

*In The Idea of Private Law, Ernest Weinrib sought to rescue private law's autonomy from functionalism's reduction of private law to an instrument of the public interest. The twin ideas he employed for this purpose were corrective justice and Kantian Right. According to Weinrib, corrective justice provides private law's unifying structure, while Kantian Right supplies its normative content. In this essay, I argue that Kantian Right cannot be the normative complement to the corrective-justice form of private law because, with the exception of trespass to the person, private law vanishes in Kantian Right. I argue that there is no possibility for an autonomous private law in Kantian Right and that there is, indeed, a logical progression from Kantian Right to the very functionalism that Weinrib opposes.*

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### I *The Idea of Private Law*

In the book for which he is rightly celebrated, Ernest Weinrib sought to rescue the concept of private law from its erasure in American legal scholarship. As Weinrib observed in *The Idea of Private Law*,<sup>1</sup> the perspective on the law of interpersonal transactions dominant in American law schools for nearly a century has been thoroughly functionalist or goal-oriented. From the realism of the 1930s to the economic analysis of today, that perspective views private law through a public-law lens, demanding that rules governing liability for losses suffered through accidents and contractual breaches rationally serve the public welfare. More specifically, the dominant approach insists that liability rules serve such goals as the deterrence of excessive risk taking, the compensation of victims, the wide distribution of losses caused by accidents, the efficient allocation of resources, or some optimal mix of all such socially desirable ends. Any claim that the law of interpersonal transactions can be understood otherwise than as furthering public ends or that a law so understood can possess normative stature is met with incomprehension or derision.<sup>2</sup>

\* Albert Abel Professor in the Faculty of Law, Professor in the Department of Political Science, University of Toronto.

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1 Ernest J Weinrib, *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995) [Weinrib, *Idea*].

2 Felix Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 *Colum L Rev* 809.

Stated generally, Weinrib's objection to the functionalist understanding of private law was that it fails to understand private law as private. For this approach, he argued, a goal is justified by some non-legal discipline as worthy of public pursuit, and then private law is, like all law, judged as to whether it effectively furthers the goal. Thus, Weinrib remonstrated, 'all law is public'; 'no distinction exists between private and public law.'<sup>3</sup> Functionalism, he wrote, 'denies that private law is private in any significant sense. At most private law is public law in disguise.'<sup>4</sup> The dominant approach 'precludes the hiving off of private law from the collective pursuit of public goals.'<sup>5</sup> In short, the standard view denies the autonomy of private law.<sup>6</sup>

Against the functionalist understanding of private law, Weinrib urged a radically different approach, to which he attached a name coined by others to designate false objectivity: legal formalism. In Weinrib's version thereof, legal formalism views the law of interpersonal transactions as ordered, not to public goals, but to a justificatory logic immanent in the direct relationship between the parties to a lawsuit. For Weinrib, the directness of the litigating parties' connection is the 'master feature' of private law, the one constituting private law's specific difference from other forms of legal ordering and supporting the autonomy of its logic from that of instrumental rationality.<sup>7</sup> The parties are connected directly in that their nexus is established solely through their transaction and independently of any joint relation to a third entity – to a political unit, for example.

What is the nature of the link between plaintiff and defendant lying at the heart of private law? It is, Weinrib argued, the 'sheer correlativity' between the defendant's doing harm to the plaintiff and the plaintiff's suffering harm from the defendant.<sup>8</sup> According to Weinrib, one understands the law of interpersonal transactions only by grasping everything about it – doctrine, procedure, institutional frame, discourse – as expressing this correlativity and cohering around it; for only thus can one preserve in one's account of private law the features without which private law would vanish as a distinctive kind. Those features are (a) the successful plaintiff's right to recover (b) from this particular defendant and from no other (c) the precise sum that the defendant is (d) duty-bound to pay the plaintiff and no other. The hallmark of functionalist understandings is that they sever correlativity by proposing justifications of liability

3 Weinrib, *Idea*, supra note 1 at 7.

4 *Ibid* at 7.

5 *Ibid* at 8.

6 *Ibid* at 3, 6.

7 *Ibid* at 10.

8 *Ibid* at 81.

(compensation, deterrence) applying to one party but not to the other – justifications whose logical thrust makes the competencies of bipolar adjudication look like irrational fetters on ambitious social policies. Thus, the compensation rationale explains why the plaintiff should recover but not why the defendant should pay nor why recovery should depend on fault, while the deterrence rationale explains why the defendant should pay but not why he should pay what the plaintiff lost nor why his liability should depend on the chance materialization of harm. In decomposing correlativity, Weinrib argued, functionalist understandings exhibit the occupational vice of the justificatory enterprise: incoherence.<sup>9</sup>

For Weinrib, to understand the law of interpersonal transactions as anchored in the correlative structure of doing and suffering is to understand it as manifesting the form of corrective justice canonically described by Aristotle. Consisting in a mathematical operation restoring the mean between excess and deficiency in respect of holdings resulting from transactions, corrective justice structures the private law relationship as a bipolar one between parties joined together as the active and passive termini of a harm. As a consequence, a corrective justice account of private law is uniquely able to comprehend its object as a unified kind, distinct in character from legal regimes not hinging on the correlativity of doing and suffering. We see this capability in the way that corrective-justice theory understands ‘justice,’ ‘injustice,’ and ‘correction.’

The justice to which Aristotelian corrective justice refers is justice of a specific kind. It is justice in relation to another as distinct from inward rectitude of character, and it is that species of other-directed justice pertaining to transactions as distinct from distributions. Transactional justice holds two interacting parties to their equal status as owners of whatever quantities of things they held prior to their interaction,<sup>10</sup> and this baseline equality functions as the mean between having too much and having too little relative to the other in the context of transactions. Though obscure, the relevant equality of the parties is evidently formal in that it abstracts from all differences pertaining to their individuality – differences in holdings, social status, virtue, and so forth. The parties are equal holders of what they hold; that is all we can say about their equality at this point.

If other-directed justice consists in the parties’ equality, then a transactional injustice occurs when someone upsets equality by gaining a ‘quantity’ at another’s expense.<sup>11</sup> Acquiring an unjust gain at another’s expense is the idea that explains the unbroken pairing of plaintiff and defendant from transaction through lawsuit to remedy. Correlativity obtains, not

9 Ibid at 32–46, 72–5, 120–2.

10 Weinrib, *Idea*, supra note 1 at 63.

11 Ibid at 62.

only between the doing and suffering of wrong, but also between what the defendant has gained from the wrongful transaction and what the plaintiff has lost, much as the upward movement of one scale of a balance is correlative to the downward movement of the other. Remedial or corrective justice is correspondingly bipolar. It consists in restoring equality by transferring from wrongdoer to victim a quantity equal to that representing the wrongdoer's unjust gain, which is itself quantitatively equal to the victim's unjust loss.<sup>12</sup>

In that it consists in restoring a base-line equality upset by a transaction, corrective justice is a form of legal ordering categorically distinct from, and irreducible to, that of distributive justice. No doubt distributive justice is also a kind of equality; but here, the equality is one of ratios rather than quantities, for distributive justice consists in allotting a benefit or burden among persons in proportion to their merit, according to some criterion thereof. The specific criterion embodies some conception of the public interest that is extrinsic to the form of proportional equality and that must therefore be imported from an extra-judicial political process, whose task is to decide authoritatively which collective purposes a distributive scheme will serve and how. This porosity to politics of distributive justice contrasts starkly, Weinrib argued, with the self-containment of corrective justice. Serving no collective end, corrective justice regards only the immediate transaction between doer and sufferer, demanding that both be restored to their base-line positions through a reverse transaction, but remaining indifferent to whether their holdings at those positions can be justified from a collective standpoint.<sup>13</sup> So, whereas corrective justice presupposes two individuals related directly through a wrongful transaction, distributive justice envisages an indeterminate number of people related mediately through common participation in a distribution serving a public interest.<sup>14</sup> Hence, the idea of corrective justice organizes private law in a way that both preserves its transactional nexus and vindicates its autonomy vis-à-vis public law.

Nevertheless, Weinrib's vindication of the idea of private law was not yet complete. Corrective justice constitutes private law's formal structure, but considered as a mathematical form, it lacks normative force. Yet, private law coerces people to rectify their unjust transactions in accordance with corrective justice, and this coercion must be justified, for law is a normative practice. For Weinrib, however, to elucidate the normative character of private law is not necessarily to engage in the normative enterprise of justifying a private-law regime. It can be the reticently positive endeavour to find the normative theory that goes with private law,

12 Ibid at 65.

13 Ibid at 210-4.

14 Ibid at 71.

setting aside the question of that theory's cogency. Whether or not a private-law system is justifiable, Weinrib might say, it gives coherent expression to a certain substantive idea of justice, in terms of which it is therefore pellucidly intelligible. In the end, one might reject this idea and replace tort law (for example) with a scheme of social insurance coherently ordered to a collective good. Weinrib offers no argument against such a reform. However, to use private law for collective aims proposed by theories of justice alien to it is to commit the formalist sin of mixing kinds. It is to abandon corrective justice without rigorously accomplishing distributive justice.

