

KANT ON ENVIRONMENTAL PROTECTION

KANT ON FREEDOM, PROPERTY RIGHTS AND ENVIRONMENTAL
PROTECTION

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ABSTRACT

This thesis aims to develop a principled rationale for coercible environmental protectionist duties, based on Kant's *Metaphysics of Morals*, specifically, the *Doctrine of Right*. The claim of the thesis is not that such a rationale can be directly extracted from Kant's arguments in that work, but rather that it can be reasonably extrapolated based on Kant's framework. For Kant, politico-juridical authority, and its exercise via coercion, can be justified only in terms of the requirements of a system of freedom. Accordingly, the only legitimate rationale for coercively inhibiting environmentally destructive activities would be that such activities are, in one way or another, contrary to freedom, or incompatible with a system of Right based on freedom. The Kantian perspective on law and politics, as applied to environmental issues, demands that we ask: in what way do acts of environmental destruction constitute a hindrance, obstruction, or diminishment, of freedom; or, in what way are such acts a defective and transgressive exercise of freedom? The basic aim of this thesis is to answer these questions, and, more specifically, to establish that owners of finite natural resources (especially land) owe duties of forbearance with respect to their holdings, i.e., duties not to destroy or dissipate (or use non-sustainably) such resources. A primary challenge is that, from a Kantian perspective, any such analysis has to be based exclusively on the idea of freedom – as opposed to notions of “harm”, “welfare”, the “public good” or the “intrinsic value of nature”. Kant's “Juridical Postulate of Practical Reason” furnishes the key to our response: environmentally destructive activity is a hindrance to freedom, and thus transgressive, because it renders usable natural resources unavailable for further use, whereas the postulate actually demands that ostensibly usable objects remain available for use in perpetuity. Further, the permissibility of environmental destruction ultimately entails the permissibility of the annihilation of the material preconditions of any possible exercise of freedom. As such, environmentally destructive acts must be intolerable within a system of Right, and environmental preservation is an imperative of Right.

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LIST OF ABBREVIATIONS

Kant's works cited in the body of the text are referred to by means of the abbreviations listed below. The English translations consulted are listed below. Citations are to the volume and page of the German text (per the Akademie-Ausgabe standard).

GMS *Groundwork of the Metaphysics of Morals*. In: M. J. Gregor ed. and trans., *Practical Philosophy*. Cambridge: Cambridge University Press, 1996.

KpV *Critique of Practical Reason*. In: M. J. Gregor ed. and trans., *Practical Philosophy*. Cambridge: Cambridge University Press, 1996.

KrV *Critique of Pure Reason*. In: P. Guyer and A. Wood trans., *Critique of Pure Reason*. Cambridge: Cambridge University Press, 1998.

MS *The Metaphysics of Morals*. In: M. J. Gregor ed. and trans., *Practical Philosophy*. Cambridge: Cambridge University Press, 1996.

TP *On the Common Saying: That May be Correct in Theory, but It Is of No Use in Practice*. In: M. J. Gregor ed. and trans., *Practical Philosophy*. Cambridge: Cambridge University Press, 1996.

VE *Lectures on Ethics*. In: P. Heath ed. and trans., *Lectures on Ethics*. Cambridge: Cambridge University Press, 1997.

VRML *On a Supposed Right to Lie From Philanthropy*. In: M. J. Gregor ed. and trans., *Practical Philosophy*. Cambridge: Cambridge University Press, 1996

ZeF *Perpetual Peace*. In: T. Humphrey trans., *Perpetual Peace and Other Essays*. Indianapolis: Hackett, 1983.

Hegel's works cited in the body of the text are to the original sections (or additions thereto) as set out in his *Elements of the Philosophy of Right*, abbreviated as "PR", and as translated in: G.W.F. Hegel, *Elements of the Philosophy of Right*, trans., H.B. Nisbet (Cambridge: Cambridge University Press, 1991).

DECLARATION OF ACADEMIC ACHIEVEMENT

All research conducted in the course of the preparation of the contents of this thesis was conducted by the author alone, namely by Attila Ataner B.A., J.D., who is as such solely responsible for any and all errors contained therein.

1 - Introduction: Background and Preliminaries to the Kantian Perspective on Environmental Protection

As will be described in greater detail below (Chapter 2), many of our scientists warn us that we face an environmental crisis of staggering proportions. While political philosophy (or normative political theory and jurisprudence) need not be especially crisis-driven, I think the prospect of an “irretrievably mutilated” planet, which, according to these scientists, is within perilous proximity, must prompt some response. Of course, the very staggering scale of our present crisis suggests it is a consequence of long-term, multi-dimensional historical developments. However, if our philosophical approach favours a given political, social, economic or legal arrangement, we must at least ask, in Kantian spirit: does that arrangement directly produce, merely permit or explicitly or implicitly preclude the kinds of activities that generate this crisis? Put simply, what is the status of environmentally destructive activity within our preferred normative framework? Further: where a given politico-philosophical outlook is subjected to scrutiny and it turns out disastrous ecological outcomes are thereby sanctioned or otherwise conceded, I would suggest we have *prima facie* grounds for rejecting that outlook. In light of the harsh environmental realities of our age, some such exclusionary assessment is, I think, difficult to avoid. We must, at a minimum, ask: is a positive environmental position at least conceivable from within our preferred framework? Or, is it at least possible to develop a stance in favour of environmental protection even if one is not immediately evident within a given (social, political or legal) scheme?

In this regard, I find it somewhat astonishing that, despite tremendous ongoing interest in the legal and political thought of the German Idealists, and despite the apparently “remarkable renaissance” that the study of Kant’s political and legal

philosophy is undergoing,¹ Kant's *Metaphysics of Morals* has not been subjected to sustained ecological reading (neither has, for that matter, Hegel's *Philosophy of Right*, nor Fichte's *Foundations of Natural Right*), at least in English. The aim of this thesis is to offer a line of argument towards filling this void. My primary focus is on Kant; however, I will make reference to Hegel (and, to a lesser extent, to Fichte) where feasible and where doing so augments my overall argument.²

¹ Patrick Riley, "Review Essay of O'Neill and Flikschuh," *Political Theory* 31, no. 2 (2003).

² There are, naturally, important differences between these thinkers, but there are also significant areas of overlap. Above all, despite differences in how they conceive of freedom, as such, they each see it as the central organizing principle of any possible normative order, or more specifically, of Right (*Recht*). Their basic questions are these: what does it mean to be free, from the standpoint of the individual situated in a plurality of individuals; what are the necessary (legal, political, social or ethical) conditions for the full realization of freedom, both in its individual and its collective dimensions; on what terms must equally free persons co-exist and interact; how is it possible to reconcile inevitable differences and disparities among individuals while maintaining the freedom of all? They proceed to answer such questions via their respective accounts of Right and, at least in the initial stages of their texts, Kant and Hegel share many key premises. Their shared assumptions can be summarized along these lines: that freedom has negative and positive, formal and substantive, as well as external and internal, dimensions; that freedom is a self-positing and self-limiting concept; that it is the *exclusive* basis of Right; that persons are to be distinguished from things in a particular way (a basic distinction they adopt from Roman legal thought); that freedom entails a certain kind of relation among persons, but also a certain kind of relation of the self to its body and to external objects; that an account of Right must begin with certain elementary forms defined as "private" (or "abstract") Right, most crucially entailing the institution of property, which they see as an indispensable pre-requisite for the realization of freedom; that certain more comprehensive freedom-enabling structures - most crucially, the state or the "civil condition" - emerge from these more rudimentary forms of Right; that an account of Right follows a certain conceptual or dialectical trajectory, involving a transition from the domain of individual or private ("abstract") Right to the domain of collective or public Right; and so on. Regarding the connection between Kant and Hegel's respective accounts of Right, see: Alan Brudner, *The Unity of the Common Law: Studies in Hegelian Jurisprudence* (Berkeley, California: University of California Press, 1995), 165-166.). See also: Peter Benson, "The Basis of Corrective Justice and Its Relation to Distributive

Accordingly, drawing on the legal and political thought of Kant, this thesis aims to develop a principled, normative basis for *coercible* juridical prohibitions against the destruction, damage or degradation of the natural environment. I aim to establish that environmental protection can be, indeed must be, an imperative of Right (*Recht*), pursuant to the political and legal principles articulated by Kant. My claim is that a careful, but also critical, analysis of Kant's account of Right, and its basis in freedom, yields certain elementary coercible duties of forbearance (i.e., duties that are legitimately enforceable by force) with respect to our natural environment. I should note that a Kantian system of Right may appear to some scholars, at best, to be indifferent or neutral regarding our treatment of the natural environment *as such*. At worst, given certain elements of this text, there may be reason to suspect that Kant would actually endorse a rather hostile stance towards the natural environment: though perhaps he may not sanction (or even contemplate) its outright destruction as permissible under principles of Right, Kant (along with Hegel) would appear, at times, to approve of the radical modification of nature (i.e., its intentional alteration by humans). That is, he asserts that, as a matter of Right, nature can be subjected to human purposes, and so he appears to endorse the domestication of "wild" nature and, generally, to privilege the "artificial" over the "natural". To the extent that any scholars have remarked on this particular point, they often take it for granted that, because nature is open to free manipulation by human will, Kant is also not especially concerned with the *destruction* of nature as a problem to be addressed, if at all, as a matter of Right. In this thesis, I will offer an alternative interpretation of Kant's account of Right: I assert that there are theoretical resources

Justice," *Iowa Law Review* 77, no. January (1992); Ernest Weinrib, "Corrective Justice," *Iowa Law Review* 77, no. January (1992): 421-423. For a discussion of some important differences between Kant and Hegel, see: Alan Brudner, "Private Law and Kantian Right," *University of Toronto Law Journal* 61, no. 2 (Spring) (2011).

within his system with which we can build a positive environmentalist stance. My claim is that had Kant lived to witness the era of climate change, peak oil, desertification, “dead” and “sacrifice” zones, mass species extension, and other such phenomena as listed by the scientists cited below, he may well have developed a position roughly along the lines I offer herein.

I concede, at the outset, that Kant’s theory of Right may not produce a comprehensive environmentalist programme that would be satisfactory from a more perfectionist ecological standpoint, that is, one that does not tolerate the “domestication” of nature to any significant degree, or one that is robustly anti-anthropocentric in asserting that nature must be “left alone” or that “pristine” wilderness has independent normative worth. However, I will proceed on the assumption that we can make a meaningful distinction between the mere alteration of the natural environment to suit human purposes (i.e., the straightforward *use* by humans of natural resources) and its destruction or misuse/abuse, which I would (tentatively) define as its being rendered unsuitable for human purposes – for instance, as in the rendering of land (which is necessarily finite) uninhabitable, or, as in the non-sustainable use of finite natural resources, i.e., uses that render such resources unavailable for *further* use, either in the present or the future. In this latter regard, Kant, I claim, has powerful arguments regarding the fundamental limits of freedom, entailed by Right, upon which positive environmental protections can be established, such that irrespective of contingent human interests, we are bound by a rational requirement not to destroy nature.

The thrust of my thesis is that there is an argument to be made from within Kant’s *Doctrine of Right* in favour of a Kantian duty not to waste or destroy natural resources, especially land, and that, as Kantian argument, this duty is not based in any special

dignity of the environment itself, which would be the “eco-centric option” sometimes adopted in environmental ethics (as discussed in Chapter 3), yet nor is it hostage, at least directly, to human interests, welfare or conceptions of the good. Rather, my argument is a Kantian counter to libertarian or Blackstonean theories of property (as discussed in Chapter 4), which are “absolutist” in so far as they claim that owners have unlimited liberties (or “despotic dominion”) over their holdings, up to and including the right to destroy them. In contrast to such Blackstonean conceptions of liberty and property, my argument draws on a Kantian view of the internal requirements and immanent constraints of the idea of *freedom* as such, i.e., on an understanding of freedom as a *self-limiting* concept (as discussed in Chapters 3(a) and 5). My argument takes seriously Kant’s understanding of the indispensable connection between freedom and property (as discussed in Chapters 6 through 8), which a Blackstonean would largely accept, but categorically denies that our freedoms with respect to ownership can be absolute, which is a position a Blackstonean would reject.

Further, and more specifically, my claim is that an implication of what Kant calls the “Juridical Postulate of Practical Reason” with regard to Right (as discussed in Chapter 9) – which holds that ostensibly usable things *must* be made available for use as property for the sake of freedom, since maintaining the converse would entail a contradiction in terms of the underlying rationale of freedom – is that the destruction by owners of their finite natural resource holdings is irrational and impermissible, for the simple reason that destroying ostensibly usable things renders them unavailable for any viable further use, i.e., it annihilates them from a practical standpoint. Where owned (natural) resources are finite, the Juridical Postulate entails that they must be used in a manner that does not deplete them. Which is to say that the possibility of our exercise of freedom in the world,

in so far as it is predicated on the use (and ownership) of ostensibly usable (and ownable) things, per the Kantian Juridical Postulate, demands that we use things *sustainably*, in a manner that retains their usability in the present or future. Any destructive or non-sustainable use of the finite natural resources we own, from this perspective, contradicts the immanent rationale of the ownership-freedom connection. Put in different terms, my claim is that the Kantian Juridical Postulate entails strictures somewhat analogous to the famous Lockean provisos with respect to legitimate property holdings, and especially Locke’s (often neglected) second proviso against waste and spoilage in the use of one’s holdings: for, as Locke puts it, “nothing was made by God for man to spoil or destroy”.³ Finally, I supplement this core argument in two ways. First (in Chapter 10), I explain how, for Kant, the ultimate finitude of the lands upon which we subsist collectively, or, as he calls it, the “unity of all places on the surface of the earth”, which compels interpersonal contact, is a pre-condition of the possibility of a united will, and thus of the formation of civil society. As such, the destruction of land simply cannot be sanctioned under Right. Secondly, (in Chapter 11), I explain that for Kant the destruction of land or natural resources is impermissible even when these are unowned: having already established that environmentally destructive activities are impermissible as a matter of Kantian “acquired right”, i.e., property rights, I go on to ask if such activities are permissible as function of Kantian “innate right”, and conclude that they are not.

³ John Locke, *Two Treatises of Government and a Letter Concerning Toleration*, ed. Ian Shapiro (Binghamton, New York: Yale University Press, 2003), 113.

2 - Our Present Ecological Crisis and its Implications

This is an excerpt of a “warning to humanity” issued by the Union of Concerned Scientists, which consists of some 1600 leading scientists, including over 100 Nobel laureates:

Human beings and the natural world are on a collision course. Human activities inflict harsh and often irreversible damage on the environment and on critical resources. If not checked, many of our current practices put at serious risk the future that we wish for human society and the plant and animal kingdoms, and may so alter the living world that it will be unable to sustain life in the manner that we know. ...

Our massive tampering with the world’s interdependent web of life – coupled with the environmental damage inflicted by deforestation, species loss, and climate change – could trigger widespread adverse effects, including unpredictable collapses of critical biological systems whose interactions and dynamics we only imperfectly understand. ...

The earth is finite. ... And we are fast approaching many of the earth’s limits. ...

A great change in our stewardship of the earth and the life on it is required, if vast human misery is to be avoided and our global home on this planet is not to be irretrievably mutilated. ...

A new ethic is required – a new attitude towards discharging our responsibility for caring for ourselves and for the earth. We must recognize the earth's limited capacity to provide for us. We must recognize its fragility. We must no longer allow it to be ravaged.⁴

And, in popular literature, it is by now commonplace to come across foreboding claims such as the following, from a review of a book⁵ written for the general public:

⁴ Union of Concerned Scientists, "World Scientists' Warning to Humanity - Scientists' Statment" <http://www.ucsusa.org/about/1992-world-scientists.html> (accessed March 7, 2011).

⁵ Tim Flannery, *Here on Earth: A Natural History of the Planet* (Toronto: Harper Collins Canada, 2011).

Here is the anguished cry of another distinguished scientist distressed by our collective incapacity to grasp the enormity of the earth's looming environmental crisis. It has been obvious for a long time ... that the global human enterprise is on a collision course with the physical and biological limits of the earth.

Estimates of how bad the situation is, of course, differ, but various assessments agree that the global economy is consuming resources at a rate equivalent to 1.3 to 1.5 times the earth's capacity to supply them sustainably. The only way this can happen is for us to be consuming the resource capital from which we should be harvesting only the interest. The consumption of resource capital is evident in the sluicing of millions of tons of topsoil into the oceans, the drawing down of underground aquifers, the salinization and desertification of erstwhile croplands, the depletion of fisheries stocks, the overharvest of forests, and on and on. We, the prodigal sons of the modern era, collectively seem powerless to stop any of this.⁶

It is, of course, possible that the concerns of these scientists are exaggerated. However, the news on environmental matters has been so persistently bad, for so long, on so many fronts, that no reasonably informed person can avoid anxiety altogether. If anything, in the twenty years since the above cited warning was issued, our troubles appear to have multiplied, in some cases exponentially.⁷

What is the appropriate response of philosophy to such warnings, supposing they are largely accurate and granted, of course, that they are based on empirical claims that

⁶ John Terborgh, "Can Our Species Escape Destruction?," *The New York Review of Books*, October 13, 2011, 29.

⁷ See for example: Jared M. Diamond, *Collapse : How Societies Choose to Fail or Survive* (London: Allen Lane, 2005); Gwynne Dyer, *Climate Wars* (Carlton North, Vic.: Scribe Publications, 2008); C. Hedges and J. Sacco, *Days of Destruction, Days of Revolt* (Knopf Canada, 2012); Polly Higgins, *Eradicating Ecocide : Laws and Governance to Prevent the Destruction of Our Planet* (London: Shephard-Walwyn, 2010); S. Lerner, *Sacrifice Zones: The Front Lines of Toxic Chemical Exposure in the United States* (MIT Press, 2010); Bill McKibben, *The End of Nature*, Random House trade pbk. ed. (New York: Random House Trade Paperbacks, 2006); Christian Parenti, *Tropic of Chaos : Climate Change and the New Geography of Violence* (New York: Nation Books, 2011); Ronald Wright, *A Short History of Progress* (Edinburgh: Canongate, 2005).

are strictly speaking beyond the purvey of philosophy? As a preliminary matter, we ought, at least, to take care in describing the current state of affairs. Take, for example, the underlying significance of the statement that “... the global economy is consuming resources at a rate equivalent to 1.3 to 1.5 times the earth’s capacity to supply them sustainably.” How do we begin to interpret claims like this from a philosophical-normative standpoint?

(a) The Ubiquity of Property and Territory

First, the claim appears to presume that the “global economy” has, in one way or another, established dominion over the entirety of the earth’s resources. This, interestingly, suggests that there are virtually no resources on earth that are not, to one extent or another, being consumed by participants in the “global economy”, or at least that there are no resources that are not in principle open to being used or consumed or subject to control of one form or another. This is consistent with another point, one that is readily apparent on a moment’s thought: there is virtually no resource nor indeed any land – essentially, no “space” – left on earth that is not in one way or another subject to *some* assertion of ownership, at least if we construe “ownership” in its broadest possible sense. By way of a preliminary background supposition, I rely, in this regard, on Waldron’s view that property, generally understood, is “a system of rules governing access to and control of material resources” wherein the decisions with respect to the use of a given resource by those who are deemed legitimate “owners” of it – be they individual persons, or collectives of various sorts, or corporations, or states, or indeed any other entities

deemed capable of proprietorship – are, within the system of rules, privileged over the decisions of non-owners.⁸

Accordingly, the implication I am struck by in the scientists’ warnings outlined above is that the “global economy”, whatever else it may entail, can at least be said to have ensnared (or, if you will, juridically captured) the *entirety* of the earth’s resources under a system, or a multiplicity of systems, of rules concerning access to, and control of, those resources by the putative participants in the global economy. And this is to say that, taken in the aggregate, all participants in the global economy, whoever and whatever they may be, are effectively “owners” of the earth. This observation would apply no matter how imperfect, incomplete, indeterminate, or open to dispute the system, or systems, of ownership to which the earth’s resources are subject may, in reality, be. While there certainly is not a single, unified system of property covering the entire surface of the earth, there nevertheless is no bit of its surface that remains free and unsubdued under *some* system.⁹ Simply put, all humanly accessible and usable spaces on earth have, in effect, been “juridified”.

⁸ Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1990), 31. Waldron’s position is broadly in line with Larissa Katz’s general definition of “owner”, which I borrow, as a person (or other entity) that has *exclusive* “agenda setting authority”, i.e., “exclusive” vis-à-vis other potential owners, with respect to the use of a given resource: “What it means for ownership to be exclusive is just that owners are in a special position to set the agenda for a resource.” See: Larissa Katz, “Exclusion and Exclusivity in Property Law,” *University of Toronto Law Journal* 58, no. 3 (2008): 277-278.

⁹ See for example: Mark Neocleous, “Off the Map: On Violence and Cartography,” *European Journal of Social Theory* 6, no. 4 (2003): 409 ff. (“In the modern world, the globe is dominated by states. Virtually every landmass that is not uninhabitable, and even most of those that are uninhabitable, is the territory of one state or another.”)

I do not suggest that all resources on earth are *privately* owned by participants in the “global economy”, but, rather, that there are virtually no resources that are not subject to claims of authority of one kind or another. Most important in this context, of course, is the most basic and fundamental “resource” of all – and I say “most basic and fundamental” since it is the “resource” upon which any and all other possible (natural, material) resources subsist – namely, all the *land* constituting the surface of the earth. Again, consider that there is virtually no land left on earth that does not fall under the rubric of either “private” property or “public” territory, or, of course, *both*.¹⁰ (In an established political order – or what Kant calls a civil condition – land in particular will be public territory and also private property, i.e., it will have a dual status, although of course in most nation-states the quantity of publicly held territory normally exceeds the quantity of private lands.¹¹) No space on earth is any longer *truly* “vacant”,¹² and

¹⁰ If we count political territories encompassing public or state held lands/spaces as quasi-proprietary domains wherein the fate of nature is dependent on state determinations and public purposes, we are struck by the fact that our dominion over nature as owners – as its controllers and allocators of its potential uses – is effectively total. The point is sometimes made that public property is, in a sense, the antithesis of property, or that there really cannot be any such thing as “common” property since, everyone having a right to the items held in common and no one having a right to exclude others from their use, the basic criteria that are normally thought to indicate the presence of property are lacking. What such claims overlook is that, given the existence of national-political boundaries, access to what is otherwise called “collective” or “common” property is indeed restricted; it is just that now citizenship or membership in the given political community serves as the exclusionary criterion. (See: Waldron, 40-41.)

¹¹ If the connection between territory and private lands is rarely remarked upon or analyzed, I believe it is because it is often taken for granted. Katz is an exception in discussing the parallels, analogies as well as the dissimilarities between private ownership and territorial sovereignty:

[The] exclusivity-based approach to ownership revives the old analogy of ownership to sovereignty. Ownership, like sovereignty, relies on a kind of notional hierarchy, in which the owner’s authority to set the agenda is supreme, if

accordingly no resource is in principle free of (“agenda setting”) claims over it, i.e., claims with respect to its modes of use or consumption.

The reasons for this state of affairs have to do with what are perhaps the basic axioms of the concept of ownership: (a) the distinction between persons and things, or between purposeful (self-determining) beings and essentially purposeless entities/objects, that (b) are deemed amenable to subordination to the purposes of purposive beings. That

not absolute, in relation to other private individuals. ... Ownership, like sovereignty, relies on the notion of hierarchy: others need not be excluded from the owned resource, so long as their position is subordinate to the owner’s. ... For a person to be described as the owner of a resource, she must be in a position that is, like a sovereign’s, supreme. (Katz: 278, 294-295. See also: Barry Smith and Larry Zaibert, "The Metaphysics of Real Estate," *Topoi* 20, no. 2 (2001).)

¹² The “vacant” character of unoccupied spaces is interestingly, if by now quaintly, depicted in the colourful opening passages of the well-known case of *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805), where the action between two parties, one a hunter the other a “saucy intruder”, who are competing over the capture of a fox is described as occurring “upon a certain wild and uninhabited, unpossessed and waste land, called the beach”. “The beach”, here, can be thought of as representing the pure ideal of unowned matter: the normatively sterile domain of what Kant and Hegel would, roughly, deem mere rightless, purposeless *things*. Of course, the issue is complicated when the state asserts authority over its territories, including territories containing hunting grounds or waters. My point here is that in modern settings, there are virtually no spaces in existence that remain *absolutely* free and clear of human claims to authoritative control – even the “open” seas are (juridically) covered, their potential uses being governed by international legal instruments, or at least by various less formal international norms. State control over natural spaces containing, say, game or other natural resources is evident in the fact that hunters or developers require its (the state’s) consent to carry out their activities (usually granted in the form of hunting or development licences or via the sale of state lands to the would-be developer). The closest analog to the “wild, uninhabited, unpossessed and waste beach” that one might today find would be the spaces available on other planets, such as the moon, or in outer space itself – though, apparently, given the existence of international legal instruments such as the *Outer Space Treaty* and the *Moon Treaty*, it appears even spaces of this kind are purportedly subject to *some* kind of authority. (See generally: Christopher C. Joyner, "Legal Implications of the Concept of the Common Heritage of Mankind," *International & Comparative Law Quarterly* 35, no. 01 (1986).)

is, the idea of property presupposes, first and foremost, that persons are situated in a world furnished with usable and ownable things – with objects openly available for acquisition. In sum, a very basic premise of the scientists’ warnings as stated above is that we have, in principle, if not in full-fledged practice (given inevitable limitations on the extent of our powers of control over nature, e.g., via technology), subdued at least *nearly* the entirety of earth’s resources to *our* aims as resource-commodity consumers. Put differently, all things around us have, in one way or another, and to varying degrees of effectiveness, been converted from unowned to owned (although, again, not necessarily under rubrics of private property as we might normally understand that notion in developed, Western legal systems). I only mean to say that virtually all natural resources are deemed subject to human dominion in one way or another, as strikingly implied by the supposition that even the moon is construed as the “common heritage of mankind”. Although they may be subject to more or less explicit authority, or fall under more or less formal juridical-political arrangements as between entities deemed capable of “ownership” (whether states or private parties), the point is that, strictly speaking, there are no resources on the planet that remain totally free of positive assertions of human power and authority over them. In today’s world, there are effectively no resources, no “external” usable objects (whether natural material resources, sea beds, or even “things” such as DNA material or radio waves), that are truly independent, untamed, unregimented, or that are uncontrolled in some manner, at least *in potentia*.

(b) The Destructive Effects of our Present or Property (and Territorial Sovereignty) Norms

The second, perhaps all too obvious observation to be made in connection with the scientists’ warnings is that the global economy’s dominion over the earth’s natural

resources is leading, ultimately, to the *destruction* of those resources. It is not sufficient to say that we are over-consuming or over-using resources, and this is because in the context of a finite, depletable resource base, the over-consumption, over-use, or, more precisely, the non-sustainable use of that resource base is equivalent to its destructive use. Of course, there is a distinction to be made here between resources (such as oil) that through their most common or most “natural” forms of use (such as combustion) are necessarily depleted, and other resources (such as apples in an apple orchard) that can, in principle, be consumed indefinitely, over time, and which can be used sustainably since they are capable of replenishing themselves. However, the scientists’ implication is that we are effectively exhausting all natural resources available to us, whether they are replenishable or not. This is simply an inescapable inference from the claim that the “global economy is consuming resources at a rate equivalent to 1.3 to 1.5 times the earth’s capacity to supply them”. If this alleged rate of consumption persists over time, we will at some terminal point be left with an earth devoid of consumable or otherwise usable resources. The scientists’ underlying claim is that we are, in effect, using “our” *prima facie* usable natural resources, i.e., the things around us that are normatively open for use by us, in a manner that will at *some* point in time render those resources no longer usable by any of us. This is the basic upshot of “non-sustainable”¹³ use of natural resources: such “use” is

¹³ The concept of “sustainable” use of resources is relatively easy to grasp. As suggested in the quote from John Terborgh above, non-sustainable resource use entails the “consumption of resource capital from which we should be harvesting only the interest.” The basic idea has been traced back to the 18th Century thinking on scientific forestry. Indeed, it appears the concept of “sustainability” (*Nachhaltigkeit*), in the context of scientific forestry – or the “maxim to only cut as much wood as can be re-grown”, was apparently “coined with reference to nature as a resource in Carlowitz’ *Sylvicultura Oeconomica* of 1713” – was not unknown in even in Kant’s own time. (Rafael Ziegler, “Crooked Wood, Straight Timber – Kant, Development and Nature.,” *Public Reason* 2, no. 1 (2010): 66. See also: Klaus Bosselmann, “Losing the Forest for the Trees: Environmental Reductionism in the Law,” *Sustainability* 2, no. 8 (2010): 2436-2437.)

tantamount to plunder because, if the *status quo* is maintained over time, at *some* point *someone* will be deprived of the use of “our” resources (or, if we look towards the future where we, the current participants in the global economy, no longer exist, then it is “their” resources that will have been made unavailable to them).

In his classic and habitually referenced article, this kind of plunder of resources is designated by Hardin as a “tragedy”, albeit for him, the tragedy is restricted to the unowned *commons*, which is not as we have seen co-extensive with the planet as a whole. Tragedy (i.e., the collective “ruin” that takes place when the carrying capacity of land is exceeded and thus stripped of usable material) purportedly transpires when economic actors are permitted to freely consume an unregulated and unowned (“common”) finite resource base. Hardin’s claim is that from the standpoint of individual consumers, it is rational to maximally extract from the commons, whilst, from the standpoint of the collective, the unrestricted actions of individual consumers are irrational and self-defeating, for the simple reason that, in the aggregate, such actions ultimately produce barren lands and resource bases stripped of (usable/consumable) resources.¹⁴ The solution, of course, is for each consumer’s actions to be restrained, so that aggregate levels of consumption are brought to within sustainable levels. As Hardin puts it, we must “legislate temperance”,¹⁵ or put in place systems of “mutual coercion, mutually agreed upon by the majority of the people affected”.¹⁶ His background assumption, however, is basically that the unconstrained “freedom” of the commons as such must be abandoned

¹⁴ Garrett Hardin, "The Tragedy of the Commons," *Science* 162, no. 13 December (1968): 1244.

¹⁵ *Ibid.*, 1246.

¹⁶ *Ibid.*, 1247.

i.e., that the commons must be enclosed (effectively juridified) by being brought under property systems that govern access to, and control of, the resources contained in the affected commons. Those who previously would have been “users-with-unrestricted-liberty” over the commons must, through mutual agreement, be transformed into a mutually constraining plurality of “owners”.

