of the historical jurists to work out a justification for the same proposition the only arguments apparently available were that it was supported by an historical “presumption” and a “feeling” that it was “naturally” right.

**Real Right**

How are things acquired? Kant answers that I acquire a thing when I act so that it becomes mine. The idea was expressed by him in the Principle of External Acquisition as follows: Whatever I bring under my power according to the law of external freedom, of which as an object of my free activity of will I have the capability of making use according to the postulate of the practical reason, and which I will to become mine in conformity with the idea of a possible united common will, *is* mine.

Three practical elements are involved in original acquisition: seizure of an object which belongs to no one; a formal declaration of possession of the object; appropriation, as the act, in idea, of an externally legislative common

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51 *P. L.* 62-63.
53 *P. L.* 82.
will, by which all are obliged to respect my act of will. The original primary acquisition of an external object of the action of the will Kant calls "occupancy," and it can occur only with respect to corporeal things. However, we are faced here with the task of accounting for title to accessory things, such as alluvial deposits. Strictly, under Kant's theory, an original occupier could claim land formed in this manner. In order to meet the question Kant invoked the scholastic (or Aristotelian) doctrine of accident, i.e., that which has no independent being, but adheres in some other substance. Accidents inhering in the substance of the soil, he held, are mine *jure rei meae*. He extended the category to include everything which is so connected with anything of mine, that it cannot be separated from what is mine without altering it substantially, e.g., gilding on an object, mixture of a material belonging to me with other things, and alteration of the adjoining bed of a river in my favor so as to produce an increase of my land. But the last case seems to beg the question. The Roman lawyers held that if a river altered its bed, the old bed belonged to the owners on each side, and the new bed became public. One of the great virtues of Kant's exposition of his theory of law is his constant putting of difficult cases, mostly drawn from Roman law sources, to illustrate his theory. A further virtue is his uniform endeavor to set forth the reasons for his position. In later jurisprudence, unencumbered by the will theory, it is held that original acquisition can take place either with or without an act of possession, the latter class embracing *accessio*, *confusio* and *commixtio*. But the categories, for all that appears, are purely empirical, and no effort is made to relate them to a general theory. Jurisprudence, by definition, if it is not theory is nothing.

When A holds an external object that belongs to B, B can compel A to return it to him. Kant's theory of real right is an effort to explain why this is possible. He denies that the exter-

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54 *P. L.* 97-98.
55 Buckland, *Textbook of Roman Law from Augustus to Justinian* (1921) 212.
nal juridical relation of the will is a kind of immediate relation to an external thing. A right on one side has always a duty corresponding to it on the other; but to affirm an obligation of persons towards things, and conversely, Kant thinks is absurd.\textsuperscript{57} He holds that there is only one condition under which it is possible to exclude every other possessor from the private use of a thing; that is the condition of common collective possession. The collective will of all united in a relation of common possession gives rise to an obligation on the part of another person to abstain from the use of the thing. Therefore the definition of right in a thing is a right to the private use of a thing, of which I am in possession—original or derivative—in common with all others. Further, the term "real right" means not only the "right in a thing" but also the constitutive principle of all the laws which relate to the real mine and thine. It is evident, however, that a man entirely alone upon the earth could properly neither have nor acquire any external things as his own, because between him as a person and all external things as material objects there could be no relations of obligation. There is therefore, literally, no direct right in a thing, but only that right is to be called "real" which belongs to any one as constituted against a person who is in common possession of things with all others in the civil state of society.

Moveable property is defined by Kant as everything that can be destroyed; and it is to be regarded as an inherence in the soil which is a substance.\textsuperscript{58} Since accidents cannot exist apart from their substances, so in the practical relation, moveables on the soil cannot be regarded as belonging to any one unless he is supposed to have been previously in juridical possession of the soil so that it is thus considered to be his. Kant therefore holds that the first acquisition of a thing can only be that of the soil. An assumption \textit{a priori} of the practical reason was that every object within the range of my free exercise of will was objectively a possible mine or thine. From this it follows that every part of the soil may be originally acquired.\textsuperscript{59}

\textsuperscript{57} P. L. 85. \textsuperscript{58} P. L. 87. \textsuperscript{59} P. L. 88.
Chance or nature has placed men upon the earth at particular places, and they are therefore originally and before any juridical act of will in rightful possession of the soil. That possession is common because of the interconnectedness of the places of the earth, which is a globe. If the earth had been an infinite plain, social community would not have been a necessary consequence of existence on the earth. Possession prior to juridical acts is an original possession in common, and Kant holds that it is not derived from experience, nor is it dependent on conditions of time, as is the case with what he regards as the imaginary and indemonstrable fiction of a primeval community of possession in actual history. Occupancy is the acquisition of an external object by an individual act of will. The original acquisition of a limited portion of the soil is an act of occupation, and its essential condition is its priority in respect of time. In the state of nature acquisition can only be provisory, and only within a civil constitution can anything be acquired peremptorily. Kant limits the right of taking possession of the soil to the extent of the capacity to defend it. Thus, within the range of a cannon shot no one has a right to intrude on the coast of a country that already belongs to a particular State. What the fishing rights are in the English Channel, now that guns can shoot across it, would be impossible to determine on this principle. How people settle themselves upon the earth, provided they keep within their own boundaries, is a matter, Kant holds, of mere pleasure and choice on their part. Thus he repudiates, as a “flimsy veil of injustice,” all attempts to rule by force the so-called backward peoples of the earth, or to establish colonies by deceptive purchase.  

Kant’s important contribution in his conception of real right is his idea that right in a thing presupposes a collective will of all united in a relation of common possession. His insistence upon this point emphasizes the significance of system in legal analysis. Through system we pass beyond knowledge which may be incomplete to knowledge in which all the necessary

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60 P. L. 93.
propositions are explicitly set forth. If knowledge is not organized in this manner the foundations of our analysis may rest upon unapprehended assumptions of the utmost dubiety. We may also be led to the useless exploration of propositions which possess no meaning in the domain of inquiry. System also promotes economy in the statement of the necessary propositions of the subject. In a modern treatment of the subject of possession no less than seven factors are described in connection with the explanation of only one element of the idea, and admittedly the enumeration is incomplete or, in some aspects, erroneous.\footnote{Kant's isolation of a collective will united in a relation of common possession furnishes not only a basis for the explanation of a right in a thing, but it separates law as a study of man in his social aspects as distinguished from such subjects as anatomy and zoology, which study him as an individual. In present-day sociology the counterpart of Kant's theory is the idea of psychic interaction, or intermindedness, the reciprocal play of mind upon mind which results in mutual influences. It is held to be not only the distinguishing mark of the group, but the very factor by which the group's character as a group is determined.}\footnote{\textsuperscript{61} Kant's isolation of a collective will united in a relation of common possession furnishes not only a basis for the explanation of a right in a thing, but it separates law as a study of man in his social aspects as distinguished from such subjects as anatomy and zoology, which study him as an individual. In present-day sociology the counterpart of Kant's theory is the idea of psychic interaction, or intermindedness, the reciprocal play of mind upon mind which results in mutual influences. It is held to be not only the distinguishing mark of the group, but the very factor by which the group's character as a group is determined.} \textsuperscript{62} Kant's isolation of a collective will united in a relation of common possession furnishes not only a basis for the explanation of a right in a thing, but it separates law as a study of man in his social aspects as distinguished from such subjects as anatomy and zoology, which study him as an individual. In present-day sociology the counterpart of Kant's theory is the idea of psychic interaction, or intermindedness, the reciprocal play of mind upon mind which results in mutual influences. It is held to be not only the distinguishing mark of the group, but the very factor by which the group's character as a group is determined.\footnote{\textsuperscript{61} Salmond, \textit{Jurisprudence} (8th ed. 1930) 302 et seq.} \textsuperscript{62} Eubank, \textit{Concepts of Sociology} (1932) 163-64. \textsuperscript{63} \textsuperscript{3} System des heutigen römischen Rechts (1840) § 140. \textsuperscript{64} Grotius, \textit{De Jure Belli ac Pacis Libri Tres} (1625) Bk. II, c. 13.

