

## KANT ON “WHY MUST I KEEP MY PROMISE?”

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## INTRODUCTION

Why is it that I must keep my promise? Immanuel Kant,<sup>1</sup> in his “Doctrine of Right,”<sup>2</sup> tells us that everyone easily understands “I must.” The duty to keep promises is a categorical imperative.<sup>3</sup> Kant says that any fur-

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1. Immanuel Kant (1724–1804), the German philosopher from Königsberg, is generally regarded as one of Europe’s most influential thinkers and the last major philosopher of the Enlightenment. Kant’s work in the “Doctrine of Right,” which is contained within the *METAPHYSICS OF MORALS* (1797), deals with the rights that people have or can acquire.

2. Kant’s works are cited by page and line, and when appropriate also by part, title, and section number of *KANT’S GESAMMELTE SCHRIFTEN*, (Akademie-Ausgabe [hereinafter AA]): *GRUNDLEGUNG ZUR METAPHYSIK DER SITTEN* [GROUNDWORK OF THE METAPHYSICS OF MORALS] (AA IV 1785); *DIE METAPHYSIK DER SITTEN* [THE METAPHYSICS OF MORALS] (AA VI 1797); *KRITIK DER REINEN VERNUNFT* [CRITIQUE OF PURE REASON] (AA III, 2d ed. 1787); *ZUM EWIGEN FRIEDEN* [TOWARD PERPETUAL PEACE] (AA VIII 1795); *FEYERABEND-VORLESUNGSNACHSCHRIFT ÜBER KANT’S NATURRECHT NACH GOTTFRIED ACHENWALL* [FEYERABEND LECTURE NOTES] (AA XXVII.2,2 1784). The translations of Kant’s texts on practical philosophy are the authors’ own. However, the authors did on occasion consult Mary Gregor’s translations in *IMMANUEL KANT, PRACTICAL PHILOSOPHY* (Mary J. Gregor trans. & ed., 1996) [hereinafter Gregor Translation]. As a courtesy to the reader, citations often include a reference to an accessible English translation.

3. Kant distinguishes between hypothetical imperatives, which determine that an action “is good for a *possible* or *real* purpose,” AA IV, p. 414, l. 32–33, *translated in* Gregor Translation, *supra* note 2, at 68, and categorical imperatives, which determine what actions “without reference to some purpose, i.e., without any other goal, [are] objectively necessary.” AA IV, p. 415, l. 2–4, *translated in* Gregor Translation, *supra* note 2, at 68. An example of a hypothetical imperative is: “If you want to avoid disappointing your friend’s expectations, keep your promise to meet him for lunch.” An example of a categorical imperative is: “Keep your promises” (whether you want to or not). Categorical imperatives are generated by subjecting the maxim of one’s action, meaning the principle of action one has subjectively adopted for oneself, AA VI, *Introduction to the Metaphysics of Morals*, p. 225, l. 2–3, *translated in* Gregor Translation, *supra* note 2, at 379, to the test of whether one can “will that maxim to become a universal law,” AA IV, p. 421, l. 7–8, *translated in* Gregor Translation, *supra* note 2, at 73. The Categorical Imperative in its first formulation is therefore, “Act only in accordance with that maxim through which you can at the same time will that it become a universal law.” AA IV, p. 421, l. 6–8, Gregor

ther proof of this imperative is simply impossible—indeed as impossible as it would be for a geometer to prove that I need three lines to construct a triangle.<sup>4</sup>

One may quickly fall into the trap of believing Kant's claim because of his arguments in the *Groundwork of the Metaphysics of Morals*,<sup>5</sup> where Kant uses false promising as his most convincing example for the first formulation of the Categorical Imperative: "Act only in accordance with that maxim through which you can at the same time will that it become a universal law."<sup>6</sup> The example posits an individual in need of money who knows he will never be able to repay a loan.<sup>7</sup> Still, to get the needed funds, he also knows that he must firmly promise to repay it. Can he make the promise? Kant states that the maxim of his action is, "When I believe myself to be in need of money I shall borrow money and promise to repay it, even though I know that this will never happen."<sup>8</sup> Such a maxim cannot be universalized without contradiction; thus, it cannot become a universal law. The individual acting on this maxim relies on the institution of promising, without which his promise would be ineffective, while simultaneously contradicting the nature of the institution of promising. Although this example seems to convincingly support Kant's Categorical Imperative, does it provide support for the *legal* duty to *perform* a contractual obligation? Two distinct questions are raised here. The first is whether the duty in connection with the false promising example Kant discusses in *Groundwork* is a legal or an ethical duty. The second is whether the duty, be it legal or ethical, is a duty not to make false promises, referring to the duty relevant at the time the promise is made, or a duty to perform as promised earlier, which first becomes relevant when performance is due.

At first blush, the duty Kant discusses in *Groundwork* is the duty not to lie, which is an ethical duty but not necessarily a legal duty. For Kant,

Translation, *supra* note 2, at 73. For an excellent discussion of the categorical imperative, see H. J. PATON, *THE CATEGORICAL IMPERATIVE: A STUDY IN KANT'S MORAL PHILOSOPHY* (1948).

4. AA VI, p. 273, l. 15–22, translated in Gregor Translation, *supra* note 2, at 423.

5. See JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* 233 (1991). Gordley critically states,

Promises are binding, [Kant] said, because one could not will, as a universal law, that promises should be broken. Promises would then be idle words. Thus, the categorical imperative brings us right back to where we were with the will theorists . . . : promises are binding because they have been defined to be.

*Id.* As we shall argue, Kant believed that promises are binding if they are accepted, because by accepting a promise or offer, the offeree acquired something that became his own, namely, the offeror's choice to perform a certain act.

6. AA IV, p. 421, l. 6–8, translated in Gregor Translation, *supra* note 2, at 73.

7. AA IV, p. 422, l. 15–18, translated in Gregor Translation, *supra* note 2, at 74.

8. AA IV, p. 422, l. 22–23, translated in Gregor Translation, *supra* note 2, at 74.

legal duties are duties one owes to others; ethical duties are duties one owes to oneself.<sup>9</sup> The duties one owes to others are legal duties if their non-fulfillment constitutes a violation of someone else's freedom of choice, thus violating Kant's universal principle of law: "Act externally so that the free use of your choice can co-exist with everyone else's freedom under a universal law."<sup>10</sup> Because the non-fulfillment of duties constitutes a violation of someone else's freedom of choice, one can be coerced to fulfill these duties.<sup>11</sup> In the *Groundwork* example, the individual considers lying to gain an advantage. Kant notes in several places that lying violates an *ethical* duty one owes to oneself,<sup>12</sup> but lying violates a *legal* duty only if the lie infringes upon someone else's rights.<sup>13</sup> In the "Doctrine of Right," Kant even states that lying is generally not prohibited by natural law be-

9. In §§ 1–3 of his "Doctrine of Virtue," Kant deals with the problem raised by duties to oneself in depth. Clearly, a duty to oneself is a self-contradictory concept if the duty-bound self and the duty-imposing self are one and the same self. Kant states that the concept is self-contradictory because one who can impose an obligation can similarly release the person obligated from the obligation. For duties to oneself, if the self imposing the obligation is the same as the self who is then obligated, then that self would have a duty it could release itself from fulfilling, or would be obligated to do something it is not obligated to do. The concept of a duty to one's self is not self-contradictory if the duty-imposing self is the self conceived as a (pure) rational being [*Vernunftwesen*], as *homo noumenon*, which imposes a duty on the then duty-bound self, conceived as a rational natural being [*vernünftiges Naturwesen*], *homo phaenomenon*. In this way, the self is regarded as having two different meanings. The rational natural being, or the *homo phaenomenon*, is a being which can be determined by reason to act in a certain way in the empirical world. Still, this notion of reason, as opposed to sensual drives and desires, determining oneself to act is not the same as the notion of obligation determining oneself to act. The (pure) rational being, or the *homo noumenon*, however, is the self conceived of as a being with internal freedom that is self-legislating, and thus that can be the author of obligations. It is this self that imposes an obligation on the self as a rational natural being. The self as a rational natural being can let its reason determine that it act in accord with duty or it can let its reason determine that it act in accord with pragmatic considerations not in accord with duty. Nonetheless, it cannot release itself from the obligation, and thus when its reason determines that it not act in accord with duty, it breaches the obligation it owes to itself as *homo noumenon*. AA VI, p. 418, l. 5–p. 419, l. 23, translated in Gregor Translation, *supra* note 2, at 543–44. For a discussion of these two notions of self, see Joachim Hruschka, *Die Würde des Menschen bei Kant*, 88 ARCHIV FÜR RECHTS-UND SOZIALPHILOSOPHIE 463 (2002).

10. AA VI, *Introduction to the Doctrine of Right*, § C., p. 231, l. 10–12, translated in Gregor Translation, *supra* note 2, at 387–88.

11. Kant states that having a right is connected with the non-prohibition against using force to ward off a violation of that right. AA VI, *Introduction to the Doctrine of Right*, § D., p. 231, l. 23, translated in Gregor Translation, *supra* note 2, at 388. The full argumentation needed to explain the difference between legal and ethical duties for Kant would exceed the bounds of this article. See B. Sharon Byrd, *Kant's Theory of Punishment: Deterrence in its Threat, Retribution in its Execution*, 8 L. & PHIL. 151, 156–69 (1989).

12. AA VI, p. 403, l. 23–24, translated in Gregor Translation, *supra* note 2, at 532; AA VI, p. 420, l. 13–20, translated in Gregor Translation, *supra* note 2, at 545; AA VI, p. 429, l. 4–7, translated in Gregor Translation, *supra* note 2, at 552 ("The greatest violation of the duty a person owes to himself seen as a moral being (the humanity in his person) is the contrary to truthfulness: the *lie* . . ."). The preceding citations are from Kant's "Doctrine of Virtue."

