'Waves of Freedom': Kant and the Right to Rescue on the High Seas

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Introduction*

This paper draws on the legal philosophy of Immanuel Kant to claim that all seafarers – from stateless migrants to billionaires on mega-yachts – possess legal rights to rescue on the high seas, that these rights are of the kind contemporary legal practitioners call 'human rights', and which correspond to enforceable obligations against the flag state of any coast guard, naval, or other *public* vessel receiving their distress signal. A secondary claim, is that we must abandon the Grotian model of the high seas as 'commons' and view them instead as 'global public goods' that the international legal order always already maintains under institutions for the *public* freedom of everyone, everywhere.

The paper has seven sections. Section 1 examines relevant doctrinal developments and their problems. Section 2 begins to outline their solution from the Kantian insight that freedom comes in *waves*: 'private' freedom is plagued with internal contradictions that must be ironed out by institutions to constitute 'public' freedom. Section 3 recapitulates a 'Kantian' account of human rights in contemporary legal practice, in which human rights are conceived as juridical rights to accountability held by subjects against political authorities – paradigmatically *States* – under public law, that are structurally analogous to rights held by principals against fiduciaries in private law. Section 4 then explains positive legal practice surrounding the extraterritorial application of human rights treaties through this model.

The remaining sections attempt to explain why, despite initial appearances to the contrary, the high seas are necessarily zones of jurisdiction, such that state authorities always already exercise authority over seafarers, and so, obligated to respond to their distress signals. This explanation unfolds in two parts. The first outlines how the seafarer in peril and the state receiving the distress signal stand in a relation of authority and subject that is analogous to a private fiduciary/principal relation. The second explains why seafarers without a state of their own must nevertheless be treated *as if* they were subjects of jurisdiction.

The relevant private law analogy is to the obligations of ferry operators, innkeepers, and liverymen; collectively 'public carriers.' Section 5 accounts for these obligations from the fact that subjects of a jurisdictional order – 'Members of the Public' – possess rights to travel that are not natural but must be constituted by institutions by their provision of 'public goods.' Section 6 extends this account to the international order to show that sovereign states are already in a jurisdictional relationship with all 'Citizens of the World' traveling upon the high seas. This is done in two steps. First, a contrast is drawn between the Kantian account of freedom on the waves with the historically dominant account of the freedom of the seas advanced by Hugo Grotius. Special attention is given to the natural law

* This paper is part of a project examining, in the light of Kantian legal philosophy, the use of human rights by the European Union as *justifications* for, rather than restrictions against, its legislative and policymaking agenda. The goal is to elucidate how the human right to rescue on the high seas requires the high seas to be conceptualized as 'global public goods', such that the European Union has obligations – and consequently, rights – to legislate and/or make policy there. This paper sets out the first, more general half of that overall argument. A subsequent paper will fill out the second half of the argument: that the public character of the high seas means the EU's assertions of extraterritorial jurisdiction in numerous policy fields relating to migration, marine safety, environmental protection, *etc* are largely – though not wholly – normatively defensible.

concept of 'Original Common Possession' that plays an organizing role for both Grotius and Kant. Second, we critique Jakob Huber's recent scholarship examining Kant's treatment of Original Common Possession. The final link in the chain is to demonstrate that although the basic case of the human right to rescue is – like all human rights – a subject of jurisdiction, *simulacra* of human rights must be presumed on the part of stateless migrants lacking all institutional protection.

The final section summarizes and concludes.

1. The Human Right to Rescue on the High Seas: The Doctrine and its Problems

The idea of a human right to be rescued at sea was first mooted in doctrinal scholarship around the early 2010s, at a time when seemingly endless waves of refugees were landing on European shores.[1] Juxtaposing law of the sea norms requiring the provision of maritime assistance – primarily Article 98 of the UN Convention on the Law of the Sea (UNCLOS)[2] – against the 'right to life' jurisprudence of the European Court of Human Rights (ECtHR), Seline Trevisanut called for enforceable individual rights to maritime assistance from the thought that a 'distress call creates a "relationship" between the state which receives it, and the persons who send it.'[3] Trevisanut's formulation was subsequently adopted by the UN Human Rights Committee (HRC) in *AS v Italy*, which held that Italy had violated its obligations under the International Covenant on Civil and Political Rights (ICCPR) by failing to come expeditiously to the rescue of refugees shipwrecked in the Mediterranean.[4]

As is the custom of most human rights bodies and tribunals, the HRC's analysis proceeded in two steps: the first examined its 'admissibility'; the second, its 'merits'. On admissibility, the Committee recited a precedent holding that 'jurisdiction' under the ICCPR arose whenever a state party 'exercise[d] power or effective control' over a complainant.[5] The Committee opined that such power and effective control giving rise to jurisdiction had indeed been exercised over the claimants on account of 'a special relationship of dependency' that emerged from a mixture of 'the initial contact made by the vessel in distress' with the Italian coast guard, 'the close proximity of the [Italian coast guard vessel] to the vessel in distress and the ongoing involvement of the [Italian coast guard] in the rescue operation and… relevant legal obligations incurred by Italy under the international law of the sea…'[6]

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[1] Seline Trevisanut, *Is There a Right to Be Rescued at Sea? A Constructive Overview*, 4 QUESTIONS INT'L L. 3 (2014).
[2] United Nations Convention on the Law of the Sea, 1833 U.N.T.S. 397 (1982). Other international norms cited by Trevisanut as possible sources include the Convention for the Safety of Life at Sea (SOLAS) Convention, 1184 U.N.T.S. 1861 (1974), the Convention on Maritime Search and Rescue, 1405 U.N.T.S. 97 (1979), and the International Convention on Salvage, 1953 U.N.T.S. 193, art. 10 (1989). *See* Trevisanut, *supra* note 1 at 5.
[3] Trevisanut, *supra* note 1 at 12.
[4] AS and Others v. Italy, U.N. Doc. CCPR/C/130/D/3042/2017 (U.N. Hum. Rts. C'ttee 2021).
[5] General comment no. 36, Article 6 (Right to Life), U.N. Doc. CCPR/C/GC/35 (U.N. Hum. Rts. C'ttee 2019), cited at AS v. Italy, *supra* note 4 at ¶ 7.8.
[6] AS v. Italy, *supra* note 4 at ¶ 7.8.

This reasoning invites several objections. As regards the law of the sea, Article 98 UNCLOS provides simply that a state party 'shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew, or the passengers… to render assistance to any person found at sea.' Comparable provisions such as Article 3(1)(9) of the Convention on Maritime Search and Rescue (SAR) impose primary responsibility upon parties within their designated 'search and rescue' regions to ensure that survivors are 'delivered to a place of safety' as soon as reasonably practicable. None of these provisions suggest the international obligations they impose are self-executing or individually enforceable before municipal or international courts. As treaty obligations, they are owed formally only by states to other states. Individual enforceability, if at all possible, must from elsewhere, say, international human rights law.[7]

This only produces further problems. Provisions commonly found near the start of most human rights treaties stipulate that parties owe obligations under them only to persons falling under their 'jurisdiction.' If so, the HRC's reasoning of jurisdiction arising out of dependency seems to presume that which needs to be argued. You first have to be under a state's jurisdiction before you can depend upon that state for assistance. Unlike comparable cases where vessels were physically boarded[8] or where they were intercepted and seafarers brought onto rescue ships or the territory of the flag state,[9] Italy did not exercise power or effective control over the claimants *at the time* they issued the distress signal. A joint dissent authored by Yuval Shany, Photini Pazartzis, and the late Christof Heyns accordingly emphasized that the majority had 'fail[ed] to distinguish between situations in which states have the *potential* to place [individuals] under their effective control… and situations involving the *actual* placement of individuals under effective state control.'[10] To be fair, the majority did not rely upon the sending of distress signals alone but reasoned that the Italian coast guard, by taking further steps to involve itself in the rescue, had assumed 'power and effective control' over the sinking refugees.[11] This, however, would mean that Italy could have escaped liability altogether if its coast guard vessels had sped off in the opposite direction the moment they received the distress signal.[12]

The majority's reasoning is indeed difficult to justify on standard academic discussions of 'extraterritorial human rights jurisdiction.'[13] According to the 2011 monograph by Marko Milanovic,

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[7] *See* e.g., Efthymios Papastavridis, *Is There a Right to Be Rescued at Sea? A Skeptical View*, 4 QUESTIONS INT'L. L. 14, 20–21 (2014).
[8] Medvedyev and ors v. France, 51 Eur. H.R. Rep. 39 (2010).
[9] Hirsi Jamaa v. Italy, 55 Eur. H.R. Rep. 21 (2012).
[10] AS v. Italy, *supra* note 4, Individual Opinion of Yuval Shany, Christof Heyns and Photini Pazartzis (dissenting) at ¶ 2.
[11] AS v. Italy, *supra* note 4, Individual Opinion of Vasilka Sancin (concurring), at ¶ 3.
[12] A dissentient worried the majority's decision would encourage precisely this. AS v. Italy, *supra* note 4, Individual Opinion of Andreas Zimmermann (dissenting), at ¶ 4 (2021).
[13] *See* e.g., Silvia Dimitrova, *Rethinking 'Jurisdiction' in International Human Rights Law in Rescue Operations at Sea in the Light of AS and Others v Italy and AS and Others v Malta: A New Right to Be Rescued at Sea?*, 56 ISR. L. REV. 120, 139 (2023) ('… the potential for a "right to be rescued at sea" at this stage may appear dubious and speculative…'); Paolo Busco, *Not All That Glitters Is Gold: The Human Rights Committee's Test for the Extraterritorial Application of the ICCPR in the Context of Search and Rescue Operations*, OPINIO JURIS (Mar. 2, 2021), http://opiniojuris.org/2021/03/02/not-all-that-glitters-is-gold-the-human-rights-committees-test-for-the-extraterritorial-application-of-the-iccpr-in-the-context-of-search-and-rescue-operations/ (last visited Jun. 2, 2024) ('rather than being the enforcement mechanism of search and rescue obligations that some would like it to be, [the decision] may result in even less compliance with these obligations.')

which remains the most widely cited treatise on the subject, 'positive' obligations such as to render assistance are strictly 'limited to those areas that are under the state's effective control.'[14] The high seas are decidedly not these. Outside such regions, Milanovic claims that states only have 'negative' obligations to refrain from actively harming. To wit, there was no suggestion that the Italian coast guard caused the shipwreck. While Milanovic does envisage a third category of 'positive' human rights obligations applying extraterritorially – 'prophylactic and procedural obligations' to investigate killings potentially perpetrated by state officials and agents on foreign territory[15] – the *AS v Italy* applicants obviously do not fall under this category.[16]

Alternatively, there is Samantha Besson's account in which human rights begin as imperfect moral 'duties' but become perfect legal obligations through the intercession of political institutions providing 'normative guidance.'[17] Besson's theory of human rights jurisdiction is *functional*: a state must possess some meaningful capacity to provide that guidance for it to owe human rights obligations. As such, 'effective power' and 'overall control should be effective and exercised, not merely claimed' over claimants,[18] and such power 'should be exercised over a large number of interdependent stakes, and not one time only and over a single matter only.'[19] Contrariwise, the *AS v Italy* 'shipwreck occurred outside [Italy's] territory, and… none of the alleged violations occurred when the [migrants] were on board a vessel hoisting an Italian flag.'[20] Moreover, an international treaty binding upon both Italy and Malta had assigned Malta primary responsibility for coordinating searches and rescues in the relevant section of the Mediterranean.

Similarly, Lea Raible has advanced an account viewing human rights functionally as instruments for the efficient 'allocation' of rights and obligations between individuals and states, making effective control over territory the crucial determinant.[21] This, according to Raible, is because territory is 'not unlike property',[22] where property presumably signifies the most pervasive mode of control over a bundle of interdependent stakes (sticks?). The argument is reminiscent of the passage in the *Free Seas* in which Grotius observes that 'territories are of the possession of a people as private dominions are of the possessions of particular men.'[23] Contrariwise, the sea is

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[14] MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY 263 (2011).
[15] *Id.* at 215–219.
[16] Marko Milanovic, *Drowning Migrants, the Human Rights Committee, and Extraterritorial Human Rights Obligations*, EJIL: TALK! (Mar. 16, 2021), https://www.ejiltalk.org/drowning-migrants-the-human-rights-committee-and-extraterritorial-human-rights-obligations/ (last visited Jun. 2, 2024) ('… the Committee's notion of special relationship of dependency is incoherent, and is simply a half-hearted attempt to deflect criticism that their functional approach is overly expansive.')
[17] Samantha Besson, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To*, 25 LEIDEN J. INT'L L. 857, 872–873 (2012).
[18] *Id.* at 873.
[19] *Id.*
[20] AS v. Italy, *supra* note 4 at ¶ 7.7.
[21] Lea Raible, *Allocating Human Rights Obligations in the ECHR*, 24 HUM. RTS. L. REV. 1 (2024). *See also* Lea Raible, *Title to Territory and Jurisdiction in International Human Rights Law: Three Models for a Fraught Relationship*, 31 LEIDEN J. INT'L L. 315, 327–328 (2018); and LEA RAIBLE, HUMAN RIGHTS UNBOUND: A THEORY OF EXTRATERRITORIALITY, ch. 6 (2020).
[22] RAIBLE, HUMAN RIGHTS UNBOUND, *supra* note 21 at 165.
[23] HUGO GROTIUS, MARE LIBERUM [THE FREEDOM OF THE SEAS] 30 (Ralph von Deman Magoffin trans., James Brown Scott ed., 1916 ed. 1609). [hereinafter '*FtS*']

> in the number of those things which are not in merchandise and trading, that is to say, which cannot be made proper. Whence it followeth, if we speak properly, no part of the sea can be accompted in the territory of any people… The people of a country might possess a river as included within their bounds, but so could they not the sea.[24]

On the broad Besson-Raible-Grotius model, therefore, the high seas are the paradigmatic example of spaces where human rights obligations cannot obtain, because, as areas 'outside of national jurisdiction', sovereign states have vanishingly little control over them.[25] Even allowing for the emergence of 'functional jurisdiction' over the high seas in contemporary maritime law – that is, of the exercise of sovereign jurisdiction over maritime zones delineated by the functions states perform there, for instance the territorial sea, contiguous zone, exclusive economic zone, *etc*[26] – it is unlikely Besson's or Raible's standards can be met, given that with the exception of outer space, the high seas remain the antithesis of territory in contemporary legal imagination. This is particularly so for claimants who, like in *AS v Italy*, are located in maritime regions functionally under the jurisdiction of states other than the one receiving the distress signal.

Last, and least, there is my own theory of human rights jurisdiction, which agrees superficially with Besson and Raible that human rights jurisdiction emerged not from power but *authority*; that is, not from the production of 'factual' effects upon claimants but *legal* effects.[27] My central argument is that without a colorable relation of authority and subjecthood between the claimant and the state defendant, no claim of human rights could ever be made, no matter how devastating the factual effects. To wit, the *AS v Italy* claimants were not citizens of Italy, and far from issuing them commands, orders or edicts, the Italian coast guard all but sped off in the opposite direction. Accordingly, I too would appear to have no room for rights to rescue on the high seas, except perhaps for nationals of the rescuing state.[28] This is a misconception the remainder of this article will dispel.

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[24] *Id.*

[25] Raible refers to *AS v. Italy* in a critique of the supposed tendency of interest-based theories of human rights tend to sneak in undefended assumptions. She does not, however, say whether her own 'Dworkinian, interpretive' account would accommodate that decision. Raible, *Allocating Human Rights*, *supra* note 21 at 7–8. I suspect it does not. Raible argues that the interpretive principles derived from a study of the practices making up ECHR jurisprudence are 'integrity' and 'equality' – which Dworkin identified as fitting and justifying the rule of law within a domestic order – instead of 'legitimacy' and 'salience', which he identified with international law. *Id.* at 12–13, citing Ronald Dworkin, *A New Philosophy for International Law*, 41 PHIL. & PUB. AFF. 2 (2013). Stateless migrants in peril upon the high seas are outsiders to the flag state's constitutional order, and therefore neither entitled to equal treatment with citizens, nor would integrity appear to mandate the consistent and coherent use of coercion in respect of them.