It followed that, in its search for normativity, corrective justice could not partner with just any substantive theory of justice that provided moral or pragmatic reasons for preserving private-law doctrines and institutions. The price of such promiscuity would be that, in depending on those external reasons, private law would again lose its autonomy as a self-regulating process. Instead, corrective justice had to find the normative complement intrinsic to it. We might say that, if law (as Weinrib famously put it) is like love, then corrective justice had to find its normative soulmate. It had to embrace a theory of substantive justice that uniquely filled the lacuna in its form, and whose longings for a suitable form of realization it could reciprocally fulfil.

Enter Kant. As Weinrib explained it, the match between Aristotelian corrective justice and Kant's philosophy of Right (henceforth, Kantian Right) was made in heaven, for it is a perfect interlocking of mutually complementary parts.<sup>15</sup> Aristotle argued that corrective justice consists in restoring the parties to an antecedent equality, but he did not say in what respect the parties are to be considered equal. He also saw that corrective justice makes irrelevant all individuating traits of the parties, intimating that the parties' equality is in respect of something transcending all such differences. However, he did not identify the transcendental point. Third, he saw that the parties under corrective justice are linked by correlativity; but, in understanding this relation as the factual doing and suffering of harm, he did not specify the appropriate legal conception of correlativity.<sup>16</sup>

All these voids are filled, according to Weinrib, by Kantian Right. The conception of equality uniquely appropriate to a form of justice prescinding from all differences between the parties is 'the equality of free purposive beings under the Kantian concept of Right.'<sup>17</sup> The transcendental point reached through abstraction from all differences is the Kantian noumenal self.<sup>18</sup> The appropriate legal specification of correlativity is

15 Ibid at 80-3.

16 Ibid at 114-5.

17 Ibid at 58.

18 Ibid at 82.

the correlativity between the right of free beings to act purposively in the world and the obligation of free beings to respect that right in exercising theirs. Conversely, the form of remedial justice uniquely appropriate to one free agent's infringement of another's right is the bipolar one of corrective justice. As Weinrib put it, 'Corrective justice is the justificatory structure that pertains to the immediate interaction of one free being with another. Its normative force derives from Kant's concept of right as the governing idea for relationships between free beings.'<sup>19</sup> Thus, corrective justice and Kantian Right are the 'arch-concepts by which one must conceptualize the features of private law...'<sup>20</sup> Corrective justice is private law's unifying structure; 'Kantian right supplies the moral standpoint immanent in its structure.'<sup>21</sup>

Everyone knows the point in the Anglican wedding ceremony at which the priest asks if there is anyone in the congregation who knows a reason why the radiant couple should not be joined in matrimony. If so, he says, that person should speak now or forever hold his peace. At the risk of being thought an unromantic spoiler, I must speak up. Kantian Right will be a terrible partner for corrective justice. He will lead her on. In the beginning, he will flatter her, dote on her, give her hope that he will foster and support her independent vitality. But in the end, he will humiliate her, destroy her independence, and forsake her for another. She could die of a broken heart.

Weinrib's argument for the mutual complementariness of corrective justice and Kantian Right leaves a gap. While it may be true that 'corrective justice is the justificatory structure that pertains to the immediate interaction of one free being with another,' it does not follow that Kantian Right lends normative force to corrective justice; for we do not yet know how Kantian Right will treat (or mistreat) that relation, whether it will sustain or immerse in public distributive justice a direct relation between right-bearing agents. That is to say, we do not yet know how Kantian Right will treat private law's autonomy.

In what follows, I argue that, with the exception of trespass to the person, private law vanishes in Kantian Right. I argue that there is no possibility for an autonomous private law in Kantian Right and that there is, indeed, a logical progression from Kantian Right to the very functionalism that Weinrib decries. Of course, I do not mean that there is no possibility in Kantian Right for a legal regime governing the interactions between one person and another; after all, even contemporary American products-liability law is such a regime. Rather, I mean that (with the exception mentioned) there is no sense in which Kantian Right

19 Ibid at 19.

20 Ibid.

21 Ibid.

can regard the law of transactions as private – as a regime categorically distinct from, and irreducible to, the law directed toward a public interest. Nor do I leap from this to the conclusion that an autonomous private law is impossible, period; on the contrary, I argue elsewhere that such a regime is indeed possible under Hegelian Right. My point is narrower. It is that Kantian Right cannot be the theory of justice belonging to private law, for it is, on the contrary, antagonistic to private law. Even if Weinrib's descriptive phenomenology of private law can be indifferent to whether the phenomenon is logically stable, it cannot regard as private law's own theory of right one for which private law is logically *unstable*.

## II *Kantian Right in the state of nature*

In his *Doctrine of Right*, Kant divides rights into natural rights and positive or statutory rights. The latter, he says, proceed from the will of a legislator, whereas the former rest on a priori principles.<sup>22</sup> However, Kant uses the term 'natural right' in two different senses. Sometimes, natural right refers broadly to the entire body of law, including public law, resting on a priori principles; and sometimes, it refers narrowly to the rights that free agents possess in a state of nature defined by the absence of public lawgiving, adjudication, and enforcement. Thus, natural right in the broad sense encompasses two divisions: state-of-nature rights and public right.<sup>23</sup> When Kant uses the term 'natural right' to refer to rights in a state of nature, he identifies natural right with private right.<sup>24</sup>

Equating private right with right in a state of nature endows private right with just the hard-edged categorical autonomy a normative helpmate would recognize and support. This is so because Kant's state of nature is a mental abstraction from the rule of a public authority – a condition in which individual agents are related only immediately through their actions' impinging on the free action of others. Absent a public framework for lawgiving and adjudication, right is necessarily the private right of each monadic agent with respect to others. For Kant, accordingly, private right means right in the state of nature because a distinct category of private right is conceivable only as a right that would hold in a condition logically prior to one of public right.

22 Immanuel Kant, *The Metaphysics of Morals*, Part I, translated by Mary Gregor (Cambridge: Cambridge University Press, 1991) at 6:237 [Kant, *Metaphysics*]. Page citations are to volume 6 of the Prussian Academy edition of Kant's works, upon which Gregor's translation is based. These page numbers appear in the margin of Gregor's translation.

23 Ibid at 6:242.

24 Ibid at 6:242

Kant defines rights (in the broad sense) as moral capacities for putting others under obligations, and he distinguishes between two sorts of these capacities.<sup>25</sup> One he calls 'innate right,' the other, 'acquired right.' Innate right is 'the Right of humanity in our own person,'<sup>26</sup> the right that every human being has, just by virtue of the end-status involved in its free will, to be independent of the constraint of another person's choice.<sup>27</sup> So, every human being has an inborn right against being forcibly held, pushed, pulled, hit, abducted, or killed by another human being unless such force is required to resist an action opposed to innate right, in which case the force is authorized by innate right.<sup>28</sup>

Logically entailed by innate right are several further propositions. One is the equal dignity of human beings and, therefore, the duty and the right of each to be 'his own master.'<sup>29</sup> The duty to be one's own master, or of 'rightful honour,' implies an injunction against treating oneself as a means for others without also being an end for them.<sup>30</sup> Juridically, this means that no one can bind himself to a coercive, non-reciprocal obligation. The right to be one's own master implies a right against 'being bound by others to more than one can in turn bind them.'<sup>31</sup> Thus, no one can unilaterally impose a coercive obligation on another, although, in the case of reciprocal obligations valid a priori (i.e., those correlative to innate right), implied consent suffices to negate imposition. Also implied by innate right is a permission to act in the world as one chooses up to a limit – defined by a law of general application – consistent with the equal permission of everyone else. In Kant's well-known words, 'Any action is right if it can co-exist with everyone's freedom in accordance with a universal law. ...'<sup>32</sup> Kant calls this principle the axiom of right. It follows from this axiom that to restrain someone in the lawful exercise of his freedom is to act in a way inconsistent with equal freedom and thus to do wrong.<sup>33</sup>

Crucially, innate right requires no action by the person, for it necessarily pertains to beings with a capacity freely to choose their ends; hence, it is established 'by nature' or a priori.<sup>34</sup> Because they are valid a priori,

25 Ibid at 6:237.

26 Ibid at 6:236.

27 Ibid at 6:237.

28 Ibid at 6:231.

29 Ibid at 6:238. For an exposition of Kant's legal philosophy that puts the right to be one's own master at the centre, see Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009).

30 Kant, *Metaphysics*, supra note 22 at 6:236.

31 Ibid at 6:237.

32 Ibid at 6:230.

33 Ibid at 6:231.

34 Ibid at 6:237.



the negative obligations (not to hit, hold, push, etc.) correlative to innate right have the *imprimatur* of an implicit omnilateral consent even prior to a civil condition. Already in the state of nature, these obligations are consistent with the innate right of being one's own master; and so they will have no need of confirmation by a citizen legislature, once such a body comes into existence. By a citizen legislature I mean the law-making authority to which Kant refers in section 46 of the *Doctrine of Right*. That authority belongs, he says, to the 'concurring and united will' of those qualified by their civil independence to consent to the statutory laws that will govern them.<sup>35</sup> Innate right will require no approval from such a body because, as a universal right of humanity entailed by free will, it already has, a priori, all the approval it needs.