13. AA VI, p. 238, l. 29–32, translated in Gregor Translation, *supra* note 2, at 394 n.\*; AA VI, p. 430, l. 1–4, translated in Gregor Translation, *supra* note 2, at 553. The citations are from Kant's "Doctrine of Virtue."

cause of every person's innate right to freedom.<sup>14</sup> A person has a right to say or promise anything regardless of whether the statement is true and honestly meant or false and dishonestly meant, so long as the lie does not infringe upon others' belongings.<sup>15</sup> Fairly speaking, falsely promising to repay one's loan infringes upon what belongs to someone else because the promisee parts with her money in the mistaken belief that the promisor intends to repay the loan. The promisee is harmed when she parts with her belonging after the promisor duped her into believing something that was not true. That could be the basis for charging the promisor with fraud, which is indeed a violation of a legal duty.

The second question raised, namely whether the duty is a legal duty to *perform* a contractual obligation, must be answered in the negative. Consider a variation of the previous example. Again, assume the promisor makes the false promise to receive the loan, but later, before the loan is due, the promisor inherits a large sum of money from a long lost relative. When the loan is due, the promisor repays it promptly. Has the promisor violated any contractual legal duty owed to the promisee? Seemingly not.<sup>16</sup> If the promisee discovers the promisor's initial inability to repay the loan before the loan is due, the promisee could perhaps charge the promisor with fraud, which is a tort and not a crime according to Kant.<sup>17</sup> However, as long as the promisor maintains that he intends to repay the loan when due, he cannot be charged with breach of contract even if his financial situation indicates that he will be unable to perform on time.<sup>18</sup>

14. Kant actually says that one has the legal faculty or authorization [*Befugnis*] to lie. AA VI, *Division of the Doctrine of Right*, § B., p. 238, l. 3–9, translated in Gregor Translation, *supra* note 2, at 394. By "authorization," he means "freedom, which is not restricted by any opposing imperative." AA VI, *Introduction to the Metaphysics of Morals*, § IV, p. 222, l. 27–30, translated in Gregor Translation, *supra* note 2, at 377. "Authorization" therefore means freedom to act in a certain way, here to lie, in the sense of being not prohibited to lie.

15. AA VI, p. 238, l. 5–9, translated in Gregor Translation, *supra* note 2, at 394. In Kant's 1797 essay "On a supposed right to lie from philanthropy," Kant goes somewhat further to say that anytime one lies, one contributes to disbelief in declarations, such that all rights based on contract lose their force. Consequently, any lie harms humanity in general. AA VIII, p. 426, l. 20–24 (1797), translated in Gregor Translation, *supra* note 2, at 612.

16. If after receiving the money, the promisor immediately tells the promisee that he has no intention to repay the loan, that would constitute anticipatory repudiation of the contractual obligation, which under the common law, can be treated as a breach of contract. See RESTATEMENT (SECOND) OF CONTRACTS §§ 251, 253 (1981). Here we are considering the case in which the promisor continues to maintain that he will repay the loan when due at a later date.

17. Kant calls torts "private offenses" [*Privatverbrechen*], which are dealt with in civil rather than criminal courts. AA VI, *General Comment E*, p. 331, l. 10–11, translated in Gregor Translation, *supra* note 2, at 472–73.

18. The common law generally has treated mere doubts as to the promisor's ability to perform when performance is due as not excusing the doubting promisee from her own performance. If, for example, a buyer of land discovers a remediable defect in the seller's title, that discovery does not give the buyer a right to repudiate the contract. Instead, the seller has until the time set for performance to

In the alternative, consider the example of an individual who thinks he will be able to repay a loan at a later date. He promises to repay the loan and receives the money. He then loses a significant amount of money in the stock market. At the time the loan is due, he can no longer repay it. He has not made a false promise, and thus has not breached the duty Kant considers in the *Groundwork* example. However, he has breached a contractual obligation owed to the promisee, even though he would gladly repay the loan if he had the money to do so.

Kant's example in *Groundwork* seemingly fails to provide support for the claim that one should *fulfill* one's promises. The problem lies in the time gap between the time of the promise and the due date for performance. Whether the promise is false depends on the promisor's beliefs as to his ability to make future payment, beliefs that may or may not be true. Kant's example in *Groundwork* relates not to the breach of a contractual obligation, but rather to the relationship between the promisor's beliefs and claims about the future. Kant himself points to the problem of the time lapse in connection with what he calls "acquisition of security through taking an oath in court."<sup>19</sup> Kant distinguishes between the promissory and the assertory oath.<sup>20</sup> He takes the example of the civil servant who is called upon at the beginning of his term in office to take an oath promising to properly fulfill his official duties.<sup>21</sup> Kant contends that it would make more sense to require the civil servant to take an oath at the end of each year, asserting that he did, in fact, properly fulfill his duties.<sup>22</sup> With the assertory oath, the civil servant is in a position to know how he actually performed

remedy his title. *Hellrung v. Hoechst*, 384 S.W.2d 561, 564 (Mo. 1964); *Clark v. Ingle*, 266 P.2d 672, 674 (N.M. 1954); *Knapp v. Davidson*, 192 N.W. 75, 77 (Wis. 1923). The common law recognizes an exception, however, for cases of insolvency. Although insolvency does not amount to repudiation and is not a reason for termination of a contract, *Ariz. Title Ins. & Trust Co. v. O'Malley Lumber Co.*, 484 P.2d 639, 647 (Ariz. Ct. App. 1971), it does give the other party the right to suspend his own performance until he receives the insolvent's performance or security for performance. U.C.C. § 2-609(1) (1995); RESTATEMENT (SECOND) CONTRACTS §§ 251-52; E. ALLAN FARNSWORTH, CONTRACTS § 8.23, at 641-42 (1982). The right to receive assurance in cases of reasonable grounds to believe the promisor will not perform is based on a principle similar to the duty of good faith and fair dealing in the performance of the contract. RESTATEMENT (SECOND) OF CONTRACTS § 251 cmt. a. However, if one party to a contract has fully performed and the only obligation remaining is for the other party to perform a series of acts, then anticipatory repudiation or breach by failure to perform any one of those acts does not permit the first party to sue for breach of contract with respect to the remaining acts. LON L. FULLER & MELVIN ARON EISENBERG, BASIC CONTRACT LAW 1000 (6th ed. 1996). If that is true, then *a fortiori* the creditor in our example would not have a right to treat the loan agreement as breached until repayment is due, regardless of the debtor's financial situation, as long as the debtor does not repudiate the contract.

19. AA VI, § 40, p. 303, l. 27-28, translated in Gregor Translation, *supra* note 2, at 448.

20. AA VI, § 40, p. 305, l. 3-8, translated in Gregor Translation, *supra* note 2, at 449.

21. AA VI, § 40, p. 305, l. 3-5, translated in Gregor Translation, *supra* note 2, at 449.

22. AA VI, § 40, p. 305, l. 8-12, translated in Gregor Translation, *supra* note 2, at 449.

during the year. With the promissory oath, he can always excuse himself at the end of the year by claiming that he could not have foreseen the difficulties he encountered during the year that hindered him from keeping his promise.<sup>23</sup>

Trying to use the first formula of the Categorical Imperative to support one's obligation to fulfill his promises creates difficulties. The maxim to be universalized is, "Whenever it is to my benefit not to perform my promise, I will not perform." The promisor is not relying on the institution of promising while simultaneously contradicting it. The promisor, at the point performance is due, is rejecting the institution of promising by refusing to perform while exhibiting no self-contradictory behavior by acting on the maxim posited at the time performance is due.

Undeniably, the Categorical Imperative could be used to substantiate a duty to fulfill contractual promises in some cases. Certainly the second formula, "[T]reat humanity in yourself and others always as an end and never merely as a means,"<sup>24</sup> seems to support that obligation. If the promisor has already gained a benefit from the promisee, then failing to fulfill his own obligation would be treating the promisee as a mere means to his own advantage. Consider the taxi passenger who impliedly promises to pay the fare on the meter. On arrival at his destination, he refuses to pay the driver. He has used the driver to pursue his own goals, but refuses to consider the driver as an end in herself pursuing goals she has adopted. If he pays the driver, he nonetheless has used her as a means, but not as a *mere* means.

Yet many other contractual arrangements legally require the promisor to perform his promise even though the promisee has not yet suffered, nor indeed will ever suffer, any detriment from non-performance. One obvious example is the (formalized and thus binding) donative promise that the promisee has accepted, but upon which she has not relied to her detriment. Even for mutually obliging contracts, one can easily imagine a case where the promisee has done nothing to her detriment in assuming that the promisor will perform.<sup>25</sup> When the time for performance is due, the promisor's refusal to perform can hardly be characterized as using the promisee as a mere means to the promisor's ends. The promisor has gained nothing from

23. AA VI, § 40, p. 303, l. 29–p. 305, l. 30, *translated in* Gregor Translation, *supra* note 2, at 448–50.

24. AA IV, p. 429, l. 10–12, *translated in* Gregor Translation, *supra* note 2, at 80.

25. See ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW* 8 (1997). Consider the example of a film company that enters into an agreement with a television network to license a television series for one year at a certain amount per episode and for twenty-two episodes. Shortly thereafter, and before the film company has invested any resources in the series or foregone any other opportunities, the television network repudiates. *Id.*

the promisee, while the promisee has suffered no detriment in relying on the promise. Still, presumably Kant and certainly modern German and American law would say the promisor has breached the contract.

The thesis of this Article is that Kant, in his discussion of contractual obligations, is not relying on traditional moral or philosophical ideas about contract as promise. Indubitably, he does have strong moral and philosophical views about lying and making false promises, although these views are not the reason he claims contractual obligations must be fulfilled. Instead, failing to fulfill a contractual obligation, or preventing someone under contract from fulfilling her contractual obligation, is a violation of the promisee's possessions or assets, more similar to theft than to moral failure to do as promised. Seeing contractual obligations in this way ends many of the battles contemporary theories of contract law have waged.<sup>26</sup>

Part I of this Article first defines the nature of a contractual claim within Kant's legal theory by examining Kant's discussion at the beginning of "Private Law of the External Mine and Thine." It will show that Kant's discussion of both sensible or physical possession, as well as intelligible possession or ownership, is equally applicable to contractual claims. When I accept a promise made to me, I acquire possession of the promisor's choice to act in a certain way in the future. Kant's notion of intelligible possession or "ownership" of that person's choice to act constitutes a contractual claim.

