

Chapter II: Justice & Rights

Victorious forces have often applied their particular forms and conceptions of justice to the vanquished force whether the defeated forces are the military, government, society as a whole, or individuals within the old regime. The application of justice is simply the application of a particular conception of what is right, of what ought to have been done but was not. A war is often an attempt to force an opponent to capitulate to a conception of proper conduct within the political sphere. By this, I simply point to the fact that wars are often fought to assert a group's claim to a thing; it is a battle for recognition of an asserted right. This recognition is either a claim of a superior right to an un-possessed thing, or a claim to have a superior right to continue to possess something of perceived value. If the international community interferes within the affairs of a given nation, such as NATO's involvement in the former Yugoslavia, then it is still a fight for recognition, but in this case the recognition of another's right. This particular fight for a third party's right involves the issues of human rights and a sovereign's abuse of them. Wars are fought for recognition, and transitional justice is the formal procedure to make concrete this claim. Transitional justice is the desire to have a right recognized at an ethical level; it is an attempt to find truth or, more aptly, unchanging and absolute universal laws from which to judge human actions.

In order to investigate the difficult issues arising from transitional justice, I will approach Kant's philosophy in the same way I have approached transitional justice. I shall look at the broader aspects and follow the trail back toward its source, or its core issue. In this way, his system may be fully explored without becoming stuck in a quagmire of irrelevant, but important, issues if one is more concerned with justifying a

system instead of investigating it for its possible faults and or hidden presuppositions. This work's purpose is not to justify a specific system, but to investigate it for the possible core problems that lead to ethics yielding a legal system that is seemingly unethical. Additionally, since Kant presents one of the strongest arguments for an objective universal law, his system needs to be fully investigated. His politics present the logical outcome of his ethics. Kant's political philosophy demonstrates the practical aspects of his theoretical work in ethics, and because of this it will highlight any problems that may be missed by only investigating his ethical writings.

For Kant, the international arena is a community beyond the power of law. Individual nations exist among each other as "moral person[s]" within a state of nature with unlimited "freedom," which creates a "constant state of war."¹ This claim seems almost contradictory if taken at face value, because it seems to disregard the reality of international treaties. Humans, as moral agents, have certain ethical duties and among these are the keeping of promises. Human law seems to be created around this specific ethical law, in that groups of people come together and agree to conduct their lives in accordance with rules established by the community. Citizens promise to obey, whether tacitly or through an oath. A law-abiding citizen is then merely one who honors her commitments, her contract to the state. A treaty would simply be a nation's way of making a commitment to the community of nations. However, this argument mistakes law for mere treaties and agreements; it mistakes the ethical for the legal.

¹ Kant. Metaphysics. 114. P.A. 6:343.

Human laws, or “external law giving,” consisting of all laws relating to an ethical foundation, and those which do not, compose what Kant terms a “doctrine of right.”² These laws may be ethical restrictions against murder and or theft, or they may be simply relating to laws requiring one to file their taxes by April 15th or to prohibit a minor from purchasing alcohol. These laws compose a doctrine of right because of their authority to command. Coercion is needed to establish law, otherwise these commands are mere suggestions; they simply lack force. However, the fundamental authority of law is not gained through empirical coercive force, but by the metaphysical authority granted to it by “reason alone.”³ This fundamental authority is what differentiates legal right from law based upon ethical right. It is the fundamental authority that makes right the object of might instead of might simply dictating what is to be observed as right in any given context. Legislative and coercive authority alone cannot make law just and right, only ethics can do this. Thus, the doctrine of right is tied to Kant’s ethical system, but the difference is that one does not need to be ethical in order to be a law-abiding citizen. This is because human law does not concern itself with the motives behind an individual’s obedience to its laws, whereas ethics does. The doctrine of right is only concerned with how individuals interact with each other in such a way that they do not interfere with each other’s free choice, “in accordance with a universal law.”⁴ Kant’s ethical system clearly defines what is a universal law and freedom; this shall be explored in Chapter III of this work. For now, Kant sees the necessity for the intimate bond of

² Kant. Metaphysics. 23. P.A. 6:229.

³ Kant. Metaphysics. 23. P.A. 6:229.

