

Review

# Kant's *Metaphysical Foundations of the Doctrine of Right*

By Friedrich BOUTERWEK

Göttingische Anzeigen von gelehrten Sachen 28 (18 Feb. 1797):265–276; GS 20: 445–453.<sup>1</sup>

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Translated by Kenneth R. Westphal  
Department of Philosophy, Boğaziçi Üniversitesi, İstanbul

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{Friedrich BOUTERWEK}, Rezension von Kants *Metaphysische Anfangsgründe der Rechtslehre*. Göttingische Anzeigen von gelehrten Sachen unter der Aufsicht der Königl. Gesellschaft der Wissenschaften Nr. 28 (18. Februar 1797): 265–276.

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<sup>1</sup>Online at: [http://gdz.sub.uni-goettingen.de/dms/load/toc/?PPN=PPN31973076X\\_1797](http://gdz.sub.uni-goettingen.de/dms/load/toc/?PPN=PPN31973076X_1797); reprinted in full in: *Immanuel Kants Gesammelte Schriften*, 20:445–453. This is the first English translation of Bouterwek's reviews. Reviews typically were anonymous, though often their authorship was well known. Bouterwek's authorship is confirmed by the journal's records. All notes are the translator's. The pagination of GS 20 is included in angled braces: {}. Excepting only the first, the original uses m-dashes rather than paragraph breaks. The translation breaks paragraphs, but retains the m-dashes to recall the original. Bouterwek cites page numbers from Kant's first edition of *RL*. These have been substituted throughout by page numbers in GS 6, which appear also in M. Gregor, tr., A. Wood, ed., *Practical Philosophy*. A third review of Kant's *RL* was also published in Göttingen in: C. F. Stäudlin, ed., *Göttingische Bibliothek der neuesten theologischen Literatur* 4.2 (1798):159–189; Online at: [http://gdz.sub.uni-goettingen.de/dms/load/img/?PPN=PPN726232009&DMDID=DMD\\_gvk77380607](http://gdz.sub.uni-goettingen.de/dms/load/img/?PPN=PPN726232009&DMDID=DMD_gvk77380607). It is strictly exegetical, very detailed and its author remains unknown. However, its style, clarity, accuracy and keen interest in its subject strongly suggest, at least to this translator, that it too was written by Bouterwek, well-known as Kant's advocate in Göttingen. (The translator thanks *Kant Studies Online* and its reviewers for indicating some needed improvements.)

## Translator's Introduction

**B**outerwek's review exhibits some understandable and instructive misunderstandings of Kant's views and analysis, which recur today as well. Clarifying these misunderstandings is often aided by careful study of Kant's working drafts and notes, and of Bouterwek's review. (An English translation of Kant's working drafts and notes shall appear soon in the Cambridge Edition of the Works of Immanuel Kant.) Bouterwek's summary of Kant's Doctrine of Justice confirms the sense of Kant's own structure of analysis and order of presentation. Bouterwek's concern about the will may seem a bit odd, but is an important reminder that Kant's Doctrine of Justice belongs to his Critical philosophy and must be understood in that context. The main issue is how Kant does or can address fundamental political issues within the framework of his Critical philosophy, and the extent to which so doing resolves otherwise intractable problems or provides unexpected insights. In this regard, Bouterwek's review repeatedly highlights what a breakthrough Kant's Doctrine of Justice is, how it really is very distinctive and deserves careful further development, despite some difficulties. He is much closer to understanding, e.g., Kant's account of rights to possession than many contemporary commentators.



**T**he aim of these pages – to distinguish among the wonders of the learned world those by which especially the sciences<sup>2</sup> expand in scope, discoveries and new perspectives – provides the reviewer a welcome duty to

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<sup>2</sup>‘*Wissenschaften*’; the German term is not limited to the natural or social sciences but includes all forms of disciplinary inquiries.

announce a book such as that lying before him with the thoroughness which directly and best contradicts the riposte of partisan fragmentation of the contents. Even if its content were less important, this book would be remarkable simply by the period in which it appears. The philosophical and philosophising thinkers who have for several years enriched our libraries with no small number of compendia of natural law based on Kantian ideas now appear, in regard to their presentation of principles, to have instead provided their own.<sup>3</sup>  
 – But no historical introduction; to the book itself!