The problem is that effectively all natural resources are *already* subject to enclosure. We find few if any true, unregulated or unowned commons that have not been subjected to *some* form of juridification. As such, the challenge we face is not just that we have not done enough to assert dominion over what would previously have been deemed *terra nullius*. But if the scientists’ warnings cited above are largely correct, the problem is that we face “tragedy” in Hardin’s sense, and on a massive, unprecedented scale, *despite* our evidently concerted (indeed, some may say frenzied) activities in asserting dominion and “control” over nature.

(c) The Underlying Pathologies of our Present Property (and Territorial Sovereignty) Norms

I am now brought to a third, and perhaps most important, observation in connection with the scientists’ warnings cited at the outset. As noted, notwithstanding the existence of spaces where jurisdiction (or exclusive agenda-setting authority) is incomplete, disputed or otherwise deficient, in principle, the entire surface of the earth, along with its primary resources, have been subsumed under the juridical-political construct of ownership; (private) property and (public) territory are ubiquitous; all places on this globe and all usable, consumable things upon it (more or less) systematically and universally “belong” to *some* rights- or authority-bearing entity construed as their

“owner”. And yet, despite this, it appears we nevertheless continue to face the prospect of an “irretrievably mutilated” planet where phenomena such as “desertification”, “dead zones” in the oceans, “sacrificed” spaces, climate change, mass species extinction, “ecocide”, and the like, are becoming more and more prevalent. But this can only mean one thing: that the proprietary and quasi-proprietary norms under which we have subsumed the earth’s natural resources are, at some fundamental level, flawed or deficient. Some, indeed, have claimed that the norms pursuant to which we relate to nature and allow the extraction of resources are outright “pathological”.¹⁷ In any event, it would appear that we simply lack sufficient normative principles under which the destructive use and/or the non-sustainable consumption of the earth’s natural resources would count as forms of *transgressive* activity.

Explicating the background reasons for, and causes of, this untenable state of affairs is beyond the reach of this thesis. Suffice it to say, however, that at some point prior to the industrial revolution, the notion of “sustainable” development in the consumption or use of natural resources would not have had to be, nor even sought as, a normative imperative; rather, “sustainability” was simply the default, inescapable reality. Since the extent of humanity’s power over nature was comparatively meager (as were population figures), the notion that our activity might irretrievably mutilate the planet would have been rather fantastical. Now, of course, we do have the means to destroy our planet: we have an unsurpassed scale of power and “control”, augmented and mediated by technology, over “our” natural environment. But if the scientists’ warnings are correct, then, evidently, we exercise our novel powers rather unwisely. And, while we may have

¹⁷ See: Lynda L. Butler, "The Pathology of Property Norms: Living within Nature's Boundaries," *Southern California Law Review* 73, no. (1999-2000).

historically unprecedented levels of control over nature, – a capacity to dominate that, along with the development of novel technologies, is expected to continue to grow indefinitely and perhaps exponentially¹⁸ – it appears, alas, that we yet lack the capacity to control ourselves, to curtail our own activities vis-à-vis “our” natural environment.

More importantly, this growth in power over the natural world is usually understood to be coupled with the advent of anthropocentrism, which has been the preoccupation of environmental ethics since its inception as an academic field.¹⁹ For instance, a frequently cited essay by historian Lynn White Jr. attributes the overexploitation of nature to religious and theological (Judeo-Christian) precepts concerning the superiority of humans over all other forms of life on earth, which are purportedly created by God specifically for human use.²⁰ Both the underlying tenets and the practical ramifications of “anthropocentrism” are of course very wide ranging, and a

¹⁸ The extent of our power over the natural world, i.e., our capacity to modify the physical processes of the earth to suits our purposes, has developed to such an unprecedented scale – having no rival in contrast to the capacities of pre-industrial humans, let alone in contrast to other species dwelling on this planet – that some scientists have designated the age that we live in the “anthropocene”, a “new geological epoch when humans exist as a geological force”. (See: Dipesh Chakrabarty, “The Climate of History: Four Theses,” *Critical Inquiry* 35, no. 2 (2009). See also: Naomi Oreskes, “The Scientific Consensus on Climate Change: How Do We Know We’re Not Wrong?,” in *Climate Change: What It Means for Us, Our Children, and Our Grandchildren*, ed. Joseph F.C Dimento and Pamela Doughman(Cambridge, Mass.: MIT Press, 2007), 93.)

¹⁹ At least one author argues that environmental ethics has paid too much attention to questions concerning anthropocentrism, wilderness and “intrinsic value”, at the cost of examining the central importance of the concept of private property. See: Benjamin Hale, “Private Property and Environmental Ethics: Some New Directions,” *Metaphilosophy* 39, no. 3 (2008).

²⁰ Lynn Jr. White, “The Historical Roots of Our Ecological Crisis,” *Science* 155, no. 10 March (1967). See also: John Passmore, *Man's Responsibility for Nature* (London: Duckworth, 1974).

sufficient account of how anthropocentrism, as an ideology or value-orientation, plays into the pathologies that produce environmental destruction is well beyond the scope of this thesis.

However, there are a number of key observations to be made in terms of the tight underlying connection between the concept of ownership and the paradigm of anthropocentrism. First, I adopt a passage from Hailwood, the basic point of which accords with my overall thesis:

Property ownership is central to [the process of human interaction with nature], [...] not only because forms of property system profoundly affect the shape of landscapes as economic endeavours, as well as the distribution of life chances of their human inhabitants, but because the notion of ownership itself encompasses a fundamental relation, mediating the human and non-human, through which we construct our surroundings. Because of this central importance, philosophical accounts of property, their selection of the factors they see as relevant and important, and the way they treat them, are telling indicators of the status given to non-human nature. Unfortunately, *traditional philosophical theories of property tend to be thoroughly anthropocentric in standardly assuming that only human interests, needs, justice and so on, should be taken into account.* Through its adherence to the anthropocentric standard assumption in its treatment of ownership, political philosophy moves in on environmental philosophy, occupying its terrain, pushing aside political consideration of nature for its own sake.²¹

Property (and by parallel, territory) is structured around the accommodation either of human needs, welfare, or other interests (wealth, etc.), or, most importantly in this thesis, human *freedoms*. Whatever else “anthropocentrism” may entail, one of its most basic implications is that we confront nature, which in itself is deemed normatively sterile or

²¹ Simon Hailwood, "Owning Nature: The Case of Hegel," in *Probing the Boundaries of Environmental Justice & Global Citizenship*, ed. Belinda Clements, Probing the Boundaries (Mansfield College, Oxford, United Kingdom: Inter-Disciplinary Press, 2007), 245. [emphasis added]

otherwise devoid of “intrinsic value”, as a domain of essentially subordinate objects that yield themselves as (mere) means towards the fulfillment of our purposes and ends, i.e., they are amenable to use, consumption, exploitation, modification, and so on. More fundamentally, as Hegel would insist, objects (“things”, *Sache*) in nature can have no independent purposiveness, no self-sufficient end-status. “Things” can only have normative import or status of any kind, in the first instance, when they are ascribed such status by us, which is to say, when they are taken up (acquired) by us, placed under our control, and put to our uses, i.e., when they are actively subordinated as *some* means suited to *some* human purpose.

Further, property (and territorial sovereignty) systems function as regulatory mechanisms governing *inter-human* relations. Although it does entail a relationship between the owner and the owned object (e.g., a portion of the natural environment, a plot of land, etc.), as a *normative* framework property is about what happens between *persons*; it sets the parameters and determines the limits of what we can and cannot do to each other, in terms of who can and cannot have access to and use of the domain of owned (or ownable) objects. In effect, property is *not* so much about the objects of property, but about the (“external” or “outer”) relationships it establishes between people. (I am, of course, merely paraphrasing the familiar claim that “property is rights, not things”.) Because what one does within one’s proprietary domain inevitably impacts on others, the owned objects themselves have significance only as indicia of the owner’s freedoms and interests and, conversely, as potential sources of harm or disadvantage to others. The upshot of this can be summed up as follows. Suppose we have an environmentalist group that wishes to see the activities of certain corporate proprietors curtailed (or wishes to challenge the government’s granting of authorization to such corporations to engage in

what they deem to be environmentally damaging activities). The environmentalists, alas, will be confined to making arguments (in courts, to government officials, or to the public) in almost exclusively anthropocentric terms: they will, invariably, be precluded from advocating in favour of the environment itself, in its own right, directly; they will have to translate and reduce putative damages or “harms” to nature into human harms or, ideally, to demonstrate that they have suffered adverse effects themselves.²² Thus, in the case of our hypothetical environmentalists, the public is a good ally to have because, were it shown that the corporation’s (or state’s) activities impact negatively on the public, there would be stronger justifications for curtailing the activities. But, of course, there can be no guarantees in this respect: the “public” may equally align itself with the corporation or the government.

Where property rights are implicated, controversies about human activities with respect to nature reduce to disputes over principles of resource allocation or forms of permissible use that are closely tied to rivalries about which of the various competing human interests or liberties in nature should be given greater scope (typically, these amount to arguments as to whether economic prosperity or environmental health should take precedence). In such contests, ownership works like a normative trump card, or at least a fairly strong hand, which *may* be overridden, but not without effort. There is a strong presumption running in the property right-holder’s favour, i.e., that when it comes to decisions about what is to be done with his holdings, *his* interests, aims or “agenda” should be privileged (to *some* significant degree, at least), to the exclusion of non-owners. As we shall see further below, this is why the work of legal scholars who challenge

²² See: Anne E. Carlson, "Standing for the Environment," *UCLA Law Review* 45, no. April 1998 (1997-1998).

anthropocentrism in the context of property norms consists mainly of demonstrating that ownership is not absolute, i.e., that the owner's interests should be privileged to a *lesser* degree, that the public's interest in a clean environment (or indeed, in humanity's interest in a non-mutilated planet) should in most, if not all, circumstances prevail, or that, generally, no one may enjoy unconditional dominion over the natural resources or spaces that they happen to own, especially where "unconditional dominion" encompasses a right to destroy one's holdings.²³

²³ See: Butler; Peter Byrne, "Ten Arguments for the Abolition of the Regulatory Takings Doctrine," *Ecology Law Quarterly* 22, no. 1 (1995); Leann Foster, "Wild Lands and System Values: Our Legal Accountability to Wilderness," *Vermont Law Review* 22, no. Summer (1998); Terry Frazier, "The Green Alternative to Classical Liberal Property Theory," *Vermont Law Review* 20, no. Winter (1995); Eric T. Freyfogle, "Ownership and Ecology," *Case Western Reserve Law Review* 43, no. Summer (1993); Eric T. Freyfogle, "Owning the Land: Four Contemporary Narratives," *Journal of Land Use and Environmental Law* 13, no. Spring (1998); Eric T. Freyfogle, "Property and Liberty," *Harvard Environmental Law Review* 34, no. Number 1 (2010); Robert J. Goldstein, "Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law," *Boston College Environmental Affairs Law Review* 25, no. 2 (1997-1998); James P. Karp, "A Private Property Duty of Stewardship: Changing Our Land Ethic," *Environmental Law* 23, no. (1993); James M. McElfish, Jr., "Property Rights, Property Roots: Rediscovering the Basis for Legal Protection of the Environment," *Environmental Law Reporter* 24, no. 5 (1994); Joan L McGregor, "Property Rights and Environmental Protection: Is This Land Made for You and Me?," *Arizona State Law Journal* 31, no. Summer (1999); Neocleous; Murray Raff, "Environmental Obligations and the Western Liberal Property Concept," *Melbourne University Law Review* 22, no. 3 (1998); Murray Raff, "Toward an Ecologically Sustainable Property Concept," in *Modern Studies in Property Law: Volume Iii*, ed. Elizabeth Cooke (Oxford: HART Publishing, 2005); Christopher Rodgers, "Nature's Place? Property Rights, Property Rules and Environmental Stewardship," *The Cambridge Law Journal* 68, no. 03 (2009); John Sprankling, "The Antiwilderness Bias of American Property Law," *University of Chicago Law Review* 63, no. Spring (1996); Joan Williams, "The Rhetoric of Property," *Iowa Law Review* 83, no. (1998). These authors try to show, in various ways, that property rights are not incompatible with environmental obligations or preservationist duties; their arguments follow a common pattern in so far as all of them seek to demonstrate that ownership does not entail absolute dominion, encompassing, say, the right to destroy.

3 - The Aims, Scope and Limitations of Present Thesis

It is clear, then, that anthropocentrism, in so far as it sets the backdrop to our basic modes of thinking about property (or territorial sovereignty) and nature, places significant conceptual constraints on the kinds of argument that can be advanced in favour of environmental protection. As I discuss further below, this is a consequence of the justificatory framework – the inner logic – of ownership as such, and the core distinction between “persons” and “things” that it entails. The very entrenchment of ownership as a social institution, as the basic juridical-political construct through which the natural environment is cognized, means that environmentalists are, with few exceptions, compelled to confront its practical workings in any given dispute over environmental preservation in almost exclusively anthropocentric terms. They have to be prepared to engage in the discourse of interests, entitlements, authorizations, claims, rights, and so on, all of which are concepts that they are expected to assert against others in their own (or in the public’s or, more broadly, in humanity’s) favour, and therefore (almost) never in favour of nature itself; rather, nature enters the discourse only by proxy, as a “medium” through which one person can either harm or benefit (or otherwise relate to) another person.

Our challenge is to establish a basis for environmental protectionism while contending with, and not necessarily fully adopting, the conceptual constraints posed by anthropocentrism in the context of ownership. We need to develop principled arguments that demonstrate the essentially *transgressive* nature of activities that damage and destroy the natural environment. Above all, we require a persuasive rationale for a rudimentary absolute prohibition against the destructive, non-sustainable use of “our” finite natural resources. We need to articulate viable analogies, for the environmentalist perspective, to

prohibitions against, say, torture or murder or slavery – prohibitions that, even if theorized in various different ways, are already well entrenched in the paradigm of humanism (broadly understood). The specific questions to be asked, in this regard, are as follows. In what way could the destruction, degradation, damage, misuse and abuse, plunder and over-exploitation, dissipatory overuse, or, in sum, the non-sustainable use of natural resources count as (coercible) *wrongs*? Are there upper limits on what we are permitted to do with, or to “our” natural environment, and on what basis might transgressions of these limits be legitimately constrained? More particularly, are individual owners of natural resources (especially land, as the prime resource upon which all other possible resources subsist) permitted to engage in destructive uses of those resources; do such owners have absolute (“agenda setting”) authority over the resources they own, or is their authority limited to any extent? Put differently, do individual owners owe preservationist obligations, or some form of a duty of forbearance, vis-à-vis their natural resource holdings? By parallel, does a state have the authority to permit or otherwise authorize the destruction of natural resource-bearing lands falling within its boundaries, i.e., of lands that are, even if privately held, unavoidably, coextensive with its territory?

Finally, but equally importantly, there is a related question to be asked that is in fact logically (or conceptually) prior to the ones just raised: do non-owners have the right to destructively use *unowned* lands or natural resources, i.e., lands that are *terra-nullius* or resources that are *res-nullius*? This question may be considered obscure, as I have suggested above that property and territory are ubiquitous; however, it is logically connected to the set of questions concerning the scope and limits of owners’ powers over nature since, at least as conceptual matter, ownership of anything as such, any object at all

(and especially land) presupposes there was some past point time when the (presently) owned thing was in fact *unowned*, and, further, that there was a distinct point in time when the thing in question was converted from unowned to owned. After all, at least in our orthodox Western understanding of property, corporeal things in the natural world do not, as it were, enter the world with a pre-determined status as property (private or otherwise); rather, as the doctrine of original acquisition (or “first occupation”) dictates, resources have to be converted into property by some agent’s (intentional, purposive) act. As such, it is important to ask if such agents (whether individual persons or other entities deemed capable of exhibiting purposive agency) are free to destroy unowned things *ab initio* - whether they are free to kill some plot of resource-bearing land, as it were, in nature’s womb, *prior* to its having been brought under the construct of ownership- or, put differently, before its entry into juridical space wherein, by now, all things, everywhere (and perhaps for all time going forward) are demarcated under the fundamentally bi-polar rubric of mine-and-thine.

One would assume, cursorily, that its status as “unowned” would afford a mere “rightless thing” no protections whatsoever from absolutely unlimited use by those who are capable of making use of it and for whom it is fundamentally – in virtue of its very value-ontological status as some-thing “submissive”²⁴ – amenable and acquiescent to

²⁴ I am alluding to Hegel’s view that “things”, in contrast to persons, are mere “rightless factors”. As Winfield explains:

What [Hegelian] abstract right [presupposes], is, first, that nature and natural determination in general have lost all independent power over the will of individuals. For things to be appropriated as property, Hegel realizes, they must face the individual as rightless *factors*, with no recognized independent spirit standing in the way of the objectification of his or her will. This means, that the desacralization of nature is a precondition of abstract right. In other words, the freedom of the person exists not in a state of nature but only historically, where

being used at will; after all, that is the fundamental premise of Hardin’s Tragedy of the Commons. However, I will argue that this position is untenable.

It is crucial to note that, despite the fact that ownership (or property as a system allocating control and access to resources between persons, as put by Waldron in his basic definition) is an essentially inter-personal construct, I do not aim to directly pose these questions in terms of a contest (or balancing act) between, say, the competing interests of owners and non-owners, or between the welfare or other exigencies of the public as against the rights of proprietors, or, more generally, between the systematic requirements of upholding individualism versus the structural necessities of social solidarity, communal co-existence, and so on. This has been, for the most part, the traditional way of addressing the kinds of ecological concerns I have raised above.²⁵ It is worthwhile to re-focus on the relationship between owner and his holdings, which, despite the well-established position that property is “rights not things”, is nevertheless a relationship that cannot be neglected altogether, for it constitutes an equally important dimension of property rights. (Moreover, as we shall see, the Kantian perspective on these matters simply does not allow for a balancing exercise in the usual fashion, namely as between the “interests” of the public or humanity versus the “interests” or agenda of owners. Rather, Kant forces us to ask only if freedom may be limited for its own sake, so the question for him is not whether an owner’s rights may be limited for the sake of the public good or welfare or other (broadly) empirical considerations, but rather, to put it

individuals have liberated themselves from the hold of nature. (Richard Dean Winfield, *Freedom and Modernity* (Albany, N.Y.: State University of New York Press, 1991), 120.)

²⁵ See authors cited in note 23 above.

somewhat abstractly, whether the laws of freedom permit a given activity in light of the immanent logic of freedom itself.)

As such, my view, in any event, is that the most important normative predicament for environmentalism must, instead of exclusively focusing on questions concerning normatively proper inter-personal relations, be this: does the concept of property encompass the *jus abutendi*, i.e, the right to destroy? That is, do owners have effectively absolute liberty over the natural resources they own, up to and including the right to annihilate them, which is to say, to use them non-sustainably, *even when* such uses do not directly affect either the status or holdings of other persons? In other words, the central problem, as I see it, is with establishing limits on owners' *own* authority over their *own* holdings, where such limits or not set by or otherwise immediately depend on the position or circumstances of *other persons*. Simply put, the central problem should not, in my view, be construed either as a rivalry amongst owners or in terms of a contest between owners and non-owners.

I say this because the many challenges entailed by the inter-personal dimension of property, where the owned objects are construed as (mere) media through which owners relate to *other persons* (whether they happen to be owners or non-owners), are already, more or less, relatively well addressed in property law doctrine. For example, it is already well established, despite various ongoing debates concerning the minutiae of proper inter-personal and inter-proprietary boundaries, that I cannot use my land in a manner that would diminish your ability to make use of yours. Notwithstanding various kinds of exceptions and qualifications, this principle is based, for instance, on basic doctrines of trespass, nuisance, or riparian rights, and so on. Likewise, certain forms of use by me of my own property that would harm or otherwise negatively affect the position of non-

owners, whether they be my immediate neighbours or the public generally – for example if my preferred mode of enjoying my lands causes pollution or some other form of irritation to those around me – are to a large extent already addressed through environmental legislation, regulations or codes of various kinds (at least in most Western jurisdictions).²⁶

While all of this is correct, it offers insufficient grounds for addressing the environmental crisis, for the simple reason that, under current juridical-political norms (as reflected in established legal doctrines), you are, in principle, free to consent to my pollution of your land, or even of your body, and, as Ripstein notes, when you consent to an act, you effectively make it your own.²⁷ Indeed, pollution (or any other negative environmental outcome) can, in principle, be the subject of a contract between us: I can pay you to allow me to pollute your land, in which case you are in effect using your own land *for* my polluting activities. By means of an agreement between us, your pollution-producing purposes can be adopted by me and become my purposes, too. Moreover, your neighbours or the public in general are in principle free – certainly in the realm of politics, if not under certain, less ecologically flexible, statutory provisions – to accept your polluting activities, especially if your environmentally damaging activities are perceived to be outbalanced by benefits of various kinds (usually economic in nature, as

²⁶ Of course, environmentalists frequently complain that such laws and regulations are not strict enough, or that their enforcement is too lax, and so on – but such concerns cannot detain us here.

²⁷ “By consenting, you can turn an act that would otherwise be another person’s despotism over you into an exercise of your own freedom.” (Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Cambridge, Mass. ; London: Harvard University Press, 2009), 47.)

in the event you happen to be an employer whose factory employs many members of the affected community).

Further, I maintain that Hardin’s dictum – “mutual coercion, mutually agreed upon” – is insufficient as a principled solution respecting environmental protection, for the simple reason that it leaves the prevention of environmental degradation to the contingencies of human *choice*. That is, whether or not a Hardian tragedy transpires will, given his proposed solution, dependent on the choices of the users of the commons, i.e., on an *actual agreement* amongst the potential instigators of the potential tragedy to curtail their respective activities by actively acceding to a system of mutual coercion – again, a system set up via “mutual agreement” – whereby the potential tragedy will presumably be averted. Clearly, this leaves environmental preservation to the vagaries of private (aggregate) choice: Hardin does not offer an account as to why avoidance of the sort of tragedy he envisions should be an unconditional imperative, i.e., normatively mandatory (either from a juridical or moral standpoint, or perhaps both) regardless of actual “mutual agreement”. Strictly speaking, by his lights, the users of the commons could opt out of any system of mutual constraint they may have entered into, especially if the system is simply (exclusively) a creation, via mutual agreement, of their own - a mere creature of contract, as it were. Presumably, the choice to enter into such a system is made by any given commons user with a view to safeguarding his or her own long-term self-interest. But Hardin would have nothing to say in a situation where, for instance, the participants happen to be (or subsequently become) members of a suicidal cult who do not particularly care for their own long-term survival: if the system of mutual coercion they set up was created by (aggregate) choice, i.e., if it is grounded in actual mutual agreement alone, then it can be disbanded on the same basis.

In my view, what has to matter for environmentalists, instead, is this: are there absolutely necessary, irrevocable and unconditional normative constraints with respect to what we, as individual owners, are permitted to do with our own land, and with respect to what we are collectively permitted to do within the boundaries of our national territories, and indeed, further, what humanity is permitted to do with the entire surface of the earth itself? Choices based solely on, and agreements made just pursuant to, self-interest (whether long- or short-term) are ultimately arbitrary, contingent and subject to capricious variation - for the simple reason that “self-interest” is, in the absence of much qualification, a notoriously malleable and ambiguous term. The question must rather be: do we have grounds for saying certain types of choices vis-à-vis the natural environment are *unconditionally* prohibited - or, to put it in Kantian terms, rationally inconceivable?

(a) The Basic Kantian Perspective

As I hope will become apparent immediately below, there is a way to cast the debate in just such terms. This is because I rely on Kant’s *Doctrine of Right* (and the *Metaphysics of Morals* generally) by way of developing answers to the types of questions I have raised, and the very first thing to note in this respect is that Kant understands *freedom* (specifically, “external freedom”) as the core foundation of Right, which, in my view, immediately suggests a novel way of casting the entire environmentalist agenda as I have raised it - or so I hope. The question becomes: are activities that are destructive of the natural environment compatible with the internal, conceptual or, that is, rational, demands of *freedom* itself, in accordance with Kant’s understanding, which, as is well known, does not subordinate the requirements of reason to empirical contingencies? (For example, if the concept of freedom, in terms of its immanent logic or rationale, entails certain duties, then those duties cannot be overridden by any given act of empirical

“choice” or “agreement”, because conformity to a duty entailed by the rational concept of freedom is what makes free choice or free agreement possible in the first place.) Adopting a Kantian perspective on ecological issues alleviates (at least potentially) the usual need for the advocate of environmental preservation to invoke considerations regarding the public good (health, welfare, wealth, etc.) in contraposition to concerns regarding the interests of the private owner (in using the things he owns as he pleases, to his benefit, for instance in making a profit, etc.). Instead, it demands that we ask the following basic question: is the sustainable use of natural resources a rational, normative imperative from the standpoint of the Kantian conception of freedom *as such*?

Bear in mind that, for Kant, practical reason, as our capacity to formulate universally valid principles of conduct and to set unconditionally binding ends (for moral agents), is subject to certain inexorable formal constraints internal to itself. At a minimum, practical reason cannot formulate principles of conduct that are self-contradictory, internally (or logically) inconsistent, or incoherent from the standpoint of the will’s (*Wille*) own essential attribute as the source of universally valid and unconditionally binding moral principles. (This is evident, for instance, in light of the universalizability requirement of the Categorical Imperative, which, in Kant’s first formulation constrains the moral agent to act only in accordance with those maxims that he can at the same time will as a universal law. A maxim will fail the test of validity if, once hypothesized as a universally applicable law, it is shown to contradict its own purported end; and, consequently, any course of action that draws on such a maxim will be morally impermissible.) This is to say, simply, that there are certain things that a rational agent cannot will, *qua* rational agent. Though an agent may freely choose (*Willkür*) to act in accordance with a maxim that contradicts or is inconsistent with the

requirements of practical reason, he is, strictly speaking, something less than fully autonomous if he does so. Thus, for Kant, the irrationality of a practical principle, in the sense suggested here, entails its practical impermissibility. And this applies to the ethical and the juridical standpoints equally, because the operation of reason as a practical faculty is what makes human autonomy as such possible.²⁸

To put these basic Kantian principles in the context of the environmentalist agenda, the question becomes: is our exercise of freedom over the natural world constrained by certain, ineluctable, logical injunctions with respect to the exercise of (external) freedom *as such*, so that *any* exercise of freedom over the natural world is subject to an absolute upper limit pursuant to which the *perpetual* usability of natural resources must be maintained? And, in a further alternative way of posing the central

²⁸ It has been noted that the will (*Wille*) is *the* locus of practical reason as the ground-determining choice to action (MS 6: 213). Thus, the inexorable constraints inherent to practical reason must apply equally in its internal legislative function binding the individual's choice (*Willkür*) and in its external aspect as the general will positing the (positive) laws and policies appropriate to civil society. For Kant, practical reason determines the law for the moral, as well as the juridical, subject because, to say again, it is our capacity for autonomous agency as such that places us before the law, which is innate to the rational will itself. Thus, the inexorable (formal) constraints inherent to practical reason apply equally with respect to the ethical and the juridical domains. The rational will is ultimately the author of any law addressed to a human being, whether he is simply an individual moral agent or a citizen of civil society. Indeed, although the question as to the proper relationship between the Categorical Imperative and the Universal Principle of Right is being extensively debated, it is fair to say that Kant's conception of Reason unifies the ethical and political-juridical aspects of his practical philosophy, or that his conception of autonomous agency as its own source of legislation is the common denominator between the otherwise distinct spheres occupied by duties of virtue and duties of right. See: Wolfgang Kersting, "Kant's Concept of the State," in *Essays on Kant's Political Philosophy*, ed. H. Williams (Cardiff: University of Wales Press, 1992), 143. [emphasis added]; Peter Benson, "External Freedom According to Kant," *Columbia Law Review* 87, no. 2 (1987); Paul Guyer, "Justice and Morality: Comments on Allen Wood.," *Southern Journal of Philosophy* 36, no. (Supp.) (1997).

question: is our exercise of freedom over natural resources strictly restricted to modes that in fact maintain our capacity to exercise that freedom in perpetuity, i.e., must we not use such resources sustainably, so that we (humanity) can go on using them indefinitely? And if the answer is affirmative, doesn't the non-sustainable use of natural resources, whereby they (eventually) become unfit for further or continued use (i.e., whereby they are annulled, annihilated and rendered useless) constitute a transgression against the value of freedom itself, and as such a transgression, a wrong (or as Kant would put it, a "hindrance to freedom"), under Right as it is understood within the Kantian framework? My answers to this series of questions will be in the affirmative; and, to prefigure one of my key arguments, a further advantage of adapting a Kantian framework towards an environmentalist programme is that it allows us to see how the destruction of finite environmental resources (in particular, land), as a defective exercise of freedom (a "hindrance of freedom"), can be subject to *coercible* constraints.

(b) Summary of Current Scholarship on Kant and Environmental Ethics

Kant's relevance to environmental ethics is not, of course, entirely unrecognized (by contrast, it appears Hegel has had very little direct influence). The existing scholarship in this respect reflects two possible approaches. The first, and perhaps most obvious type of approach, is to ask if we as rational beings owe, or could owe, direct or indirect duties to "non-rational nature", for example to animals or other living things, or to ecosystems or other aspects of the non-human world. The question here is whether the proper exercise of what Kant, in his ethical system, calls "internal" freedom entails respecting beings other than rational beings like ourselves; or, put differently, whether practical reason, or the Kantian self-legislating will (*Wille*),²⁹ could possibly generate

duties of any kind towards or regarding beings that lack rational will. A variant of this first approach asks if being virtuous, or having a proper internal moral disposition, requires that we respect nature.³⁰ The second type of approach focuses on the ethico-ontological status of nature, rather than on the ethical duties or internal dispositions of the rational agent. Here, the aim is to show that nature is ethically or morally considerable, and more particularly, that it has value in its own right, i.e., that it has intrinsic value just as we humans are normally presumed to have. This second approach denies that the rational will is the exclusive bearer of moral worth and intrinsic value, which is usually a premise of the first approach. Usually, this kind of approach aims to establish that nature is not, or not entirely, non-rational, i.e., that nature in some way exhibits qualities that are the same (or similar) to those qualities that are normally presumed to endow us rational beings with moral worth.

I note briefly that I will pursue a third alternative: my primary focus will not be on Kantian ethical duties, i.e., constraints on the exercise of what Kant calls “internal

²⁹ For Kant, since “reason is required for the derivation of actions from laws, *the will is nothing other than practical reason.*” (GMS, 04: 412; 66; emphasis added) See also MS, 06: 213; 375.

