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I. KANT ON THE PUBLIC DUTY TO SUPPORT THE POOR

In his ground-breaking article on tort theory more than three decades ago, George Fletcher lamented that among legal scholars "[t]he fashionable questions of the time are instrumentalist."[1] To the extent that this is now no longer as true as it was then, Fletcher himself deserves a significant amount of the credit, if credit it be. His writings have highlighted and reconstructed the non-instrumental conceptions of fairness that pervade legal discourse and the history of legal doctrine. Reinforcing his legal analysis is a deep but not untroubled appreciation of Kant's philosophy as pointing out a path between the contemporary extremes of skepticism and instrumentalism.[2] Accordingly, in keeping with his interest in Kant, my contribution to this set of tributes to Fletcher presents an interpretation of the particularly enigmatic passage in which Kant announces the state's right to tax in order to fulfill a public duty to support the poor.[3]

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1 George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 538 (1972).

2 *See* George P. Fletcher, *Law and Morality*, 87 COLUM. L. REV. 533 (1987); George P. Fletcher, *Why Kant*, 87 COLUM. L. REV. 421 (1987); *see also* GEORGE P. FLETCHER, LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS ix (1993); George P. Fletcher, *Remembering Gary—and Tort Theory*, 50 UCLA L. REV. 279, 285 (2002).

3 *See infra* text accompanying notes 9 & 11 for the text of the passage.

Whether the state should satisfy the basic needs of its citizens is a standard issue of distributive justice. This recourse to distributive justice involves the state's use of its taxing powers to take something that would otherwise remain within the private resources of those taxed. In a well-ordered state these resources reflect proprietary rights worked out and protected by private law within a conception of corrective justice.[4] Thus, the state's support of the poor, one might think, accomplishes distributive justice at the expense of citizens' corrective justice entitlements.

This supposed clash between distributive and corrective justice leads to the temptation to eliminate one form of justice in favor of the other. Contemporary legal and political thinking shows this temptation operating in both directions. Those opposed to the state's distributive operations claim, in effect, that corrective justice is all the justice that there is.[5] On this view, justice is fully satisfied by the private-law notions that recognize entitlements to property and personal integrity; allow for the voluntary transfers through contract and gift; and protect rights through the law of contract, torts, and unjust enrichment. These notions themselves are interpreted as embodying a distinctive private law mode of practical reason that works justice between individual parties without reference to any distributive purposes. "Distributive justice" can be regarded merely as a euphemistic term that camouflages the injustice of the state's treating individuals and their entitlements as means to collective ends. This primacy of corrective justice honors private-law entitlements while renouncing the existence of a state obligation to satisfy citizens' basic needs.

On the other hand, those who favor the state's distributive role may be tempted to regard the working of distributive justice as normatively fundamental. The doctrines of private law then become nothing more than special operations of distributive justice. On this view, property can be seen simply as the residue remaining after the state's distributive activity rather than as a locus of independent normative significance.[6] Liability rules also, whether dealing with contracts, torts, or unjust enrichment, are regarded as justified to the extent that

4 On corrective justice and the contrast with distributive justice, see ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 56–83 (1995).

5 The leading representative of this view in recent years was Robert Nozick (though he would not have described his position in the terminology I use in this paragraph). *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 149–82 (1974).

6 For a recent example of this, see LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 74–75, 173–77 (2002).

they embody distributive moves.[7] State support for the poor is then merely one distributive operation among many. Abandoned or explained away is the distinctive significance of the private-law concepts as the legal manifestations of corrective justice.

Kant's remarks on the state's right to tax in order to fulfill a public duty to the poor indicate that he does not share these one-sided views of justice. As a philosopher working within the tradition of natural right—indeed, as perhaps its greatest expositor—Kant gives a detailed non-distributive account of the principal features of private law, especially of property and contract. Developing corrective justice in terms of his own metaphysics of morals, Kant portrays private law as a system of rights whose most general categories give juridical expression to the coexistence of one person's action with another's freedom under a universal law. Yet despite his affirmation that private law entitlements, understood non-distributively, are the necessary components of a free society, Kant nonetheless holds that there is a public obligation (and not merely a liberty) to support the poor. He thus seems to regard this aspect of distributive justice as compatible with corrective justice, with the state being duty-bound to actualize both. Neither of the temptations that characterize certain contemporary approaches to law attracts him.

However, the question that arises is whether Kant is entitled to the view about the alleviation of poverty that he professes. Kant's view of property is at least as extreme as the most extreme of today's libertarians.[8] How on his view can the state function both as the guarantor of purely non-distributive property rights and as the public authority that levies taxes in order to fulfill a public duty to support the poor? This question is all the more serious because Kant is a systematic philosopher for whom obligation signifies necessity, so that the duty to support the poor that he posits must somehow arise out of, and not merely be consistent with, his non-distributive account of rights. Furthermore, for Kant, rights are the juridical vindications of freedom that the state coercively protects against infringement; coercion for the benefit of anyone, including the poor, seems inadmissible within the Kantian framework. Kant offers almost nothing resembling an argument in support of the duty he announces. Nor does he explain how this duty is to be integrated into his austere system of rights.

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7 For some notable examples, see Hanoch Dagan, *The Distributive Foundation of Corrective Justice*, 98 MICH. L. REV. 138 (1999); Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311 (1996); and Anthony Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980).

8 Kant, for instance, has nothing like the Lockean proviso that limits property rights for Nozick. *See* NOZICK, *supra* note 5, at 178–82.

In the crucial passage, appearing in his section on public right in *The Metaphysics of Morals*, Kant describes the state's right to tax in order to fulfill its duty to the poor in these terms:

> To the supreme commander there belongs *indirectly*, that is, insofar as he has taken over the duty of the people, the right to impose taxes on the people for its own preservation, such as taxes to support organizations providing for the *poor*, *foundling homes*, and *church organizations*, usually called charitable or pious institutions.[9]

Because for Kant a right is always connected to the authorization to use coercion,[10] Kant goes on to specify that the state's support of the poor should be achieved by coercive public taxation and not merely by voluntary contributions. He explains the basis of the right to tax as follows:

> The general will of the people has united itself into a society that is to maintain itself perpetually; and for this end it has submitted itself to the internal authority of the state in order to maintain those members of the society who are unable to maintain themselves. For reasons of state the government is therefore authorized to constrain the wealthy to provide the means of sustenance for those who are unable to provide for even their most necessary natural needs. The wealthy have acquired an obligation to the commonwealth, since they owe their existence to an act of submitting to its protection and care, which they need in order to live; on this obligation the state now bases its right to contribute what is theirs to maintaining their fellow citizens.[11]

No reader of Kant's legal philosophy can fail to be struck by the apparent oddity of these paragraphs. Kant's legal philosophy is an elucidation of concept of Right, that is, of "the sum of conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom."[12] In introducing the concept of Right, Kant notes that "it does not signify the relation of one's choice to the mere wish (hence also to the mere need) of others, as in actions of beneficence."[13] The consequence of this abstraction from "mere need" is a complex of proprietary, con-

9 IMMANUEL KANT, *The Metaphysics of Morals*, *in* THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT—PRACTICAL PHILOSOPHY 353, 468 [6:326] (Mary J. Gregor ed. & trans., 1996) (1797) [hereinafter KANT, *Metaphysics*]. Numbers in square brackets (i.e., [volume:page number]) refer to the citation from the Berlin Academy Edition (standard German edition) of this work.

10 *Id.* at 388 [6:231].

11 *Id.* at 468 [6:326] (footnotes omitted).

12 *Id.* at 387 [6:230].

13 *Id.*

tractual, and domestic rights that place others under correlative negative duties of non-interference, "for anyone can be free as long as I do not impair his freedom by my external action, even though I am quite indifferent to his freedom."[14] Yet when outlining the rights of government in the quoted paragraphs, Kant introduces—seemingly out of the blue—a positive duty, which government takes over from the people, to support those "unable to provide for even their most necessary natural needs."[15] As Jeffrie Murphy remarks, "it is very difficult to see what Kant is up to."[16]

Kant's legal philosophy is so parsimonious and its architecture so austere that little leeway is available in dealing with a perplexity of this sort. Kant's adamantine boundary between right and ethics—the former dealing with externally coercible duties, the latter with incoercible duties done for their own sake—prevents recourse to appealing ideas found in Kant's writings on ethics. For example, because Kant does not formulate the duty to support the poor as the reflex of any correlative right that the poor have, one might be tempted to regard that duty as somehow connected to the personal duty, postulated by Kant elsewhere,[17] to come to another's aid. However, the duty to aid is an ethical rather than a juridical one; it therefore cannot be associated with the coercive taxation authorized for support of the poor. Kant's own description of the concept of Right, with its contrast between rightful actions and actions of beneficence, confirms that state support of the poor does not fall under the duty to aid.[18]

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14 *Id.* at 388 [6:231].

15 *Id.* at 468 [6:326].

16 JEFFRIE G. MURPHY, KANT: THE PHILOSOPHY OF RIGHT 145 (1970).

17 KANT, *Metaphysics*, *supra* note 9, at 524 [6:393]; IMMANUEL KANT, *Groundwork of the Metaphysics of Morals*, *in* THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT—PRACTICAL PHILOSOPHY 37, 74 [4:423], 81 [4:430] (Mary J. Gregor ed. & trans., 1996) (1785) [hereinafter KANT, *Groundwork*].