The preliminary Introduction to the *Metaphysics of Morals* first provides once again the fundamental ideas which are already familiar to the (20:446) readers of Kant's writings. (Regrettably, of these the definition of the capacity of desire: 'The capacity of desire is the capacity, through its representations to be the cause of the objects of these representations', requires scrutiny, since it amounts to nothing as soon as one abstracts the consequences of desire from external circumstances. However the capacity of desire is also something according to idealists, though to them the external world is nothing.<sup>4</sup>) What is (juridically) right is determined according to these fundamental ideas (6:228). The juridical concept of right is not connected to wish (the motive of action), but instead merely to the power of choice (its limitation as such). Right (6:230) is thus the totality of conditions under which one's power of choice can coexist with another's power of choice in accord with a universal law of freedom. From that follows the universal principle of right: Any act is right by which, or by its maxim, the freedom of anyone's power of choice can coexist with everyone's freedom in accord with a

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<sup>3</sup>Bouterwek suggests that such works have presented their author's own principles rather than Kant's; see below.

<sup>4</sup>Kant responds directly to this objection (*RL* 6:356–7).

universal law. (The conviction of the reviewer is that precisely this principle has always been silently assumed by common practical reason; and just for this reason it is the principle to which the philosophy of right must adhere. It comes down to this alone, to determine the concept of freedom according to the concept of what is morally permitted, whereupon the entire theory of the principles of natural law becomes clear. It is thus also made evident that in accord with the idea of universal freedom (limited only by the moral law) I cannot treat a person as a thing; for that would be to exclude from the idea of universal freedom a being which nevertheless is comprehended under this idea. Whence emerges moreover the usefulness of the principle long since advocated by Herr Kant: ‘Treat humanity not as a means, but as an end in itself’, provided the difference between things and persons is specified. But that Herr Kant would not, as is done in the systems of natural law based on Kantian ideas, ground natural law in its entire scope upon this principle, was expected with great confidence by the reviewer, as indeed he recently expressed in the announcement of the new edition of Höpfner’s textbook.<sup>5</sup> If one does not proceed from the idea of universal freedom, then nothing is easier than to present cases of how I can use a human being as a means without in the least doing him wrong, and of how I can treat him as an end and nevertheless injure him against all right.

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<sup>5</sup>Ludwig Julius Friedrich HÖPFNER, *Naturrecht des einzelnen Menschen, der Gesellschaften und der Völker* (Gießen: J. C. Krieger, 2<sup>nd</sup> rev. ed. 1783, 3<sup>d</sup> rev. ed. 1785, 4<sup>th</sup> rev. ed. 1787). Höpfner belonged to the law faculty in Gießen. This book was reviewed anonymously in the *Allgemeine Literatur-Zeitung*. 3.197a (16 Aug. 1788): columns 141–2 (PURL: [http://zs.thulb.uni-jena.de/receive/jportal\\_jparticle\\_00003619](http://zs.thulb.uni-jena.de/receive/jportal_jparticle_00003619)). At the top of column 142 the reviewer comments, ‘... the highest principle of natural right offered (§24) ... is in fact only the highest principle of morals ...’. The style, the command of the literature and issues and the reviewer’s keen interest all strongly suggest Bouterwek’s authorship of this review. It is worth considering whether Bouterwek’s observation retains currency, e.g., in view of Rawls’s *Theory of Justice* taking its Kantian inspiration from the *Groundwork* rather than from the *Rechtslehre*.

Furthermore the concepts of (20:447) means and end are products of the empirically reflecting power of judgment, and so do not at all belong originally to the moral law.) However this maxim holds merely for external actions (6:231), and one can express it also more precisely: ‘Act outwardly so’ etc. (though one might wish that Herr Kant had more precisely expounded the idea of freedom in connection with external justice). Right is bound with the authorisation to coerce (6:231). For coercion is nothing but the obstruction of an obstruction to freedom. (How acute and how apposite! Why moral duties as such cannot be coerced is self-explanatory. For the juridical concept of right only limits another’s freedom insofar as it cannot coexist with the freedom of all; though it prescribes no law by which the other would be bound to do something, except if he himself by uncoerced contract in a certain regard has made me into the master of his freedom.) Strict right (into which nothing ethical enters) can thus also be represented as the possibility of a thoroughly reciprocal coercion compatible with everyone’s freedom according to universal laws. —

There would be only two cases (6:233–4) which call for juridical decision for which no such decision can be found. They ground equivocal right (*Jus aequivocum*). To this belongs first the case of equity. Whoever demands something on grounds of equity, e.g. because he did more than the others within a *Mascopey* in which all are to benefit equally,<sup>6</sup> bases himself not merely upon the moral obligation of the others, but rather upon a right, except that he lacks the necessary conditions by which a judge can base his judgment. (But how so, if the member of the *Mascopey* can e.g. reckon precisely at least in cash how much has been added?). To this belongs second the case of necessity (not of self-defence), e.g. if I am shipwrecked

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<sup>6</sup>A ‘*maskopey*’ is a commercial society founded to provide equal benefits; the term derives from Dutch (*Krünitz*).