[26] *See* MARIA GAVOUNELI, FUNCTIONAL JURISDICTION IN THE LAW OF THE SEA, ch.2 (2007).

[27] Aravind Ganesh, *The European Union's Human Rights Obligations Towards Distant Strangers*, 37 MICH. J. INT'L L. 475, 504–511 (2016).

[28] Francesco Bosso, *Cooperation-Based Non-Entrèe. What Prospects for Legal Accountability?*, 6 IFHV WORKING PAPER 1, 18–19 (2016).

2. Salient Aspects of Kant's Philosophy of Right

My account of extraterritorial human rights jurisdiction started from the 'Kantian' thought that the fundamental juridical status of a human being lay not in the fulfillment of needs or advancement of welfare, but solely in *freedom*, understood specifically as 'independence from being constrained by another's choice.'[29] In the Introduction to the *Doctrine of Right*, which expounds his general theory of law, Kant identifies this as the 'Innate Right of Humanity' and the *only* 'natural' right we possess purely by virtue of being born human.[30]

'Independence' thus conceived has certain extensively-discussed features. First, it is irreducibly *relational*: one can be dependent or independent only in relation to some *other* person. Second, it is *formal*: no heed is paid to substantive 'matters' of choice such as need or desire. To use a famous example, a slave remains in an objectionable condition even if her master generously provides for her every need and lets her go wherever she wants, simply because she is subject to her master's arbitrary choice. Third, independence is *institutional*. On familiar, 'liberal' conceptions of freedom as 'absence of constraint', the commands of political authorities are regrettable even if they ultimately increase the scope of action or the range of interests satisfied, simply because they are constraints.[31] By contrast, on the 'republican' concept of freedom as independence, authority is not just compatible with freedom but necessary for it. If the well-kept slave were to be attacked while on a jaunt outside, she would have to rely on her own strength and guile, or hope for the intercession of free passersby or her master, who – unlike the slave – possess *standing* to marshal the community's protection in their own name, say, by filing a police report, or a legal claim before a court. Just as such, whatever 'freedom' she enjoys is no better than that of an unchained dog. As the concept of freedom appropriate for human beings, independence requires for its very conceptual possibility an institutional guarantee that no one will dominate or instrumentalize you with impunity. This generates an absolute moral obligation to leave a system of pure private interaction – a 'State of Nature' – and enter an institutional order – a 'Rightful Condition' – in which 'what is to be recognized as belonging to [each member] is determined by law and is allotted to it by adequate power (not its own but an external power)…'[32]

This article, however, focuses on a less well-explored feature of freedom-as-independence; that it comes in *waves*. Purely 'private' attempts to interact on terms of freedom produces contradictions that can be resolved only by *public* institutions. The thought might perhaps be best illustrated by contrast with other common approaches in human rights scholarship. One common tendency is to treat human rights as congealed normative expectations;[33] that is, as concretizations of abstract

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[29] Immanuel Kant, *The Doctrine of Right*, *in* PRACTICAL PHILOSOPHY: THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT, 393 (6:237) (Mary J. Gregor ed., 9th ed. 2006). [hereinafter '*DoR*'].
[30] *Id.*
[31] *See* e.g., Isaiah Berlin, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118, 123, note 2 (1969). ('Law is always a fetter, even if it protects you from being bound in chains that are heavier than those of the law, say, some more repressive law or custom, or arbitrary despotism or chaos.')
[32] *DoR* 6:312, 456.
[33] I borrow this expression from Hans Lindahl, who uses it for different purposes. Hans Lindahl, *Place-Holding the Future: Legal Ordering and Intergenerational Justice for More-Than-Human Collectives*, 6 (March 2023).

moral or policy goals.[34] Another trend is to specify certain goals or values as ultimate ends and, then, to 'allocate' legal entitlements and duties between individuals to best achieve them.[35] Common to both the concretization and allocation strategies is a presumption that the normative ends (however defined) are identifiable independently of the laws and institutions serving as 'efficient means' for their attainment.[36] Grotius expresses fundamentally this same idea in the *Laws of War and Peace*:

> … in Things of a moral Nature, as we have often said before, those Means which conduce to a certain End, do assume the very Nature of that End: And therefore we are supposed to be authorised to employ those Things, which are (in a moral, not a physical Sense) necessary to the obtaining our just Rights.[37]

The Kantian approach differs fundamentally. One immediate reason why rights and obligations can be specified neither by concretization nor allocation of normative ends is that the distinctive feature of laws and institutions – *coercion* – is completely antithetical to moral duties. To wit, moral duties like cultivating generosity, honesty, loving-kindness, and other 'virtues' exist and are binding, but the motivation to fulfill them must come from within. A shopkeeper fulfills no moral duties if she refrains from short-changing her customers only because she calculates it will be more profitable in the long run. To be morally worthy, the act must be undertaken for the sake of honesty alone. If honesty motivated by love of profit is worthless, so too it must be if compelled by legal sanction.

This means there has to be a fundamental distinction between ethical and juridical lawgiving. Law and institutions are neither grounded in, nor do they guide people towards, ultimate moral ends. Rather, their role is to facilitate individuals doing the right thing on their own accord rather than at the say-so of others. Accordingly, rights and obligations must be organized around a principle distinct from that of ethics. The non-fraudulent (rather than honest), self-interested shopkeeper may be a contemptible wretch as far as ethics is concerned, but, for all that, she is in full compliance with her *legal* obligations. Put bluntly, law has nothing to do with being nice. In addressing the *rightfulness* of an act, 'no account at all is taken of the matter of choice' – that is to say, the reasons behind that choice. 'All that is in question is the *form*.'[38] Laws against against fraud are therefore in no wise derivative of, or designed to cultivate virtues like honesty but are explicable solely in terms of not instrumentalizing others.

This realization undermines a recent defense by Aphrodite Papachristodoulou of rights to rescue on the high seas from the passage in the *Metaphysics of Morals* where Kant states that '[e]very man has

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[34] *See* e.g., John Tasioulas, *Saving Human Rights from Human Rights Law*, 52 VAND. J. TRANSNAT'L L. 1167, 1207 (2019) ('…human rights are first and foremost moral standards and that IHRL's formative aim is to give those standards appropriate legal expression and effect.'); Linnéa Nordlander, *What's in a Right? Concretizing States' Climate Change Mitigation Obligations under Human Rights Law*, 24 HUM. RTS. L. REV. 22 (2024).

[35] In a recent article pointedly entitled '*Allocating* Human Rights Obligations in the ECHR', Raible observes that the 'analysis of the structure of claim-rights captures the fact that rights that seemingly entitle the right holder to a certain outcome need to be specified in terms of concrete mandated behaviour or conduct.' Raible, *Allocating Human Rights*, *supra* note 21 at 4.

[36] Ariel Zylberman, *Why Human Rights? Because of You*, 24 J. POL. PHIL. 321, 321 (2016).

[37] HUGO GROTIUS, DE JURE BELLI AC PACIS [ON THE LAW OF WAR AND PEACE] 1186 (bk. 3, ch. 1, ¶ 2(1)) (Francis W. Kelsey trans., James Brown Scott ed., 1925 ed. 1625). [hereinafter '*WaP*']

[38] *DoR* 6:230, 387. (emphasis added)

a rightful claim to respect from his fellow man,'[39] from which Papachristodoulou contends that legal duties to rescue follow. The problem, is that legally compelled respect is not respect at all. The passage Papachristodoulou cites is taken from the *Doctrine of Virtue*, which is the second part of the *Metaphysics of Morals*. Kant's general theory of *law*, however, is in the *Doctrine of Right*, which is the *first* part. This sequence is crucial: Right is conceptually prior to the Good. We must first figure out how to be free before worrying about how to be good, because, if we are not free, our acts are not *ours* to be praised or blamed for. In ignoring this sequence, Papachristodoulou suggests only an ethical duty to offer maritime assistance rather than a juridical obligation personal to individual claimants.

A more interesting problem with the concretization or allocation strategies lies in the assumption that normativity is definable independently of laws and institutions. Kant contends precisely the opposite: without laws and public institutions, moral ends are not just inconvenient but *unthinkable*. In the *Doctrine of Right*, Kant remarks that the core problem in a State of Nature is that the 'human beings, peoples and states' in it 'can never be secure against violence from one another, since each has its own right to do what seems right and good to it and not to be dependent upon another's opinion about this.'[40] Astute readers will recognize several biblical references. The first is to the Book of Judges – 'In those days there was no king in Israel, but every man did that which was right in his own eyes.'[41] – which recounts a period in the history of the Israelites when they lacked a common executive power but instead governed themselves under a loose confederal system. This arrangement notoriously ended in disaster, because what seemed right in each man's eyes was inconsistent with what was right and good in the sight of the Lord.[42] Kant repurposes these lines to suggest that institutions are in some way 'a necessary condition for moral activity.'[43] As Barbara Herman puts it, 'We have become accustomed to thinking about institutions either as they provide means to independently conceived ends or as elements in the social construction of experience… It is as if we thought we could in principle live moral lives without civil society – if only we and others were good enough.'[44] Kant reviles such mawkish sentimentality:[45] no amount of examination of one's

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[39] Aphrodite Papachristodoulou, *The Recognition of a Right to Be Rescued at Sea in International Law*, 35 LEIDEN J. INT'L L. 337, 343 (2022). Papachristodoulou cites the 1964 Ellington translation of the *Metaphysics of Morals* in IMMANUEL KANT, ETHICAL PHILOSOPHY: THE COMPLETE TEXTS OF GROUNDING FOR THE METAPHYSICS OF MORALS, AND METAPHYSICAL PRINCIPLES OF VIRTUE, PART II OF THE METAPHYSICS OF MORALS, WITH ON A SUPPOSED RIGHT TO LIE BECAUSE OF PHILANTHROPIC CONCERNS 132 (James Ellington tran., 1994). In the Gregor translation, that passage is at Immanuel Kant, *The Doctrine of Virtue*, *in* PRACTICAL PHILOSOPHY: THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT , 579 (6:462) (Mary J. Gregor ed., 9th ed. 2006).
[40] *DoR* 6:312, 456.
[41] *Judges* 17:6
[42] *Deuteronomy* 6:18.
[43] Barbara Herman, *Could It Be Worth Thinking about Kant on Sex and Marriage?*, *in* A MIND OF ONE'S OWN 53, 59 (Louise M. Antony & Charlotte E. Witt eds., 1 ed. 1993).
[44] *Id.*
[45] *See* Christian F. Rostbøll, *Kant and the Critique of the Ethics-First Approach to Politics*, 22 CRITICAL REV. INT'L SOC. & POL. PHIL. 55 (2019). A superficial – but no less important – objection to either of the concretization and allocation strategies is the assumption that the (invariably American or European) jurists, legislators and academics doing the concretizing and/or allocating have some unique insight into the workings of morality. As a justification of political legitimacy within political communities this is bad enough; when invoked to justify civilizing missions or extraterritorial assertions of jurisdiction it is positively repugnant. For a scathing criticism of the 'hollow hypocrisy' of such moralizing discourses, *see* Joseph Raz, *Human Rights without Foundations*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 321, 322 (Samantha Besson & John Tasioulas eds., 2010).

moral intuitions by oneself can ever suffice because that by itself will produce nonsensical and contradictory demands.

The clearest illustration of this is in Kant's theory of the original acquisition of property. To summarize a complex argument, the thought is that you must have rights to use and possess individual things to the exclusion of others, because independence would be impossible if you had to obtain the permission of everybody in the world before you could, say, keep a particular toothbrush for yourself.[46] However, everyone else in the State of Nature could make that same 'claim' to that toothbrush. Seeking the consent of everyone else is not viable because anyone could veto your request, and neither would fighting others off solve anything, because some better fighter could always turn up to relieve you of the toothbrush. Thus, human beings in a State of Nature are in an impossible position of being simultaneously required to and prohibited from acquiring external objects of choice. This would leave usable things like toothbrushes systematically unusable, resulting in a condition where human beings were subject to things rather than the other way around.[47]

Kant's solution is to imagine original property acquisition as a *conceptual* exercise where human beings justify their exclusion of others from external objects of choice by and on condition of 'postulating' – imagining into existence – an 'omnilateral' authority. This authority speaks on behalf of all, and so, can publicly and systematically confirm in each community member rights of ownership in their things.[48] In this way, the public institution of a representative legislature makes possible the Roman juridical precept of *suum cuique tribuere* – 'rendering to everyone that which belongs to them.'[49] Disputes over property rights so legislated must be settled publicly and systematically by a judiciary, and enforced, again publicly and systematically, by an executive holding a monopoly on force. On this conception of public institutions resolving the contradictions of private interaction, they do not simply check, balance, or 'mediate' between pre-existing values, needs, or class interests,[50] but rather open up a perspective – the *public* – that is otherwise unavailable but without which even the simplest private juridical relations cannot make sense.[51]

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[46] Kant expresses the necessity of property ownership in terms contemporary readers will find upsetting. Itinerant workers such as 'the woodcutter I hire to work in my yard; the blacksmith in India, who goes into people's houses to work on iron with his hammer, anvil and bellows…; the private tutor, as compared with the school teacher; the tenant farmer as compared with the leasehold farmer' are 'mere underlings of the commonwealth because they have to be under the direction or protection of other individuals, and so do not possess civil independence.' *DoR* 6:314-315, 457. This leaves them as merely '*passive*' subjects rather than '*active*' members of the state, he continues, meaning they are not entitled to vote. *DoR* 6:315, 457-458. The point of these remarks is not that the franchise should be restricted to property owners. Rather, it is that political freedom is empty without economic freedom: the Indian blacksmith lacks independence even if he can vote. Nicholas Vrousalis, *Interdependent Independence: Civil Self-Sufficiency and Productive Community in Kant's Theory of Citizenship*, 27 KANTIAN REV. 443, 450 (2022).

[47] Ernest J. Weinrib, *Ownership, Use, and Exclusivity: The Kantian Approach*, 31 RATIO JURIS 123, 131 (2018).

[48] For a useful summary, see JAKOB HUBER, KANT'S GROUNDED COSMOPOLITANISM: ORIGINAL COMMON POSSESSION AND THE RIGHT TO VISIT 77–79 (2022).

[49] *DoR* 6:237, 392, citing J. Inst. 1.1.3.J.

[50] *See* Henry Shue, *Mediating Duties*, 98 ETHICS 687 (1988).

[51] As Corradetti puts it, 'the peremptory justification of the provisional character of unilateral appropriations is understandable under the idea of a synthetic a priori will from which both private and public rights are held together.' Claudio Corradetti, *Constructivism in Cosmopolitan Law: Kant's Right to Visit*, 6 GLOBAL CONSTITUTIONALISM 412, 414 (2017). I would insert an 'only' between the words 'is' and 'understandable.'

Sections 5 and 6 will argue that just like rights to property, rights to move from place to place, let alone travel the world, are both morally necessary but inconceivable in a State of Nature. Public institutions, domestic and international, are required to be able even to *think* them.

3. Human Rights as Legal Rights

Independence is a natural right but not a *legal* right. It would not suffice for a constitution to contain just one article declaring no one subject to the will of another. Rather, enforceable rights and obligations must be individuated and posited in law by reference to the natural right to independence. As such, Kantian independence is comparable to the concept of being *sui iuris* underlying the Roman law of obligations. That is to say, it is not a substance or a 'value' maximized through concretization or allocation – nobody goes to court demanding some thing or performance because this would 'optimize' or 'advance' their *sui iuris*-ness – but a *formal* requirement. Your legal claims in tort, contract, and unjust enrichment are 'organized' around the idea that you are *sui iuris*.