**Personal Right**

One of the most influential of Kant's ideas in jurisprudence was his theory of contract which he based on his conception of the external mine and thine. It is a philosophical justification of the so-called subjective theory of contract which was authoritatively stated by Savigny\footnote{\textsuperscript{63} System des heutigen römischen Rechts (1840) § 140.} and further developed by the later historical jurists. Kant's problem was to provide a justification for the enforcement of contracts. In the natural law theory which preceded him promises were self-justifying on the basis of their own inherent moral force.\footnote{\textsuperscript{64} Grotius, \textit{De Jure Belli ac Pacis Libri Tres} (1625) Bk. II, c. 13.} Kant asserted emphatically that is was impossible to give any proof of the proposition
"promises ought to be kept," a task on which previous writers on jurisprudence had expended much labor.\textsuperscript{65} Kant's whole justification of enforcement turned on his idea of a common collective possession.\textsuperscript{66} One of the forms of right, according to Kant, is the possession of the active free-will of another person which includes the power to determine it by my will to a certain action according to the laws of freedom. It is possible to have several such rights in reference to the same person or to different persons. The principle in the Kantian system which justifies such possession is that of personal right, and there is only one such principle. The acquisition of a personal right can never be primary or arbitrary, nor is it permissible, Kant insisted, to employ an unjust means in such acquisition. Acquisition by means of the action of another is always derived from what that other has as his own. As a juridical act the derivation can never be a mere negative relinquishment or renunciation of what is his, because such a negative act would only amount to a cessation of his right, and not to the acquirement of a right on the part of another. There must therefore be a positive transference or conveyance. But this is only possible on Kant's theory, by means of a common will, through which objects come into the power of another, so that as one renounces a particular thing which he holds under the common right, the same object when accepted by another, in consequence of a positive act of will, becomes the property of that other. Kant calls the transference of the property of one to another its "alienation"; and the act of the united wills of two persons, by which what belonged to one passes to another, he terms "contract."

Four juridical acts of will are involved in every contract, Kant held; two of them are preparatory acts, and two of them constitutive acts. There is first an offer, which in turn is followed by an indication that the offer will be received; these two acts are followed by a promise and an acceptance. For an offer cannot constitute a promise before it can be judged that the

\textsuperscript{65} P. L. 103. \textsuperscript{66} P. L. 101.
thing offered is something that is agreeable to the party to whom it is offered, and this much is shown by the first two declarations; but by them alone there is nothing as yet acquired. In the civil law theory Kant's separation of offer and promise still prevails, but the corrections in the theory that are made from time to time are worked out on an empirical and not an abstract basis. A merchant who exposes an article for sale may be regarded as offering it at that price to any one; but he may also be permitted to substitute an identical article; and when he offers it in the window he may, under certain circumstances, not be required to sell it at all. An offer of reward to the finder of lost property is not invalid because the offeree is indeterminate; but a "To Let" notice on a house is not an offer, but merely an offer to negotiate. 

In contemporary common law theory it is argued that an offer is a promise, but the question is not free from doubt. Unless an offer is a promise it is difficult to imagine on what basis general offers, such as an offer of reward for the apprehension of criminals, could be sustained. The common law theory of contract recognizes a manifestation of a general intention or willingness to contract, but which nevertheless does not amount to an offer, i.e., a promise. Thus A may say to B: "Would you be interested in buying my horse?" This category of the common law theory, the logical justification of which goes back to Plato's argument in the *Sophist*, that false knowledge is knowledge, does not differ from Kant's idea of "offer." In the Kantian theory an "offer" is a necessary step, from the point of view of the will-idea, in the formation of a contract; but it is not a juridically necessary one.

But a further difficulty remains. Kant points out that it is not by the particular wills of the promisor and promisee that the property of the former passes over to the latter; this is effected only by the combined or united wills of both, and

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69 *P. L. 102.*
Kant consequently so far only as the will of both is declared at the same time or simultaneously. This idea is at the basis of the common law rule, settled by Cooke v. Oxley,\textsuperscript{70} that an offer must be accepted instantaneously, or it ceased to exist. But as Kant pointed out, simultaneity is impossible by empirical acts of declaration, which can only follow each other in time, and are never actually simultaneous. For if I have promised, and another person is now merely willing to accept, during the interval before actual acceptance, however short it may be, I may retract my offer, because I am thus far still free; and on the other side, the acceptor, for the same reason, may likewise hold himself not to be bound, up till the moment of acceptance, by his counter-declaration following upon the promise. After Kant the civil law lawyers found no reason in theory why an offer was not revocable; but the offeree would frequently act upon the offer as soon as it was received. Furthermore an offer clearly was terminated by death or insanity. Jhering first solved the problem by holding the offeror liable for losses actually sustained by the offeree in reliance on the offer, but not for the profits which would accrue under the contract. Eventually, the German Civil Code, and the codes of other countries, provided that an offer cannot be revoked for a reasonable time or for the time provided in the offer, unless the offer provides against the irrevocability.\textsuperscript{71} Kant argued further that the external formalities on the conclusion of a contract—such as shaking hands or breaking a straw held by two persons—prove in fact the embarrassment of the contracting parties as to how and in what way they may represent declarations, which are always successive, as existing simultaneously; and the forms fail to do this. They are, by their very nature, acts necessarily following each other in time, so that when the one act is, the other either is not yet or is no longer. The same problem is present in the common law which holds that offer and acceptance must exist simultaneously. British and Ameri-

\textsuperscript{70} (1790) 3 T. R. 653; 1 Williston, \textit{op. cit.} note 68 at 142-43; 12 Holds. 582.

\textsuperscript{71} 1 Williston, \textit{op. cit.} note 68 at 186.
can courts have sometimes attempted to meet the problem with the fiction of a relation back of the acceptance of the offer. Thus Lord Ellenborough, in a case involving a contract by mail, said, "the acceptance must be taken as simultaneous with the offer." But this is objected to by Williston on the ground that the offer is not merely evidence of a state of mind. It is an element in the formation of a contract irrespective of the offeror's mental attitude, and may continue effective in spite of a change in that attitude. He therefore believes that the resort to a fiction is unnecessary, and that the only accurate way to express the matter is to say that the offeree's power of acceptance continues till the acceptance. This solution is in accord with the rule that a revocation requires communication; but this seems inconsistent with the requirement that the formation of a simple contract demands a manifested mutual assent, inasmuch as there can be a manifested mutual dissent, but if the revocation has not been communicated, the contract is nevertheless formed upon the acceptance of the offer. There is the further difficulty of applying the rule to general offers. Must every member of the public who sees the general offer receive notice of its revocation? In an additional departure from the rule the Supreme Court has held that a reasonable effort to give notice of revocation, i.e., full publication so far as possible in the same way as the original offer, is sufficient.

All this points merely to the great difficulty of framing a general theory into which can be fitted the unforeseeable complexities of legal phenomena.

Kant accepted all the conditions of his contract theory and met the simultaneity problem squarely. His solution turned on his concept of "having" discussed above. The two juridical acts of promise and acceptance must necessarily be regarded as following one another in time. But the juridical external relation which is established when I take possession of the free-will of another is purely rational in itself. The will as a law-

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72 *Kennedy v. Lee* (1817) 3 Mer. 441, 454. Quoted 1 Williston, *op. cit.* note 68 at 143 n.4.

giving faculty of reason represents this possession as intelligible in accordance with the conceptions of freedom and under abstraction of the empirical conditions. But then the two acts of promise and acceptance are not regarded as following one another in time, but as proceeding from a common will (Kant's presupposition of a collective will of all united in a relation of common possession), and the object promised is represented, under elimination of empirical conditions, as acquired according to the law of the pure practical reason; i.e., the a priori assumption to treat every object within the range of the free exercise of the will as objectively a possible mine or thine. Thus the modern common law theory, and Kant's theory both come to the same thing: an offer and an acceptance must exist at the same time; but simultaneity in the common law is preserved through the fiction of a continuing power in the offeree, and in Kant's theory through the elimination of the condition of time.

Kant's idea of a union of wills as the necessary element in the formation of contracts has been supplanted in the modern common law by the so-called objective theory. This theory, in the words of one of its most vigorous proponents, insists that the legal meaning of such acts on the part of one man as induce another to enter into a contract with him, is not what the former really intended, nor what the latter really supposed the former to intend, but what a "reasonable man," i.e., a judge or jury, would put upon such acts. In an extreme case this means that when adverse parties who speak different languages and cannot understand each other voluntarily agree upon an interpreter to translate for them, his representations are chargeable to each although his statements may be erroneous. However, it is interesting to note that there is a retreat from the rule, founded on the objective theory, that the offeror is bound by an inaccurately transmitted telegraphic offer. It is now proposed not to bind him but to put him under a duty

74 Holland, op. cit. note 56 at 256.
75 Bonelli v. Burton, 61 Or. 429, 123, Pac. 37 (1912).
to use due care to mitigate damages, a solution which would meet Jhering's analysis of a hundred years ago. Kant does not discuss the question of mistake in offer and acceptance, but there is no question that his theory would not permit the formation of a contract where there was not a union of wills. But there is some ground in his language for thinking that he may be closer to the objective theory than is generally supposed. How are we to determine when there is a union of wills? Again, Kant does not expressly take up the point, but he nowhere suggests or implies that the hearts of the offeror and offeree shall be searched. On the contrary, he refers to the "various modes of confirming the declarations" and cites two instances of an objective nature; further, he expressly states that the contract relation "is conceived at first empirically by means of the declaration and counter-declaration of the free-will of the parties," which seems to indicate an objective measure.