Part II of this Article considers why I have the moral capacity to acquire another's choice to act in a certain way in the future. Part II claims that I have that capacity by virtue of the permissive law of practical reason contained in section 2 of the "Doctrine of Right." The permissive law of practical reason, by giving me the capacity to be a promisee, makes contractual claims *possible*. It does not, however, make me a promisee *in fact*. To be a promisee in fact, I must acquire a contractual claim against a concretely existing promisor by accepting the promisor's promise. Part II also discusses the nature of this acquisition and shows that the parties to a contract establish this claim through their united self-legislating wills. Their wills make contractual claims a *reality*.

Part III of this Article addresses why the bilateral wills of two contracting parties can legislate so that the contractual claims they generate are recognized by all and enforceable in a court of law under a system of dis-

26. See, e.g., P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979); CHARLES FRIED, *CONTRACT AS PROMISE* (1981); GRANT GILMORE, *THE DEATH OF CONTRACT* (1974); HILLMAN, *supra* note 25; ANTHONY T. KRONMAN & RICHARD A. POSNER, *THE ECONOMICS OF CONTRACT LAW* (1979); Robert A. Hillman, *The Crisis in Modern Contract Theory*, 67 *TEX. L. REV.* 103 (1988-1989).

tributive justice. Part III also argues that courts will recognize contractual claims to the extent the contracting parties' bilateral self-legislating wills are contained in the *a priori* necessarily united will of all.<sup>27</sup> If they are, then by closing a contract the parties define their own obligations and simultaneously obligate all others to refrain from interfering with the parties' contractual claims. The *a priori* necessarily united will requires that these obligations be imposed to avoid constant conflict and ensure the one final goal of the "Doctrine of Right": perpetual peace. Consequently, a court will enforce the obligations in a system of distributive justice, making the claims peremptory and thus imparting *necessity* to them.

Finally, the Closing Comments return to the question asked at the beginning of this text: "Why must I keep my promise?" In this final section, we attempt to explain how Kant answers this question and why he insists that any proof of the Categorical Imperative that "I must" is impossible.

#### I. PHYSICAL AND INTELLIGIBLE POSSESSION OF ANOTHER'S CHOICE

Generally, Kant interpreters consider the first ten sections in the "Doctrine of Right," discussing private law, only in light of its relevance to property law.<sup>28</sup> Yet, in section 4 of the "Doctrine of Right," Kant clearly indicates that the external objects of my choice include physical things, another's choice to perform an act, and another's status in relation to me.<sup>29</sup> Stated differently, the principles Kant develops in these first ten sections relate to property law, contract law, and family law. The first ten sections thus form what one can call the "general part" of private law on the external mine and thine.<sup>30</sup> Therefore, to understand the nature of a contractual

27. "But the *rational title* of acquisition can lie only in the idea of a will of all united *a priori* (necessarily to be united), which is here tacitly assumed as a necessary condition [*conditio sine qua non*], for a unilateral will cannot put others under an obligation they would not otherwise have." AA VI, § 15, p. 264, l. 17–22, translated in Gregor Translation, *supra* note 2, at 416.

28. See, e.g., Mary Gregor, *Kant's Theory of Property*, 41 REV. METAPHYSICS 757 (1988); Kenneth R. Westphal, *Do Kant's Principles Justify Property or Usufruct?*, 5 JAHRBUCH FÜR RECHT UND ETHIK [ANN. REV. L. & ETHICS] 141 (1997). Of course, these articles are concerned with property ownership. Very little has been written on Kant's theory of contract.

29. AA VI, § 4, pp. 247–48, translated in Gregor Translation, *supra* note 2, at 402.

30. Private law on the external mine and thine, as Kant calls it, is organized into one general part and three specific parts. The general part discusses how it is that someone can have an external object of his choice as his own. In the specific parts, Kant discusses acquisition of these objects of choice, or how my legal capacity to have an external object of choice can be concretized. For original acquisition of a piece of land, the argumentation is tedious and cannot be elaborated on within this paper. See B. Sharon Byrd & Joachim Hruschka, *The Natural Law Duty to Recognize Private Property Ownership, Kant's Theory of Property in his Doctrine of Right*, U. TORONTO L.J., (forthcoming 2006). For acquisition derived through contract, the argumentation is exceptionally brief and contained in AA VI, §§ 18–21, pp. 271–76, translated in Gregor Translation, *supra* note 2, at 421–25. The argumentation is brief because much of what Kant has already discussed in relation to original acquisition of external things applies to acquisition derived through contract. Kant also later considers the various types of contractual

claim for Kant, we must first consider these principles and their meaning for contractual claims.

One central concept Kant uses in the general part of private law is that of "possession."<sup>31</sup> Kant begins by distinguishing between sensible and intelligible possession. The former is physical possession and the latter purely legal possession.<sup>32</sup> For physical possession, Kant distinguishes between empirical possession [*possessio phaenomenon*] and possession as a pure concept of the understanding.<sup>33</sup> Empirically possessing an external thing is also called "holding."<sup>34</sup> I have empirical possession of an apple when I am holding the apple in my hand. Possession as a pure concept of the understanding abstracts conditions of space and time from empirical possession. What remains after the abstraction is that I "have" the thing I possess. "Having" an external thing means that the thing is under my control [*potestas*], even though I may not have empirical possession of it. The possession I have is still sensible, physical possession. Consider an apple someone buys in a store and places in his kitchen. He retains possession of it even though he leaves it behind when he goes to work and no longer has empirical possession of it. That is true as long as he has control over the apple by having closed the windows and locked the door to his house.<sup>35</sup>

Although the expression "possession" seems most appropriate in regard to things a person has, Kant uses it in relation to contractual claims as well by saying that I am "in possession of the choice" of my contracting party.<sup>36</sup> This is unusual usage perhaps, but not altogether implausible, even in the sense of physical possession. If I hold a gun to someone's head and tell him to give me his money or I will shoot, then I can be said to be in physical possession of his choice to act. A slave owner can be said to be in physical possession of his slave's choice, just as a prison warden can be said to be in physical possession of her prisoners' choices. Furthermore this physical possession of another's choice can be further divided into empirical possession, or holding, and possession as a pure concept of the under-

relations. AA VI, § 31, pp. 284–91, translated in Gregor Translation, *supra* note 2, at 432–38; see also Sharon Byrd, *Kant's Theory of Contract*, in *KANT'S METAPHYSICS OF MORALS: INTERPRETIVE ESSAYS* 111, 121–31 (Mark Timmons ed., 2002).

31. "Possession" is also a concept relevant to contractual claims. See *infra* Part II.

32. AA VI, § 1, p. 245, l. 18–19, translated in Gregor Translation, *supra* note 2, at 401.

33. AA VI, § 7, p. 253, l. 7, translated in Gregor Translation, *supra* note 2, at 407.

34. AA VI, § 4, p. 247, l. 29, translated in Gregor Translation, *supra* note 2, at 402 (explaining "to hold in my hand (physically possess)"); AA VI, § 6, p. 250, l. 3, translated in Gregor Translation, *supra* note 2, at 404; AA VI, § 7, p. 253, l. 8–9, translated in Gregor Translation, *supra* note 2, at 407.

35. Kant develops these ideas primarily in AA VI, § 7, p. 252, l. 31–p. 255, l. 21, translated in Gregor Translation, *supra* note 2, at 407–09 and AA VI, § 17, p. 268, l. 1–p. 270, l. 9, translated in Gregor Translation, *supra* note 2, at 419–21.

36. AA VI, § 4, p. 248, l. 11–12, translated in Gregor Translation, *supra* note 2, at 402.

standing, or having. The armed robber who directly confronts his victim is in empirical physical possession of the victim's choice. He has her choice in his hand, so to speak. For possession as a pure concept of the understanding, imagine that the robbery victim has no money with her. To avoid any unpleasant consequences, she tells the armed robber she will bring the money with her the next day at the same time and to the same place. The victim knows that if she does not show up as promised, the robber will come after her. The robber is in physical possession of her choice to act, even though he is not standing in front of her with the gun. He has her choice under his control, or possesses it in abstraction from conditions of space and time, through the feasibility of his threat to hunt her down. Similarly, the prison warden has the prisoner's choice under her control even though the prisoner might have been released for the weekend and is expected to report back to prison on Monday. This is because the prisoner knows the police will track him down and force him to return if he fails to do so himself.

Kant contrasts sensible, physical possession of another's choice, be it empirical possession (the armed robber directly confronting his victim) or possession as a pure concept of the understanding (the armed robber having his victim's choice under his control through his feasible threat to come after her), with intelligible possession, or purely legal possession of another's choice.<sup>37</sup> The terminology Kant uses follows from the distinction he draws in *Groundwork* between the sensible and intelligible worlds.<sup>38</sup> The sensible world is the world of our experience, which is subject to laws of nature. In the prior example, the robber's possession follows from his physical presence and feasible threat to use physical force. The intelligible world is the world of intellect, which lies outside the sensible world and is subject to what Kant calls "laws of freedom."<sup>39</sup> The distinction between sensible and intelligible possession is rooted in the distinction between the sensible and intelligible worlds. Intelligible possession is possession as a pure concept of reason. It is possession by virtue of a *duty* others have under a law of freedom to refrain from interfering with what someone else possesses. It is possession within the intelligible world of the intellect. In-

37. AA VI, § 1, p. 245, l. 16–21, translated in Gregor Translation, *supra* note 2, at 401; AA VI, § 5, p. 249, l. 3–13, translated in Gregor Translation, *supra* note 2, at 403; AA VI, § 7, p. 252, l. 34–p. 253, l. 1, translated in Gregor Translation, *supra* note 2, at 407; AA VI, § 7, p. 255, l. 10–13, translated in Gregor Translation, *supra* note 2, at 408–09.