The most basic legal rights thus derived are in Private Right. In outlining it, Kant follows classical tradition in defining a first category of 'rights to things' and a second category of 'rights against persons,' but departs from it in his third category of 'a right to a person akin to a right to a thing (*ius realiter personale*), that is, possession (though not use) of another person as a thing.'[52] This elaboration can be explained as follows. The basic characteristic of a thing is that it can be utterly dominated; that is, used and possessed at the same time.[53] Accordingly, the first category covers rights to use and/or possess things to the exclusion of others: *tort/property*. Innate Right, by contrast, requires that humans cannot be treated as things. This, however, does not mean that they can never be used or possessed, only not *at the same time*. As such, the second category encompasses the 'use' of other persons so long as they are not also 'possessed.' Persons give each other rights to use one another in *contract* by agreeing to make certain performances.

Most relevant for our purposes, however, is the third category of 'rights to persons akin to rights to things.' As the name suggests, these seem at first glance as if they are rights *in rem*, but closer inspection reveals them to be fundamentally *in personam*. One person 'possesses' another like a thing: a parent tells their child to eat their vegetables,[54] an attorney signs a settlement agreement on behalf of her clients, *etc*, and the person so possessed must is 'bound.' However, because the possession is of another *person*, the possessor cannot use the other but must act for their purposes,

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[52] *DoR* 6:260, 412.
[53] *DoR* 6:270, 421 ('An external object which in terms of its substance belongs to someone is his *property* (*dominium*), in which all rights in this thing inhere (as accidents of a substance) and which the owner (*dominus*) can, accordingly, dispose of as he pleases (*ius disponendi de rea sua*).')
[54] Kant begins his discussion of rights to persons akin to rights to things by explaining how parental obligations to children arise from their having brought them into existence without first seeking their consent. *DoR* 6:280-81, 429–430. As such, Kant anticipates by at least a century the still controversial notion that parents are fiduciaries of their children. *See* M(K) v M(H), [1992] 3 S.C.R. 6, 61–62 (Can.) (It is intuitively apparent that the relationship between parent and child is fiduciary in nature, and that the sexual assault of one's child is a grievous breach of the obligations arising from that relationship…'); Cooper v. Cavallaro, 2 Conn. App. 622, 626 (1984) ('… the parent-child relationship does not *per se* give rise to the establishment of a fiduciary relationship.')

never their own. This is the *fiduciary* relation, whose structure is 'inseverably compound'[55] and whose 'hallmark… is that the relative legal positions are such that one party is at the mercy of the other's discretion.'[56] The implications of possession and use also operate in the opposite direction. If another possesses you, you get to use them. Their status in relation to you is 'an external object of choice' in your possession just like a performance owed you by contract or an item of your property.[57] Others cannot interfere in the relation between you and your fiduciary without becoming liable to you as trustees *de son tort*. In this way, rights and obligations in private law are in no way functional – they are not allocated, distributed, or otherwise keyed to advancing the interests or needs unique to each of the interacting parties – but depend solely upon the formal relation both the parties stand as regards one another.

Recall that Innate Right requires human beings to leave the State of Nature and join a Rightful Condition – ideally, the State. States are themselves persons; actions are attributed directly to them rather than mediately through their constituents.[58] Moreover, they do not simply exercise 'power' over their subjects in the manner of private multinational corporations but uniquely claim a juridical entitlement to tell their subjects what to do and to force them to do as they are told – *authority*. As such, the binding of subjects' wills can be consistent with their natural right to independence if, and only if, those decisions are consistent with purposes those subjects may make for themselves. Thus, the concept of 'sovereignty' in public law is simply an extension of the concept of fiduciary power in private law. If so, just as private law entails rules to prevent relations between fiduciaries and beneficiaries from degenerating into self-dealing, public law also sets out rules to preventing sovereign-subject relations from collapsing into domination. This is the point of the legal entitlements known as 'human rights' in contemporary legal practice.[59]

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[55] Peter Birks, *The Content of Fiduciary Obligation*, 34 ISR. L. REV. 3, 33 (2000). Birks uses this phrase to describe its *content*, rather than structure.

[56] Ernest J. Weinrib, *The Fiduciary Obligation*, 25 U. TORONTO L.J. 1, 7 (1975). One might add that the interaction cannot be inherently antagonistic. A chess grandmaster checkmates you without becoming your fiduciary.

[57] *DoR* 6:247, 402.

[58] The separate personality and life of the State distinct from that of its subjects is often explained by reference to the idea of an orchestra, which is more than just an aggregation of individual musicians sounding notes on their instruments in isolation from one another because it has just one purpose – making music – that is distinct from the interests and struggles its members have outside of their orchestral practice. *See* John Rawls, *The Priority of Right and Ideas of the Good*, 17 PHIL. & PUB. AFF. 251, 271 (1988); RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 226 (2000). An important difference is that the end of a republic is not a *material* one like playing a tune but the *formal* one of enabling the 'formal compossibility of the choices of all under universal laws of right.' Vrousalis, *supra* note 46 at 47, note 17.

[59] Kant scholars might object that Kant nowhere recognizes the permissibility of judicial review of sovereign decisions, let alone of coercive resistance against sovereigns for violation of rights – this is revolution which must be put down. Neither of these considerations preclude sovereign-subject relations having a juridical form. In *Theory and Practice*, Kant is emphatic that the head of state owes juridical obligations to the people but maintains only that these cannot be enforced coercively because no one has the *standing* to do so. Immanuel Kant, *On the Common Saying: That May Be Correct in Theory, but It Is of No Use in Practice*, *in* PRACTICAL PHILOSOPHY: THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT 273, 301-302 (8:303-304) (Mary J. Gregor ed., 9th ed. 2006). Kant's seemingly contradictory statement in *DoR* 6:231, 388 that 'Right is Connected with an Authorization to use Coercion' should not be understood to mean that rights are always enforceable, for Kant discusses several instances where are not, most famously in his discussion of the law of market overt. *DoR* 6:301, 447. Rather, all it means is that all uses of coercion must be consistent with the various forms of right. If so, a judge, in her role as the keeper of the sovereign's conscience, may review sovereign enactments for consistency with right. Precisely this is envisaged in Kant's discussion of equity, where he states that a judge is

Contrary to much rhetoric, human rights – as *legal* terms of art – are neither possessed purely by virtue of being human, nor do they respond to all violations of right. If your neighbor were to kidnap you, force you into her cellar, and waterboard you to the strains of ambient techno, jurists would characterize these not as human rights violations but as private wrongs in battery, false imprisonment, *etc*. As legal terms of art, 'human rights violations' obtain only if there is no *public* response – no police to prevent kidnappings, legislation or courts to remedy them in civil actions, punish them in criminal law, *etc*; that is, only if your entire community has failed you *publicly* and *systematically*. States are the primary obligors in human rights law not because they are the most prolific manufacturers of adverse effects upon human beings nor because they have the broadest shoulders to bear the burden of allocated duties – both claims seem increasingly untenable under the conditions of advanced capitalism – but because they alone stand in a formal relation of *authority* over individuals, in a manner distinct from even the most powerful private multinational conglomerate.[60]

4. 'Extraterritorial' Human Rights 'Jurisdiction'

The claim that human beings possess legal rights only by subjection to the authority of public institutions might be at variance with rhetoric, but is *entirely* consistent with legal practice, in particular, with the doctrine that parties to human rights treaties owe obligations only to persons under their 'jurisdiction.' To date, the system under which the most highly developed body of jurisprudence on this topic has arisen is not the ICCPR but the European Convention on Human Rights (ECHR)[61] – in particular, in the progression between the *Banković* and *Al-Skeini* decisions.[62]

Briefly, the reasoning in *Banković* – brought by Serbs whose relatives were killed in a NATO airstrike on a civilian radio tower in Belgrade during the 1998 Kosovo War – was (1) that human rights were in the first instance limited to territory, (2) that the Convention could not be divided and tailored, and (3), that any extension outside of the Convention's '*espace juridique'* – a concept introduced for the first time in that case – obtained only in exceptional circumstances not present in that case. In *Al-Skeini* – which arose out of the UK's activities in Southern Iraq during the second Gulf War – the court did away with the requirement of an all-or-nothing Convention and the *espace juridique* confabulation, and held instead that 'state jurisdiction' under Article 1 ECHR obtained anywhere in the world the Convention parties exercised (1) state agent authority and control over persons,[63] or

competent to pronounce on the rightfulness of the conduct of someone on whose behalf she is entitled to speak, such as in an action for indemnification between the crown and its employees. *DoR* 6:234-235, 391.

[60] I bracket the case of the European Union, the sole example of an international organization exercising jurisdiction over persons.

[61] For reasons of space I do not discuss the theory of extraterritorial jurisdiction advanced by the Inter-American Court of Human Rights that tracks the causation of adverse effects on persons outside its territory. Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights, No. 23 Inter-Am. Ct. H.R. (ser. A) ¶¶ 100–103 (Nov. 15, 2017).

[62] Georgia v. Russia (II), Merits, App. No. 38263/08, ¶¶ 113–114 (Jan, 21, 2021).

[63] Al-Skeini and ors v. United Kingdom, Merits and just satisfaction, 53 Eur. H.R. Rep. 18, ¶¶ 133–37 (2011).

(2) effective control over territory.[64] It then proceeded to find that the applicants fell within the first category, because

> following the removal from power of the Ba'ath regime and until the accession of the interim Iraqi government, the United Kingdom (together with the United States of America) assumed in Iraq the exercise of some of the public powers normally to be exercised by a sovereign government. … the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basra during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.65

Al-Skeini thereby confirms the necessity of subjection to the authority of institutions exercising public powers for the possession of human rights. Although the *Al-Skeini* test for jurisdiction includes 'control' alongside 'authority' in its formulation, a better view is that the sole criterion is a claim – even just a pretense – to authority.[66] Consider the *Ilaşcu-Catan* line of cases,[67] where Moldova was held to owe obligations towards individuals in the Russian-sponsored breakaway Transdniestria region 'even in the absence of effective control' of that region by Moldova.[68] Despite being good law, these decisions have been criticized almost universally in the scholarship,[69] which is unsurprising because, on the functional conception of human rights as efficient means to attaining higher normative goals, it makes no sense to allocate obligations to institutions that will be ineffective.[70] Besson expresses this essentially Razian thought in superficially Kantian terms when she states that 'the feasibility of duties is [both] part of their concrete requirements (following the principle 'ought implies can') *and a condition for their existence*.'[71] Her thought, evidently, is that because Moldova is completely unable to assert its authority over Transdniestria – its edicts would immediately be countermanded by rebel forces – nothing it says can have any impact there, and so, it cannot be expected to owe anything to individual Transdniestrians.

An authentically Kantian approach disagrees. Human rights obligations – like all obligations – are formal, and so, not keyed to the ease and convenience of obligors. The ought-implies-can maxim

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[64] *Id.* at ¶¶ 138–40.
[65] *Id.* at ¶ 149.
[66] *See* Ukraine and the Netherlands v. Russia, App. Nos. 8019/16, 43800/14, 28525/20, ¶ 549 (2022). ('Even in cases where it is established that the alleged violations occurred in an area under the respondent State's effective control (and thus within its *ratione loci* jurisdiction), the latter will only be responsible for breaches of the Convention if it also has *ratione personae* jurisdiction.')
[67] Ilaşcu and ors and Romania (intervening) v. Moldova and Russian Federation, Admissibility, E.C.H.R. 318 (2004); Catan v. Moldova and Russian Federation, Merits and just satisfaction, E.C.H.R. 1827 (2012).
[68] Ilaşcu v. Moldova, *supra* note 67 at ¶ 331.
[69] *See*, e.g., MILANOVIC, *supra* note 14 at 107; RAIBLE, HUMAN RIGHTS UNBOUND, *supra* note 21 at 171–174; Janina Dill, *Towards a Moral Division of Labour between IHL and IHRL during the Conduct of Hostilities*, *in* THE LAW APPLICABLE TO ARMED CONFLICT 197, 244, note 151 (Ziv Bohrer, Janina Dill, & Helen Duffy eds., 2020).
[70] *See* Joseph Raz, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210, 213 (2nd ed. 2009) (the 'literal' sense of the rule of law contemplates '(1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it.'); NICOLE ROUGHAN, AUTHORITIES: CONFLICTS, COOPERATION, AND TRANSNATIONAL LEGAL THEORY 30 (2013) ('one point on which all theories of authority seem to converge is that authority can exist only where it is effective—that is, only where some person or body actually has the capacity to direct and/or coordinate subjects.')
[71] Besson, *supra* note 17 at 868. (emphasis added)

does the opposite of what Besson imagines: it contends that precisely 'because something is commanded by reason, it *is* possible.'[72]

> Morals is of itself practical in the objective sense, as the sum of laws commanding unconditionally, in accordance with which we ought to act, and it is patently absurd, having granted this concept of duty its authority, to want to say that one nevertheless cannot do it. For in that case this concept would of itself drop out of morals (*ultra posse nemo obligatur*)…[73]

Practical obligations are never nullified by the obligor's physical impossibility to perform. Debt obligations do not disappear if debtors become impecunious. Contracts (and by analogy, treaties) are never frustrated due to difficulties in performing, total failure of consideration, or 'frustration of adventure', but only if a fundamental change in circumstances renders performance radically different to what the parties had agreed.[74] The same principle operates in international law to relieve a state of its treaty obligations.[75]

Human rights jurisdiction is also formal and not functionally keyed to a state's ability to produce actual 'impacts'[76] or assert its claimed authority.[77] To 'ground' the existence of human rights obligations on the provision of effective control is to commit the mistake of focusing on substance rather than form. Effective control might be the substance or 'regulative principle' of authority-subject relations, in that a well-functioning legal order should ideally be able to enforce its writ. However, the absence of effective control does not mean that the form or 'constitutive' principle of those relations is lacking. Rather, it might simply mean the legal order is defective. That, however, does not make it any the less *authoritative*.

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[72] Alice Pinheiro Walla, *Global Government or Global Governance? Realism and Idealism in Kant's Legal Theory*, 13 J. GLOBAL ETHICS 312, 318 (2017). *See* IMMANUEL KANT, KANT: ANTHROPOLOGY FROM A PRAGMATIC POINT OF VIEW 39 (7:179) (Robert B Louden ed., 2006) ('… what he wills *at the order of his morally commanding reason*, he *ought* to do and consequently *can* also do (for the impossible is not commanded to him by reason).')

[73] Immanuel Kant, *Toward Perpetual Peace*, *in* PRACTICAL PHILOSOPHY: THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT 311, 338 (8:370) (Mary J. Gregor ed., 9th ed. 2006). [hereinafter '*PP*']

[74] Canary Wharf (BP4) T1 Ltd v. European Medicines Agency, [2019] EWHC 335, ¶ 27 (Eng.).

[75] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, art. 62 (1969).

[76] *See* e.g. Yuval Shany, *Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law*, 7 L. & ETHICS HUM. RTS. 49 (2013).

[77] Moreno-Lax understands 'functional' as denoting literally the governmental 'functions' through which the power of the state finds concrete expression in a given case.' In her view, therefore 'Jurisdiction… is therefore always functional and expressed through legislative, executive, and/or adjudicative activity, by which the state exercises its powers, combining personal and geographical aspects.' On this basis, Moreno-Lax contends that 'not only effective control over persons or territory matters for the activation of ECHR obligations', but that 'Control over (general) policy areas or (individual) tactical operations, performed or producing effects abroad, matters as well. These are the vehicles of the exercise of "public powers" that amounts to jurisdiction.' Violeta Moreno-Lax, *The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model,"* 21 GERMAN L.J. 385, 402–403 (2020). This is both under and overinclusive. Overinclusive because several policy areas – paradigmatically the prosecution of wars – are commonly identified with public powers and are productive of 'effects' abroad, but do not give rise to human rights obligations. Underinclusive because its insistence on 'control' in these policy areas is inconsistent with established precedent. Moldova had no ability to advance its policies in Transdniestria, but still owed obligations there.