By the contract, Kant held, I acquire the promise of another, as distinguished from the thing promised. I have become the richer in possession by the acquisition of an active obligation that I can bring to bear upon the freedom of another. Nevertheless it is only a personal right, valid only to the effect of acting upon a particular physical person and specially upon the causality of his will, so that he shall perform something for me. It is therefore not a real right through which alone I can acquire a right valid against every possessor of the thing; for it is in this that all right in a thing consists. On the basis of the current American theory that a contract is a promise for breach of which the law gives a remedy, the answer to the question what is acquired by a contract would be the same as Kant's. It was held further by Kant that a thing is not acquired by the acceptance of the promise, but only by the delivery of the object promised. Kant is here following the rule of the

77 P. L. 102-103.
78 Restatement of Contracts § 1.
Roman law which insisted upon delivery before a transfer of the property was effected; but this rule was already on its way towards abandonment by the common law by the time of Henry VI.

**REAL PERSONAL RIGHT**

Personal right of a real kind, the last of the categories of the mine and thine, is the right to the possession of an external object as a thing and to the use of it as a person. This right refers specially to the family and household; and the relations involved are those of free beings in reciprocal real interaction with each other. The household forms a society composed as a whole of members standing in community with each other as persons. Kant held that individuals acquire this social status neither by arbitrary individual action nor by contract, but by a natural permissive law, based on the right of humanity in our own person. This law is not only a right, but constitutes possession in reference to a person; it is therefore a right which rises above all mere real and personal right. In the household a man acquires a wife; the husband and wife acquire children, thus constituting the family; and the family acquire domestics. These objects can be acquired, but they are inalienable; and the right of possession in the objects is the most strictly personal of all rights.

To the great pain of subsequent moralists Kant defined marriage as a mutual lease of the sexual organs. He held that the domestic relations were founded on marriage, which in turn was founded on the natural reciprocity or intercommunity of the sexes. This natural union of the sexes could proceed according to the mere animal nature (fornicatio) or according to law, i.e., marriage. In spite of the formality of his approach to the problem Kant, probably under the influence of Protestant theology, here adopted what has since become a widely

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81 *P. L.* 108.
82 *P. L.* 110.
shared ethical point of view. He admitted two factors as the end of marriage—the erotic and procreative elements. Montaigne, whose analysis of such matters was anything but formalistic, refused, following the classical tradition, to admit the legitimacy of the erotic element and, in fact, condemned its presence as a kind of incest. On the basis of his conception Kant proceeded to lay down a series of highly edifying rules. In the relationship of natural reciprocity—in the strict Kantian sense of *usus membrorum sexualium alterius*—there is an enjoyment for which the one person is given up to the other. But in this relationship the human individual makes himself a *res*, which is contrary to the right of humanity in his own person. However, this is possible under the one condition that as the one person is acquired by the other as a *res*, that same person also equally acquires the other reciprocally, and thus regains and re-establishes the rational personality. The acquisition of a part of the human organism being, on account of its unity, at the same time the acquisition of the whole person, it follows that the surrender and acceptation of, or by, one sex in relation to the other, is not only permissible under the condition of marriage, but is further only really possible under that condition. Moreover, the personal right of this relationship is real in kind. Therefore if one of the married persons runs away or enters into the possession of another, the aggrieved spouse is entitled to bring the erring one back to the former relation as if that person were a thing. Since marriage is a relationship of equality it is only truly realized in monogamy; on the same principle Kant condemns both concubinage and morganatic marriages. But how is the case of the legal supremacy of the husband to be justified? This is not contrary to natural equality, Kant said, if it is based only upon the natural superiority of the faculties of the husband compared with the wife, in the realization of the common interest of the household, and if the right to command is based merely upon this fact. For this right may thus be deduced from the very duty and

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equality in relation to the end involved. Finally, he held that the contract of marriage is completed only by conjugal cohabitation. If there is a secret agreement before marriage not to cohabit the marriage may be dissolved at will by either party; if the incapacity arises after marriage no such right exists. Kant wrote, of course, before the great revolution in the social status of women had occurred. But the doctrines of Condorcet, and Mary Wollstonecraft’s little book, which had been translated into German, were an indication that a new wind was beginning to blow. This gentle zephyr left Kant, however, unmoved.

Kant’s treatment of the relationship of parent and child, and of master and servant, was also a faithful reflection of eighteenth-century thought. From the fact of procreation there follows the duty of rearing children as the products of the union. Children accordingly as persons have a congenital right to be reared by their parents until they are capable of maintaining themselves.\(^\text{84}\) Parents have no right to destroy their child as if it were their own property, or even to leave it to chance. Kant is here speaking of legitimate children; his opinion of the treatment of illegitimate children was, as we shall see, different. From these duties of the parents there arises the right of the parents to the management and training of the child, which continues until the period of practicable self-support. The domestic relationship of the household is not founded on social equality, but is of the kind that one commands as master and another obeys as servant.\(^\text{85}\) Domestics belong to the master as if by a real right; for if any of them run away, he is entitled to bring them again under his power by a unilateral act of will. But in the master’s use of domestics he is not entitled to conduct himself towards them as if he were their owner. His power rests only on contract, and particularly on a restricted contract. For a contract by which the one party renounced his whole freedom for the advantage of the other, ceasing thereby to be a person and consequently having

\(^{84}\text{P. L. 114.}\)

\(^{85}\text{P. L. 119.}\)
no duty even to observe a contract, is self-contradictory, and is therefore of itself null and void. In the American law of slavery the self-contradictory feature of contractual relations with slaves was recognized, but from an entirely different point of view. Unless granted by statute, a slave possessed no legal capacities at all, and attempts to extend positive rights to him were regarded as an effort to reconcile inherent contradictions.\textsuperscript{86} “It was an inflexible rule of the law of African slavery, wherever it existed,” the Supreme Court observed, “that the slave was incapable of entering into any contract, not excepting the contract of marriage.”\textsuperscript{87} The court added that this rule was harsher than the one applied to the Roman bondman, the Saxon villein, the Russian serf and the German and Polish slave. The domestic relationship contract in the Kantian system never permits an abuse of the domestic, and in what constitutes an abuse the servant is as competent to judge as the master. Servants should therefore never be held in bondage as slaves or serfs. On the same principle a domestic contract cannot be concluded for life, but in all cases only for a definite period. Children, including even the children of one who has become enslaved owing to a crime, are always free; for every man is born free, because he has at birth as yet broken no law.\textsuperscript{88}

Kant concludes his survey of the principles of private right with an account of what he terms ideal modes of acquisition, that is to say, acquisition which involves no causality in time and which is founded upon a mere idea of pure reason. He holds there are three such modes of acquisition—usucapion, inheritance, and the continuing right of a good name after death, the latter mode representing an attitude to which the law of defamation generally has not given its approbation. Kant also considers certain forms of acquisition—gifts, loans, lost property, and the security which is gained through the taking of an oath—from the point of view of their association

\textsuperscript{86} Ex parte Boylston, 2 Strob. 41 (S.C. 1846).

\textsuperscript{87} Hall v. United States, 2 Otto 37 (1876).

\textsuperscript{88} P. L. 132-40.
with the judicial process. But he introduces no new principles at this point in his argument, and it is therefore unnecessary to examine it in any detail.

Thus in the Kantian system, the principle of the external mine and thine carries the whole burden of the private rights of persons. At the opening of the Institutes of Justinian we are told that the study of law is divided into two branches: public law was that part which has to do with the government of the Roman Empire; private law was that part which concerned the interests of individuals. Kant’s public law, as will be seen, is also a system of constitutional law. However, Kant has transformed the Roman classification into a formal system of law based upon a set of postulates which purportedly, in themselves and in the conclusions deducible from them, express the regulatory principles applicable to private and public rights. Kant’s principle of the external mine and thine has the merit of great generality. By its terms it covers such basic categories as property and contract in their root aspects. But it goes further than that: Its generality is such that the modern theory of interests, which classifies interests as (a) interests of personality; (b) domestic interests; and (c) interests of substance, admittedly builds directly upon Kant’s three-fold classification of rights as personal, real-personal and real. On its face, therefore, the Kantian analysis, at least in its abstract phase, is sufficiently general to embrace the entire contemporary field of private rights, i.e., the individual interests which are secured by law. But the most cursory inspection reveals that in actuality it falls far short of this. That is to say, there are large areas of the law occupied by doctrines relating to individual interests—trusts, for example—which in principle may be covered by Kant’s theory but which he does not discuss at all. It is easy to perceive that the theory of trusts falls within the principle of the external mine and thine; but it is also apparent that adjustments would have to be made in the principle if it is

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89 P. L. 141-54.
90 I. 1. 4.
fully to account for the law of trusts, since it is clear that many
trust doctrines cannot be deduced from the premises established
by Kant. In the modern theory of interests this difficulty is
avoided through the use of the method of enumeration. In
the Kantian system the classes of rights are deduced from
the Kant's principle of non-discrimination.