38. AA IV, p. 452, l. 23–30, translated in Gregor Translation, *supra* note 2, at 99.

39. See AA VI, p. 214, l. 13, translated in Gregor Translation, *supra* note 2, at 375.

telligible possession is purely legal possession because it is based on duty and not on physical strength.<sup>40</sup>

Speaking of a "contractual claim" or of a person being a "creditor" or a "debtor" is first possible on the level of intelligible possession of another's "choice." A contractual claim a creditor has against a debtor is not merely the expectation or hope that the debtor will repay the loan. Such expectation or hope, which certainly can be connected to the claim for repayment, is a purely psychological phenomenon, adding nothing to the legal nature of the claim. Similarly, and in the same vein as our discussion of physical possession of another's choice, the creditor's claim for repayment is not the creditor's direct use of force upon the debtor to obtain the repayment money, assuming he has it, or the creditor's credible threat of tracking down the debtor and forcing him to pay if he does not do so on time. Instead, a contractual claim is a claim the creditor has against the debtor on a purely intellectual level. It is a claim that the debtor has a *duty* to repay the money, meaning repayment is required by a law of freedom. Why such a claim is *possible* and how to establish one *in fact* is discussed in the next part.

## II. THE POSSIBILITY AND REALITY OF A CONTRACTUAL CLAIM

Why is it possible legally to acquire possession of someone else's choice to perform a certain act? How does one go about acquiring someone else's choice to act in fact? Consider the following example when deciphering Kant's answers to these two questions: A offers to deliver one thousand pins to me. I accept A's offer.

### A. *The Possibility of a Contractual Claim*

Kant answers the first question in section 2 of the "Doctrine of Right," where he first notes that an object of choice is something one has the *physical* capacity to use.<sup>41</sup> In our example, I have the physical capacity to use A's choice to deliver pins to me. If I know that A has pins I desperately need, I can force A at gunpoint to hand over the pins. If I did that, I would have empirical physical possession of A's choice to deliver the pins to me, much like the person holding an apple in her hand has empirical physical possession of the apple. I can also take A's choice to deliver pins to me *tomorrow* under my control by telling him that I will come after the pins

40. AA VI, § 11, p. 260, l. 15, translated in Gregor Translation, *supra* note 2, at 413; AA VI, § 16, p. 267, l. 19–23, translated in Gregor Translation, *supra* note 2, at 418.

41. AA VI, § 2, p. 246, l. 9–10, translated in Gregor Translation, *supra* note 2, at 405.

tomorrow with my gun. If I did that, I would have non-empirical physical possession of A's choice to give me the pins because I have his choice under my control. I am like the person who places an apple in his kitchen and locks his doors before leaving. He too has the apple under his physical control and thus in non-empirical physical possession. Because this concept of physical possession abstracts conditions of space and time from the concept of empirical physical possession, Kant calls it possession as a pure concept of the understanding.<sup>42</sup> If A promises to deliver the pins to me tomorrow and I *accept* A's promise, I am taking A's choice into my non-empirical physical possession. And I have his choice under my control even in cases when I do not threaten him with my gun. For example, I have physical control of A's choice if I expressly or impliedly threaten to spread the word that A breaks his promises, assuming A is the type of person who would care about his reputation for promise keeping. If A is a friend or family member, simply saying that I will be sad if he does not do what he promised can be enough to establish control over his choice.<sup>43</sup>

Kant then considers whether I also have the *legal* capacity to use A's choice to deliver the pins to me tomorrow. He posits that the law cannot *always* prohibit taking possession of someone else's choice.<sup>44</sup> If such taking was always prohibited, situations would arise where I have the physical capacity to use the other person's choice as my own, but am prohibited from doing so, even though my choice to use the other person's choice to act was compatible with that person's and everyone else's freedom of choice under a universal law. My choice to accept A's offer to deliver pins to me can be compatible with everyone's freedom of choice if A's offer is free from coercion and is only directed to me or directed to anyone who chooses to accept and I am the first to accept it.<sup>45</sup> If it is physically possible but legally impossible to take A's choice to deliver the pins into my possession without violating anyone else's freedom of choice, freedom would rob itself of the use of its choice with respect to a usable object of choice.

42. See *supra* notes 31–35 and accompanying text.

43. Of course, once we have a state with state institutions to enforce promises, I can say I have someone's choice to deliver pins to me tomorrow under my control and thus in my non-empirical physical possession because I know that I can appeal to a court for an order to have the sheriff enforce the claim. However, at this point in the "Doctrine of Right," Kant is developing the basic concepts of private law that we know and can discover *a priori* logically before any state has come into existence.

44. AA VI, § 2, p. 246, l. 23–25, translated in Gregor Translation, *supra* note 2, at 405. See also § 1, p. 245, l. 9–10, translated in Gregor Translation, *supra* note 2, at 401.

45. For claims to land, Kant indicates that the principle "prior in time, stronger in right" [*prior tempore potior iure*] applies. AA VI, § 10, p. 259, l. 16–17, translated in Gregor Translation, *supra* note 2, at 412. Presumably, it is also applicable to the acceptance of an offer made to anyone who chooses to accept it, assuming that only one person can accept whatever is offered. See *infra* note 75 and accompanying text.

Therefore, it must be *possible* to treat A's choice to give me the pins tomorrow as something I can legally accept and call mine. I am *permitted* to see and treat A's choice as potentially mine, which is what the "permissive law of practical reason" provides.<sup>46</sup> If I am permitted to do so, then A's choice to deliver the pins *can be* objectively mine under laws of freedom in the sense of intelligible possession rather than only under laws of nature in the sense of sensible possession.

### B. *The Reality of a Contractual Claim*

Section 2 of the "Doctrine of Right" considers my capacity [*facultas moralis*] to have another's choice to act in a particular way as mine, and thus my capacity to be a promisee or an obligee under contract.<sup>47</sup> Although I have this capacity, I do not yet *in fact* possess anyone else's choice to act in a particular way. I can acquire someone else's choice to act only if a concrete person actually makes a promise to me that I accept. The acceptance, in the terminology of section 2, is an act of *my* choice through which I take the promisor's choice under my "control" [*potestas*].<sup>48</sup> The idea is the same as Kant's idea of the original acquisition of a piece of land.<sup>49</sup> Section 2 gives me the *legal capacity* to have an external thing, such as land, as my own. I acquire land in fact when I take control of an unclaimed piece of land with the intent to have it as my own. For original acquisition of land, my unilateral act of taking possession and willing that the land be mine is decisive.<sup>50</sup> For a contractual claim against another person, the will

46. "Erlaubnisgesetz (*lex permissiva*) der praktischen Vernunft." AA VI, § 2, p. 247, l. 1–2, translated in Gregor Translation, *supra* note 2, at 406. For an explanation of this permissive law, see Joachim Hruschka, *The Permissive Law of Practical Reason in Kant's Metaphysics of Morals*, 23 L. & PHIL. 45 (2004).

47. AA VI, p. 247, l. 2–6, translated in Gregor Translation, *supra* note 2, at 406. By "promisee" we mean someone to whom a contractual obligation is owed. The "promisee" is the offeree who has accepted the offeror's offer and thus entered into a binding contract. Kant and modern German law use the terminology of "Gläubiger" and "Schuldner." The most obvious translation of "Gläubiger" is "creditor" and of "Schuldner" is "debtor." In English, however, these translations sound limited to the context of money loans. The correct translation of the German in our context is "promisee" [*Gläubiger*] and "promisor" [*Schuldner*]. All too often these terms are incorrectly translated in modern legal texts and German-English legal dictionaries.

48. In his lectures during the 1784–85 winter semester, Kant noted that the person making a promise becomes a promisor through the promisee's acceptance of the promise. No one becomes a promisor through *merely* making a promise. My own will alone is insufficient to make me a promisor. AA XXVII.2.2, p. 1354, l. 12–15.

49. Acquisition of something is "original" if the thing is not acquired from someone else. Only unowned, or what Kant calls "masterless" [*herrenlos*], things can be acquired originally. In contrast, acquisition of something is derivative if the thing is owned by someone else and one acquires it from that person. AA VI, § 10, p. 258, l. 7–8, translated in Gregor Translation, *supra* note 2, at 411.

50. See AA VI, § 10, pp. 258, l. 1–259, l. 12–20, translated in Gregor Translation, *supra* note 2, at 411–12.

of both parties to the contract is decisive. The parties' bilateral and united wills declare what their respective duties under the contract shall be. The idea of the offer and the acceptance as the united will of the two makes the promise contained in the offer binding upon acceptance.<sup>51</sup>

Because offer and acceptance are needed to form a contract,<sup>52</sup> Kant says only the *common* will of the contracting parties makes the promise binding. This common will presents some conceptual difficulties because imagining it in the empirical world of space and time is impossible. When an offeror makes an offer to an offeree and the offeree then accepts the offer, Kant notes that the parties' wills do not unite.<sup>53</sup> By the time the offeree accepts, the offeror may have changed her mind and may no longer want to enter into the contract. Because she remains free until the offer is accepted, she is free to change her mind. Similarly, because the offeree cannot know whether the offeror has changed her mind at the time the offeree accepts the offer, he need not feel bound by his acceptance either. Kant points out that the many ceremonies accompanying the closing of a contract—such as shaking hands on the deal—are all feeble attempts to remedy what cannot be remedied, namely, that the offer and the acceptance simply do not occur simultaneously.<sup>54</sup> Without simultaneity, the wills do

51. Kant explicitly compares acquisition through contract to acquisition of external things by taking them under one's control [*Bemächtigung*]. AA VI, § 19, p. 273, l. 25–29, translated in Gregor Translation, *supra* note 2, at 423.

52. Kant does not simply “pack” “the need for an offer and an acceptance . . . into the definition of contract” as Gordley claims. GORDLEY, *supra* note 5, at 234. The acceptance is needed because one cannot acquire something without having the will to do so. The offer is needed because without the offeror's will to give up an aspect of his freedom of choice, one could acquire it from him only through force. The use of force would violate the offeror's innate right to freedom, the innate right to freedom being the only assumption Kant makes in his theory of law and rights. Gordley goes on to say, “It is never explained why one cannot conceive of an offer in some other way, for example as a commitment binding unless and until rejected by the other party.” *Id.* Why, Gordley asks, can people in a Kantian world not “bind themselves by simply willing to do so” and without communicating anything about their intentions? *Id.* If *A* commits herself to deliver a cobra to *B* tomorrow and does not communicate her intent to *B*, then *A*'s fulfilling her personal commitment to herself would mean that *B* will become the unfortunate possessor of the cobra tomorrow. *B* has not rejected *A*'s commitment, indeed has not had any opportunity to reject it because he, as Gordley has posited, does not know anything about it. Because *A* remains bound by her personal commitment unless and until *B* rejects it, she will be required to deliver the cobra to *B*. If that is the basis of the *law* of contract, she indeed will be *legally* required to deliver the cobra to *B*. Gordley does not elaborate on *B*'s position while *A* is fulfilling her commitment, but if she is legally required to fulfill it, then it is logically consistent to assume that the law will require *B* to permit her to fulfill it. Of course in the world Gordley posits, *B* can make the same commitment to *A* after he has possession of the cobra, and so the cobra can travel back and forth between *A* and *B* indefinitely, all with the support of the legal system. Furthermore, if promises are simply personal commitments, meaning the promisor places herself under a duty, then some explanation needs to be given of why they are not inherently self-contradictory. See AA VI, § 1, p. 417, translated in Gregor Translation, *supra* note 2, at 543 (within the “Doctrine of Virtue”). Kant solves this problem by distinguishing between the *homo noumenon* and the *homo phaenomenon*. See *supra* note 9.