The same cannot be said of acquired rights, however. Acquired right is the right to have as mine things that are distinct from me. To have a right to call mine something that is not me, it must be the case that I have a right, not only to prevent another from taking what I empirically possess (for this is just the innate right that I have in me), but also to recover the thing from someone who has already wrested it from my possession and to prevent him from using the thing even though my physical possession has been interrupted. That is to say, ownership of things distinct from me implies a right to an 'intelligible possession' that is distinct from empirical possession. Such a right is not, however, analytically contained in the idea of innate right; for I could be master of my body even were I were master of nothing else. Nevertheless, the right to own things that are not me is synthetically connected to innate right by what Kant calls a 'postulate of practical reason with regard to rights.'<sup>36</sup> According to this postulate, I have a right to prevent another's using something of which I was dispossessed because, were it wrongful to do this, I would have no right to the use (as distinct from the empirical possession) of things according to my free will, even though they are useful and I have the physical capacity to use them; hence, the range of my freedom would be curtailed short of what is required for equal freedom, and that is contrary to the axiom of right.

Acquired rights to things distinct from me can be either originally or derivatively acquired. Acquisition is original if I acquire the thing solely

35 Ibid at 6:314. Henceforth, I use the terms 'omnilateral will' and 'general will' interchangeably to refer to the will that legislates, a priori, the body of law comprising natural right in the broad sense. The omnilateral (general) will is represented in a civil condition by the united will of a multitude that has formed itself into a state under laws of right. Laws of right are either necessary laws of a priori right or statutory laws consistent with a priori right; see *ibid* at 6:313.

36 Kant, *Metaphysics*, *supra* note 22 at 6:246.

by my own action; derivative, if I acquire a right to the thing through another's transferring the right to me by contract (in which Kant includes gift) or by law.<sup>37</sup> The distinguishing feature of acquired rights is that they require some action by an agent; hence, they are contingent on an agent's choice. For example, a right to the intelligible possession of a piece of land requires a choice to occupy hitherto unoccupied space and to signal one's intention to control it to the exclusion of others; a contractual right to compel another's choice depends on notionally simultaneous acts of offer and acceptance. Because they depend on a *contingent* choice, ownership rights over the specific objects one acquires in a state of nature lack the sanction of an implicit or a priori consent by everyone who would be bound by them.<sup>38</sup> Because they depend on a *unilateral* choice, they also lack, prior to the civil condition, the actual collective authorization of those whom specific property claims would bind.

Here, alas, we come upon a sign full of foreboding for the marriage between private law and Kantian Right. For Kant, the fact that acquired rights depend on an action means that, in a state of nature, acquired rights to specific objects necessarily derive from a contingent and unilateral choice.<sup>39</sup> There is for Kant no pre-civil validation of right-claims over particular things by those whom the claims purport to exclude. In Kant's state of nature, rights are either knowable a priori and approved by an

37 Ibid at 6:260.

38 To be precise, rights to the *intelligible possession* of specific objects lack a priori omnilateral consent. By contrast, my right empirically to possess a particular piece of land and to prevent others from ejecting me rests, Kant says, on an 'innate possession in common of the surface of the earth and on a general will corresponding a priori to it, which permits private possession on it . . .'; *ibid* at 6:250. This implicit omnilateral consent to empirical possession must be assumed for the sake of innate right, given the circumstance that Earth is a sphere; *ibid* at 6:262. My right to bodily integrity entails a right to be where I am even though this precludes others from being there. If Earth were an unbounded plane, no one's possession of land would subtract from the total, for there would be no total to subtract from; therefore, no a priori consent to someone's physically occupying a place would have to be assumed. Given, however, that Earth is spherical, possession of any area bears implications for everyone else; hence, the a priori consent of all who originally possess the Earth in common must be assumed as a deduction from innate right. Observe, however, that what is legitimated in the state of nature by the implicit consent of possessors in common is only my empirical possession of something in particular, not my right to call it mine even when I am not possessing it. In the state of nature, according to Kant, I have an omnilateral authorization to own abstractly and an omnilateral authorization to possess something in particular, but no omnilateral authorization to own the particular object I chose to possess; that can come only in a civil condition; see *ibid* at 6:267.

39 *Ibid* at 6:259, 263.

implicit omnilateral consent, or they are contingent on a unilateral choice; there is nothing in between.<sup>40</sup>

The significance of this, of course, is that a unilateral choice cannot bind others consistently with their innate right of equality and self-mastery. As Kant puts it, 'Now a unilateral will cannot serve as a coercive law for everyone with regard to possession that is external and therefore contingent, since that would infringe upon freedom according to universal laws.'<sup>41</sup> Since, however, Kant thinks that all natural (private) rights to acquired things involve unilaterally imposed obligations, he has to think that all such rights come with a question mark. We will see that this is the case. To call them 'natural rights,' it turns out, is to flatter them. Their naturalness is no warrant for their validity.

One might think that natural rights to things acquired through contract are different from rights to things acquired originally because, in the former case, one's right is acquired with the consent of the one bound by it, whose right to dispose of the thing is reciprocally recognized by the one who acquires it. However, Kant denies that contract confers a stronger property than original acquisition. In his view, rights acquired through a transfer likewise derive from a unilateral choice because a bilateral will is still particular in relation to an omnilateral will.<sup>42</sup> No doubt, the contractual right itself is a right only with respect to a particular, consenting person, not purporting to bind the world. But, argues Kant, the *in personam* right is not a right to the thing promised; it is, rather, a right to compel the will or choice of the promisor.<sup>43</sup> The right to the thing acquired through the promisor's accepted offer is an *in rem* right vis-à-vis everyone; and the contracting parties cannot by themselves confer such a right compatibly with the innate right of equality and self-mastery. In contrast to innate right, accordingly, all rights to external

40 For Hegel, original acquisition is validated (though still subject to the good) in a prejudicial condition by the social institution of contract. I have no valid property in anything I acquired originally until I freely relinquish it to another (all others having passed on the opportunity to acquire it) in return for recognition of my right to alienate it for equal value. Recognition is necessitated as that without which claims of objectively valid end-status would remain self-contradictorily subjective. Since my final property is not in the thing (which I surrender) but in its value, property involves no unilateral claim to exclude others from the thing. Prior to exchange, I have an imperfect property based on original possession and use, which confer relative rights (possession stronger than no possession, use stronger than possession) in anticipation of their being validated through contract. See GWF Hegel, *Hegel's Philosophy of Right*, translated by TM Knox (Oxford: Oxford University Press, 1967) at paras 71–3, 77.

41 See also Kant, *Metaphysics*, supra note 22 at 6:263.

42 Ibid at 6:263, 274.

43 Ibid at 6:274.

things acquired in the state of nature lack the *imprimatur* of an omnilateral will.

Because natural or private rights to acquired things lack the sanction of an omnilateral will, they are, according to Kant, 'only provisional.'<sup>44</sup> By 'provisional,' Kant cannot mean unrealized for want of a coercive public authority, because innate right in the state of nature is also unrealized for want of such an authority, and yet Kant does not regard it as provisional; only acquired rights are burdened with this qualifier. Nor can 'provisional' mean in need of further determination by a public authority as to, say, what constitutes 'control' or when something is a 'fixture' or an 'accession;' for innate right likewise requires specification by positive law before it can determine cases (when is an attack sufficiently 'imminent' to justify pre-emptive force? from whose viewpoint is 'necessary force' determined?).

Perhaps, provisional means 'defeasible by laws promoting a collective end.' But this is too imprecise; for, inasmuch as Kant always contrasts 'provisional' with 'conclusive' (so provisional rights are inconclusive), he must mean by 'provisional' something more disparaging than at least one sense of defeasible. A defeasible right can be an objectively valid claim to another's forbearance – one that exerts continuing force even though defeated in a particular case. In constitutional law, a defeated right's residual force manifests itself in a requirement that the right be impaired only to the extent necessary to satisfy the defeating reason. Let me label that legal phenomenon a defeasible right. So, by a defeasible right I mean an objectively valid claim to have put others under an obligation – one that, while not holding in all cases, exerts continuing force when overridden by a collective end external to the right's validity conditions. Such an end justifiably infringes rather than defines the right.

A provisional right is different from a defeasible right so understood. Because it is unilaterally asserted, a provisional right is one whose status as a valid claim is unsettled, tentative, 'up in the air,' and vulnerable to being shot down once all who would be bound by the right have considered whether they could be bound by it consistently with their right of self-mastery.<sup>45</sup> Until its status is settled, a provisional right to an acquired object holds in the meantime, but only in a comparative sense (it is stronger than a dispossessor's claim); for it might be vetoed. If the provisional right is indeed vetoed, then the question hanging over it has finally been answered. It is not a valid claim after all. So, it has been not so much overridden as disconfirmed, rejected – spurned, we might say. This is another ominous sign for the marriage Weinrib seeks to arrange between Kantian Right and private law; for Kant, though he directs long gazes at private

44 Ibid at 6:264.

45 Ibid at 6:312.

law, evidently thinks of her as Ms Now rather than Ms Right. But let us examine more closely what Kant means by ascribing to acquired rights a provisional character.