Stated generally, the task of formalistic theories of law is
to achieve the universality which will comprehend the possible
legal systems, and at the same time allow for the differences
which the separate systems necessarily will exhibit. But to
accomplish this end the formalistic theory must establish indicia
which will show when the determination is juridically indifferent
and when it is significant. The requirement in Anglo-American
law of a sufficient consideration in the formation of informal
contracts is not paralleled by the Roman or modern Continental
law. Is this a matter to which a formal theory of law should
be indifferent or not? Formalism's great weakness is that it is
nondiscriminating in an area where discrimination is necessary.
This is clearly shown by Kant's insistence on the proposition
that a lie is never justified; but moralists have never accepted
the idea that a lie told to an intended assassin in order to save
an innocent life is not justified. In the Kantian theory a
discrimination of this kind is condemned on the ground that it
destroys the universality of the system. However, it is precisely
this kind of discrimination which formalistic systems must
make if they are to be effective. Formalistic theories must also
provide for the growth of the system and supply indicia from
which rules can be deduced to cover new situations. Kant put
illicit sex relations on the level with cannibalism; 92 he also, as
we saw above, placed such a value upon the worth of a good
name that he would permit satisfaction for the calumny of a
dead person. 93 To date the rule of the American courts is that
no damages will be allowed for the mental distress and humiliation
caused a woman who receives a proposal of illicit inter-

92 P.L. 299. 93 P.L. 139.
of course, "the view being, apparently, that there is no harm in asking." It is arguable that Kant would hold otherwise; but there is nothing in his system from which that conclusion can be strictly deduced.

**The Juridical State**

Kant has now isolated the rights which individuals may claim as their own, and he has worked out the principles on which those rights are founded. But he has not yet told us how the rights are to be secured. His solution of this problem contained little that was new, and is clearly derived from Hobbes and others. He argued that the juridical state alone contains the conditions under which it is possible for every one to obtain the right that is his due. The formal principle of actually participating in such right is public justice, which has three aspects: protective justice, commutative justice and distributive justice. In protective justice the law declares merely what relation is internally right in respect of form; in commutative justice it declares what is likewise externally in accord with a law in respect of the object, and what possession is rightful; in distributive justice it declares what is right, and what is just, and to what extent, by the judgment of a court in any particular case coming under the given law.

Now the non-juridical state is that condition of society in which there is no distributive justice, and is commonly called the state of nature. Its opposite is the civil state, which possesses distributive justice. Juridical forms of society, such as marriage and parental authority, may exist in a state of nature; but there is no incumbent obligation *a priori* to enter into any of those forms. However, in the juridical state, persons ought to enter into them. Private right therefore finds its domain in the non-juridical state, and public right finds its domain in the civil state. But the latter state contains no more and no other

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85 *Leviathan* (1651), 98 *et seq.*
86 *P. L.* 155.
duties of men towards each other than what may be conceived in connection with the former state. Thus the matter of private right is exactly the same in both. The laws of the civil state, therefore, only turn upon the juridical form of the co-existence of men under a common constitution; and in this respect these laws must necessarily be regarded as public laws.

In contemporary social theory Kant's main point is now a commonplace. It is important, for certain purposes, to distinguish the state from other groupings of individuals, such as society, associations and communities. Kant locates in the legal order the precise criterion which marks the difference between the state and other groupings. This conception does not necessarily involve any commitment with respect to either a liberal or an authoritarian view of the state. In the hands of a liberal sociologist such as R. M. MacIver, whose attitude on this question is identical with Kant's, it can lead to a completely liberal theory of state power. But Kant's constitutional theory was autocratic in important doctrines, and he therefore at this point prepared the way for it. He denied that the civil union in a strict sense was a society, on the ground that there was no sociality in common between the ruler and the subject under a civil constitution. They are not co-ordinated as associates in a society with each other; the subject is subordinated to the ruler. Those who may be co-ordinated with one another must consider themselves as mutually equal, in so far as they stand under common law. Kant therefore held that the civil union is to be regarded not so much as being, but rather as making a society. Whether or not the ruler was legibus solutus was, of course, a much debated question prior to Kant. The early Christian Fathers, St. Augustine, St. Ambrose and St. Isidore of Seville, apparently favored the idea that the prince ought to obey his laws; but later civilians such as Baldus held that the prince was not under his laws, that he rules others and is ruled by no one. However, in the mediaeval Germanic

97 MacIver, The Modern State (1926) 17 et seq.
98 1 Carlyle, History of Mediaeval Political Theory in the West (1930) 164;
practice, which may have influenced Kant, it was customary for the princes frequently to acknowledge that they were bound by the law; 99 and it was this rule, notwithstanding the autocratic element in his thinking, that Kant urged. Although at first glance it would appear that the prince ought to be subject to the law, the proposition is not self-evident. Is the state subject to the same morality that is applicable to its citizens? "It is ridiculous," Montesquieu said, "to pretend to decide the rights of kingdoms, of nations, and of the whole globe, by the same maxims on which (to make use of an expression of Cicero) we should determine the right of a gutter between individuals." 100 The same thought was also expressed by Holmes: "A State is superior to the forms that it may require of its citizens." 101 However, this doctrine appears to have its roots in expediency; at least we still await its theoretical justification.

On the basis of the conditions of private right in the natural state Kant formulated the postulate of public right: In the relation of unavoidable co-existence with others, thou shalt pass from the state of nature into a juridical union constituted under the condition of a distributive justice.102 Kant accepted Hobbes' view that the state of nature was a war of all against all; but it cannot be said, Kant maintained, that even in cases of actual hostility that the individuals involved do wrong or injustice to one another. However, in general they must be considered as being in the highest state of wrong, as being and willing to be in a condition which is not juridical.

Kant therefore defines public right as the whole of the laws that require to be universally promulgated in order to produce a juridical state of society.103 It is the necessary system of laws to order the conduct of the people who constitute a nation,

6 ibid. (1936) 82. Under the common law the king's powers were limited. 4 Holds. 201-202.
99 Kern, Kingship and Law in the Middle Ages (1939) 75.
100 Esprit des Lois (1748, Nugent's trans.) XXVI, c. 16.
101 Virginia v. West Virginia, 220 U. S. 28 (1911).
102 P. L. 157.
103 P. L. 161.
and to regulate the relations of nations themselves. Since men and nations have a mutual influence on one another, they require a juridical constitution uniting them under one will, in order that they may participate in what is right. In the relationship of the individuals of a nation to one another we have the civil union in the social state; taken as a whole in relation to its constituent members, it forms the political state.

What Kant hoped to gain by a separation of public right from private right is not clear. Since he identified private right in the non-juridical state with natural law, and since he further maintained that private right in both the juridical and non-juridical state were identical, he could for all that appears have made his point with a brief excursus on natural law. In truth, he appears to be the victim of the distinction taken in Roman law between public and private law. It is not a necessary distinction in legal systems, and while it is held to have been a useful factor in the development of Roman legal science, it is also recognized that it had certain disadvantages. In the actual ordering of the life of a state the two sets of rules are intimately associated; but the distinction keeps them vividly apart. Thus Roman jurists gave little or no attention to constitutional and administrative law, to the law relating to public property, to the public law relating to real property, public acquisition of real property, and the public law limitations on land ownership. This method of treatment has resulted, for example, in a distorted view of the Roman law of real property, which takes on an appearance of liberality which it did not possess if the public law limitations are taken into consideration. However, as an advantage, Roman private law attained the form of a highly developed system, "tinged," Savigny wrote, "with an assurance not found elsewhere except in mathematics, and it is no exaggeration to say that they made calculations with their conceptions." This resulted, as in the Kantian system, in Roman private law taking on a natural

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104 Schulz, *Principles of Roman Law* (1936) 27 et seq.
law aspect, so that with its revival in the Middle Ages it was regarded as a kind of law of nature, a *ratio scripta*. Perhaps the truth of the matter lies in Jhering's observation that at bottom private law and public law were indistinguishable in their "subject"; one but had to do solely with the private rights of individuals, and the other was available to all citizens generally.  

**Constitutional Law**

Political theory and law are hopelessly intertwined in Kant's treatment of public rights. No doubt a sound constitutional system must have its foundation in valid political conceptions; but Kant's political theory is a hash of the principles of Hobbes, Montesquieu, Rousseau and others, and the legal conceptions which he puts forward are not, for all their apparent mixture, necessarily related to the political principles.

He defines a state as the union of a number of men under juridical laws, and he holds that the laws as such are to be regarded as necessary *a priori*, and not as merely established by statute. The form of the state is thus involved in the idea of the state; and this ideal form furnishes the normal criterion of every real union that constitutes a commonwealth. Every state contains three powers—legislative, executive and judicial.