18 For a recent argument that support of the poor exemplifies a duty of beneficence, see ALLEN D. ROSEN, KANT'S THEORY OF JUSTICE 173–208 (1993). Rosen draws on the duty to aid another that Kant sets out in KANT, *Groundwork*, *supra* note 17, to conclude that:

> [i]f no one can rationally will the maxim of never helping others *as a law of nature* . . . then neither can an entire people rationally will *as a law of political society* that the state should allow them to perish rather than supply their basic needs. The *same* reason that makes it impossible rationally to will the maxim of never helping others as a law of nature also makes it impossible rationally to consent to a law of political society that would permit the state to ignore the basic needs of its citizens.

Some commentators have seen Kant's requirement of support for the poor as an expression not of benevolence but of political prudence.[19] The alleviation of poverty facilitates the state's survival by promoting the state's strength and stability against internal disorder and external attack. Kant elsewhere indeed seems to authorize the state to legislate on this basis for the happiness and prosperity of its citizens.[20] However, the acknowledged instrumentalism of such legislation[21] fits awkwardly into Kant's exposition in the paragraphs quoted above. In these paragraphs the relief of poverty is viewed not as something from which the state might contingently benefit, but as a duty of the people that the state assumes. Like all duties Kant describes, this duty presumably reflects a normative necessity rather than a prudential option.[22]

In this Essay I develop a different possibility.[23] My contention is that, far from being inconsistent with the internal logic of Kantian right, the state's duty to support the poor is the inexorable outcome of that logic. Kant includes support of the poor among the "effects . . . that follow from the nature of the civil union."[24] The civil union marks the transition to public right from the property regime of the state of nature. Kant's theory of property rights necessitates not only this transition but also—as part of it—the people's duty to the poor. Just as for Kant, the movement to public right is obligatory, so the

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ROSEN, *supra*, at 201. However, it by no means follows from the notion that everyone is obligated to help another that everyone is also obligated to give the state the power to coerce such help.

19 *See* BRUCE AUNE, KANT'S THEORY OF MORALS 157 (1979); MARY J. GREGOR, LAWS OF FREEDOM 36 (1963); Wolfgang Kersting, *Kant's Concept of the State*, *in* ESSAYS ON KANT'S POLITICAL PHILOSOPHY 143, 164 n.7 (Howard Lloyd Williams ed., 1992); Mark LeBar, *Kant on Welfare*, 29 CANADIAN J. PHIL. 225 *passim* (1999).

20 IMMANUEL KANT, *On the Common Saying: That May Be Correct in Theory but Is of No Use in Practice*, *in* THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT—PRACTICAL PHILOSOPHY 273, 297 [8:298] (Mary J. Gregor ed. & trans., 1996) (1793) [hereinafter KANT, *Common Saying*].

21 *Id.* ("This is not done as the end for which a civil constitution is established but merely as a means for *securing a rightful condition*, especially against a people's external enemies.").

22 KANT, *Metaphysics*, *supra* note 9, at 377 [6:222] (defining duty as "that action to which someone is bound" and "the matter of obligation," and defining obligation as "the necessity of a free action under a categorical imperative of reason").

23 For brief suggestions of an approach similar to the one set out here, see LESLIE A. MULHOLLAND, KANT'S SYSTEM OF RIGHTS 317, 395 (1990); and Mary Gregor, *Kant on Welfare Legislation*, 6 LOGOS 49, 55 (1985). *See infra* note 86 for comments on Mulholland's view.

24 KANT, *Metaphysics*, *supra* note 9, at 461 [6:318].

state's support of the poor, as an incident of that movement, shares its obligatory status.[25]

On this reading of Kant, the very idea of private property implies the state's right to tax property owners in order to discharge a public duty to relieve poverty. Although Kant's notion of property completely conforms to corrective justice, it generates the distributive justice that consists in the alleviation of poverty through taxation. Far from being a self-sufficient and free-standing institution of justice, property requires redistribution to the poor for its own legitimacy. Thus Kant transcends the categorical difference between corrective and distributive justice while preserving and elucidating the distinct roles that each plays in a free society. In this Essay I attempt to reconstruct the argument, implicit in his theory of law but not articulated by Kant himself, that underlies this remarkable conclusion.

II. KANT'S ACCOUNT OF PROPERTY

Kant's account of property in *The Metaphysics of Morals* features a conceptual progression that starts from the innate right to freedom and culminates in the establishment of property as an institution of positive law. Kant exhibits the phases of this progression as implicit in the relationship of free persons under the conditions of human existence. Because property is consistent with the freedom of all, it is rightly secured and protected by the law's coercive powers.

This progression has three phases, which Kant presents from a variety of standpoints as befits their structural importance.[26] Sometimes he describes these phases in terms of the categories of modality (the possibility, the actuality, and the necessity of possessing objects).[27] Sometimes, he refers to them as divisions of justice (*iustitia tutatrix, iustitia commutativa, iustitia distributiva*).[28] Sometimes he re-

25 ALEXANDER KAUFMAN, WELFARE IN THE KANTIAN STATE 153 (1999) (arguing that Kant's conception of justice requires "access to the opportunity to develop one's capacity for unconditioned purposiveness"). Kaufman develops this view through a careful interpretation of Kant's political theory as a whole. *Id. passim.* While I have my doubts about this interpretation, I think that Kant's statement about the public duty to support the poor can be more directly explicated within the narrow ambit of the work in which it appears by using Kant's specific account of property.

26 For a further treatment of the significance of these three phases, see ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 100–09 (1995); and Ernest J. Weinrib, *Publicness and Private Law, in* 1 PROCEEDINGS OF THE EIGHTH INTERNATIONAL KANT CONGRESS 191 (1995). For an application of these three phases to Kant's ideas about international law, see B. Sharon Byrd, *The State as a "Moral Person", in* 1 PROCEEDINGS OF THE EIGHTH INTERNATIONAL KANT CONGRESS 171, 175–79 (1995).

27 KANT, *Metaphysics, supra* note 9, at 450 [6:306].

28 *Id.*

fers to the division of duties that accompanies the divisions of justice.[29] Sometimes he refers to these phases in terms of form and matter.[30] Sometimes he calls them different variations of right (what is intrinsically right, what is rightful, what is laid down as right)[31] or different kinds of laws of justice (*lex iusti, lex iuridica, lex iustitiae*).[32]

However the phases are referred to, the progression through them exhibits a dialectical structure of argument.[33] In the first phase Kant starts with the universal principle of Right, which mandates the coexistence of one person's action with another's freedom under a universal law, and notes the juridical relationship analytically contained within that principle.[34] This juridical relationship does not include property in external things, but it does encompass certain "authorizations" such as equality and non-dependence,[35] which are normative attributes implicit within the universal principle of Right and therefore ascribable to the parties at this phase. In the second phase he extends this initial argument on the ground that having something external as one's own, although not analytically contained in the universal principle of Right, marks a connection to external things that matches the capacity for choice characteristic of self-determining action. This extension, however, is problematic because although ownership of external things is now permissible, it is not yet put into effect under conditions consonant with the authorizations articulated in the first phase. The second phase, accordingly, is merely provisional. The problems it raises are resolved at the third phase, where the conditions of acquisition take a form that is fully consistent with what was analytically contained in the universal principle of Right. As Kant puts it with unfortunate opacity when he lists the threefold division of duties, the duties of the third phase "involve the derivation of the [duties of the second phase] from the principle of the [duties of the first phase] by subsumption."[36]

Although presented in a sequence, these three phases are conceptual, not temporal. Kant is not offering a philosophical reconstruction of the historical evolution of property. Rather, the three

29 *Id.* at 392 [6:236].

30 *Id.* at 450 [6:306].

31 *Id.* at 418 [6:267], 450 [6:306].

32 *Id.* at 392–93 [6:236–37], 418 [6:267], 450 [6:306].

33 *Id.* at 408 [6:254–55] (noting that the concept of having something external involves "an antinomy of propositions concerning [its] possibility" that forces reason into "an unavoidable dialectic").

34 *Id.* at 387–97 [6:230–42].

35 *Id.* at 393–94 [6:237–38].

36 *Id.* at 393 [6:237].

phases represent aspects that together are constitutive of property in the juridical relationships of free persons (e.g., that external things can be acquired through acts of will, that property does not require actual possession, that property rights are enforceable, and so on), but presented in an ordering that purports to show property's normative necessity within a system of rights. The three phases comprise an articulated unity: each phase proceeds with its distinct mode of argumentation (the first is analytic, the second is synthetic, and the third is by subsumption), but the account of property stands or falls on the totality of the three phases taken together. Kant himself presents property as absent at the first phase and as problematic at the second. If these phases were considered independently, the argument would not get off the ground or would collapse as soon as it did so. Nor does the third phase stand alone either; its role is to incorporate what is necessary to reconcile the second phase to what is analytically contained in the first one. The result is that the institutions of public law that emerge at the third phase determine and guarantee the property entitlements that are the product of the second phase in a way that expresses the normative significance of the principle of right that initiated the first phase.