53. AA VI, § 19, p. 272, l. 11–29, translated in Gregor Translation, *supra* note 2, at 422–23.

54. AA VI, § 19, p. 272, l. 14–16, translated in Gregor Translation, *supra* note 2, at 422–23.

not form a union, and thus, for Kant, there is no acquisition through contract.

Kant claims to solve this problem by doing a transcendental deduction of the concept of acquisition through contract.<sup>55</sup> What one acquires through the contract is the other person's choice to perform a certain act, such as to deliver one thousand pins tomorrow. Although empirically the promise and the acceptance take place under conditions of time, with the acceptance following the offer, the relationship between the parties is still a purely legal and an intellectual one. The transcendental deduction thus abstracts from the temporal difference in declarations of will and assumes they occurred *simultaneously*. Abstracted from conditions of time, the parties' wills are seen as common, and the party's choice is represented as acquired. Because the party's choice is seen as acquired, the party no longer has any freedom of choice with respect to the act constituting performance under the contract.<sup>56</sup> For that reason, the other party can say he has indeed *acquired something* at the time the contract is closed, even if the time for performance is in the future.<sup>57</sup> Furthermore, he has acquired the other's choice to act in a manner consistent with Kant's universal law of right:

55. A transcendental deduction is "an explanation of how concepts can relate *a priori* to objects." AA III, p. 100 (B 117), l. 5–7, *translated in* IMMANUEL KANT, CRITIQUE OF PURE REASON 220 (Paul Guyer & Allen W. Wood eds. & trans., 1998).

56. AA VI, § 4, p. 248, l. 11–13, *translated in* Gregor Translation, *supra* note 2, at 402.

57. Admittedly, the issue of when performance is due in relation to when the deal is closed is different from the issue of the simultaneity of the parties' declarations of will when closing the deal. Nonetheless, it is an important issue when considering what exactly one has acquired by closing the contract. Kant states, "I cannot say I have *performance* through the other party's choice as mine if all I can say is that this performance came into my possession *simultaneously* [*pactum re initum*] with his promise, but only if I can say I am in possession of the other party's choice (to determine him to perform) even though the time for performance is yet to come." AA VI, § 4, p. 248, l. 8–13, *translated in* Gregor Translation, *supra* note 2, at 402. The difference Kant is pointing to here is the difference between empirical physical possession (e.g., holding the apple in my hand) and non-empirical physical possession (e.g., having the apple locked in my kitchen). To explain the concept of non-empirical physical possession, Kant also employs transcendental deductions. For the concept of possession of external *things*, the transcendental deduction Kant employs abstracts primarily from conditions of space. Where the apple is located in relation to myself is irrelevant for calling the apple mine in the sense of non-empirical physical possession. For the concept of possession of *performance through someone else's act*, the transcendental deduction Kant employs abstracts primarily from conditions of time. Accordingly, the time when performance is due in relation to when the deal is closed must be irrelevant for calling the performance mine in the sense of non-empirical physical possession. I have the other party's choice to perform his promise in my empirical physical possession if performance occurs simultaneously with closing the deal, but I have it in my non-empirical physical possession even though performance is not to occur until later. Kant then combines the idea of non-empirical physical possession with the authorization connected to the postulate in AA VI, § 2, p. 247, l. 1–8, *translated in* Gregor Translation, *supra* note 2, at 406 (within the "Doctrine of Right"), and AA VI, § 7, p. 253, l. 22–36, *translated in* Gregor Translation, *supra* note 2, at 407, to arrive at the concept of intelligible possession, or ownership. The transcendental deduction of the concept of intelligible possession of someone else's choice to perform under a contract is different from the transcendental deduction considered in the text above regarding the closing of the deal and the simultaneity of the two declarations of will. Intelligible possession, or ownership, will be discussed in Part III.

“[A]ct externally so that the free use of your choice can coexist with the freedom of all according to a universal law.”<sup>58</sup> That is so because the contractual relationship is based on the free choice of the two contracting parties, assuming neither of them was subjected to coercion at the time they entered into the contractual relationship. Indeed, entering into a contractual relationship for Kant can only be done through one’s free choice.<sup>59</sup> Otherwise, the wills of the two parties are not self-legislating and cannot be said to have united.

To this point, Kant has explained why contractual claims are *possible*. They are possible because of the permissive law contained in section 2 of the “Doctrine of Right,” which gives me the moral capacity to possess another’s choice to act in a certain way as a usable object of my choice.<sup>60</sup> He has also explained how I can *in fact* acquire another’s choice to act. By accepting an offer the other person makes to me, meaning that our wills unite, I thereby take the other person’s choice to act in a certain way under my control.<sup>61</sup> The remaining question is why our bilateral wills can legislate in a way that is recognized by all and enforced in the civil social order, or in a system of distributive justice where the decision of a judge imparts *necessity* to our contractual claims. Another way of formulating the question is: How can the mere *bilateral* wills of the two contracting parties have any effect, in particular any *legal* effect, for everyone else?<sup>62</sup>

### III. INTELLIGIBLE POSSESSION OF ANOTHER’S CHOICE

We return now to the permissive law of practical reason (section 2) and claims to external things, such as land. The permissive law gives us “the authorization . . . to impose an obligation on everyone else which they otherwise would not have to refrain from using certain objects of our

58. AA VI, § C., p. 231, l. 10–12, *translated in* Gregor Translation, *supra* note 2, at 388.

59. AA VI, § 18, p. 271, l. 11–14, *translated in* Gregor Translation, *supra* note 2, at 421–22.

60. AA VI, § 2, p. 247, l. 2–6, *translated in* Gregor Translation, *supra* note 2, at 406.

61. AA VI, § 19, p. 273, l. 5–10, *translated in* Gregor Translation, *supra* note 2, at 423.

62. As Kant states with respect to the original acquirer of an external thing, in the state of nature there is no reason to suppose that the others will accept an obligation to refrain from interfering with that thing because the acquirer’s will is merely *unilateral* and thus without the force of law. Accordingly, in the state of nature, one can acquire only *physical* possession of an external thing. Still, this physical possession “has the legal presumption to make it legal possession through union with the will of all under public law and is valid *comparatively* as legal possession in expectation” of entering the civil social order. AA VI, § 9, p. 257, l. 6–19, *translated in* Gregor Translation, *supra* note 2, at 410. Similarly, the *bilateral* wills of two contracting parties permits them to take only *physical* possession of the other party’s choice in the state of nature. As for possession of external things, this physical possession is also valid comparatively as legal possession in expectation of entering the civil social order. Possession first becomes legal possession in the civil social order through union with the will of all under public law. How this union takes place is discussed in Part III.

choice because we were the first to take them into our possession."<sup>63</sup> The meaning of this permissive law is clear in relation to physical things and rights in rem. A right in rem is a right against *everyone*.<sup>64</sup> To acquire a right against everyone to the undisturbed possession of an external thing, I must impose an obligation on all of them to refrain from interfering with the external things I have acquired and willed to be my own. The problem Kant faces for property claims is explaining why others would have to accept this unilaterally imposed obligation. The answer he gives is more complicated than can be discussed within the framework of this paper.<sup>65</sup> Suffice it to say, however, that this obligation is imposed by my will if my will is contained in the *a priori* united absolutely commanding will.<sup>66</sup>

One might too hastily conclude that for contractual claims, my will (and the will of my contracting party) need not be contained in the *a priori* united will. After all, contractual claims are claims I have against my promisor and not claims I have against everyone. Still, the permissive law of practical reason, by its mere location within the general part of the "Doctrine of Right,"<sup>67</sup> applies to all objects of my choice and not merely to external things. Consequently, the permissive law of practical reason also applies to contractual claims. Furthermore, in his discussion of acquisition through contract, Kant speaks of "apprehension."<sup>68</sup> Apprehension is "taking possession of an object of choice in space and time,"<sup>69</sup> and the possession one takes is *possessio phaenomenon*.<sup>70</sup> Accordingly, by accepting someone's offer, I take his choice under my control, or into my *physical* possession as a pure concept of the understanding. The question then remains, how do I get *intelligible* possession of his choice to act in a certain way in the future? In other words, why does one have a *duty* under a law of freedom to perform as one has promised under the contract? Why will others—all others—recognize my claim and give it the force of law?

The answer is very similar to the reasoning for acquisition of external things. Physical possession of another's choice becomes intelligible possession if the bilateral wills of the two contracting parties are contained in the

63. AA VI, § 2, p. 247, l. 1–6, translated in Gregor Translation, *supra* note 2, at 406.

64. BLACK'S LAW DICTIONARY 1324 (7th ed. 1999).

65. For the full argument, see Byrd & Hruschka, *supra* note 30.

66. AA VI, § 14, p. 263, l. 19–23, translated in Gregor Translation, *supra* note 2, at 415.

67. Indeed Kant uses the word "*Gegenstand*" [object] and not "*Sache*" [thing] in his formulation of the permissive law. AA VI, § 2, p. 247, l. 5, translated in Gregor Translation, *supra* note 2, at 406.