The legislative power can only belong to the united will of the people. All rights proceed from this power, and it is therefore necessary that its laws should be unable to do wrong to anyone. Kant attempts to explain this point through the idea of a united and consenting will. If any one individual determines anything in the state in contradistinction to another, it is always possible that he may perpetuate a wrong on that other; but this is never possible when all determine and decree what is to be law to themselves. Hence it is only the united and consenting will of all the people—in so far as each of them

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107 *Geist des Römischen Rechts* (1852) 195.
108 *P. L.* 165.
determines the same thing about all, and all determine the same thing about each—that ought to have the power of enacting law in the state. Kant is here insisting upon a doctrine which Madison \footnote{The Federalist, No. 10.} had urged in other terms, the doctrine that the greatest enemy of popular government is the growth of faction or, in modern phraseology, pressure groups. But the mere vesting of ultimate power in the legislature is not, as contemporary democratic practices make clear, the final solution of the problem, however much it may be a necessary step towards that solution. Further, if the legislature decrees a course of action to which I am opposed and have duly voted against, does it express the united and consenting will of all? Rousseau, through the idea of the General Will, answers that it does, on the ground that the conflict is only apparent; the legislature gives expression to what I really desire although I am not aware of it, and may in fact by my action oppose it. Kant does not reveal whether his idea of a united will embodies this conception.

The citizen of the state possesses three juridical attributes that inseparably belong to him by right: The right to have to obey no other law than that to which he has given his consent or approval; the right to recognize no one as a superior among the people in relation to himself, except in so far as such a one is as subject to his moral power to impose obligations, as that other has power to impose obligations upon him; the right to owe his existence and continuance in society not to the arbitrary will of another, but to his own rights and powers as a member of the commonwealth; and consequently, the possession of a civil personality which cannot be represented by any other than himself. These noble-sounding principles disclose with what ease Bills of Rights may be devised, and with what difficulty their draftsmanship is attended if they are to possess any significant meaning. For in the next breath Kant excludes apprentices, servants, women, and all who are compelled to maintain themselves under the control of others, \textit{e.g.}, wood-
cutters, resident tutors, and ploughmen, from civil personality. However, they are entitled to be treated according to laws of natural freedom and equality, as passive parts of the state.

Kant makes a distinction between the universal sovereign as head of the state, which he defines as the people itself united into a nation,¹¹⁰ and the individual person who possesses the executive power.¹¹¹ This is an essential distinction in constitutional theory occupied with any state short of an absolute autocracy, and arises immediately upon the denial of the truth of Louis XIV’s purported assertion “l’état c’est moi.” So far as can be determined from his writings Kant has only one object in view: the ascertainment of the form of the state which he considers ideal, and the justification of the principles which should prevail in that state. Unlike Aristotle he therefore ignores all other possible forms of the state, from absolute autocracy at one limit to anarchy at the other. At the same time, his theory of the state contains elements which liberal opinion would repudiate as characteristic of the authoritarian approach.

The universal sovereign is the ruling power and its function is to govern; the individuals of the nation are the subjects, the ruled constituents, and their function is to obey. The people constituted itself a state by an original contract; by this act they gave up their external freedom in order to receive it immediately again as members of a commonwealth. The individual, therefore, has not sacrificed a part of his inborn external freedom for a particular purpose; he has abandoned his wild lawless freedom wholly, in order to find all his proper freedom again entire and undiminished, but in the form of a regulated order of dependence, that is, in a civil state regulated by laws of right. It is thus on the basis of the individual’s own regulative law-giving will that Kant accounts for the relation of dependence. Furthermore, he carefully limits the idea of the original contract to merely an outward mode of representing the conception by which the rightfulness of the process of organ-

izing the constitution may be made conceivable. But it needs little reflection to perceive that consent is not a sufficient justification ethically upon which to base authority. Many slaves in the Southern states at the close of the Civil War would willingly have consented to a continuation of their slave status. Kant himself held that it was morally impossible for an individual voluntarily to give up his whole freedom to another.\textsuperscript{112} Consent may be a desirable element in the recognition of authority; but it cannot transform the morally unjustifiable into the morally proper.

From these general premises Kant drew the logically necessary conclusions; but no actual state has ever exhibited them, and it is unlikely that ethics could sustain them. He held that the three powers of the state in their relations with each other are (a) co-ordinate with one another as so many moral persons, and the one is thus the complement of the other for the completion of the constitution of the state; (b) they are also subordinate to one another, so that their separate function cannot be usurped; and (c) through the union of both relations they assign distributively to every subject his own rights. In its dignity, the will of the sovereign legislator, in respect of what constitutes the external mine and thine, is to be regarded as blameless; the executive function of the supreme ruler is to be regarded as irresistible; and the judicial sentence of the supreme judge is to be regarded as irreversible, being beyond appeal.\textsuperscript{113} Kant’s view of the blamelessness of the legislative power involves a direct denial of the ancient conception of natural law as a form of higher law. The enactment in the United States, on the authority of a duly adopted constitutional amendment, of repressive minority laws, would in his theory be fully valid. But a natural law theory would deny this. It would hold, as Cooley argued, that amendments to the Constitution “cannot be revolutionary; they must be harmonious with the body of the instrument.”\textsuperscript{114} For such a theory to be effective, it would

\textsuperscript{112} P. L. 119.
\textsuperscript{113} P. L. 170.
\textsuperscript{114} The Power to Amend the Federal Constitution, 2 Mich. L. Jr. 109 (1893).
have to be widely held as an article of faith by the electorate; but in that event no such amendment would be adopted. A society which believes in the desirability of legislation of this type is closer in its thinking to Kant than to Antigone, and if the modern doctrine is sound that courts should follow the will of the people, it is unlikely that natural law would be much of a refuge.

The executive authority in Kant's theory is the supreme agent of the state. It appoints the magistrates and promulgates the laws enacted by the legislature; as a moral person it constitutes the government. Kant insists that the orders issued by the government to the people, the magistrates and the administrators are not laws but rescripts or decrees; for they terminate in the decision of particular cases, and are given forth as unchangeable. Furthermore, if they were law the government would be a despotic one. It is true that rescripts are not law under the Kantian conception that law is the whole of the circumstances according to which the free will of individuals may be reconciled according to a universal rule of freedom. But in the Roman law rescripts sometimes had the force of law, and in the United States today it would be difficult, from the point of view of their effect, to distinguish many executive orders from legislation. Nevertheless the point Kant makes is an important one. Is there an essential difference between law and administration? Kelsen, the leader of the neo-Kantians, tells us, contrary to the teachings of Kant, that there is not. Pound, the chief of the sociological school, assures us with Kant that the distinction is a vital one. It is argued, on the one hand, that functionally it is impossible to perceive any difference, on the other, that unless one is made absolutism is inevitable.

Kant held that the legislative power should be clearly sep-
rated from the executive, inasmuch as the ruler should stand under the authority of the law, and is bound by it under the supreme control of the legislator. The legislative authority may therefore deprive the governor of his power, depose him, or reform his administration, but not punish him. He makes the curious assertion that this is the proper and only meaning of the English maxim "The King can do no wrong." But it was specifically provided that Henry VI, who was nevertheless King although under age, should be physically chastised whenever he "trespasseth or doth amys." Kant argued that an application of punishment would necessarily be an act of that very executive power to which the supreme right to compel according to law pertains, and which would itself be thus subjected to coercion; and this would be self-contradictory. This argument was also advanced in the debates on the Federal Constitution at the Philadelphia Convention in 1787, except that it extended to impeachment itself. In spite of the apparent force of the proposition that officials who violate their public trust should be removable from office, to say nothing of being subjected to punishment, the final vote on the issue in the Convention was eight to two, with Massachusetts and South Carolina in the negative.\(^{120}\) To date the American constitutional solution which allows both impeachment and punishment, but refers the latter to the regular processes of law seems a wise course. But it has not been tested in a crucial case; and Hamilton’s fears may some day be realized that if the issue ever arises it will be impossible to divorce the political from the juridical aspects of the matter, so that the question will not be resolved on its proper grounds.

Finally, Kant insists upon separating the judicial function from both the legislative and executive powers, although he argues that it is by means of the executive authority that the judge holds power to assign to every one his own.\(^{121}\) It is only

\(^{120}\) 5 Elliot, Debates (1845) 343. Kant’s argument is also stated by Hamilton but refuted by him on the ground that the doctrine of the separation of powers permits a “partial intermixture.” The Federalist, No. 66.