To say that private rights to acquired things are provisional is to say something double-sided about the validity they have and about the validity they lack. The validity they have originates in the state of nature, and that validity is but a relative one. Claims to things rightfully acquired in the state of nature are only stronger than the claims of dispossessors; they are not objectively valid because they are, as yet, only subjectively asserted. We will presently see what makes claims stronger or weaker than rivals. But rights to external objects unilaterally asserted on the basis of first possession or voluntary exchange have relative force by virtue of the postulate of practical reason regarding rights, according to which, for the sake of freedom, it must be possible to have external objects as mine in whatever condition, natural or civil, I am living.<sup>46</sup>

To see what private rights to acquired things lack, we have to distinguish between property as a formal concept and property as a concept with a specific distributional content. Formally, property is just the idea of having anything as mine such that others wrong me by using it without my permission even though I do not physically possess it. Whatever I own, that is what it means to own it. Distributively, property refers to *what* I own and to my justification for saying that I own it. Along this dimension, property denotes a right, based on some justificatory argument, to exclude others from using something in particular – Blackacre, let us say. In the state of nature, the argument runs as follows: I own Blackacre because I was the first to occupy it and surround it with a fence or because I acquired it through a voluntary exchange from someone who could trace his title to a first possessor or to someone who had been in prolonged possession.<sup>47</sup>

Kant's view is that the private right to acquired things is defective both formally and distributively. Formally speaking, property is self-contradictory in the state of nature because, on the one hand, the postulate of practical reason regarding rights requires that ownership be possible; but on the other hand, absent a public legislative and executive authority, it is not possible. This is so because of innate right's injunction against unilateral obligations by which one would become servile to another's freedom. Because no one can expect or be assured that others will respect a fence he or she has unilaterally erected, no one is obliged to respect the fences of others. Thus, no one can wrong another person by the unauthorized use of anything that person has acquired consistently with the freedom of others. The cure for this problem is a public

46 Ibid at 6:264.

47 Ibid at 6:292–3.

legislature that can put everyone under a reciprocal obligation to respect others' fences and an executive that can enforce the obligation. Thus, only in a civil condition is it formally possible to own anything.<sup>48</sup>

However, Kant also contends that, quite apart from the problem with *owning* in a natural state, there is a further problem with owning the *particular* things one has acquired there; and this is the defect to which the qualifier 'provisional' refers. A civil condition makes ownership possible, but it does not suffice to legitimate the particular fences erected in a state of nature. After all, those fences were put up unilaterally, and, unlike the right to own simply, there is nothing necessary about them. They reflect arbitrary choices. So, by the innate right against imposed obligations, things acquired by first possession or bilateral exchange are not conclusively one's own until they are publicly ratified as such *within* a civil condition. Here, in other words, the problem is an absence, not only of public authority, but also of omnilateral confirmation for one's ownership of the particular objects one has chosen to possess. Because one cannot bind others by a contingent and unilateral appropriation, one's right to the particular things one has acquired lacks conclusive force until the united will of those sought to be bound confirms it as possessing such force; and the united will may demur.<sup>49</sup> This is the sense in which rights to things appropriated unilaterally and contingently are provisional. They are vulnerable to disconfirmation.<sup>50</sup> So, if a publicly minded citizen legislature redistributes an object rightfully acquired through first possession or voluntary exchange, it has not justifiably infringed a conclusive right; it has disconfirmed a provisional right. Inasmuch as there has been no validation for unilateral right-claims prior to public law, there is nothing here that could be infringed.

True, right-claims to particular objects acquired in the state of nature carry presumptive force to the extent that the objects were acquired consistently with the possibility of owning anything and so compatibly with the idea of a civil condition (i.e., were not snatched from a prior possessor); for were they not civilly enforceable unless disconfirmed, claims based on actions consistent with ownership would be no stronger than

48 Ibid at 6:256, 263.

49 'But the law that is to determine for each what land is mine or yours will be in accordance with the axiom of outer freedom only if it proceeds from a will that is united originally and a priori ... Hence it proceeds only from a will in the civil condition (*lex iustitiae distributivae*), which alone determines what is right, what is rightful, and what is laid down as right'; *ibid* at 6:267.

50 Kant leaves no doubt as to what he means by 'provisional' in explaining the doctrine of title by prolonged possession. Without such a rule, he says, 'no acquisition at all would be conclusive (guaranteed); all acquisition would be only provisional (up to the present) ...'; *ibid* at 6:292. So 'provisional' means holding for now but always vulnerable to the chance of being ousted in the future.

the claims of dispossessors, and so there could be no natural right to own in the formal sense for the civil condition to perfect.<sup>51</sup> Thus, only its consistency with formal ownership favours a private right to a particular object in a contest with the claim of a dispossessor.<sup>52</sup> Neither the first possessor nor the dispossessor has a conclusive right of intelligible possession; but the first possessor has a better claim than the dispossessor because his claim *can* be confirmed by the united will of all, whereas the dispossessor's cannot. So, the possibility of its being confirmed omnilaterally gives a private right relative force against a wrongdoer and presumptive force for a citizen legislature and a court.

Still, presumptive force is not 'defeasible' force as defined above. There having been no validation of right-claims to external things prior to public law, nothing of any firmness exists yet. So the presumption looks forward to a possible validation rather than backward to an actual one.<sup>53</sup> The only advantage a private right has over a wrongdoer's claim is that, owing to its compatibility with owning in general, it is *eligible* for confirmation by a citizen legislature. But though eligible for confirmation, a right to a particular object rightfully acquired in the state of nature remains suspended in doubt, because not before the unilateral claim to a contingently chosen object is submitted for the publicly minded approval of those whom it purports to bind is the question of its validity settled; and we do not know what the citizen lawgiver will make of it.<sup>54</sup> The legislature may always shift things around pursuant to a public interest, and it is only the right conferred by the united will of citizen legislators that innate right will allow to be conclusive.

It follows that, for Kant, the rightful ownership of particular objects is the *exclusive* product of public law.<sup>55</sup> Formally, to be sure, the *concept* of ownership grasped in private law is only confirmed or rendered coherent by a civil condition, whose public authority secures each in whatever he or she owns (not has). But the actual determination of who owns what is exclusively a determination of public law *within* a civil condition. In the end, therefore, private law's criteria for determining ownership are irrelevant. Property is ultimately 'allotted' and 'divided' rather than acquired privately and 'aggregated.'<sup>56</sup> That is why Kant defines a 'property right,' not as an immediate relation between a person and a thing producing a fee simple, but as a usufructuary entitlement within a framework of

51 Ibid at 6:257.

52 Ibid at 6:257, 267.

53 Ibid at 6:257.

54 Ibid at 6:263, 264.

55 See note 49 supra.

56 Ibid at 6:312, 323-4.

common ownership, one mediated by 'the sum of all the principles having to do with things being mine or yours.'<sup>57</sup>

So, despite the attention Kant initially lavishes on private law, despite his laying bare the metaphysics implicit in our everyday private-law notions of property and contractual transfer, in the end, he makes corrective justice a servant of public law. For if one's property in a particular object is a product solely of public law, then there is no privately acquired right that corrective justice could autonomously vindicate. There is only the public division, which corrective justice must serve. I'll return to this.

To understand why acquired rights in the state of nature are provisional is to understand why innate right is not. Because it is sanctioned a priori by an omnilateral will, innate right cannot be disconfirmed by the omnilateral will's law-making organ. There being nothing contingent or unilateral about innate right, there is no need for its empirical authorization by the omnilateral will's lawgiving representative. Though unrealized in a state of nature, innate right is already objectively valid there; and so a public authority instituted for the purpose of securing rights has a duty to respect and enforce this state-of-nature right undiminished.<sup>58</sup> Here, we can say that the united will of a people is constrained by a prior and independent private law of trespass to the person.<sup>59</sup> It cannot violate that law without ceasing to be a united will.

No doubt, innate right bears the imperfection afflicting all rights (both innate and acquired) in a state of nature. However, that imperfection stems, not from unilaterally imposed obligations, but from unilaterally (inwardly) felt commitments to an omnilateral obligation and from unilateral interpretations of that obligation. Because no one in a state of nature can have assurance of another's rectitude and because innate right precludes unilateral restraint, each may use whatever pre-emptive force against another's body he or she deems necessary. Moreover, in

57 Ibid at 6:261. Thus Kant writes, 'A right to a thing is a right to the private use of a thing of which I am in (original or instituted) possession in common with all others'; *ibid* at 6:260-1. Or again, 'What is called a right to a thing is only that right someone has against a person who is in possession of it in common with all others' (in a civil condition); *ibid* at 6:261. See also *ibid* at 6:323.

58 Ibid at 6:316.

59 It is even questionable whether innate right is a genuinely private right, for its conclusiveness in the state of nature rests on its a priori acceptability to all; hence it, too, is already mediated by an omnilateral will. For Hegel, the dignity of the person in 'abstract right' is not mediated by a universal transcending the particular person. It rests immediately on the particular free will of a monadic agent who, while impelled by an unconscious rational necessity into relationships embodying a common will, has yet to learn that its dignity is objective as a right to respect only within a relationship of mutual recognition; see Hegel, *supra* note 40 at paras 34, 75, 81, 82, 104. Nevertheless, innate right is a private right within Kant's understanding of what a private right is.



the absence of impartial adjudication, each is judge as to how the concepts of wrongful and justified force apply to particular cases. On either count, no one can 'assault' another in a state of nature, and so innate right in that condition is self-contradictory; it requires a disinterested judge and public guarantees of enforcement to perfect it. However, innate right is subject *only* to the imperfection inherent in the absence of a public determination and enforcement of an omnilateral obligation; it does not suffer from the problem of unilaterally imposed obligations, and so it enters the civil condition as a conclusive or valid right binding the citizen lawgiver.