⁴ Kant. Metaphysics. 24. P.A. 6:230.

human law and ethics. Although human law is an empirical endeavor, without its union with ethics it is empty and one encounters the problems of might alone making ‘right’.⁵

Kant’s important connection between ethics and human law is simply that ethics does grant law its authority. A law devoid of an ethical foundation may not be inherently wrong, but it is arbitrary and may be reasonably argued against. For instance, a law establishing the legal voting age at eighteen has legal authority by legislation alone, but it has no true fundamental authority. However, the connection between certain laws and ethics does not imply ethics and law are one. Ethics establishes duties done for the sake of duty alone, whereas human law establishes duties based upon the power of some type of coercive force. Before this coercive power is created and agreed to by the individuals who make a community, all actions are “right” and each individual may “do what seems right and good” in her own eyes.⁶ A treaty is not law, because it lacks any real coercive force, which can insure a nation will keep its commitments. Although coercion may either appeal to one’s desires or fears, societal laws gain their power by appealing to one’s fears of punitive reprisals for non-compliance.

An interesting aspect of Kant’s dance between ethics and law is that there is also a type of divorce between the two when a superior coercive force has not been established, which is a state of war. This separation of ethics and law at an empirical level must be further investigated in order to fully understand its import. Ethics fall into the realm of the individual, meaning that one determines to either obey or disobey an ethical law;

⁵ Kant. *Metaphysics*. 23. P.A. 6:230 “Like the wooden head in Phaedrus’s fable, a merely empirical doctrine of right is a head that may be beautiful but unfortunately has no brain.”

⁶ Kant. *Metaphysics*. (89-90). P.A. 6:312. “. . . before a lawful condition is established individual human beings, peoples, and states can never be secure against violence from one another, since each has its own right to do *what seems right and good to it* and not to be dependent upon another’s opinion about this. So, unless it wants to renounce any concepts of right, the first thing it has to resolve upon is the principle that it must leave the state of nature . . . [and] subject itself to a public lawful coercion . . .”

one's motives are what matter. Ethical laws only state one ought to obey and may differ significantly from a specific nation's positive laws. For Kant, ethical laws are universal, whereas positive law may be relativistic. Human law rests in the seemingly distinct realm of the community, where one's actions are of paramount importance. An individual must obey or be punished for her disobedience. However the main aspect dividing ethics and law is found in the division between the transcendent and the empirical. Ethics transcend the empirical by allowing humans to make free choices, whereas human law merely appeals to one's inclinations to avoid punishment. Again the ethical part of this distinction will be discussed in depth in Chapter III. What is important to note for now is that without an established community there can be no law, or justice.

The clearest example of this distinction can be illustrated through the use of a simple stop sign at a deserted intersection. A stop sign has never forcibly stopped anyone; neither has an ethical law ever made anyone obey. Without the power of the state to punish violators, a driver would only stop if she freely chose to by reasoning that the sign, if obeyed, could prevent accidents. Human law is equivalent to the police officer insuring the concept within the stop sign is made real within the empirical world, namely that one does stop out of fear of receiving a fine. Human law does not make ethics; it merely attempts to enforce an ethical system. The importance of this move is simply that human law must be based upon ethics in order to have true authority, but human law without coercive power is simply agreements that may be violated at will.

It would appear that violations of asserted universal laws could necessarily go unpunished in the international arena, because no true international law exists. At times, nations have banded together, creating temporary international communities to enforce

law through coercion, as evidenced by Nuremberg. However, the temporary alliances created after wars seem to be more akin to vigilante groups of the Old West than they are to a civilized community, which attempts to establish consistent and enduring human laws within its borders. This is merely an “alliance” for Kant, and does not hold the same power of a true nation, because a nation can never have a separate “sovereign authority” over it, otherwise it would cease to be a nation.⁷ Without a sovereign authority, no true law can exist, because a constitution cannot be created. It should be noted that a constitution is a worthless document without a strong and powerful sovereign to enforce the laws written within the document itself.