³⁰ This variant entails the conjunction of virtue ethics and environmental ethics, and some authors have drawn on Kantian themes to develop the connection between these fields. See: Geoffrey B. Frasz, “Environmental Virtue Ethics: A New Direction for Environmental Ethics,” *Environmental Ethics* 15, no. Fall (1993); Thomas E. Hill Jr., “Ideals of Human Excellence and Preserving Natural Environments,” *Environmental Ethics* 5, no. Fall (1983). Hill argues that a virtuous stance towards the environment entails “humility” and “gratitude”, attitudes that are lacking in those who wantonly destroy the natural environment and, as such, are likely lacking in their comportment towards other humans as well; Frasz suggests the requisite virtue is “openness”, an attitude of “awareness of oneself as part of the natural environment, as one natural thing among many others”. In either case, the contrary, “vicious” attitude is essentially “arrogance”, which, where it prevails with respect to the non-human environment, will generally tend to also prevail in a person’s comportment towards humans as well.

freedom”, or on questions as to whether comportment towards the natural environment can reflect the agent’s “inner” dispositions, whether virtuous or vicious. Nor, secondly, will I focus on the ethico-ontological status or purported “intrinsic value” of nature, as per the perspective of “eco-centrism”. Instead, I will ask if, given our subsistence in a finite natural environment, there are certain necessary limits – indeed, absolute, elementary constraints – on our exercise of “external” freedom, within what Kant calls, in the Doctrine of Right, the domain of “outer practical relations” amongst persons. That is, I will focus on the possibility that environmental protection is an imperative of Right – a requirement of Kant’s system of mutual constraint governing the (“external” or “outer”) interactions - or the “formal relations of choice”, among a plurality of equally and identically free agents. Albeit, an important qualification I will insist upon (in contrast to Arthur Ripstein’s reading, for instance) is that Kant’s system of Right is not *exclusively* concerned with rules governing external interactions amongst persons, but is also responsive to questions concerning the appropriateness of our relations to our finite natural environment, and in particular, to land.

In any event, the important question, I would maintain, is not whether non-rational nature is morally or ethically considerable, but rather if it is, as it were, *juridically-politically* considerable. My basic motivation in attempting to develop the proposition that there are Kantian “external”, juridical duties concerning the environment, as opposed to merely “internal” or ethical duties, is that within Kant’s practical philosophy only the former are coercively enforceable: the agent cannot be (externally) forced to adopt ethical duties or to have a virtuous disposition, but he can be forced to comply with the requirements of Right. Relatedly, I will not pursue the possibility of an “eco-centric” Kantian perspective because it would, I believe, be exceedingly difficult to justify

coercible duties from within such a perspective: few if any environmental ethicists would, I think, go so far as to argue that the recognition of the “intrinsic value” of nature, or the adoption of an “eco-centric” perspective generally, readily provides a basis for legitimate coercion (for example, that people may reasonably be disciplined, at the behest of a duly founded authority, for destroying the environment in light of its purported *inherent* or *intrinsic* moral worth, just as they may be rightfully coerced for, say, murder or rape).

(c) *Kantian Ethical Duties With Respect to Non-Rational Nature*

Regarding the first type of approach taken in the existing scholarship: there is textual support for this kind of reading, as Kant does claim that we owe certain *indirect* ethical duties concerning non-rational nature. These are duties that ultimately depend on, and are derived from, the prior underlying respect we owe to “rational nature”, or more specifically, to “humanity” within ourselves. In this regard, there are exegetical treatments of Kant’s prohibition against the cruel treatment of animals,³¹ or against the “wanton destruction of what is beautiful in inanimate nature” (MS 06: 443; 564).³² One

³¹ See Tim Hayward, "Kant and the Moral Considerability of Non-Rational Beings," *Royal Institute of Philosophy Supplements* 36, no. (1994); Onora O'Neill, "Kant on Duties Regarding Nonrational Nature: Onora O'Neill," *Aristotelian Society Supplementary Volume* 72, no. 1 (1998); Allen W. Wood, "Kant on Duties Regarding Nonrational Nature: Allen W. Wood," *Aristotelian Society Supplementary Volume* 72, no. 1 (1998).

³² The primary (indeed, sole) relevant passage from Kant’s *Doctrine of Virtue* reads as follows:

A propensity to wanton destruction of what is beautiful in inanimate nature (*spiritus destructionis*) is opposed to man’s duty to himself; for it weakens or uproots that feeling in man which, though not of itself moral, is still a disposition of sensibility that greatly promotes morality or at least prepares the way for it: the disposition, namely, to love something (e. g. , beautiful crystal formations, the indescribable beauty of plants) even apart from any intention to use it. [...] With regard to the animate but nonrational part of creation, violent and cruel treatment of animals is far more intimately opposed to man’s duty to himself, and he has a

basic problem that should be noted immediately is that Kant's occasional, isolated comments on such matters are limited in scope and applicability; a general prohibition on the destruction of the natural environment as such is not, or is not obviously, entailed in the claim that acting ethically or virtuously precludes abuse of animals or beauty. As such, the efforts of authors such as Wood and O'Neill consist largely in attempting to extend the environmentalist implications of Kant's otherwise seemingly narrow understanding of any ethical duties owed towards non-rational nature. As well, it is often claimed that Kant's ethical thought - in particular, its basic "logocentric" premise³³ - is generally inhospitable to environmentalism.³⁴ (With Hegel, unfortunately, there appears to be very little direct textual support for any particular position in environmental ethics;

duty to refrain from this; for it dulls his shared feeling of their pain and so weakens and gradually uproots a natural predisposition that is very serviceable to morality in one's relations with other men. Man is authorized to kill animals quickly (without pain) and to put them to work that does not strain them beyond their capacities (such work as man himself must submit to). But agonizing physical experiments for the sake of mere speculation, when the end could also be achieved without these, are to be abhorred. Even gratitude for the long service of an old horse or dog (just as if they were members of the household) belongs *indirectly* to man's duty *with regard to* these animals; considered as a direct duty, however, it is always only a duty of man *to himself*. (MS 6:443)

For a discussion of this passage, see: Robert R. Clewis, *The Kantian Sublime and the Revelation of Freedom* (Cambridge University Press, 2009), 141-145; Paul Guyer, *Kant and the Experience of Freedom: Essays on Aesthetics and Morality* (Cambridge University Press, 1993), Chpt. 9; Jane Kneller, "Beauty, Autonomy and Respect for Nature," in *Kants Ästhetik/Kant's Aesthetics/L'esthétique De Kant* (Berlin/New York: Walter de Gruyter, 1998).

³³ As Wood explains, Kant's ethical theory is taken to be notoriously anthropocentric or "logocentric", in that "it is based on the idea that rational nature, and it alone, has absolute and unconditional value". (Wood: 189.)

³⁴ See: Christina Hoff, "Kant's Invidious Humanism," *Environmental Ethics* 5, no. 1 (Spring) (1983).

but, in any event, to the extent that he shares Kant’s value ontology,³⁵ similar basic limitations would presumably apply.)

Although a Kantian approach to environmental issues along these lines is compatible with the arguments I present in this thesis, I will not be relying on this dimension of Kant’s thought for one simple reason: the proposition upon which the approach I have just mentioned, namely that we might owe non-rational nature (whether “non-rational nature” is supposed to consist just of non-rational animals or other living things or, alternatively, is a wider category encompassing the natural environment as a whole), arises exclusively from Kant’s *Doctrine of Virtue*, i.e., the ethical-moral side of his practical philosophy, which he separates from his *Doctrine of Right*, i.e., his legal and political thought. His claim is that we owe indirect *ethical* duties to non-rational nature, and such duties are actually derivative of the imperfect duty we owe to ourselves as humans to improve ourselves.

³⁵ Kant’s value ontology can be summarized as follows. For Kant, the rational will itself – as opposed to anything independent of, prior or external to it – is the source of its own unconditionally binding ends, i.e., it is the source of any possible duty, precisely because it is autonomous and, as such, stands outside and beyond the blind necessity of nature. The rational will is unique, as it is not part of the heteronomous order of the (external) world. As Kant explains: “Everything in nature works in accordance with laws. Only a rational being has the capacity to act in accordance with the representation of laws, that is, in accordance with principles, or has a will.” (GMS 04: 412) The moral agent is autonomous if, and only if, his will can bind itself to its own moral decree, which is the basic meaning of “autonomy” in the Kantian idiom. Thus, for Kant, we exhibit our incomparably higher worth as rational beings only if our actions conform to a moral law self-given in our rational will. Moreover, our capacity for autonomy constitutes our dignity as human beings: “For, nothing can have a worth other than that which the law determines for it. But the lawgiving itself, which determines all worth, must for that very reason have a dignity, that is, an unconditional, incomparable worth; and the word respect alone provides a becoming expression for the estimate of it that a rational being must give. Autonomy is therefore the ground of the dignity of human nature and of every rational nature.” (GMS 04: 436)

As such, much of the existing literature on Kantian environmental ethics is not readily applicable in establishing *coercible* duties of forbearance with respect to the natural world, because duties of virtue, for Kant, cannot (by definition, within the framework of his overall practical philosophy) be subject to coercion, but must instead be internally generated, i.e., self-positing by the self-legislating Will (*Wille*).³⁶ This, of course, is one of the most basic, and perhaps most well-known, aspects of Kant’s moral philosophy: in order to be have moral worth, an act must be motivated strictly by the thought of duty itself, and not by any form of “external” incentive, or factors such as inclinations or the threat of punishment; nor can morally correct action be brought about via actual legitimate force. As I explain in some more detail further below, by contrast, in a legal system, an act may be rightful even if it is not virtuous, i.e., not all duties of Virtue are duties of Right, although, conversely, all duties of Right must also be duties of Virtue, and persons *qua* citizens in a civil union may be legitimately forced to conform to the requirements of Right. Note that Kant does not absolutely separate the moral from the juridical-political: on the one hand, one who violates the strictures of Right commits a wrong that is in a recognizable sense, a moral wrong; yet, on the other hand, the point of the Kantian distinction is that satisfying the strictures of Right is not sufficient to act morally. Rather, from the standpoint of Right, “internal” motivations vis-à-vis the moral law, and indeed intentions generally, are strictly speaking deemed irrelevant: it is sufficient for an act to be rightful if it can be harmonized with the freedom of choice of

³⁶ According to Kant, we are autonomous beings precisely because the source of the laws that determine our exercise of freedom, or any exercise of free choice (*Willkür*), are “internal”, i.e., they ultimately reside “within” ourselves, i.e., within the will (*Wille*) construed as practical reason itself. Since the will (*Wille*), as such, is self-legislating, it is, in effect, equivalent to practical reason. (See MS 06: 213) And note, again: “Since reason is required for the derivation of actions from laws, the *will is nothing other than practical reason.*” (GMS 04:12; [emphasis added])

other persons, i.e., if in its external dimension the act is compatible with – does not interfere with or otherwise hinder – the (external) freedoms of other persons. Either way, acts contrary to Right are subject to coercion, while acts contrary to the moral law (the requirements of Virtue) are not.

Nevertheless, it may be worth noting that it is in principle possible to arrive at a position similar to, and certainly compatible with, the one I explore in this thesis by focusing on Kant’s Doctrine of Virtue, as suggested by a comment from O’Neill: “... a focus on indirect [moral] duties offers another, perhaps humbler, way of filling out the appropriate relations between the human and non-human worlds. *Natural systems are the material basis for all human and non-human life, for human production and for human culture: if then we have duties not to destroy but to sustain one another, and indirect duties with regard to non-human animals, these will often have to be expressed yet more indirectly in efforts to establish and sustain productive ways of life, clean waters, fertile soils, non-polluting technologies and stable habitats for human and non-human animals, as well as preserving biodiversity.*”³⁷ While O’Neill does not, unfortunately, develop this line of reasoning extensively, this passage demonstrates that environmental preservationist duties may well be required by Kant’s ethical system, just as I maintain they are entailed by his system of Right. The drawback, as we have seen, is that this approach cannot legitimate coercible duties, for which I suggest we must find a proper philosophical basis given the scale of the environmental crisis we face. In other words, I have set a justificatory threshold for this thesis that is comparatively higher than a focus on Kant’s ethics alone would allow us to meet.

³⁷ O’Neill: 226. [emphasis added]

(d) The Eco-Centric Option

The second approach taken in the literature, although more promising as an effort to overcome anthropocentrism generally, is, in the final analysis, perhaps overly ambitious. More importantly, it requires a thoroughgoing and ultimately far too radical re-articulation of the fundamental precepts of the concept of property. Here, the effort is to adapt Kant or Hegel's respective philosophies of nature (or, in a somewhat different vein, Kant's aesthetic theory) to a positive environmental ethic,³⁸ which involves identifying "intrinsic value" in nature (or in "natural forms") based on a purported rationalist metaphysics of nature. Logocentrism is either denied or, in effect, its key premise – the identification of value with rationality (or with "mindedness", as opposed to "naturalness", to use Pippin's terms³⁹) – is extended to encompass nature as a whole. Nature, on this view, is not entirely bereft of "rational" processes, and the basic argument is that the environment must be protected from destructive human activity to the extent that nature itself also exhibits rationality or "purposiveness", and thus "goodness". Like the human will, natural structures and processes are subject to (a form of) rational necessity, and this constitutes a limit on human freedom. The aim is to deny as much as possible the (ordinarily) strict dichotomy between rational necessitation, to which (per Kant) only free persons are deemed subject, and the "blind" necessity that is supposed to rule in nature. "Naturalness" and "mindedness", on this view, exist on a continuum: the

³⁸ See Sharon Anderson-Gold, "The Purposiveness of Nature: Kant and Environmental Ethics," in *Law and Peace in Kant's Philosophy* ed. Valerio Rohden et al. (Berlin: Walter de Gruyter, 2008); Marc Lucht, "Does Kant Have Anything to Teach Us About Environmental Ethics?," *American Journal of Economics and Sociology* 66, no. 1 (2007); Alison Stone, *Petrified Intelligence : Nature in Hegel's Philosophy* (Albany, NY: State University of New York Press, 2005).

³⁹ See: Robert B. Pippin, *Hegel's Practical Philosophy: Rational Agency as Ethical Life* (Cambridge; New York: Cambridge University Press, 2008), 38 ff.

differences in terms of “value” between, say, animate (or even inanimate) matter, on the one hand, and autonomous persons, on the other, are on a spectrum, because rationality and purposiveness, in some sense and to some degree, inhere in nature as a whole. Put differently, the aim is to deny that nature is thoroughly disenchanting, and thus, does not exhibit merely instrumental value.

Unfortunately, even if a non-anthropocentric stance towards nature could be found in Kant’s ethics⁴⁰ or, as some have argued, in his theory of aesthetics as developed in his *Critique of Judgment*,⁴¹ there are no readily discernible non-anthropocentric elements within his legal and political philosophy.⁴² As we have seen briefly above, his theory of

⁴⁰ See: Anderson-Gold. (Arguing that “Kant has the resources within his concept of the purposiveness of nature to generate a robust environmental ethic, an ethic responsive to the insights of deep ecology. ... [And,] that the inner purposiveness of organisms while only analogous to practical [human] purposiveness nonetheless grounds a unique status for living beings that requires that they be treated with moral consideration.”)

⁴¹ See: Lucht. (Arguing that Kant’s” account of the disinterestedness of taste raises the possibility of a manner of motivating a noninstrumental and responsive—rather than self-interested and consumerist [or “instrumentalist”] —attitude toward nature. The aesthetic consciousness thus can help situate us within rather than pit us against the natural world.”)

⁴² Alison Stone, having gone to great lengths to establish the non-anthropocentric implications of Hegel’s *Philosophy of Nature*, which she maintains opens up possibilities for understanding the natural world as intrinsically good and as existing on a value-ontological continuum with humans, is openly dismayed by Hegel’s position in the *Philosophy of Right*, which asserts a radical discontinuity between persons and nature and claims the latter is fundamentally subservient to the former. It would appear that Hegel’s legal and political thought is at odds with the rest of his system in this regard. As Stone explains: “Despite his stance in the *Philosophy of Nature* that all natural entities are intrinsically good [and “purposive”] in virtue of the goodness of their internal structures, Hegel in the *Philosophy of Right* denies that humans have any duties to respect or preserve those entities; on the contrary, [in his theory of property] he affirms our positive duty to transfigure those entities (as extensively as we please). This duty is not—and never becomes—limited or qualified by any countervailing duties of respect.” (Stone, 157.) While Stone is disappointed with the apparent inconsistency in Hegel’s framework,

property in particular is strictly in line with orthodox anthropocentric, “instrumentalist” Western premises, which are that the world is essentially “disenchanted”⁴³ and “mechanistic”, i.e., devoid of any “spiritual value” and, as such, consists of objects (in themselves incapable of bearing rights and lacking independent end-status) *prima facie* open and yielding to human use: for Kant, as for virtually any political philosopher in the Western canon⁴⁴, natural “resources” are just that, mere means available for subjection towards human (self-positing) ends. This should not be surprising given Kant’s logocentric value ontology (as cited above), which, though arguably articulated most explicitly in his ethical writings (especially in *GMS*), nevertheless pervades his practical philosophy as a whole, not least because Kant’s contra-distinction between the mechanistic natural world (devoid of inherent worth) and the autonomous human will (the only possible source of value) is indispensable to his theory of freedom as a whole. Accordingly, any effort to adapt eco-centrism (in any of its variants, such as “deep ecology”) towards the

any effort to read an eco-centric stance into any given part of Kant’s overall philosophy is bound to run into similar disappointments once the exegesis confronts the implications of Kant’s legal and political thought as articulated in the *Doctrine of Right*, especially his theory of property, which is similar to Hegel’s.

⁴³ See, generally: Richard J. Bernstein, “Mcdowell’s Domesticated Hegelianism,” in *Reading Mcdowell: On Mind and World*, ed. Nicholas Smith (London: Routledge, 2002), 17. (“The sharp dichotomy that Kant makes between freedom and nature (and all the aporiai that result from this dichotomy) follow from Kant’s uncritical acceptance of ... a disenchanted concept of nature”); John McDowell, *Mind and World* (Cambridge, MA: Harvard University Press, 1994), 97. (“For Kant, nature is the realm of law and therefore devoid of meaning. And given such a conception of nature, genuine spontaneity cannot figure in descriptions of actualizations of natural powers as such.”); Robert B. Pippin, “Idealism and Agency in Kant and Hegel,” *Journal of Philosophy* 88, no. 10 (1991); Sally Sedgwick, *Metaphysics and Morality in Kant and Hegel the Reception of Kant’s Critical Philosophy* (Cambridge University Press, 2000).

⁴⁴ Some scholars trace the anthropocentric paradigm of Western property doctrine as far back as Aristotle. See: Peter D. Burdon, “Earth Jurisprudence: Private Property and Earth Community” (PhD, Adelaide University, 2011), 37 ff; McGregor: 418.

justification of preservationist duties within a Kantian system of Right would be exceedingly difficult, whatever the merits of such an approach in connection with his Doctrine of Virtue (or, indeed, his Critique of Judgment).

Furthermore, eco-centrism is problematic as a starting point in an analysis of ownership because, as I have already intimated, the institution itself, at least as we know it in the West, is thoroughly embedded within an anthropocentric paradigm. This does not, of course, mean that alternative conceptions of ownership do not exist or are otherwise inconceivable: there are cultures and civilizations where, for example, spiritual value is attributed to land, where nature is (in one way or another) construed as sacred, and where the Kantian view that the autonomous human will alone is “sacrosanct” would be denied.⁴⁵ But, unfortunately, such alternative conceptions are not readily accommodated within legal systems in the West.⁴⁶ Although I cannot develop this point here, consider this: virtually any kind of interaction with nature, or action by humans upon it, can and will, if we are operating under the basic precepts of Western legal systems, be characterized as a “form of use” corresponding to one or another “incident of property”. Even a “spiritual experience” of nature must be translated into a form of “use” if it is to fit within the parameters of a legally manageable dispute, for example. In any event, I am going to set the possibility of an eco-centric option aside and, instead, will try to develop an argument that hews more closely to the Kantian framework of Right.

⁴⁵ See: Bradley Bryan, "Property as Ontology: On Aboriginal and English Understandings of Ownership," *Canadian Journal of Law and Jurisprudence* 13, no. 1 (2000); Kristen A. Carpenter, "Real Property and Peoplehood," *Stanford Environmental Law Journal* 27, no. 14 (2008).

⁴⁶ See: Marcia Yablon, "Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land," *Yale Law Journal* 113, no. 7 (May) (2004).

4 - The “Absolutist” Conception of Property

My primary aim in this thesis is to establish that owners of natural resources and, in particular, of lands – “owners” being broadly construed to include states as holders of quasi-proprietary authority over natural resources and land *qua* sovereign territory – are subject to a duty of Right to forbear from making destructive or dissipatory or non-sustainable use of the natural resources and lands they own or assert jurisdiction over. Further, my claim is that destructive, “dissipatory”⁴⁷ or non-sustainable use of land is an impermissible (transgressive and ultimately wrongful) exercise of *freedom* within the meaning of Kantian principles of Right. In particular destructive use, especially of the finite lands upon which we subsist collectively, is an illegitimate exercise of “external” freedom, i.e., of our capacity to make choices in the external world. And the “external world”, in turn, consists not just of an aggregation of usable things but, concomitantly, of a plurality of persons with whom we cannot avoid interactions “in space and time” given our co-existence on the surface of a finite globe. As such, preservationist duties are

⁴⁷ I borrow the term “dissipatory waste” or use from McCaffery, who associates it with the Blackstonean absolutist conception and elaborates as follows:

[T]he idea of waste as dissipation [entails] the pure loss of value, with none but some possibly perverse - to an Anglo-American at least - pleasure in the loss. Think of letting the farm go to seed or burning down the house. Such “dissipatory” waste represents no tangible good to anyone; the value disappears into the ether. ... Blackstone first defines waste in Book II of his Commentaries as follows: [“]Waste, *vastum*, is a spoil or destruction in houses, gardens, trees or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee-simple or fee-tail.[”] ... When Blackstone [discusses] the topic of waste ... he first mentions that waste is “destruction in lands and tenements” and goes on to elaborate: [“] [W]aste is a spoil and destruction of the estate, either in houses, woods, or lands; by demolishing not the temporary profits only, but the very substance of the thing; thereby rendering it wild and desolate; which the common law expresses very significantly by the word *vastum* . . . [”] (Edward J. McCaffery, "Must We Have the Right to Waste?," in *New Essays in the Legal and Philosophical Theory of Property* ed. Steven Munzer (Cambridge: Cambridge University Press 2001), 85.)

legitimately enforceable by force. And, this is because, for Kant, Right is automatically connected with an authorization to coerce, such that wrongful exercises of freedom – exercises of freedom that actually hinder freedom – may be countered with coercion that is, thereby, inherently legitimate. The “hindrance of hindrances of freedom”, to use Kant’s terminology, is authorized by Right. The central difficulty of the thesis is to show how, *exactly*, the destructive, dissipatory or non-sustainable use of natural resources, especially land, might constitute a transgression (a hindrance) of freedom.

Now, the chief opposing figure here is, of course, Blackstone. That is, the aim of this thesis, in part, is to overcome the Blackstonean, absolutist (“despotic” or “egocentric”) conception of ownership, which holds that “the right of property [is] that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe”.⁴⁸ More specifically, for our purposes, it is important to note that the absolutist conception posits that the right to destroy (*jus abutendi*), or to consume absolutely, to use up, or “waste”, is an essential element of property ownership. As Blackstone puts it: “[I]f a man be the absolute tenant in fee-simple . . . he may commit whatever waste his own indiscretion may prompt him to, without being impeachable or accountable for it to anyone.”⁴⁹ This absolutist or “despotic” understanding of property, which recognizes no ultimate limits (of the kind I propose) on the use of one’s own property (provided only that no harm is inflicted upon the person or property of others), is further reflected, for example, in Blackstone’s claim that intentionally burning down one’s own house,

⁴⁸ William Blackstone, *Commentaries on the Laws of England* (1766). Cited in: Lior Jacob Strahilevitz, “The Right to Destroy,” *Yale Law Journal* 114, no. 4 (2005).

⁴⁹ Blackstone, Book III, Chpt. 14; Cf. Book III, Chpt. 18.

provided no mischief is done to one's neighbours, is not felony arson, even though normally arson is a crime "much more pernicious" than theft because "in simple theft the thing stolen only changes its master, but still remains *in effe* for the benefit of the public, whereas by burning the very substance is absolutely destroyed."⁵⁰ I note that a number of authors have tried to show that the absolutist conception of property, as expressed by Blackstone generally, if not in every detail of his account, remains the basic, background or "intuitive" view of property in Anglo-American law and politics.⁵¹ Indeed, as Meyer argues, the absolutist conception is so thoroughly embedded, at least in American mores, as the "ideal-type" or "default" definition of property, that it constrains the imagination even of those, such as environmentalists, who would otherwise wish to oppose it.⁵²

Meyer explains as follows:

In the U.S., Blackstone's image of property as absolute dominion sounds familiar, even to those who have never heard of its author or his Commentaries. "A man's home is his castle" is an aphorism taken seriously by many. It is also reflected in realtors' and lawyers' talk of "fee simple" or "freehold" ownership, and in the notion of unified ownership captured in the legal maxim *cujus est solum ejus est usque ad coelum* (whoever owns the soil owns all the way to heaven). This view of private property resonates widely. ... The absolutist concept regards private property as unitary, precluding legitimate restrictions on possession, use, or transmission of property. It conceives of property as isolated from its context within a web of social and ecological relations that generate diverse claims of public interests and that might be in tension with the will of the property owner. Taken to its logical conclusion, this notion of property ownership would simultaneously prefigure and negate the concept of political sovereignty. After

⁵⁰ Blackstone, as cited in: Strahilevitz.

⁵¹ See for example: Williams.

⁵² John M. Meyer, "The Concept of Private Property and the Limits of the Environmental Imagination," *Political Theory* 37, no. No. 1 (2009).

all, if property is truly held as a unitary and exclusive right, then the right-holder is sovereign.⁵³

Meyer notes that the Blackstonean view is most ardently advanced by libertarians and “classical liberal theorists” who seek to reject the legitimacy of any robust role of the state, excepting what is narrowly allowable under “takings” doctrine (as in the Fifth Amendment to the U.S. Constitution), in controlling or limiting the extent of owners’ liberties, or in restricting the key incidents of property, for example, for the sake of the public good or for redistributive purposes.⁵⁴

The intuitive, reflexive appeal of the absolutist position lies in its purportedly maximal promotion of individual liberty. One’s proprietary domain is supposed to be that within which we are supposed to be able to pursue our purposes as we see fit, and to exercise our most arbitrary goals, and even our most capricious whims, all without external interference, i.e., without being answerable to anyone (unless of course we cause harm to others). Further, as Freyfogle notes:

In the typical tale used to frame discussions about private property rights, an individual landowner is pitted in battle against a government regulatory body. The landowner wants to exercise her individual liberty by using her land in some way; the government body, desirous of promoting some public conservation goal, opposes the proposed land use and deploys a law to restrict it. *Liberty, that is, appears to inhabit one side of the conflict, the private side, and government regulation invades or restricts it.* ... This, it appears, is the widespread assumption about property and liberty.⁵⁵

⁵³ Ibid., 103.

⁵⁴ Two of the most well-known authors in this regard are Robert Nozick and Richard Epstein. See for example: Richard A. Epstein, "Property Rights, State of Nature Theory, and Environmental Protection," *New York University Journal of Law & Liberty* 4, no. 1 (2009). See: Meyer: 104.

⁵⁵ Freyfogle, "Property and Liberty," 77. [emphasis added]

In essence, just as with libertarianism in general, the absolutist stance in property theory appears to be a cousin of, if not a radicalization of, the basic Western liberal tradition that places individual freedom at the centre of law and politics. No wonder, then, that the absolutist view has its defenders, some of whom go so far as to suggest that the state's regulation of private proprietary activities in the name of the common good is tantamount to a novel form of "feudalism".⁵⁶

It appears, furthermore, that even property scholars who are not libertarians *per se*, and even environmentalist jurists, tend to get caught up in the parameters set by the absolutist conception. Meyer points to Honoré and Waldron⁵⁷ as exemplars in this regard:

While not intending to advance the absolutist concept as a normative guide to property practice, scholars such as Honoré and Waldron nonetheless ease the way for those who do. From this vantage point, what Waldron terms conceptions of property are ones that to some degree must grapple with the existential web of social and ecological relations within which property exists. Yet these come to be viewed as deviations from the supposed ideal type of ownership itself. Conversely, normative arguments that seek to strengthen respect for property's embeddedness within this web are more difficult to legitimate than they might be otherwise. Here, government action on behalf of public interests is necessarily viewed as a restriction upon or intervention into property properly conceived. Thus, the burden of proof needed to justify such action is great, while the absence of such violations will be viewed as the default position whenever the burden of proof is not met. It is striking, then, that even when careful and insightful theorists recognize an incongruity between the absolutist concept and the actual practice of property, they nonetheless reify and legitimize the idea of absolute ownership as central to their idea of private property.⁵⁸

⁵⁶ See: Richard J. Lazarus, "Debunking Environmental Feudalism: Promoting the Individual through the Collective Pursuit of Environmental Quality," *Iowa Law Review* 77, no. July (1991).

⁵⁷ See: Waldron, 39, 47-53.

⁵⁸ Meyer: 105.

Suffice it to say, given its ubiquity, the absolutist conception of property, as indeed with the anthropocentric world view, with which it has obvious underlying connections, is difficult to overcome. My task is simplified to some extent by the fact that I aim to challenge only one key aspect of the absolutist view, namely that ownership accords the owner the right to destroy, i.e., the *jus abutendi*, which is defined by Pound as the “right of destroying or injuring [one’s property] if one likes”⁵⁹, or as the affirmative right “to consume, waste or destroy the whole or part of [one’s property],” as defined by Honoré.⁶⁰

Given his insistence on a fundamental underlying connection between (external) freedom and property – i.e., given his claim that property ownership, analogously to our simply having *bodies* responsive to our will (for instance in making a choice to stand here rather than there, etc.), is essential and indispensable to the very possibility of our exercising our freedoms in the external world, and that property ownership *must* therefore be possible as a matter of Right – Kant *must*, I maintain, oppose the Blackstonean conception of property. At a minimum, Kant *must* oppose any conception of property that encompasses the right to destroy, which is a purported right that, as I demonstrate, contradicts the core premise of Kant’s theory of property as expressed in his “Juridical Postulate of Practical Reason”, which, briefly put, posits that usable things in the external world *must* be made available for use (and rightful ownership) by persons. However, most simply put, Kant has to oppose the Blackstonean view because a basic premise of Kantian practical philosophy is that freedom in general is an inherently *self-limiting*

⁵⁹ Roscoe Pound, "The Law of Property and Recent Juristic Thought," *American Bar Association Journal* 25, no. (1939): 997.