The first phase features the innate right to freedom. The innate right to freedom consists of the independence of one's actions from constraint by the actions of another, insofar as such independence is consistent with the freedom of everyone else.[37] This right stands in an analytic relationship with the universal principle of Right, which requires that one person's action be able to coexist with the freedom of everyone under a universal law. Formulating freedom as an innate right adds nothing to what the universal principle already contains; it merely isolates a constituent element of, and represents what is already involved in thinking about, that principle.

The innate right is "the only original right belonging to every man by virtue of his humanity."[38] This right is innate because every person has it simply by virtue of his or her existence. Similarly, it is original because it arises independently of any act that would establish it. Because my innate right is not mine by virtue of some act of acquisition, it is what is internally mine, in contrast to what is externally mine, which must always be acquired.[39] What is internally mine is my

37 *Id.*

38 *Id.*

39 *Id.*

freedom,[40] that is, my capacity to act in the execution of the purposes I form as a self-determining being.

For human beings the paradigmatic manifestation of what is internally mine is the body, the physical organism through which the person expresses his or her freedom as a self-determining being.[41] By mandating actions that can coexist with the freedom of all, the universal principle of Right signals its application to the actions of self-determining agents. In the case of human beings, self-determining activity takes place through the body. Because the body is an inseparable unity of members in a person,[42] interference with any part of another's body is a wrong against that person's freedom. This right with respect to one's own body is innate. It arises not through the performance of an act of acquisition (indeed, no such act is conceivable because the body itself is what would have to perform it), but simply by virtue of one's being born. Thus, the body is the primary locus of what Kant calls the "right of humanity in our own person."[43]

The occupation by a person's body of a particular space is an exercise of this right: "All human beings are originally (i.e., prior to any act of choice that establishes a right) in a possession of land that is in conformity with right, that is, they have a right to be wherever nature or chance (apart from their will) has placed them."[44] Given the finitude of the earth's surface, the occupation of space carries with it the possibility of persons coming into contact with one another.[45] Such contacts are governed by the universal principle of Right. Because no one can interfere with the body of anyone else, a person who occupies a particular space excludes all other persons from that space.

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40 *Id.* at 402 [6:248] ("what is *internally* mine (freedom)"); *id.* at 404 [6:250] ("what is internally mine (my freedom)").

41 Kant does not say this explicitly, but it is clear from what he does say about the innate right. *See* MULHOLLAND, *supra* note 23, at 214. In addition to the passages Mulholland cites, one can adduce the significance of the right in our own person for legitimate sexual relations. *See* KANT, *Metaphysics*, *supra* note 9, at 426–27 [6:277–78]; *see also* IMMANUEL KANT, *Vorarbeiten zum Privatrecht*, *in* 23 GESAMMELTE SCHRIFTEN 287 (Walter de Gruyter & Co. 1955) (1902) (making reference to "my innate right to security of the person" (translated by Graham Mayeda)) [hereinafter KANT, *Vorarbeiten*].

42 *See* KANT, *Metaphysics*, *supra* note 9, at 427 [6:278].

43 *Id.* at 392 [6:236], 395 [6:239]. Other aspects of the innate right that Kant mentions are the infant's right to parental support, *id.* at 430 [6:280], the right to a good reputation, *id.* at 441 [6:295], and the right to one's religious beliefs. *Id.* at 469 [6:327].

44 *Id.* at 414 [6:262].

45 *Id.* at 414–15 [6:262].

In this phase, where one's only right is the innate right of humanity in one's own person, property as the entitlement to something distinct from the person's body does not exist. Of course, a person may come into physical possession of some external object. I might (to use Kant's examples)[46] hold an apple or lie on the earth. But someone who wrested the apple away from me or pushed me off the land on which I was lying would be wronging me, not with respect to my property, but with respect to my body. By disturbing the disposition of my fingers as they grasped the apple or of my physical frame as it rested on the earth, the wrongdoer would be acting inconsistently with my innate right to occupy a particular space, rather than infringing a right I have in the apple or in the resting place as such. The interference would be with what is internally, not externally, mine.

Property goes beyond innate right by treating the person as entitled to an external thing even when it is not in the person's physical possession. Innate right prohibits another's interference with an external thing only insofar as such interference would simultaneously be an interference with my body as something internally mine. Property, in contrast, entails treating the thing as externally mine, so that the apple I was holding remains mine even when I set it down, and similarly the land upon which I was lying remains mine even when I have moved elsewhere. Under a property regime, anyone who interferes with what is mine wrongs me despite the fact that my body is not immediately affected.

The extension of the scope of rights to include what is externally mine is the second phase of Kant's account of property. Kant introduces what he calls the "[p]ostulate of practical reason with regard to rights" under which "[i]t is possible . . . to have any external object of my choice as mine."[47] This postulate asserts both the possibility of property in the external objects of a person's will and the existence of a duty of justice to act towards others in recognition of that possibility.[48]

The postulate is itself based on a sequenced set of considerations.[49] First, the universal principle of Right requires that the action

46 *Id.* at 402 [6:247].

47 *Id.* at 404 [6:250]. On the postulate of practical reason with respect to rights, see MULHOLLAND, *supra* note 23, at 245–53; Kenneth Baynes, *Kant on Property Rights and the Social Contract*, 72 MONIST 433, 436–38 (1989); Mary Gregor, *Kant's Theory of Property*, 41 REV. OF METAPHYSICS 757, 775–76 (1988); and Wolfgang Kersting, *Freiheit und Intelligibiler Besitz: Kants Lehre vom Synthetischen Rechtssatz a Priori*, 1 ALLGEMEINE ZEITSCHRIFT FÜR PHILOSOPHIE 31, 35–39 (1981).

48 *See* KANT, *Metaphysics*, *supra* note 9, at 406 [6:252].

49 *See id.* at 401 [6:246].

of one person co-exist with the freedom of another, thus making that freedom (which is represented by the innate right of humanity in one's own person) the limit of one's action. This implies that everything that is distinct from that to which one person has an innate right is available for another's use as an external object of choice. Thus, nothing about a usable thing could put it beyond the possibility of being used. Nor, second, could one person's desire or need for the thing prevent another from using it. For purposes of the external relationships of right, freedom is a formal concept that refers to the capacity for choice, rather than directly to the content of persons' particular choices. Accordingly, as was noted above, the concept of right abstracts from the wants and needs that fuel particular choices.[50] From the standpoint of the concept of right, all that matters is that the use of a thing by one person be formally consistent with the freedom of others, regardless of the intensity with which they want the thing or the urgency with which they need it. Third, this formal consistency of use to the capacity for choice also means that it is not the case that all that a person can rightfully have with regard to things is the liberty to actually use them, a liberty that would not take the postulate any farther than the innate right exemplified by the apple in the hand. The capacity for choice is not engaged solely by a thing's being in someone's physical possession, for physical possession signifies not the capacity for choice, but an actual act of choice. Because one's capacity for choice cannot, consistently with one's freedom, be limited to what one actually chooses (in this context, what one holds in one's physical possession), then one must postulate rights that maintain things in a state of being possible objects of choice even when they are not in one's physical possession. Accordingly, for something to be the object of someone's capacity for choice rather than of his or her actual choice, the person must have an entitlement to it, immune from the intrusions of others, that continues regardless of whether he or she physically possesses it. This entitlement is the proprietary right in an external thing, which renders the thing juridically available for the exclusive exercise of the proprietor's capacity for choice. Thus, fourth, for a thing to be thought of as a possible object of choice, what marks the connection between the proprietor and thing owned is not the proprietor's physical possession of the thing (as is the case with innate right), but the mere consciousness of having the thing available for use as one pleases so far as others are concerned. In this way the postulate of practical reason with respect to rights makes it possi-

50 *See supra* note 13 and accompanying text.

ble to have something external as one's own, thus extending the scope of rights beyond the body-bounded regime of innate right.

Yet the rights made possible by the postulate are problematic. Although they are consistent with the regime of innate rights in one respect, they are inconsistent with it in another. They are consistent with it by allowing external things to be usable in a way that matches the capacity for choice that characterizes the freedom of innate right. They are, however, inconsistent with it because they do not treat the parties involved as innately equal. Because in the first phase everyone has an innate right that everyone else is obligated to abstain from coercing, the participants in a regime composed exclusively of innate rights have innate equality, which Kant defines as "independence from being bound by others to more than one can in turn bind them."[51] This equality does not obtain with respect to the external rights allowed by the postulate of practical reason. Unlike the innate right, external rights are acquired through the performance of an act. In the case of original acquisition, when the proprietor comes to own something not owned by anyone, this act is the exercise of a unilateral will that puts others under an obligation that they would not otherwise have. Despite the fact that innate right authorizes innate equality, the proprietor, by virtue of his or her unilateral act of acquisition, binds others with respect to the acquired thing without being reciprocally bound to them. This should be beyond the rightful power of one person's unilateral will, for it is inconsistent with innate equality of all that the acquirer should be able to subordinate others to his or her purposes.[52]

This inequality has further consequences. Because an acquired right, like all Kantian rights, carries with it the power to coerce others not to violate it, the unilateral act of acquisition that creates the right also gives the right-holder coercive power. Accordingly, although the universal principle of Right forbids an act that does not coexist with the freedom of another, the coercion occasioned by acquisition is precisely such an act, in that it allows the unilateral will to serve as a coercive law for everyone.[53] Moreover, although others also can create rights through their unilateral will, no one can be sure of how others interpret the extent of their respective rights or of whether they are willing to abide by the rights of others. In the interplay of unilateral

51 *See* KANT, *Metaphysics*, *supra* note 9, at 394 [6:237–38].