By contrast, acquired rights in the state of nature have the additional defect of deriving from unilaterally imposed obligations; and this defect poses a problem for acquired rights that is unique to them. Because no one can unilaterally impose a distribution on others consistently with their self-mastery, acquired rights to particular objects do not enter the civil condition as conclusive rights; nor do they become conclusive by virtue of the civil condition alone. A public legislature need not accept a specific fence just because it was erected conformably to private right, because the rightness of a contingent and unilateral appropriation depends on its being omnilaterally approved; only public law can determine conclusively who owns what.<sup>60</sup> As Kant writes,

for although each can acquire something external by taking control of it or by contract in accordance with its concepts of Right, this acquisition is still only provisional as long as it does not yet have the sanction of public law, since it is not determined by public (distributive) justice and secured by an authority putting this right into effect.<sup>61</sup>

So, to say that private acquired rights are provisional is not to say that acquisition according to private law's 'concepts of Right' confers a valid property that distributive justice might override. It is to say that acquisition according to private right grounds a right-claim with relative force, one that is eligible for validation by a citizen legislature but that might be invalidated. If invalidated, the hitherto provisional right is nullified.

### III *Acquired rights under a lawgiving will*

Let us draw out more explicitly the implications of the provisional character of private rights to acquired things as these unfold in the civil condition. In this section, I consider the implications of 'provisionality' for

60 Kant, *Metaphysics*, supra note 22 at 6:256: 'For a civil constitution is just the rightful condition, by which what belongs to each is only secured, but not actually settled and determined.'

61 Ibid at 6:312.

property rights *vis-à-vis* the legislature; in the next, I deal with its implications for private law's autonomy in court.

The self-contradictoriness of rights in a state of nature yields the 'postulate of public right,' according to which a multitude is obligated by innate right as well as by the postulate of practical reason regarding rights (that, for freedom's sake, it must be possible to own external things) to quit the state of nature and submit to the powerful authority of the united will of all, 'so that they may enjoy what is laid down as right.'<sup>62</sup> By this hypothetical contract, a civil condition originates, 'in which what is to be recognized as belonging to [the individual] is determined by *law* and is allotted to it by adequate power. . . .'<sup>63</sup> The 'sum of the laws' laid down by the united will of all in a civil condition Kant calls 'public right,' in which he includes laws protecting intelligible possession and laws governing derivative acquisition.<sup>64</sup> The laws ordering derivative acquisition through bilateral exchanges Kant calls 'commutative justice'; those ordering derivative acquisition through the united will of all he calls 'distributive justice.'<sup>65</sup>

Observe that rightful ownership of something in particular is now identified with what is recognized as rightful under all the laws comprising public right; the state-of-nature right has been ousted. 'Commutative justice,' the scholastic term for corrective justice, is now considered part of public justice, from now on the exclusive object of Kant's attentions. Moreover, Kant equates a rightful or civil condition with a 'condition of distributive justice' or with 'a society subject to distributive justice'; for it is the united will of all that determines conclusively what belongs to whom.<sup>66</sup> This means that the commutative justice ordering bilateral exchanges is subject to distributive justice, 'which alone determines what is right, what is rightful, and what is laid down as right.'<sup>67</sup> By itself, the phrase 'subject to distributive justice' might be ambiguous. It could mean 'vulnerable to override by a separate principle of distributive justice but retaining independent force'; or it could mean 'susceptible to being thoroughly moulded and transformed by distributive justice so

62 Ibid at 6:311.

63 Ibid at 6:312.

64 Ibid at 6:311.

65 Ibid at 6:306.

66 Ibid at 6:307, 306.

67 Ibid at 6:267. Each member of this triad has a distinct meaning. 'Right' conduct is conduct consistent with the formal possibility of owning; 'rightful' conduct is conduct in accordance with the legal desiderata for acquiring specific objects; 'what is laid down as right' refers to the authoritative decision of a court in applying the relevant law to a particular case; *ibid* at 6:306. Thus, public right has supplanted private right with respect to every modality (possibility, actuality, necessity) of ownership.

as to leave nothing of independent force.' But since Kant has told us that distributive justice *alone* determines what is right, the phrase admits of only one interpretation: the latter one.

The most general implication of the provisional character of private acquired rights is that a citizen legislature in a civil condition has no, not even a defeasible, duty to respect the distribution of holdings brought about by first acquisition and bilateral exchange, even if that distribution resulted from actions consistent with the innate right to be free of another's constraint and with the possibility of owning external things. Such holdings carry presumptive force because they *can* be consistent with an omnilateral willing; but it may turn out that they are actually inconsistent therewith (because, let us say, some are destitute or the citizen legislature decides that it will not countenance contracts for the sale of certain objects). In that case, the presumption is defeated, and the force of the private right, resting as it did on a unilateral choice, is then entirely spent. Nothing remains of it. The private right is not, as in Hegel's system, 'sublated' – that is, cancelled insofar as it purports to hold absolutely but retained as informing a distinct paradigm of Right exerting continuing force even though overridden. It is simply cancelled. Because private rights to acquired things are conceived by Kant as unilaterally asserted, and because conclusive rights issue only from an omnilateral lawgiving, the private right vanishes once vetoed. The citizen lawgiver is not even minimally constrained by it.<sup>68</sup> That I was the first to occupy a piece of land, that I did so with *animus possidendi* and by notorious acts of control, or that a contract was concluded by mutual consent for valid consideration attracts no further respect from a citizen lawgiver once it determines that the public interest requires reallocation or non-enforcement of the contract.

Now, if the private *right* to rightfully acquired things vanishes in relation to the omnilateral will's lawgiving authority, it follows that (innate right aside) what the agent is left with in its interaction with the citizen lawgiver is an *interest*, denuded of right, in secure possession and in the enforcement of contractual obligations. Of course, the agent has a right of intelligible possession against other agents *in whatever is allotted to him* because the civil condition fulfils the postulate of practical reason regarding rights, according to which it must be possible to possess intellectually and therefore to use external things. But in relation to the citizen lawgiver, the subject has only an interest in secure possession and the enforcement of obligations; it has no right thereto, for property is a product of all the laws respecting mine and thine issued by the citizen lawgiver itself. True, the lawgiver has a duty to protect these interests

68 Ibid at 6:316: [T]he will of the legislator ... with regard to what is externally mine or yours is irreprouchable ...'

because it was just for the sake of secure possession and of enjoying what is one's own that the civil condition was instituted. But the content of what is one's own is now determined by public, not private, right. And in public right, one's interest in secure possession and the enforcement of contracts counts (albeit heavily) only *with* other public interests. Since, moreover, private rights to acquired things have disappeared *vis-à-vis* the citizen lawgiver, the only procedure available to the lawgiver for deciding who owns what is to seek an optimal accommodation between the common interest in secure possession and competing public interests.

In deciding what is optimal, the citizen legislature is constrained by nothing but omnilaterality. That is, it may not redistribute holdings to advance a particular interest. Thus Kant says,

When people are under a civil constitution, the statutory laws obtaining in this condition cannot infringe upon natural Right (i.e. that Right which can be derived from a priori principles for a civil constitution); and so the rightful principle "whoever acts on a maxim by which it becomes impossible to have an object of my choice as mine wrongs me," retains its force.<sup>69</sup>

The parenthetical qualification makes clear that the natural right by which legislation is constrained is not the state-of-nature 'right' to acquired things; it is the right resting on a priori principles, among which is the right to the possibility of intelligible possession. A lawgiver's dispossessing some for the exclusive benefit of others embodies a maxim under which intelligible possession is impossible.<sup>70</sup> But while omnilateral-ity constrains the accommodation of interests, privately acquired rights do not, not even residually. Thus, there is no requirement that legislative expropriation impair a prior right as little as possible; for there is no such prior right. Property rights issue from the accommodation itself. That property is a conclusion of interest accommodation is, of course, the motto of legal realism and functionalism. It means that the laws of property and contract are directed to public goals.

If property falls out of public distributive justice, then a taking by the citizen lawgiver of what is in a subject's possession ought in general to be compensated, not because it is an infringement of property, but for the sake of the common interest in secure possession or because it would be distributively unfair for one person to shoulder the whole social cost of achieving a public goal. But this means that compensation is contingent on the balance of public interests or on whether the possessor was distributively entitled to the object in the first place. If the citizen lawgiver

69 Ibid at 6:256.

70 Thus, maximizing net utility across individuals is ruled out as a redistributive principle, but either Rawls's fair equality of opportunity or difference principle is eligible.

regards the holding as distributively unfair, then expropriating without compensating achieves distributive justice. Under Kantian public right, accordingly, there can be no right to compensation for a public taking. The citizen legislature has not taken property; it has defined property.<sup>71</sup> Stated otherwise, under Kantian public right, there can be no constitutional right to property even residually binding the citizen legislature such that takings are justified *if* compensation is paid. Or rather there can be no right in the Kantian sense of a right. No doubt there can be a right in the welfarist sense of a marker for a strong interest.