⁶⁰ A.M. Honoré, "Ownership," in *Oxford Essays in Jurisprudence*, ed. A.G. Guest(Oxford: Clarendon University Press, 1961).

concept, so that, at the very least, any “absolutist” understanding of our freedom to act in the world will be immediately suspect, and this is so *despite* the Kantian claim that persons are free and autonomous in the sense of their being “self-originating” or “self-authenticating” sources of valid claims (to use Rawl’s terminology⁶¹) in respect of their agency in the external world.

As it happens, I am not, of course, alone in opposing the Blackstonean, absolutist conception of ownership liberties. Despite its ubiquity in the Anglo-American jurisprudential imagination, this conception has been subject to challenge by a fairly significant number of legal scholars⁶², who generally tend to seek out various established legal doctrines and/or politico-legal developments (e.g., the introduction of environmental regulations), and by a relatively small number of philosophers, who generally have questioned the moral status of the purported right to waste or destroy.⁶³ Additionally, there is a recent, more concerted effort by two legal theorists to establish proper “philosophical foundations” for environmental law⁶⁴, although this sub-field within jurisprudence is admittedly in its nascent stages.⁶⁵ As I have only limited space to

⁶¹ See: John Rawls, *Political Liberalism*, vol. 4 (New York, NY: Columbia University Press, 1993), 32 ff.

⁶² See authors cited in note 23 above.

⁶³ See: Andrew Jason Cohen, "A Conceptual and (Preliminary) Normative Exploration of Waste," *Social Philosophy and Policy* 27, no. 2 (2010); Robert E. Goodin, "Property Rights and Preservationist Duties," *Inquiry* 33, no. 4 (1990); McCaffery.

⁶⁴ Sean Coyle and Karen Morrow, *The Philosophical Foundations of Environmental Law: Property, Rights, and Nature* (Oxford ; Portland, Or.: Hart Pub., 2004).

⁶⁵ E. Fisher and others, "Maturity and Methodology: Starting a Debate About Environmental Law Scholarship," *Journal of Environmental Law* 21, no. 2 (2009).

summarize this scholarship, I will point out two common threads running through the majority of these authors' arguments.

The strategy in opposing Blackstone from an environmentalist standpoint – i.e., in denying that property rights are absolute (especially to the extent of encompassing a right to waste or destroy, or in my preferred terminology, to use natural resources unsustainably) and, conversely, in asserting that property rights are in one way or another burdened by certain key obligations (especially by the duty to preserve or conserve, or, again, in my preferred terminology, to use natural resources in a sustainable, non-dissipating manner) – is essentially threefold. Firstly, the absolutist conception is associated with negative environmental outcomes in so far as it ostensibly immunizes private owners and enables them to make decisions regarding their holdings without regard to environmental concerns, and its prominence is seen as an obstacle to the state's ability to act in the name of the public good.⁶⁶ Secondly, having a clean and healthy environment is, in one way or another, identified as a public good, a necessity from the standpoint of the community, which may be construed widely enough to encompass humanity as a whole. Thirdly, the anti-absolutists deny that property rights form a unitary, indissoluble or "impenetrable" set of pre-political powers, or that they are "absolute" in the further sense of being independent from, or unqualified by, communal or political (democratic) considerations.⁶⁷ Relatedly, it is often asserted that property rights are

⁶⁶ See: McGregor: 392-394.

⁶⁷ As McGregor argues:

[We] also have within our tradition of property ownership the view that property rights are social conventions serving particular social goals, not exclusively aimed at satisfying individual preference. Thus, they are instrumentally important to achieve important social interests. Those interests can

merely a social convention or construct⁶⁸ or, further, that their existence in the first place, their very possibility, is owed to the legal, political and social systems that secure them. As such, public policy, invoking the public good, can properly serve as an instrument in securing positive environmental outcomes. Thus, in this vein, Raff suggest that we must adopt a “socially embedded” conception of property that emphasizes the responsibilities and duties that are necessarily associated with proprietorship, in opposition to the one-sided privileging of owners’ liberties of the absolutist conception.⁶⁹ Similarly, Coyle and Morrow argue that we can, and must, transition from an “entitlement based” understanding of property towards a “responsibility based” view that permits official interference in owners’ activities in the name of public welfare.⁷⁰ The conclusion, either way, is that the idea of ownership is in effect more malleable than the absolutist

be public or political ones, such as democracy's interest in having an independent citizenry, or they can be individual interests, such as the individual's interest in moral development and self- determination. (ibid., 393-394.)

⁶⁸ As Meyer argues:

Any reconceptualization [of the concept of ownership] must begin by recognizing that “private property” cannot be defined or discovered *a priori*. This is the absolutist mistake. Property is created through practices and conflicting claims are reconciled through governmental institutions, especially the courts. “Property rights,” ... “are made, not found.” This pragmatic approach to property rights necessarily limits the precision with which we can delineate an alternative to the absolutist concept. Yet placing social and ecological embeddedness at the core of our understanding of property – rather than marginalizing them as deviations from or limits upon the idea of property – challenges [the key tenets of] the absolutist concept. (Meyer: 116-117.)

⁶⁹ See: Raff, "Toward an Ecologically Sustainable Property Concept."

⁷⁰ Coyle and Morrow, 12 ff.

conception would have us believe, and that duties of environmental care, preservation⁷¹, conservation or stewardship⁷² can be legitimately imposed on owners.

An inherent weak point in this anti-absolutist line of reasoning must be noted: in order to justify the requisite restrictions on owners' liberties, pace the absolutist conception, there has to be an exceptionally tight connection drawn between the public good (or communal interests) and environmental protection. The anti-absolutist argument depends on establishing that certain activities pursued under color of ownership rights undermine the public good *because* they damage or degrade the environment (the integrity of which is presumed to be essential to the public good), and must therefore be

⁷¹ In an interesting treatment of these issues, Goodin takes an approach that is somewhat distinct from that pursued by many of the other authors I have cited. Goodin begins by arguing that there is an “analytic core” to the notion of property. Citing a number of authors who essentially distill Honoré’s well-known list of the “incidents of property”, Goodin claims that the “tidiest parsing of property rights offered to date decomposes them into three principal components: (1) the right to use a thing; (2) the right to use it exclusively; and (3) the right to transfer it at will.” He then undertakes a careful logical/conceptual analysis of each of these components and concludes, in each case, that a right to destroy is not entailed by any of them. As such, he maintains that if “property rights cannot be shown to imply - either analytically or argumentatively - a right to destroy, then there is no necessary trade-off between property rights and preservationist duties.” (Goodin: 403, 404.)

⁷² See for example: Karp: 735, 748. He recommends that “private property ownership of land must include, legally and ethically, a duty to be a steward of the land. Much as a landowner currently must refrain from using land in a manner that creates a nuisance, in the future a landowner must avoid using land in a fashion that significantly interferes with its natural resource value.” Karp bases this conclusion on a claim that: “Land is fundamentally different from other forms of property. Because any parcel of land is part of a network of natural systems extending beyond the boundaries described in the deed, it attains an importance superior to any individual landowner or to any period in time. *Land is essential to our right of survival...* [S]tewardship [can be defined] as management of a resource that uses no more of it than is necessary, does not allow damage to go unattended, exercises “proper” dominion over it, and looks out for others' needs.” [emphasis added]

restricted. But, alas, the “public good” is an inherently malleable notion. If it were perfectly self-evident in every instance that environmental damage caused by owners to their own holdings was contrary to the “public good”, it would be difficult indeed to deny the fallacies of the absolutist position in so far as it purports to permit, in the name of owners’ full-spectrum autonomy (the “despotic dominion” over their holdings), even environmentally damaging activities (so long as the damage was restricted to the owners’ own holdings). Unfortunately, it is clear that (at least *some level* of) environmental degradation can, in many contexts, be viewed as being consistent with the “public good”: a libertarian would certainly insist that, if the extent of owners’ rights are to be made contingent on the public good at all, then any given community (as an aggregate of individuals) is free to determine for itself (presumably by means of democratic choice) what counts as its good, and may, accordingly, choose environmental degradation as a trade off for, say (as most often occurs), economic development. This is why it is important to construe the “public good” as widely and universally as possible, ideally encompassing humanity as a whole, as well as future generations. But even then a staunch libertarian, bracketing off the problem of future generations, could retort by arguing that there is nothing, in principle, wrong with humanity as a whole choosing to “mutilate” the planet so long as such a collective decision is made with full knowledge on the part of all individuals concerned (in this case, all members of humanity) of all pertinent consequences of their decision; and presumably the choice can, in principle, be normatively permissible even if it results, in the extreme, in collective suicide.

The libertarian would, in other words, insist that an absolutist conception of property can only be countered or juxtaposed with a likewise absolute conception of aggregate decision making with respect to the “public good”. And this, again, is because

the absolutist, libertarian perspective generally does not see freedom as an inherently self-limiting concept. By contrast, Kant would insist that freedom *as such*, as “everything that is possible” via “practical reason” (KrV: B 828), is fundamentally subject to self-limiting conditions. And this basic Kantian position avoids the problems that inevitably arise when the extent of property rights are made contingent upon a (or *some*) conception of the public good, as environmentalists would insist, or vice versa, when the “public good” is seen as nothing more than a function of the rights of individual proprietors taken in the aggregate, as the absolutist or libertarian would no doubt insist.

Put differently, suppose we grant owners the full, unadulterated right to absolutely destroy, to simply annihilate, their holdings - for instance to burn their houses such that they no longer remain *in effe* for the public benefit, as in Blackstone’s example (cited above). Or better yet, let us say it is permissible for owners to annihilate their lands in this way, as they see fit. Kant, I maintain, would see this as an impossible exercise of individual proprietary freedom, as something that simply cannot be sanctioned by practical reason. Because, as I establish in greater detail below, property rights over external objects (as a subset of acquired rights) are intended to *enable* freedom – to provide the means with which we can pursue any ends we might set for ourselves, to facilitate our effective purposiveness in the external world – the annihilation of those objects would, in fact, ultimately undermine, rather than enhance, our freedom. In other words, the destruction of owned things, of the things that are supposed to facilitate our purposiveness, or the rendering of otherwise usable objects into useless ones, amounts to a radically self-contradictory, and hence, for Kant, impermissible, exercise of freedom. Further, suppose the objects in question were plots of land: since all proprietors are supposed to enjoy identical freedoms, i.e., as proprietors we are (formally) identically

situated vis-à-vis the objects we own, to allow one landowner to annihilate his lands means all landowners are in principle allowed to do so. But then, this would mean that, conceptually, land ownership as such entails the possibility, given its apparent permissibility, of the destruction of *all* (owned) lands. And the problems with this are multifold – indeed, the libertarian position leads to form of *reductio ad absurdum*. The absolutist claims, in the name of full-spectrum proprietary freedoms, that we must be permitted to destroy the things we own, but to actually act on that permission would leave us with few, if any, tangible freedoms exercisable in our (mutilated) external environment: we would literally have no lands left capable of supporting our (land-related or land-dependent) purposes. Thus, land ownership that encompasses the right to destroy is an absurdity in principle. (As far as Kant is concerned, there are further, even deeper problems with the absolutist position when it comes to land in particular, which I discuss below.)

5 - Kant on (External) Freedom and Property Right (Preservationist Duties Owed by Individuals and/or Private Parties)

In order to more fully understand the anti-absolutist position I articulate immediately above, we need to undertake a partial exposition of the basic structure and argument of Kant's *Doctrine of Right*. The purpose of this exposition at this stage is to better explain why, according to Kant, *individual*, private proprietors (as opposed to the state with authority over its territory, which Kant calls "supreme proprietor of the land") are precluded, by Right (*Recht*)⁷³, from destroying, degrading or dissipating their holdings, especially their lands and the natural resources contained thereon. Later and

⁷³ In any discussion of Kant (or Hegel's) legal and political thought, it is customary to comment on the complexity of the German term "Recht", which has multiple, inter-related meanings. Regarding Kant, Byrd and Hruschka explain as follows:

Because the German *Recht* can mean either "law" or "right," people can easily disagree on whether Kant has written a Doctrine of Law or a Doctrine of Rights. We believe Kant enjoyed playing with words. Since his *Rechtslehre* focuses on the rights individuals have and on the way law must be to accommodate those rights, he can use the word *Recht* to capture both meanings. His expression *Axiom des Rechts* ... thus can connote either "axiom of law" or "axiom of right." ... [And further:] The German noun *Recht*, as the Latin *ius*, can mean either "law" or "right." To distinguish between these two meanings, German lawyers today use *objektives Recht* to mean "law," and *subjektives Recht* to mean a "right" someone has. Kant too distinguishes between these two meanings of *Recht*, the first being a systematic doctrine of natural and positive *Recht*, or what we would designate as natural and positive law in English; the second being the moral capacity to place others under obligation, or what we would designate as a right. (B.S. Byrd and J. Hruschka, *Kant's Doctrine of Right: A Commentary* (Cambridge: Cambridge University Press, 2010), 28-29.)

Regarding Hegel's concept of *Recht*, see: Dudley Knowles, *Routledge Philosophy Guidebook to Hegel and the Philosophy of Right* (London: Routledge, 2002), 83. See also: Michael Inwood, *A Hegel Dictionary* (Oxford: Blackwell Publishers, 1992), 259-261. As for the connection between Hegel and Fichte, see: (Frederick Neuhouser, *Foundations of Hegel's Social Theory: Actualizing Freedom* (Cambridge, Mass. ; London: Harvard University Press, 2000), 288.

further below, I will also explain why individuals *per se*, even if they are non-owners, also owe duties of forbearance with respect to the (unowned) natural environment, i.e., not to destroy resources, especially land that is strictly speaking designated as *res* (or *terra*) *nullius* – even though, as I suggested above, the question concerning such duties owed by non-owners may be more properly thought of as being, logically prior to the one concerning the duties of proprietors. (Further, although Kant’s conception of land presents certain difficulties, which I address below, I will presume that land can reasonably stand as an analog or place-holder for “the natural environment”.) The key aspect of Kant’s overall doctrine is, of course, his theory of property, which requires some unpacking as it is generally considered one of the most difficult aspects of his legal and political thought.⁷⁴ But of course, Kant’s theory of property is inextricable from his theory of freedom, and especially his understanding of “external” freedom, and as such, this will need to be woven into my overall exposition.

(a) Kant on (External) Freedom and Right in General

Kant’s understanding of “freedom” generally is multi-faceted, complex and admittedly difficult to summarize briefly. However, very broadly speaking, it encompasses a closely related cluster of ideas, including: self-rule, self-determination, self-mastery, autonomy, independence, and the like.⁷⁵ Accordingly, full elucidation of his

⁷⁴ Mary Gregor, a well-respected Kantian scholar and translator of Kant’s works, concludes her discussion of his theory of property by saying: “Kant has never been accused of underestimating his readers, but he seldom treats them so harshly.” (Mary Gregor, “Kant’s Theory of Property,” *The Review of Metaphysics* 41, no. 4 (1988): 787.) Indeed, it has become something of a convention to preface one’s discussion of Kant’s *Metaphysics of Morals* by commenting on the difficulty and obscurity of the text, not least because prominent figures such as Schopenhauer and Arendt had dismissed that work as a product of Kant’s supposed senility. See the introduction to: Katrin Flikschuh, *Kant and Modern Political Philosophy* (Cambridge: Cambridge University Press, 2000).

theory of freedom is well beyond the scope of this thesis. But the more basic point is that Kant posits that freedom is *the* foundation and rationale of justice, law, politics, and indeed of any possible normative ordering. (A perhaps more limited version of his claim would be that, in modern times, Freedom, as opposed for instance to The Divine, becomes the only explicit principle in terms of which any given mode of normative ordering may be legitimized.⁷⁶) Hodgson elaborates on Kant's steadfast claim that freedom is the *exclusive* basis of Right as follows:

Kant's political philosophy rests on a highly contentious claim: that rational agents have a right to freedom, by which he means that their *freedom can justifiably be restricted only for the sake of freedom itself*. ... On Kant's view, the use of state power is justified only so long as it aims to protect freedom, and the sole aim of political philosophy is to determine the conditions under which rational agents can live side by side—and thus affect each other through their choices—without infringing on one another's freedom. All other questions that have traditionally been part of the field—questions concerning distributive justice, most notably—must be either recast in terms of freedom or set aside.⁷⁷

⁷⁵ Beck identifies and elucidates no fewer than five distinct senses of “freedom” operating in Kant's overall philosophy. See: Lewis White Beck, “Five Concepts of Freedom in Kant,” in *Philosophical Analysis and Reconstruction*, ed. T. J. Szrednick and Stephen Korner (Dordrecht: Martius Nijhoff Publishers, 1987).

⁷⁶ As Honneth notes in connection with the legacies of Hegel and Kant: “No modern theory of justice can refrain from grounding its legitimacy in the freedom of the individual or the self-actualization of social individuals.” (Axel Honneth, “Justice as Institutionalized Freedom: A Hegelian Perspective,” in *Dialectics, Self-Consciousness, and Recognition: The Hegelian Legacy*, ed. A. Sørensen, Raffnsøe-Møller, M. & Grøn, A. (Uppsala: NSU Press, 2009), 172.)

⁷⁷ Louis-Philippe Hodgson, “Kant on the Right to Freedom: A Defense,” *Ethics* 120, no. 4 (2010): 791, 794. Hegel's thought follows a similar trajectory, as Patten explains:

Freedom is the value that Hegel most greatly admires and the central organizing concept of his social philosophy. He holds that freedom is the “worthiest and most sacred possession of man” (PR §215A) and thinks that the entire normative sphere, or ‘system of right’, can be viewed as ‘the realm of actualized freedom’ (PR §4; cf. §29). He goes so far as to say that freedom is ‘the last hinge on which

Accordingly, as I intimate above, if we were to adopt this perspective on the inextricable connection between Right and freedom, then any question as to the normative status of environmentally destructive activity, or as to the proper basis for prohibiting such activity, must be answered with reference to the idea of freedom.

At this stage, our focus has to shift to his *Doctrine of Right* in particular, which means we need to understand the sense of freedom corresponding to Kant's legal and political thought, which in turn entails drawing a contrast with his conception of freedom pertinent to his *Doctrine of Virtue*, i.e., his ethical and moral thought. The basic distinction is that, within the former, what Kant most often emphasizes is our capacity for *choice (Willkür)* (which is regulated by the Universal Principle of Right) while, in the context of the latter, what matters principally is our capacity for autonomy, where the Will (*Wille*) is construed as the ultimate, self-authenticating source of morally valid duties (the content of which is specified by the Categorical Imperative). Even though, within Kant's overall practical philosophy, there are underlying parallels between these two conceptions of freedom,⁷⁸ and at times it is difficult to tell which, in particular, Kant is invoking, their distinct characteristics must nevertheless be borne in mind throughout.

To begin with, Kant defines Right as “the sum of the conditions under which the choice [*Willkür*] of one can be united with the choice of another in accordance with a universal law of freedom.” (MS 6: 230) Or, as he puts it elsewhere, “Right is the

man turns, a highest possible pinnacle, which does not allow itself to be impressed by anything’ (VGP iii. 367/459) (Alan Patten, *Hegel's Idea of Freedom* (Oxford University Press, 1999), 4.)

⁷⁸ For a discussion of the basic underlying parallels, see: Attila Ataner, "Kant on Capital Punishment and Suicide," *Kant-Studien* 97, no. 4 (2006).

restriction of each individual's freedom so that it harmonizes with the freedom of everyone else” (TP 73). The Universal Principle of Right, in this vein, is defined as: “Any action is *right* if it can coexist with everyone’s freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with a universal law.” (MS 6: 230) However, in turn, generally, what places us before the universal *law* of freedom is nothing other than our *capacity* for freedom, which entails the ultimate independence of human choice (*Willkür*) from natural inclination. Kant explains:

That choice which can be determined by *pure reason* is called free choice. That which can be determined only by *inclination* (sensible impulse, *stimulus*) would be animal choice (*arbitrium brutum*). Human choice, however, is a choice that can indeed be *affected* but not *determined* by impulses, and is therefore of itself (apart from an acquired proficiency of reason) not pure but can still be determined to actions by pure will. *Freedom* of choice is this independence from being *determined* by sensible impulses; this is the negative concept of freedom. The positive concept of freedom is that of the ability of pure reason to be of itself practical. But this is not possible except by the subjection of the maxim of every action to the condition of its qualifying as a universal law. (MS 6: 213-214)⁷⁹

The immediate counterpart of a choice (*Willkür*) affected by impulse is a choice determined by the will (*Wille*) itself, which has no external determining ground but rather subjects itself to a law that, as practical reason,⁸⁰ it gives to itself.⁸¹ The free will is free in

⁷⁹ Kant makes a similar claim in the *Critique of Practical Reason*. See: KpV A534/B562

⁸⁰ Recall: “The will itself, strictly speaking, has no determining ground; insofar as it can determine choice, it is instead practical reason itself”. (MM 6: 213)

⁸¹ This is to say that the addressee of the law must, at the same time, be its author. According to Kant, we are *autonomous* beings precisely because the source of the laws that determine our exercise of freedom, or free choice (*Willkür*), ultimately resides within ourselves, i.e., within the will (*Wille*) as practical reason itself. And the will just is practical reason itself because “reason is required for the derivation of actions from laws”,

the negative sense in so far as it may purge itself of all external content (e.g., inclinations, impulses, desires, etc.). We are capable of free choice, in this sense, simply because we are not subject to the necessity of nature (“to have any end of action whatsoever is an act of *freedom* ... not an effect of *nature*” (MS 6: 385)). On the other hand, because (as *homo noumenon*) we stand outside nature, we are immediately subject to the necessity of pure practical reason. This is the positive aspect of freedom, which Kant calls the capacity of “pure reason to be of itself practical”.⁸² And, pursuant, of course, to the demands of the Categorical Imperative, positive freedom is possible only in the sense that the intrinsic rationale of any free action, the “maxim” of any given choice, may qualify as a universal law that applies to all rational beings. (*ibid.*) Further, a maxim of choice may qualify as a universal law if, and only if, considered *formally*, i.e., irrespective of its particular content, it may be universalised – that is, if, and only if, it may be posited, recognized and adopted by a community of purely rational beings. This is why Kant goes on to say that pure reason, as a lawgiving faculty, cannot render any given maxim the determining ground of free choice, or elevate any given maxim to the status of supreme law, unless its *form* is fit to be universal law.

so that “*the will is nothing other than practical reason.*” (GMM 4: 412; cf. MS 6:213 above). In the *Groundwork of the Metaphysics of Morals*, he writes: “... the will is not merely subject to the law but subject to it in such a way that it must be regarded also as self-legislative and only for this reason as being subject to the law (of which it can regard itself as the author).” (GMM 4: 431) And, in the *Critique of Practical Reason*, he echoes this in saying: “[we] are indeed legislative members of a moral realm which is possible through freedom and which is presented to us as an object of respect by practical reason; yet we are at the same time subjects in it, not sovereigns”, since practical reason itself is ultimately “sovereign”. (KpV)

⁸² Likewise, in the *Critique of Practical Reason*, Kant identifies positive freedom with the autonomy of the will (*Wille*) as pure practical reason and further elucidates the contrast between negative and positive freedom. (See: KpV 5: 33)

Now, for the purposes of understanding the *Doctrine of Right*, i.e., Kant’s legal and political thought as opposed to his moral and ethical philosophy, we must focus not on his positive conception of freedom (which is essentially a function of the Categorical Imperative), but rather on freedom’s negative and, indeed, *external* aspect (which is regulated by the Universal Principle of Right). Here, we encounter the Kantian distinction (which I already briefly mentioned above) between the domains of Right and Virtue, or between the domains of the juridical-political, on the one hand, and the ethical-moral, on the other.⁸³ The operation of practical reason in the context of the former, entails external or juridical lawgiving – which, unlike internal lawgiving, constrains the subject via an incentive drawn from the subject’s aversions, i.e., it threatens to deploy force or inflict pain as a consequence of wrongdoing (cf. MS 6:219). Right, more generally, pertains to the “external and indeed practical relation of one person to another, insofar as their actions, as facts, can have (direct or indirect) influence on each other.” (MS 6:230) (This dimension of Kant’s *Doctrine of Right*, of course, generally corresponds to “abstract right” in Hegel’s framework.) The rule of law, and the use of force and coercion in the name of justice, is a matter of securing “right”, which, as we have seen, is the “sum of the

⁸³ Hasan usefully explains the core distinction as follows:

Governing the domain of right (*Recht*), [the Universal Principle of Right, “UPR”] pertains to the *form of interaction* between agents, i.e., to the way in which the actions of one agent restrict the possible actions of another. It enjoins rules of legitimate coercion that render the free exercise of the agency of one agent compatible with the agency of all. Governing the domain of ethics, [the Categorical Imperative, “CI”] pertains to the relation of a rational will to itself, surmounting its inclinations so as to act solely from the incentive of duty. It thus provides an internally prescriptive rule grounded in the self-legislation of the subject rather than on an external coercive structure. Developing the insight that UPR pertains simply to what an agent does [in the external world wherein external, inter-personal interactions take place], whereas CI pertains to the reasons for which an agent acts[.] (Rafeeq Hasan, "Politics, Property, Personhood: Kant’s Rousseauian Return," (North American Kant Society, 2011). [emphasis added])

conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom”. Accordingly, whereas positive freedom generally entails the possibility (rational permissibility) of action under a maxim that may, at once, accede to universal law, the positivity of *external* freedom, as it were, more specifically, entails action under a maxim the universalization of which would preserve and respect the external freedom of all, i.e., it entails that a given choice is rightful only if this choice is possible (rationally permissible) in light of the existence of choices available to all others, with which it must be compatible.

The upshot of Kant’s Universal Principle of Right is that there are inherent restrictions placed upon the extent of external freedom of one person by the sheer presence of another, each being possessed of the same capacity for freedom and each exercising this capacity within a shared finite space, namely the spherical surface of the earth – in light of which, it is important to emphasize, external interaction between them is inevitable, i.e., contact is unavoidable, as is the potential for the actions of one to obstruct the actions of the other (cf. MS 6: 230). Further, as I already indicated in drawing a contrast with the absolutist (libertarian) understanding, Kant emphasises that freedom itself, in its idea, is limited as such:

Thus, the universal law of right, so act externally that the free use of your choice can coexist with the *freedom of everyone* in accordance with a universal law, is indeed a law that lays an obligation on me, but it does not at all expect, far less demand, that I myself should limit my freedom to those conditions just for the sake of this obligation; instead, *reason says only that freedom is limited to those conditions in conformity with the idea of it and that it may also be actively limited by others ...* (MS 6: 231 [emphasis added])

Here, Kant sets out the crucial connection between Right and the authorization to coerce.

The full account of this authorization is as follows:

Resistance that counteracts the hindering of an effect promotes this effect and is consistent with it. Now whatever is wrong is a hindrance to

freedom in accordance with universal laws. But coercion is a hindrance or resistance to freedom. Therefore, *if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a hindering of a hindrance to freedom) is consistent with freedom in accordance with universal laws, that is, it is right.* Hence there is connected with Right by the principle of contradiction an authorization to coerce someone who infringes upon it' (MS 6: 231 [emphasis added])

Given this, from a juridical standpoint, the easiest and most obvious form of wrongful action consists in one person making a choice that fails to respect, and directly hinders, the choice of another particular person. In such cases, coercion that counteracts the hindrance is readily justifiable, by Kant's account. What is more difficult to explain are instances where an action counts as wrongful, i.e., is transgressive in virtue of the Universal Principle of Right, and is thus, legitimately subject to coercion, *even though* there is no *immediate* effect on the external freedom of some particular person (or persons), or where no one's choices, ends, purposes, nor their bodily integrity nor their proprietary holdings, are particularly or directly interfered with. I will, of course, have to take some time to explain how a wrong in this latter sense is possible from a Kantian standpoint, since my aim is to establish that certain types of activities by proprietors affecting only their *own* holdings – namely, uses of land that are destructive, dissipating or non-sustainable – are contrary to Right despite the fact that such activities do not, in any obvious way, immediately violate the (external) freedoms of – nor otherwise directly interfere with the ends (or choices) or the means (or bodily integrity or proprietary holdings) of – any other person in particular.

For now, it is worth noting that, because the principle of right pertains to external actions, Kant says that it is possible for a person to act *rightfully*, from a strictly juridical standpoint, even though he does not act *virtuously*, though the converse is not possible. We may observe, then, that whereas our capacity for negative freedom, i.e., freedom from

determination by impulse, places us immediately before the universal law as dictated by practical reason, which constitutes our capacity for positive freedom, positive freedom in turn is sub-divided into external and internal aspects (pursuant to the sub-divisions of the *Metaphysics of Morals* into the separate Doctrines of Right and Virtue). The crucial difference is that the rightfulness of actions from an external or juridical standpoint is not dependent on purity of motive or end sought, since the juridical standpoint is indifferent to the *matter* of choice, whether it happens to be based on some inclination or not. As Kant puts it, “[a]ll that is in question is the *form* in the relation of choice on the part of [each person], in so far as choice is regarded merely as *free*, and whether the action of one can be united with the freedom of another in accordance with a universal law”. (*ibid.*) From the juridical standpoint, what matters is how a given act might affect the freedom of another, irrespective of the end contemplated in performing it. Hence, from a strictly juridical standpoint, to choose “freely”, in a positive sense, it is *only* necessary that my choice should, in terms of its form, be able to coexist with the freedom of choice of another, or that my action should not hinder the external freedom of another. (In contrast, the ethical standpoint considers whether the underlying motive of the choice was determined “purely” by the thought of duty itself.) Kant is saying, then, that even from a strictly juridical standpoint we are nevertheless in a special, limited sense, still “positively” free, i.e., our conduct is thereby still ultimately governed by practical reason to the extent that any conduct potentially entails an external relation to another person and/or a relation with objects in the external world - and this is so *even if* our choice is actually motivated (“affected but not determined”) by some impulse or inclination.⁸⁴

⁸⁴ As Ripstein notes, “Kant’s concern [in the *Doctrine of Right*] is not with how people should interact, as a matter of ethics, but with how they can be forced to interact, as a matter of right.” (Ripstein, 14.) This is correct, but it does not, in my view, mean that the

Further, for our immediate purposes, what this means is that we cannot rely on some indication of internal malice to designate an act of environmental destruction as wrongful; rather, it has to be the external act itself that is in some way wrongful. The actual background aims or purposes of those who would mutilate the planet are, from the perspective of Kantian Right, largely irrelevant: what matters are (a) the actual (external) effects of their choices and how those choices impact the freedoms of others, and (b) ultimately, whether those choices conform with the conditions of freedom *as such*, or with the requirements of the *sum* of the conditions of freedom, i.e., the Universal Principle of Right.