52 *See id.* at 416 [6:264], 412 [6:259].

53 *Id.* at 409 [6:256].

wills that results, each person is the judge of his or her own entitlements, doing what seems right and good in his or her own eyes.[54]

Thus, the postulate of practical reason with respect to rights creates a conceptual tension, to be resolved in the subsequent phase, between the unilateralism of the proprietor's conduct and the equality authorized by innate right. The universal principle of Right, in which innate right is analytically contained, forbids one person from coercing the freedom of another. Yet the postulate of practical reason allows one person coercively to restrict another's freedom through unilateral acts that establish a proprietary right to exclude. Drawing on the vocabulary of his natural law predecessors, Kant terms the postulate a "permissive law of practical reason (*lex permissiva*), which gives us an authorization . . . to put all others under an obligation, which they would not otherwise have, to refrain from using certain objects of our choice because we have been the first to take them into our possession."[55] The permissive law permits what is otherwise impermissible, but only because an additional move is pending that brings external rights back into conformity with the equality of innate right. Understood as a permissive law, the postulate of practical reason with respect to rights has the function of allowing us provisionally to hold the notion of external property in place until the thought of it can be completed in a further phase that establishes the conditions under which external property is conclusively rightful.

This transformation of provisional rights into conclusive ones occurs in the third phase of Kant's account of property. Kant introduces a second postulate, the postulate of public Right, which marks the transition from the state of nature to the civil condition of law-governed society. The postulate declares that "when you cannot avoid living side by side with all others, you ought to leave the state of nature and proceed with them into a rightful condition."[56] In this rightful condition the state provides duly authorized institutions of adjudication and enforcement. These replace the exercise of private judg-

54 *See id.* at 455–56 [6:312].

55 *Id.* at 406 [6:247]. The history of the idea of the permissive law and the aporias that accompany it in Kant's account of property have now been illuminatingly discussed in two articles by Brian Tierney. *See* Brian Tierney, *Kant on Property: The Problem of Permissive Law*, 62 J. HIST. OF IDEAS 301 (2001) (exploring the usefulness of the permissive law concept to Kant's account of property), *available at* http://muse.jhu.edu/journals/jhi (Apr. 2001); Brian Tierney, *Permissive Natural Law and Property: Gratian to Kant*, 62 J. HIST. OF IDEAS 381 (2001) (examining Kant's permissive law concept in a broad historical context), *available at* http://muse.jhu.edu/journals/jhi (July 2001).

56 *See* KANT, *Metaphysics*, *supra* note 9, at 451–52 [6:307].

ment about controversial claims with the authoritative judgments of courts that determine the scope of each person's entitlements according to what is laid down as right.[57] Moreover, the coercion that secures each person's rights is no longer private but emanates from a public lawful regime under which rights are secured by adequate power external to the contending parties.[58] The civil condition is the product of a social contract, which is conceived not as an historical occurrence, but as an idea "in terms of which alone we can think of the legitimacy of a state."[59] This notional union of all wills transforms the external acquisition of unowned things from a merely unilateral act on the part of the acquirer to an omni-lateral act, to which everyone as possible owners of property implicitly consents and whose rights-creating significance everyone acknowledges.[60] Such acknowledgement follows from the very act of acquisition: just as an acquirer cannot claim a right for oneself without recognizing the similar rights of others, so others cannot assert the rightfulness of their own acquisitions without respecting the acquisitions of everyone else. Because no one is obligated to respect the entitlements of others unless assured that everyone will do so, the state's coercive power is required to guarantee what everyone owns.[61] Now acquisitions are seen not as isolated unilateral acts, but as mutually related through a system of property in which all are reciprocally bound and publicly coerced to respect the property rights of others. The reciprocal equality of innate right is now recaptured in the transmuted form of civic equality, which consists in "not recognizing among the *people* any superior with the moral capacity to bind him as a matter of right in a way that he could not in turn bind the other."[62]

Kant affirms that leaving the state of nature and entering the civil condition is "objectively necessary, that is, necessary as a duty."[63] This duty follows from the recognition in the second of the three phases that private property is rightful. The postulate of practical reason with respect to rights allows the conclusion that that having external things as one's own is an exercise of freedom that, although not analytically contained within the universal principle of Right, is formally consistent with it, and therefore capable of putting others under a duty of non-interference. The duty is only provisional, because in the second

57 *See id.* at 443 [6:297], 456 [6:313].
58 *Id.*
59 *Id.* at 459 [6:315].
60 *Id.* at 409 [6:256], 411–12 [6:259].
61 *Id.* at 408–09 [6:255–56].
62 *Id.* at 457–58 [6:314].
63 *Id.* at 416 [6:264].

phase of Kant's account this formal consistency with the universal principle of Right is not accompanied by conditions that reflect the innate equality entailed by that principle. The absence of these conditions does not negate the validity of the duty. Canceling the second phase and returning to the first one is therefore not an option. While this regressive move would restore the original innate equality, it would nullify the possibility of external freedom that the postulate of practical reason identified with having something external as one's own, thereby leading to infringements of the duty provisionally established through that possibility. Hence arises the necessity to move forward to the third phase, in which the impediments to the conclusive operation of the duty are eliminated. Just as all are under a duty at the second phase to respect proprietary entitlements, so all are under a duty to create the conditions under which those proprietary entitlements are fully rightful. The establishment of institutions of public right removes—indeed, is the only way to remove—the unilaterality of judgment, coercion and acquisition that characterizes the state of nature. Accordingly, the duty of non-interference with property that makes its appearance in the second phase of Kant's account matures at transition to the third phase into a duty to leave the state of nature and to enter (and force others to enter) the civil condition.

Kant regards the public duty to support the poor as a juridical effect of this move from the state of nature through the social contract into the civil condition. As the passage in the first Part of this Essay indicated, he does not explain why he posits such an effect or why he regards support of the poor as a public duty.[64] Presumably he thinks that the specific duty to support the poor, like the more general duty to establish the civil condition, is necessary if the property regime is to conform to the equality of innate right. Then state support of the poor would be as obligatory as the state itself. In the next Part, I explicate this supposed line of thought.

III. THE DUTY OF RIGHTFUL HONOR

In the civil condition the will of all is united through a social contract to which it must be possible for everyone to agree.[65] Formulat-

64 *See supra* note 9 and accompanying text.

65 *See* KANT, *Common Saying*, *supra* note 20, at 297 [8:297]. Kant stated that

> [the social contract] is instead *only an idea* of reason, which, however, has its undoubted practical reality, namely to bind every legislator to give his laws in such a way that they *could* have arisen from the united will of a whole people and to regard each subject, insofar as he wants to be a citizen, as if he had joined in voting for such a will. For this is the touchstone of any public law's

ing this in terms of the three phases of Kant's account of property, one can say that the civil condition presupposes that it is possible for everyone to agree to the transition from the first phase, where each person has only the innate right, to the second and third phases, where there are provisional and then conclusive rights in external property. Kant's inclusion of the public duty to support the poor among the effects of the civil condition suggests that the agreement of all would be impossible unless the state assumed this duty.

Kant's description of the innate right to freedom indicates why this might be so. In his division of the duties of right, Kant notes that concomitant to right of humanity in our own person is what he calls the duty of rightful honor. This duty, he says, "consists in asserting one's worth as a human being in relation to others, a duty expressed by the saying, 'Do not make yourself a mere means for others but be at the same time an end for them.'"[66] The duty is to make the exercise of one's freedom as a self-determining being expressive of one's own purposes, not of the purposes of others. To act according to this duty is to assert oneself against others and to resist being subordinated to them.[67] The duty corresponds to the person's "innate right to act directly in his own interest," about which Kant comments that "a condition in which the determination of this interest is given over to someone else is impossible from the standpoint of right."[68] The duty of rightful honor thereby precludes compromising one's freedom by surrendering control of it to others. Thus, if the transition to a regime of external property involves ceding to another the freedom inherent in having an innate right, consent is impossible.

At first sight this idea of self-assertion may seem strangely phrased as a duty. The duty is not one that a person owes to someone else by virtue of the latter's rights, as is usually the case with juridical duties; it is rather a duty, by virtue of one's own humanity and the innate right that it imports, to behave in a self-assertive way with respect to someone else. Kant traces the formulation of this duty to the famous definition of justice offered by the ancient Roman jurist Ulpian: justice is

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conformity with right. In other words, if a public law is so constituted that a whole people *could not possibly* give its consent to it . . . it is unjust; but if it is *only possible* that a people could agree to it, it is a duty to consider the law just, even if the people is at present in such a situation or frame of mind that, if consulted about it, it would probably refuse its consent.

Id.

66 *See* KANT, *Metaphysics*, *supra* note 9, at 392 [6:236].

67 Hence, Kant terms the justice applicable to this duty "*protective justice* (*iustitia tutatrix*)." *Id.* at 450 [6:306].