Nations only have rights and no duties within a state of nature, which is a state of war. Because of this perpetual state of war, an alliance of nations has the right to go to war at any time in order to assert a claim.⁸ In an established community, a constitution creates legal procedures allowing one to present a claim and seek a fair judgment. The united community as a whole insures the “authority” of law.⁹ However, the international community is not a true unified group, like a nation is. Therefore, no authoritative law can proceed from its mere alliances. Treaties can be broken at will, because of this. Duty either arises internally from ethics or externally from a coercive force. For Kant, law needs agreement, or a “united will,” with the power to consistently coerce, otherwise a

⁷ Kant. Metaphysics. 115. P.A. 6:345. “This alliance must, however, involve no sovereign authority (as in a civil constitution), but only an association (federation); it must be alliance that can be renounced at any time and so must be renewed from time to time. This is a right *subsidiium* of another and original right, to avoid getting involved in a state of actual war among the other members.”

⁸ Kant. Metaphysics. 116. P.A. 6:346.

⁹ Kant. Metaphysics. 91. P.A. 6:314.

state of nature is all that exists.¹⁰ Within a state of nature all that exists is the right to act and acquire without a reciprocal duty created by law.

A state and its property, or more specifically its citizens, cannot be punished for any actions done in the course of war, because punitive wars are forbidden¹¹. This prohibition on conducting a punitive war is merely the logical result of the international implications of the doctrine of right. For Kant, war is a free agent's right within a state of nature; sovereign authorities are merely free agents with no coercively enforced legal code to restrict their actions. One cannot be punished for merely acting upon a right, something that is not legally wrong. Furthermore, a state of nature already entails non-justice because the concept of justice depends on law, which cannot exist without the establishment of a constitution.¹² If this is true, then universal laws cannot offer international justice any authority, because they only apply internally to established nations.

On a national level might merely enforces right, which is completely different than might making right. However, on an international level might is simply might, there can be no applications of justice. The Nazis and all there vile brethren throughout time go free for their past transgressions and are merely given new laws within an internationally constructed constitution governing their future behavior.¹³ What of their victims? What of the horrors and pain they have caused the international community,

¹⁰ Kant. *Metaphysics*. 91. P.A. 6:314.

¹¹ Kant. *Metaphysics*. 117. P.A. 6:347. "No war of independent states against each other can be a *punitive war (bellum punitivum)*. For punishment only occurs in the relation of a superior (*imperantis*) to those subject to him (*subditum*), and states do not stand in that relation to each other."

¹² Kant. *Metaphysics*. 119. P.A. 6:350.

¹³ Kant. *Metaphysics*. 119. P.A. 6:349. "[A defeated nation] cannot lose its original right to unite itself into a commonwealth, though it can be made to adopt a new constitution that by its very nature will be unfavorable to the inclination of war."

who sent their sons to die in order to stop their aggressive and destructive behavior? Nothing, and this seems grotesquely wrong. However, one's intuition may simply be wrong in this matter. In either case, the individual nation must be explored in order to follow Kant's political thought back to its apparent total divorce from his ethics.

Kant's international system with the authority of competing free sovereigns is based upon a conception of innate rights. Most modern intra-national and international laws are based upon the ideals of different types of natural, inherent rights. Human beings possess certain rights based often upon a given conception of freedom, of what a human may do as an individual outside of civilized society. Nations being the aggregates of these individual human beings possess these same rights, but on a much more grandiose scale. Kant only implies that this aggregate creates the power of a nation, its sovereignty, by the sheer "united will" of its people.¹⁴ He specifically denies that a "ruler" is the sovereign, because she is merely an "*agent*" of a nation.¹⁵ All other top-level dignitaries are also agents serving a specific function in order to carry out the united will of a people. Kant is unclear as to whether the sovereignty of a nation is a synthetic whole in nature, or if it is an analytic whole. However, it is clear from a nation's rights it is not analytic in nature, because it does not gain anything in addition to the rights of an individual in a state of nature. The sum is not more than its parts; it is merely a proxy of a united people. However, if rights are viewed strictly within the empirical framework of a nation, what are they based upon and how does this conception play its role within human law?

Kant clearly spells out that societies of humans need a "civil constitution" that binds "free men" under "coercive laws" in order to protect individuals from the abuses of

¹⁴ Kant. Metaphysics. 91. P.A. 6:314.