How does the provisional character of private property under Kantian Right affect private law's autonomy *vis-à-vis* public distributive justice? In one sense, this depends on what the citizen lawgiver chooses to do with the private law it receives from the state of nature; but in a deeper sense, private law's autonomy dissolves in the civil condition no matter what the lawgiver does. Once the civil condition is instituted, the citizen legislature might deign to leave largely intact private rights of property and contract as having provisional and presumptive force subject to interstitial legislative changes and *ad hoc* expropriations for public ends; and it might leave courts to determine those provisional rights and to interpret statutes as presumptively retaining state-of-nature rights absent clear language to the contrary. But of course there is no Kantian necessity for this Anglo-American choice of common-law adjudication. Because private rights to acquired things have only provisional force for Kant, nothing in his system stops the citizen lawgiver from wiping the slate clean with respect to acquired rights, consigning private law to the dustbin of history, and beginning afresh in light of the sovereignty of the united people and the supremacy of public right, assimilating whatever past law accords therewith and discarding the rest. On the contrary, Kantian Right demands a rational systematization of *civil* law under the united will of all; for this is exactly the Judgment Day for which provisional rights have been waiting. Such a system might look like the French Civil Code, in which acquired rights are shaped in accordance with 'public order and good morals'; or it could be the former Soviet Civil Code, in which private ownership was replaced by a civil right to use things owned collectively by the people.<sup>72</sup> But

71 Kant is clear that corporations whose possessions have been taken by the people for a public purpose 'cannot complain of their property being taken from them'; Kant, *Metaphysics*, supra note 22 at 6:324-5.

72 The *Civil Code of the Russian Socialist Federation of Soviet Republics* (1965) forbade individual ownership of land (permitting only use) and restricted personal property to that derived from the common capital; see AKR Kiralfy, 'The New Civil Code of the RSFSR: A Western View,' 15 ICQL 1116 at 1118 (1966). Compare Kant, *Metaphysics*, supra note 22 at 6:260-1, 6:312, 6:323-4.

whatever its specific incarnation, a Kantian Civil Code must, because of the infirmity it sees in private property, so imbue civil rights with public-law norms that the idea of a private law delimited by a border separating it from public law would cease to refer to anything real.

Even assuming a common-law system, Kantian Right cannot view the law of transactions as private in any significant sense. In *The Idea of Private Law*, Weinrib dismissed the notion that the base-line equality vindicated by corrective justice is given by a prior allotment of holdings according to some conception of distributive justice.<sup>73</sup> For if this were true, corrective justice would be subservient to, rather than independent of, distributive justice; it would not be an autonomous ordering of human interactions. The base-line equality alone suited to an autonomous form of corrective justice, Weinrib argued, is the equal worth of free agents considered as connected only by their transactions. This must be true. Yet from a full Kantian perspective, the condition in which free agents are connected only by their transactions is a conceptually unstable – hence transient – state of nature. And because property claims in that state receive no objective validation, the condition wherein agents are connected only by their transactions disappears into one wherein they are united under an omnilateral will (as well as by their transactions), leaving behind no proprietary legacy save the provisional one that public statutes determining ownership *supplant*. These statutes (e.g. tax and social assistance laws) comprise a scheme of distributive justice through which property in specific things first comes into being. In the civil condition, accordingly, the base-line equality vindicated by corrective justice can be nothing other than the equality produced by the distributive scheme, because public distributive justice *is* Justice and because the condition in which agents are linked only through their transactions has vanished without a juridical trace.<sup>74</sup> Thus, even a common-law system existing by the grace of the citizen lawgiver must be conceived by Kantian Right as vindicating a distribution of holdings in accordance with ‘the sum of all the principles having to do with things being mine or yours.’<sup>75</sup>

73 Weinrib, *Idea*, supra note 1 at 78–80.

74 Innate right is not an exception because it presupposes the idea of agents united under an omnilateral will.

75 Kant, *Metaphysics*, supra note 22 at 6:261. Weinrib observes that, if corrective justice vindicates a background distributive scheme, then the remedy could take the form of two separate actions, one restoring to the plaintiff what he lost, the other taking from the defendant what he gained; nothing but administrative convenience justifies a direct transfer; Weinrib, *Idea*, supra note 1 at 79. Yet this is just the humiliation of corrective justice that Kantian Right implies.

IV *Acquired rights before a public court of justice*

It might be argued that, while Kantian Right recognizes no private right to acquired things binding (even residually) the citizen lawgiver, it does make room for a relative private right before a court. As the organ of the omnilateral will that applies general laws to particular cases, a court may not fashion contingent accommodations between the interest in secure possession and other public interests – for two reasons. One, the coercive force of decisions reflecting such adjustments is consistent with the innate right of self-mastery only if these decisions are actually accepted omnilaterally by the people or their representatives. Two, a court's deciding a case according to an *ad hoc* balancing of interests would subject the parties to an unknowable law they cannot have imposed on themselves; and this, too, would violate the innate right of being one's own master. From this we can infer that a court rules consistently with innate right only if it rules in accordance either with statute or with necessary principles of right a priori knowable and acceptable to all.

Now, one might be tempted by the idea that the only such principles are those comprising private right – namely, innate right, the axiom of right regarding external freedom, the postulate of practical reason regarding rights, and the obligation to enter a civil condition. Public right, one might think, consists only of positive legislation involving contingent accommodations of various public interests. Were this map of the legal landscape accurate, we could speak of an autonomous private law binding the judicial organ of the omnilateral will, if not its legislative organ, simply by virtue of the separation of powers demanded by innate right. Such a law would apply to agents regarded, however artificially, as related only by their transactions; and corrective justice would be the formal structure of this hived-off body of rationally discoverable law.

The map is crude, however, for Kant denies that private right exhausts the content of a priori Right; the latter, he says, contains public-law principles of distributive justice as well, and these are enforceable by a court. For Kant, natural right broadly understood (as comprising the totality of principles resting on a priori Right) includes both the a priori principles governing bilateral exchanges, which he calls 'commutative justice,' and the a priori principles governing the allotment of things to persons in a civil condition, which form the rationally necessary part of distributive justice.<sup>76</sup> Moreover, in adjudicating disputes, courts, too, determine what belongs to whom in a civil condition; and so Kant sees them, not only as declaring the provisional rights that would have relative force in a state of nature, but also as applying that part of public distributive justice resting

<sup>76</sup> Kant, *ibid* at 6:297.

on principle and governing how court decisions must be reached if they are to be publicly transparent and acceptable to all.<sup>77</sup> I'll discuss this principle presently. But here, too, as one would expect, the conclusive rights issuing from public distributive justice nullify the provisional, private rights belonging to the state of nature.

For example, public distributive justice, Kant argues, favours the bona fide purchaser for value without notice of the seller's defective title over the owner recognized by private right (we'll see why presently). In this contest, public right's favourite prevails, and Kant is content to leave the owner according to private right remediless.<sup>78</sup> Were the private right firm but defeasible rather than provisional, it would remain alive; and so one would expect a solution minimally invasive of the right – for example, one awarding title to the purchaser provided he compensate the owner. But Kant makes no mention of this (or any other) right-preserving possibility. Since it was only tentative, the private right can be shunted aside once public law has spoken conclusively. Even before a court, then, the standpoint of public law overwhelms that of private law, which loses all force.

What is the a priori principle of distributive justice binding on courts in their adjudication of claims arising at private law? Stated generally, the principle enjoins a court to award each his due in a manner that preserves the court's public character; for only under that condition can both parties be bound by the decision consistently with their innate right of self-mastery. Kant, however, does not state the principle so generally; instead, he focuses on a particular concretization of the principle in a requirement one might call a 'rule of publicity.' This rule requires a court to decide a dispute only in the light of evidence in the public domain – evidence concerning which reasonable certainty is possible. Thus, a contract must be interpreted according to its knowable stipulations, setting aside assumptions about what the parties privately wished or thought. Similarly, the bona fide purchaser without notice acquires an *in rem* right good against the world (or did in Kant's day) because the court must give effect to the formalities of purchase and sale observed in a public market rather than enforce a supposedly true title of which no one can be certain. A publicity rule binds a court because transparency is a condition of its decision's being self-willed by both parties. Were the decision to rest on the judge's assumptions about recondite matters, it would become the decision, not of a public court of justice, but of the natural individual occupying the bench. Its binding force would then contradict the subject's innate right of being his own master.

<sup>77</sup> Ibid at 6:297–305, 313.

<sup>78</sup> Ibid at 6:300–3.



Observe that, in this case, the a priori principle of distributive justice binding a court governs the relationship between court and litigant rather than that between litigants and that its point is to preserve the public character of the court's decision, so that, in obeying the decision, the litigant remains 'his own master.' We can call this general principle a 'self-imposability' principle. The publicity rule upon which Kant focuses is an application of this principle to the court's procedure, in that the rule governs the *manner* in which a court decision is reached, specifying the sort of evidence a judge may consider, requiring oath swearing as surety for the truth of testimony, and so forth.

Now, if the self-imposability principle were satisfied by a procedural rule of publicity enjoining decisions based on certain grounds, private law could retain both its doctrinal autonomy and structural integrity in court. It could preserve its doctrinal autonomy because the procedural rule, in trumping a right at private law, does not criticize or pare down the right it trumps. For example, the public law favouring the bona fide purchaser for value has no qualms with the private right of the owner; it merely substitutes its favourite for evidentiary reasons having nothing to do with the private right's force. Nor does the procedural rule governing the relationship between court and litigant disrupt the correlativity structuring the relationship between plaintiff and defendant. The rule favouring the bona fide purchaser for value still gives him an *in rem* right putting all others under a correlative obligation. Because private law is not ordered to a substantive conception of distributive justice, the correlative structure of wronging and being wronged that gives private law its distinctive identity remains intact.