But point (a) in the foregoing seems to suggest that, pursuant to Right, what matters exclusively is how persons interact with one another. If external interactions among a plurality of persons are the sole and exclusive emphasis of Right, a “wrong”, for Kant, can really only transpire where one person has, in one way or another, “improperly” interacted with another person, namely by interfering with the other person’s choices, or (absent consent) has obstructed their bodily movements, or trespassed on their property, or has otherwise in some way usurped their holdings. Either way, the emphasis appears to be on “proper” forms of *inter-personal* interaction, and what matters from the standpoint of Right is how and where each person stands relative to others. This, as it happens, is how Ripstein interprets Kant’s entire *Doctrine of Right*: “as a matter of right, each person is entitled to be his or her own master, not in the sense of enjoying some form of special self-relation, but in the contrastive sense of not being subordinated to the choice of any

rules as to how people can be forced to interact with each other externally are not ultimately derived from the strictures of practical reason generally; on the contrary, principles of Right, as Weinrib suggests (see note 101 below), are merely the manifestation of “practical reason in its external aspect”.

other particular person.”⁸⁵ And again: the Kantian “right to be your own master is neither a right to have things go well for you nor a right to have a wide range of options. Instead, it is *explicitly contrastive* and inter-personal: to be your own master is to have no other master. It is not a claim about your relation to yourself, *only about your relation to others*. The right to equal freedom, then, is just the right that no person be the master of another [which according to Ripstein is the core tenet of the *Doctrine of Right*].”⁸⁶ And yet more succinctly: “Self-mastery [under Kantian Right] is a contrastive idea: the idea that you are your own master is equivalent to the idea that no other person is your master.”⁸⁷

(b) The Open-Ended, Multi-Faceted Meaning of “Freedom”

While, for now, I bracket off my full response to Ripstein’s interpretation until I reach my discussion of Kant’s Juridical Postulate with regard to Right, I will simply point out that, pursuant to point (b) in the paragraph above, there is a plausible alternative reading of Kant’s understanding of Right, the meaning of “wrong” as a transgression of freedom, and the authorization to coerce connected with such transgressions. Right *also* entails a concern with whether or not choices conform with the conditions of freedom *as such*, or with the requirements of the *sum* of the conditions of freedom, *including* certain indispensable material conditions. According to Ripstein (and some other interpreters, such as Benson⁸⁸), because the strictures of Right supposedly have to do *merely* with the harmonization of the innate mutual independence – i.e., the equal, formal freedom and

⁸⁵ Ibid., 4.

⁸⁶ Ibid., 36. [emphasis added]

⁸⁷ Ibid., 108.

⁸⁸ See: Benson, "The Basis of Corrective Justice and Its Relation to Distributive Justice."

identical capacity for choice – of a *plurality* of persons,⁸⁹ the freedoms of the agent under Right are supposed to be circumscribed *only* by a minimal set of relatively simple rules having to do with inter-personal, external relations, and these rules are supposed to be entirely permissive (or at least mute) as to the proper scope of persons’ freedoms over nature *as such*, i.e., over the domain of external things that make up the natural environment.

I disagree, and my position is that the most rudimentary principles of Kantian Right are not concerned *exclusively* with the harmonization of mutually independent wills. That is, Kant’s most basic starting point is not just a plurality of persons possessing an identical, strictly formal capacity for free choice – or a capacity and entitlement to be “one’s own master”, in Ripstein’s terminology. While it may be accurate to say that his system primarily addresses the “harmonization” problem (namely, on what terms is the consistent, mutually reciprocal exercise of (the equally held) right to freedom possible among a plurality of interacting persons?), this basic problem does not exhaust the content of the Kantian system of Right. While the inter-personal and “contrastive” dimension of freedom is, of course, crucial from the standpoint of Right, there is also, inescapably, a material dimension to freedom, which entails the relation between persons and things, and between the will (or “ego”) and its body.⁹⁰ That is, I claim that Right, for

⁸⁹ For example, if the mutual independence of persons is to be respected, there must be a prohibition against inter-personal violations of bodily integrity: each must be accorded exclusive use of one’s own body and each must be identically (reciprocally) precluded from using another’s body as a mere thing, i.e., without the other’s consent. As well, certain kinds of liberties in inter-personal interactions must be legally accommodated, as reflected, for example, in the right of freedom of contract, which is additional to the right of proprietary acquisition.

⁹⁰ Accordingly, I disagree with the series of claims made by Ripstein, as cited immediately above, especially his view, which he states with a discernible degree of

Kant (as well as for Hegel), is also crucially concerned with how freedom is possible for an agent situated in the material world (in “space and time”).

This is most clearly evident in how Kant articulates the necessity of the right to property: he does not, contrary to Ripstein’s interpretation, say that property rights (rights to the exclusive use of things) arise just in light of the *plurality* of mutually independent persons, but rather that such rights are necessary in order for persons to *be* free individuals (agents freely and effectively acting in the world) in the first place. In order to be free or “independent” at all, it is absolutely necessary that we possess and use (“master”), first, our own bodies and, then, various objects in the environment within which we are situated. Innate and acquired rights, in a broad sense, protect individual agents’ possession and use, first, of their bodies and, then, of external objects, in the context of a plurality of agents, but as we shall see the *original* impetus for property rights follows from the bare need of agents to be effectively present in the world (through their bodies and through their interactions with the environment). Put simply, while there is an obvious person-to-person dimension to property rights, there is also an indispensable person-to-thing relation. (Many commentators emphasize the contrastive dimension in property rights as a relation *among persons*, but they sometimes neglect the fact that, accurately put, property rights entail relations among persons *with respect to things*; absent the reference to “things”, the concept of property is incomplete and largely meaningless.) Accordingly, we are free not just in relation to other persons, but also in relation to material things, and the idea of Right as articulated by Kant (and Hegel) does,

sarcasm, that “[For Kant, the] right to be your own master is neither a right to have things go well for you nor a right to have a wide range of options.”

or indeed must, recognize this.⁹¹ As such, our treatment of material things, including our material bodies, is not a matter of indifference to Right: whether or not we destroy those things that make the exercise of freedom possible in the first place *matters* from the standpoint of Kantian Right.

In this vein, in order to establish my point (and to further clarify my point of disagreement with Ripstein), I propose that we must take great care in reading what Kant actually states in the passages, cited above, regarding the connection between freedom and the authorization to coerce: it would seem that what matters is whether “*a certain use of freedom is itself a hindrance to freedom*”, and “that *freedom is limited to those conditions in conformity with the idea of it [where this latter “it” in question just is “freedom” itself]*”. Here, it is imperative that we ask: what, precisely, is meant by “*freedom*” in these key passages? What sense, what conception, of *freedom* does Kant have in mind here, exactly? Note that Kant does not qualify his claims by saying that a use of freedom is wrongful (only) if it hinders the (external) freedom of some person in particular, or only if it hampers another’s self-mastery. Instead, he claims that freedom is limited by, and is thus rightfully curtailed in the name of, the *conditions* that are in conformity with *the idea of it*, i.e., with the idea of freedom – presumably, in my view, with the idea of freedom *in general*.

⁹¹ As I will demonstrate further below, Kant’s “juridical postulate of practical reason”, pursuant to which it *must* be possible to have an external object of one’s choice rightfully as one’s own, failing which freedom would be in contradiction with itself, and Hegel’s claim that possession and property ownership “is in the first place the immediate embodiment which freedom gives itself in an immediate way” (PR §40), amount to a very similar claim: in order to have effective presence in the world as *free* agents, we must first and foremost be able to possess and make use of *material* things (including, initially, our bodies, and then land – at least according to Kant – along with other material resources).

But what exactly are the *conditions* that conform with the idea of freedom, violations of which are rightfully subject to coercion? Is it possible that the *conditions* of the *idea* of freedom could be violated, transgressed or otherwise undermined *even* where no *particular* person's (formal, external) freedoms or choices have been infringed or negatively affected; even if no given person's choices (or means, or ends) are "subordinated" to the choice of another? I maintain that it is. Further, I claim that the "*sum of the conditions* under which the choice of one can be united with another" do not pertain *exclusively* to contrastive inter-personal relations. Simply put, Kantian Right is not exhausted by considerations pertaining to inter-personal relations. Rather, while it is no doubt correct, per Ripstein's interpretation, that the Universal Principle of Right regulates inter-personal external interactions, I maintain it *also* encompasses the *conditions* of freedom as a self-limiting concept; most importantly for our purposes, Right must also be responsive to acts that undermine the *material* (pre)conditions of freedom, in general – that is, Right is engaged not just with acts by one that undermine the material standing of another, but also with acts by any given person that undermine anybody's, or indeed everybody's, material capacity to have effective presence in the world, *including*, of course, that person's *own* material standing. The most *important* material pre-conditions of freedom for our purposes are (a) secure possession of our bodies (pursuant to Kantian innate right), and (b) secure access to land⁹² (pursuant to Kantian acquired right): given that both are fundamental pre-requisites to any possible exercise of freedom in the external world (in "space and time"), and given that both are inherently vulnerable, i.e., are capable of being destroyed, in so far as they are necessarily finite, their security and integrity simply cannot be a matter of indifference from the standpoint of Right. In any

⁹² For Kant, land ownership is a pre-requisite to the possibility of any further ownership, i.e., of any objects other than land (movables). See MS §12.

event, my claim is that violations of Right from a Kantian standpoint are not, indeed cannot be, exclusively a function of defective inter-personal, contrastive relations, as Ripstein would seem to insist.

Thus, I claim that the “conditions” of freedom may be violated by a person even where he has not directly impacted the status, condition or “independence” of another person (or her ability to be her “own master”) by, as in the above examples, interfering with her body or by trespassing upon or usurping her holdings, or in some way interfering with the various means she has at her (rightful) disposal, or by undermining the ends she has set for herself, and so on. These latter examples are only the most obvious instances of “wrongful” uses of freedom by one against another. However, pace Ripstein, a violation of the conditions of freedom can *also* take place where a person, by his own acts, undermines his own freedom *qua* his autonomy, as in the case of someone purporting to enter into a slavery contract, or committing suicide, or lying.

(c) Slavery Contracts

Take the case of slavery contracts, the incoherence and thus, impossibility of which, from the standpoint of Right, Ripstein himself explains as follows:

The difficulty with slave contracts ... lies ... *in the form of relation that they presuppose*. You can only vary your rights and obligations in relation to another insofar as you are a being entitled to set your own purposes; a slavery contract both presupposes and rejects that entitlement. As Kant remarks, the moment you close such a contract, you are no longer bound by it. Kant’s point is not that you will be unable to meet such a contractual obligation; people who undertake contractual obligations they cannot meet are still bound by them. *The problem instead is that a slave can have no legal obligations whatsoever, and so cannot have the obligation of obedience that is a supposed term of the contract*. The master may think otherwise, as, indeed, may the slave. But the fact that the parties wish to create such a relationship does not show that they can make one, because their contract has inconsistent terms, and so cannot be the object of an agreement.⁹³

⁹³ Ripstein, 136.

Here, Ripstein focuses on the defective nature of the *relations* entailed by slave contracts: inter-personal relations of the kind presupposed by such contracts are intolerable as a matter of Right, simply because the right to be one's own master is, according to Ripstein, at the centre of Kant's legal and political thought.

But the defect in the “form of [the inter-personal] *relation*” presupposed by slavery contracts, surely, is not their *only* defect. Ripstein's discussion simply does not exhaust the range of the problems involved. The difficulty with such contracts can *also* be understood from the standpoint of the individual party purporting to become a slave, i.e., avowedly of his own volition. Here, the defect can be seen as consisting of an incoherent exercise of freedom by that party considered in isolation; what we *also* have, in this person's circumstances, is a problematic form of *self*-relation. The person wishing to become a slave purports to exercise his freedom in a manner that extinguishes that freedom, and that is impermissible as a matter of Right. Further, the two problems are neither distinct nor mutually exclusive; indeed, they are intimately connected: the slave-want-to-be purports to extinguish his own freedom by purporting to enter into a certain kind of relation with another person, the supposed master. And, indeed, as it happens, Kant explicitly recognizes that Right pertains to defects in self-relation as well, in so far as he invokes the duty of “rightful honour”, which, while I cannot fully explicate its meaning here, *is* a duty of Right. Ripstein recognizes this in a passage immediately preceding the one cited above, although in his overall exposition he tends to understate the full significance of Kant's notion of a duty of rightful honour because it is clearly inconsistent with Ripstein's steadfast emphasis that “Kantian independence [as self-mastery] is not a feature of the individual person considered in isolation, but of relations

between persons.”⁹⁴ Yet this special, essentially self-relational, duty of “rightful honour” cannot be avoided in any full account of the circumstances regulated by Right, which Ripstein (again, in a passage preceding the one cited above) appears to acknowledge:

The ... argument [against slavery contracts] can be stated in the vocabulary of the duty of rightful honor. ... [L]ike all duties relating to right, the “internal duty” of rightful honor restricts the ways in which a person can exercise his or her freedom to be consistent with the Universal Principle of Right. No rightful act on your part can bind you to a condition in which you are subject to another person’s choice. *So the limit on the exercise of your freedom must be the preservation of that freedom.*⁹⁵

Suffice it to say, then, that the inter-personal relations do not exhaust the domain of Right, and the Universal Principle of Right is capable of grounding restrictions on how persons exercise their freedoms with respect to themselves (for instance, with respect to their own bodies or their proprietary holdings) *in addition* to regulating freedoms exercised in the context of inter-personal relations, or the standing of any given person relative to others.

(d) *Suicide*

For Kant, an act of suicide is arguably the most clearly defective form of self-relation from the standpoint of freedom. It is impermissible because it is radically incoherent and irrational: as an act of freedom, suicide annihilates the (material) preconditions of its own possibility. For our purposes, perhaps the most pertinent passage regarding the Kantian prohibition on suicide is this:

A human being cannot renounce his personality as long as he is a subject of duty, hence as long as he lives; and it is a contradiction that he should be authorized to withdraw from all obligation, that is, freely to act as if no authorization were needed for this action. To annihilate the subject of morality in one’s own person is *to root out the existence of morality itself from the world, as far as one can*, even though morality is an end in itself. Consequently, disposing of oneself as a mere

⁹⁴ Ibid., 15.

⁹⁵ Ibid., 136. [emphasis added]

means to some discretionary end is debasing humanity in one's own person (*homo noumenon*), to which the human being (*homo phaenomenon*) was nevertheless entrusted for preservation. (MS 6: 422-423 [emphasis added])

Take note of the phrase “to root out the existence of morality itself from the world, as far as one can”. Here, Kant gives full expression to the sheer gravity of suicide as a moral offence: to will one's own death is a terrible thing because it entails renouncing autonomy in the most extreme way. It involves rooting out *morality itself* from the world, which practical reason certainly cannot sanction. The suicide does not just kill himself; rather, his death as a particular person, also brings about an annihilation of morality, i.e., as that which ultimately underwrites the possibility of freedom itself. Because humanity is something we all share, *noumenal* freedom being universally present in all persons, the implications of suicide transcend the particular act. To *will* the annihilation of morality, i.e., of the will itself, is perhaps the most profound contradiction of all.⁹⁶

Unfortunately, for Kant, the duty not to commit suicide is a duty of virtue, not an imperative of Right. But I claim this does not necessarily mean that suicide is irrelevant from the standpoint of Right altogether. At the very least, Kant appears to have been ambivalent about the status of suicide. At one point in the *Metaphysics of Morals*, albeit in the section on the *Doctrine of Virtue*, he directly claims: “Killing oneself is a *crime* (murder)” (MS 6: 422 [emphasis added]), which, at least if taken in isolation, suggests suicide is also impermissible as a matter of Right. Further, in earlier writings, Kant claims

⁹⁶ It is thus not surprising that Kant is deeply concerned with the problem of suicide and that he discusses it, throughout his works, both by way of articulating his conception of duties to oneself and as a central example in the universalizability and consistency requirements of his ethics. Suicide is perhaps the clearest instance of an inconsistent or contradictory end or maxim; just as the making of false promises is a good example of a course of action that is impermissible because its maxim cannot be universalized, or willed for everyone.

that the (attempter or) suicide forfeits his civil personality. Indeed, Kant had some rather callous things to say about the suicide, which would normally apply to the criminal. In the *Lectures on Ethics*, Kant claims that “suicide evokes horror, in that man thereby puts himself below the beasts. We regard a suicide as a carcase ...” (VE 27: 372) He goes on to say that one who attempts suicide loses his claim to human worth, that “he who takes himself for [a beast], who fails to respect humanity, who turns himself into a thing, becomes an object of free choice for everyone; anyone, thereafter, may do as he pleases with him; he can be treated by others as animal or a thing; he can be dealt with like a horse or a dog, for he is no longer a man; he has turned himself into a thing, and so cannot demand that others should respect the humanity in him”. (VE 27: 373)

While I would not wish to rest my case on (rather archaic and frankly disturbing) claims of this type, I would suggest that applicability of principles of Right to suicide can be established more directly, albeit via somewhat speculative reasoning. Consider the Universal Principle of Right, which states: “Any action is *right* if it can coexist with everyone’s freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with a universal law.” (MS 6: 230) Now, we might wish to ask: is suicide an action that can coexist with *everyone’s* freedom in accordance with a universal law; or, is suicide such an action that, pursuant to its maxim (i.e., “on its maxim”), the freedom of choice *of each* can coexist with *everyone’s* freedom in accordance with a universal law? The response could, reasonably, be in the negative: arguably, an act of suicide fails to coexist with *everyone’s* freedom in accordance with a universal law assuming only that, along with the freedom of “each” and “everyone”, we include the freedom of the suicide himself. The principle applies even if when we include the qualifier “if *on its maxim* the freedom of choice of each can coexist with everyone’s freedom in accordance with a universal law”: if the

suicide himself is included in the ranks of “each” and “everyone”, whose freedom of choice is supposed to coexist under a universal law, then it is quite clear that the freedom of choice of the suicide fails the test. As such, suicide can reasonably be said to violate the Universal Principle of Right. This is not to suggest that Kant would insist on the ex-post punishment of a successful suicide, as that would be patently absurd; but, he might agree that someone attempting suicide can be legitimately prevented from completing the act by means of ex-ante coercion.⁹⁷

(e) The Significance of Lying (or the Duty of Truthfulness) Under Principles of Right

In a *Supposed Right to Lie*, Kant explicitly considers the possibility that act of lying is contrary to Right even though no person in particular is wronged. While a comprehensive discussion of this issue is beyond our reach at this point, a passage from Edwards puts the matter succinctly:

Even in the event that no one in particular is wronged by an act of lying, the agent who lies nevertheless violates ‘the principle of right with respect to all unavoidable necessary statements in general’ ([VRML] 8:427). For Kant, this is as much as to say that a wrong is thereby ‘inflicted upon *humanity in general* [die Menschheit überhaupt]’ ([VRML] 8:426) even if an act of lying (and thus the lying agent) ‘escapes being subject to punishment by accident’ ([VRML] 8:427). It is specifically in view of the notion of the infliction of wrong on *humanity in general* that we are to understand the relation between lying and juridical wrongdoing. As Kant states towards the end of his article, the problem presented by lying is ‘not the danger of harming (accidentally [zufälligerweise]) but of doing wrong, as would happen if I make the duty of truthfulness, which ... constitutes the supreme juridical principle in statements, into a conditional duty subordinate to other considerations’ ([VRML] 8:429). In setting forth the unconditional duty of truthfulness, the supreme juridical principle in statements

⁹⁷ Alas, Kant does not draw an explicit connection between (ex-post) punishment and the authorization to coerce.

specifies a formal condition or requirement of external freedom that must be fulfilled if the infliction of wrong on humanity in general is to be avoided.⁹⁸

Suffice it to say, the notion that a lie may constitute a transgression under Right, as an infliction of a wrong on “humanity in general”, entails a conception of wrongdoing that is wider in scope than that suggested by Ripstein’s line of reasoning: the example of lying illustrates that it is possible to do wrong without wronging any person in particular, or affecting their capacity for self-mastery, or interfering with their pre-existing holdings (e.g., their bodily integrity or property). For our purposes, it is worth noting that, for Kant, the duty of truthfulness is a pre-condition of the possibility of humanity forming a united will – that is, lying disrupts our capacity to form a united will. And this, interestingly, as we shall see further below, is similar in nature to another pre-condition of the possibility of united will formation, namely the finite surface of the earth as a globe (or “the unity of all places on the face of the earth as a spherical [finite] surface”), which is an empirical, material pre-condition for the formation of civil society (since, in its absence (i.e., were the surface of the earth an unbounded plane,), there would be no necessity for humanity to come together or to form Rightful external relations in the first place).

⁹⁸ Jeffrey Edwards, "Truthiness and Consequences in the Public Use of Reason," *Veritas* 53, no. 1 (2008): 86-87. [emphasis added] See also: Jacob Weinrib, "The Juridical Significance of Kant's 'Supposed Right to Lie'," *Kantian Review* 13, no. 01 (2008).

6 - Kant's Theory of Property: What Does it Mean to Have Property in a Thing, or a Proprietary Holding as "Intelligible Possession"?

Now, arrangements between persons as to the exclusive use of objects, i.e., property relations, are simply one way in which persons enter into external and practical relations with each other. ("By the term 'property right' (*ius reale*) should be understood not only a right to a thing (*ius in re*) but also the *sum* of all the laws having to do with things being mine or yours." (MS 6: 261)) Property relations establish boundaries between persons in terms of their respective spheres of rightful action (or, in more familiar parlance, I may not hinder or otherwise adversely affect your use of that which belongs to you, without your consent). Direct, or physical interaction between persons, where the right of bodily integrity is engaged, is another such relation, though it is more rudimentary: it is a function of what Kant refers to as our "innate right", which (as I explain in greater detail below) is the single most elementary right we all enjoy, simply in virtue of being born, prior to *any* acts we might undertake establishing or acquiring (further) rights. In any case, property rights, in the simplest sense, are correlative to the duties of forbearance individuals owe each other by virtue of their co-existence in a system of mutual (external) constraint, i.e., civil society; although Kant does say that it is possible to have property in the state of nature, i.e., prior to the original contract, albeit in a "provisional" manner, for only in civil society are property rights fully secured and peremptory.⁹⁹

⁹⁹ The distinction between "provisional" and "conclusive" possession is put as follows: "Possession in anticipation of and preparation for the civil condition, which can be based only on a law of a common will, possession which therefore accords with the *possibility* of such a condition, is *provisionally rightful* possession, whereas possession found in an *actual* civil condition would be *conclusive* possession." (MS 6:257)

Further below I will discuss Kant’s claim that, pursuant to the Juridical Postulate with regard to rights, the acquisition of property is an imperative of freedom; that is, he insists that having property *must*, logically, be possible – it must, as conceptual demand of the idea *freedom as such*, be permissible for previously unowned things to be acquired and to become mine or yours, so that I and you can rightfully exercise freedoms beyond what is permissible under innate right alone. Otherwise, we would be confined to the rightful use only of our bodies, as entailed by innate right, which of course would mean we would be severely limited in the means we have at our disposal for pursuing our purposes. The possibility of ownership is, to use the terms we encountered above, a necessary *condition* of the idea of freedom. We must, simply put, be able to (rightfully) acquire external, material objects (in the external, material world or, more abstractly put, in “space and time”), to make them our own, thereby establishing secure, bounded relations of mine and thine, but *also* thereby expanding the scope of our capacity to act in the external, material world.

However, for now we need to say more about what it means to *have* property, i.e., to have something external that is one’s own, within his framework. According to Kant, if someone is able to say, “this external object is *mine*”, their expression entails “a *giving of a law* that holds for everyone ... since by it an obligation is laid upon all others, which they would not otherwise have, to refrain from using the object”. (MS 6: 253) Further:

[T]he real definition [of a “right to a thing” (*ius reale, ius in re*), the nominal definition of which is that “it is a right against every possessor of it”] would have to go like this: A right to a thing is a right to the private use of a thing of which I am in (original or instituted) possession in common with all others. For this possession in common is the only condition under which it is possible for me to exclude every other possessor from the private use of a thing (*ius contra quemlibet huius rei possessorem*) since, unless such a possession in common is assumed, it is inconceivable how I, who am not

in [physical or direct] possession of the thing, could still be wronged by others who are in [physical or direct] possession of it and are using it. ***By my unilateral choice I cannot bind another to refrain from using a thing, an obligation he would not otherwise have; hence I can do this only through the united choice of all who possess it in common.*** Otherwise I would have to think of a right to a thing as if the thing had an obligation to me, from which my right against every other possessor of it is then derived; and this is an absurd way of representing it. [...] By the term Property Right (*ius reale*) should be understood not only a right to a thing (*ius in re*) but also the sum of all the principles having to do with things being mine or yours. But it is clear that a man who was all alone on the earth could really neither have nor acquire any external thing as his own, since there is no relation whatever of obligation between him, as a person, and any other external object, as a thing. Hence, *speaking strictly and literally, there is also no (direct) right to a thing.* What is called a right to a thing is only that right someone has against a person who is in possession of it in common with all others (in the civil condition). (MS 6: 261)

Here, to summarize, Kant’s insistence that there can be no *direct* right to a thing can only mean that property rights to things are mediated in and through (external) relations among a plurality of persons: my having anything as my own is, strictly speaking, only possible within the setting of an (institutionalized) system of reciprocal, inter-personal relations, i.e., within civil society. Kant’s concern is that a person acting alone cannot, strictly speaking, *have* (or acquire) a right to any object because his standing with respect to that object can be rightful only by means of the choice of all. Rights, in other words, cannot be held in isolation, or unilaterally: they can only arise and be held via collective mediation, or “omnilaterally”.

Now, this means, in part, that to *have* property is not equivalent to making an ongoing choice in holding (or physically grasping) an object, or to somehow performing an act of perpetual (physical) detention. Rather, for Kant, property entails having an “object of one’s choice” as one’s own via what he calls “intelligible” as opposed to physical possession of the object in question. For an individual to own something entails

that that individual be attributed a normative status vis-à-vis that thing, and thus, does not require the individual to be engaged in any kind of ongoing (physical) activity of possession, or a perpetual exercise of freedom in (empirically) holding or detaining the thing. The idea of “having” property entails abstraction from spatiotemporal considerations concerning the empirical or physical detention of objects, and instead means thinking purely in terms of having (intelligible) “control” of them.¹⁰⁰ Despite this, property has to be understood as an essential aspect of external freedom (in its “positive” sense), not least because it is an indispensable pre-requisite for our ability to make meaningful choices and to have sufficient means to realize those choices. Much like the innate right of bodily integrity, property rights are meant to secure for each a sphere of personal, external freedom the violation of which constitutes a wrongful (coercible) act. Thus, “Possession is the connection of an object with myself so that on account of my freedom others restrain their will [*Willkür*] to use that object”. (*Vorarbeiten zur Rechtslehre*, 23: 212) In the *Metaphysics of Morals*, Kant qualifies this by positing that the type of “possession” established under Right is “intelligible possession”, or that there should be an “intelligible”, not empirical or physical, connection between the object and its owner, such that the owner may be wronged by another’s use of it even when the owner is not in direct physical possession of the object.

¹⁰⁰ Kant’s way of putting all of this is somewhat obscure: “Since the concept of right is simply a rational concept, it cannot be applied to *directly* to objects of experience and to the concept of empirical possession, but must first be applied to the understanding’s pure concept of *possession* in general. So the concept to which the concept of a right is direct applied is not that *holding* (*detentio*), which is an empirical way of thinking of possession, but rather the concept of *having*, in which abstraction is made from all spatial and temporal conditions and the object is thought of only as *under my control* (*in potestate mea positum esse*).” (MS 6:253)

But, as already suggested, *having* an object of one's choice as one's own is only possible omnilaterally, and not unilaterally, i.e., it is only possible in accordance with a universal law, pursuant to collective, social mediation. As Kant puts it, repeatedly, "my *rightful* power to make use of" an object must "coexist with the freedom of everyone in accordance with a universal law". (MS 6: 246) In the *Groundwork*, we saw that for any action to be rightful, i.e., *moral* (for, there Kant was not yet concerned with external relations, as he is in the *Rechtslehre*), the universalization of its maxim had to entail no contradiction; and, in keeping with what I would call a "relational (or inter-personal) conception of positive freedom" that takes account of the inescapable fact that we exist among a plurality of persons, practical reason could only approve a choice the maxim of which could be adopted by any and all rational beings at once. Similarly, my *having* an object of my choice rightfully as my own, whereby others may be coercively restrained from using it, is only possible under a universal law, i.e., a law applicable to all rational beings. In effect, my *having* an object of choice as my own must be sanctioned by practical reason in its external manifestation as the general will; ultimately, for me to actually own anything, my ownership of it must be possible (rationally permissible) under the Universal Principle of Right and, once civil society is established, the idea of the original contract.¹⁰¹ This is the key to understanding Kant's theory of property:

¹⁰¹ There is, accordingly, a tight conceptual connection between "practical reason", the "universal will", the "principle of right" and the idea of the "original contract", which I've presupposed throughout my discussion. This relationship has been described by Weinrib as follows:

Practical reason is the determination of purposive activity by the causality of concepts; similarly, the principle of right, that one person's action must be capable of coexisting with another's freedom, is the determination by the concept of right of the relationships governed by that concept. Both practical reason and the principle of right abstract the form of free choice from whatever content it happens to have, and make this form determine the operation of the free will. The

“intelligible” possession of an object, by any person as that object’s proprietor, is only possible if the proprietor co-exists with others in a setting (civil society) where his use of the object is universally (albeit only notionally) assented to by those others, who are after all, the non-proprietors vis-à-vis the object and thus, under an obligation, subject to coercion, to refrain from using it. This latter duty, i.e., to refrain from using an owned object, can only arise if it is assented to by those who owe it; otherwise, the duty would be imposed upon them in violation of *their own* right to be their own masters.