In the conclusion to the *Doctrine of Right*, Kant anticipates his readers' distress not just at the imperative to '*Obey the authority who has power over you* (in whatever does not conflict with inner morality)', but also at his contention that 'even to *investigate* publicly the title by which he acquired his authority, and so to cast doubt upon it with a view to resisting him should this title be found deficient, is already punishable…'[78] The contrast is between 'an actual deed (taking control)' that establishes 'the condition and the basis for a right' to obedience, and 'the *mere idea* of sovereignty over a people' which 'constrains me, as belonging to that people, to obey without previously investigating the right that is claimed.' Kant explains that an 'actual deed (fact)' like taking control 'is an object in *appearance* (to the senses).' In contrast, *ideas* are things 'to which no object given in human experience can be adequate – and a perfectly *rightful constitution* among human beings is of this sort – is the thing itself.'[79] On this basis, Kant concludes that if 'a people united by laws under an authority exists, it is given as an object of experience in conformity with the idea of the unity of a people *as such* under a powerful supreme will, though it is indeed given only in appearance… And even though this constitution may be afflicted with great defects and gross faults and be in need eventually of important improvements, it is still absolutely unpermitted and culpable to resist it.'[80]

Accordingly, factual questions like ability to assert control cannot determine the normative salience of a legal order. Certainly, effective control over persons or territory raises a presumption of authority over persons because it is vanishingly unlikely to have been established without systematic attempts to tell people there what to do and to force them to do as told. It does not, however, determine the question of authority. The legitimate government of Poland in 1940 was the one in exile.[81] Subjects' rights to authority survive their violation, as do the obligations of authorities. So long as a state exists, its public fiduciary status is an external object in its subjects' possession neither within the state's power to alienate, nor defeasible by the wrongs of other states or rebel groups. The wrongful seizure of territory by other states or rebel groups does not nullify the existence of these obligations. Instead, having usurped authority, the occupiers are held to the same obligations in the manner of public trustees *de son tort*.[82] Accordingly, Moldova's claim of sovereignty over Transdniestria is just the same thing as an acknowledgment of obligations in human rights to people there. The imposition of like obligations upon Russia, in contrast, arises from its usurpation of Moldovan sovereignty over Transdniestria.

This is not to claim that practical difficulties in exercising control are irrelevant, but to restrict their relevance arises at the *merits*. At the jurisdictional or admissibility stage, the defendant state is encumbered with human rights obligations simply because it has formally held itself out as an authority over subjects, even if only constructively, illegally, or risibly. The onerousness of these obligations in no way negates their existence. What the *content* of these obligations are, and whether

[78] *DoR* 6:371, 504-505.
[79] *DoR* 6:371, 505.
[80] *DoR* 6:372, 505.
[81] Joseph Raz, *The Problem of Authority: Revisiting the Service Conception*, 90 MINN. L. REV. 1003, 1005–1006 (2006). cf his claims about the nature of the rule of law *supra* note 70.
[82] GERHARD GLAHN & JAMES LARRY TAULBEE, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 635 (2015) ('… occupation does not transfer sovereignty.' Rather, the 'occupant… exercises a temporary right of administration, on a trusteeship basis until the occupation ceases in one way or another.')

it has breached them, are separate and subsequent questions. An excuse might lie if a state really cannot fulfill its obligations, but it bears the burden of proving it tried.[83]

Pace Raible and Grotius, there is a difference between a sovereign and a landlord. Territories are nothing like property: they may not be bought and sold through inheritance, exchange, purchase, or donation.[84] Moldova might not have been able to do very much for its claimed subjects in Transdniestria, but it still owed them *something*. For this reason alone, it was obligated to take whatever 'diplomatic, economic, judicial or other measures' remaining within its limited power.[85] That obligation weighed only upon Moldova, even though there were other ECHR parties that could have wielded greater diplomatic and economic influence over the Transdniestrian Republic and Russia. What mattered was that Moldova formally claimed authority over Transdniestrians, not how well it could actually perform the functions of an authority.

4.1 Finding Human Rights in a Hopeless Place

If jurisdiction is a necessary threshold for the possession of rights, it follows that human beings have no legal rights purely in virtue of being human, *especially* not 'human rights' as terms of art in contemporary legal practice. Such rights are acquired only by becoming subjects of authority. This commitment produces two difficulties. The easier one is that it contradicts the well-established *dicta* in the *Nuclear Weapons* advisory opinion that the protections of international human rights law do not cease even in the heat of war where institutional order has broken down:

> In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined

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[83] Al-Skeini, *supra* note 63 at ¶ 166 (compliance with positive duties is an obligation of means rather than result, meaning the duty-bearer must demonstrate due diligence.)

[84] *PP* 8:344, 318. The *locus classicus* of the 'territory-as-property' theory that still dominates textbooks of international law is, as with many other topics in international law, Hersch Lauterpacht, who cites the sale in 1917 of the then Danish Virgin Islands to the US for US$ 25 million. Hersch Lauterpacht, *Property Relations Between States. State Territory*, *in* INTERNATIONAL LAW: VOLUME 1, THE GENERAL WORKS: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 367, 367–368 (Eli Lauterpacht ed., 1970). Lauterpacht's account of a mercenary transaction leaves out several salient facts. The US had threatened to invade if the islands were not sold, and the demand raised such fraught questions in Denmark that a referendum was organized for the first time in Danish history, in which – unlike previous elections – Danes of all classes and even women were allowed to vote. There was, of course, one class of Danish subjects who did not get to take part in the referendum – the inhabitants of the islands themselves. A historic referendum, THE DANISH WEST-INDIES, https://www.virgin-islands-history.org/en/history/sale-of-the-danish-west-indian-islands-to-the-usa/a-historic-referendum/ (last visited Jun 2, 2024). A happier reprise occurred a century later, when another US administration offered to purchase Greenland from Denmark in a supposed 'a real estate deal.' Martin Pengelly, *Trump Confirms He Is Considering Attempt to Buy Greenland*, THE GUARDIAN, Aug. 18, 2019, https://www.theguardian.com/world/2019/aug/18/trump-considering-buying-greenland (last visited Jun 28, 2020). This time, the Danish Prime Minister rebuffed the offer, stating – in what arguably reflects a new rule of customary law – that 'Thankfully, the time where you buy and sell other countries and populations is over'. Edward Helmore, *Trump Cancels Denmark Trip after PM Says Greenland Is Not for Sale*, THE GUARDIAN, Aug. 21, 2019, https://www.theguardian.com/us-news/2019/aug/20/trump-greenland-denmark-mette-frederiksen (last visited Jun 2, 2024).

[85] Ilaşcu v. Moldova, *supra* note 67 at ¶ 331.

> by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.[86]

A more nettlesome difficulty is that my claim in section 6.3 is precisely that stateless migrants possess rights to rescue, and moreover, that they do so as *human* rights. To make good on this, there must be a way for 'human rights', as terms of art, to emerge even in hopeless and lawless conditions.

For this, we turn to the curious *obiter* discussion toward the end of *Al-Skeini*, where the Court recalled the facts of the earlier *Issa* decision involving an alleged (but unproven) incursion into Iraq by Turkish soldiers, following which certain civilian shepherds were shot.[87] The *Al-Skeini* court opined that Article 1 ECHR state jurisdiction would not have emerged on those facts, but that it might have if the shepherds had instead been taken to a nearby cave before being shot. The crucial difference between the pure *Issa* fact pattern and the gloss is that the latter has room to argue that the victims are not just 'affected' by being ordered into a truck, but *governed*. This is admittedly a strained reading. The challenge is not just to explain – as was just done in the previous sub-section – how authority-subject relations can emerge where occupying forces have yet to consolidate effective control over a particular region, and so, cannot exercise public powers there, but to explain how a state can be seen as holding itself out as an authority over individual human beings when its officials make no pretense of it.

To understand this, we must briefly consider Kant's account of the laws of war, or what is now euphemistically called international 'humanitarian' law (IHL).[88] The authorities before Kant, primarily Grotius, considered war the legal means through which sovereigns sought satisfaction for what they unilaterally determined to be violations of their rights.[89] In contrast, Kant maintains that a unilateral will could never bind another, meaning that violence can never settle legal disputes. Recall from our toothbrush discussion that victory signifies only superiority in combat, never correctness on the merits. Against the consensus of his time, therefore, but consistently with that of ours, Kant condemned aggressive war as wrongful in the 'highest degree'[90] because it substitutes a Rightful Condition where disputes are settled on the merits for a State of Nature where might alone decides.

Now, war might be barbaric, but it is not a legal vacuum. Kant remarks that it might be 'difficult even to form a concept of [right] or to think of law in this lawless state without contradicting oneself (*inter armas silent leges*),'[91] but it still is possible to identify a principle around which the *jus in bello* can be organized: Do Not Remain In This Condition.[92] If you must fight a war, you must do so in a way that

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[86] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep 226, ¶ 25 (Jul. 8, 1996).
[87] *Al-Skeini*, *supra* note 63 at ¶ 136, *citing* Issa and ors v. Turkey, Merits, 41 Eur. H.R. Rep. 567 (2004).
[88] These paragraphs are based on Aravind Ganesh, *Between Wormholes and Black Holes: A Kantian (Ripsteinian) Account of Human Rights in War*, *in* THE PUBLIC USES OF COERCION AND FORCE: FROM CONSTITUTIONALISM TO WAR 151 (Ester Herlin-Karnell & Enzo Rossi eds., 2021).
[89] For a sophisticated yet highly readable exploration, *see* OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD (2017). For this reason Kant excoriates Grotius, Pufendorf, and Vattel in *Toward Perpetual Peace* as 'only sorry comforters', whose counsel merely justify the endless wars started by the crowned heads of Europe, and so, encourage perpetual war. *PP* 8:355, 326.
[90] *PP* 8:302, 300; *DoR* 6:344, 482.
[91] *DoR* 6:347, 485.
[92] For a similar but Razian argument that the laws of war confer no rights but merely reflect prohibitions, *see* ADIL AHMAD HAQUE, LAW AND MORALITY AT WAR ch. 2 (2017).

leaves open the rational possibility of a future peace. A war crime, therefore, is any act whose maxim is inconsistent with that possibility: the Sixth Preliminary Article of the model treaty outlined in *Toward Perpetual Peace* is introduced under the caption 'No state at war with another shall allow itself such acts of hostility as would have to make mutual trust impossible during a future peace…'[93] Such impermissible acts of hostility include the use of assassins and poisoners, perfidy, and incitement to rebellion in the enemy state. Consider perfidy: pretending deceptively to surrender makes it impossible to ever surrender genuinely, thus forcing the parties into a war of extermination whose duration stretches to eternity.[94] Similarly, attacking civilians, soldiers *hors de combat*, *etc* in violation of the principle of distinction makes it impossible not to be part of the war effort, thus extending the scope of the combatants to infinity. Likewise, uniforms and insignia are worn so combatants can tell 'who is friend and who is foe…'[95] The fraudulent use of uniforms and insignia makes it impossible so to distinguish, thus rendering the range of foes plenary. In each case, war crimes 'hand everything over to savage violence…'[96] They turn wars into juridical voids – 'black holes' – from which there is no escape.

With this idea to hand we can understand how human rights jurisdiction emerge in the 'glossed' *Issa* fact pattern. The basic case is that law and institutions are completely supplanted by force in armed conflict, such that there are no rights outside of institutional order, not even – or especially not – human rights. Nevertheless, human rights *can* be claimed in barbaric conditions of war if, and only if, the claimant can argue that despite the factual context seeming at first glance like a condition of war, closer inspection reveals it to be a formal interval of peace. If human rights as legal rights are irreducibly relational, then human rights claimants, as masters of their claims, are entitled to characterize that relation on the facts. They may accordingly construe their being ordered into the jeep as an exercise of authority – of being 'told what to do' – by officials of the defendant state. In response, the defendant state cannot answer by claiming that its soldiers did not intend to exercise jurisdiction over their victims but only to kill them, for that would be an admission of a war crime, and no one can be heard to allege their own turpitude in defense to accusations of wrongdoing.[97]

This is how to understand the *Nuclear Weapons* dictum. International human rights law can and does operate in conditions of armed conflict where rights are by default absent, but only if the relation between the parties can be characterized formally – even if only risibly – as a condition of peace. It cannot lie in the mouth of an ECHR state party to plead the objective fact of a barbaric condition in

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[93] *PP* 8:346, 320.
[94] *See DoR* 6:308, 452; 6:347, 485.
[95] The Trial of Otto Skorzeny and Others, Case No. 56, IX Law Reports of Trials of War Criminals, Vol. IX, 92 (1949) (U.N. War Crimes Comm'n).
[96] *DoR* 6:306, 452.
[97] In his response to me in Ganesh, *supra* note 88, Ripstein observes that the *nemo auditur* structure I outline risks sounding like a 'rule of pleading' or a 'rule for the courts.' Instead, he argues that it must appeal to some stronger modality in the form of the status of the soldiers as officials of a public order. Arthur Ripstein, *From Constitutionalism to War - and Back Again: A Reply*, *in* THE PUBLIC USES OF COERCION AND FORCE: FROM CONSTITUTIONALISM TO WAR 229, 311–315 (Ester Herlin-Karnell & Enzo Rossi eds., 2021). I agree: a band of brigands or private mercenaries would not be subject to this structure, because they would not be under the first-order obligation of states not to commit human rights violations against persons under their jurisdiction. Brigands or mercenaries might be subject to international humanitarian law in those situations, but not international human rights law because they have no public character.

defense to what is characterized as a claim of right, because that is tantamount to admitting to the deepest possible wrong of savage violence; that is, of waging eternal war.

The tragedy of the pure *Issa* fact pattern, then, is that there is no space on the facts to argue that the defendant state ever held itself out as an authority over the claimant. Not even a *scintilla* of law-speaking arises if shepherds are simply shot where they stand.[98] Likewise, a pilot dropping bombs upon civilians from a great height cannot be characterized as expecting obedience from the victims below. The only possible characterization is that she expects them to die.[99] Again, 'power' or 'effective control' is completely irrelevant. One can in principle imagine one group effectively controlling another group of people the way the Spartans controlled the Helots, or dogs round up sheep. There may be effective control in these scenarios but no semblance of lawgiving, just terror. It is impossible to imagine any rights in that condition, not even human rights – indeed, especially not human rights.[100]

A good lawyer, then, will seek to distinguish their case from the pure *Issa* or *Banković* fact patterns and characterize them instead as akin to the *Issa* gloss. This is how to make sense of *Hanan v Germany*, where the victims were Afghan civilians killed in an airstrike just like those in *Banković*. The crucial difference was that Germany had concluded a 'Status of Forces' Agreement with the Afghan government immunizing German soldiers from criminal prosecution. This allowed the ECtHR to claim that Afghan public powers had been effectively 'delegated' to Germany, thus giving rise to jurisdiction.[101] If that decidedly strained interpretation had not been adopted, the Court would have had to concede that Germany had, together with Afghanistan, manufactured a juridical black hole where German soldiers enjoyed impunity. Such a thing is fundamentally inconsistent with the very idea of Germany being a public order, and so, it had to be held to obligations under the ECHR. Whether it had *breached* those obligations was a separate question, which the *Hanan* Court answered in the negative at the merits.