68. AA VI, § 19, p. 272, l. 36, translated in Gregor Translation, *supra* note 2, at 423.

69. AA VI, § 10, p. 258, l. 31–32, translated in Gregor Translation, *supra* note 2, at 411.

70. AA VI, § 10, p. 258, l. 33, translated in Gregor Translation, *supra* note 2, at 411.

*a priori* united absolutely commanding will.<sup>71</sup> Clearly, that will not always be the case. I may promise to perform all kinds of acts and my promises may be accepted by others. Still, if an act I promise to perform is not permissible in light of the Categorical Imperative, I have no duty to perform it because the *a priori* united will does not impose such a duty. Indeed, the *a priori* united will prohibits my promisee from forcing me to perform the act, even though he has taken my choice to perform it under his control.

A. *Why the A Priori United Will Recognizes Contractual Agreements*

The question is not why the bilateral wills of the two contracting parties may *not* be contained in the *a priori* united will, but why they may. Why would the *a priori* united will ever impose an obligation on my contracting partner to perform? Indeed, if we take the formulation of the permissive law seriously, why would it impose an obligation on *all* others to refrain from interfering with contractual claims I have acquired as mine? The answer is that without contractual obligations, we would face constant conflict and not be able to pursue the one single goal of the “Doctrine of Right”: perpetual peace.

Imagine a world with ownership rights but no legal capacity to transfer these rights to anyone else through contract.<sup>72</sup> In such a world, certain declarations of will would be legally relevant and effective to define and redefine one’s ownership rights, but only those that are unilateral. One example of such a unilateral declaration of will is what Kant calls “appropriation” [*Zueignung*] within the context of original acquisition of external things.<sup>73</sup> When I appropriate a physical thing, “I *will* [this thing] to be mine (in conformity with the Idea of a possible united *will*).”<sup>74</sup> The idea of legislating through my unilateral will makes the appropriation effective to give

71. AA VI, § 10, p. 258, l. 25–26, p. 259, l. 1–4, *translated in* Gregor Translation, *supra* note 2, at 411.

72. Ownership rights are more fundamental than contractual rights, because without ownership of things, those things cannot conceivably be transferred through contract. Ownership rights are also more fundamental than contractual rights because without ownership rights no system of law is conceivable for lack of a state territory and thus lack of a state. The state could not exist without a territory over which to exercise its dominion and within which to permit establishment of a legal order. As Kant notes, if one did not legally recognize acquisition of external objects of choice at least provisionally before entering the civil social order, the civil social order would be impossible. AA VI, § 44, p. 312, l. 34–36, *translated in* Gregor Translation, *supra* note 2, at 456. The institution of property ownership is thus more fundamental than the civil social order itself, because it is a necessary condition for the state’s existence. *See* Byrd & Hruschka, *supra* note 30.

73. AA VI, § 14, p. 263, l. 11, *translated in* Gregor Translation, *supra* note 2, at 415. For the concept in relation to objects of choice in general, see AA VI, § 10, p. 259, l. 1, *translated in* Gregor Translation, *supra* note 2, at 411.

74. AA VI, § 10, p. 258, l. 25–27, *translated in* Gregor Translation, *supra* note 2, at 411.

me purely legal possession [*possessio noumenon*] or ownership of the thing.<sup>75</sup> Presumably the effect can be reversed to disown the thing. Kant speaks of abandoning or renouncing what is one's own, although he does not explain how that process works.<sup>76</sup> However, if I can take control of an external thing and will that it be mine, I can also relinquish control of one of my own external things and will that it no longer be mine. Accordingly, in this world, ownership and disownership can be accomplished through unilateral declarations of will, but nothing can be transferred or exchanged through bilateral declarations of will made by two parties to an agreement.

In this world of ownership without contract, individuals could alter their stockpile of goods only by abandoning one or more of them and hoping to find similarly abandoned goods to acquire originally.<sup>77</sup> The world would be without commutative justice, or what Kant also calls "justice in bilateral acquisitions,"<sup>78</sup> because no acquisition could be bilateral. One might object and argue that A and B could exchange goods simply by "agreeing" to each abandon what the other wants in exchange for what he is abandoning, and subsequently each originally acquire what the other has abandoned.<sup>79</sup> Such an exchange, however, poses a dilemma similar to the prisoner's dilemma because neither A nor B can be certain that the other will release the goods he is supposed to abandon and will not simply hold on to his own goods while grabbing the other's already abandoned goods.

Of course, in a world with ownership but no contract, goods could change hands through theft and robbery as well.<sup>80</sup> In a society dependent on the division of labor, as Adam Smith describes at the beginning of *The Wealth of Nations*, without contract law, theft and robbery will be the easi-

75. Of course, I can take possession and will that something be mine in conformity with the idea of a possible united will only if that thing is not yet in someone else's possession. If it is in someone else's possession, then the united will would not will that my taking it makes it mine because my act of taking it violates the original possessor's right to it and thus my act of taking it is not compatible with the freedom of all under a universal law. For this reason Kant insists on applying the rule "prior in time, stronger in right" [*prior tempore potior iure*] for original acquisition of external things such as land. The same idea applies for contract when an offer is made to anyone who chooses to accept it and the thing that is offered is limited in number.

76. AA VI, § 18, p. 271, l. 23–25, translated in Gregor Translation, *supra* note 2, at 422; AA VI, § 39, p. 300, l. 25–27, translated in Gregor Translation, *supra* note 2, at 446; AA VI, *Annex of Explanatory Comments* 6, p. 365, l. 9, translated in Gregor Translation, *supra* note 2, at 499.

77. For an explanation of the difference between original and derivative acquisition, see *supra* note 49.

78. "[W]echselseitig erwerbende . . . Gerechtigkeit." AA VI, § 41, p. 306, l. 6–7, translated in Gregor Translation, *supra* note 2, at 450.

79. Kant mentions this approach to bilateral exchange and rejects it. AA VI, § 20, p. 274, l. 21–24, translated in Gregor Translation, *supra* note 2, at 424.

80. The offenses of theft and robbery presuppose ownership rights, but not contractual rights.

est ways to acquire goods one cannot produce oneself.<sup>81</sup> If X is in possession of pins, and Y is in great need of pins but cannot buy them from X because there is no contract law, then Y will take them away from X, using force if necessary. This society would be one in which there is a “naturally unavoidable conflict between the choice of one with that of another,”<sup>82</sup> resulting in constant conflict.

In a world *with* contract law, theft and robbery undermine contract as a means of acquiring goods derivatively. Interestingly, Kant calls theft a “public offense,” as opposed to the “private offenses” of embezzlement and fraud<sup>83</sup> because “they [theft and robbery] endanger the commonwealth and not merely an individual person.”<sup>84</sup> The commonwealth Kant means is the public market for the exchange of goods. The market is the place of ensuring commutative justice,<sup>85</sup> meaning justice as it reigns in mutual acquisitions, which is one instance of “public justice.”<sup>86</sup> Commutative justice is also “justice of the public marketplace,”<sup>87</sup> keeping in mind Adam Smith’s<sup>88</sup> “invisible hand” in *The Wealth of Nations*.<sup>89</sup> The thief ignores the opportunities contract law provides and attacks the market from the *outside*, undermining it.<sup>90</sup> “Embezzlement, i.e., misappropriation of money or goods entrusted for commerce” and “fraud in buying and selling” are private of-

81. Kant refers to Adam Smith by name in the “Doctrine of Right.” AA VI, § 31, p. 289, l. 12, translated in Gregor Translation, *supra* note 2, at 436. See also AA XXVII.2.2, p. 1357, l. 14–16 (remarking on Adam Smith in his lectures).

82. AA VI, § 16, p. 267, l. 7–8, translated in Gregor Translation, *supra* note 2, at 418.

83. The offenses of embezzlement and fraud presuppose both ownership and contractual rights.

84. AA VI, *General Comment E*, p. 331, l. 7–17, translated in Gregor Translation, *supra* note 2, at 472–73.

85. Kant translates “*commutatio*” as “the exchange of what is mine and yours,” AA VI, § 31, p. 289, l. 18–19, translated in Gregor Translation, *supra* note 2, at 436, as “commerce among human beings,” AA VI, § 39, p. 302, l. 3–5, translated in Gregor Translation, *supra* note 2, at 447, in acquisition of external things, and as “commerce between the possessor of a thing and an acquirer,” AA VI, § 39, p. 301, l. 13–14, p. 302, l. 20–23, translated in Gregor Translation, *supra* note 2, at 446–47.

86. AA VI, § 41, p. 306, l. 4, translated in Gregor Translation, *supra* note 2, at 450.

87. “Public market” is an expression Kant uses in connection with his discussion of “justice.” AA VI, § 39, p. 301, l. 20, p. 303, l. 1, translated in Gregor Translation, *supra* note 2, at 446–47.

88. As early as the *Groundwork of the Metaphysics of Morals*, Kant speaks of a market price as “what relates to general human wants and needs has a *market price*.” AA IV, p. 434, l. 36 (emphasis in original), translated in Gregor Translation, *supra* note 2, at 84.

89. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 456 (R. H. Campbell & A. S. Skinner eds., 1976) (1776).

90. What is true of theft and robbery for personal property is true of breaking and entering for real property. The crime of breaking and entering undermines real property ownership rights and is an attack from outside the system of such rights and their acquisition. German criminal law distinguishes two types of traffic endangerment offenses depending on whether the actor is a *participant* in traffic, such as by driving under the influence, or a *non-participant* in traffic, such as by blocking a road with boulders. See Strafgesetzbuch [StGB][German Penal Code] Dec. 19, 2001, §§ 315(b), 315(c), translated in THE GERMAN PENAL CODE 185–87 (Stephen Thaman trans., 2002).

fenses.<sup>91</sup> These offenses can be committed only if and because contract law exists. The difference is that a person who commits embezzlement or fraud abuses commerce as a *participant* in the marketplace. He attacks the market from *within*, utilizing, albeit abusively, the rules of contractual exchange. Because he depends on the market in order to defraud others, he is not an enemy of the public and its institutions, but rather is an enemy only of the individual victim.