Put differently, Kant’s central concern is to give full expression to the proposition that property is a *relation* among wills with respect to the use of objects of choice, as opposed to a “direct” right or relation to things. A further implication of this is that, as with any (external) right, the formal character of property is a “reciprocal relation of choice”, as the sole basis of mutual obligation:

When I declare (by word or deed), I will that something external is to be mine, I thereby declare that everyone else is under obligation to refrain from using that object of my choice, an obligation no one would have were it not for this act of mine to establish a right. This claim involves, however, acknowledging that I in turn am under obligation to every other to refrain from using what is externally his; for the obligation here arises from a universal rule having to do with external rightful relations. I am therefore not under obligation to leave external objects belonging to others untouched unless everyone else provides me assurance that he will behave in accordance with the same principle with regard to what is mine. This assurance does not require a special act to establish a right, but *is already*

principle of right is therefore the external aspect of practical reason, or practical reason as it pertains to interaction among free wills. Under its external aspect, practical reason or *Wille* becomes the general or universal will (der allgemeine *Wille*). ... Just as practical reason holds free choice to the requirements of the rational nature of free choice, so the general will, as it functions in accordance with the principle of right, holds the external and practical relationship among those with free choice to the conceptual requirements of that relationship. (Ernest J. Weinrib, "Law as a Kantian Idea of Reason," *Columbia Law Review* 87, no. 3 (1987): 490.)

contained in the concept of an obligation corresponding to an external right, since the universality, and with it the reciprocity, of obligation arises from a universal rule. (MS 6: 255; emphasis added)

Now, Kant could have avoided the exceedingly difficult problem that will arise when we consider the question as to how *original acquisition* actually takes place (to be addressed in the next section) had he argued (for example, along with Fichte¹⁰²) that where the requisite “assurance” (or, for Fichte, “recognition”) is not provided, as in the state of nature, ownership as such is not be possible, since the reciprocity of obligations that is essential to the establishment of any right is not present. (Note that the idea that I would not be under an obligation to leave objects “belonging” to others untouched in the absence of a reciprocal, mutual assurance of forbearance – which, ultimately, is only provided in the civil condition – is a bit misleading, because, in the absence of such assurance, the concept of “belonging” as such would be, strictly speaking, meaningless). But Kant does not, as we shall see, adopt such a position: instead, he wants to say that property rights may be established (albeit “provisionally”) even in the absence such reciprocal assurances that are otherwise, strictly speaking, necessary for property rights to exist. The establishment of a civil condition merely secures such rightful possession. As Kant puts it, a “civil constitution is just the rightful condition, by which what belongs to

¹⁰² For Fichte, the legitimation of private property is premised on the explicit recognition of the putative owner’s right to a thing (of which he is at first merely a possessor) by others, and it is only through such external common legitimation that mere possession may become property. “When man is posited in relation to others, his possession becomes rightful only insofar as he is recognized by others. In this manner, he attains for the first time external common legitimation, common to him and the parties that recognize him. Thus possession becomes property for the first time, i.e., something individual.” (J.G. Fichte, *Foundations of Natural Right [1796-97]: According to the Principles of the Wissenschaftslehre*, trans., Michael Baur (Cambridge: Cambridge University Press, 2000), 117.) This means there can be no rightful property holdings in the state of nature, in Kant’s sense, not even in a “provisional” sense. (See generally: D. James, “Fichte's Theory of Property,” *European Journal of Political Theory* 9, no. 2 (2010).)

each is *only secured*, but not actually settled and determined. ... Prior to a civil constitution (or in *abstraction* from it) external objects that are mine or yours [i.e., ownership] must therefore be assumed to be possible”. (MS 6:256 [emphasis added]) Nevertheless, Kant’s point at this stage is relatively clear: it is only possible to really “have” an external object of my choice rightfully as my own under a universal law of external freedom (or in accordance with practical reason in its external manifestation as the general will) that governs “reciprocal relations of choice” among all rational beings and establishes mutual obligations of forbearance with respect to the use of external objects that may, thereby, be mine or yours.

All this further accounts for the core characteristic of Kantian property rights, namely that possession must be “intelligible”, as opposed to direct and physical. (For Kant’s full background explanation of the passages cited above, see: MS 6: 253.) For our purposes at this point, to say again, for Kant, ownership is not in any way dependent on a physical relation to an object. (This differs considerably from Hegel’s position, which is that possession, and hence ownership as such – although this latter inference is admittedly exegetically controversial – entails the immediate “presence”, in the sense of the external recognisability, of the owner’s will in the object itself. That is to say that the owner-and-thing-owned relation entails an essentially physical, objective relation of grasping, marking, making use of, or the manipulation of the object by its owner.) The validity of the concept of possession as intelligible (*noumenal*), as a concept of the understanding, is, in turn, associated with what I have called the strictly relational conception of property, as a right established via reciprocal relations of choice and mutual obligation under a universal law of freedom.

(a) Implications for the Environmentalist, Anti-Blackstonean Agenda

Unfortunately, Kant's theory of property at this stage carries no direct implications for our environmentalist agenda. Kant appears to place no explicit restrictions on the forms of use an owner may make of his holdings. Indeed, at certain points, Kant's definition of property appears to be consistent with the absolutist conception, as when he states: "an object of my choice is that which I have the physical capacity to use *as I please*, that whose use lies within my power (*potentia*)." (MS 6: 247; cf. 6: 249, 6: 254) However, any apparent consistency with the absolutist conception is, I claim, merely superficial. The unavoidable restrictions on the forms of use to which an owner is subject, especially with respect to land holdings, will become apparent further below in our discussion of the central premise of Kant's entire theory of property, namely the Juridical Postulate of Practical Reason, by means of which Kant explains the absolute *necessity* of property from the standpoint of freedom.

7 - Kant's Predicament Regarding Original Acquisition of Property: How is Unilateral Acquisition Possible?

Thus far, we have sketched out the meaning of property as such within the Kantian framework. At this stage, we must consider how property rights may be acquired originally. But here, Kant faces an exceptionally difficult problem: how is the *unilateral* acquisition of objects as property possible? This question is difficult for Kant because he insists it is permissible (possible) to acquire objects *unilaterally* even though: (a) as we have just seen, *having* property as such is only possible under *omnilateral* assent, i.e., pursuant to a United Will; and (b), as we are about to see, having and acquiring property *must be possible* pursuant to the Juridical Postulate of Practical Reason. In other words, although it is only possible to have property under a universal law of outer freedom, Kant also insists that the acquisition of property, first-possession, involves a unilateral, particular and necessarily physical, act of acquisition, or a choice that something external should be mine.¹⁰³ Here, Kant faces a seemingly intractable problem: how to bridge the gap between the particular and unilateral, on the one hand, and the universal or omnilateral, on the other? In other words, while it might be clear that to have an external object of my choice rightfully as my own is only possible via the authorization of practical reason in its external dimension (i.e., in the figure of the United Will), it is not immediately obvious how such rightful (and thereby intelligible) possession is established in the first place: how is it that merely by acquiring an object, through a physical act of taking possession, I effectively put each and all under an obligation, give “a law that

¹⁰³ Kant clearly endorses a version of the “original-acquisition” justifications of property (See generally: A. John Simmons, "Original Acquisition Justifications of Private Property," *Social Philosophy and Policy* 11, no. 2 (1994).), or what Waldron would call a principle of justice in acquisition which specifies “that the transition to the private ownership of a resource can be effected by the *unilateral action* of the individual who is to be the owner” (Waldron, 263. [emphasis added])

holds for everyone”, to leave that which I thereby possess untouched? The problem is internal to Kant’s framework, for, as we have seen, he insists that a unilateral or particular will cannot impose a universal obligation, and that, accordingly, even original acquisition must, in some sense, be a product of a relation between rational wills. The problem briefly put is that, in keeping with a relational conception of property, Kant maintains that original acquisition is only possible through a universal law-giving; and yet, he also insists that first possession is a unilateral act. Under what circumstances, then, could original acquisition be rightful?

The difficulty with Kant’s position is that first-possession is a *unilateral* act taken by one person without the assent or participation, either passive or active, implicit or explicit, of another; it is an *independent* exercise of freedom, an act that, in itself, makes no immediate reference to another person, although it does entail a demand that others should *subsequently* assent to and respect the relation between possessor and thing-possessed that is thereby established. In legal thought, at least, this is simply axiomatic.¹⁰⁴ Strictly “socialized” conceptions of property, where there is no room for pre-political (or pre-relational) property, such as that of Fichte, will tend to either deny the possibility of a proprietary *right* established unilaterally, i.e., by means of first possession alone, or will at least make it difficult to account for such a possibility. By contrast, Kant fully agrees

¹⁰⁴ See: (Peter Benson, "Philosophy of Property Law," in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. J. Coleman and S. Shapiro (Oxford: Oxford University Press, 2002), 756 ff.), and especially his discussion of *Pierson v. Post*.

that first-possession must be essentially unilateral: “the will that a thing ... is to be mine, that is, appropriation of it, in original acquisition can be only unilateral”. (MS 6: 263).¹⁰⁵

Recall that *immoral* action, for Kant, exhibits a kind of fatal particularity: it involves willing for oneself what could not simultaneously and equally be willed for or by an other (or by all others), or acting upon a principle that could not form the basis of properly reciprocal relations. Given this, original acquisition is *prima facie* problematic: although it does not involve the appropriation of anything belonging to any other persons, it does entail a unilateral modification of their (juridical) status, i.e., in the sense that all others are thereby (rightfully) excluded from using the acquired object. When I will that an object should be mine, and indeed *make* it mine as a matter of right, merely by physically grasping it, I place you at a disadvantage with respect to the object, impose upon you an obligation to stay away, and render you susceptible to coercion (under certain circumstances). And yet my action is not immediately or obviously reciprocated, i.e., you have an obligation (or duty of forbearance) with respect to me that I do not necessarily have with respect to you (for, it is possible that you have no object of your own in respect of which I might owe you a like duty of forbearance). It would seem, *prima facie*, that original acquisition is unacceptable from a Kantian moral standpoint as well as, more importantly in our context, under Kantian principles of Right.

The problem is especially acute in light of Kant’s suggestion that original acquisition, in so far as it unilaterally establishes an obligation that all others “would not otherwise have”, constitutes a *prima facie* detriment to the outer freedom of those with

¹⁰⁵ For Hegel, this is too obvious to have to state explicitly, and it is in any case implicit in his claim that the “principle that thing belongs to the person who happens to be the first in time to take it into his possession is immediately self-explanatory ...”. (PR §50)

whom we co-exist, since the law thereby established is coercible: “a unilateral will cannot serve as a coercive law for everyone with regard to possession, since that would infringe upon freedom in accordance with universal laws.” (MS 6: 256; cf. 6: 264) According to Flikschuch, the problem for Kant is that original acquisition by one person compromises the equal right to freedom of everyone else by limiting their range of options or possible modes of exercising their freedom: “Under conditions of unavoidable empirical constraints (i.e., the earth’s spherical surface) any exercise of choice by one compromises the freedom of everyone else by removing from availability to them external objects of their possible choice.”¹⁰⁶ (Hence an individual’s claim to exclusive possession of an external object would augment that person’s freedom by, in a sense, compromising the freedom of everyone else.)

However, this does not quite state the full extent of the problem as Kant sees it. Almost any exercise of choice whereby some external object is consumed or otherwise used by one will reduce the range of options available to others (e.g., once I eat an apple or take a drink of water, those objects are no longer available to you), and this does not in any obvious sense constitute a *violation* of their external freedom (especially if this is what the phrase “compromises” freedom suggests). The more serious issue, rather, is that original acquisition of a previously unowned object by one modifies the juridical status of all others in such a way as to render them susceptible to coercion, as I stated earlier. As Ripstein notes, what happens in the case of original acquisition of land (which is central for Kant) is that the first-possessor becomes entitled to coercively exclude all others from a given space even though, according to Kant himself, they previously had an innate right

¹⁰⁶ Flikschuh, 134; see also 135, 144.

to be anywhere on the surface of the earth, i.e., merely by virtue of their having been born within a finite space (i.e., the earth's spherical surface):

The problem about appropriation, from the standpoint of external freedom, arises from my entitlement to exclude others coercively. The problem is simplest in the case of land: by appropriating an unowned piece of land, I deprive nobody else of anything that they had. Once I have appropriated it, however, it becomes the case that, if anyone trespasses on that land, they wrong me, that is, they interfere with my external freedom. Because external freedom carries with that the authorization to coerce, I am entitled to coercively exclude others. My entitlement to coercively exclude them appears to be incompatible with the trespasser's innate right of humanity in his own person, a right which includes with that the authorization to be wherever one happens to be.¹⁰⁷

As I already suggested above, the problem is further compounded by the fact that there appears to be no obvious reciprocity as between owner and non-owner: owners through first-possession unilaterally acquire a (novel) right as against all others that is not necessarily possessed by them, and conversely, all others acquire a duty of forbearance that is not necessarily shared by the first possessor. In light of the universality requirements of juridical-practical reason, it might seem as if this would preclude the possibility of original acquisition altogether.

(a) The Juridical Postulate of Practical Reason

However, according to Kant's Juridical Postulate of Practical Reason, any unowned object (as *res nullius*) must be available for acquisition. That is, it *must* be possible to have an external object of one's choice as one's own, otherwise "freedom

¹⁰⁷ Arthur Ripstein, "Natural Law and Social Contract: Variations on Kantian Themes," (Conference on Contractarian Legal and Political Philosophy: University of Pennsylvania School of Law, 2003).

would be depriving itself of the use of its choice with regard to an object of choice, by putting usable objects beyond any possibility of being *used*”. (MS 6: 250)

Now, for the purposes of this thesis, the full statement of Kant’s Juridical Postulate (or as Kant technically calls it, the “Postulate of practical reason with regard to rights”) is the single most important passage in Kant’s *Metaphysics of Morals* and the lynchpin of my entire argument, and as such must be cited in full:

It is possible for me to have any external object of my choice as mine, that is, a maxim by which, if it were to become a law, an object of choice would *in itself* (objectively) have to *belong to no one* (*res nullius*) is contrary to rights. For an object of my choice is something that I have the *physical* power to use. If it were nevertheless absolutely not within my *rightful* power to make use of it, that is, if the use of it could not coexist with the freedom of everyone in accordance with a universal law (would be wrong), then ***freedom would be depriving itself of the use of its choice with regard to an object of choice, by putting usable objects beyond any possibility of being used***; in other words, ***it would annihilate them in a practical respect and make them into res nullius, even though in the use of things choice was formally consistent with everyone’s outer freedom in accordance with universal laws***. – But since pure practical reason lays down only formal laws as the basis of using choice and thus abstracts from its matter, that is, from other properties of the object *provided only that it is an object of choice* [i.e., something usable], it can contain no absolute prohibition against using such an object, **since this would be a contradiction of outer freedom with itself**. (MS 6: 250 [emphasis in bold added])

As Guyer notes by way of explaining Kant’s postulate, the “moral possibility of property rests, in the first instance, on the assumption that it would be *irrational* to deny ourselves the use of objects that can be used as means to our ends and that, at least in the case of physical objects, the objects themselves have no rights, or we have no obligations to them, that would block this use.”¹⁰⁸ Suffice it to say, a solution to the normative

¹⁰⁸ Paul Guyer, "Kant's Deduction of the Principles of Right," in *Kant's Metaphysics of Morals: Interpretive Essays*, ed. Mark Timmons (Oxford: Oxford University Press, 2002), 59.

predicament posed by the notion of “unilateral acquisition” is required if Kant’s theory as a whole is to be plausible; and since the logic of the Juridical Postulate is, as it were, self-standing and self-contained, any solution must introduce further considerations distinct from it.

8 - Kant's Solution to the Predicament: The Lex Permissiva or the United Will as the Consolidation of Civil Society

As we have just seen, Kant insists that it can, and must, be possible for an act of unilateral physical (original) acquisition to result in “intelligible (rightful, proprietary) possession” of the object acquired, even though “intelligible possession”, in turn, requires omnilateral assent, which is only possible under the United Will. Kant requires a solution to the inherent dilemma present in his claim, and so he (somewhat arbitrarily) posits that the validity of the right of a first-occupant follows immediately from the Juridical Postulate, and invokes the notion of a *lex permissiva* as the basis of that right:

This postulate can be called a permissive law (*lex permissiva*) of practical reason, which gives us an authorization that could not be got from mere concepts of right as such, namely 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. Reason wills that this hold as a principle, and it does this as *practical* reason, which extends itself a priori by this postulate of reason. (MS 6: 247)

Accordingly, the idea of a permissive law is Kant's first basic solution to the underlying problem of how a right (and corresponding universal obligation) may be established through an act of mere first-possession, i.e., an ostensibly unilateral, physical act of original acquisition, even though such an act cannot strictly speaking establish universal, coercible obligations.¹⁰⁹

¹⁰⁹ Recall Kant's claim in this regard: “Now, a unilateral will cannot serve as a coercive law for everyone with regard to possession that is external and therefore contingent, since that would infringe upon freedom in accordance with universal laws. So it is only a will putting everyone under obligation, hence only a collective general (common) and powerful will, that can provide everyone this assurance. – But the condition of being under a general external (i.e., public) lawgiving accompanied with power is the civil condition. So only in a civil condition can something external be mine or yours.” (MS 6: 256)

However, Tierney has explored Kant's use of the *lex permissiva* in his justification of property at length¹¹⁰ and has arrived at the conclusion that Kant's usage of this notion is ultimately untenable within his own framework. As he states:

Kant repeatedly asserted that rightful possession must depend on consent expressed in "a collective general (common) and powerful will," "a will that is united *originally* and a priori"; but he acknowledged that such a general will would not exist in a state of nature before the institution of civil society and that an act of original acquisition would necessarily proceed from a unilateral will. "But the will that a thing is to be mine ... can be only *unilateral*." And yet Kant also wrote, "By my unilateral choice I cannot bind another to refrain from using a thing, an obligation he would not otherwise have." Kant never did explain how a permissive law, allowing a person to act unilaterally, could impose an obligation on others.¹¹¹

Kant's attempt to derive an authorization of the right of a first-occupant, and the corresponding universal obligation, from a permissive law – an authorization that otherwise "could not be got from mere concepts of right as such" – seems to be rather inconsistent with Kant's thoroughly relational conception of property, as a right that is only possible under reciprocal relations of choice. Reason's endeavour to "extend itself" by means of this postulate seems to be arbitrary (for, as Tierney notes, the apparent role of permissive law is "to allow something that would otherwise be prohibited"),¹¹² which is an unusual move for a thinker like Kant.

¹¹⁰ See: Brian Tierney, "Kant on Property: The Problem of Permissive Law," *Journal of the History of Ideas* 62, no. 2 (2001); Brian Tierney, "Permissive Natural Law and Property: Gratian to Kant," *Journal of the History of Ideas* 62, no. 3 (2001).

¹¹¹ Tierney, "Permissive Natural Law and Property: Gratian to Kant," 382.

¹¹² Tierney, "Kant on Property: The Problem of Permissive Law," 309.

Nevertheless, Kant clearly posits that, pursuant to the juridical postulate of practical reason, it *must* be possible to have an external object of one’s choice rightfully as one’s own (under a universal law of freedom), and that possession *must*, thereby, be intelligible (non-empirical). Put simply, because of the essential contradiction involved in asserting the converse (as explained above), it must be possible to rightfully acquire objects originally. This is clear, as it stands. However, Kant also wants, at this stage, to justify the permissibility of a unilateral imposition of a coercible universal obligation, which is entailed in original acquisition, on the basis of the Juridical Postulate (restated in the form of a permissive law).¹¹³ Indeed, Kant also wants to say both: (a) that the possibility of intelligible (i.e., non-physical and rightful) possession in general can be “inferred” from the Juridical Postulate as an immediate consequence of it; and (b) that the possibility of original acquisition is, likewise, an *immediate consequence* of the Juridical Postulate. (cf. MS 6:252) But in light of Kant’s insistence that a unilateral and particular will cannot bind universally, the elementary *rightfulness* of such acquisition seems, at least, to be insufficiently supported by the Juridical Postulate itself. On its face, the Juridical Postulate is meant to establish merely the necessity of original acquisition, i.e., on the premise that practical reason cannot sanction a law that renders usable objects of choice unusable (or *res nullius*) because this would be self-contradictory, it would entail “a contradiction of outer freedom with itself”. But from this alone it cannot immediately or obviously follow that unilateral original acquisition can and must also be legitimate

¹¹³ As Tierney notes, Kant simply asserts the identity of the juridical postulate as a permissive law, without actually explaining how this is so. Moreover, in substance, the idea of a permissive law in the Doctrine of Right seems to be inconsistent with Kant’s invocation of the same term in other works.

from a normative standpoint, i.e., from the standpoint of the universality requirements of juridical-practical reason.

Whatever the difficulties entailed by the notion of the “*lex permissiva*” as such, which cannot detain us here, what matters is that for Kant the Juridical Postulate ultimately necessitates our entry into civil society, where our acquisitions are rendered conclusive and rightful under the United Will. Again, because it *must* be possible to acquire objects unilaterally, and because the only way unilateral physical acquisition can be converted into rightful intelligible possession is by having a unilateral act *somehow* being brought under the rubric of the United Will, the necessity of the possibility of original acquisition *ultimately* entails the necessity of entry into civil society, where all provisional acquisition is rendered conclusive. Put simply, the Juridical Postulate entails the *genesis* of the state and civil society. That, fundamentally, is Kant’s resolution of the problem concerning the gap between the particular-unilateral act of acquisition, on the one hand, and the necessarily universal-omnilateral character of property ownership, on the other. Whatever the merits of the notion of the *lex permissiva* in itself, Kant’s ultimate solution is to invoke the inevitability of constructing civil society *given that original acquisition must be possible*. Kant’s ultimate solution demonstrates just how crucial and imperative the import of the Juridical Postulate is within his overall legal and political system.

Firstly, in this regard, I note that the exposition of the concept of *having* an external object as one’s own, together with the idea of intelligible possession, is supposed to immediately produce “a duty of right to act towards others so that what is external (usable) could also become someone’s”, which does go some way towards addressing the problem of omnilateral reciprocity indicated above. (MS 6: 252) Put simply, because it

must be possible to have an external object rightfully as one's own (*noumenally*), it is also necessary to suppose that original acquisition is possible, and also that there is a kind of reciprocity already implicit in the act of first possession, i.e., the notion that by asserting a right of original acquisition for myself, I must acknowledge the existence of a like right for others.

But more importantly, Kant claims that original acquisition can only be undertaken with “a view” towards the establishment of a civil condition. As Tierney explains:

An act of original acquisition had to be “in conformity with the Idea of a civil condition, that is, with a view to it and to its being brought about though prior to its realization.” It was the common duty to enter civil society that justified the use of coercion to bring about this condition. Not only was original acquisition possible, but, Kant wrote, “*provisionally*, it is a *duty* to proceed in accordance with the principle of external acquisition.” And again the doctrine of permissive law was invoked. “Provisional acquisition, however, needs and gains the permission of a law (*lex permissiva*)...” This passage concludes with a restatement of an antinomy that runs through Kant's argument. The acquisition justified by permissive law did not extend beyond the point at which others consented to it; but if they refused to consent the acquisition was still in conformity with Right because they all had a duty to enter civil society. [Note: “Since this acquisition precedes a rightful condition and, as only leading to it, is not yet conclusive, the permission does not extend beyond the point at which *others* (participants) consent to its establishment. But if they are opposed to entering it (the civil condition) ... this permission carries with it all the effects of acquisition in conformity with Right, since leaving the state of nature is based upon a duty.” (MS 6: 267)]¹¹⁴

The notion that original acquisition can be legitimate so long as it is undertaken “with a view” to the establishment of the civil condition is just this: one should and *must* as

¹¹⁴ Tierney, "Kant on Property: The Problem of Permissive Law," 307.

function of the requirements (the conditions) of *freedom* as such be able to acquire objects (most importantly, land) even in the state of nature, and thus, must also have the right to coercively exclude others from what one has acquired, if only provisionally in the state of nature; but, since one would only have such a right on a peremptory, conclusive basis in the civil condition, entry into the civil condition is itself a (coercible) duty. If I assert an exclusionary (and coercible) proprietary right, and another person happens to object, my (unilaterally) self-positing right is nevertheless provisionally legitimate because I also happen to have a right to compel the objector to enter the civil condition wherein my one-sided and provisional right will be transformed into a peremptory right via the authority of a common, United Will. In other words, because I have the right to compel my neighbour to enter into a civil condition along with me (because it is his duty), a condition wherein all obligations are ultimately effected by a common, United Will and all rights hence rendered fully secure, I also have a right to presume or act *as if* my unilateral imposition of an obligation upon all others is rightful and legitimate, even though, strictly speaking, it may be deeply problematic from a normative standpoint.¹¹⁵

Put differently, the Juridical Postulate, according to Kant, is actually *the very impetus* for the construction of, and our duty to enter into, civil society. From the Juridical Postulate follows ineluctably the Postulate of Public Right. Weinrib explains the extended logic of Kant's argument, and is worth quoting in full on this point:

¹¹⁵ Kant could conceivably have avoided this problem altogether by arguing (along broadly Fichtean lines) that original acquisition is not co-extensive with unilateral first-possession (as we have assumed it to be thus far) or based on a particular act by an individual, but rather that "original" acquisition could only be an act of *allocation*, in a civil condition, by a public authority properly constituted as the representative of the general will and, as such, endowed with authority to impose a universal law. I am uncertain why, but Kant does not take this route; instead, he sides with Locke in saying that pre-political holdings, albeit provisional, are nevertheless rightful and legitimate.

... 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." 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 [entry into civil society] that establishes the conditions under which external property is conclusively rightful. ... This transformation of provisional rights into conclusive ones occurs [when] 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. ... This notional union of all wills [in civil society] transforms the external acquisition of unowned things from a merely unilateral act on the part of the acquirer to an omnilateral act ...¹¹⁶

For our purposes, it is important to note just how much weight the Juridical Postulate carries within Kant's system: the train of thought that leads from: (a) the core point about the necessary pre-conditions of freedom as such and the concomitant demand that freedom cannot contradict itself lest original acquisition be rendered impossible (and usable objects be rendered *res nullius*), to (b) a United Will forming the rubric of a civil condition that renders such acquisition possible and conclusive, may well be difficult, at many points convoluted, and certainly circuitous, yet is clearly of vital importance to the overall system.

¹¹⁶ Ernest J. Weinrib, "Poverty and Property in Kant's System of Rights," *Notre Dame Law Review* 78, no. 3 (2003): 808-809. [emphasis added]

9 - Implications of the Juridical Postulate for the Environmental Agenda

In order to understand the anti-absolutist import of the Juridical Postulate, we must ask again: how wide or narrow is the meaning of the term “freedom” in the relevant passage?¹¹⁷ What does Kant mean, precisely, in claiming that if it were “absolutely not within my rightful power to make use of” objects of choice, or if their use could not coexist with the freedom of everyone, then “*freedom* would be depriving *itself* of the use of *its* choice with regard to an object of choice ...”? or, when he claims that “pure practical reason ... can contain no absolute prohibition against using such an object, since this would be a *contradiction* of outer freedom *with itself*.”?

(a) Comprehensive Exposition of the Meaning and Significance of Kant’s Juridical Postulate

We have already noted Guyer’s exposition, which is that the “moral possibility of property rests, in the first instance, on the assumption that it would be *irrational* to deny ourselves the use of objects that can be used as means to our ends”. Guyer further claims that the postulate entails that it would be a “contradiction in *practical reason itself* to deny ourselves the use of objects” and that this

... presupposes the canon of rationality that underlies all of Kant’s claims about contradictions in willing, the presupposition that if it is rational to will an end then it must also be rational to will the means (see [GMS] 4:417). ... [Accordingly,] just as that principle must always be restricted by the permissibility of using an object in question as a means ... so here too the argument that it would be irrational to deny ourselves the use of something that could be useful as a means

¹¹⁷ The full passage is reproduced at p. 96 above.

must be supplemented by the premise that it is permissible to treat an external object merely as a means.”¹¹⁸

However, Guyer’s reading, albeit quite informative, is somewhat generic: I believe we will still need to understand, at a deeper level, what exactly it means to say that “*freedom* would be denying its own capacity to make use of material objects” or that there would be a “contradiction in *practical reason itself* to deny ourselves the use of [ostensibly usable] objects”. Again, what sense, exactly, of “freedom itself” or “practical reason”, does Kant intend in the Juridical Postulate?

Here, we encounter two possible readings, one of which is thrust on us by Ripstein and his insistence that the *Doctrine of Right* is strictly and exclusively concerned with freedom as a contrastive, inter-personal concept, and that the Universal Principle of Right is a rule exclusively about the harmonization, under universal law, of disparate choices among a plurality of persons. As we have already seen to some extent in our discussion

¹¹⁸ Guyer, "Kant's Deduction of the Principles of Right," 57-58. For a further, albeit also orthodox, exposition of the Juridical Postulate, see: Robert B. Pippin, "Mine and Thine? The Kantian State," in *The Cambridge Companion to Kant and Modern Philosophy*, ed. Paul Guyer (Cambridge: Cambridge University Press, 2006), 430. Note also the following exposition by Flikschuh:

The general prohibition urged by the antithesis [that ownable things cannot be acquired as someone’s] effectively amounts to a denial of any but the most trivial kind of agency. A denial of the possibility of agency cannot constitute a principle of practical reason. Hence the thesis wins by default: if the denial of the possibility of external possession is contrary to Right, external possession *must* be possible. Yet on the present interpretation the postulate’s apparent affirmation of the thesis remains worrying. After all, the thesis’ solution also entails a violation of the universal principle of Right. Strictly speaking, however, the postulate does not affirm the rightfulness of the thesis. It only affirms that external possession *must be possible*, insofar as its general prohibition would be contrary to Right. (Katrin Flikschuh, "Freedom and Constraint in Kant's *Metaphysical Elements of Justice*," *History of Political Thought* 20, no. 2 (1999): 264. [emphasis added])

regarding the impermissibility of slavery contracts above, Ripstein insists that the notions of independence and self-mastery (which pertain to freedom in inter-personal relations) are distinct from the notion of autonomy (which entails being able to be the author of one's own life and having a range of valuable options to pursue). Ripstein elucidates the difference as follows:

Kantian independence is not a feature of the individual person considered in isolation, but of relations between persons. Personal autonomy contrasts with dependence on circumstance. Independence contrasts with dependence on another person, being subject to that person's choice. Independence is relational, and so cannot be predicated of a particular person considered in isolation. The difference is important from two directions. First, in principle a slave with a benevolent master and favorable circumstances could be autonomous in the contemporary technical sense. A slave could never be independent, because what he is permitted to do is always dependent on his master's choice or grace. Second, autonomy can be compromised by natural or self-inflicted factors no less than by the deeds of others; Kantian independence can only be compromised by the deeds of others. It is not a good to be promoted; it is a constraint on the conduct of others imposed by the fact that each person is entitled to be his or her own master.¹¹⁹

Further, Ripstein insists that freedom as independence or self-mastery pervades the entirety of Kant's legal and political thought, to the *exclusion* of freedom as autonomy:

The idea of independence carries the justificatory burden of the entire argument, from the prohibition of personal injury, through the minutiae of property and contract law, on to the details of the constitutional separation of powers. Kant argues that these norms and institutions do more than enhance the prospects for independence: they provide the only possible way in which a plurality of persons can interact on terms of equal freedom. Kant's concern is not with how people should interact, as a matter of ethics, but with how they can be forced to interact, as a matter of right.¹²⁰

¹¹⁹ Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy*, 15.

¹²⁰ *Ibid.*, 14.