I push away another who cannot save himself along with me, in order to save myself.<sup>7</sup> (20:448) (Does this entirely new perspective upon two such controversial cases not also require a very exacting examination?) —

Now follows (6:236) the division of the doctrine of right. There be only one innate right, the right to freedom (independence from another's necessitating power of choice).<sup>8</sup> All other rights must be acquired. —

The entirety of natural right is private right or public right (6:242). Right of society constitutes no particular class. Private right contains the grounds of mine and thine, public or civil right contains the possibility of securing the same. —

Of the manner in which to have something as one's own. Rightfully mine is that with which I am so bound that the use another makes of it without my consent would injure me. (But what is injury? Does not the juridical concept of injury presuppose the concept of mine and thine?) 6:245. The subjective condition of the possibility of use is possession. Juridical possession is intelligible, not physical. Now it is a juridical postulate of reason that I am able to have as my own any external object of my power of choice, and to consider no thing (Sache) as intrinsically ownerless; since to place usable objects (Gegenstände) beyond all possibility of use contradicts practical reason. (This important proposition: a priori no thing is ownerless,<sup>9</sup> instead originally everything belongs to everyone, is also in the view of the reviewer the key to the theory of property right. A primaeval community is not the point. Not by particular agreement does something belong to someone, but instead only because something belongs to someone can the

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<sup>7</sup>The example is ancient, tracing back to Carneades.

<sup>8</sup>It is worth considering whether 'freedom' and 'independence' are distinct factors here, as they are in Rousseau's theory of justice (Neuhouser 2000, 63–80).

<sup>9</sup>'*Adespoton*', here used in the sense of the term used by Kant: *res nullius*; see Kazhdan (1991), 'Salvage, Right of'.

right of everyone to everything be made valid whence the riddle of universal property can be solved practically.) Whoever wants to maintain that something is his must be in possession of it. (Since upon what would he otherwise ground his private right against the universal right?) Thus private property (if the reviewer correctly understands Herr Kant) is acquired through possession (intelligible detention cum animo sibi habendi).<sup>10</sup> (And what one commonly calls taking into possession would thus be merely sensible signs of intelligible taking into possession. These ideas too shine a completely new light on one of the most difficult questions of natural law.) Hence one should, according to 6:229, never say: one has a right to this or that thing, but rather: to possess it merely rightfully. However, this merely rightful taking into possession must, if it is to be recognised by another, be demonstrated sensibly (by a physical act); and because this demonstration can never be entirely sufficient, no entirely proper claim to property is possible in a state of nature. From this it follows (6:255–6) that I have the right a priori to compel anyone with whom I come to discuss mine and thine to enter into a civil constitution. Nevertheless (6:256) the provisional mine and thine within the state of nature is an actual mine and thine. —

Now follows (6:259f) the division of right into rights in things, personal rights and – yet a third? Our jurists and philosophers will be puzzled about this, but Herr Kant contends there is actually a third, namely a personal thingly right.<sup>11</sup> What this is, or is supposed to be, will puzzle many even more than the new idea itself. (20:449) First of rights to things (6:260ff). The right to (or as is here said, in) a thing (Sache) is a right to the private use of a thing (Sache) in regard to which I together with others am in collective possession. (Collective possession?

<sup>10</sup>As his thing, with the sense of owning it himself.

<sup>11</sup>Though he abbreviates Kant's phrase, Bouterwek here discusses Kant's 'right to a person tantamount to a right to a thing' (*RL* §§21, 22; *GS* 6:276–7).