Kant emphasizes the need for contractual agreements in order to avoid violence in his earlier *Perpetual Peace* (1795)<sup>92</sup> and later in the "Doctrine of Right" (1797).<sup>93</sup> In *Perpetual Peace*, Kant considers the meaning of "commercial trade" through which various peoples are "brought together in agreement, community, and *peaceful relations*."<sup>94</sup> He speaks of the "spirit of commerce, which *cannot coexist with war*."<sup>95</sup>

In *Perpetual Peace*, Kant also develops the idea of a "right to visit," which one has to "offer oneself for social interaction."<sup>96</sup> Furthermore, in the "Doctrine of Right," Kant states that all peoples are originally in "physically possible interaction (*commercium*), i.e., in a thoroughgoing relation of each to all others to offer themselves to engage in commerce with any other, and they have a *right* to attempt to do so without the foreign population having any right to treat one of them as an enemy."<sup>97</sup> The basis of this right is the "idea of reason of a *peaceful*, if not yet friendly, thoroughgoing community of all nations on the earth which could come into relations affecting one another."<sup>98</sup> This right to visit opens the door for

91. AA VI, *General Comment E*, p. 331, l. 7–17, translated in Gregor Translation, *supra* note 2, at 472–73.

92. AA VIII, p. 364, l. 1–5, p. 368, l. 1–20, translated in Gregor Translation, *supra* note 2, at 333, 337.

93. AA VI, § 62, p. 352, l. 1–p. 353, l. 37, translated in Gregor Translation, *supra* note 2, at 489–90.

94. AA VIII, p. 364, l. 1–5, translated in Gregor Translation, *supra* note 2, at 333.

95. AA VIII, p. 368, l. 6–7, translated in Gregor Translation, *supra* note 2, at 336 (emphasis added).

96. AA VIII, p. 358, l. 7–10, translated in Gregor Translation, *supra* note 2, at 329.

97. AA VI, p. 352, l. 14–22, translated in Gregor Translation, *supra* note 2, at 489. Kant's comments on this visitation right are connected with severe criticism of Europeans' abuse of this right. AA VIII, p. 358–59, translated in Gregor Translation, *supra* note 2, at 329–30.

98. AA VI, § 62, p. 352, l. 6–8, translated in Gregor Translation, *supra* note 2, at 489. The legal basis for this right to visit is the *communio fundi originaria*, or the "original common possession of the earth's surface." AA VI, § 6, p. 251, l. 1–2, translated in Gregor Translation, *supra* note 2, at 405; AA VI, § 16, p. 267, l. 5, translated in Gregor Translation, *supra* note 2, at 418; AA VIII, p. 358, l. 9, translated in Gregor Translation, *supra* note 2, at 329. On the earth's surface, as on the surface of a sphere, "they cannot scatter indefinitely but instead finally will have to tolerate themselves in proximity to each other; *originally however no one has more right than any other to be on one place on the earth*." AA VIII, p. 358, l. 11–13, translated in Gregor Translation, *supra* note 2, at 329 (emphasis added). Of course, after the (legally required) division of the land occurs, certain persons do have a

contractual agreements between peoples and states and is a prerequisite for closing international contracts.<sup>99</sup>

### B. *The Universal Right Nature of Contractual Claims*

Because the possibility of forming contractual agreements is necessary to avoid constant conflict, the *a priori* united will requires that the agreements people close through declarations of their bilateral wills be binding. Physical possession of another's choice becomes intelligible possession because pure reason imposes a duty on everyone to recognize derived acquisition through contract.<sup>100</sup>

This aspect of contractual rights is interesting in and of itself because it fortifies the idea that failing to fulfill a contractual claim or interfering with someone else's fulfilling a contractual claim is a violation of the promisee's possessions or assets and is more similar to theft than to moral failure to do as promised. Furthermore, the idea was not new at the time Kant wrote the "Doctrine of Right."<sup>101</sup> Rights of this type were understood and recognized in the eighteenth century.<sup>102</sup> Gottfried Achenwall discusses them at length.<sup>103</sup> Achenwall expressly assumes a "right against everyone" to "not violate my rights acquired through contract."<sup>104</sup> For example, I have a right not to have to tolerate someone's hindering my promisor from performance.<sup>105</sup> Achenwall provides no argumentation for why that is so, but it seems fairly obvious within Kant's system of rights. One who interferes with my contractual relations violates the principle "harm no one" [*ne-*

better right to be at a certain place on the earth than others do. Still, the right to visit combined with the right not to be treated as an enemy remains from the original community of the land.

99. Kant speaks of "commerce," meaning "a thoroughgoing relation of one person to all others to offer himself for trading with others," as a "cosmopolitan right." AA VI, § 62, p. 352, l. 18–25, *translated in* Gregor Translation, *supra* note 2, at 489.

100. AA VI, § 19, p. 273, l. 28–29, *translated in* Gregor Translation, *supra* note 2, at 423; AA VI, § 10, p. 258, l. 22–27, *translated in* Gregor Translation, *supra* note 2, at 411; AA VI, § 42, p. 307, l. 14–16, *translated in* Gregor Translation, *supra* note 2, at 452; and AA VI, *Conclusion*, p. 355, l. 7–16, *translated in* Gregor Translation, *supra* note 2, at 491.

101. *See, e.g.*, GOTTFRIED ACHENWALL, *IUS NATURAE PARS PRIOR* (6th ed. 1767) § 186, p. 167. The sixth edition of *Ius Naturae Pars Prior* is the last edition that Achenwall himself published and it was the most recent edition in existence at the time Kant wrote the *METAPHYSICS OF MORALS*. Later eighteenth century editions of Achenwall's *Ius Naturae Pars Prior* are reprints of the edition of 1767.

102. *Id.*

103. Kant was familiar with Achenwall's work. Kant held his lectures on natural law in Königsberg over the course of twenty years and expressly held Achenwall in high esteem. AA VIII, p. 301, l. 3–4, *translated in* Gregor Translation, *supra* note 2, at 299.

104. "Ius in quemlibet, ne quis violet ius illud suum pacto adquisitum." ACHENWALL, *supra* note 101, § 186, at 167.

105. "Ius non patiendi, ut quis promittentem in praestando impediatur." ACHENWALL, *supra* note 101, § 186; *see also id.* §§ 187, 188, 191, 192.

*minem laede*] assuming, as Kant does, that I have in fact *acquired* something from my promisor through his promise.<sup>106</sup>

Achenwall does attempt to more precisely characterize this right, which is neither a right in rem nor a right in personam.<sup>107</sup> The distinction between a right in rem and a right in personam was understood and emphasized both by Achenwall and later by Kant.<sup>108</sup> As Kant sees it, a right in rem is a "right against any possessor" of the thing, whereas a right in personam is a right only "against a specific person."<sup>109</sup> Achenwall first calls the right to freedom from interference with my contractual claims a "non-personal right" [*ius non-personale*], and later a "universal right" [*ius universale*].<sup>110</sup> As a right against everyone, it indeed is not a right in personam, if a right in personam is, as Kant defines it, a right "against a specific person." My right against everyone to not interfere with my contractual relationship, however, is also not a right in rem, although it does have one common feature with a right in rem. It, like a right in rem, is a universal right, namely, a right against everyone. Thus the primary division of rights is not between a right in rem and a right in personam, but rather between a personal right and a universal right. A right in rem is then one type of universal right; a right to freedom from interference with a contractual claim is another. Kant had this primary division in mind when he wrote in section 2 of the "Doctrine of Right" that through acquiring rights to external objects of choice, including contractual claims, we can impose an obligation on everyone to refrain from interfering with the right acquired, an obligation they otherwise would not have.

Interestingly, both German and U.S. tort law recognize the universal right approach to contractual claims. If I close a contract with P for grass-mowing services, and T detains P during the time P is supposed to be cutting my grass, then T has violated not only P's right to freedom of choice, but also my right against T that he not interfere with P's contractual per-

106. In his lectures, Kant states that the duty to perform a contract may seem to be a duty to act positively rather than a prohibition, meaning a duty to not act in a certain way. The former type of duty is a duty of ethics and the latter, if owed to someone else, is a duty of law. Kant confirms that this duty is negative and a violation of "*neminem laede*" [harm no one] "because the other already regards [my performance] as his own; and if I do not give it [my performance] to him then *I take what belongs to him*." AA XXVII.2,2, p. 1336 l. 43–p. 1337, l. 5 (emphasis added).

107. ACHENWALL, *supra* note 101, § 186, at 167.

108. AA XXVII.2,2, p. 1354, l. 32–43; AA VI, § 20, p. 274, l. 5–12, translated in Gregor Translation, *supra* note 2, at 424.

109. AA VI, § 39, p. 300, l. 27–29, translated in Gregor Translation, *supra* note 2, at 446.

110. "[I]us non-personale." GOTTFRIED ACHENWALL, *IUS NATURAE PARS PRIOR* (5th ed. 1763) § 186, p. 163. The expression "*ius universale*" was added in the sixth edition. ACHENWALL, *supra* note 101, § 186, at 167.

formance. Under both German and U.S. tort law, I would have a claim for money damages against T.<sup>111</sup>

Kant discusses one's duties to recognize another's possession of an external object of choice three times in the general part of private law on the external mine and thine. The first is in section 6, where he states that "it is a legal duty to act toward others so that the external (usable) can become someone's own."<sup>112</sup> This duty reflects the authorization contained in the permissive law of practical reason. The permissive law gives me the capacity to have an external object of choice (for instance, another's choice to act in a certain way in the future) as my own. The duty in section 6 requires everyone to act toward me and me to act toward them in a manner recognizing this capacity. This duty is fortified by what Kant claims in section 9: "One who proceeds according to a maxim through which it would be impossible to have an object of my choice as mine injures me."<sup>113</sup> One breaches the section 6 duty within the context of contracts if that person prevents anyone from ever acquiring something derivatively through contract. Imagine the overly zealous proponent of the inalienability of rights. This person believes that the external things one possesses are inalienable. Once a person acquires possession of an external thing originally, he can no more transfer it to someone else than he can transfer his arm or leg to someone else. Every time the zealous proponent discovers that one person is about to enter into a contract with another, he will use coercion to prevent the two parties from reaching an agreement, by gagging them for example. The zealous proponent has violated the section 6 duty by refusing to act toward the two parties so that the one party's choice to perform an act in the future, which is an external usable object of the other party's choice, can become the other party's own. The zealous proponent has injured the acquirer under section 9 because he is proceeding according to a maxim that makes it impossible for the acquirer to have the other party's choice as his own.