\(^{121}\) P. L. 173.
the people, Kant holds, that can properly judge in a cause; either the executive or the legislative authority might do an individual wrong in their determinations in cases of dispute with respect to the property of individuals, inasmuch as individuals are merely passive in their relationship to the supreme power which assigns to any one what is his. It is even beneath the dignity of the Sovereign to act as judge; for by so doing he would put himself in a position in which it would be possible to do wrong, and thus to subject himself to the demand for an appeal to a still higher power. Kant recognizes that the people can judge in a cause only indirectly, *e.g.*, by representatives elected and deputed by themselves, as in a jury. Judges should be appointed, Kant holds, by the executive power. On the basis of the British experience, which follows this method, Kant's proposition has much to support it. The American state practice of electing judges has little or nothing to recommend it, and in some states an attempt has been made to meet its obvious defects, through the cooperation of the principal parties in the re-election of able judges irrespective of their political allegiance. However, the Swiss system of legislative appointment of judges has apparently worked well in that country. If we put aside appointment by election as impossible, on the ground that the electorate does not possess the technical information to estimate properly the judicial qualities of candidates, we are faced with only two other methods—legislative or executive appointment. Either system will work satisfactorily if coupled with an adequate sense of responsibility; both will break down if that factor is absent. It is argued that in the nature of things the executive would have a greater awareness of the obligation involved than would the legislative power, where political pressures and the necessity for compromise are more immediate. But the historical evidence adduced for this position is far from conclusive.

When there is cooperation of the three divisions of government the state realizes its autonomy. This autonomy consists in its organizing, forming and maintaining itself in accordance
with the laws of freedom. In the union of the three divisions
the welfare of the state is achieved. This does not mean merely
the individual well-being and happiness of the citizens. Kant
expressly follows Rousseau in arguing that the welfare of the
group is more important than the welfare of the citizens. If
we look merely for individual well-being it can perhaps be
attained, Rousseau asserted, more desirably in a state of nature.
But the welfare of the state as its own highest good is reached
when the greatest harmony is attained between its constitution
and the principles of right. To individualist theory this argu­
ment, of course, makes no appeal. That the welfare of the
state is something different from the welfare of its citizens
is an abstraction that is either meaningless or else is an at­
temted justification of state power that cannot be admitted;
the welfare of the state means the welfare of the citizens, and it
is the citizens and not the state who are the ultimate judge of
that condition. If the Rousseau-Kant argument is taken socio­
logically, in the sense of the group versus the individual, the
anarchist position has still to be met. In the last resort the
individual must determine for himself whether he will follow
collective action or oppose it. If he opposes it, he must accept
whatever penalties that position entails, from execution at one
end, as in the case of Socrates, to relatively harmless social
displeasure at the other.

Kant attempted to solve several constitutional questions
which had vexed his predecessors. Today they possess for the
most part little beyond an historical interest; but the twentieth
century tendency towards autocracy may again give them an
immediacy. Is the sovereign, viewed as embodying the legis­
latve power, to be regarded as the supreme proprietor of the
soil, or only as the highest ruler of the people by the law?
Martinus in the twelfth century had argued that the Emperor
had a true ownership of all things; at the same time Baldus had
“taught that above private ownership there stood only a
Superiority on the part of the State, which was sometimes
expressly called a mere *iurisdictio et protectio*, and which even
Kant 449

when it was supposed to be a sort of dominium, a sort of over-ownership, was still treated in a purely 'publicistic' manner.\textsuperscript{122} Kant maintained that the sovereign was the supreme proprietor of the land, but only in the sense of an idea of the civil constitution, objectified to represent, in accordance with juridical conceptions, the necessary union of the private property of all the people under a public universal possessor.\textsuperscript{123} The representation of the relation in this manner forms a basis for the determination of particular rights in property. It also denies any private property in the soil to the supreme universal proprietor; for otherwise he would make himself a private person. Private property in the soil belongs only to the people, taken distributively and not collectively. The supreme proprietor accordingly ought not to hold private estates, either for private use or for the support of the court. If the opposite rule were permitted the extent of the sovereign's domains would depend upon his pleasure, and all land would be taken by the government and all citizens treated as bondsmen of the soil. To meet this same point, and others, various American states have placed limitations on the quantity of land which may be owned by corporations. Kant therefore concludes that the supreme proprietor of the land possesses nothing of his own except himself; otherwise disputes with others would be possible and there would be no independent judge to settle the cause. However, this problem, as earlier and later history shows, can be solved in a different manner. If the state possesses property, then there must be, as Kant saw, an independent judiciary to adjudicate claims. This is one of the principal meanings of the growth of remedies against the crown in England from the thirteenth century to the present day. In an autocratic state an independent judiciary no doubt is not to be looked for; but in other forms of government it can be taken as a matter of course. The mediaeval idea of a \textit{judex medius} was fully expressed in the Aragon constitution,\textsuperscript{124} and has its counterpart today in such in-

\textsuperscript{122} Gierke, \textit{Political Theories of the Middle Age} (1938) 79.
\textsuperscript{123} P. L. 183.
\textsuperscript{124} \textit{Op. cit.} note 99 at 125.
stitutions as the United States Court of Claims and in the practices of the Supreme Court in suits in which the government is a party in interest. Although the sovereign possesses nothing, it may also be said, Kant argued, that he possesses everything; for he has the supreme right of sovereignty over the whole people to whom all external things severally belong; and as such he assigns to every one what is to be his. Kant is here merely stating one of the dogmas of the doctrine of sovereignty which, however much it may be exemplified in today's practices, has still not been satisfactorily stated. Should the state be allowed to take or destroy private property without compensation? That it does so does not mean that the practice is sound constitutionally; for an ideal of health, the vast liquor industry in the United States was wiped out without compensation; for an ideal of race, the private property of the Jews was expropriated in Germany; for an ideal of economics, private property of certain classes is appropriated by the European and other governments which adopt the communist system. A sound theory of ideals, which would permit a discrimination, might provide the bases for a solution of the problem; but there is little room in history for any expectation that a people in the grip of a reform movement will heed the dictates of a rational ethics which runs counter to their frenzy.

On the basis of the sovereign right to assign property distributively Kant would permit the state to reclaim corporate and church property, and that of the nobility, whenever the usefulness of the particular institution has ceased to exist. But in all cases survivors must be indemnified for their interests. Kant also insisted upon a correlative doctrine. The government is justified in compelling those who are able to furnish the means necessary to preserve those who are not themselves capable of providing for the most necessary wants of nature to furnish them. In particular, he urges relief for the poor, the establishment of foundling asylums, and aid to charitable and

125 P. L. 184. cf. Ruppert v. Caffey, 251 U. S. 264 (1920), where the government was permitted, under the prohibition laws, to close the breweries without compensation.
pious foundations. However, the actual cost of maintaining the church should fall, he thinks, only upon the people who profess the particular faith of the church. He does not express any opinion on the legitimacy of indirect state subsidies to churches, such as exemption from taxes. To the supreme authority in the state Kant assigned the right of distributing offices and conferring dignities. He asked whether the sovereign has the right, after bestowing an office on an individual, to take it away again at his mere pleasure, without any crime having been committed by the holder. He answered emphatically, No. As Mr. Justice Brandeis observed, in his dissent against the view that the President could remove officials without the consent of the Senate, an essential of free government was held in 1787 to be the protection of officials against "the arbitrary or capricious exercise of power." 126

Kant's absolutistic attitude is best illustrated in his arguments against a right of revolution. 127 He argues that the supreme power in the State has only rights and no duties towards the subject. If the head of the state violates the law the subject may oppose a complaint to the injustice, but not active resistance. In no case is resistance on the part of the people to the supreme legislative power legitimate. It is the duty of the people to bear any abuse of the supreme power, even though it should be considered to be unbearable. Kant's reason is that any resistance of the highest legislative authority must always be contrary to law, and must even be regarded as tending to destroy the whole legal constitution. There cannot, he says, even be an article contained in the political constitution that would make it possible for a power in the state, in case of the transgression of the constitutional laws by the supreme authority, to resist or even to restrict it in so doing. The argument is that it would be self-contradictory for the constitution so to provide. But this point is easily met through Locke's theory that the legislative is only a fiduciary power;
therefore "the community perpetually retains a supreme power of saving themselves from the attempts and designs of anybody, even of their legislators, whenever they shall be so foolish or so wicked as to lay and carry on designs against the liberties and properties of the subject." In the constitutions of New Hampshire, Pennsylvania and Delaware, in the Declaration of Independence and in the Declaration of the Rights of Man of 1789, the right of revolution was expressly recognized. Kant's argument that it is impossible for a constitution to provide for its own forcible change is thus met by actual historical cases to the contrary. Of course, constitutions can be self-contradictory, and perhaps ought not to be. But apart from Locke's theory, there seems to be no reason why the community may not substitute one legal order for another, and by revolutionary means if it so desires. Even if the legal order which it is preparing to overthrow embodies absolute perfection, which is the only possible argument for a denial of the right, it is certainly within the competence of the community to desire an order which might perhaps subject them to a different mode of living. In a twentieth-century version of the myth of the Creation, when God saw "that Man had become perfect in renunciation and worship, he sent another sun through the sky, which crashed into Man's sun; and all returned again to nebula." Revolutions, as historical examples show, may come about simply out of a desire for change. For legal theory to attempt to declare such a process inherently criminal or impossible would be to subject itself to the likelihood that it will be overruled by future events.