68 KANT, *Vorarbeiten*, *supra* note 41, at 292 (translated by Graham Mayeda).

to live honorably, to injure no one and to give each person his due.[69] Allocating the three members of this definition to the three phases of his own account, Kant playfully interprets the first member (to live honorably) as an imperative to be (that is, to assert oneself as) an honorable man in one's relationships with others. This duty defines the nature of freedom within a system of rights. For one person to "make himself into a thing"[70] that is at the service of another is incompatible with the innate equality associated with the innate right of freedom. Thus, viewing persons as acting in a way that requires others to deal with them as self-determining beings is the ultimate presupposition of rightful relationships, as Kant indicates by making rightful honor the foundational element in Ulpian's definition of justice. Rightful honor counts as a duty of right both because it is constitutive of external freedom as expressive of the right of humanity in one's own person and because the assumption that one is acting to forward one's own ends is a necessity internal to an intelligible system of rights. Accordingly, the transition from the first phase of Kant's account to the subsequent phases must be consistent with that necessity if the civil condition that finally emerges is to be truly rightful.

The duty of rightful honor requires one to act in a manner consistent with the right of humanity in one's own person. What this means emerges from the "authorizations" that "the principle of innate right already involves,"[71] that is, the normative attributes that persons can be regarded as having simply by reason of their right of humanity. One of these is the innate equality that loomed so large in the account of property outlined in the previous section of this paper. From this equality flows "a man's quality of being *his own master (sui iuris)*,"[72] that is, his non-dependence on anyone with whom he might interact. Another of these authorizations is that one is "a man *beyond reproach (iusti)*."[73] Because wrongs can be imputed only to acts affecting others' rights, one's very existence is not a wrong. The duty of rightful honor thus requires one to insist on the maintenance of one's innate equality and non-dependence, and not to acquiesce in one's subordination to others, as if one were guilty of a wrong simply for being who one is.

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69 *See* KANT, *Metaphysics*, *supra* note 9, at 392–93 [6:236–37]. Ulpian's writings that Kant explicates can be found in DIGEST OF JUSTINIAN 1.1.10.1 (Alan Watson ed., Univ. of Pa. Press 1985) (533 A.D.).

70 KANT, *Metaphysics*, *supra* note 9, at 427 [6:278].

71 *Id.* at 393 [6:237–38].

72 *Id.* at 394 [6:238].

73 *Id.*

If, as Kant says, there is an innate right (as well as a corresponding duty) "to act directly in his own interest," what interest does a person have in a juridical order composed solely of everyone's respective innate rights? Kant unequivocally connects innate right to what is needed for self-preservation. Referring to the aspect of innate right that consists in occupying space, Kant writes, "Through the innate possession of land I can exclude everyone from using that which is necessary for sustaining my existence."[74] In accordance with their innate right, possession by humans of the land on which they find themselves "is the supreme condition of the possibility of using this land, as long as this use is absolutely necessary only for purposes of sustaining their existence."[75] By excluding others from whatever the person is physically connected to, such as the very space that the person occupies, innate right allows the use, unaffected by others, of what is immediately necessary for one's survival. Thus, innate right serves one's interest as a free being in not being dependent on others with respect to one's continued existence.

By linking innate right with the sustaining of one's existence, Kant is not claiming that one has a positive right to the means of existence. His argument is rather that the innate right signifies that others have a negative duty not to interfere with the incidents of that right, and that one's existence is therefore immune from deprivation at the hands of others. This is because one's mere existence is not a wrong to anyone (because wrong is imputable only to actions) and accordingly provides no rightful ground for others to interfere with one's body and with whatever one physically possesses. The body, of course, is the organ through which one maintains one's physical existence. Similarly, the things that are attached to the body (for example, the earth on which one lies, the apple in one's hand) are the objects most immediately implicated in one's continuing survival.[76] Accordingly, although innate right does not include a *right* to survival,

74 KANT, *Vorarbeiten*, *supra* note 41, at 286 (translated by Graham Mayeda).

75 *Id.* at 318.

76 In connecting food in the hand with survival and in differentiating between such food and property in external things, Kant's account is reminiscent of the Franciscan controversy in the fourteenth century. The Franciscans insisted that simple factual use (*simplex usus facti*), which, as exemplified by the eating of food, was necessary for human survival, was not the implicit exercise of a property right and therefore not inconsistent with the renunciation of property. *See* ANNABEL S. BRETT, LIBERTY, RIGHT AND NATURE: INDIVIDUAL RIGHTS IN LATER SCHOLASTIC THOUGHT 52–68 (1997); BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW 1150–1625, at 93–169 (1997). In 1279, Pope Nicholas III distinguished simple factual use as follows: "[i]n temporal things we have to consider especially property, possession, usufruct, right of use and simple factual use, and the

its imposition of a correlative duty of non-interference on others does serve the person's *interest* in not having one's survival depend on action by others. Thus, to the extent that the transition to a regime of external property compromises that interest, the consent of all would be impossible to attain.

The scope of this interest is enhanced by the fact that in a regime characterized only by innate right, everything is available for use by everyone, except the space that others occupy and whatever is in their physical possession. Accumulation is impossible because no one has external things as one's own. As long as I occupy a particular space, nobody can push me out of it. But when I move, I can occupy any other space not occupied by someone else, gaining my new space and simultaneously losing the power to prevent others from occupying the old one. Similarly, as long as the apple is in my hand, no one can take it from me. But I cannot store it while gathering others, for as soon as the apple is released from my grasp it becomes available to anyone else who can take it. This general availability of everything except the space that others occupy and the things that they physically possess means that my survival cannot directly be affected by the actions of others. Whatever external things are available to my neighbors are also available to me. So far as my relationship with others is concerned, I am (in the terminology of Kant's authorizations of innate right) my own master,[77] able to act on my own and without dependence on others for my continued existence.

Of course, my survival may be affected by a natural scarcity. If there is only one apple, my neighbor's seizing it before I do may mean that I die from starvation. However, the action of my neighbor in seizing the apple is normatively irrelevant to innate right. Innate right is an original right; it arises independently of any action. Therefore, under the principle of innate right my starvation has to be attributed not to my neighbor's seizure of the apple—that act in itself creates no right at this point, and the situation would be no different if he found himself in physical possession of the apple without any seizure—but to my inability to gain access to the apple without disturbing my neighbor's body. From the juridical point of view, I starve not because of any act of his, but because the presence of the apple in his hand makes it wrongful for me to use it.

The non-dependence of one's existence on others is the hallmark of juridical relationships restricted to the exercise of innate rights. In-

life of mortals requires the last as a necessity, but it can do without the others." TIERNEY, *supra*, at 94.

77 *See* KANT, *Metaphysics*, *supra* note 9, at 394 [6:238].

nate right protects each person's existence on the basis of the innate equality of all, since everyone was reciprocally bound not to interfere with the bodily integrity of everyone else. Also serving to protect existence is the availability to all of everything except for those things that were immediately connected to the body of others—a connection through which persons receive the things directly necessary for sustaining themselves. This combination of the inviolability of the body plus the availability to everyone of everything means that no one's survival is dependent on anyone else's actions.

In this account, the significance of one's survival is entirely relational. The gross corporeality of the body and its continued existence do not demand attention on the ground that life, taken on its own, forms a basic value in abstraction from one's interaction with others.[78] The standpoint of right is concerned only with the relationship between one person's freedom and another's action. Accordingly, the body has a juridical significance because as the organ through which human beings exercise their freedom, it imposes duties on others whose actions must be capable of coexisting with everyone's freedom. Similarly, when innate right is considered as a regime of equality, the body as the organ of one's freedom cannot rightfully become the means through which that freedom is compromised through subordination to or dependence on others. Thus, from the standpoint of right, continued existence matters not because of its unilateral importance to the person whose existence it is, but because of its role within a relationship of free, equal, and mutually non-dependent beings.

The inevitable non-dependence that characterizes innate right disappears with the introduction, first provisional and then conclusive, of external property. Because ownership obtains even in the absence of a physical connection between the owner and what is owned, the accumulation of external things is now permissible. My range of rightful possibilities is now confined to what might be left over from others' efforts at accumulation. The possibility of amassing land makes it conceivable that, given the finitude of the earth's surface,[79] all the land may be appropriated by others, leaving me literally with no place to exist except by leave of someone else. Moreover, it may turn out that I must now seek the food that is to sustain me from my neighbors. My continued existence may become dependent on the goodwill or sufferance of others, to whom I might then have to subordinate myself, making myself into a means for their ends, per-

78 For an example of life treated as a basic value, see JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 86 (1980).

79 KANT, *Metaphysics*, *supra* note 9, at 414 [6:262], 455 [6:311].

haps becoming their bondsman or slave. Moreover, my inability otherwise to satisfy my basic needs may make me dependent on the generosity of others, that is, on that to which I have no right. In contrast to the situation under innate right, the actions of others can now directly and radically affect my survival.

This transformation of one's position relative to others from assured non-dependence to potential dependence renders it impossible to agree to the social contract that will secure rights in external things. To consent to the possibility of dependence with respect to one's existence would violate one's duty of rightful honor.