Shouldn't it be called: upon which collective right, though without possession, is ascribed to all? Is it not, even according to Herr Kant's ideas, the sole possession which grounds private use?) Without presupposing such a collective possession it is inconceivable how I, who am not in possession of a thing (Sache), could be injured by another. (I who am not in possession of the thing (Sache)? So long as I lack (intelligible) possession, no injury can occur. The issue here should indeed not be collective possession, which cannot possibly obtain, but rather universal property, which always obtains. Thus does the reviewer also understand the remarks which Herr Kant appends to his contention.) —

Necessarily the first acquisition of a thing (Sache) is the acquisition of ground. (Again in his explanation of this indubitable proposition Herr Kant appears to confuse collective possession and collective property.)<sup>12</sup> The rational title to acquisition can lie only in the idea of an a priori united will of all. The possession of land extends as far as one can defend it. The sea belongs to the master of the coast, as far as the cannons reach. The open sea is free.<sup>13</sup> (But if one now climbs from land to ships and occupies the open sea with floating fortifications and dominates it with cannons, to whom does it then belong?) That one can have a moveable thing (Sache) upon another's ground is possible, though only by contract. (How? Would a thing (Sache) I have previously acquired which was thrown, say by a storm, onto another's land, if there is no prior contract, belong to him?) —

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<sup>12</sup>This is the first of several passages in Bouterwek's review which state a clear, apparently uncontroversial and generally accepted juridical distinction between possession (*Besitz*) and property (*Eigenthum*). This distinction has been widely neglected or denied by Kant's commentators. Bouterwek's use of and comments on this distinction strongly corroborate Kant's use of this distinction, especially in the opening sections of *RL*. For discussion, see Westphal (1997), Friedrich (2004).

<sup>13</sup>Bouterwek here notes Kant's stand on the debate stemming from the early modern period between advocates of *mare liberum* and *mare clausum*, i.e., free or open vs closed or protected seas; e.g. between Grotius (1609) and Seldon (1635).



Of personal rights, 6:271ff. It is grounded upon intelligible possession of another's power of choice in a certain regard. To this belongs transfer by an intelligible act of unification of their bi-lateral will, i.e. by a contract. To comprehend the possibility of contract I must abstract from all relations of time. Otherwise I could, even in the moment when the recipient accepts, withdraw my decision. (The reviewer counts this thought among the most exquisite valuables of practical truth found by Herr Kant.) —

Of the right to a person tantamount to a right to a thing (6:276). This then is the new phenomenon in the juridical heavens. Here Herr Kant has in mind what he calls the category of reciprocity. Here we find, completely unexpectedly, marital right, parental right and household right. (Relations of the head of household to his servants.) The husband acquires a wife, the pair acquire children and the family (including the children?) acquire servants. This properly acquired right is not merely a personal right; since the husband can vindicate as his, his wife who has fled, the father his child, the master his servant. (Is it possible that a first-rate thinker does not see the circularity of this argumentation? If it is true that the husband can to an extent vindicate his claim to his wife etc., then the relationship between the married couple etc. is certainly more than personal. Now the greater part of the juridical world, and among others (20:450) also this reviewer, deny the hypothetical premise, and hence also the Kantian conclusion.) In the case of sexual relations one party gives itself to the other for enjoyment of the thing (Sache). (The reviewer would suppose, for reciprocal performance of service. The moral self can never become a thing (Sache) nor ever be enjoyed. But corporeal performances of service, of whatever kind, belong to personal right.) Only monogamy is marriage in accord with right because – neither can possess the other as thing (Sache) except insofar as he

would give himself to the other as thing (Sache). (But how so, if neither party claims more than a performance of personal service? If a bearer of goods allows me to climb upon his shoulders so that I can climb over a wall (the wall of need), has the bearer thus become a thing (Sache)?) Hence left-handed marriage<sup>14</sup> or concubinage also according to natural law is no true marriage. (Of course not according to Kantian ideas.) Hence even marriage prior to marital cohabitation is not to be regarded as consummated. Hence also by natural law impotence prior to marriage annuls the marriage contract, though not impotence consequent to marital cohabitation. (Hence just as the honourable *Jus canonicum*<sup>15</sup> will have it.) In order not to be too prolix we pass over how on the basis of this theory parental right and the right of the head of the household are developed, at the least, sensibly enough. —

The division of kinds of contract (6:284ff.) may well rest upon more solid ground. All contracts, so far as they can be surveyed according to principles of reason, are either beneficial contracts such as gift, loan, deposit; or onerous (20:451) contracts, such as exchange of goods, purchase, exchange of like for like, etc., and securities contracts, such as deposit,<sup>16</sup> security, and hostage.<sup>17</sup> (Exchange of like for like (Mutuum) without interest would thus be an onerous contract because it is not a loan (Commodatum)? Has one then not also used publically the money lent gratis?<sup>18</sup>) —

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<sup>14</sup>An established though ambiguous legal phrase, more formally: *morganatische Ehe*, from the Latin *matrimonium morganaticum*. In Prussia it designated marriage between partners of different social standing (*Preußisches Allgemeines Landrecht von 1794*, 2:1, §§835–944), which often included a man's marriage to his mistress, including cases of pregnancy out of wedlock, though also for love.