**Criminal Law**

Kant's anti-utilitarianism is nowhere better exhibited than in his theory of punishment. His whole conception of the criminal law turns on the idea of retributive justice, to which he commits

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128 *Two Treatises of Government*, II, sec. 149.
129 Russell, *Mysticism and Logic* (1918) 47.
himself without reservation. He holds that punishment can never be administered merely as a means for promoting another good either with regard to the criminal himself or to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime. A man ought never to be dealt with merely as a means subservient to the purpose of another, nor be mixed up with the idea of rights in things. Against such treatment his inborn personality has a right to protect him, although he may be condemned to lose his civil personality. He must first be found guilty and punishable, before there can be any thought of drawing from his punishment any benefit for himself or his fellow-citizens. To this point Kant’s argument seems beyond attack. He has not ruled out reformation or deterrence as possible objects of punishment; he has insisted that these purposes ought not to be brought into view until it has first been determined that a crime has been committed by the person on trial. In the present state of our knowledge, the proposition that the criminal law could operate upon an individual before there had been a transgression of the law would be untenable. In the future, psychiatry or some other branch of knowledge may be able to predict with disturbing certainty that particular individuals will commit certain specified crimes. Remarkable instances of this kind have occurred in the past; but they have not been numerous enough to warrant a reconsideration of the basic principle which Kant has set forth.

However, Kant goes further and argues that retribution is the only rationally just principle of punishment. The penal law, he maintains, is a categorical imperative; and woe to him who creeps through the serpent-windings of utilitarianism to discover some advantage that may discharge him from the justice of punishment, or even from the due measure of it, according to the Pharisaic maxim: “It is better that one man should die than that the whole people should perish.” Kant puts the case of a criminal condemned to death, but who agrees to

131 P. L. 195.
permit a dangerous medical experiment to be performed upon him on the understanding that his life will be spared if he survive. Kant would execute the criminal on the ground that justice would cease to be justice if it were bartered away for any consideration whatever. Retaliation is the only principle which can definitely assign both the quality and the quantity of a just penalty; all other standards are wavering and uncertain. Thus, whoever has committed murder must die. In this case there is no judicial substitute or surrogate that can be given or taken for the satisfaction of justice. There is no likeness or proportion between life, however painful, and death; and therefore there is no equality between the crime of murder and the retaliation of it but what is judicially accomplished by the execution of the criminal. Kant then states his famous case of a civil society ready to dissolve itself with the consent of all its members—as might be supposed in the case of a people inhabiting an island resolving to separate and scatter themselves throughout the world. Under those circumstances the last murderer lying in prison ought to be executed before the resolution is carried out. The murderer will then realize the desert of his deeds, and there will be no bloodguilt upon the people; otherwise they might all be regarded as participants in the murder as a public violation of justice.

From Plato\textsuperscript{132} to the latest volume on criminology the retributive view of punishment has met with vigorous condemnation. However, it has not been without enlightened support since Kant's day.\textsuperscript{133} The opposing theories of reformation and deterrence are attacked on the ground that their supporters will not face the logical consequences involved. If punishment is a deterrent, then the family of the offender should also be punished, since this would increase the deterrent element. Further, the heaviest punishment should be inflicted in cases of the maximum provocation, since they need a greater deterrent. Thus crimes of passion would be punished severely, but a crime

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\textsuperscript{132} Protagoras 324 B.
\textsuperscript{133} Kohler, \textit{Philosophy of Law} (1914) 283; 1 Westermarck, \textit{Origin and Development of the Moral Ideas} (2nd ed. 1912) 70 et seq.
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of parricide would be viewed leniently since filial affection is already present as a restraining influence. If reformation is the guiding principle, the petty offender, such as drunkards and vagrants might receive life sentences, since they are the most incorrigible of all offenders, while perpetrators of serious crimes might be treated lightly, since statistics seem to show that they are the most easily reformed. However, arguments by way of horrible examples are not conclusive; there is no compulsion on society to adopt all the consequences of any view to which it adheres. England, as Disraeli observed, is not governed by logic; she is governed by Parliament. The fatal error in the Kantian theory is its conception of justice as an end in itself. If the sole end of society is justice then Kant’s argument is unassailable; but if some other good is sought, such as Aristotelian happiness, then the retributive theory may not be the agency to accomplish that end. To analyze the problem properly it appears that we need ask only two questions: What is the end of the criminal law? Does punishment assist in the realization of that end? If the end of the criminal law is the promotion of the common interest, as most jurists from Aristotle to the present have insisted, that common interest must still be determined for the particular society before the first question can be answered properly. It may be happiness, economic security, religious freedom, military superiority or other objectives or mixtures of them. But not until the end is precisely envisaged and a correlation established between that end and retribution, deterrence, reformation or some other objective is a concrete solution of the problem possible. It may well be that the whole idea of punishment may be found to have no foundation and ought to be abandoned. In that event criminals might be segregated, as are the mentally disordered, until they could safely be restored to society.

In spite of the logical rigor of his position Kant found himself forced to make three exceptions to the categorical imperative that the murderer must die. Suppose there are so many accomplices to the murder that the State, in resolving to be without
such criminals, would be in danger of soon also being deprived of subjects. In that case the sovereign as a matter of necessity may assign some other punishment and thereby preserve the people.\textsuperscript{134} It is difficult to perceive why the principle of this exception would not also justify sparing the life of a criminal who survived a dangerous medical experiment the results of which preserved the population from the ravages of a calamitous plague. Kant would also not apply the death penalty to the survivor of a duel. He does not think that killing under those circumstances is murder, inasmuch as it takes place publicly, with the consent of both parties, and is intended to satisfy an idea of honor. In this position Kant joined hands with Utilitarianism. Bentham thought that duelling served a social purpose by filling a gap which the law ignored. If the law gave the same protection to honor that it gave to the person then duelling could be safely abolished.\textsuperscript{135} Finally Kant would not inflict the death penalty in cases of maternal infanticide with respect to an illegitimate child. He argues that the child is beyond the protection of the law, that it is analogous to smuggled goods, and as it has no legal right to existence its destruction may be ignored.

In the maintenance of his position Kant took account of the arguments of Beccaria against the justice of the death penalty. Beccaria argued that capital punishment is wrong because the penalty of death could not be contained in the original social contract; for in that case every one would have had to consent to lose his life if he committed murder. But such a consent is impossible, because no one can thus dispose of his own life. Kant denounces this as mere sophistry. No one undergoes punishment because he has willed to be punished, but because he has willed a punishable action. The individual who, as a co-legislator, enacts penal law, cannot possibly be the same person who, as a subject, is punished according to the law; for, \textit{qua} criminal, he cannot possibly be regarded as a legislator, who is rationally viewed as just and holy. If any one then enact a
penal law against himself as a criminal, it must be the pure juridically law-giving reason (*homo noumenon*) which subjects him as one capable of crime, and consequently as another person (*homo phenomenon*), along with all the others in the civil union, to this penal law. Beccaria's chief error, in Kant's view, consists in regarding the judgment of the criminal himself, necessarily determined by his reason, that he is under obligation to undergo the loss of his life, as a judgment that must be grounded on a resolution of his will to take it away himself. Thus the execution of the right in question is represented as united in one and the same person with the adjudication of the right.

Kant allowed the right of pardoning, but only in the case of treason or some form of it. He would not permit the right to be exercised in application to crimes of the subjects against each other; for exemption from punishment would be the greatest wrong that could be done them. He defined a crime as any transgression of the public law which makes him who commits it incapable of being a citizen. This definition would limit crimes to felonies; but it contains the germ of the present-day conception of crime as an act forbidden by the criminal law.

**International Law**

Kant's speculations on international law were a development of his view of human history. Does the human race, viewed as a whole, he asks, appear worthy of being loved; or is it an object which we must look upon with repugnance, so that, while in order to avoid misanthropy, we continue to wish for it all that is good, we yet can never expect good from it, and would rather turn our eyes away from its ongoings? Kant assumes a continuous progress towards the better. He does not attempt to prove this assumption, but takes his stand on the proposition that every member in the series of generations is prompted by his sense so to act in reference to posterity that they may always become better; the possibility of this must be assumed.

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136 *P. L.* 204.  
137 *P. L.* 194.  
138 *P. P.* 65.  
139 *P. P.* 68.
Nevertheless, there was no easy hopefulness behind this attitude; in fact, so strongly marked is Kant's pessimism that Schopenhauer's conclusion that of all conceivable worlds this is the worst, is one of the speculations for which Kant may be held ultimately responsible. But for the Kants of this world pessimism seems inevitable. "Neither paganism nor Christianity," Acton wrote, "ever produced a profound political historian whose mind was not turned to gloom by the contemplation of the affairs of men. It is almost a test to distinguish the great narrators from the great thinkers,—Herodotus, Livy, Froissart, Schiller, Macaulay, Thiers from Thucydides, Polybius, Tacitus, Machiavelli, Raleigh, Gibbon, Guizot, Niebuhr."