¹⁵ Kant. Metaphysics. 93. P.A. 6:316.

others.¹⁶ A civil constitution only applies to the intra-national level of human interactions, because international peace is only possible by divine sanction, as demonstrated in Kant's religious philosophy. Kant's reliance on divine providence shall be explored in chapter IV of this work. However, in the intra-national arena, this single idea is perhaps the most enlightening part of all of Kant's political philosophy and shows his break in thought from thinkers such as Hobbes, who viewed power as dependent upon the mere arbitrary will of a sovereign and her strength to enforce her will. The addition of a written contract found in a constitution involves an agreement between a sovereign and her subjects. The rules for this society are clearly laid out so that all players in this game may know in advance what is guaranteed, allowed, and prohibited. Although a sovereign is still seen above the law, a constitution allows for the possibility that ethical laws may be made real within foundational consistent laws that will last as long as the nation does.

The benefits of a constitution lie in the fact that it is a written document clearly spelling out what the coercive laws of a society will be. It establishes law and serves as the foundation to which all other laws must conform. A well-written one attempts to leave nothing to doubt or ambiguity due to its central location within law. It insures that a group of free humans have the ability to know what the concrete laws of the society they choose to become a citizen of are, because "all rights depend upon law."¹⁷ Kant has clearly established that rights exist in a state of nature, but the key change here is that a right based upon law is guaranteed. It is a qualitative difference, as well as a definitional change. A right in a state of nature is akin to the sheer ability to act. It is a right, because

¹⁶ Kant, Immanuel. Classics of Modern Political Theory. "On the Old Saw: That May Be Right In Theory But It Won't Work In Practice." Trans. Cahn, Steven. Oxford: Oxford, 1997. 557.

¹⁷ Kant. On The Old Saw. 560.

no duties have been legally established. Without law, there can be no illegal activity, so in an amoral fashion all is permissible. However, within a nation, laws create legal rights, which also have corresponding duties. For instance, the right to life creates a corresponding duty not to kill unjustly. A guarantee of one's innate human rights has been established through coercive force.

Another important aspect to Kant's theory is that its citizens do not merely form a society in order to enable the "pursuit of happiness".¹⁸ Rights are not created to insure a pleasurable existence; they merely insure that one's choices will be honored, as long as they do not interfere with another's. If these guarantees correspond to a universal law, then a nation has a doctrine of right. A society is formed for only the purposes of allowing an individual the opportunity to express her freedom within the bounds of coercive laws, which act as a leveling device. These coercive laws insure the "a priori . . . principles" that each citizen has "freedom", has a guaranteed "equality" with every other citizen, and has the "independence" of action as a citizen of the society that is free of any illegal or unnecessary coercion.¹⁹ However, these three principles of society must be unpacked in order to gain any understanding of what they actually mean.

For Kant, law is created for the sole purpose of protecting the individual's freedom. It insures no one has the authority to interfere with another person's intellectual or physical activities, unless these activities cannot "coexist" with another person's freedom within a "possible universal law."²⁰ Equality simply means that the law will deal with every citizen in the exact same way as every other citizen. Justice is to be blind

¹⁸ Kant. On The Old Saw. 557.

¹⁹ Kant. On The Old Saw. 557.

²⁰ Kant. On The Old Saw. 558.

and not concern herself with a citizen's economic or social position. Equality is also to guarantee that a citizen has the ability to climb the social and economic ranks through "talent, industry, and luck" without any undo interference from other citizens.²¹ However, this does not mean human rights are merely fictions created by a constitution alone. For Kant, human law merely enforces and expounds upon what is already innate to humanity.

Kant asserts that the only true right belonging to humanity is the ability to exercise one's free choice without the interference of other's choices, within the bounds of his ethics.²² This one right acts as the entire foundation for his legal and political thought. This right already includes "equality" and a conception of inherent human dignity, in that before one transgresses the right of another she is "beyond reproach."²³ What is interesting about this conception of right is that it is entirely based upon the individual and her ability to do whatever she wants. In a state of nature, or war, she may do whatever she wants and violate universal laws, but it is only within the framework of a nation that ethics can be enforced and limit the destructive power of one's actions.