<sup>15</sup>Canon law.

<sup>16</sup>*Pfandvertrag*, not *Depositum*; i.e., deposits paid against something used or borrowed.

<sup>17</sup>Compare Kant's Table of Contracts (*RL* 6:285–6), on which see Byrd & Hruschka (2010), chapters 11, 12.

<sup>18</sup>Bouterwek plays on the German terms '*unentgeltlich*' (interest-free) and '*Geld*'

In two episodic appendices the questions, What is money? and What is a book? are more closely examined and by a new argument the republication of books is declared to be unjust.<sup>19</sup>

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This is about the limit to which the reviewer has followed the author in the conviction that the established truths far outweigh the intermingled ambiguous claims. However, from page 6:290 on, almost throughout to the end of the book, paradox follows upon paradox. Even according to natural law shall purchase break rent.<sup>20</sup> For otherwise by a lien against the thing (Sache) the tenant would have acquired a Jus in re.<sup>21</sup> (Had he then not actually done so? Is the right to use thus not also a Jus in re?) —

The right of acquisitive prescription (Usucapio)<sup>22</sup> (according to 6:291ff.) is to be grounded by natural right. For if one were not to assume that an ideal acquisition, as it is called here, were grounded by legitimate possession, then altogether no peremptory acquisition would be obtained. (However Herr Kant himself assumes in the state of nature only a provisional acquisition and on that basis urges (20:452) the juridical necessity of a civil constitution. What was sought by the Roman jurists, ut dominia rerum sint certa,<sup>23</sup> is also sought by natural law; but from that no natural right to acquisitive prescription follows. I present myself as a legitimate possessor; but only against him who cannot prove that he, earlier than I, was the legitimate possessor of the same thing (Sache) who had never willed to cease so being.) —

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(money).

<sup>19</sup>The topic here is the republication of books, not by the original publisher, but by unlicensed second presses; copyright was not yet established.

<sup>20</sup>The phrase denotes the automatic termination of a rental contract upon sale of the premises; Kant discusses this issue, using this phrase, in print (*RL* 6:290, 303, 361–2) and in his drafts (*GS* 16:792, 23:264–6).

<sup>21</sup>*Jus in re* is right in (or to) a thing, not merely to its use.

<sup>22</sup>Acquisition by long-term occupancy.

<sup>23</sup>'So that dominion over things be secure'.

As ideal acquisition the testamentary right to inheritance is also to be grounded a priori. Admittedly, says Herr Kant, unilateral will cannot transfer anything to another, and as long as the testifier lives, the designated heir cannot acquire it; though silently he does acquire a right to the estate, because necessarily any human being accepts everything through which he can lose nothing. (And what would be such a thing by the acquisition of which I could not possibly lose another advantage, more important to me, e.g., to be rid of troubles?) —

Finally Herr Kant assumes another ideal right of the honourable man to a good name in perpetuity, by which any survivor is justified to demand the accountability of whomever denigrates the good name of the deceased. —

The distinction of a double pronouncement by natural right is very useful, according to whether one assumes that there already is an authority, or that none yet exists. Yet in the latter case would I hence not be liable to be coerced to uphold a contract of gift, *quia nemo suum jactare praesumitur*,<sup>24</sup> as is stated on 6:298? Must I, according to 6:298, assume damages which, without fault of my own, pertain to a thing (Sache) I have loaned? Would I, according to 6:300f, actually acquire by legitimate purchase a thing (Sache) stolen from its proprietor?<sup>25</sup>

So much for private right. Most of the author's ideas following under the rubric of public right regarding the right of the state, right of peoples and what he calls cosmopolitan right are familiar from his essay (20:453) on Theory and Practice and his tract on Perpetual Peace. Space does not allow the reviewer to comment on these. Nevertheless so far as we know no philosopher – for here the concern is not with co-philosophising

<sup>24</sup>Since no one may be presumed to have renounced'; Bouterwek repeats Kant's principle (*RL* §37, 6:298).