On this reading, Kant’s Juridical Postulate would appear to entail nothing more than that unrestricted private access to usable objects, by any given individual *relative* to others, is a requirement of system of inter-personal relations governed by Right. The Postulate does not, on this take, mean that access to usable objects is a requirement or demand of Right *in general*.¹²¹

I concede that I find Ripstein’s insistence that “freedom” within the meaning of the Juridical Postulate precludes “a premise about the benefits of having things subject to your [individual] choice, or about the need for having external objects to fully realize your [individual] purposiveness” somewhat perplexing. It seems to me that, just as in the cases of slavery contracts, suicide or the duty of truthfulness, Kantian Right is not *exclusively* concerned with setting requisite boundaries as between individuals, i.e., with inter-personal relations, without any regard to individuals’ standing or status, i.e., as a function of their self-relation. In other words, it strikes me as arbitrary to look at just one side of the equation: is it really possible to say that Kantian Right does not (to *any* extent) aim to protect persons’ autonomy or self-mastery in isolation from others or, conversely, that you are independent *only* relative to others, i.e., to the extent that you are free from

¹²¹ In his exegesis of the Postulate, Ripstein states the following:

... Kant argues that the exercise of acquired rights [as dictated by the Juridical Postulate] is consistent with the freedom of others, because it never deprives another person of something that person already has. So anything less than fully private rights of property, contract, and status would create a restriction on freedom that was illegitimate because based on something other than freedom. [...] Consider ... the formal nature of purposiveness and so of freedom. *If Kant’s argument depended on a premise about the benefits of having things subject to your choice, or about the need for having external objects to fully realize your purposiveness, it could not generate a constraint on the conduct of others.* Others owe you no enforceable duty of right to see to it that you receive a benefit, or even that your purposiveness is realized. (ibid., 62-63. [emphasis added])

interference by others. Surely, whether or not you have, for example, a body or proprietary holdings, with and through which you can exercise your freedoms (means suitable to your “purposes”), *must* matter from the standpoint of Right, not least because making any determination as to how others have or could affect your body or holdings – whether or not the means you have at your disposal to effect your purposes have, for example, been violated or interfered with by others – is impossible in the absence of some determination about, or some evaluation of, the condition or status of your body or holdings in the first place. Simply put, no *relationship* between persons can be properly assessed without an assessment of the standing of the individuals that comprise the relationship: for instance, you cannot determine if a given individual is free from (non-consensual) constraint or interference by another person without evaluating that individual’s condition *in addition* to evaluating his relationship to that other person. Suffice it to say, it strikes me that the strict division Ripstein insists upon is ultimately untenable: rather, I would maintain that freedom as autonomous self-relation and freedom as inter-personal independence are *not* mutually exclusive.¹²²

In any event, notwithstanding Ripstein’s reading of Kantian Right, I would maintain that an equally valid interpretation of the Juridical Postulate is that Kant, thereby, sought to draw a tight entailment between property and freedom in general. As such, the Juridical Postulate is perfectly compatible with Hegel’s understanding of the

¹²² It is somewhat surprising, then, that in a separate passage, Ripstein offers a more generic interpretation of the Juridical Postulate, where he elaborates on its meaning as follows: “the possibility of a rightful relation with respect to property follows from the postulate of practical reason with regard to rights, which is supposed to show that it must be possible to have rights to things other than your own person or powers, insofar as these other things could be available as means for setting and pursuing *your own* purposes.” (ibid., 86. [emphasis added])

connection between property and freedom as reflected in certain key passages from The Philosophy of Right, which can be read in conjunction with Kant's, in that they help elucidate the meaning of the latter. The laws of freedom, as Kant and Hegel would insist, demand that persons have use-rights over objects in nature that, as Guyer noted, can "have no rights that would block their use" or over objects as "rightless factors", to use Winfield's term, or a "thing" as "something *unfree*", "lacking subjectivity" (and the capacity for purposiveness"), and that is "external in and for itself", to use Hegel's own idiom.¹²³ Indeed, both Kant and Hegel are emphatic about this: in order to be free and mutually independent and, more fundamentally, in order to have effective presence in the external world, or, to be able to "actualize" and "objectify" (in Hegel's language) one's subjective purposes, persons must be permitted to rightfully acquire and use previously unowned objects, i.e., to have secure access to objects in the external world. The primary exemplars of such objects are, as we have already seen, the "things" (*Sache*) that comprise the natural environment, for example, land or movables inhering upon it.

In this respect, Hegel first claims that "a person must give himself an external sphere of freedom in order to have being as Idea. [...] Not until he has property does the person exist as reason." (PR §41) Further, Hegel makes a claim that can readily count as a plausible background exposition of the meaning of Kant's Juridical postulate: where Kant refers to the logical impossibility of placing ostensibly usable objects beyond the

¹²³ Here is Hegel on the meaning of "things" (*Sache*) being devoid of spirit:

What is immediately different from the free spirit is, for the latter and in itself, the external in general – a *thing*, something unfree, impersonal and without rights. ... What is external for the free spirit (which must be clearly distinguished from mere consciousness) is external in and for itself; and for this reason, the definition of the concept of *nature* is that it is the *external in itself*. ... Since a thing has no subjectivity, it is external not only to the subject, but also to itself. (PR §42)

possibility of being used, Hegel refers to the absolute right of each person to “place his will into any and every [external] thing (*Sache*)”, thereby making it his *property*; the “thing thereby becomes *mine* and acquires my will as its substantial end (since it has no such end within itself), its determination, and its soul – the absolute *right of appropriation* which human beings have over all things [*Sachen*]” (PR §44). The full passage encompassed in the Addition reads as follows:

All things can become property of human beings, because the human being is free will and, as such, exists in and for himself, whereas that which confronts him does not have this quality. Hence everyone has the right to make his will a thing or to make the thing his will, or, in other words, to supersede the thing and transform it into his own; for the thing, as externality, has no end in itself, and is not infinite self-reference but something external to itself. ... The will alone is infinite, *absolute* in relation to everything else, whereas the other, for its part, is merely *relative*. Thus to appropriate something means basically only to manifest the supremacy of my will in relation to the thing and to demonstrate that the latter does not have being in and for itself and is not an end in itself. This manifestation occurs through my conferring upon the thing an end other than that which it immediately possessed; I give the living creature [or non-living thing], as my property, a soul other than that which it previously had; I give it my soul. (PR §44A)¹²⁴

I suggest that this passage parallels, or is at least analogous to, Kant’s Juridical Postulate. Given his claims above, Hegel would likely find it difficult to disagree with the Kantian

¹²⁴ Kersting’s take on the Juridical Postulate is squarely in line with the Hegelian variant:

[The postulate affirms] the right to dominion [*Herrschaftsgewalt*] over external objects [as] a natural entitlement of freedom of choice [which] cannot be lawfully restricted. Any legal regulation must be rejected, whose norms restrict or even deny freedom’s right of dominion over the realm of objects. The postulate constitutes a transcendental relation of Right [*transzendentes Rechtsverhältnis*] between freedom of choice as such and external objects; it confers upon freedom of choice an absolute legal power [*Rechtsmacht*] over external objects. (Wolfgang Kersting, "Freiheit Und Intelligibler Besitz: Kants Lehre Vom Synthetischen Rechtssatz a Priori," *Allgemeine Zeitschrift für Philosophie* 6, no. (1981): 38. As cited in: Flikschuh, *Kant and Modern Political Philosophy*, 128.)

claim that it is rationally inconceivable for ostensibly usable objects to be placed beyond the capacity, and legitimate power, of any person to actually use them or that it is morally necessary that the scope of the legitimate exercise of freedom should be extended to permit persons to have exclusive use of objects of choice, i.e., physical means at their disposal, beyond the use of just their own physical bodies.¹²⁵

Hence, all objects that are *res nullius* are in principle open to appropriation and use for human purposes. From the standpoint of Right, as far as both Kant and Hegel are concerned, there can be no coherent rule against the possibility of proprietary appropriation or, there can be no rule dictating that objects that are *res nullius*, or should remain such, i.e., beyond the capacity of anyone to appropriate and use them, for such a prohibition would indeed be a “contradiction of outer freedom with itself” (MS 6: 247), especially in a context where freedom encounters intrinsically (freely) usable resources. In this regard, the Juridical Postulate could reasonably be interpreted as a secular version of Locke’s frequently cited take on the most elementary axiom of property theory, namely

¹²⁵ In support of my claim here, I note that Ryan also sees underlying parallel between Kant and Hegel’s theories of property. He summarizes Hegel and Kant’s basic ideas regarding property as follows:

The main lines of Hegel's account of property rights are very like Kant's, in that he begins with the right of the free will to externalise itself. Put less opaquely, this amounts to saying that the idea that we are free agents makes little sense unless we are free to do something; what we do makes a difference to the physical world, so we must have the right to control it, alter it and dispose of it in the exercise of our freedom. The thought that we might not be able to appropriate things is incoherent, for what can prevent us? The appropriating will can only be forestalled by another such will, and things have no such will of their own (T)he world needs an owner; it has no value or point until it is given one. (Alan Ryan, *The Making of Modern Liberalism* (Princeton, N.J.: Princeton University Press, 2012), 593.)

that the inherently consumable or usable things present in our environment are open, amenable and yielding to consumption and use by us:

God ... made Man, ... and furnished the World with things fit for Food and Rayment and other Necessaries of Life, subservient to his design, that Man should live and abide for some time upon the Face of the Earth, and not that so curious and wonderful a piece of Workmanship by ... want of Necessaries, should perish again, presently after a few moments continuance ...¹²⁶

Hegel's explanation regarding the necessary connection between property ownership and freedom is similar to Kant's in terms of its core elements, and yet I should also acknowledge that there are differences. I maintain that what Hegel is doing with his account is deepening and broadening Kant's: certain themes that remain implicit in the Kantian postulate are made explicit by Hegel. Hegel, I would suggest, is simply offering a philosophically more comprehensive background to Kant's theory. Firstly, for Hegel, as for Kant, we *must* be free to forge a connection with external things through ownership. External things, as "rightless factors", are inherently usable and ownable, but if there

¹²⁶ Accordingly, Waldron makes a point in connection with Locke's theory of property that is closely related to (or at least compatible with) the core meaning of the Juridical Postulate (as well as Hegel's key paragraph as cited above), namely that ostensibly usable things are (by right) free to be used:

As creatures with needs and appetites finding themselves in a world of resources capable of satisfying them, none of us can be criticized, at least in general, for making use of what is evidently useful. As we have seen, the task of a theory of property is to determine, when there are disputes, who is to make use of what; but the starting point of any but the most fanatically ascetic theory must be that useful objects are there to be used for the support and comfort of human life. (Waldron, 143.)

Of course, Kant and Hegel would deny that the satisfaction of biological necessities in particular could give rise to the moral necessity of property, i.e., to the normative availability of ostensibly usable things for actual use by humans; instead, they would insist that our capacity for *freedom* as such grounds the moral necessity property.

were a rule prohibiting us from using and owning them, our capacity for freedom would be radically frustrated.

But why, for Hegel, would persons, as it were, seek to use and own things in the first place? At its simplest, the answer is that, because freedom is meaningless apart from active engagement in, with and through the (external) world, including engagement and interaction with other persons. Autonomous agents, even construed in the narrower sense as agents capable of “self-mastery” or “independence” (in Ripstein’s idiom), must overcome their initial isolation as subjects with “inner” lives; they must assert themselves in the external world, and must demarcate areas of the world within which they may effectively pursue their purposes. The capacity to freely choose among ends cannot be sustained in a vacuum, or in circumstances wherein any, or all, choices fail to be actualized, made real, or “objectified”. Put differently, freedom is nothing if it cannot be given effect in time and space. Or, as Waldron puts it, individuals “need to ‘embody’ the freedom of their personalities in external objects so that their conceptions of themselves as persons cease to be purely subjective and become concrete and recognizable to themselves *and* others in a public and external world.”¹²⁷ To put it in potentially

¹²⁷ Ibid., 353. [emphasis added]. Waldron explains in greater detail as follows:

Fundamental to Hegel’s philosophy is the principle that mind or freedom is necessarily embodied – that it does not make sense to conceive of its existence in any ‘pure’ or transcendent form. That principle applies to free will at every stage of its development. ... For the person, the first step in this process of externalization is the establishment of the bare principle of his personality in the public world of material objects. Hegel’s thesis is that by appropriating, owning and controlling objects, a person can establish his will as an objective feature of the world and transcend the stage in which it is simply an aspect of his inner and subjective life. (ibid., 355-356.)

derogatory and controversial terms, the free will requires *lebensraum*.¹²⁸ (Although this latter term entails difficult, undoubtedly controversial associations, I hope it helps to remind us that Kant and Hegel’s entire line of reasoning in these passages is thoroughly and decisively anthropocentric; I am certain environmental ethicists of a more “radical” critical bent would have no qualms in using even more contentious, perhaps even contemptuous, terminology.)¹²⁹ Hegel’s own way of putting it is that “the rationale of

¹²⁸ Though similar to Waldron’s account, Brudner’s way of explaining our need of self-externalization is rather more complex, and is worth citing in so far as it conveys something of the flavour of the Hegelian terminology and mode of thought pertaining to this issue:

Personality’s need of things can be explained in the following way. The person claims to be an unconditioned end, and yet it is in fact conditioned as an emptiness by the very world of finite beings from which it is abstracted. As that which is not finite, personality depends for its identity on the world of finite things. This dependence confers on finite things an independent reality to which personality is not juxtaposed. The juxtaposition of personality to an independent other, however, converts personality into something finite and particular. A disparity thus opens between personality’s subjective conviction of absolute worth and the reality of its dependent and finite existence. In so far, therefore, as personality remains alongside a world independent of it, it is self-contradictory as an unconditioned reality. This internal contradiction implies that personality lacks the world, whose subjugation to personality is needed to verify or make objective the person’s claim of absolute worth. Because it lacks the world, personality also desires it. This is no longer an appetite for sensuous things, relative to the particular individual, but a universal (because conceptually generated) desire of personality for self-embodiment. *The satisfaction of this desire is the cancellation of the independence of external things and their reduction to instrumentalities of the person.* Because this reduction of things is to an end regarded as absolute, it is said to be constitutive of a property. [Emphasis added.] (Brudner, *The Unity of the Common Law: Studies in Hegelian Jurisprudence*, 42.)

¹²⁹ Brudner’s talk of a world “whose subjugation to personality is needed to verify or make objective the person’s absolute worth”, and that the “satisfaction of this desire [to establish personality’s absolute worth] is the *cancellation* of the independence of external things and their *reduction to instrumentalities* of the person” would certainly prompt strenuous objection among environmental ethicists primarily concerned with overcoming

property lies in the suppression of the pure subjectivity of personality” (PR §41A). We may sum up as follows: for Hegel, being free and conscious persons possessed of inner lives, we directly experience ourselves as such, i.e., as beings capable of freely, consciously and spontaneously positing some purpose or other, some goal or other, or of choosing *this* end rather than another; but, our freedom would be radically inhibited if our inwardly generated objectives could never be realized in the world; indeed, “pure consciousness is pure nonsense”, as Hegel puts it, so that we can truly *be* persons only if our capacity to choose has material effect, i.e., if our purposes are realized, or if they at least have a chance of being realized. We must transcend the limits of our inner, subjective lives if we are to be free in actuality; and, this also means that our attachment to, and interaction with, the external world is not merely contingent from the standpoint

anthropocentrism. Arguably even more problematic than Brudner’s comments, in this regard, are those of Stillman:

[For Hegel], behind the apparent immobility of property as a thing is hidden ... the historical activities of work and interaction that have domesticated nature by demystifying it, purging it of its natural gods, proving that natural objects exist not for themselves but only for man, and transforming the natural worked into “things” lacking reason or purpose in themselves and thus, as things, into that which can be appropriated by man. ... Property is thus a continuing manifestation and wilful proof of man’s domination, as the individual continuously asserts in property that nature and natural objects exist for man and that man in property maintains and proves his free mastery of nature. ... The properties a person owns are his way of controlling and shaping nature in order to develop, affect, and express his own character and his ways of living and working. ... [Modern technoscience has further advanced, indeed immeasurably, our capacity to master nature by disclosing it as a domain subject to “laws and structure”:] nature, comprehensible and comprehended, is transformed; human beings have discovered nature’s rationality and necessity and indeed have discovered this rationality and necessity by thinking and positing nature’s substantiality, structure and processes. (Peter Stillman, "Property, Freedom and Individuality in Hegel’s and Marx’s Political Thought," in *Property (Nomos Series Vol. 22)*, ed. J. Roland Pennock and John W. Chapman (New York: New York University Press, 1980), 138.)

of Right; we must, and we must have a right to, as it were, force our (otherwise subjective) purposes upon the world. Hegel believes this is the core rationale of property. This is why, for Hegel, “Right is *in the first place* the immediate embodiment which freedom gives itself in an immediate way, i.e., (a) possession, which is property-ownership.” (PR §40)

(b) Positive Implications for the Environmentalist Agenda

The general tenor of the preceding discussion is palpably anthropocentric. This, however, should not discourage us. Recall that our question is: what acts of freedom are permissible in accordance with the requirements of freedom and practical reason as it governs our external comportment generally? Our concern, recall, is with freedom as a self-limiting concept. As such, if we can establish that our comportment, i.e., our free agency, vis-à-vis the natural environment is limited by the idea of *freedom itself*, then the need to establish limitations on that comportment with reference to the purportedly “intrinsic value” of nature is, at least to some extent, alleviated. Certain elementary limits on our activities in connection with our environment can be justified from within an anthropocentric paradigm, so long as that paradigm does not comprehend freedom in absolutist terms. The resulting limits and restrictions may not satisfy a full-blown eco-centrist; however, they are at least a start, with the added advantage that, per Kantian Right, they carry a built in authorization to coerce. In this regard, what the preceding discussion clearly establishes is that the possibility of our exercising freedom rightfully, for both Kant and Hegel, entails not just that we must relate to others under certain constraints (i.e., with due respect exhibited towards those with whom we co-exist as identically free persons), but also that we *must* establish certain relations pertaining to, or with respect to, the material environment. Indeed, we have seen that there is a sense in

which the latter is more primordial than the former: in order to have effective presence in the world in the first place, beyond the limited freedoms available to us merely as embodied agents¹³⁰ (which fall under “innate right”, a topic I will return to further below), we must acquire (as property) and make use of objects in our environment. Put differently, there are indispensable *material* pre-requisites to freedom as such or, as Kant might be willing to put it, freedom is (also) limited by *material* conditions in conformity with the idea of it.

The main question is whether our freedoms in making use of acquired objects are inherently limited, whether certain forms of use are contrary to freedom. In this respect, I wish to introduce a further passage in Kant, drawn from his admittedly non-political (or not immediately political) *Lectures on Ethics*, which further bolsters my overall condition when read in conjunction with the Juridical Postulate:

[Freedom] has to be restricted, not, though, by other properties and faculties, but by itself. Its supreme rule is: In all self-regarding actions, *so to behave that any use of powers is compatible with the greatest use of them*. For example, if I have drunk too much today, I am incapable of making use of my freedom and my powers; or if I do away with myself, I likewise deprive myself of the ability to use them. So this conflicts with the *greatest use of freedom*, that it abolishes itself, and all use of it, *as the highest principium of life. Only under certain conditions can freedom be consistent with itself; otherwise it comes into collision with itself*. If there were no order in nature, everything would come to an end, and so it is, too, with *unbridled freedom*. There are doubtless evils in nature, but the true

¹³⁰ Ripstein emphasizes that Kant’s Juridical Postulate is supposed to take us beyond the confines of embodiment, i.e., beyond the limited means of our bodies: “the possibility of a rightful relation with respect to property follows from the postulate of practical reason with regard to rights, which is supposed to show that it *must be possible to have rights to things other than your own person or powers*, insofar as these other things could be available as means for setting and pursuing your own purposes.” (Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy*, 86.)

wickedness, vice, resides solely in freedom. ... ***The conditions under which alone the greatest use of freedom is possible, and under which it can be self-consistent, are the essential ends of mankind.*** With these, freedom must agree. The *principium* of all duties is thus the conformity of the use of freedom with the essential ends of mankind. (VE 27: 346 [emphasis added])

If we extract this passage from its intended context, namely Kant's discussion of the prohibition on suicide, and join it with the Juridical Postulate, we can clearly extrapolate a rule pertinent to the environmentalist agenda: the use of our choice with respect to objects of choice (i.e., ostensibly usable objects, including natural resources) is restricted to conditions under which their use is compatible with "greatest use of freedom", lest freedom, in unbridled form, "abolishes itself and all use of" it as the highest principium of life and essential end of mankind.

Now, at this stage I reiterate my basic claim, per the environmentalist agenda, which is that the destruction of owned objects is outside the scope of owners' legitimate freedoms. My rationale for this claim is as follows. As we have seen, Kant (along with Hegel) insists that property ownership must be possible as a matter of Right; otherwise our freedom, our capacity to act effectively in the world, would be radically inhibited. This simply follows from the Juridical Postulate, pursuant to which any unowned object (*res nullius*) must be available for acquisition. But if property is so utterly crucial to freedom, if the rightful use of evidently usable things is so very vital to our ability to have actual presence and effective agency in the world, then the destruction of evidently usable things (even where they are already owned) would appear to contradict the core logic, the underlying rationale, of property, for the simple reason that destruction renders usable things no longer usable. The logic of freedom (the "laws of freedom") as applied to property rights suggests that ownership of things is supposed to enhance the freedom of

owners; otherwise, as Ripstein notes, they would have rightful use only of their own bodies, which in itself is a severely limited means of effecting one's purposes. In this vein, the destruction of one's own finite, non-renewable resources is patently self-contradictory: for example, it is simply not rational for a land-owner to destroy (for example, to permanently poison or flood or irradiate) the land he inhabits. Would not such a land-owner, to use Kant's own language, "be putting usable objects [namely his own land] beyond any possibility of being used" and would he not, in other words, "annihilate [it, the land] in a practical respect and make them into *res nullius*"?

We can also make our point with a series of questions: If "[f]reedom requires that you be able to have usable things fully at your disposal, to use as you see fit, and so to decide which purposes to pursue with them",¹³¹ then is not the destruction of usable things in contradiction with the requirements of freedom? How are you supposed to pursue any further purposes if you have made it your purpose to destroy the things within which you pursue your purposes? Clearly, given the Kantian perspective on the meaning of property, the (permanent) destruction of finite, non-renewable natural resources, such as land, is incoherent: one simply cannot invoke the right of property, or the freedoms that it is supposed to enable, to justify destroying such resources. Similarly, suppose Hegel is right to say that property permits the suppression of the "pure subjectivity of personality", or that in possessing property I become "an actual will", or that property "gives my will existence", such that "not until he has property does the person exist as reason". In that case, wouldn't the destruction of property result in a failed actualization of the will? Suppose, again, we have a land-owner who wishes to poison his lands,

¹³¹ *Ibid.*, 19. [Emphasis added.]

rendering them unfit for future use: is such a person actualizing his will freely and effectively, or is he undercutting his own (future) ability to act freely and effectively? I maintain that, for both Kant and Hegel, the destruction of property holdings, especially of finite depletable resources, is fundamentally incompatible with the core rationale of property as a freedom-maximizing institution. Put differently, the destructive, dissipating or non-sustainable use of finite, depletable natural resources, especially land, constitutes a *transgression* of freedom because such use is radically inconsistent with the conditions under which alone “the greatest use of freedom” is possible. That is, Kant’s core tenet regarding the necessity of property acquisition as a function of our extended freedom in the world dictates that the character of usable things *as* usable, as means fit for the realization of human purposes, must be maintained in perpetuity.

Otherwise, freedom would be systematically depriving itself of the use of objects of choice. Indeed, if, within a Kantian system of property, the annihilation of a portion of a finite resource were permissible in a particular instance, then its annihilation as a whole would be have to be universally permissible, for the simple reason that, in the thought of Kant (even just in terms of its general tenor in insisting that maxims of action must conform to universal laws, whether “internal” or “external”), all rights of property must be held consistently and uniformly among proprietors. But this would mean that if a right to destroy were included among those rights, then the property system itself would in principle allow the total dissipation of the finite resource through continued non-sustainable use; the system itself would permit a previously available resource to become entirely unavailable. But a system that tolerates circumstances where a means previously at our disposal becomes no longer suitable to our ends can hardly be called a system that enhances human freedom. And, suppose the resource in question is land: the potential

outcome inherent in a system that permits the destruction of land by landowners – the outcome being a “permanently mutilated planet” resulting from aggregate destructive acts, albeit *rightfully undertaken* in particular instances – is, suffice it to say, inimical to Kantian Right, *even if* such an outcome is a possibility only in principle. As such, the use of natural resources pursuant to the tenets of Blackstonean absolutism is impermissible from a Kantian perspective. Finally, any destructive form of use with respect to such resources is subject to legitimate coercion because it constitutes an act of freedom that contradicts the tenets of freedom itself: the destruction of the underlying *material* (pre)conditions of freedom just is a hindrance of freedom that can be rightfully counteracted. Our hypothetical land-owner, for instance, can be legitimately forced to curtail his destructive activities vis-à-vis his own holdings or, put differently, he can be duly burdened with preservationist duties. (I set aside the more difficult question as to whether or not he can be *punished* for engaging in destructive activities, since the question concerning the connection between legitimate coercion and punishment with Kant’s framework is a rather difficult one; however, it would presumably follow that if the land-owner proceeds, undeterred by the juridical rationale of inherently limited property rights, pursuant to which he enjoys his holdings in the first place, then some form of legal sanction ought to be applied.)

With this, I conclude the exposition of my core thesis, and the remainder of my arguments may be treated as supplements to it. My core argument has been, in essence, that the norms to which we are necessarily subject simply in virtue of having freedom, i.e., the “laws of freedom” (in Kant’s idiom), stipulate that we must maximally preserve the *material* preconditions that make human freedom possible, or “actual” (in Hegel’s idiom) in the external world. The absolutist, libertarian theory of property, as outlined

above, is radically incompatible with this conclusion, and must, at least from a Kantian perspective, be rejected.

10 - “Any Piece of Land Can Be Acquired Originally, and the Possibility of Such Acquisition Is Based on the Original Community of Land in General” – Or, The Finite Surface of the Earth is the Pre-Condition of the Possibility of the United Will

Kant emphasizes the importance of land for his system of Right, and in particular the fact that land is finite, in at least two ways: first, in §12 of the Doctrine of Right, he makes an interesting (and often overlooked) argument claiming that original acquisition can *only* be of land; but, more importantly, in §13, he aims to establish that any piece of land can be acquired originally *and* that the possibility of such acquisition is based on the “original community of land in general”. The argument for this claim is as follows:

All men 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. This kind of possession (*possessio*) — which is to be distinguished from residence (*sedes*), a chosen and therefore an acquired *lasting* possession — is possession *in common* because **the spherical surface of the earth unites all the places on its surface; for if its surface were an unbounded plane, men could be so dispersed on it that they would not come into any community with one another, and community would not then be a necessary result of their existence on the earth.** The possession by all men on the earth that precedes any acts of theirs which would establish rights (that is constituted by nature itself) is an *original possession in common* (*communio possessionis originaria*), the concept of which is not empirical and dependent upon temporal conditions, like that of a supposed *primitive possession in common* (*communio primaeva*), which can never be proved. Original 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. (MS 6: 262 [emphasis added])

The main point I wish to draw from this and related passages is that, for Kant, the unity of all places on the finite surface of the earth is the *ultimate* basis of, i.e., the *ultimate* pre-condition for the possibility of, the United (omnilateral, or universal) Will.

The material conditions of human life on the *finite* surface of the earth make a civil condition both necessary and possible: because the surface of the earth is finite, we cannot avoid coming into contact with each other -- as Kant insists in various ways, we are always already, “originally”, in “community” with each other just because the earth’s surface is finite, i.e., we co-exist in an “original community of land”, we are, by innate right, members of an “original community of possession”. But because this unavoidable co-existence holds an inherent potential for conflict, we must enter into a civil condition, and indeed, we are permitted to force each other to do so. But if the surface of the earth were a boundless plane, there would be no necessity, nor indeed the possibility, of a civil condition. Put differently: there would be no necessity for a civil union bound by a *universal* will because there would be no necessity for *all* persons to come together to form it. Either way, accordingly, *ultimately*, in the absence of our co-existence on the finite, spherical surface of the earth that unites all places on it, there would be no (empirical) basis for a united (omnilateral, universal) will. As Edwards puts it, “the idea of original community [of land] is a conceptual representation that picks out the *objective correlate of the idea of universal will*.”¹³²

Strictly speaking, there are extra steps in the argument, from the finitude of the surface of the earth to the universal will, involving the justifiability of unilateral acquisition of property. As we have seen, property is a necessary institution, for Kant, because it must be possible for me to have exclusive (and hence rightful) possession of external objects of choice; otherwise, freedom would be arbitrarily and severely limited in

¹³² Jeffrey Edwards, ““The Unity of All Places on the Face of the Earth”: Original Community, Acquisition, and Universal Will in Kant’s Doctrine of Right,” in *Reading Kant’s Geography*, ed. Stuart Elden and Eduardo Mendieta (Albany: State University of New York Press, 2011), 242.

scope (in virtue of the innate right to freedom, I would have exclusive use of my body, but would not be able to acquire and use any external objects of choice, and thus would have no security in engaging in any projects that require such external objects, i.e., any activities beyond merely moving my body around in space). But, as we have seen in the section above, the primary and most crucial external object of choice that we may acquire is land. Land is the central and paradigmatic instance of property, and freedom demands that it must be possible for me to own land exclusively, i.e., rightfully and to the exclusion of others, in order to have sufficient means for any given ends I may set for myself. Simply put, land ownership (whether collective or private) is indispensable to human purposiveness.

But Kant's entire argument in this regard would be pointless if humans happened to live not on a finite surface, but on a boundless plane (or, if you prefer a different scenario, if we had the ability to travel to other uninhabited but habitable planets at will): there would be no need, nor indeed any possibility (pursuant to Kant's understanding), for property in land if we had recourse to an endless supply of it. Situations of conflict, for instance, where at a given time we needed to make use of land but came into contact with someone else who wanted to make use of the same plot, would simply not arise: we would all be dispersed across the boundless plane that sharing land would occur only by active choice, and any voluntary community would be likewise subject to voluntary disbandment where any party to it could simply pick up and find another, equally (indeed identically) suitable plot. All plots of land would be interchangeable with another, and given the endless supply of land there would also (presumably) be an endless supply of resources. We would, in effect, be in a position of being able to create land *ex nihilo*. Land, as the most rudimentary/elementary instance of property and a pre-requisite to

having secure ownership of any further means, would be infinitely available. (Recall that the human body is of course the first and most immediate means at our disposal, and we have a right to it innately, i.e., we possess it rightfully simply in virtue of being born into it; for Kant, as we have seen, the only way we could acquire any further means is by acquiring land *first*; but rightful possession of land is a pre-requisite to any further rightful external acquisition, i.e., of any things other than our bodies.)