The individual is seen as an entity outside of a community in much the same way Hobbes saw the lone individual with unlimited freedom to do what she saw fit to do before entering into a contract of mutual benefit with others.²⁴ The doctrine of right does take into account that one interacts with others, but its individualistic aspects are seen in

²¹ Kant. On The Old Law. 559.

²² Kant. Metaphysics. 30. P.A. 6:237.

²³ Kant. Metaphysics. 30. P.A. 6:237-8.

²⁴ Hobbes, Thomas. Great Traditions in Ethics. "Social Contract Ethics: Leviathan," Ed. Adams, Peter. Wadsworth: Belmont, 1999. 111. "Nature hath given to everyone a right to all; that is, it was lawful for every man, in the bare state of nature, or before such time as men had engaged themselves by any covenants or bonds, to do what he would, and against whom he thought fit, and to possess, use, and enjoy all what he would, or could get."

its failure to fully comprehend that one is never truly free of one's historical and social location in time. One is born into a host of relationships, which entail pre-made duties and expectations whether one's community is a civilized nation or a clan. Furthermore, one's cultural and historical surroundings will severely limit one's possibilities of actions, which will be explored in depth in Chapter V.

The doctrine of right is a mechanical rule, which lacks any kind of emotional content or duty toward another. The doctrine of right presupposes that one will necessarily see the community as wholly other, a mere boundary that limits one's total freedom, as compared to seeing oneself enmeshed within one's community and using one's free choices in service to this community. An individual's rights are of paramount importance without any thought to the rights of the community and the duties these entail. The doctrine of right asserts laws are made for the profit of individuals and not necessarily for the betterment of the community. In this system the individual necessarily supercedes the community. An example of this can be taken from modern capitalist economic practices. The community may benefit from the individual's desire to make a profit, but the individual's profit is the focus of economic endeavors and not the community's benefit. The community's betterment is a fortuitous accident within both systems, because of their individualistic viewpoints.

Although Kant has introduced an idea of an ethical law, which limits the abuses of a legal system based entirely on individual freedoms, he has based human rights on the paradigm of the individual exercising her freedom to acquire possessions. Kant makes a clear distinction between one's inherent true natural right and one's civil rights. The latter receives all of its authority from the former, but the former turns into a right to

possess.²⁵ In fact, a great deal of Kant's doctrine of private right deals with properly defining what possession actually is in order that a nation may safeguard it within a constitution. The doctrine of right has accomplished much for politics in general, if human beings are viewed primarily as economic creatures. However, all human interactions and disputes do not involve property. Are the expression of ideas and or the ability to adhere to a specific religion merely matters of property? How many wars and disputes have been fought over these two issues alone without any true concern over property? Of course, one can redefine property and cast all human interactions into terms of economics alone, but this misses the whole phenomenology of what it is to be a human. Homo sapiens are not solely homo economicus.

One's freedom becomes one's right to own. If freedom is defined as the right to act, then everything external to one can be used as an example of one's "outward freedom."²⁶ One's free actions become the manipulation of objects within the world. The expression of one's freedom results in one of three classes of choices within a civil society, which result in three types of possessions. One may choose a "corporeal thing," "another's choice" to carry out an action, or "another's [relational] status" to the one choosing.²⁷ One may choose to acquire a physical object, such as an acre of land or a horse, and by so doing come to own it, as long as it is not already claimed. This is simply the modern conception of ownership; one acquires an object within the framework of the

²⁵ Kant. Metaphysics. 34. P.A. 6:242. "The highest division of natural right cannot be the division (sometimes made) into natural and social right; it must instead be the division into natural and civil right, the former of which is called private right and the latter public right. For a state of nature is not opposed to a social but to a civil condition, since there can certainly be society in a state of nature, but not civil society (which secures what is mine and yours by public laws). That is why a right in a state of nature is called a private right."

²⁶ Hoffe, Otfried. Immanuel Kant. Trans. Farrier, Marshall. State: Albany, 1994. (178).