<sup>25</sup>Bouterwek appears to have in mind someone purchasing goods from one party, which, unbeknownst to the purchaser (at least), are stolen from another party.

individuals, whose entire philosophy aims at providing a formulation intelligible to themselves of what the author said<sup>26</sup> – has acknowledged the most paradoxical of all paradoxical Kantian propositions, the proposition that the mere idea of sovereignty should necessitate me to obey as my lord anyone who has imposed himself upon me as my lord, without asking who has given him the right to command me.<sup>27</sup> That one shall recognise sovereignty and a sovereign, and that one shall hold a priori this or that sovereign, whose existence has not at all been given a priori, to be his lord, these are supposed to be one and the same? —

Only when prepared by such contentions is one no longer amazed when one sees that natural penal justice, which first finds its place here in natural right of the state (6:331ff.), is grounded upon a strict Jus talionis.<sup>28</sup> —

Nevertheless the eternal truth shall here, as in all things, gradually assert its right, and thus if many thoughts of the reformer of philosophy may be honoured only in memory, his metaphysical principles of the doctrine of right shall indeed on the whole remain a benefit to science, for no second-rate thinker and none other than the all-penetrating assayer of the human capacity for knowledge could produce them.




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<sup>26</sup>Bouterwek uses the phrase, attributed by Diogenes Laertius (8:46) to Pythagoras, ‘αυτος εφα’, meaning, ‘He said so himself’.

<sup>27</sup>Kant quotes Bouterwek’s question in his published reply (*RL* 6:370–1).

<sup>28</sup>Strict right of retribution.

Review

# Kant's 'Explanatory Remarks to the Metaphysical Foundations of the Doctrine of Right', 1799.

By Friedrich Bouterwek

2 sheets in Octavio (GS 6:356–372). Göttingische Anzeigen von gelehrten  
Sachen Nr. 120 (29. July 1799):1197–1200.

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Translated by Kenneth R. WESTPHAL  
Department of Philosophy, Boğaziçi Üniversitesi, İstanbul

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{Friedrich BOUTERWEK}, Rezension von Kants »Erläuternde Anmerkungen zu den  
*Metaphysische Anfangsgründe der Rechtslehre*«, 1799. 2 Bogen in Octavio  
Göttingische Anzeigen von gelehrten Sachen Nr. 120 (29. Juli 1799):1197–1200.<sup>29</sup>

**T**hese sheets are published along with the second edition of the metaphysical foundations of the Doctrine of Justice by Herr Kant and are printed specially for those who possess the first edition. Their content requires extensive notice by the reviewer, for these remarks, by which the author explains his doctrine of justice, are, as is expressly stated in the Introduction, for the most part occasioned by the review of Kant's doctrine of justice in these Notices (1797 Nr. 28). These Notices however are not polemics. Furthermore, the reviewer feels too much respect for and gratitude to the author, as to wish to enter into any public dispute, in which even to win the victory cannot please anyone who still has any sense of scholarly parental respect. That Herr Kant calls the Göttingen Review on the whole an acute

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<sup>29</sup>Online at: [http://gdz.sub.uni-goettingen.de/dms/load/toc/?PPN=PPN31973076X\\_1799](http://gdz.sub.uni-goettingen.de/dms/load/toc/?PPN=PPN31973076X_1799).

and thorough review, is an honour by which the trial between the author and the reviewer only becomes more involved. Hence only a few remarks to the remarks now lying before us. —

First Herr Kant defends his definition of the capacity of desire, which the reviewer had criticised, as a capacity by which its representations can cause the objects of these representations. The reviewer found in this definition an assumption about which one must first come to terms with the idealist, who claims [to account for] the reality of the outer world, but who does not doubt the capacity of desire. The reviewer is now happy to concede that his critique was from too far afield. May the representation of external things come from wherever whence; the distinction between representation and object of representation remains psychologically certain in any event; and thus it can have its use for the doctrine of justice. It would be an entirely different matter, if by a transcendental definition, like that provided by the author, the psychological truth which no sceptic attacks were surpassed and an absolute truth were to be brought to bear in order to show the unity of theoretical and practical philosophy. To seek this unity was however admittedly no task of the doctrine of justice.