But if this were possible, then we would all be, normatively, exactly in the same position as a single individual living alone on earth, who, for Kant, cannot (and need not) actually come to own anything because the structure of property (as Ripstein would insist) is essentially relational, i.e., property entails a relation of persons with respect to things and not a direct relation between persons and things. If there were an endless supply of land (and hence, logically, of natural resources), then, just like the man living alone on earth, there would be no necessity and no possibility of any relations of mine and thine with respect to external things (only with respect to innate right, since we would still have our bodies as our own). More importantly, the normative predicament concerning how unilateral acquisition may give rise to omnilateral obligations, to which the civil union bound by the universal will is the ultimate solution, as discussed above, would simply not arise. But a resolution to this predicament *is* needed, and Edwards explains how the “unity of all places on earth” plays a role in its resolution as follows:

In Kant’s doctrine of acquisition ... reference to the global unity of the earth’s surface—i.e., reference to the physically insurmountable unity exhibited by the universal object and material substrate of all possible original acquisition—is what puts us in a position to regard possession-taking as the type of act that can be performed in conformity with the idea of an *a priori* united will. Kant introduces the notion of “the unity of all places on the face of the earth as a spherical surface” [MS 6:262] as an essential feature of the rational concept of an

original community of possession. *He employs this idea to show how every subject's possession-taking acts can be represented as ultimately grounded in an authorization to occupy that fulfills the universality requirements of practical reason's external lawgiving. The idea of an original community of land thus furnishes an a priori conceptual representation that structurally corresponds to, and combines with, the idea of universal will as an omnilateral will.* Although this rational concept of original community is non-empirical and independent of temporal conditions, its correlation with the idea of universal will allows for the determination of certain sensible conditions – specifically, the spatial conditions – for everyone's original external possession as well as the conditions under which empirical possession is established through a unilateral will to occupy: “We have found the title of acquisition in an original community of land, and thus among the spatial conditions of an external possession. The way of acquisition [*Erwerbungsart*], however, we have found in the empirical conditions of an external possession-taking (*apprehensio*), joined with the will to have the external object as one's own” [MS 6:268].¹³³

The idea of property presupposes the plurality of persons and, as it were, the singularity of land (or, if you prefer, the finitude of external objects and scarcity of ownable resources). But if land were not finite (and if resources were not scarce), then there would be no possibility of a united will because the necessity (and hence possibility¹³⁴) of the united, universal will arises when we, given the finite surface of the earth, (a) cannot avoid coming into contact (and hence potential conflict) with each other, and (b) must (per the Juridical Postulate) be able to acquire land as our own. If the surface of the earth were infinite, then, logically, we (a) could always avoid relations, and (b) would not be (conceptually) compelled to acquire any particular bit of land permanently as our own.

For Kant, the “community of land” is the necessary material pre-requisite for the establishment of a civil condition bond by a general will and hence for any possible

¹³³ Ibid., 243. [emphasis added]

¹³⁴ For Kant something is possible, in this context, only if it is necessary, and vice versa – necessity and possibility are, here, conceptually interwoven.

public lawgiving. The necessity, and hence, the possibility of a civil condition is premised on our co-existence on the finite surface of the earth. Indeed, “land is the ultimate condition that alone makes it possible to have external things as one’s own [in a civil condition]” (MS 6:324). But this has to mean that the maintenance of the integrity of land is an imperative of Right. There can be no authorization consistent with the principles of Right, more specifically with Kantian principles of property, to destroy the material/empirical (pre)condition of the possibility of the united, universal will that (as we have seen above) is the ultimate normative basis of secure property rights. Accordingly, we have, here, further justification for a prohibition against the destruction (or degradation, dissipation or non-sustainable use) of land by landowners. Simply put, the destruction of land, given its finitude, entails the destruction of the material/empirical substrate of the universal will, and hence, cannot be permissible as a matter of Right. Of course, it is true that if any particular portion (part, or parcel) of the surface of the earth were to be destroyed, the possibility of humans coming together under a united will would not thereby be precluded – all this would mean is that there would be diminished quantity of a finite resource, namely less land upon which humans could subsist. In circumstances where land on the surface of the earth were diminished in quantity, yet (obviously) remained finite and unified, humans would remain in a position to form a civil union bound by a general/universal will. (In other words, if our planet were to spontaneously shrink in size, Kant’s argument would remain unchanged.) But the point is *not* whether or not any given portion of land could be destroyed and what, if any, implications such partial destruction would have for the possibility of constructing a united/universal will. Rather, the question is whether there could be a *general* right, a universal liberty, to destroy land: whether, *in principle*, landowners could annihilate their holdings, such that the destruction of the earth’s surface as a whole would be

conceptually permissible (even if practically unlikely). And, in this latter respect, the answer must be negative.

11 - Is the Destruction of Unowned Land (Construed as Terra- or Res- Nullius) Permissible as a Function of Innate Right?

According to Kant, there “*is only one innate right. Freedom* (independence from being constrained by another’s choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity,” (MS 6: 237) Kant construes the “one innate right” in rather stark and minimalist terms, however, one immediate implication of person’s being vested with it is that they have, as a matter of course, a right to bodily integrity. Weinrib explains as follows:

The innate right is "the only original right belonging to every man by virtue of his humanity." 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. What is internally mine is my freedom, [MS 6:248] 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. ["Kant does not say this explicitly, but it is clear from what he does say about the innate right."] 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, 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.

Further:

[Innate right] 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." [MS 6: 236; MS 6: 239] 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." [MS 6: 262] 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. [MS 6: 262] 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.¹³⁵

Now, we have seen that the concept of property ownership as articulated by Kant cannot be extended to legitimize acts that annihilate freedom: simply put, the destruction of finite depletable natural resources, especially land, cannot be coherently recognized as a use-right within the rubric of a Kantian property system.

But this still leaves the (logically prior) possibility that we are free to destroy resources that are currently *res nullius*, or land that is *terra nullius*. Let us imagine a highly simplified world where a plurality of persons subsists on the (finite, spherical) surface of the earth no part of which is owned by anyone at all. In such a world, the primary and arguably only rule that restricts a person's freedom pertains to the inviolability of other persons' bodies and the space they occupy. And this is because, as we have just seen, we are always already situated in our bodies (embodied),¹³⁶ such that, as the most elementary instrument of freedom, the living body is immediately sacrosanct from the standpoint of Right. By contrast, external things are, as we have noted, mere "rightless factors": and indeed, this fundamental normative distinction between persons

¹³⁵ Weinrib, "Poverty and Property in Kant's System of Rights," 803-804.

¹³⁶ As Ripstein notes, you "are always in possession of your body, or, to be more precise, your body just is your physical person." (Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy*, 94.) According to Fichte's Fourth Theorem in the *Foundations of Natural Right*, the "rational being cannot posit itself as an individual that has efficacy [in the world], and thereby determining, a material body." Further, the "material [articulated] body ... is posited as the *sphere of all the person's possible free actions*, and nothing more. Its essence consists in this alone." (Fichte, 53, 56.)

and things is presupposed by the Juridical Postulate itself.¹³⁷ Simply put, in this imagined world, persons, who are immediately both subjects and objects of Right, confront a natural world that is normatively sterile or, if you will, desacralized, “disenchanted” and, since not part of it is owned by anyone, i.e., is “vacant” as a matter of Right.

¹³⁷ For Kant, generally:

A *person* is a subject whose actions can be *imputed* to him. Moral personality is therefore nothing other than the freedom of a rational being under moral laws (whereas psychological personality is merely the capacity for being conscious of one's identity in different conditions of one's existence). From this it follows that a person is subject to no other laws than those he gives to himself (either alone or at least along with others). [...] A *thing* is that to which nothing can be imputed. **Any object of free choice which itself lacks freedom is therefore called a thing** (*res corporalis*). (MS 6: 223 [emphasis added])

At least according to one interpreter of Hegel, the elementary distinction between persons and things entails not only that persons (as self-determining agents) are absolutely free to appropriate things (as rightless factors), but also that persons are free to make unlimited use of things, up to and including destroying them:

By virtue of its abstraction from everything empirically given, the person stands opposed to a world of particular things, some forming its own natural endowment, others lying outside it. A “thing” is a being that is not a person, or that lacks the capacity for self-transcendence. Lacking this capacity, ***the thing is not an unconditioned end and so offers no moral resistance (has no right) against its use and destruction by other beings ... things cannot protest their subjugation ...***[.] ... Because the self [or person] considers itself the sole essential reality, objects that are not selves [or persons] are, from this point of view, inherently nothing in themselves, achieving their reality as instruments. Obversely, personality has a right to appropriate all things. Appropriation is thus not a violence done to things *ab extra*[.] (Brudner, *The Unity of the Common Law: Studies in Hegelian Jurisprudence*, 42-43. [emphasis added])

(a) First Response: An Act of Destruction of Unowned Land is Normatively Parallel to an Act of Original (First) Acquisition of Land, and is Therefore Ultimately Subject to the Same Restrictions (Preservationist Duties) Inherent to Ownership of Land In General

At this stage, one might object to the core argument of this thesis as follows: even if a proprietor is, in virtue of the very rationale of property rights, precluded from destroying land (and any finite, depletable resources that exist thereupon) that he already owns (nor, of course, land that is already owned by others), he cannot be precluded from doing so when it comes to resources owned by no one. Indeed, destroying objects that are *res nullius* can be counted simply as an incident of a more general right to act in the world, which, as Ryan put it, entails that “we must have the right to control [the physical world], alter it and dispose of it in the exercise of our freedom”. By definition, physical objects have no discernible status: they are simply outside the rubric of Right altogether. Owned objects, by contrast, have been brought under a normative regime, i.e., they are subject to some authority; as such, any rights anyone may have over owned objects may, in principle, be subject to certain responsibilities. You suggest that owners are burdened by a basic preservationist duty with respect to finite natural resources: very well, that may be – however, no such duties, or indeed any responsibilities, can apply with respect to resources that are *res nullius*, which as we have seen, Hegel sees as mere “rightless factors”, things “external in and for themselves”, etc. Suppose, then, that I carry a vat of poison out onto some vast, waste, vacant, desert lands, lands belonging to no one at all and where no one travels or resides, and proceed to dump my cargo: since, by definition, I have neither affected nor interacted with any rights bearing entity, what could justify a prohibition against my actions?

A thorough response to such a challenge is beyond the scope of my thesis here. However, I can say the following: an act of this kind is, in fact, *not* normatively neutral; indeed, in light of Kantian principles of property, an act that destroys unowned land constitutes a form of original acquisition of property. Consider this: Kant, pursuant to the basic principles of acquisition, holds that *res nullius* objects become a person's property by means of a unilateral act. But, as we have seen, in order to qualify as a valid act of original acquisition, first possession as a physical act by the potential owner must assert and manifest *decisive control* over the sought object. Control, in turn, is indicated by the putative proprietor's ability to exclude other persons from use of the object, as well as his ability to subject the object to his purposes. But, in that case, an environmentally destructive act, such as the poisoning of land (or, say, its irradiation, or some other manner of rendering it uninhabitable), *just is* an act of original acquisition: at a minimum, it is a form of proto-proprietary act and thus must fall under the rubric of property rules, including the prohibitions I have outlined above.

For, by polluting a tract of land, for example, the polluter has asserted a form of control over it: (a) in so far as other persons are forthwith excluded from making use of the given tract of land (note that pollution or other similarly destructive uses of finite resources are functionally equivalent to fencing off, for the simple reason that, by destroying the resource, the first-user, i.e., the destroyer, has effectively excluded all other potential users from the resource, and, indeed, destruction is arguably the *ultimate* and most radical form of exclusion in this sense); and (b) in so far as the polluter has clearly realized at least one of his purposes effectively, namely the destruction of the resource in question (granted he has made a very limited, one-off use of the land, it is nevertheless fair to say that, *precisely* by destroying its future use value the polluter has, in fact, albeit

in an admittedly unique sense, *originally acquired* that tract of land). Whatever form it takes after the destructive act, the destroyed object certainly cannot be classified as *res nullius*. Rather, the act of destruction itself attaches the object to its destroyer in a proto-proprietary relation. And, of course, I say it is a “proto-“ or “quasi-“ proprietary relation because ownership, in this context, must ultimately be inchoate and, indeed, radically incoherent: the polluter has sought to simultaneously acquire *and* discard the tract of land, or, put differently, he has sought to use and deplete the object in question at once. Suffice it to say, this kind of incoherence – this irrationality at the core of an act of destruction against a purportedly *res nullius* object – is fatal from the standpoint of Right: an act of this kind simply cannot be authorized under laws of freedom, for the same reasons that already owned lands are subject to duties of preservation (as I have argued above). Just as with self-mutilation or suicide, acts of this kind are, from the standpoint of freedom, radically self-defeating, and hence impermissible within the Kantian normative framework. In sum, the basic preservationist duty intrinsic to property rights, as characterized above, must apply even in the context of supposedly neutral acts of destruction inflicted on land that is supposedly terra nullius, or on *res nullius* objects.

There is, of course, an important difference between an act of original acquisition in the ordinary course, where a person intends to acquire and make *future* use of land, and a one-off act of destruction that, I say, structurally mimics original acquisition. In the ordinary case, the acquirer purports to unilaterally impose an *obligation* on all others to stay away from the object he seeks to make his own. (This, as we saw, posed a key predicament for Kant’s theory of property acquisition: how does a unilateral act give rise to omnilateral obligations?) Now, arguably, in the case of someone who simply wishes to destroy an object that is owned by no one (or just to render a tract of land uninhabitable),

there is no intent (implicit or explicit) to generate an omnilateral obligation. But I claim that this is irrelevant: the potential destroyer of unowned (“vacant”) land purports to have a *right* to destroy it: the performance of such an act must be accompanied by an implicit assertion of such a right. The fact that, technically, no correlative (or corresponding) omnilateral duty to stay away from the land can be said to arise is, in my view, irrelevant. The normative structure, and import from the standpoint of Right, of an act of original acquisition whereby all others are excluded from use of the acquired land *by obligation* (unilaterally imposed yet omnilaterally held), is *ultimately* identical to that of an act of destruction whereby all others are excluded from use of the land in virtue of physical (empirical) restrictions (i.e., the post-destruction unsuitability of the land for further use by any others). The claim that you should have the *right* to exclude all others from using a given plot of land because you intend to make use of it for your own purposes going forward is not distinguishable in any important sense from the claim that you should have the right to *physically* exclude all others from using a given plot of (unowned) land going forward because you intend to make one-off use of it by destroying it. At a minimum, the two claims are normatively parallel: to posit a *right* in the former sense entails a virtually identical effect or outcome as positing a right in the latter sense, it is simply that in the former sense the resulting exclusion of all other persons from use of the land is due to normative constraint, while in the latter sense the resulting exclusion is due to empirical constraint. And yet, even here, because the resulting constraints issue from acts of freedom, purportedly undertaken under color of right, the supposedly merely empirical constraint (i.e., the physical exclusion of all persons from use of the destroyed land) must be understood to carry normative weight. As such, the destruction of unowned land (by persons endowed only with innate right) is normatively indistinguishable from the destruction of owned land (by persons who have acquired rights in it).

(b) Second Response: The Natural Environment is Never Res- or Terra- Nullius in Absolute Terms, Such that the Destruction of Even Unowned Land is Impermissible

My second line of argument in rejecting the claim that unowned lands are freely destructible, i.e., the view that our freedoms over and against the natural environment are unlimited, is as follows. Given, as we have seen above, Kant's claims pertaining to humanity's possession of the earth *ab initio* being an "original possession in common" or an "original community of land in general", I deny that the natural environment can ever be thought of as truly *res nullius*, or, more appropriately, that land can be *terra nullius* in some *absolute* sense. This claim, while I cannot fully develop it here, rests simply on Kant's general conception of land, which has unusual, often overlooked, implications within his overall framework. Briefly put, as we have seen, Kant claims that our possession in common of the finite surface of the earth is a (material) precondition of (the possibility of) our collective coexistence under Right, or, relatedly, that the unity of all places on the earth's finite surface is a condition of the possibility of a united will among a plurality of unavoidably interacting persons. (For, as we have already noted, if the surface of the earth were infinite and unbounded, we would not *necessarily* come into contact with each other; hence, the united will, the sole condition pursuant to which rightful relations among all can be established, would carry no normative necessity. As Edwards puts it succinctly, if somewhat obscurely, Kant's "idea of original community [of land] is a conceptual representation that picks out the *objective correlate of the idea of universal will.*")

The upshot of Kant's line of reasoning, essentially, is that, as a collective, we inhabit the surface of the earth (and, by extension, the natural environment) in a manner parallel to the way in which we inhabit our bodies as individuals: in order to exist as free

persons, we have to subsist as individuals in finite bodies; in order to co-exist as free persons under conditions of Right dictated by a united will (the *only* possible way in which we can co-exist as mutually *free* persons, mediated by the dictates of practical reason in its external aspect and the idea of the social contract, etc.), we have to subsist collectively within a finite (confined) space, namely upon the spherical surface the earth that unites all lands upon it. In either case, *freedom* as such can only have reality under certain *material*, empirical (pre)conditions. But, if the integrity of our finite bodies is necessary to our individual freedom, then we have to also admit that the integrity of the finite surface of the earth (and by extension, the natural environment) is essential to our collective co-existence as free persons. For, imagine if each of us were free to destroy some bit of the finite surface of the earth; in that case, it would, in principle, be permissible to destroy all surfaces of the earth. However, if we, through collective cumulative action, were to destroy the earth's (finite) surface, we would have nothing, no space, to subsist upon, either collectively or individually. As such, it is hardly coherent to say that the destruction of portions of the surface of the earth must be permissible under laws of freedom; and, the incoherence of the destruction of land (as a matter of Right) in this regard is exactly parallel to the incoherence of suicide (as a matter of Virtue).

More generally, and without necessarily relying on Kant's technical arguments about the juridical character and normative import of land, I maintain there is a valid and important parallel to be drawn between the fact that we always already collectively inhabit (or possess) the natural environment and the fact that we always already individually inhabit (or possess) our material bodies: in neither instance can (or ought) that which is being inhabited be characterized as normatively sterile or inert. Even if it is correct to say that the natural environment cannot have, or be a bearer of, rights per se, i.e., that it must

consist of “rightless factors”, this cannot place it in absolute contra-distinction with the human body. Indeed, if we are looking for objects that are absolutely *res nullius*, and hence perfectly “sterile” from a normative standpoint, we would need to look at objects like the moon, meteors in outer space or stars or distant galaxies and the like: these, clearly, are objects in no one’s possible possession. But, it is simply inappropriate to categorize the surface of the earth (land, and by extension, the natural environment) in this manner: at the very least, the land that we live on is more like our body than like the moon.

Admittedly, an important difference between land and the human body is that the latter is always already “individuated”, while the former has to be subdivided into private holdings. As Ludwig notes, there “is no natural distribution of external objects introduced by natural law (as there is for the innate right, as, for example, to the limbs of one’s own body), but property is an artefact of the human will.”¹³⁸ Yet this does not take away from the fact that collectively we inhabit *inescapably shared* space, and Kant reflects this insight with several consistent references to our “original community of land in general”, “original possession in common” as the “possession by all men on the earth that precedes any acts of theirs which would establish rights”, or our “original community in possession” of the earth’s finite, unified spherical surface, and so on (cf MS 6: 262, 6: 268). And, again, perhaps the most significant import of Kant’s thinking in this regard is

¹³⁸ Bernd Ludwig, “Whence Public Right? The Role of Theoretical and Practical Reasoning in Kant’s Doctrine of Right,” in Kant’s *Metaphysics of Morals: Interpretive Essays*, ed. Mark Timmons (Oxford: Oxford University Press, 2002), 180. The fact that, by law, the natural world is subject to arbitrary subdivision (to carving up) by humans is in itself a cause of concern for environmentalists. Because it necessarily stands in eco-systemic relation to other natural spaces, no tract of owned or ownable land can be ecologically self-contained, but it is treated as such when it is parcelled for the purposes of proprietary possession and control.

that our “original” possession in common, or the “original” community of land in general, is an ultimate precondition to the possibility the construction of a united (universal, or omnilateral) will pursuant to which we may, in turn, form a civil condition (which, of course, renders original individual, or private, acquisition of property in land possible).¹³⁹

Curiously, in contrast to Edwards, Ripstein appears to want to emphasize the *disjunctive* character of humanity’s common possession of the earth prior to any appropriation taking place:

The only form of common possession of the Earth prior to appropriation must be the “disjunctive” possession of the Earth’s surface entailed by innate right, that is, that each person is entitled to be “wherever nature or chance” has placed him or her, except in whatever place is occupied by another person. Persons who are in merely disjunctive possession of the Earth’s surface, considered separately, are in a position neither to authorize anything nor to bind anyone.¹⁴⁰ ... [And further:] Kant rejects the idea of collective ownership of the Earth in favor of the idea that prior to appropriation, the Earth is occupied disjunctively, but unowned.¹⁴¹

Ripstein’s reasons for emphasizing the disjunctive character of original possession likely have to do with his general interpretation of Kantian Right exclusively in terms of the demands of harmonization of the innate independence – the equal formal freedom and identical capacity for choice – of a plurality of persons. The upshot of my position has been that the most rudimentary principles of Kantian Right are not concerned exclusively with the harmonization of mutually independent wills. That is, Kant’s most basic starting point is not just a plurality of persons possessing an identical, strictly formal capacity for

¹³⁹ Admittedly, there is a certain circularity to Kant’s line of reasoning in this regard, and indeed, his means of argumentation the Doctrine of Right is notoriously circuitous and, in places, overly compact. Alas, I cannot comment on or explore Kant’s methodology in this regard, except to say that it nonetheless yields highly valuable insights.

¹⁴⁰ Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy*, 155-156.

¹⁴¹ *Ibid.*, 291.

free choice – or a capacity and entitlement to be “one’s own master”, in Ripstein’s terminology. While it may be accurate to say that his system primarily address the “harmonization” problem – namely, on what terms is the consistent, mutually reciprocal exercise of (the equally held) right to freedom possible among a plurality of interacting persons? – this basic problem does not exhaust the content of the Doctrine of Right. While the inter-personal and “contrastive” dimension of freedom is, of course, crucial from the standpoint of Right, there is also, inescapably, a *material* dimension to freedom, which entails the relation between persons and land (as well as, by parallel, between the will and its body). That is, I claim that Right, for Kant, is also crucially concerned with how freedom is possible – i.e., on what (reflexive) terms, and under what self-referential restrictions is freedom possible – for an agent materially situated in the external world (in “space and time”), whether upon the earth’s finite lands or within a material body.

But for our purposes, at this point, it is important to point out a further, related implication of Ripstein’s claim that what matters is the *disjunctive* nature of our original possession of the earth’s surface. Implicit in this claim is that, as a matter of our innate rights (but also, ultimately, of our acquired rights), what is done by anyone to lands that, though they may be shared as between us, are yet owned by no one in particular, is irrelevant to Right. That is, acts that change the character of unowned land (presumably even destructive acts) cannot count as wrongs. Unless person A interferes with person B’s *existing* holdings – for example, by trespassing upon land that person B has already acquired, or by interfering with person B’s body or in some way penetrating the space it immediately occupies – person A has committed no transgression as a matter of Kantian Right. The fact that space may be shared between person A and B is irrelevant because

shared space is merely the “context” within which A and B exercise their respective freedoms.

Put differently, anything we might have or hold independently of each other (i.e., disjunctively), whether our bodies (via innate right) or land (via acquired right) may be subjected to various forms of mutual interference that would constitute wrongs; but, that which exists as between us (conjunctively), namely unowned lands/spaces or portions of the world in general belonging to one in particular, is merely the medium within which we are free to act as we please. Ripstein makes this explicit when he claims the following:

As ... [per] ... innate right, as a general matter, others wrong you if they interfere with your person, but they *do no wrong by changing the context in which you use your means to set and pursue purposes*. [...] The freedom of others would only be compromised if one person’s having a proprietary or contractual right deprived some other person of something *he or she already had*. From the standpoint of each person’s right of humanity in his or her own person, the acquired rights of others are *just parts of the context within which they choose*. [...] Your property constrains others because it comprises the external means that you use in setting and pursuing purposes; if someone interferes with your property, he thereby interferes with your purposiveness. The same point can be made through the distinction ... between a person’s means and the context in which that person uses them. *A changed context raises no issues of right, because it is the inevitable result of people’s exercise of their freedom*. A system of property is a system in which persons have rights to means others than their bodily powers, and others may not change those means or their availability. If you could not have a right to something in your absence, everything except your bodily powers would be *mere context*, subject to the choice of others.¹⁴²

¹⁴² Ibid., 61, 63-64, 91. [emphasis added] By way of illustration, Ripstein provides an example of one person acquiring an object ahead of another, thereby depriving him of it, and yet committing no discernible wrong as a matter of Right, because the object the latter was “deprived” of did not *already* belong to him:

What you can accomplish depends on what others are doing—someone else can frustrate your plans by getting the last quart of milk in the store [or acquiring something as yet unowned]. If they do so, they don’t interfere with your independence, because they impose no limits on your ability to use your powers to

While I cannot develop a comprehensive response to his position, I can say that Ripstein appears to have entirely overlooked Kant's arguments regarding the import of land and the finite unity of the spherical surface of the earth, which, of course, is the *ultimate* "context" within which any of us can exercise our freedoms. The *finitude*, and hence depletable, of land is, as I have sought to establish, of utmost importance in the Kantian framework: not all exercise of freedom that change the world (or the "context") within which we act while affecting no particular person's holdings are normatively equivalent to one person foiling some other person's plans by purchasing the last quart of milk before the latter is able to get to the milk aisle. I note that Ripstein appears to assume a world abundant with resources, i.e., that the "context" within which we exercise our freedoms is an inexhaustible source of means that we can utilize towards our purposes generally: even if some of our particular purposes are at particular times frustrated by the acts of others in simply being first in time in "changing" the context in which we act, Ripstein seems to presume there will always be some alternative material means out there in the world at our disposal. As such, unlike Kant, he seems not to take into account of the fact that the material means available to us must be ranked in terms of the scale of their value *as* finite resources, with land being highest in priority since its depletion entails the depletion of all other resources ("means") potentially at our disposal towards the realization of our purposes.¹⁴³

set and pursue your own purposes. *They just change the world in ways that make your means useless for the particular purpose you would have set. Their entitlement to change the world in those ways just is their right to independence.* (ibid., 16. [emphasis added])

¹⁴³ See: ibid., 67. ("Kant makes no reference to scarcity ... in developing his account [of property].") In light of Kant's discussion of land generally, this is patently false: indeed,

What is missing in Ripstein’s chosen examples, like that of the quart of milk – and indeed in virtually all of Ripstein’s discussions and illustrations on this point – is any indication that certain activities that change the world we share, i.e., that affect the broadest possible “context” within which we act, can diminish it in such a way as to make further exercises of freedom extremely difficult or indeed impossible. Suppose I had the means to take away the last bit of air left between us just an instant before you were able to suck it into your lungs (thereby making it your own). Or, suppose we are stranded on one of those islands in the middle of a vast expanse of water (frequently depicted in *New Yorker* cartoons), and I arbitrarily decide to chop down the sole palm tree providing us with any sustenance, and say I do this just before you can stop me by acquiring (taking control of) the tree for yourself with a view to protecting it (being the good environmentalist/survivalist that you are) for both our sakes. Has my act *merely* changed the context within which you, or indeed both of us, can act? More importantly, does my act truly raise *no* issues of Right? I find that doubtful: acts of this type are irrelevant to Right only if you assume an absolutist conception of freedom whereby entirely arbitrary, non-self limiting exercises of freedom are deemed permissible, or indeed the “ideal”. Simply put, the finite *material* resources we share, i.e., hold conjunctively – and in particular, the *finitude* of the lands and natural resources upon which we collectively subsist – do not constitute a normatively neutral setting, a merely sterile context otherwise construed as *res-* or *terra-nullius*, within which we may exercise our freedoms without inherent limitations.¹⁴⁴ If the material human body is sacrosanct as the most immediate

the finitude of the spherical surface of the Earth, whereby all places are united, is of utmost importance to Kant’s account. Edwards’ essay makes this abundantly clear.

¹⁴⁴ In a critical review of Ripstein’s book, Edmundson makes some interesting observations pertinent to a number of my own disagreements with Ripstein. See: William

site of our freedom, then land (and the natural environment sustained thereon) is freedom's secondary locus; and, no doubt, some environmental ethicists would claim the obverse, i.e., that the land comes first and the body second, though this sort of point need not detain us here. The analogies and parallels between the human body and land, once we look closer, are simply unavoidable in Kant's *Doctrine of Right*: to use Fichte's idiom, each, respectively, are a "sphere" of any possible free agency. And given their finite material nature, they are inherently vulnerable, meaning that each must have protected status within a system of Right.

A. Edmundson, "Arthur Ripstein, Force and Freedom: Kant's Legal and Political Philosophy (Book Review)," *Ethics* 120, no. 4 (July) (2010): 872-873.

12 - Conclusion

To summarize my overall argument, I note the following. If juridical-political authority, and in particular its exercise via coercion, can be justified only in terms of the requirements of a system of freedom bound by the Universal Principle of Right, then the only legitimate rationale for coercively inhibiting environmental destruction caused by a given agent would be that such activities are somehow contrary to freedom, or incompatible with a system of Right based on freedom. As I have explained, the Kantian perspective on law and politics, as applied to environmental issues, demands that we ask: in what way does destruction of the environment constitute a hindrance, or obstruction, or diminishment, of freedom, or, in what way could such activity be construed as a defective exercise of freedom? My aim was to articulate exactly how such activity could constitute a violation of Right, or be a wrong pursuant to the “laws of freedom”. A further point was emphasized: from the Kantian perspective, any such analysis had to be based exclusively on the idea of freedom – as opposed, for example, to notions of “harm”, “welfare”, the “public good” or the “intrinsic value of nature”, or on contingent or empirical human interests. Kant’s Juridical Postulate furnished the key to our response: environmentally destructive activity is a hindrance to freedom because it renders previously usable *finite* natural resources unavailable for further (future) use, and as such, ultimately, annihilates the material preconditions of any possible exercise of freedom. That is, not only do they contradict the immanent rationale of property as a requirement of freedom (per the Juridical Postulate), but environmentally destructive acts must also be intolerable within as *system* of Right, for the simple reason that were such acts systematically permissible then we will have constructed a system, purportedly built on freedom, that would actually permit the rise of circumstances where freedom would be rendered impossible.

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