It is worth noting that the criteria for determining whether consent is possible arise from the conceptual implications of innate right itself, not from a calculus about the effect of property on collective or individual welfare. It may well be, as Locke famously observed, that instituting external property produces an enormous surplus compared to what preceded,[80] and that the judgment of whether this would be an improvement or a worsening of any individual's situation depends on how that individual factors his or her degree of risk aversion into the calculation of the chances of capturing part of the surplus. For Kant, however, the issue is more constrained. Non-dependence with respect to one's continued existence is the interest relevant to innate right, because that is almost all that is sheltered by the duty not to interfere with another's physical integrity and by the consequent availability of everything to everyone. The standards for judging whether one can consent to a property regime are provided by the normative ideas authorized by innate right: not probability and welfare, but innate equality and non-dependence. Whether consent to enter the civil condition is consistent with rightful honor raises not a quantitative issue ("Will I have less?"), but a relational one ("Will my existence change from not being to possibly being dependent on others' actions?"). In dealing with the duty of rightful honor, the focus remains where the universal principle of Right put it from the start: on the relationship between the freedom of one person and the action of another.

Thus, the progression from innate right to the state's guarantee of all property holdings seems to reach an impasse. On the one hand, this progression is a normative necessity in which I am obligated to participate. On the other hand, innate right at least has the advantage that no person or aggregate of persons can engross the world's resources, shut me off from access to what is necessary for my exis-

80 JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 37 (Hackett Publ'g Co. 1980) (1690).

tence, and thereby make the exercise of my freedom dependent on the beneficent or exploitative will of another. Consenting to this possible dependence would be inconsistent with my duty of rightful honor. The establishment of a civil condition, it seems, is both a fulfillment and an infringement of my duty.

The public duty to support the poor breaks—and indeed is the only thing that can break—this impasse. The requirement allows all persons, consistently with their rightful honor, to consent to the establishment of a civil condition. The sovereign's assumption of the duty to support the poor makes up for the possible inaccessibility of the means of sustenance. The result is that in the civil condition, just as under innate right, no one's subsistence is dependent on the actions of others. Moreover, because the duty to establish a civil condition cannot proceed without ensuring everyone's sustenance, supporting the poor is as much a duty as is the establishment of a civil condition; the necessity of the end entails the necessity of the means required to effect it. Everyone must now consent to enter the civil condition, provided that the civil condition incorporates public support for the poor.

Furthermore, the duty is incumbent on the people (and derivatively on the sovereign) rather than on any particular person. The institution of a regime of external property allows for the accumulation of property; no individual commits a compensable wrong simply by engaging in this process. Moreover, the prospect of impoverishment is created by the systemic legitimacy of acquisition, rather than by the appropriative acts of any particular acquirer. The *systemic* difficulty that property poses for innate right is resolved by the *collective* duty imposed on the people to provide subsistence as needed. The people, defined by Kant as the "multitude of men . . . that, because they affect one another, need a rightful condition under a will uniting them, a constitution (*constitutio*), so that they may enjoy what is laid down as right,"[81] must collectively discharge the duty that is incidental to achieving that rightful condition.

To be sure, individuals pay the tax. This, however, is not because they are duty-bound as individuals to support the poor but because the sovereign is authorized to tax them. The obligation of the taxpayers is to the state, not to the poor directly, because the taxpayers whose property is secured by the state are the beneficiaries of the transition to a regime of external property. The incidence of this tax is based on a notion of reciprocity that flows from the state's guarantee of property and, with it, of the proprietors' means of survival; because

81 KANT, *Metaphysics*, *supra* note 9, at 455 [6:311].

the wealthy "owe their existence to an act of submitting to [the commonwealth's] protection, which they need in order to live,"[82] they are obligated to contribute what is theirs to sustain the existence of those who, because of the property regime, now lack what they need in order to live.

Kant remarks that the sovereign has the right to tax the people "for its own preservation," explaining that "[t]he general will of the people has united itself into a society that is to maintain itself perpetually."[83] One might be tempted to think that Kant is pointing to the right of the sovereign to act prudently in order to prevent anarchic social unrest.[84] However, Kant presents support for the poor not as a merely permissible exercise of prudence but rather as a requirement of duty, which the sovereign takes over from the people. Accordingly, in these references to the people's self-preservation and society's self-perpetuation, Kant may be making a sharper point. The existence of a duty to support the poor is the necessary precondition for establishing a state that guarantees property in a manner consistent with each person's innate right. Unless the duty is fulfilled, the state forfeits its legitimacy. On this approach Kant is referring not to the physical dissolution of political society but to the negation of its rightfulness. A people that fails to fulfill its duty to support its poor cannot be regarded as joined together in a rightful condition. Support of the poor, in other words, may for Kant be a constitutional essential.[85]

This does not mean that, for Kant, the poor have a right to subsistence. Since a right is always accompanied by the authorization to coerce and the state is the ultimate repository of legitimate coercive power, Kant can recognize no right against the state. The poor are supported not because they hold a right but because they are the beneficiaries of a duty. The sovereign takes over from the people the duty to support the poor that is an incident of everyone's obligatory entrance into a civil condition. The satisfaction of basic needs is not an entitlement of the poor, but a duty that reflects the terms of the people's necessary emergence from the state of nature.[86]

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82 *Id.* at 468 [6:326].

83 *Id.*

84 *See* sources cited *supra* note 19.

85 On the idea of constitutional essentials, see JOHN RAWLS, POLITICAL LIBERALISM 227–30 (1993). Rawls also considers "a social minimum providing for the basic needs of all citizens" to be a constitutional essential. *Id.* at 228.

86 *But see* MULHOLLAND, *supra* note 23, at 317, 395. Mulholland's very brief but instructive treatment of the problem of the needy notes the connection between innate right and Kant's passage about supporting the poor. However, he concludes from this, unnecessarily, that Kant recognizes a right to welfare. For this LeBar cor-

The operation of this duty re-establishes the non-dependence that marked innate right and was threatened by the introduction of private property. In one's relations with another, everyone continues to have the same right to bodily integrity that they had as a matter of innate right. The availability to everyone of everything that was distinct from others' bodies has been superseded by the public duty to support the poor. One's interest in non-dependence with respect to one's continued existence is as well served by the juridical order of the third phase as it was by the juridical order of the first phase. The danger of being reduced to a means for others, present in the second phase, has been eliminated by the public duty to the poor.[87]

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rectly criticizes him, demonstrating that no right to welfare can emerge from innate right. *See* LeBar, *supra* note 19, at 247–48. LeBar in turn concludes that the defect in Mulholland's argument means that Kant's remarks can be understood as going only to political prudence. *Id.* at 226, 236, 249. Mulholland's conclusion is understandable in the sense that in a modern polity the duty could be juridically recognized and enforced only if it was constitutionally expressed through the explicit or implicit positing of a correlative right. For an example of the operation of such a right, see Gov't of the Republic of South Africa v. Grootboom, 2001 (1) SA 46 (CC).

87 In his treatment of citizenship Kant explicitly draws attention to the significance of non-dependence at the third stage. KANT, *Metaphysics*, *supra* note 9, at 394 [6:238]. Just as he had listed "a man's quality of being *his own master (sui iuris)*" among the authorizations of innate right, so in a parallel passage, *id.* at 457 [6:314], about the effects of instituting a civil condition, he provides a list of "the attributes of a citizen," one of which is "the attribute of civil *independence*, of owing his existence and preservation to his own rights and powers as a member of the commonwealth, not to the choice of another among the people." *Id.* Because the sole distinguishing feature of a citizen is the right to vote, this passage is not directly applicable to the public duty to support the poor. In any case, on my reconstruction of Kant's argument, a poor person does not have an entitlement to survival and therefore cannot claim support by virtue of "his own rights and powers." *Id.* Nonetheless, the passage is suggestive in indicating the relevance of not "owing his existence and preservation . . . to the choice of another among the people." *Id.* On my interpretation, Kant's remarks about the public duty to support the poor are the outcropping of a similar argument about not owing one's existence to the choice of another that focuses on the effect of introducing a property regime. Kant's notion of civil independence is not a complete maturation of innate right's quality of being *sui iuris*. Innate right is pre-political and therefore cannot be exclusively completed by the right to vote at the third phase. Moreover, the notion of being *sui iuris* is taken from Roman Law, where it referred not to the suffrage (one did not have to be *sui iuris* in order to vote in Rome) but to the absence of subordination to another's paternal power (*patria potestas*) or marital power (*manus*). *See* THE INSTITUTES OF GAIUS bk. I, §§ 48–50 (Francis de Zulueta trans., 1946) (138–155 A.D.). Kant's statement about civil independence may, accordingly, assist in revealing the difficulty—the possibility of dependence for one's existence on the actions of another—that the public duty to the poor overcomes.

That the requirement of sustaining the poor is a duty of the sovereign rather than a right of the needy against any particular person bears on two possible objections to the interpretation I am proposing. The first objection is that the public duty to support the poor does not, after all, succeed in reconciling property with innate right. Does it not merely replace possible dependency on the actions of others with an equally unsatisfactory dependency on the state? In answer, one may note that Kant's discussion of citizenship expressly differentiates between being dependent on others for one's existence and being dependent on the state.[88] Kant apparently does not consider the relationship of the poor to the state to involve real dependence. In his view, one may surmise, dependence involves a relationship with someone who, without breaching a duty, can withhold a benefit necessary for one's survival. This is the case when someone owes his survival to the choice of another, because in exercising such a choice no one is under a duty of beneficence as a matter of right. The state is different. The poor receive support from the state because it is owed to them as members of the commonwealth. Because the state is under a duty, it has no discretion to withhold the support; and having no private interest of its own,[89] it also has no motivation to withhold support.[90] The receipt of state support thus does not make the needy subservient to the will of others.