Second, Herr Kant defends his personal right tantamount to a right to thing; first logically according to its concept, then practically according to its actuality. Against the logical defence the reviewer has nothing to object. Once a personal right is distinguished conceptually from a right to a thing, there of course remain a personal right tantamount to a right to a thing, and a right to a thing tantamount to a personal right as concepts for two logical divisions. Now as Herr Kant himself says, a right to a thing tantamount to a personal right immediately lapses, regardless of whether the concept logically maintains its place. The question then, is whether a personal right tantamount to a right to a thing also remains an empty placeholder, if one properly illuminates the practical reality which is supposed to be put in this place. And here the reviewer still sees nothing in

the propositions by which the author wants in fact to fill that empty placeholder, except a subtle thought, an artificial elevation of an ethical refinement to the dignity of a principle of justice. All sexual intercourse is moralised by ethical refinement or, what here amounts to the same, humanised, i.e. an animal feeling is transformed by morality into a human feeling. The honourability of marriage, insofar as it is the pure result of truth humanity, the reviewer has accordingly never doubted. But that is not the topic, when it is asked, whether the married couple have, in regard to each other, a personal right tantamount to a right to a thing; that is, whether they, so far as they are a married couple, possess each other as things. This is what Herr Kant once again contends. But on what grounds? Because the married couple, says Herr Kant, obligate each other to mutual use. Hence the entire dispute turns on the concept of use. Now the question arises: can one call the fulfilment of the marital duty – may one forgive the reviewer this vulgar term of art! – a use in the same meaning, as one understands that word within the doctrine of justice? That is the question to which all of this comes. This question is expressly affirmed by Herr Kant. But why? In these Remarks he goes so far as to call the married couple, insofar as they can use each other in their sexual capacity, actual *res fungibiles*.<sup>30</sup> One can foresee how the jesters will take up this bit of earnestness. But also those, such as the reviewer, who from due seriousness have no wish to make jokes, may still ask about the grounds of this contention, which here is only repeated again as a contention. The reviewer still sees nothing more juridically in sexual intercourse than a kind of provision of service. Persons exchange their services mutually. What in so doing they may intend does not concern the doctrine of justice. Since these persons do not want to burden each other's personality, and in fact do not burden each other. The mutual enjoyment which accompanies this provision

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<sup>30</sup>The term is also used in Anglophone law to designate things which can be exchanged or substituted (including for money by sale); Kant uses the term in just this connection (*RL* 6:360).



of service, is of equally little concern to the doctrine of justice; since it is nothing more than the highest degree of enjoyment which one human being can possibly provide another through corporeal provision of service. Only from the perspective of humanity or moral development of sensibility do these relations appear differently, and indeed yet again differently from the side of the man as from the side of the woman. However, the doctrine of justice is no doctrine of humanity.

In addition Herr Kant defends his theories of prescription, of inheritance and of punishments. In connection with inheritance some excellent ideas about the rights of the state regarding permanent foundations for its subjects. In conclusion, where a bit more about rights of government is said, Herr Kant appears to suspect, that it was the commanding idea of supreme authority within Kant's account of rights of the state which had incited the reviewer's reason. No, not the idea as idea; but the postulated duty of justice, the concept of a rightful sovereign posited a priori in a usurper, such as Cromwell and Robespierre, to recognise them as consolidated [in authority], because this usurper now rules, is to the understanding of the reviewer – he does not deny it – inaccessible.



## GLOSSARY

|  |   |
|--|---|
| abrogieren                                   | abrogate  |
| bestiztnehmen                                | take into possession <sup>31</sup>                                  |
| Bedingung                                    | condition   |
| eigenmächtig                                 | unilaterally  |
| Eigentümer                                   | proprietor. <sup>32</sup>   |
| ein auf dingliche Art<br>persönlichen Recht. | A right to a person tantamount to a right to a thing. <sup>33</sup> |

<sup>31</sup> As Bouterwek notes in his review (e.g., 20:449), the contrast between possession and ownership is central to Kant's analysis of the fundamental principles required by each of these. 'Besitznehmung', like 'possession', is commonly understood to involve proprietary right. These ordinary connotations, however, must be disregarded in order to formulate and to understand Kant's basic and Critical concern about the fundamental principles governing rightful possession and their eventual relations to proprietary rights. 'Ownership' or what is 'one's own' concerns proprietary rights, not merely rights of possession nor even preliminary non-rightful possession. Traditionally, property ownership is designated in legal texts in terms of 'mine or thine', though it is a matter of interpretation whether Kant also uses these terms in a broader sense to designate possession without full proprietary rights. This point is crucial to understanding Kant's specifically Critical analysis and justification of rights to possession or to property; see Westphal (1997). In these drafts Kant also distinguishes 'distributive' and 'collective' forms of universal (i.e., common) possession of the earth's ground, on which see Edwards (1998).