[98] *See* Besson, *supra* note 17 at 876 ('… military occupation with effective control over a territory need not imply jurisdiction, because it may lack the normative element of reason-giving and appeal for compliance. Another example may be effective personal control by troops without, however, any normative appeal besides the use of coercion.')
[99] Marko Milanovic, *Al-Skeini and Al-Jedda in Strasbourg*, 23 EUR. J. INT'L. L. 121, 130 (2012) ('While the ability to kill is 'authority and control' over the individual if the state has public powers, killing is not authority and control if the state is merely firing missiles from an aircraft.').
[100] On this point, Ripstein argues that public actors like states 'must therefore act in conformity with human rights obligations' because 'as soon as they exercise control over a human being, they are bound.' Ripstein, *supra* note 97 at 315. In contrast, I contend that a public actor can exercise control over human beings without being bound by human rights obligations, because 'control' is something that brigands and mercenaries can wield, while jurisdiction or law-speaking is unique to public actors. While there is a presumption that their agents exercise and act under authority, this is not a conceptual necessity. In such situations, those actors would commit no human rights violations, but only violations of the laws of war.
[101] Hanan v. Germany, App. No. 4871/16, at ¶¶ 137–144 (Feb. 16, 2021).

5. Waves of Freedom: Public Goods and the Right to Travel

We have gone quite a while without mentioning the high seas, let alone rights to rescue on them. There might appear to be several salient differences between the claimants in the cases canvassed above and the applicants in *AS v Italy*. In those cases, the claimants were physically located outside of the defendant states' territories but were not really strangers to their legal orders because, by at least claiming authority over them, those states formally treated the applicants as members of their institutional orders, and so, were either fixed with or could not be heard to deny the public fiduciary obligations of accountability in human rights arising from that relation.

In contrast it is not evident how a state whose coast guard speeds away from a stricken vessel can be characterized – even risibly – as holding itself out as an authority over the persons on that vessel. Rather, the whole point of speeding away is to avoid precisely this. Unlike the soldiers in *Hanan* or the *Issa* gloss who performed acts of commission against the claimants, the fleeing coast guard's *omission* would preclude not just fiduciary-like obligations in human rights, but even more basic tort-like obligations. First-year law students know that you commit no tort if you callously stroll past a baby drowning in a puddle because. On the Kantian account this is because the baby and you are independent beings each doing your own thing – strolling and drowning – and nothing has happened between the two of you to turn the baby's need into a right enforceable against you consistent with your innate freedom. Moreover, 'stateless' migrants lack a jurisdictional relationship not only with the state receiving the distress signal but with any state anywhere. The prospect of a human right to maritime rescue thus appears to vanish from all directions.

These objections are all mistaken. Section 6 will demonstrate that the sovereign states of the world are collectively always already in a public fiduciary relation of authority with human beings traveling the high seas, which, as 'global public goods', are always already zones of jurisdiction. Recall that the right to rescue is not limited to stateless migrants; a billionaire on a stricken mega-yacht is just as entitled to rescue. In fact, she is the default claimant of that right; how the reasons applying to her extend to stateless persons is the further argument that is required. The task of this section is to lay the foundation for this discussion by introducing the private law concepts that section 6 will extend by analogy to the international legal order.

The key lies in the famous caption of the Third Definitive Article of the model treaty proposed in *Toward Perpetual Peace*: 'Cosmopolitan right shall be limited to conditions of universal *hospitality*'.[102] Evidently, 'Hospitality' supplies the whole content of a category of public law called 'Cosmopolitan Right', which Kant insists 'is not a question of philanthropy but of *right*…'[103] That Hospitality cannot be a question of being nice follows from the claim in section 2 that legal rights and obligations are neither concretizations nor allocations of ethical values. Indeed, legal enforcement would defeat the whole point of welcome: few would feel welcomed by tea and biscuits

[102] *PP* 8:357-358, 328-329.
[103] *Id.* While he does not mention Hospitality in the *Doctrine of Right*, he reiterates that Cosmopolitan Right is not 'a philanthropic (ethical) principle but a principle *having to do with rights*.' *DoR* 6:352, 489.

served under pain of penalty. The mystery, then, is what Kant could mean by a *right* of hospitality corresponding to legal obligations.

There are, in fact, persons for whom 'hospitality' is not just an ethical duty but a legal obligation: *innkeepers*. By Kant's time, it was trite in both civil and common law that innkeepers, along with ferry operators and liverymen – collectively 'public carriers' – owed two unique and onerous obligations inexplicable at tort/delict or contract.[104] The first was an obligation to serve all travelers, sounding in personal liability to those improperly refused. The second was an obligation to act as an insurer of their guests, sounding in strict and vicarious liability for losses of property occurring within the protection of the inn.[105] The origins of these obligations are usually traced – as we shall see, *wrongly* – to two titles of the *Digest of Justinian*, the first being the 'Action for Theft Against Ships' Masters, Innkeepers, and Liverymen';[106] and the second the Action for Receipt, which features in the section dealing with obligations of restitution.[107] The obligation to receive is inexplicable at contract; the hanging of a business sign ordinarily signifies only an invitation to treat rather than an offer. The obligation to restitute lost property similarly departs from ordinary delict in requiring neither fault nor intention. The public carrier was the only character in all of the Roman law subject to what we would now call strict or vicarious liability.[108]

I have argued elsewhere that the reference to Hospitality in *Perpetual Peace* almost certainly alludes to the law of public carriers.[109] My reasons for so claiming are, first, Kant's choice in the original German not to use ordinary words like *Gastfreundschaft* but the strange conjunction 'Hospitalität (*Wirtbarkeit*),'[110] of which the first is distinctly Latinate while the second carries distinct connotations of an innkeeper or publican. Second, and more dispositive, are the multiple textual parallels between the relevant passages in the *Perpetual Peace* and the aforementioned titles of the *Digest*. For instance, the Roman jurist Ulpian states in the *Action for Theft* that 'an innkeeper or liveryman is not regarded as choosing his own traveller and cannot refuse those making a journey; but in a way, the innkeeper does select his permanent residents…' This distinction is mirrored in Kant's contrast between the traveler's 'right to visit', which the receiving state cannot refuse, and the 'right to be a guest', which requires a 'special beneficent pact… making him a member of the household for a certain time.'[111] Most striking, however, is Kant's appellation for the permanent residents of a country; not *Einwohner*, as one would expect, but *Hausgenossen* – lodgers!

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[104] *See* Reinhard Zimmermann, *Die Geschichte der Gastwirtshaftung in Deutschland*, *in* USUS MODERNUS PANDECTARUM: RÖMISCHES RECHT, DEUTSCHES RECHT UND NATURRECHT IN DER FRÜHEN NEUZEIT; KLAUS LUIG ZUM 70. GEBURTSTAG 271, 317 (Hans-Peter Haferkamp & Tilman Repgen eds., 2007).

[105] These rules are still valid in many jurisdictions. *See* e.g., German Civil Code, § 701 (Ger.); Hotel Proprietors Act 1956, § 1(2) (1956) (U.K.).

[106] Dig. 47.5.1.6 (Ulpian, ad Edictum 38), trans. ALAN WATSON, THE DIGEST OF JUSTINIAN (Vol. 4) 275 (Rev'd ed. 1998). Also at J. Inst. 4.5.3.

[107] Dig. 4.9.1 pr – 1 (Ulpian, ad Edictum 14), trans. ALAN WATSON, THE DIGEST OF JUSTINIAN (Vol. 1) 160 (Rev'd ed. 1998).

[108] *See* e.g., PETER BIRKS, THE ROMAN LAW OF OBLIGATIONS: THE COLLECTED PAPERS OF PETER BIRKS 213 (Eric Descheemaeker ed., 2014); REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 1121–1122 (1996).

[109] Aravind Ganesh, *Wirtbarkeit: Cosmopolitan Right and Innkeeping*, 24 LEG. THEORY 159 (2018).

[110] *PP* 8:357-358, 328–329.

[111] *Id.*

In elaborating the role of public carriers in a domestic legal order – which section 6 will then extrapolate to the international order – I will refer to English rather than Roman or 18th Century German law. This might seem intriguing given Kant was neither English nor likely to have followed the then revolutionary developments in English bailment law.[112] It is nevertheless not inappropriate because, first, the goal of this paper is not historical accuracy but conceptual illumination, and second, because English jurists were arguably *more* Kantian in this respect than their German counterparts.[113]

5.1 Public Carriers as Public Fiduciaries

In a mid-15th Century dispute, the Court of Common Pleas considered a case where a freehold tenant had set up a flour mill in competition with one owned by the lord of the vill. Paston J dissented in favor the lord on the grounds that 'if I have from old time a ferry in a vill, and another raise another ferry on the same river next to my ferry, so that the profits of my ferry are impaired, I will… have against him an Action on my Case, so perhaps here…'[114] Joining the majority in holding pure economic losses unrecoverable, Newton J answered that the 'case of a ferry differs from the case at bar, because in your case you are held (obliged) to sustain the ferry, and to serve and repair it for the ease of the common people…'[115] As such, the first of the three professions held – if only *obiter* – to owe mandatory duties to serve the public was the ferry operator. A century later, a traveler requested room at an inn to be told it was full.[116] He offered to 'make shift among the other guests,'[117] but the innkeeper refused to overcrowd his establishment. The Court found for the innkeeper but observed – again *obiter* – that 'if the cause of the refusal be false, the guest may have his action on the case for his refusal.'[118] Accordingly, innkeepers and liverymen also came to owe

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[112] At around this time, the first systematic treatment of the English law on the subject was being put together by Sir William Jones, a judge of the High Court of Calcutta established by the East India Company. WILLIAM JONES, AN ESSAY ON THE LAW OF BAILMENTS (London, Charles Dilly 1781). Jones was also a hyperglot, and the first to propose a common origin between most European languages and Sanskrit. In 1790, Jones published his English translation of the *Abhijñānaśākuntalam of the 4th century poet* Kālidāsa under the title 'Sacontalá or the Fatal Ring', which was rendered into German by Georg Forster in 1791. Between 1785 and 1788, Forster and Kant had engaged in an acrimonious public debate over the equality of races. Forster defended it, while Kant supported white supremacy. Whether Kant remained wedded to his scientific racism or had 'second thoughts' remains a live question. *See* Pauline Kleingeld, *Kant's Second Thoughts on Race*, 57 PHIL. Q. 573 (2007); and Charles W. Mills, *Black Radical Kantianism*, 95 RES PHILOSOPHICA 1 (2018).

[113] In a study of the history of English innkeeping law, Zimmermann remarks that the central English decisions did not rely arguments of utility, but proceeded 'sondern in einer rechtspolitischen Erwägung…' Reinhard Zimmermann, *Innkeepers' Liability - Die Entwicklung Der Gastwirtshaftung in England*, 2 *in* FESTSCHRIFT FÜR CLAUS-WILHELM CANARIS ZUM 70. GEBURTSTAG 1435, 1450 (Andreas Heldrich, Jürgen Prölss, & Ingo Koller eds., 2007). Similar theories entered German law only late in the 19th century. Zimmermann, *Gastwirtshaftung in Deutschland*, *supra* note 104 at 297–303. Moreover, Zimmermann – perhaps the greatest comparative lawyer of our time – exhibits innkeeping law as a prime example of his intellectual goal of demonstrating the unity of European private law. Zimmermann, *Innkeeper's Liability*, *supra* at 1437 ('Interessant ist die Gastwirtshaftung auch als Zeugnis europäischer Rechtseinheit – sowohl historisch begründeter als auch durch moderne Maßnahmen der Privatrechtsharmonisierung jedenfalls teilweise wiedererlangter.')

[114] Trespass on the Case in Regard to Certain Mills, Y.B. 22 Hen. 6, fol. 14, pl.10 (1444) (Eng.).

[115] *Id.*

[116] White's Case, 73 Eng. Rep. 343 (1558) (Eng.).

[117] *Id.* at 343.

[118] *Id.* at 344.

mandatory duties toward traveling members of the public, except these were privately enforceable 'on the case'; that is, in an action where quantifiable loss is the core of the complaint.

The watershed, however, was the great case of *Coggs v Bernard*,[119] where Holt CJ established the modern common law of bailment on a (supposedly) Roman foundation by overturning the previous rule of strict liability for damage for all classes of bailees.[120] The sole exceptions to this revolution were 'the public carrier, common hoyman, master of a ship, *etc*…' who remained under the old regime of strict and vicarious liability. This exceptional and onerous treatment was necessary because each such profession was

> … a politick establishment, contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, *etc* and yet doing it in a clandestine manner, as would not be possible to be discovered. And this is the reason the law is founded upon in that point.[121]

Because it is 'a publick employment' despite being conducted for private profit, public carriers remained – and, subject to legislative amendments still remain – liable for damage 'at all events… but acts of God, and of the enemies of the King.'[122] Their position is distinct from private carriers (Bed & Breakfasts, AirBnBs, Ubers), ordinary land carriers, and private ships' masters, none of whom owe a duty to the public nor liability for damage except for fault.[123]

Holt CJ's reasoning turns on two thoughts: (1) the systematic *vulnerability* of patrons in relation to public carriers, and (2) the *public necessity* of their profession.[124] The former is very ancient and emerged out of the contempt in which innkeepers were held by Roman society. A Roman inn was an unsalubrious affair little more than a brothel, and its 'reputation was so bad that it was regarded as degrading for a senator to lunch or dine in a *caupona*.'[125] Naturally, the *cauponae* keeping such establishments were presumed not to be averse to slipping light-fingered employees keys to guests' room in exchange for a cut of the spoils, and likewise, masters of ferries might conspire with dockyard thieves. In each case, the victims would have a tough time proving complicity. That said, this alone was insufficient to establish a relation of trust and dependency needed for a fiduciary relation. Taverners had much the same power over their drunken patrons, but on neither side of the channel was similar liability imposed upon them. Rather, to give rise to a fiduciary relation, the hallmark of which is one person being at the discretion of another, we require the notion of the hoyman's 'public'

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[119] Coggs v. Bernard, 2 Ld. Raym. 909 (1703) (Eng.).
[120] Southcote's Case, 4 Co. Rep. 83 (1601) (Eng.).
[121] Coggs v Bernard, *supra* note 119 at 918.
[122] *Id.* at 917–918.
[123] The English common law differentiated between innkeepers and private hosts for hire. The former made a regular business of hosting travelers while the latter only took them in occasionally because no public inns were nearby. JOHN H. SHERRY, THE LAWS OF INNKEEPERS: FOR HOTELS, MOTELS, RESTAURANTS, AND CLUBS 10-11 (§2:3) (John E. H. Sherry ed., 3d ed. 1993). By contrast, Scots law never recognized this distinction. Rothfield v. North British Railway Co., 1920 S.C. 805, 833 (1920) (S.C.) (Scot.).
[124] JONES, *supra* note 112 at 107 ('the *public* employment of the *hoyman*, and that *distrust* which an antient writer justly calls the *sinew of wisdom*, are the real grounds of the law's rigour in making such a person responsible for a loss by *robbery*.')
[125] ZIMMERMANN, LAW OF OBLIGATIONS, *supra* note 108 at 516, note 51.

employment. We need the idea that all persons are *obliged* to – have no choice but to – trust public carriers.

The public necessity rationale, which translates into the obligation to receive travelers, is *entirely* modern, with no counterpart in Roman sources. Contrary to Ulpian's throwaway statement in the *Action for Theft* that 'an innkeeper or liveryman is not regarded as choosing his own traveler and cannot refuse those making a journey', Roman innkeepers were in fact entitled to reject their guests at will. The correct statement of Roman law is in the *Action for Receipt* where Ulpian declares 'Let no one think that the obligation placed on them is too strict; for *it is in their own discretion whether to receive anyone*.' The extent of Holt CJ's innovation is best demonstrated by considering that Ulpian's seemingly incorrect statement in the Action for Theft was intended to explain – correctly as a matter of Roman law – why innkeepers were not answerable for *thefts* committed by passing guests. The statement in the Action for Receipt, in contrast, supports an argument – again correct as a matter of Roman law – for *restitutionary* liability for losses of guest's property.[126] At best, therefore, the Roman sources indicate that public carriers can either be required to admit all guests or held strictly and vicariously liable for losses of their property, but not both. By requiring both – indeed, by grounding their strict and vicarious liability for losses of guest's property precisely upon the public duty to admit all guests – Holt CJ seems to deal public carriers a massive double-whammy.