²⁷ Kant. Metaphysics. 38. P.A. 6:247.

rules of her society. Additionally, one can acquire the actions of others by their promises. This is simply the idea of a legally sanctioned oath or contract; a promise's fulfillment is enforced by the state's coercive power when necessary. However, Kant appears to step outside of his ethics and doctrine of right by claiming one can acquire people merely due to their status within a civil society. A possession is "*rightfully*" one's own, if someone else's use of it would somehow "wrong" one who has already established a claim on it.²⁸ A wife, children and servants all fall under persons who can be claimed as living property.

This ownership of another person is more than a simple claim that one might make when stating that one is my spouse or one is my child. There is a qualitative difference between a claim of mine-ness versus claiming a person is my property and that the unauthorized use of that person is a violation of my right. A modern conception of family relations is based upon a sense of belonging, such as the belonging of one to her community or of an athlete belonging to her team. It is a claim of a bond, which is based more upon emotions than on a logical legal analysis of biological relations. A coach does not mean that she owns her players when she asserts they are hers. In order to highlight the significance of Kant's claim one needs to look no farther than his assertions about marriage.

Marriage, for Kant, is the legal guarantee of sole access to another's sexual organs; one gains legal possession of another sexually.²⁹ If Kant is merely attempting to

²⁸ Kant. *Metaphysics*. 37. P.A. 6:247.

²⁹ Kant. *Metaphysics*. 62. P.A. 6:277-8. "Sexual union in accordance with law is marriage (*matrimonium*), that is, the union of two persons of different sexes for the lifelong possession of each other's sexual attributes . . . For the natural use that one makes of the other's sexual organs is *enjoyment*, for which one gives itself up to the other. In this act a human being makes himself into a thing, which conflicts with the right of humanity in his own person. There is only one condition under which this is possible: that while

reduce some human interactions to their least common denominator in order to guarantee certain rights by law, then there is no real issue here. However, his claim is more fundamental than simple legislation. His claim is that ethically in order for one to have sexual relations with another, each must first become the other's property. This is caused by his assertion that sex involves the use of another as a thing, which robs one of one's own dignity and the right to one's own possession, namely one's own body. The only way for the sexual act to become ethical is to establish a legally fair trade, namely the exchange of each other's bodily possession. Marriage is the exchange of mere sexual organs; the person attached to the sexual organ is simply part of the deal like the mineral rights accompanying the purchase of land for the sole purpose of agriculture. One becomes a legal possession of the other in the strictest sense of the word. One may rightfully claim back this possession from another, if it is taken or leaves of its own accord.³⁰ A person is never a mere thing or simple possession. Neither is marriage a contractual agreement solely for sexual access. In fact, Kant's whole view of the sexual act itself seems to entirely miss the point. His view is more akin to the sexual act that transpires between a prostitute and a 'john'. Marriage is a commitment and duty to another; it is an act focusing on the community, which sees one as part of the other. In this sense, marriage is akin to friendship or parenting, but marriage usually involves sexual intercourse. Sexual intercourse between two people, who genuinely love one

one person is acquired by the other *as if it were a thing*, the one who is acquired acquires the other in turn; for in this way each reclaims itself and restores its personality. But acquiring a member of a human being is at the same time acquiring the whole person, since a person is an absolute entity. Hence it is not only admissible for the sexes to surrender and to accept each other for enjoyment under the condition of marriage, but it is possible for them to do so *only* under this condition."

³⁰ Kant. *Metaphysics*. 62. P.A. 6:278. "That this *right against a person* is also *akin to a right to a thing* rests on the fact that if one of the partners in a marriage has left or given itself into someone else's possession, the other partner is justified, always and without question, in bringing its partner back under its control, just as it is justified in retrieving a thing."

another, is an act done not for mere pleasure, but to achieve a belonging, a sense of total union with this community of two. Furthermore, it is often about pleasing the other more than pleasing one-self. The danger of reducing humanity to either pure economic rational creatures is present in Kant's political philosophy. This problem leads to laws that are completely inhuman in their nature, and therefore unjust. However, this is a merely a byproduct of reducing human interactions to the individual and failing to see that one is a part of a community.