<sup>32</sup> 'Owner' is often ambiguous between 'possessor' and 'proprietor', especially within the context of 'mine and thine' and Kant's distinction between possession and ownership of property, especially in connection with a right to a person tantamount to a right to a thing. Although Kant uses established legal terms and phrases, he does not always use them in their legal sense. Instead, he recasts these terms to suit his specifically Critical, *a priori* metaphysical investigation. For example, in legal usage, a 'res nullius' is something which happens to be unowned. In Kant's *RL*, a 'res nullius' is something within the human capacity to use, though it is in principle excluded from all rightful use.

<sup>33</sup> Gregor's rendering, 'a right to a person akin to a right to a thing', is misleading because 'akin' is too vague, especially in this context. Kant's term '*gleich*' is very strong; 'tantamount' closely approximates the sense of Kant's use of '*gleich*'. As Bouterwek notes in his review, Kant's concept of this right is difficult to understand, especially upon the basis of Kant's published discussion alone. This difficulty is common in the Anglophone literature which takes note of this concept. One virtue of Kant's draft reply to Bouterwek is that he examines and explains this concept and its significance much more thoroughly than he does in print. For these reasons, accuracy clearly favours using 'tantamount' instead of 'akin'. This stronger term is justified by Kant's Latin formulation of this right at *GS* 23:224,17–18: '*ius in persona instar iuris in re contra quemlibet possidentem*'.

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|                    |  |
|--------------------|--|
| erwerben           | acquire  |
| Gewalt             | control, though in the context of public right:<br>authority.      |
| hindern            | obstruct <sup>34</sup>   |
| Hindernis          | obstruction  |
| ius in re          | right in a thing   |
| ius ad rem         | right regarding a thing <sup>35</sup>                              |
| jus latte dictum   | broad right  |
| jus stricte dictum | strict right   |
| Rechtsanspruch     | a claim to a right   |
| Rechtsspruch       | verdict, sentence <sup>36</sup>                                    |
| status             | state (context makes clear that no political state is<br>at issue) |
| Willkühr           | power of choice  |

<sup>34</sup> Much of Kant's terminology is drawn directly from legal and juridical texts. Anglophone discussion of Kant's views has suffered by neglecting these important aspects of his terminology. I have tried to render Kant's notes accordingly; this is one case in point. 'Obstruction' is the English legal term corresponding to the German legal sense of '*Hindernis*'. 'Hindrance' too easily connotes direct physical interference, whereas the legal usage is not restricted to physical interference; e.g., 'obstruction of justice'.

<sup>35</sup> Regarding Kant's distinction between '*ius in re*' and '*ius ad rem*', see *GS* 6:302, 361–2, and Byrd & Hruschka (*Commentary* (2010), 127 n25), who state: 'Kant uses the Latin *ius in re* (also *ius reale*) and calls it a *Recht in einer Sache* (*RL* §11, 6:260,15, 260,33–261,1, 261,16), which we are translating in the quote above as 'right to a thing'. With the expression, Kant means something similar to what is called a 'right *in rem*' to property in the Anglo-American legal literature, or a right against *everyone* to that property, albeit not [*sic*] an ownership right. Kant also uses the Latin *ius ad rem*, which in German is *Recht auf eine Sache*. (Cf. Kant's contrast between *ius in re* and *ius ad rem* in Kant's 'Annex of Explanatory Remarks 4', *GS* 6:362,1–4; *ius ad rem* is also used in *RL* §39, 6:302,11–12.) A *ius ad rem* is a right *in personam* to property, e.g., a right against the landlord to the use of property specified in a rental contract, or the right against the owner of property to have that property transferred into one's ownership, as specified in a sales contract. A *ius ad rem* is a right against *someone*, the landlord or the property owner, not a right against *everyone*, as is a right *in rem*.

<sup>36</sup> Gregor's glossary for *Practical Philosophy* specifies 'verdict, sentence' for '*Rechtsanspruch*', whereas a '*Rechtsanspruch*' is a claim to a right, whilst '*Rechtsspruch*' (no '*an*' in the middle!) means 'verdict, sentence'. These distinct meanings are virtually built into the etymology of these two terms, as the contrast between '*spruch*' and '*anspruch*'.

|         |   |
|---------|---|
| Wille   | will<br>situation; ‘condition’ only where unambiguous or noted. |
| Zustand |   |

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<sup>37</sup>One cautionary note: this volume often cites Kant’s sources for various Latin terms, *e.g.*, in his predecessors’ natural law theories. In such cases, unfortunately, it does not provide Kant’s often distinctive development and use of these terms and the concepts they connote.

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