The second objection is that the duty of support recognizes need, despite Kant's earlier indication that need is irrelevant to the concept of right.[91] One should, however, consider the context and significance of the earlier reference to the irrelevance of need. In expounding the "concept of right, insofar as it is related to an obligation corresponding to it," Kant remarks that "it does not signify the relationship of one's choice to the mere wish (hence also to the mere need) of the other as in actions of beneficence or callousness, but only a relation to the other's *choice*."[92] Kant is affirming that, when the interaction between persons is examined from a juridical viewpoint, one cannot ascribe a right—or a duty corresponding to that

88 *See* KANT, *Metaphysics*, *supra* note 9, at 457 [6:314].

89 *Id.* at 466 [6:324] (arguing that the state cannot have domains of its own).

90 In these respects, the duty of the sovereign stands in contrast to voluntary contributions for the support of the poor, which Kant, giving the instance of lotteries, criticizes as exploitative. *Id.* at 468 [6:326]: Conversely, Kant also says that begging "is closely akin to robbery," *id.*, perhaps because the beggar exercises a kind of emotional coercion on the sympathies of the donor to cause the donor to surrender that to which the beggar has no right.

91 *Id.* at 386–87 [6:230].

92 *Id.*

right—on the basis of the needs of one of the parties. Kant here is pointing to a conceptual feature of rights and their correlative duties when one person acts upon another.[93] The duty to support the poor, in contrast, deals not with action by one person that is inconsistent with the rights of another, but with the relationship between the individual and the state. To be sure, the state is under a duty defined in terms of the individuals' needs; that duty, however, does not arise through its correlativity with the individual's right. The state is under this duty not because the individual has a right to subsistence, but because a rightful property-protecting regime, which there is a duty to create, cannot be instituted except on condition that the accumulation of property not be capable of rendering the poor dependent on the actions of others. The public duty to support the poor is, accordingly, not the response of one person to the need of another, but the response of the commonwealth to the possible dependency that is incompatible with the commonwealth's obligatory existence.

IV. "ORIGINAL POSSESSION IN COMMON"

If, as I have suggested, Kant connected the notion of subsistence under a property regime to the availability of everything to everyone before the emergence of property, he was following a well-marked path. Property theorists in the centuries preceding Kant typically treated the legal issues surrounding subsistence in terms of a notional residue from primordial use rights that had been transformed into property rights. No reader of Kant's account of property can fail to note the presence of vocabulary and ideas inherited from the older tradition of a natural right. Yet Kant reconfigured these to make them consistent with his distinctive philosophy. In this Part, I want to note the originality of Kant's duty to the poor by discussing its relationship to the ideas presented by his great predecessors in the natural right tradition, Grotius and Pufendorf. The contrasting views of these two influential figures crystallized the issues that dominated subsequent legal theory. Because Kant was undoubtedly aware of their treatments of property and drew upon them, the comparison also reinforces from a historical perspective the argument that I have so far presented on interpretive grounds.

Like Kant, Grotius posits a connection between a use right in the state of nature and the satisfaction of basic needs in a developed property regime. According to Grotius, humans originally had a common

93 *See id.* at 392 [6:230] ("The concept of Right . . . has to do . . . with the external and indeed practical relationship of one person to another, insofar as their actions, as deeds, can have (direct or indirect) influence on each other.").

right over things, in consequence of which "each man could at once take whatever he wished for his own needs, and could consume whatever is capable of being consumed . . . . [W]hatever each had thus taken for his own needs another could not take from him except by an unjust act."[94] Each person's position was similar to that of the theater-goer, who has a right to the seat in which he is sitting even though the theater is a public place.[95] With the loss of innocence and the growth of greed and refinement, this primitive ownership in common, as well as the right to immediate use and consumption that it involved, was superseded by a social contract that allowed possession to be replaced by property.[96] One of the implicit terms of this contract was that a person in direst need could, under a claim of necessity, revive the right of user that was part of the original common ownership.[97]

Kant's account, although differing in its details, is similar in its structure. Kant has the person start off with a right to occupy space with one's body (like Grotius's example of the seat in the theater) and to satisfy one's needs through a right to use and consume with which others could not justly interfere. This general right to use and consume does not survive the institution of private property. Nonetheless, for both Kant and Grotius, the original ease of access to resources for purposes of survival means that the law that emerges from the social contract must continue to allow for survival. This is the basis both for Grotius's right of necessity and for Kant's duty to support the poor.

Within this shared structure, however, Kant recasts Grotius's argument in two significant ways. The first is that Kant explicitly rejects Grotius's conception of a primitive community of common ownership. For Kant the challenge is not to derive private ownership from common ownership but to understand the basis of ownership as such. Kant criticizes the notion of a primitive community on the grounds that such a community would itself have arisen from contract and thus, since the possession it yielded would be derived from the antecedent possession of the contracting parties, would cast no light on original acquisition. Moreover, the legitimacy that arises from primitive

94 HUGO GROTIUS, DE JURE BELLI AC PACIS (Francis W. Kelsey trans., Claredon Press 1925) (1626), *reprinted in* 2 THE CLASSICS OF INTERNATIONAL LAW 186 (James Brown Scott ed., 1995).

95 *Id.*, *reprinted in* 2 THE CLASSICS OF INTERNATIONAL LAW (James Brown Scott ed., 1995).

96 *Id.*, *reprinted in* 2 THE CLASSICS OF INTERNATIONAL LAW 188–90 (James Brown Scott ed., 1995).

97 *Id.*, *reprinted in* 2 THE CLASSICS OF INTERNATIONAL LAW 193 (James Brown Scott ed., 1995).

possession would be merely contingent on the historicity of the contract that instituted it, rather than grounded in principle.[98]

However, although Kant discards Grotius's conception of a primitive community of common property, he signals that he retains the structure of Grotius's argument by replacing it with the "original possession in common."[99] This original possession in common is merely the innate right understood in terms of the space that a person occupies. The possession is in common not because the earth is owned by all, but because the space one occupies can be anywhere and changes with one's change of location. Accordingly the earth on which I now stand and from which, by virtue of my innate right, I cannot be removed becomes part of your innate right when I move away and you take my place.[100] The commonality of this kind of possession thus refers to the access we all have to the earth due to our freedom to be wherever someone else is not. By using the term "original possession in common," Kant reconfigures the inherited notion while retaining the inherited terminology. The rightful response to dire need in the civil condition then emerges from the original common possession as surely as its analogue in Grotius emerges from primitive community.

The second way in which Kant recasts Grotius's argument is by shifting the mechanism for alleviating the dire need that a property regime might occasion. Whereas Grotius focuses on the claim of necessity, Kant posits a public duty of welfare. The claim of necessity would be completely misplaced within Kant's argument. Necessity relates two individuals through the resource that one seizes from another. However, the need that motivates this seizure is the consequence not of any particular person's owning the resource, but of the system of property ownership as a whole. Hence Kant posits a duty on the state as the guarantor of the entire property regime. Moreover, as Kant's classic discussion of necessity indicates,[101] a claim of necessity involves the existence of a wrong, albeit one that is unpunishable by a court of law. But if the problem presented by innate right was that, because of the duty of rightful honor, consent to the property regime could not be secured, necessity would not be the solution. For it would be inconsistent with rightful honor to allow one's consent

98 KANT, *Metaphysics*, *supra* note 9, at 406 [6:251], 411 [6:258].

99 *Id.* at 415 [6:262].

100 *See* KANT, *Vorarbeiten*, *supra* note 41, at 320 ("Each person has an innate right to this place or that place on the earth, i.e., each person is in potential but merely disjunctive general possession of all places on the surface of the earth." (translated by Graham Mayeda)).

101 *See* KANT, *Metaphysics*, *supra* note 9, at 391–92 [6:235–36]; *see also* Ernest J. Weinrib, *Deterrence and Corrective Justice*, 50 UCLA L. REV. 621, 634–37 (2002).

to be won by the prospect of committing a wrong. Rightful honor asserts the equality of persons under innate right, not the immunity of one to commit a wrong against another. Moreover, rightful honor reflects the blamelessness of a person who commits no wrongful act, not the culpability of someone who is unpunishable because of the wrongful act's necessitous circumstances. In contrast, for purposes of Kant's argument the state's duty to support the poor succeeds where necessity fails, for the duty operates not through the commission of a wrong but as a precondition for the existence of a regime of Right.[102]

Grotius was not alone in connecting the satisfaction of basic needs under a regime of private property with the original right to immediate use. The same connection re-appears in Pufendorf, despite his extensive criticism of other aspects of Grotius's account.