Apart from Kant's views on marriage, if all he is saying is simply a nation can establish laws designating certain people as property, then he is just alluding to the obvious. Namely, if a law says you can own something, then it is legal. However, his claim is of a more fundamental nature and it revolves around his presuppositions of who actually is free enough to have rights. A state of nature entails the ability to control a thing physically and repulse all others who might take it away.³¹ However, once a civil authority has been established it creates laws insuring that one's possessions are not just temporary claims, but claims fixed for an indefinite period of time by the creation of coercively powerful laws. The community as a whole acts as a combined force to physically repulse the few who would attempt to take a possession away from its rightful owner. In this sense, might makes rightful ownership whether in a state of nature or a civilized society. Since all laws are based upon the idea of possession, whether this be one's livestock or one's own life, might appears to make legal right.

In order to understand this seemingly complete divorce of law from ethics, the foundations of rightful legal ownership must be investigated. Simple possession of an

³¹ Kant. Metaphysics. 45. P.A. 6:257.

object is not merely the physical holding of an item, mere “sensible possession,” but it is the “intelligible possession” of a thing that makes it rightfully one’s.³² One must establish possession based upon one’s freedom of choice within the bounds of ethics. Possession is therefore not an empirical claim, but a rational one. Legal ownership is based on “practical reason” and is therefore in accordance with a universal law, as a “principle” of reason.³³ Reason dictates that an action is permissible, if this action can be made into a universal law that applies to all. In order to establish a legally rightful claim to an object, Kant must demonstrate the necessity of private property through reason alone. But, reason alone cannot dictate a universal law establishing that an object is necessarily one person’s or another’s. There are two actual universal laws one can make regarding property. One could make a universal law stating no one may possess property, but this results in a contradiction with one’s innate right of free choice. If one cannot possess an object to make use of it, then one cannot be free. The maxim that all objects of use may be possessed for their use does not conflict with one’s freedom. Possession of objects then becomes a necessary condition for humans to express their outward freedom. And more importantly for Kant’s purposes, private ownership of property is a law of reason. Therefore, if freedom needs property in order to exist within

³² Kant. Metaphysics. 37. P.A. 6:245.

³³ Kant. Metaphysics. 40. P.A. 6:246. “It is possible for me to have any external object of my choice as mine, that is, a maxim by which, if it were to become a law, an object of choice, would in *itself* (objectively) have to belong to no one (*res nullis*) is contrary to rights. For an object of my choice is something that I have the *physical* power to use. If it were nevertheless absolutely not within my *rightful* power to make use of it, that is, if the use of it could not co-exist with the freedom of everyone in accordance with a universal law (would be wrong), then freedom would be depriving itself of the use of its choice with regard to an object of choice, by putting *usable* objects beyond any possibility of being *used*; in other words, it would annihilate them in a practical respect and make them into *res nullis*, even though in the use of things choice was formally consistent with everyone’s outer freedom in accordance with universal laws.”

the empirical world and a constitutional government is needed in order for property to exist, then a constitutional government is a “rationally necessary institution.”³⁴

Government, property, and human freedom are so intimately connected within Kant’s political philosophy they cannot be separated in the least. One acquires any object as a possession because one has a use and the “physical capacity” to use, which is an expression of one’s freedom.³⁵ A person as an object of possession would require a physical capacity to use and a use for this person. A government makes a person into a possession by the sheer force of “law” through its coercive power; this is beyond the right to mere objects and it is not a contract, it is a “natural permissive law”.³⁶ This permissive law is established by humanity being social beings. However, what does this actually mean? Humans have cultures and histories, but this does not make their practices right, moral, or ethical. Law’s authority is dependent upon ethics, but is the ownership of people ethical? Is the enforcement of social norms ethical? Granted, Kant limits this type of ownership to wives, one’s offspring, and one’s employees; these owned persons must be treated ethically, but is a limited form of ethical slavery ethical?³⁷ Again, it would appear that the individual’s rights outweigh the rights of other’s solely based upon one’s social rank within a society. This may be the actual way things are, but what of the way things ought to be? This question is of paramount importance, if Kant’s assertion that ethics gives authority to law is to be taken seriously.

Kant’s political system of freedom and property, coupled with the coercive force of a legislating government, gives rise to many legally permissible actions, which seem

³⁴ Hoffe. Immanuel Kant. 180.