However, it is not clear that the self-imposability principle is satisfied by a procedural rule enjoining court decisions based on certain evidence. Take the case of bad faith or oppressive assertions of private right. Jones invites Smith onto his land and looks on approvingly as Smith builds a cottage on it. Then, after the cottage is completed, Jones revokes his licence and orders Smith off his land.<sup>79</sup> Private right provisionally permits Jones to eject Smith; but if a court enforces Jones's right against Smith, it becomes the instrument by which Jones subordinates Smith to his choice, contrary to innate right. And so the binding force of the court's decision on Smith would itself contradict Smith's innate right to be his own master; for it would be a decision to which no dignified agent could assent. Accordingly, the a priori principle of distributive justice that generated a rule of publicity for a court also yields a rule against a court's enforcing oppressive claims, however well founded in private law. In this case, the rule's effect is to transform Smith's licence

79 *Inwards v Baker*; [1965] 2 QB 29 CA.

into a possessory right in the cottage and thus to transfer some of Jones's land to Smith. The court, however, does not aim at this redistribution; it merely brings it to pass as a side-effect of preserving its nature as a public court of justice.

In this example of proprietary estoppel, the overruling of private right to preserve the court's public integrity invokes substantive rather than procedural concerns because the threat to the court's integrity comes from the unqualified private right, not from a reliance on uncertain evidence. Therefore, the rule that public law applies – that a court may not enforce oppressive private-law claims – frontally criticizes the private right insofar as it is asserted without qualification. Since, however, a private right has shrunk in conforming to a rule of public law concerning the scope of enforceable private rights, one can no longer say that private-law doctrine is wholly independent of public law. The appearance of doctrinal autonomy under the rule of publicity is more an accidental function of the weakness of the procedural principle than a reflection of the strength of the provisional right.

Still, one can say that private right has thus far retained its systemic integrity before a court. This is so because the principle overruling it does not introduce interpersonal obligations inconsistent with private right or redirect private law toward a public end so as to destroy the correlativity of wronging and being wronged. It is a passive rather than an active principle. In *Jones v Smith*, for example, the court's principle is not that Jones owes a duty to provide a gratuitous benefit to Smith; it is that a court will not lend its authority to Jones's abuse of his private right. The gratuitous transfer is a by-product, not the principle, of the court's decision. In the idiom of judges, proprietary estoppel is a shield rather than a sword.

Now, if private right retained a residual force in being overridden by public distributive justice, we would say that this passive mode of the latter's operation is the limit of its operation in a court of law. We would say that the *only* reason a court could invoke for overruling private right is the requirement that it preserve its nature as a public court of justice. It could thus *only refuse* to enforce private right in certain well-defined cases; but it could not mould the law of interpersonal transactions into a vehicle for realizing public ends. In particular, a court could not impose civil obligations for the sake of distributive justice that contradicted private right's basic norm against unilateral obligations; nor could it impose liabilities for a common end that disrupted the correlativity of wronging and being wronged. Any demand of distributive justice whose satisfaction in court would breach these limits would be for the legislature to fulfil on a system-wide basis external to the transaction between a plaintiff and a defendant. That is what we would have to say if private right exerted residual force in a civil condition.

For Kant, however, private rights to acquired things are but unilaterally asserted claims. Hence, they hold only provisionally, and when at last they come before the tribunal of public distributive justice, they are judged. If found wanting, they disappear. Without a trace. Even in court, as we have seen, they lack residual force when trumped by an a priori principle of distributive justice enforceable by the judicial branch. So, provided it can do so by invoking a principle of distributive justice knowable a priori to reason, a court could, with Kantian Right's blessing, fundamentally reshape private law into a transparent medium for the realization of a public end.<sup>80</sup> Does Kantian Right know a principle with that sort of power?

Consider innate right. It is, Kant says, the right to be one's own master. Analytically contained in this right is the right to be 'independent of the constraint of another's choice' – that is, of another's forcible restraint of one's body pursuant to his ends. We have seen, however, that innate right carries a priori implications beyond the one strictly entailed by it. To have a right to be one's own master is to have a freedom to act on one's choices to the greatest extent compatible with the equal freedom of others; and this axiom of right with respect to outward freedom implied a right to use things distinct from a right to possess them, hence a right to recover from others objects one has claimed by a prior possession.

However, just as the right to things that are not me was joined to innate right synthetically by reasoning from the right to be one's own master, so too can a right to a reasonable measure of security for one's investment in a life plan be so connected. To be one's own master is to be master of one's life. But one is master of one's life only if the vulnerability of

80 It could so without falling into what Kant, *Metaphysics*, supra note 22 at 6:297, calls the 'common fault of experts on Right' – namely, the misrepresentation of public right as natural right (in the sense of right in the state of nature). If public right is forthrightly presented as supplanting natural right, there is no misrepresentation. Indeed, that is just how Kant presents it. What, however, of Kant's statement, *ibid* at 6:306, that public right 'contains no further or other duties of human beings among themselves than can be conceived [in private right]; the matter of private right is the same for both?' This cannot mean that public right introduces no new specific duties between human beings because Kant, in illustrating how public right changes a result required by private right, shows how public right indeed introduces several dramatically new interpersonal duties; see note 82 *infra*. The statement's meaning is unclear, but it could mean that the common matter of public and private right is the right to have as mine something or someone that is not me as well as the contractual right to compel another's choice. Public law does nothing but perfect both. However, public law introduces its own criteria for determining who owns what as well as its own criteria for determining when a promise is enforceable and how a risk was allocated between the parties. Given the provisional character of private rights, there is no reason why these new criteria should respect private right; therefore (as the examples in note 82 *infra* show), Kant doesn't.

one's investment in a life plan to the choices of others is limited to a dependence on choices within the power of a finite agent to foresee and control; for if it were not so limited, other people would get to determine the kind of life one leads. So, a right to be one's own master implies a right to have one's vulnerability to others' choices kept within bounds consistent with the equal self-determination of all. Consequently, if human beings cannot avoid dependence on others' choices, the right to be one's own master implies their right to coerce the unwilling to enter a civil condition within which the right to protection for one's investment in a life plan against the unforeseeable choices of others is guaranteed by public law.

Because the right to life-plan security against others' unforeseeable choices is derivable a priori from innate right, it has the sanction of an omnilateral will prior to a civil condition. Hence, it is not provisional; a public authority is duty-bound to protect it undiminished. In a civil condition, moreover, this right becomes a principle of public distributive justice knowable a priori by reason. Therefore, a court may enforce it consistently with the subject's innate right of self-mastery and must do so if it is to administer public distributive justice to the limit of its constitutional powers.

Let us now return to Jones and Smith, only this time let Smith be the plaintiff. By inviting Smith onto his land and by acquiescing in Smith's building a cottage there, Jones raised in Smith a reasonable expectation that Smith would be able to enjoy his cottage for as long as Jones owned the land. In turning around and asserting his property right, Jones violated Smith's right to life-plan security against the unforeseeable (because unreasonable) choice of another. A court of public justice is obliged to vindicate Smith's right, but by what remedy? It could simply order Jones to pay Smith fair market value for the cottage he built in order to create the mutual transfer between equals within which alone (absent gift) a property right can pass. However, that remedy, while respecting the innate right against unilateral obligations, is misaligned with the right infringed – a right to mastery of one's life, not to ownership of one's product; and so corrective justice is not served. The only remedy perfectly aligned with Smith's right is an order that Jones fulfil the expectation he raised by transferring to Smith a possessory right in the cottage tenable for as long as Jones owns the land.<sup>81</sup> To this remedy, Jones's property right presents no obstacle, for that right was only provisional, and so it yields without remainder to Smith's right in public distributive justice. In the result, private law is moulded toward a public end of self-determination because the court has found that

81 The 'constructive trust' doctrine is available for this end; see *Pettkus v Becker*, [1980] 2 SCR 834.

Jones has a coercive duty to confer a benefit on Smith for which Smith did not pay.<sup>82</sup>

It might be argued that, since innate right is conclusive in the state of nature, it must put a constraint on public law, which is therefore enjoined from introducing civil obligations inconsistent with the innate right against unilateral ones. Observe, however, what sort of constraint this is. Because it operates against the logical momentum of innate right's own public realization, the constraint manifests a conflict *within* innate right – one between its positive and negative dimensions. Therefore, its legal force reflects, not the rational limit of a principle forming part of a coherent organization of principles, but the ambivalence of a principle at odds with itself. To respect Jones's negative right against being coerced unilaterally to benefit another is to leave Smith's positive right to be master of his life unrealized; to enforce Smith's positive right in public law is to violate Jones's negative right in private law. Since nothing determines a court's choice as to which side to favour and which to sacrifice, there is no constraint.<sup>83</sup>

In the foregoing example, private law's injunction against gratuitous positive obligations is dispatched, but the correlativity structure of corrective justice seems undisturbed. Smith's right is against Jones, who has a correlative duty to Smith, and Jones has a duty to give Smith exactly what Smith has a right to receive from Jones.