As egregious a misreading of the Roman sources as they might be, Holt CJ's *dicta* nevertheless reveal a valuable, and distinctly Kantian, insight. 'Rights' to travel, even to move, do not belong to us purely in virtue of being human but must be constituted by institutions. They are 'human rights' as defined in section 3; that is, rights held in virtue of being a subject of jurisdiction. The next sub-section illustrates why this is so.

5.2 The Right to Travel and Public Goods

In the chapter of his ground-breaking explication of the *Doctrine of Right* entitled 'Roads to Freedom', Arthur Ripstein invites us to consider an imaginary libertarian paradise where every square inch of land is privately owned, such that the only way to leave home or get back would be by obtaining the permission of each intervening landowner.[127] Each landowner therefore wields an arbitrary power to determine their neighbors' movements, and their neighbors would wield the same power over them, resulting in every community member systematically dominating and being dominated by everyone else. Crucially, the 'problem is formal, because it does not depend on the particular purposes for which any two persons might wish to interact, but rather on the fact that they are subject to a third (or fourth or fifth) person from whom they must secure permission to interact.'[128] You might have no desire ever to leave your house. This arrangement of property rights would still be intolerable, simply because your neighbors wield a power to determine your movement. Accordingly, arranging property rights in this fashion does 'not simply foreclose some

[126] David S. Bogen, *Ignoring History: The Liability of Ships' Masters, Innkeepers and Stablekeepers under Roman Law*, 36 AM. J. LEG. HIST. 326, 358–359 (1992).
[127] ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY ch. 8 (2009).
[128] *Id.* at 247.

particular purpose that you might happen to have, but also forecloses the entire formal class of purposes involving voluntary interactions with others.'[129]

Although the overall situation is inimical to everyone's natural right to independence, nobody individually violates anybody else's *legal* rights, because a refusal to let a neighbor cross one's land is neither nuisance nor trespass. The community members are in an impossible position. They need to have a right to leave their homes without their neighbors' leave for their freedom to be complete, but private freedom prohibits them from doing so except by their neighbors' leave. Just as with property in section 2, only public institutions can break this impasse. The solution is a system of *public roads*; that is, spaces provided and maintained publicly for the members of the community to pass and repass. Freedom comes in waves: roads as 'public goods' constitute the *public* freedom of the community members. Whereas before they were no better than serfs tied to the land,[130] they are now transformed into 'Members of the Public' with *rights* to travel independently throughout the spatial expanse of the legal order.

This is how to understand Holt CJ's conception of the public necessity of the public carrier's profession. As a Member of the Public exercising your right to travel, 'there is someplace you are going, but when night falls, you have nowhere else to go.'[131] The right to use public roads therefore entails a right to come to rest when travel is no longer possible, correlating to an obligation enforceable against persons offering such rest facilities. Otherwise, public roads would transform Members of the Public into the opposite of serfs tied to the land – objects propelled into perpetual motion. Both are inconsistent with Innate Right. Alternatively, it may be reasoned that because an innkeeper's profession is parasitical upon the public system of roads facilitating rightful travel by Members of the Public, improper denials of service contradict the point of their calling. Each innkeeper, if they have room, must therefore admit every traveler who comes to him and cannot tell her to go elsewhere. Likewise, ferry operators must serve all who require their services – 'Otherwise, the provision of the service would amount to a license to prevent one person from interacting with others, based not on something that the operator owned but rather on the presence of an unfordable river.'[132] As Holt CJ put it in *Lane v. Cotton*, 'where-ever any subject takes upon himself a public trust for the benefit of his fellow-subjects, he is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him… one that has made profession of a public employment, is bound to the utmost extent of that employment to serve the public.'[133] A public carrier's improper denial of service thus interferes with

[129] *Id.*
[130] Kant refers to *glebae adscriptus* at two points in the *Doctrine of Right*; that is, serfs in the late mediaeval period that were forbidden to leave their feudal lord's land, as well as bought and sold with the land. The first mention, where he describes them as *grunduntertänig*, features in a discussion of the impermissibility of a head of state's holding land as private property. *DoR* 6:324, 466. The second mention occurs when elaborating necessary terms in labor contracts under which the employee is housed on the employer's property. Here he describes them as *Gutsuntertan*. *DoR* 6:330, 472.
[131] ARTHUR RIPSTEIN, KANT AND THE LAW OF WAR 251 (2021).
[132] *Id.*
[133] Lane v. Cotton, 88 Eng. Rep. 1458, 1464–1465 (1701) (Eng.).

the right of a Member of the Public to pass and repass on public roads, and so, is actionable in the same way as blocking the road with a log gives rise to a private claim in public nuisance.[134]

This account of common carrier's obligations is comparable to Evan Criddle's and Evan Fox-Decent's description of how, in several private relations regularly described as 'fiduciary', the agents concerned owe not just 'first-order' obligations to their principals but also 'second-order' duties to the general public.[135] They cite the example of attorneys who resemble public carriers in not being permitted to choose their clients. Attorneys' first-order obligations to clients include keeping within their terms of engagement, refraining from taking up opportunities in conflict with their clients' interests, *etc*. At the same time, they owe stringent second-order *public* duties as 'officers of the court' often requiring them to act contrary to their clients' interests: they must share relevant evidence with opposing parties, refrain from producing evidence they suspect to be fraudulent, withdraw representation rather than assist in a client's crime or fraud, *etc*.[136] At first glance, the two sets of obligations/duties seem to be in tension, but closer inspection reveals an underlying unity. The second order is in fact 'constitutive' of the first:[137] the legal profession depends for its rational possibility upon a judiciary doing justice publicly and systematically, but this is inconceivable if perjury, fraud, and other methods of undermining judicial integrity were permitted. An affirmative duty not to enable a client's fraud is therefore necessary simply to imagine the attorney's calling.

Public carriers' obligations display exactly this two-part structure, except that the obligations reinforce each other rather than conflict. Innkeepers owe their guests first-order fiduciary obligations sounding in restitutionary liability for lost property. The travel industry in which the first-order obligations obtain presumes human beings with rights to travel, which in turn implies rights to be provided room and board, conveyed across unbridged rivers, transported along public roads, *etc*. And so, public carriers also owe second-order obligations to admit all travelers.

The above argument is not historical, sociological, or empirical. The Roman hospitality sector operated smoothly for centuries despite *cauponae* picking and choosing their customers, and the same seems to have been true of apartheid societies where oppressed minorities were systematically denied board, crossings, and fares or allowed only on unfavorable terms. Market forces likely played no part in bringing down these systems; if anything, customer preferences compelled even non-bigoted public carriers to segregate their facilities.[138] Minorities coped by

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[134] Both are actionable on the case. Two decades before White's Case, *supra* note 116, a plaintiff came before the Common Pleas complaining that a right of way 'along the royal road' had been blocked, to his quantifiable detriment, by the defendant. Baldwin CJ voted to dismiss the private claim on grounds that the proper venue was leet or criminal proceedings but Fitzherbert J allowed on grounds that the plaintiff had suffered 'much worse 'hurt' or inconvenience (incommodity) than' the general public. Likening the plaintiff's special hurt to that of someone riding at night who falls into a ditch dug into the road, he contended that 'the plaintiff had more profit (commodite) by this highway than any other had, and so when it was obstructed (estoppe) he had more grave damage because he did not have any way to go to his close; so it seems to me that he will have this action by his special matter…' Anonymous, Y.B. Mich., 27 Hen. 8, fo. 27, pl. 10 (1535) (Eng.).
[135] Evan J. Criddle & Evan Fox-Decent, *Guardians of Legal Order: The Dual Commissions of Public Fiduciaries*, *in* FIDUCIARY GOVERNMENT 67, 68 (Evan J. Criddle et al. eds., 2018).
[136] *Id.* at 71–76.
[137] *Id.* at 80.
[138] *See* Joseph W. Singer, *We Don't Serve Your Kind Here: Public Accommodation and the Mark of Sodom*, 95 B.U. L. REV. 929, 937 (2015).

compiling directories of the hotels, petrol stations, swimming pools, and lakes available to them, by carrying days of food and fuel, sleeping in cars, *etc*, but the success of these strategies in no way washed away the injustice that necessitated them. Rather, because travel in such communities is determined not by right but by the might of the dominant majority, travel facilities in apartheid societies would have been objectionable even if separate and equal facilities were as readily available and equivalent in quality to those reserved for the majority.

The idea of public facilitation of the right to travel distinguishes public carriers from private carriers, private landowners who refuse to invite you to a birthday party because they revile your ethnicity, or encircling neighbors who refuse to let you cross their land. Most private businesses are nowadays subject to duties of non-discrimination giving rise to civil liability, but these duties are *external* and must be imposed by civil rights and race relations acts, conform-interpretation of private law in the light of constitutional law or international human rights treaties, *etc*.[139] Just like tortious liability for damage suffered by another's failure to rescue, or of occupiers to trespassers, they must be created by statute – that is, 'omnilaterally.'[140] In contrast, a public carrier's obligation is *internal* to her office; liability for refusal of service arises entirely from within private law because her standing as regards the traveler is not that of an ordinary private tortfeasor, but a quasi-public official.

Taverners once again provide a useful comparison. In addition to not being strictly liable for losses of their patron's property, they were allowed at common law to exclude anybody for any reason or none. Joseph Beale explains this difference as arising because 'one was instituted for the weary traveller, the other for the native; the one furnished food that the traveler might continue his journey, the other furnished drink for the mere pleasure of neighbors…'[141] This is almost certainly incorrect as history,[142] but still helpful as 'lore' because it illustrates the *a priori* conceptual necessity of the duty to admit all travelers to the rational possibility of a public calling. At pure private law, ordinary business operators are liable only for fault because you could have chosen someone else. In contrast, Members of the Public are always already in a special relationship of dependency with

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[139] The fact that the constraint is external does not mean it is unimportant: a state that permits restaurants, bakeries, regularly to discriminate against oppressed minorities is defective according to its regulative ideal of a public fiduciary over the whole people and may therefore be liable in human rights to those minorities.

[140] cf Hanoch Dagan & Avihay Dorfman, *The Tort of Discrimination*, 16 J. TORT L. 393 (2023). Dagan and Dorfman argue for a 'full-blown' general tort of discrimination from the premise – which I share – that '[r]ather than merely tracking, or even facilitating, our extra-legal voluntary interactions, the law sometimes plays a constitutive – and highly valuable – role in making these interactions possible in the first place… by introducing legal powers and correlative vulnerabilities that do not merely preserve our rights and duties but actually empower us to change them and create new ones.' *Id.* at 395. They then claim that 'the view of discriminatory choices as inherent in freedom of choice is untenable when this freedom is not a natural right but a natural power artificially manufactured through the operation of law… Wrongful discrimination, then, rather than merely one more example of substandard behaviour is an instance of *ultra vires*, namely, acting beyond one's legal power.' *Id.* at 395–396. While correct in thinking that public institutions are necessary to conceive private legal relations, Dagan and Dorfman err by picturing that necessity as consisting in private law being *derivative* of public norms. Kant, in contrast, views public and private norms as *coordinate*: horizontal relations are not derived from an antecedent vertical relation but 'make sense' only against the background of it.

[141] Joseph H. Beale Jr., *The Medieval Innkeeper and His Responsibility*, 18 GREEN BAG 269, 270 (1906).

[142] In a dispute before the Common Pleas, Moyle J proposed that '[I]f I come to an innkeeper to lodge with him and he refuses to provide lodging for me, I shall have upon my case an action for trespass against him.' To this, Prisot CJ responded conformably with Roman law that an 'innkeeper is not bound… to provide lodging for you if he does not want to'. Anonymous, Y.B. Hen. 6, fol. 18, pl. 24 (1460) (Eng.).

public carriers without the need for legislative supervention, just because of their systemic role in public facilitation of rightful movement. Should they decline or commit misfeasance in that role, their inns, ferries, stables, taxis, law firms *etc*, would no longer serve to constitute public freedom but to further private domination. Accordingly, the 'innkeeper needs to take accept guests, not because they need some place to sleep – an obligation that private homeowners do not owe to passing strangers – but because they are travelers and the innkeeper keeps an inn, an act which invites members of the public, just as such.'[143] A ferry operator must serve without distinction all persons wishing to cross an unbridged river because she operates a ferry service, just as such.

The special relationship of dependency between travelers and public carriers gives rise to a second dependency. Because the traveler is obliged to trust the innkeeper – she has nowhere else to go when night falls – the innkeeper has a unique power over the traveler when she brings herself and her property *infra hospitium*. Accordingly, the innkeeper is strictly and vicariously liable for losses to that property. The second-order obligation to admit all travelers grounds the first-order obligation to insure their property.

6. Freedom on the Waves: The High Seas as Cosmopolitan Thoroughfares

The above framework – of personal rights to travel facilitated by public goods like roads, hotels, ferries, *etc* – extends beyond the state. Members of the Public with *constitutional* rights to travel to other parts of their community also have *cosmopolitan* rights as 'citizens of the world *to try to* establish community with all and, to this end, to *visit* all regions of the earth.'[144] The right to be disembarked is the international analogue of the domestic right to be received by a common carrier – both are necessary concomitants of a publicly constituted right to travel.[145] There is, of course, an apparent disanalogy: an innkeeper cannot turn away a traveler, but a state may do so, so long as 'this can be done without destroying him.'[146] The disanalogy is only apparent: innkeepers, at least initially, were not obligated to receive persons living nearby, and so, not *bona fide* travelers.[147] A 'Citizen of the World' can be turned away because she has a home state to return to. The only requirement is that she cannot be punished simply for presenting herself for interaction. As section 6.3 will explain, a refugee – a Citizen of Nowhere – must be treated differently.

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[143] RIPSTEIN, *supra* note 131 at 251.
[144] *DoR* 6:353, 489.
[145] *See* A. Pelliconi, *Unexpected Maritime Crossroads. The 'Duty to Rescue' and the Human Rights Content of the Law of the Sea*, 13 (2021), https://openaccess.city.ac.uk/id/eprint/25880/ (last visited Jun. 2, 2024). ('… the duty to disembark is the necessary and logical termination of the duty to rescue without discrimination. A right to be safely disembarked is inferable from the right to be rescued, and full enjoyment of the latter is not achieved until the former is also satisfied.')
[146] *PP* 8:358, 329.
[147] Calye's Case, 8 Co. Rep. 32a (1584) (Eng.). This rule has become obsolete in England. *See* David Grant & Julia Sharpley, *No Room at the Inn - The Hotelkeeper's Right to Reject or Eject Guests - Part One*, 2001 INT'L TRAVEL L.J. 53, 56 (2001).

'Uninhabitable parts of the earth's surface' such as the 'seas and deserts' may 'divide' the community of nations, but they do so 'in such a way that *ships* and *camels* (*ships* of the desert) make it possible to approach one another over these regions…'[148] In this way, the high seas, along with the deserts, are the means by which Providence facilitates cosmopolitan rights to visit all ends of the earth.[149] Kant reiterates this thought in the *Doctrine of Right*:

> Although the seas might seem to remove nations from any community with one another, they are the arrangements of nature most favoring their commerce by means of navigation; and the more *coastlines* these nations have in the vicinity of one another (as in the Mediterranean), the more lively their commerce can be.[150]

If roads are domestic public goods, then the high seas are *global* public goods. And so, just as domestic highways are necessarily subject to – cannot be imagined without – traffic regulations and road safety acts, so too are the high seas necessarily zones of jurisdiction.