But if human nature is worthy to be loved it must establish a civil society, universally administering right according to law; for it is only in such a society that the highest purpose of nature, which is the development of all her capacities, can be attained in the case of mankind. Thus the natural state of nations as well of individual men is a state which it is a duty to pass out of, in order to enter into a legal state. National rights which exist before this transition are merely provisory; they can only become peremptory in a universal union of states analogous to that by which a nation becomes a state. It is only through this means that a real state of peace can be established. However, perpetual peace, which is the ultimate goal, is in fact an impracticable idea. The too great extension of a union of states over vast regions makes government, i.e., the protection of individual members, impossible; and the existence of a multitude of separate states would again bring round a state of war. The political principles, however, which aim at such an end and which enjoin the formation of such unions among the states as may promote a continuous approximation to a perpetual peace, are not impracticable; they are as practicable as this approximation itself, which is a practical

\[140\] Bury, The Idea of Progress (1920) 250.
\[141\] Quoted, Mathew, Acton: The Formative Years (1946) 98.
\[142\] P. P. 12, 76.
\[143\] P. L. 224.
problem involving a duty and founded upon the rights of men and states. This view is similar to the one advanced by Plato with respect not only to the ideal form of the State, but to all ideal forms; he said that the ideal form could only be approximated and never realized, although the urge toward perfect form is inherent in all things.

No state, Kant recognizes, is for a moment secure against another in its independence or its possessions. The will to subdue one another or to reduce each other's power, is always rampant; and the equipment for defence, which often makes peace even more oppressive and more destructive of internal prosperity than war, can never be relaxed. Against such evils there is no possible remedy but a system of international right founded upon public laws enjoined with power to which every state must submit—according to the analogy of the civil right of individuals in any one state. A lasting peace on the basis of the so-called balance of power in Europe is a mere chimera. It is like the house described by Swift, which was built by an architect so perfectly in accordance with all the laws of equilibrium, that when a sparrow lighted upon it, it immediately fell. But, he asks, will the State submit to such compulsory laws. Is not his proposal a pretty theory, but of no value for practical purposes? As such has it not always been laughed at by great statesmen as a childish and pedantic idea fit only for the schools from which it takes its rise?

For his part, Kant replies, he trusts to a theory which is based upon the principle of right as determining what the relations between men and States ought to be; and which lays down to these earthly gods the maxim that they ought so to proceed in their disputes that such a universal international state may be introduced thereby, and to assume it therefore as not only possible in practice but such as may yet be presented in reality. This theory is further to be regarded as founded upon the nature of things, which compels movement in a direction even against the will of man. Under the nature of

\[144 P. P. 75.\]
things, human nature is also to be taken into account; and as
in human nature there is always a living respect for right and
duty, Kant neither can nor will regard it as so sunk in evil
that the practical moral reason could ultimately fail to triumph
over this evil, even after many of its attempts have failed.

Every neighboring state is free to join the Congress of
Nations which Kant envisages.\textsuperscript{145} But he means by a Congress
only a voluntary combination of different states that would be
dissoluble at any time and not such a union as is embodied in
the United States, founded upon a political constitution, and
therefore indissoluble.

Kant couples with his idea of international law his conception
of so-called cosmopolitical law. This is the right of man as a
citizen of the world to attempt to enter into a communion with
all others, and for this purpose to visit all the regions of the
earth.\textsuperscript{146} It does not embrace a right of settlement upon the
territory of another people, for which a special contract is
required. The relations between the various peoples of the
world have now advanced everywhere so far that a violation of
right in one place of the earth, is felt all over it.\textsuperscript{147} Hence the
idea of a cosmopolitical right of the whole human race is no
fantastic mode of representing right, but is a necessary com-
pletion of the unwritten code which carries national and inter-
national right to a consummation in the public right of
mankind. Thus the whole system leads to the conclusion of a
perpetual peace among the nations.

Historically Kant's solution of the problem of international
anarchy may be traced to mediaeval thought which conceived
of a world state based on a universal ethic under divine
guidance. Perpetual peace may be possible only through the
establishment of the system of states contemplated by Kant;
but on the empirical level it remains true that the mind of
man has been able to devise only two systems which have given
mankind peace for any appreciable periods of time—the balance
of power and world domination by one state. It was on the

\textsuperscript{145} P. L. 225. \textsuperscript{146} P. L. 227. \textsuperscript{147} P. P. 103.
latter method that mediaeval thought seized. At no time, says Dante, since the fall of our first parents, has the world been quiet on every side except under the perfect monarchy of the divine Augustus. Kant's proposal is of course, a modification of this idea. For the world sovereignty of a single state, he would substitute the world sovereignty of a union of states. However, since Kant wrote there has developed no further evidence that the progress of nature is toward the realization of his idea.

**Conclusion**

Kant's philosophy of law was put forward in the year 1797, when he was seventy-three years of age, and has often been dismissed by unsympathetic students as the product of an enfeebled old age. But this estimate in no way accounts for the fact that Kant's system has been the fountainhead of one of the most acute schools of legal philosophy which the nineteenth and twentieth centuries have known. With Stammler, Del Vecchio, and Kelsen the Kantian point of view has been carried forward to the present day in the form of an aggressive, acute philosophy of law possessed of at least as much power as any other system to capture the allegiance of contemporary thinkers. Perhaps one of the secrets of Kant's strength is that his followers can repudiate so much of what he would have regarded as vital in his thought, and still regard themselves as inspired by his teaching. Stammler held the basic Kantian formula of an act as right when it is consistent with every one else's freedom, according to a universal law, to be erroneous because it undertakes at the same time to define the concept of law as well as to determine when its content is just. We are told by Kelsen that the Kantian ethic can be regarded as the most perfect expression of the classical doctrine of natural law as it evolved in the seventeenth and eighteenth centuries on the

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148 De Monarchia, I, xvi.
149 Or perhaps 1796. See 2 Erdmann, History of Philosophy (1909) 368.
150 Theory of Justice (1925) 162.
basis of Protestant Christianity. For Del Vecchio Kant was not a great innovator; he merely corrected and clarified, by a rigorous method, the ancient teachings of natural law. However, he believes the natural law school had stated a sound principle: that the basis of law is in man himself; but it had given an historical meaning to what was only a rational principle; it had represented as an empirical growth what was only an ideological development. Kant’s great merit lay in his suppression of the confusion between the historic and the rational, in his affirmance of the purely rational value of the principles of natural law.¹⁵²

These criticisms suggest that Kant’s continuous appeal can be accounted for by two considerations. Notwithstanding the autocratic elements to be found in his system, in its main principles it follows the liberal philosophy of Rousseau and the eighteenth century. It is a significant coincidence that the year which saw the publication of Kant’s Philosophy of Law witnessed also the great Defense of Babeuf, similarly Rousseauistic in its origins, and from which the whole movement of European socialism stems. In his Philosophy of Law Kant set forth for the world of legal theory the possibilities of a doctrine of freedom as the basis of a legal philosophy which could not fail to appeal to subsequent liberal thought however purged of romanticism it might be.

More important was Kant’s doctrine that knowledge should be based on principle, which means the power to see the particular in the universal by means of concepts. Perhaps some day, he insisted, we may find out the principles of the civil law, instead of being confronted with their infinite multiplicity. That remains not only the essential task of the Neo-Kantians, but of all jurisprudence; as an ideal it has for the jurist almost overpowering attractiveness. Stated this way the Kantian approach does not appear to raise any crucial problems. But the basic idea of Kant’s system is the conception of right which is held to be purely rational in origin. In legal terms this means

¹⁵² Lezioni di filosofia del diritto (1936) 90.
that the actual content of laws can be determined from purely formal principles. But Kant never demonstrates how it is possible to pass from a purely logical form, apart from material premises, to the actual content of a law.\textsuperscript{153} There is a further difficulty. Kant's formal test of the rightness of acts is so general that it leaves room for numerous possibilities, but his system as actually presented does not contemplate those possibilities. He defines marriage as the union of two persons of different sexes for lifelong reciprocal possession of their sexual faculties. But this is an arbitrary definition. That is to say, so far as the universal law of freedom is concerned it could just as well have been otherwise. It would have been completely in accord with his universal law of freedom if he had provided that marriages should be for a term of years, as they were in old Japan. Similarly, he could have held that marriage had for one of its chief ends the production and care of children. He could then have asserted in accordance with a frequent practice that the contract of marriage is completed only by the birth of a child or by signs of pregnancy, instead of providing that it was completed only by conjugal cohabitation. But this difficulty is necessarily present in all formalistic theories of law. It was not solved by Kant or by any of his successors. It does not mean that we must abandon the valuable elements in formalism, particularly the search for principle. It teaches us specifically that a pure formalism can never cope with the facts of the legal order. It is here that the great merits of Kant are apparent. No one else has surpassed him in revealing the force of principles, if due account is taken of empirical circumstances, in the attempt to order the infinite diversity of legal phenomena.

\textsuperscript{153} Cohen, \textit{Law and the Social Order} (1933) 295.