Kant also discusses a duty one has to recognize others' external objects of choice as their own in section 8, where he states, "Thus I am not obligated to leave external objects belonging to others untouched unless everyone else provides me assurance that he will behave in accordance with the same principle regarding what is mine."<sup>114</sup> The only way this as-

111. Bürgerliches Gesetzbuch [Civil Code] § 826 cmt. 8q margin n. 52 (Otto Palandt ed., 64th ed., 2005), translated in THE GERMAN CIVIL CODE 153 (Simon L. Goren trans., 1994); RESTATEMENT (SECOND) OF TORTS, §§ 766, 766 cmt. a, b (1979).

112. AA VI, § 6, p. 252, l. 13–15, translated in Gregor Translation, *supra* note 2, at 406.

113. AA VI, § 9, p. 256, l. 25–27, translated in Gregor Translation, *supra* note 2, at 410.

114. AA VI, § 8, p. 255, l. 33–p. 256, l. 1, translated in Gregor Translation, *supra* note 2, at 409.

assurance can be provided is by entering the civil social order where the provisional possession of external objects of choice acquired in the state of nature becomes peremptory possession.<sup>115</sup> For Kant, the transition from the provisional to the peremptory is the same as the transition from reality, or actually having possession of an external object of choice in fact, to necessity. As outlined above, the permissive law of practical reason makes it *possible* to take possession of an external object of choice and have it as one's own. To acquire someone else's choice to perform an act *in fact*, a person must accept another's promise such that the two parties' wills unite, and legislate the duties each of them have under the contract. These duties become peremptory in the civil social order, where there is a judge who will enforce them if and because the parties' bilateral will is contained in the *a priori* universal and united will of all. Importantly, the judge will not only enforce these duties as between the two parties to the agreement, but also as to everyone else, thereby preventing interference with the contractual relationship. Everyone else must provide me assurance that they will leave what is mine—my contracting partner's choice to act in a certain way in the future—untouched.

#### CLOSING COMMENTS: WHY MUST PROMISES BE KEPT?

This Part contemplates the question asked at the beginning of this Article: Why do promises have to be kept? Kant, as usual, rejects any utilitarian considerations. In his lecture during the winter semester of 1784–85, Kant states that authors who write about this topic usually take cost-benefit considerations into account.<sup>116</sup> These authors claim that breaking promises is harmful. In these lectures, Kant notes that "nothing results" from such calculations.<sup>117</sup> Instead, Kant's argument is a logical one that unfolds like the principles of Euclidean geometry from its axioms, postulates, and definitions. The argument is limited to promises that have been accepted,<sup>118</sup> meaning only promises that have been accepted as in the model provided by the example discussed above.<sup>119</sup> The promise and the acceptance are thus both acts of choice, and the acceptance in particular is an act of choice by which the offeree takes the offeror's choice under his control. The argument goes as follows:

115. See, e.g., AA VI, § 15, p. 264, l. 1–28, translated in Gregor Translation, *supra* note 2, at 416.

116. AA XXVII.2.2, p. 1350, l. 29–32.

117. AA XXVII.2.2, p. 1350, l. 31–32.

118. AA VI, p. 220, l. 2, translated in Gregor Translation, *supra* note 2, at 384.

119. See *supra* Part II.

- (1) Contractual claims are possible. I have the legal capacity to be a promisee because of the permissive law contained in section 2.
- (2) Contractual claims cannot be acquired originally, but rather only derivatively, because original and unilateral acquisition of someone else's choice "would not accord with the principle of harmony between the freedom of my choice and everyone else's freedom and thus be wrong."<sup>120</sup>
- (3) It follows from (2) that a promise is needed for a contractual claim to arise.
- (4) If (accepted) promises did not have to be kept, then contractual claims would not be possible (contrary to (1) and the capacity I have to be a promisee). Therefore, (accepted) promises must be kept [*pacta sunt servanda*].<sup>121</sup>

This line of argumentation is not "proof" that accepted promises have to be kept. As noted, Kant states that any further proof of "this categorical imperative" is impossible.<sup>122</sup> Instead, his argumentation shows the relationship between the possibility of contractual claims and the legal principle that (accepted) promises have to be kept. The legal principle that (accepted) promises have to be kept is the opposite side of the coin from the principle that contractual claims are possible. If accepted promises are to be kept, that *means* that the promisee has a contractual claim. Contrarily, if someone has a contractual claim, that *means* that accepted promises have to be kept. When Kant, in section 19, says that the legal principle that (accepted) promises have to be kept is a "postulate of pure reason," he is referring to the postulate in section 2. Accepted promises are called "contracts." The principle "accepted promises must be kept" [*pacta sunt servanda*] is therefore a postulate of pure practical reason.

Kant's theory of contractual rights solves many of the problems scholars discuss when trying to find a grand unified theory of contract law. For Kant, contract law has two primary bases, namely (1) the autonomous and united wills of the parties to a contract, who are self-legislating with respect to their own duties under the agreement; and (2) the *a priori* and united will of all, which gives legal force to the bilateral wills of the parties to the contract and imposes a duty on all to not interfere with the contractual relationship. Accordingly, we can state the following five principles.

First, only those contracts are binding where the parties' wills were autonomous and united. This principle excludes "agreements" entered into

120. AA VI, § 18, p. 271, l. 12–14, translated in Gregor Translation, *supra* note 2, at 421–22.

121. AA VI, § 19, p. 273, l. 15–29, translated in Gregor Translation, *supra* note 2, at 423.

122. AA VI, § 19, p. 273, l. 15–22, translated in Gregor Translation, *supra* note 2, at 423.

under *duress*, *mistake*, or *incapacity* because the parties' wills do not unite in the case of mistake and are not autonomous in the cases of duress and incapacity.

Second, no contracts are binding if the bilateral wills of the parties are not contained in the *a priori* necessarily united will of all. This principle excludes any agreement that is *unconscionable*, whereby unconscionability is determined by subjecting the agreement to the Categorical Imperative. For example, contracts to enter into slavery can not be contained in the *a priori* united will of all, and thus are not binding. Admittedly, determining what is and is not unconscionable poses the same problem posed by how to apply the Categorical Imperative in many cases. Still, Kant's theory remains consistent and does exclude enforcing unconscionable agreements, assuming we can determine what is unconscionable.

Third, subject to the limitation under the second principle, all contracts are binding where the parties' wills were autonomous and united. This principle includes any agreement that was reached through acceptance of an offer, regardless of whether the parties entered into a bargained-for exchange or not. Therefore, *consideration* is not a necessary element of a binding contract. The doctrine of promissory estoppel is thus unnecessary to make accepted promises binding.<sup>123</sup>

Fourth, *donative contracts*, assuming the offer to make a gift was accepted, are binding regardless of whether the donee has *relied on the promise to his detriment* or not.<sup>124</sup> When the promisee accepts the offer to make

123. See GILMORE, *supra* note 26, at 61–76, 87–90 (claiming that the promissory estoppel, quasi-contract, and unjust enrichment cases are the hallmark of the death of contract); FRIED, *supra* note 26, at 28–39 (discussing the issue of consideration); *id.* at 54–56 (discussing detrimental reliance). Interestingly, German law includes three distinct bases for claims in its Civil Code sections on the law of obligations, namely contract, tort, and unjust enrichment. Unjust enrichment, therefore, is a type of civil law claim independent from, but on an equal footing with, contract and tort.

124. Gordley seems to misinterpret Kant when he states, "His [Kant's] only explanation of why a gratuitous promise should be treated differently is that a court should not presume that the promisor willed that the promisee should have the right to enforce it." GORDLEY, *supra* note 5, at 237 (citing AA VI, § 37, *translated in* Gregor Translation, *supra* note 2, at 443–44). Section 37 is located in the third main part of the "Doctrine of Right," which Kant calls "On subjectively dependent acquisition through the judgment of a public court." This part of the "Doctrine of Right" discusses four cases where the decision of a court is different from the decision an individual would make on what is right. Section 37 discusses the donative contract. Here Kant clearly states that although in an individual's judgment of what is right, a donative contract should not be enforceable, *in the judgment of a court in the civil social order, the contract will be enforced*:

It is not to be presumed, however, that I hereby intended to be forced to keep my promise and thus also to throw away my *freedom* for nothing and thereby to throw away myself [*nemo suum iactare praesumitur*], which indeed would happen according to the law in the civil social order, because there the donee can *force* me to perform my promise.

AA VI, § 37, p. 298, l. 2–8, *translated in* Gregor Translation, *supra* note 2, at 444. No doubt, for Kant the promisee has a right to enforce a donative contract against the promisor through the decision of a court in the civil social order.

the gift, the promisee acquires the donor's choice with respect to the future act of transferring the gift to the donee. Furthermore, because the donee accepted the donor's promise, the donor has acquired the donee's choice with respect to the future act of receiving the gift. Indeed, detrimental reliance is never necessary to enforce a promise that has been accepted.

Fifth, no contracts are binding if they are *impossible* to perform.<sup>125</sup> This principle is a basic principle of law ("As to the impossible there can be no duty."<sup>126</sup>), and it is also a principle of Kant's moral and legal theory. This principle does not immediately follow from the two prongs or bases of Kant's theory of contract, but instead from general principles about what can constitute a duty and what is within the range of one's choice, as opposed to being merely one's wish. However, the principle can also be used to explain *frustration* cases and why courts do not enforce contracts in those cases. Frustration cases actually seem to be cases of impossibility, where the non-frustrated party cannot perform as promised. Consider *Krell v. Henry*,<sup>127</sup> where Krell promised to provide Henry rooms to watch the coronation of King Edward VII in return for a price far above the normal room rate. Decisive, however, is not the fairness question, but instead the question whether it was possible for Krell to perform at the time performance was due. The answer is no, and through no fault of his own, as the coronation did not take place. Krell was thus relieved from his obligation to Henry, and not the other way around. For that reason, Henry had no obligation to pay for use of the rooms, which was the holding of the court.

125. See FRIED, *supra* note 26, at 57–73 (discussing mistake, frustration, and impossibility).

126. DIG. 50.17.185 (Celsus) ("Impossibilium nulla obligatio est.")

127. 2 K.B. 740 (Eng. C.A. 1903).