The sovereign states of the world jointly exercising that jurisdiction are always already authorities over the Citizens of the World passing and repassing them. This gives rise to a special dependency between seafaring Citizens of the World and sovereign states whose officials receive their distress signals. Should seafarers find themselves in peril, that special dependency entitles them to service from all public officials such as coast guard, naval, and other *public* vessels. A distress signal is just such a service request. Similar entitlements to maritime rescue against *private* vessels require specific domestic legislation to become individually actionable. Put prosaically, a public vessel is like a ferry operator while a private vessel is like an Uber. Finally, although stateless refugees are Citizens of Nowhere, limitations internal to the concept of right prohibit nevertheless sovereign states from treating them as savages. To refuse them rescue would transform the high seas from zones of jurisdiction into juridical black holes.

This proposed Kantian outline of freedom on the waves faces two powerful objections. The first comes from Grotius, whose account of the high seas as 'commons' has been overwhelmingly dominant historically and continues to drive contemporary legal thought. The second emerges from within Kantian scholarship: Jakob Huber has recently argued that Cosmopolitan Right lacks institutions but appeals directly to our 'reflexive awareness of shared earth dwellership, grounded in the simple fact that [we] cannot but claim a place on earth for [our]selves.'[151] Both objections emerge from interpretations of the biblical concept of 'Original Common Possession' which plays a central role in the natural law tradition to which both Grotius and Kant belong.[152] The remainder of this section argues that the Kantian picture, and my proposed interpretation thereof, is preferable both normatively and for its explanatory power.

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[148] *PP* 8:358, 329.
[149] *PP* 8:361-362, 331-332.
[150] *DoR* 6:352-353, 489.
[151] HUBER, *supra* note 48 at 92.
[152] It continues to inspire contemporary natural lawyers. In a pamphlet written for a Conservative British think-tank, the legal philosopher John Finnis invokes it to criticize the Archbishop of Canterbury for opposing British governmental plans to deport asylum seekers to Rwanda. NIGEL BIGGAR, JOHN FINNIS & RICHARD EKINS, *From the Channel to Rwanda: Three Essays on the Morality of Asylum*, 12 (2022).

6.1 Grotius: God adores a legal vacuum

The Grotian account of the origins of property, as set out in the chapter of *War and Peace* entitled '*Of Things which belong in common to all Men*,' begins from the premise that 'God at the creation and again after the Deluge, gave to Mankind in general a Dominion over Things of this inferior World.'[153] Like Kant, he maintains that private property cannot emerge from 'a mere internal Act of the Mind' because 'one could not possibly guess what others designed to appropriate to themselves, that he might abstain from it; and besides, several might have a Mind to the same Thing, at the same Time.'[154] The accounts diverge in other respects: Kant depicts the original acquisition of property as a conceptual explanation of what we must presume we have done and continue to do to have the rights that we do and must have. By contrast, Grotius's account takes place in *historical* time, albeit a highly idealized one stitched together from a dazzling array of philosophical, literary, and scriptural sources, to rationalize current distributions of wealth and resources.[155] Essentially, Grotius tells a story of a primitive condition in which human beings held all things in common that becomes unstable as they take on 'a Kind of *gigantick* Life'[156] where their societies increase in complexity while they individually decline in virtue. In response, through a series of tacit compacts human beings gradually extend practices of exclusive possession and use from consumables like food to other things in the common stock, resulting in property and eventually, territory.

There are, however, limits to this process of commodification. For two reasons it stops short of things like the seas and the air. First, a 'moral Reason': 'the Sea is of so vast an Extent, that it is sufficient for all the Uses that Nations can draw from thence, either as to Water, Fishing, or Navigation.'[157] Second, a 'natural Reason': 'the taking of Possession obtains only in Things that are limited' such as land and not unbounded liquids or gases.[158] As such, the seas are for Grotius a wilderness outside of time and history; the remnant of a primeval condition before the advent of civilization. Grotius gives this thought its most sublime expression in a passage in the *Free Seas*, where he describes the 'whole ocean' as that which

> antiquity calleth unmeasurable and infinite, the parent of things bordering upon heaven, with whose perpetual moisture the ancients supposed not only fountains and rivers and seas, but also the clouds and the very stars themselves, in some sort to be maintained, which finally compassing the earth (this seat of mankind) by the reciprocal courses of tides can neither be kept back nor included and more truly possesseth than is possessed.[159]

These considerations clearly pertain to the Natural Reason. As for the Moral Reason, Grotius declaims – in what are possibly his best lines – that

> If any in so great a sea should take empire and jurisdiction wholly to himself from the common use, yet nevertheless he should be accompted an ambitious seeker of excessive dominion; if any should forbid others to fish, he could not escape the brand

[153] *WaP* 420 (bk. 2, ch. 2, ¶ 2(1)).
[154] *WaP* 426 (bk. 2, ch. 2, ¶ 2(5)).
[155] *See* Macarena Marey, *A Kantian Critique of Grotius*, PROBLEMOS 67, 72 (2019).
[156] *WaP* 425 (bk. 2, ch. 2, ¶ 2(2)).
[157] *WaP* 428 (bk. 2, ch. 2, ¶ 3(1)).
[158] *WaP* 428 (bk. 2, ch. 2, ¶ 3(2)).
[159] *FtS* 32.

> of the brainsick covetousness. But he that doth also hinder navigation whereby he loseth nothing, what shall we conclude of him?[160]

He elaborates, citing Cicero, that

> If any should forbid another to take fire from his fire, which is wholly his, and light from his light, by the law of human society I would accuse and sue him to condemnation, because the force of this nature is such [That no less will his [light] shine when he his [friend's] has lit].[161]

Original common possession restricts property from the other end as well. Because property rights are instituted precisely to satisfy basic human needs, Grotius contends that they must be defeasible 'in a case of absolute Necessity' whereupon 'that antient right of using Things, as if they still remained common, must revive, and be in full Force.'[162] In the case of equal necessity or secular disaster, however, Grotius insists that the actual owner retains priority: the right of necessity 'is in no Ways to be allowed, if the right Owner be pressed by the like Necessity; for all things being equal, the Possessor has the Advantage.'[163]

Few today consider the seas unenclosable – we have had the technology for this since the 1940s.[164] Nor, perhaps more importantly, do we consider them inexhaustible; this was challenged in Grotius's own lifetime by the Scottish jurist William Welwod, who, in a pamphlet refuting the *Free Seas*, observed that 'whereas aforetime the white fishes daily abounded even into all the shores on the eastern coast of Scotland, now forsooth by the near and daily approaching' of large-scale Dutch fishing fleets 'the shoals of fishes are broken and so far scattered away from our shores and coasts that no fish now can be found worthy of any pains and travails, to the impoverishing of all the sort of our home fishers and to the great damage of all the nation.'[165] Welwod objected only to Grotius's defense of the freedom to 'fish indifferently on all kind of seas', but conceded that the freedom of navigation was 'a thing far off from all controversy, at least upon the ocean, specially since passage upon land through all regions Christian is this day so indifferently permitted to all of all nations, even to Turks, Jews, pagans, not being professed enemies…'[166]

In an unpublished rejoinder found amongst his papers centuries after his death, Grotius understandably complained that Welwod had missed the whole point of the *Free Seas*, which was to defend freedom of navigation rather than of fishing. Insofar as he had discussed freedom to fish it was because 'if fishing should be free, which takes something from the sea, much more would navigation, which takes nothing.'[167] That said, he doubled down on the freedom to fish on the high

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[160] *FtS* 33.
[161] *Id.*
[162] *WaP* 434 (bk. 2, ch. 2, ¶ 4(2)).
[163] *WaP* 436 (bk. 2, ch. 2, ¶ 7).
[164] This development is often traced to the 1945 Truman Proclamation, in which the US contended that it was just and reasonable for littoral states to lay claim to the continental shelf because the latter was simply the geophysical extension of the coastal state's landmass.
[165] William Welwod, *Of the Community and Propriety of the Seas (1613)*, *in* THE FREE SEA 63 (David Armitage ed., Richard Hakluyt trans., 2004).
[166] *Id.* at 65.
[167] Hugo Grotius, *Defense of Chapter V of the Mare Liberum: Which Had Been Attacked by William Welwod, Professor of Civil Law, in Chapter XXVII of That Book Written in English to Which He Gave the Title "An*

seas on the grounds that *no one had standing to prohibit it*. Recall Grotius's contention in the *Free Seas* that the people of a country might possess a river within their bounds but not the sea. In his rejoinder to Welwod, the sea and rivers mark the difference between 'things which are common to all' and 'things which are properly called public…'[168] Regarding public things, Grotius approvingly cites an English authority describing them as 'those which were at one time the entire people's, [but] are transferred by our law to the King, namely, him who sustains the person of all the people and consequently of the commonwealth itself.'[169] As such, Grotian sovereigns are essentially super-proprietors: 'we deny nothing to a prince which is granted to a private individual, but grant much to him which is not granted to a private individual.'[170] By contrast, common things cannot be removed from the original common stock, and so, never become the territory-*qua*-property of any sovereign. After a lengthy and casuistic discussion about whether the sea can be stood upon, marked out, joined up, or otherwise occupied in the manner of land, Grotius concludes that '[a]lthough many things under God as supreme Master receive other masters, nevertheless besides that supreme and first Master the sea has absolutely no other master.'[171]

Now, 'princes make laws… with regard to the property of others, and the "law-making" (*νομοθετική*) power comes from sovereignty, not from ownership.'[172] As such, 'the prince [can] make law for the maritime actions of his subjects, judge these acts, even impose tribute, [as well as] do this for his allies, if this has been agreed to by treaty.'[173] That, however, is the most that can be asserted by way of 'extraterritorial' jurisdiction on the seas. After searching the ancient authorities, Grotius declares 'I do not find laws or tributes imposed upon foreigners when acting on the sea.'[174] He intended to supplement these with more contemporary citations but never got around to it, leaving the piece unfinished.

The absence of *sovereign* jurisdiction on the high seas does not, however, mean all jurisdiction is excluded: 'a distinction should be made between that jurisdiction which is competent to each in common and that which is competent to each one properly speaking.'[175] In the primaeval expanses of the high seas under no master but God, prince and subject each have the same insight into the natural law. Accordingly, '[a]ll peoples or their princes in common can punish pirates and others, who commit delicts on the sea against the law of nations. For even supposing a land that has been occupied by no people, there will be the same right against brigands lurking there.'[176] In a brilliant move, Grotius cites the example of Julius Caesar who, as *a private citizen*, led a maritime expedition to capture and crucify a band of pirates, adding the observation that 'Caesar would no more have

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Abridgement of All Sea-Lawes", *in* THE FREE SEA 77, 78 (David Armitage ed., Richard Hakluyt trans., 2004). [hereinafter '*Reply to Welwod*']

[168] *FtS* 30.

[169] *Reply to Welwod* 114.

[170] *Reply to Welwod* 118–119.

[171] *Reply to Welwod* 91–92.

[172] *Reply to Welwod* 100. Grotius takes this ancient idea from Seneca's maxim *sub optimo omnia rex imperio possidet singuli dominio*. *See* LUCIUS ANNAEUS SENECA, ON BENEFITS (bk. 7, ch. 6, ¶ 3) (Miriam Griffin & Brad Inwood trans., 2011).

[173] *Reply to Welwod* 128.

[174] *Reply to Welwod* 129.

[175] *Reply to Welwod* 128.

[176] *Id.* at 128.

dared this on the sea than in the province, indeed would have committed *lese majesty*, if the sea had been as much the territory of the Roman people as the province itself.'[177] As such, contrary to the recent trend of international lawyers citing Grotius to advance claims of wide-ranging sovereign powers to enact extraterritorial 'legislation for humanity,'[178] an authentic reading reveals the exact opposite. Sovereigns are the *only* persons exercising no jurisdiction on the high seas. Insofar as they act in that space they do so as, and on equal footing with, private persons. This point is crucial to the Grotian 'commons' model which, after all, was designed precisely to defend *private* warfare by Dutch East India Company against the sovereign state of Portugal for control over the Spice Trade.

This Grotian framing remained astonishingly dominant for *centuries*. As late as 1893 the panel in *Fur Seals* arbitration denied the United States any 'right of protection… in the fur seals frequenting the islands of the United States in the Bering Sea, when such seals are found outside the ordinary three-mile limit'[179] in the face of a British claim of a 'right to come and go upon the high sea without let or hindrance, and to take therefrom at will and pleasure the produce of the sea.'[180] Given the introduction of a 'Constitution for the Oceans' in UNCLOS,[181] however, one might think international law had completely left the Grotian model behind. As Oude Elferink observes, 'the sea no longer is wholly common' and instead 'Most marine resources have been removed from the pool of common property through the extension of coastal State jurisdiction over areas adjacent to the coast in the second half of the 20th century.'[182] The seabed and subsoil beyond national jurisdiction have also been 'internationalised' and placed under the jurisdiction of an International Seabed Authority.[183] Finally, in a reversal of *Fur Seals*, the World Court held in 1974 that

> States have an obligation to take full account of each other's rights and of any fishery conservation measures, the necessity of which is shown to exist in those waters… the former laissez-faire treatment of the living resources of the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all.[184]

For all that, however, Oude Elferink maintains that 'for a better understanding of the present structure of the law of the sea, De Groot and his contemporaries provide a logical starting point' simply because of its 'strength [as] a cogently and concisely formulated idea.'[185] Perhaps 'cogent' is too charitable. Contrary to Grotius's contention that denying others the costless use of one's things

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[177] *Reply to Welwod* 129.
[178] Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295, 309–310 (2013).
[179] U.S. GOVERNMENT PRINTING OFFICE, FUR SEAL ARBITRATION: PROCEEDINGS OF THE TRIBUNAL OF ARBITRATION, CONVENED AT PARIS, UNDER THE TREATY BETWEEN THE UNITED STATES OF AMERICA AND GREAT BRITAIN, CONCLUDED AT WASHINGTON, FEBRUARY 20, 1892, FOR THE DETERMINATION OF QUESTIONS BETWEEN THE TWO GOVERNMENTS CONCERNING THE JURISDICTIONAL RIGHTS OF THE UNITED STATES IN THE WATERS OF BERING SEA 12 (1895).
[180] *Id.* at 10.
[181] The idea was introduced by Tommy Koh, President of the Third UN Conference on the Law of the Sea, in speech marking the opening of UNCLOS for signature. Tommy Koh, *A Constitution for the Oceans*, *in* THE LAW OF THE SEA, xxxiii (1983).
[182] Alex Oude Elferink, *De Groot – A Founding Father of the Law of the Sea, Not the Law of the Sea Convention*, 30 GROTIANA 152, 158 (2009).
[183] *Id.* at 163.
[184] Fisheries Jurisdiction Case, 1974 I.C.J. 3, ¶ 72 (Jul. 25, 1974).
[185] Oude Elferink, *supra* note 182 at 167.

violates the law of nature, you do not – I think – mark yourself with the brand of brainsick covetousness if you decline to let others run their fingers through your hair as and when they please. Also, contrary to Grotius's argument that if more intrusive things like fishing are allowed so much more must less intrusive things like navigation also be, consider that ranchers are entitled to slaughter their cattle but not to beat them for fun. Nevertheless, Grotius's grip over the collective legal imagination remains tight: consider the voluminous literature on 'global public goods' trading in essentially Grotian concepts of rivalrousness and exhaustibility, even if it purports to import those concepts from the economic sciences. Indeed, even prominent attempt to refute him do so only on terms he defined. Consider the infamous article *Tragedy of the Commons*, in which Garrett Hardin claimed that the seas were enclosable as well as exhaustible, as well as cited concerns over overpopulation to contend that the 'shibboleth of the "freedom of the seas"' had brought 'species after species of fish and whales closer to extinction.'[186] Despite his rejection of the Natural and Moral Reasons, Hardin nevertheless followed Grotius on equal necessity to claim that given the rates of marine extinction, it would be not just permissible, but *morally obligatory* for wealthy Western states violently to exclude refugees. Such refugees were culpable for overbreeding, but their exclusion would be justifiable even if their plight was caused by factors beyond their control like climate change.[187] The problem is that anything can be made excludable and/or rivalrous if we are cruel enough, and Hardin thinks cruelty is now morally required.