³⁵ Kant. Metaphysics. 41. P.A. 6:246.

³⁶ Kant. Metaphysics. 61. P.A. 6:276.

³⁷ Kant. Metaphysics. 61, 66. P.A. 6:277, 283.

anything but just and ethical. For instance, a child born out of wedlock may be killed by the mother.³⁸ This action is not murder, because the child has no legal rights by being born outside of a legally sanctioned procreative contract, i.e., marriage. Of course, Kant asserts the mother may be punished, but not executed, because this action was not a case of legal murder. Is not murder always murder, whether a law has been created to strictly forbid it? Kant's entire system of politics suffers from its derivation from mere property rights. Property is a thing, however human beings are more than mere objects. They are living entities deserving of respect and imbued with dignity, which Kant argues for in his ethics. Law being based solely on property rights misses the major thrust of ethics, which is beyond mere duty. Ethics are about community and the quality of life within a community. If law arises from ethics, then law should also aim for human flourishing, or the highest good.

Although Kant has been attacked for holding antiquated ideas of marriage and society in general, it is his philosophy and not his beliefs that give rise to the major problems within his politics. An innate right to use an object does not imply one needs to possess it. For almost ten years, I used a police car to express my outward freedom as a police officer. However, I did not own this vehicle, the state, or more aptly the sovereign will of the people, owned this vehicle. It is also doubtful whether the term "own" can necessarily be used when describing something belonging to the community. Granted, the use of this vehicle was restricted to police officers in the performance of their duties, but police officers are the only one's who have a real use of the vehicle. It is simply a

³⁸ Kant. *Metaphysics*. 109. P.A. 6:336. "A child that comes into the world apart from marriage is born outside the law (for the law is marriage) and therefore outside the protection of the law. It has, as it were, stolen into the commonwealth (like contraband merchandise), so that the commonwealth can ignore its existence (since it was not right that it should have come to exist in this way), and can therefore also ignore its annihilation . . ."

major error to base law on only one aspect of humanity, its economic aspect. Human interactions are social interactions, which encompass more than the ownership of objects.

In Kant's political philosophy all legal aspects of human interactions pertain to property rights. Rape is merely the theft of someone's property, namely the use of one's sexual organs. Murder is the theft of someone's life. The list can go on until every ethically forbidden act can be viewed as an issue of the theft of property. Kant's system feels cold and impersonal and seems to miss the entire purpose of law's being just. His formulation creates a legal system based entirely on the individual and not on the community. The community merely exists to lend its combined physical might to establish a legal code of self-interest.³⁹ Law cannot exist with property, which cannot exist without the establishment of a constitutional government. International justice is then a quixotic quest for an imaginary ideal of holding individuals accountable for their action. However, human law gains its authority from ethics. Ethics forbids murder, rape, and many other horrid actions. The prohibition of such actions is not based upon theft, but upon some deeper issue of certain actions being inherently wrong. The Nazi's, the East German's and many other groups, such as the Taliban, have committed extreme violations of ethical laws. Ethics and law seem to demand from one, or an entire nation, more than self-interested justice. Justice is aimed at punishing wrongs, simply because they are wrong and not because a law has been created within the empirical world stating an action is wrong.

³⁹ Wolfgang, Kersting. The Cambridge Companion to Kant. "Politics, Freedom, and Order," ed. Guyer, Paul. Cambridge: Cambridge, 1992. 345. "Inner intentions and convictions are excluded from the sphere of justice just like interests and needs. That means that no claims of right can arise from one's neediness. Right does not help powerless needs. For Kant a community of right is not a community of solidarity among the needy, but a community for self-protection among those who have the power to act."

Justice is a community effort to answer the cries of the victims of any wrong. Labeling legal wrongs as mere property rights' violations seems to make a qualitative mistake about what ethics truly is. However, Kant may have simply mis-formulated his politics, or he may have realized that the motivations behind ethics cannot be legislated within the empirical world. Or, as I shall argue, it could be that his ethics, which includes his laws of freedom, is faulty. The apparent faults in his political thought may arise from a fault in his conception of what it is to be a human, to be an individual. However, before this question can be answered, his ethical and his religion, which ultimately grounds his ethics, must be explored.