Pufendorf rejected Grotius's conception of an original community of common ownership. He contrasted what he termed Grotius's "positive" community of common ownership in which all things are owned by everyone, with the "negative" community in which "all things lay open to all men, and belonged no more to one than to another."[103] Pufendorf then traced the development of ownership through a series of social pacts, the first of which was to the effect that "whatever one of these things which were left open to all, and of their fruits, a man had laid his hands upon, with intent to turn it to his uses, could not be taken from him by another."[104]

Kant's conception of the earliest stage in the development of property is more or less identical to Pufendorf's. Both Kant's original possession in common and Pufendorf's negative community of all things imply the same criticism of Grotius, that the task is not to derive private from common ownership but to trace the development of ownership from non-ownership. To this end both Kant and Pufendorf situate persons within a regime of rights and their correlative negative duties. From an early stage—Kant through the innate right and Pufendorf through the initial social pact—both regard interference with another's use as an injustice. Their main difference is that whereas Pufendorf treats the negative community of all things as

102 This is not to say that in the civil condition necessity is unavailable as a response to urgent need, but only that necessity does not deal with the problem that I argue is resolved by the duty to support the poor.

103 SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO (C.H. Oldfather & W.A. Oldfather trans., Claredon Press 1934) (1688), *reprinted in* 2 THE CLASSICS OF INTERNATIONAL LAW 537 (James Brown Scott ed., 1995).

104 *Id.*; *see also id.*, *reprinted in* 2 THE CLASSICS OF INTERNATIONAL LAW 539 (James Brown Scott ed., 1995) (stating that in this original negative community, "all things should lie open to all for the promiscuous use of every man").

a historical stage, Kant declares that "[o]riginal possession in common is, rather, a practical rational concept which contains a priori the principle in accordance with which alone men can use a place on the earth in accordance with principles of Right."[105]

To deal with the problem of subsistence within a fully developed property regime, Pufendorf indicates that the magistrate, as well as other persons of means, has a duty to relieve extreme need.[106] This duty is embedded within Pufendorf's account of necessity. For Pufendorf, assistance to someone in extreme need is an imperfect duty, correlative to the needy person's imperfect right to the assistance. The reason for regarding the duty as imperfect is that, because it is "performed upon a kind of voluntary impulse arising from a man's good nature,"[107] the person who would benefit from the performance of the duty has neither the power to compel him to perform nor the right to be compensated for non-performance.[108] Instances of the breach of imperfect obligations are ingratitude and the failure to give benefactions, as Pufendorf thinks it unjust to "neglect an occasion for doing a benefaction to others" and not to return the favor for "benefactions received."[109] In the case of aiding the needy, "[t]he reason why only an imperfect right is allowed, especially to such things as are owed on the grounds of humanity, is that thereby a man finds the opportunity to show that his mind is intent upon voluntarily doing his duty, and at the same time possesses the means to bind others to him by his kindness."[110] But "when necessity does not admit of any other means to secure his safety,"[111] Pufendorf allows the needy person to exercise self-help: "must some poor fellow die of hunger because he cannot overcome by his prayers the inhumanity of some man of

105 KANT, *Metaphysics*, *supra* note 9, at 415 [6:262].

106 *See* PUFENDORF, *supra* note 103, *reprinted in* 2 THE CLASSICS OF INTERNATIONAL LAW 305 (James Brown Scott ed., 1995) (discussing the possibility of appeal to a magistrate to avoid the necessity of "taking [a] thing through force or stealth").

107 *Id.*, *reprinted in* 2 THE CLASSICS OF INTERNATIONAL LAW 315 (James Brown Scott ed., 1995).

108 SAMUEL PUFENDORF, ELEMENTORUM JURISPRUDENTIAE UNIVERSALIS LIBRI DUO (William Abbott Oldfather trans., Claredon Press 1931) (1672), *reprinted in* 2 THE CLASSICS OF INTERNATIONAL LAW 59 (James Brown Scott ed., 1995).

109 *Id.*, *reprinted in* 2 THE CLASSICS OF INTERNATIONAL LAW 60 (James Brown Scott ed., 1995).

110 PUFENDORF, *supra* note 103, *reprinted in* 2 THE CLASSICS OF INTERNATIONAL LAW 305 (James Brown Scott ed., 1995).

111 PUFENDORF, *supra* note 108, *reprinted in* 2 THE CLASSICS OF INTERNATIONAL LAW 59 (James Brown Scott ed., 1995).

wealth?"[112] The result is that, although aiding the poor is an imperfect obligation, "the urge of supreme necessity makes it possible for such things to be claimed, on the same ground as those which are owed by a perfect right."[113] The wealthy person's breach of duty in failing to be beneficent to the needy, when combined with the urgency of the needy person's situation, gives the needy person the right to take for himself what he ought voluntarily to have been given. Necessity, as it were, perfects an otherwise imperfect right.

From Kant's perspective, this account of necessity is rife with confusion. First, the obligation to assist the poor is based on considerations of beneficence, which are ethical rather than juridical. Moreover, the duty imposed on the magistrate is not a public one derived from the political nature of the magistrate's power, but is merely a reflection of the magistrate's opportunity for beneficence. Furthermore, when necessity takes hold, the benefactor's imperfect duty gets matched to a corresponding right that can be treated as perfect, thus destroying the correlativity of duty and right. Finally, necessity is regarded as triggering the operation of a right, rather than excusing the commission of an unpunishable wrong.

For our purposes the basis of the right to subsistence that underlies Pufendorf's account of necessity is of particular interest. For Pufendorf, property emerges from the original availability of everything to everyone through a series of social pacts. These pacts allow for a variety of property arrangements, "provided they involve no contradiction and do not overturn society."[114] But, Pufendorf notes, all property regimes acknowledge that the necessity of another provides an exception to the proprietor's rights.[115] Pufendorf sees necessity as reviving the right of everyone to everything that characterized the original negative community in which property rights did not exist. This is because Pufendorf is of the opinion that a condition to that effect is implicit in social pacts establishing property: "it is understood that whenever any man in the division of things renounced his right to such things as are assigned others he did so with this reservation:

112 PUFENDORF, *supra* note 103, *reprinted in* 2 THE CLASSICS OF INTERNATIONAL LAW 305 (James Brown Scott ed., 1995).

113 *Id.*, *reprinted in* 2 THE CLASSICS OF INTERNATIONAL LAW (James Brown Scott ed., 1995).

114 *Id.*, *reprinted in* 2 THE CLASSICS OF INTERNATIONAL LAW 537 (James Brown Scott ed., 1995).

115 *Id.*, *reprinted in* 2 THE CLASSICS OF INTERNATIONAL LAW 538 (James Brown Scott ed., 1995).

Provided he cannot otherwise secure his own safety."[116] Thus, a person's desperate need does not create a new right in the property of others, but triggers the operation of the condition under which everyone's right to everything was surrendered, that property would not endanger survival. Presumably the reason for Pufendorf's insistence on reading this condition into the social contract is that "individuals would not consent to a system of rights that might require that they starve."[117]

On my suggested reconstruction of Kant's thought, Kant reconfigures the idea that individuals would not contract into the possibility of starvation, by relating that possibility to a dependence on the actions of others. Kant's conception of right eliminates the ethical elements that vitiated Pufendorf's account of necessity and adds a public duty to the poor. The notion of rightful honor, the need to reconstruct in the civil condition, the lack of dependence on others that was present in innate right, and the requirement that everyone's consent to the social contract be possible enable Kant conceptually to connect the duty to support the poor with each person's innate right. This connection is consistent with the natural right tradition represented by Grotius and Pufendorf, who each in their different ways traced the legal categories for benefiting the poor to the rights that everyone had before the institution of private property. Kant's attention to what he termed "original possession in common" indicates his continuity with this tradition. Kant did not explicitly link innate right in the first phase of his account to subsistence for the poor in the third phase. But it may well be that this connection was so well known from the writings of his predecessors in the natural rights tradition that he regarded it as obvious.

Drawing on and arguably perfecting this tradition, Kant purported to show how instituting private property and taxing to support the poor were jointly necessary if society was to be a rightful association of self-determining agents. His account treats property and taxation to support the poor as distinct but interconnected. On the one hand private property and taxation figure in different kinds of juridical relationship. Property relates one person to another through the correlativity of right and duty; the duty to support the poor relates the taxpayers to the state and the state to the poor. One can say (in the

116 *Id.*, *reprinted in* 2 THE CLASSICS OF INTERNATIONAL LAW (James Brown Scott ed., 1995).

117 THOMAS A. HORNE, PROPERTY RIGHTS AND POVERTY: POLITICAL ARGUMENT IN BRITAIN, 1605–1834, at 36 (1990). Although Kant lies outside the scope of Horne's treatment, Horne's book in its entirety casts valuable light on the contemporary understanding of the connection between property and the relief of poverty.

scholastic terminology about justice that treats citizens as the parts and the community as the whole)[118] that property relates part to part whereas taxation to support the poor relates part to whole. The consequence of this distinction is that considerations of poverty have no effect on the definition and application of property rights. On the other hand, property and the public duty to support the poor are connected through a single sequenced argument that extends the reach of the universal principle of Right while preserving consistency with the ideas of rightful honor, innate equality and non-dependence that this principle implies. For Kant, taxation is not theft, and neither is property. On the contrary, the two are jointly necessary for a civil condition. On Kant's view as I have reconstructed it, the public duty to support the poor is latent within private property as a rightful institution.

118 *See* THOMAS AQUINAS, SUMMA THEOLOGIAE II-II, Q. 61, art. 4, at 1454–55 (Fathers of the English Dominican Province trans., 1948) (1274).