Consider, however, a nuisance case. Suppose a developer builds houses on the outskirts of town that eventually extend into the vicinity of Jones's long-standing pig farm, converting the farm into a nuisance at private law. Smith, one of the new homeowners, sues to enjoin Jones from raising pigs near the development. Since Smith's private right to enjoy this particular

82 The idea that a court ought to impose the interpersonal obligations required by public distributive justice even though they are inconsistent with private right's basic norm against unilateral obligations need not be inferred from Kant's text; it is there explicitly. Although Kant sees the gratuitous contract as part of a rational classification of contracts, he thinks that private law must make assumptions about donor intent in line with innate right – assumptions that public law must then *reverse*; Kant, *Metaphysics*, supra note 22 at 6:285. So he argues that, absent an express reservation, the rule of publicity binding a public court requires a donor to keep a gratuitous promise accepted by the donee even though, at private law, a court must assume that the donor did not intend to bind himself, for to have done so would have been to throw himself away; *ibid* at 6:298. Similarly, where a bailor lends something gratuitously, a public court (Kant argues) must lay the onus on him expressly to put the responsibility for damage on the bailee even though private law, in accordance with the presumption against gratuitous guarantees, assumes that the bailor did not accept responsibility and so puts the onus on the bailee to disclaim responsibility in a separate contract; *ibid* at 6:298–300.

83 Therefore, Kant, in his own examples of conflict between public and private right, observes no constraint; he simply opts for public right; see note 82 supra.

home is 'only provisional,' it offers no resistance to Jones's right in public law to the security of his life plan against the unforeseeable choices of others. And yet Smith, too, has invested in a life plan, reasonably (indeed, correctly) believing that private law was on his side. So Smith's right to self-determination must also be secured. To mete out equal justice, the court must pull a remedial rabbit out of a distributive-justice hat. Perhaps it will enjoin Jones's pig farming but order Smith to compensate Jones for the cost of moving his farm.<sup>84</sup> Or perhaps it will dismiss Smith's suit to enjoin Jones's farming but nonetheless order Jones to compensate Smith for his loss of odour-free enjoyment.<sup>85</sup> In either case, the correlativity structure of private law crumbles compatibly with Kantian Right. Plaintiff's right is no longer correlated to defendant's liability; it may co-exist with plaintiff's liability and defendant's right. Nor is defendant's liberty correlated to plaintiff's no-right; it can co-exist with plaintiff's right to compensation. Indeed, neither plaintiff's nor defendant's right to compensation need be satisfied by the other. Since the public right to life-plan security can be guaranteed from a public fund, funneling compensation through the litigants is merely an administrative technique. Against this outcome, private law can raise no outcry, assert no uxorial right of independence, for its autonomy was always provisional pending public right's move to supplant it, and now its fate has been sealed.

It is dead.

#### V Conclusion

Kantian Right will not wed private law freely. It will have to be coerced. This is so because Kant regards private rights to acquired things as resting on a unilateral appropriation – one that receives no validation prior to public distributive justice. Because, however, no one can impose a binding distribution on others consistently with their innate right of self-mastery, privately acquired rights hold only provisionally. This means that they are tentatively enforceable as claims stronger than those of wrongdoers because of their consistency with the formal concept of ownership but that a citizen legislature may reject a distribution resulting from actions permitted by private law; and only the public distribution yields conclusive rights. Unlike innate right, therefore, privately acquired rights have no conclusive normative status that a public lawgiver is obliged to respect; nor do they exert residual force once they have been set aside by an organ of the omnilateral will administering

84 *Spur Industries v Del E. Webb Development Co*, 494 P2d 700 (Ariz Sup Ct 1972).

85 *Boomer v Atlantic Cement Co*, 257 NE2d 870 (NY Sup Ct. 1970).

public distributive justice. This is as true before a court as it is before a legislature.

It follows that under Kantian Right, right is identical with public right. There is no such thing in a fully realized Kantian Right as a distinctively private right to acquired things that corrective justice could separately vindicate. At best, there is a semi-autonomous private law before a common-law court; but even that depends on the legislature's choice whether or not to systematize civil law under the united will's sovereignty as well as on the robustness of the principle of distributive justice that a court applies to a property or contract dispute.

If Kantian Right's depreciation of private law shows in Kant's viewing private rights to external things as provisional, one may wonder how essential this view is to Kantian Right. Perhaps, it is a reparable flaw in Kant's elaboration of his system or a non-essential and therefore alterable aspect thereof. Perhaps, we can change provisional rights to firm but defeasible ones consistently with Kantian Right. If so, private law could maintain some autonomy from public law within a system encompassing both as constituent parts. Also, private acquired rights could retain residual force though defeated by public distributive justice; and that force might express itself in a requirement that, when overridden, private rights be impaired no more than necessary. We could even be forgiven for calling such a requirement the Kantian approach to relations between private law and public right.

The idea that private rights to external things are provisional is essential to Kantian Right understood as a theory of justice resting on a particular fundamental principle that gives Kantian Right its specific identity. Fundamental to Kantian Right is the idea that Right rests on the united will of all.<sup>86</sup> This is understood, not as an empirical aggregate of desires, but as a concept grasped by reason. Right rests on a pure will that wills only what all self-respecting ends could will for themselves – namely, the sum of the conditions of equal freedom. Antithetical to this idea is the notion that individual rights to particular things could be established, even defeasibly, in the *absence* of the united will of all. It is, in other words, a contradiction to say both that Right rests on the united will of all and that the united will of all must defer (even if only to acknowledge a duty of minimal impairment) to right-claims to external things arising independently of it.

That is why Kant, the Kantian, distinguishes between the force of innate right and that of acquired rights in the state of nature. Innate right already has, a priori, the omnilateral will's sanction, whereas

86 Kant, *Metaphysics*, supra note 22 at 6:313: 'The legislative authority can belong only to the united will of the people. For since all Right is to proceed from it, it cannot do anyone wrong by its law.'

right-claims to acquired things do not. So, though all rights in the state of nature are unrealized for lack of a public authority, only acquired rights hold provisionally barring public rejection. Only their force is limited to comparative force based on the possibility of their confirmation by the united will of all. Once a civil condition is instituted, the united will may test unilaterally asserted right-claims for public validity, or it may leave them in limbo and enforce those that *can* be confirmed. But before the testing occurs, there is nothing constituted that could subsequently be overridden by public justice. There are only claims eligible or ineligible for enforcement. If a claim is rejected by the united will, its force is nullified, not defeated and preserved; if accepted, the property right is constituted by public justice, not protected as constituted beforehand. Accordingly, Kant's characterization of private rights to external things as provisional reflects his fundamental allegiance to the juridical supremacy of the united will of all. His depreciation of private acquired rights is the obverse of his idolization of the general will.

It follows that changing provisional rights in the state of nature to firm but defeasible ones would require a basic philosophical reorientation. Unless incoherent, such an amendment would signify a transfer of allegiance from the general will to a will that embraces the distinction between the general will and the particular will of the monadic individual – a will of which the general will is but a constituent element. That fundamental idea would organize another system of Right distinct from the Kantian. In fact, it organizes Hegel's system of Right.<sup>87</sup> So, unless one wishes to use 'Kantian Right' as a brand name for whatever package of juristic ideas seems most appealing, one cannot quietly change provisional rights in the state of nature to firm but defeasible ones and call the new and improved product Kantian Right. That private rights to external things are provisional and displaceable by public right – that all conclusive right is public right – is an idea essential to Kantian Right. Indeed, it *is* Kantian Right.

If, as Kantian Right holds, there is no such thing as a private right to acquired things, then the 'idea of private law' has no referent. Nothing in reality corresponds to it. I don't mean that nothing in empirical existence

87 The idea – named by Hegel 'Geist' – involves three logical moves beyond Kantian Right. First, it requires an objective Will distinct from the pure will of empirical individuals. Second, it requires an objective Will that incorporates a public-minded particular will as the means of its confirmation as an end. Third, it requires this inwardly differentiated Will to defer to the particular will of the atomistic individual as to the means of its confirmation as the structure of all valid worth claims. In what must therefore be regarded as the worst compound matchmaking error since Emma Woodhouse persuaded Harriet Smith to reject Robert Martin for Mr Elton, Professor Weinrib, while setting private law up with the wrong partner, told her that the right one was but an imitator of his favourite; see Weinrib, *Idea*, supra note 1 at 81, n 54.



corresponds to it; that may or may not be true, and even if it were true, that would imply no defect in the idea. I mean that nothing of any stable reality corresponds to it. An idea of something (for instance, a state) to which no empirical entity fully corresponds may still be an archetype or excellence that its examples can rightfully be called upon to replicate or approximate. Such an idea Kant calls an idea of reason having practical reality – that is, an idea that ought to govern practical deliberations about what institutions to establish and what laws to enact.<sup>88</sup> But an idea of something (for instance, a serf) to which an empirical existence can correspond but to which no rational existence corresponds Kant would call an empty idea.<sup>89</sup> Under Kantian Right, the idea of private law is an empty idea.

Of course, this is not to say that the idea of private law is an empty idea. It is not, and Ernest Weinrib's formal analysis of this idea is for the ages. However, Kantian Right cannot be the normative complement for Aristotle's form of corrective justice if the idea of private law is empty *for it*. For a bridegroom for corrective justice, one must look, not in Königsberg, but in Berlin.

88 Immanuel Kant, 'On the Proverb: "That May be True in Theory, But Is of No Practical Use,"' in Immanuel Kant, *Perpetual Peace and Other Essays*, translated by T Humphrey (Indianapolis: Hackett, 1983) at 77.

89 Kant, *Metaphysics*, supra note 22 at 6:241.

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