Hardin's 'lifeboat ethics' – according to two recent commentators the 'most important metaphor' of contemporary far-right ecologism and ecofascism[188] – might seem diametrically opposed to the liberality of Grotius, who begins the very first chapter of the *Free Seas* by condemning the turning away of shipwrecked seafarers as a violation of the 'most sacred law of hospitality' and demands 'What race of men, and what land is so barbarous as to permit this custom?'[189] Nevertheless, they both agree that the high seas are by default ungoverned, pre-institutional wildernesses. Order, if at all possible, must be imposed *from without*. Essentially this thought underlies the *AS v Italy* joint dissentients' concern that extending Italy's jurisdiction to the high seas would 'disrupt the legal order which the SOLAS and SAR Conventions attempted to introduce, with a view to minimizing the "tragedy of the global commons", generated by the lack of a clear division of labor between coastal states over search and rescue operations.'[190] How exactly is this 'legal order' attempted to be introduced? As the majority describes, 'the SAR convention sets *delimitations* between States and their respective SAR areas, so as to include… portions of the high seas, with the identification of a single competent SAR authority for said area.'[191] The majority further outlines that 'in all circumstances, a *single* Rescue Centre, which is responsible for coordinating operations in its own area and to which operational choices are reserved must be identifiable.'[192] Again, 'Under the SAR

[186] Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1245 (1968).
[187] *See* Garrett Hardin, *Commentary: Living on a Lifeboat*, 24 BIOSCIENCE 561, 563 (1974) (ridiculing the objection '"But it isn't their fault! How can we blame the poor people who are caught in an emergency?"')
[188] SAM MOORE & ALEX ROBERTS, THE RISE OF ECOFASCISM: CLIMATE CHANGE AND THE FAR RIGHT 39 (2022).
[189] *FtS* 11.
[190] *AS v. Italy*, *supra* note 4, (Individual Opinion of Yuval Shany, Christof Heyns and Photini Pazartzis (dissenting)) at ¶ 6.
[191] *Id.* (Individual Opinion of Yuval Shany, Christof Heyns and Photini Pazartzis (dissenting)) at ¶ 4.4.
[192] *Id.* (emphasis added)

convention, only *one* authority is responsible for the coordination of rescue interventions in each SAR area.'[193]

Grotius reviled delimitation as a means of acquiring *rights* over regions of the sea; if it were possible to reduce a portion of the sea to exclusive possession simply by drawing 'a certain imaginary line', then the 'geometricians should long since have taken away the earth from us and the astronomers heaven.'[194] Recall the 'Scramble for Africa' initiated by 1885 Berlin Conference. Effectively the obverse – a scramble *away* from Africa – results from the SAR Convention's allocation of *responsibilities* through delimitation of the sea by imaginary lines. In an important article, Itamar Mann claims that the law of the sea cannot help but generate 'black holes' in which people are rendered *de jure* rightless. Mann begins by contrasting state territories that are defined and under jurisdiction against the high seas, which are a 'maritime commons' where 'law is *radically privatised*…'[195] Being undefined and ownerless, the high seas are individuated into unique SAR zones to bring them 'functionally' under jurisdiction.[196] This, however, gives rise to a thoroughgoing paradox: it creates the possibility of stretches of the high seas remaining in primeval wilderness if the states of the world leave them ungoverned, or falling back into it if the state assigned a specific SAR zone collapses. Simply put, 'Maritime legal black holes stem from international law's distribution of public and private duties among its different actors.'[197] This is the *real* tragedy of the global commons of the seas. As a radically privatized space the sea is an institutional vacuum: there is law there, but anyone – national coast guards, latter-day Caesars and East India Companies – can unilaterally enforce it in whatever manner seems right and good in their own eyes. *This* is what makes it barbaric.

6.2 Kant and the Peremptoriness of Cosmopolitan Thoroughfares

Just as the inhabitants of Ripstein's libertarian paradise end up prisoners in their own homes, Grotius's model of complete license on the seas necessarily collapses into Hardin's total securitization. In contrast, Kant's republican 'global public goods' model conceives the seas in terms of formal interaction (*commercium*),[198] such that questions of whether the seas can be enclosed, stood upon, or joined up which occupy Grotius so much become wholly irrelevant. Even if a state had the technological prowess to build a 40-foot wall across a stretch of the high seas, doing so would be wrongful because it would constitute an attempt unilaterally to determine how other

[193] *Id.* (emphasis added)
[194] *FtS* 34.
[195] Itamar Mann, *Maritime Legal Black Holes: Migration and Rightlessness in International Law*, 29 EUR. J. INT'L L. 347, 367 (2018).
[196] *Id.* at 370.
[197] *Id.* at 366.
[198] *DoR* 6:352, 489.

states might interact with one another.[199] Maritime barriers are therefore internationally wrongful in the same way as blocking the road with a log is domestic public nuisance.[200]

There are, however, objections to this private law analogy from within Kant scholarship. Roads cannot be thought without also thinking traffic regulations, road safety acts, *etc* legislated, adjudicated, and enforced by municipal institutions. It is 'not as though the road is already there, and then the rules are subsequently imposed.'[201] In contrast, the oceans were there long before humans emerged, and will likely remain long after we disappear. Moreover, the international legal order possesses nothing like the constellation of domestic institutions, and nor should it: Kant maintains that only sovereign states should possess a constitutional order and that to replicate the same setup internationally would produce the 'soulless despotism'[202] of a World State. The only institution he envisages in the Right of Nations is a loose 'congress' members must be free to leave, and which performs no legislative functions but solely a *judicial* one: through it, states decide 'their disputes in a civil way, *as if by a lawsuit*, rather than… by war.'[203] In the terse page-and-a-half dealing with Cosmopolitan Right in the *Doctrine of Right*, Kant says nothing about institutions. For such reasons, Jakob Huber argues that Ripstein's account of public goods cannot be extrapolated internationally, say, to the high seas, and that Cosmopolitan Right must appeal to deeper pre-institutional entitlements.[204] This he locates in Kant's version of Original Common Possession, which he describes as a 'Right to be Somewhere.'[205] If Huber is correct, it would be impossible to justify human rights to rescue upon the high seas, at least not on the theory advocated here of human rights as institutional rights.

These objections fail: 'cosmopolitan' rights are not just institutional, but in fact the *most institutionalized* rights imaginable. Understanding this, however, requires examination of Kant's singularly unique interpretation of the concept of Original Common Possession. Kant introduces his version of that concept in Private Right while discussing how land can be acquired originally in a State of Nature. There he writes that 'All human beings are originally (i.e., prior to any act of choice that establishes a right) in a possession of land that is in conformity with right, that is, they have a right to be wherever nature or chance (apart from their will) has placed them.'[206] Moreover, in a clear attempt to distance himself from Grotius, Kant stipulates that such '*original possession in common*

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[199] *Id*. To be sure, Kant considers in § 17 of the *Doctrine of Right* 'whether a tract of the ocean floor can be acquired (the right to fish off my shore, to bring up amber and so forth),' to which he answers that 'My *possession* extends as far as I have the mechanical ability, from where I *reside*, to secure my land against encroachment by others (e.g., as far as cannon reach from the shore), and up to this limit the sea is closed (*mare clausum*).' In contrast, because 'it is not possible to *reside* on the high seas themselves, possession also cannot extend to them and the open seas are free (*mare liberum*).' *DoR* 6:268, 419. These comments, however, are included in the course the 'Deduction of the concept of original acquisition', and so, establish only that the seas cannot be reduced to property. They do not exclude that they might be zones of public jurisdiction, any more than the fact that territories are not property precludes their being zones of jurisdiction.
[200] *See* Danae F Georgoula, *Building Walls at Sea: An Assessment of the Legality of the Greek Floating Barrier*, 34 INT'L J. REFUGEE L. 54 (2022).
[201] RIPSTEIN, *supra* note 127 at 249.
[202] *PP* 8:367, 336.
[203] *DoR* 6:351, 488. (emphasis added)
[204] HUBER, *supra* note 48 at 104–105.
[205] *Id.* at ch.1.
[206] *DoR* 6:262, 414.

(*communio possessionis originaria*)… is not empirical and dependent upon temporal conditions, like that of a supposed *primitive possession in common* (*communio primaeva*), which can never be proved.'[207] Unlike Grotius' just-so story of a primaeval floating charge over the land and resources of the world conferred by a deity at a conjectured point in history, Kant's Original Common Possession is 'a practical rational concept which contains a priori the principle in accordance with which alone people can use a place on the earth in accordance with principles of right.'[208] Being possessed before any act of acquisition, Original Common Possession is an aspect or dimension of the natural right to independence, like the other various 'authorizations' Kant discusses as flowing from Innate Right.[209] Kant then explains that what makes Original Common Possession 'a possession in common' is the fact that 'the spherical surface of the earth unites all the places on its surface…'; if instead 'its surface were an unbounded plane, people could be so dispersed on it that they would not come into any community with one another, and community would not then be a necessary result of their existence on the earth.'[210] After this mention, Original Common Possession resurfaces again only at the end of the *Doctrine of Right* in the terse page-and-a-half on Cosmopolitan Right, which is *Public* Right. There Kant says that

> since possession of the land, on which an inhabitant of the earth can live, can be thought only as possession of a part of a determinate whole, and so as possession of that to which each of them originally has a right, it follows that all nations stand *originally* in a community of land[211]

Huber is correct to call Kant's version of Original Common Possession distinctly 'grounded',[212] and to observe that unlike the Grotian rationalization of current distributions of rights to resources, it 'spells out a specific way in which we relate *to one another*' in space.[213] Recall that Huber expresses that relation as a 'right to be somewhere' on the limited spherical surface of the earth. It is, however, even more grounded than *that*. A right to be somewhere is a right to be here, there, or somewhere else. Kant's formulation – 'a right to be where nature or chance, apart from your will, has placed you' – sounds nothing like this, but like a right to be just *where you are*, and *nowhere else*. There is no suggestion of mobility, only the thought that as a being embodied in space, the ground beneath your feet is as inseparable from you as your shadow, and so, part of your very person. This is why it precedes any acts by which you might establish rights. Every other person on earth has this same relation to the spot of earth they occupy, and so together you form with them a 'community' of possession.

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[207] *DoR* 6:262, 415.
[208] *Id*. In a footnote, Kant observes that the 'original community of land… is an idea that has objective (rightfully practical) reality' and which 'must be distinguished from a *private community (communio primaeva)*, which is a fiction.' He then comments that such a primeval common possession could emerge only if it was positively instituted by people collectively pooling their initially individual possessions. *DoR* 6:251, 405.
[209] These include 'independence from being bound by others to more than one can in turn bind them; hence a human being's quality of being *his own master* (*sui iuris*), as well as being a human being *beyond reproach* (*iusti*)…' *DoR* 6:237-238, 393-394.
[210] *DoR* 6:262, 415.
[211] *DoR* 6:352, 489.
[212] This is in the title of Huber's book.
[213] HUBER, *supra* note 48 at 4.

Unlike Grotius, who thinks you have a God-given entitlement to go lollygagging all over the world, Kant denies you the moral power even to move from where you just are, let alone push others off where they are, in a State of Nature. You will hopefully have the natural *ability* to move around, but a *right* to do so is a different thing altogether. If, in a State of Nature, a sudden gale were to blow you and some others off your feet, and you ended up trapped against a corner surrounded by others, you would not be entitled to shove them out of your way, for they ended up surrounding you purely by nature and chance apart from their wills. To rightfully coerce them into moving, you would have to postulate an omnilateral institution entitled to command them to move. This interpretation of Original Common Possession is consistent with – indeed a concentrated version of – the claim in section 5 that rights to movement are not natural but must be publicly instituted. For the same reason, physically impaired persons lacking natural mobility must be provided with public goods – ramps, elevators, *etc* – to constitute their Membership of the Public.

It leads, however, to a jarring question: If Original Common Possession is fully stationary, how does it 'ground' Cosmopolitan Right, which involves movement, travel, and *commercium*? The answer lies in looking carefully at *whose* right of Original Common Possession grounds Cosmopolitan Right. Kant pointedly describes Cosmopolitan Right as a 'thoroughgoing community of all *nations* on the earth…'[214] Again, it is specifically *nations* that 'stand in a community of possible physical *interaction (commercium)*, that is, in a thoroughgoing relation of each to all the others of *offering to engage in commerce* with any other...'[215] Cosmopolitan Right does not speak to human beings directly, but only *through* their membership of nations. States are entitled to engage in commerce with one another, which they occasionally do through their diplomats, but more often through their private subjects.

This realization is consistent with commonplace intuitions. You cannot travel the world except on a ship or airplane bearing the flag of some state. Upon landing in, say, New York, you must present a passport saying something like 'The President of the Republic of Singapore requests all authorities to allow the Singapore citizen named in this passport to pass without delay or hindrance and, if necessary, to give all assistance and protection.' As such, the Republic of Singapore makes a request of the United States *through you*, which can be refused, say, if you do not have the correct visa. If admitted into the US, your private rights – say, in the Swiss watch purchased by your late grandfather in Singapore that was gifted to you when you started your first job – are entitled to US state and federal protection no less than that accorded private rights acquired entirely within New York.[216] Even though the story of how that watch came to be your property is entirely one of Swiss and Singaporean private law, someone who robs you of it in Manhattan is liable to you under the *New York* tort of conversion. In this way, barring public order exceptions, US state and federal authorities must recognize and protect under 'private' international law all the private rights visitors bring *infra hospitium*.[217] Failure to do so constitutes a wrong against Singapore under the international law of

[214] *DoR* 6:352, 489.
[215] *Id*.
[216] Contemporary international lawyers contend that the protection required is not determined by the host state's standards, but an international standard. *See* ALICE OLLINO, DUE DILIGENCE OBLIGATIONS IN INTERNATIONAL LAW 25 (2022). While beyond the scope of this paper, a problem with this is raised below in the text to notes 220 and 221.
[217] *Weltbürgerrecht* can plausibly be translated as 'world private law.'

diplomatic protection, to be determined by lawsuit before an international court.[218] These rights are personal to Singapore, not its national: it alone has full discretion over whether to bring, compromise, or settle claims without its national's participation. If it wins judgment, sharing reparations with the national is a question for Singapore's legal order, not international law.[219] In this way, cosmopolitan interactions aren't just institutionalized but *doubly* so; they presume the institutions of both states and the international order.

A state's person – that is, its public order – has no right to move. Original Common Possession entitles it to be only where nature or chance, apart from its will, has placed it. The spatial expanse of the public order – its territory – is as juridically inseparable from it as its shadow, and so, its person rather than its property. States cannot acquire territory by conquest, export their public orders by setting up colonies on the territory of other states, nor substitute their domestic public orders with a single global constitutional order. For the same reasons, travelers may only bring their private rights with them, never their public statuses. A Sergeant in the Singapore Armed Forces may not drill a platoon of the US Marines, for that would make her not a visitor but a colonizer. Hence, the 'public law taboo' prohibiting states from enforcing the public law of others.[220] One might object that this classical, 'statist' model has been fundamentally disrupted by developments like Bilateral Investment Treaties and Investor-State Contracts, under which foreign investors are accorded direct rights disputes over which are settled by state-investor arbitration rather than international adjudication. These practices recall the 19th century practice of 'consular jurisdiction', or the 'uniform practice of civilized governments for centuries to provide consular tribunals in other than Christian countries, or to invest their consuls with judicial authority', so that their subjects would be exempt from the jurisdiction of uncivilized, non-Christian host states.[221] Such exemptions from the host state's public order were invariably, but not necessarily, extracted through treaties called 'capitulations' now indelibly linked to colonialism. Kant would have condemned in similar terms the extension of foreigners' home states' public orders into the territory of host states. In contrast, the problem with contemporary international investment law is that envisaging property rights directly created at the international level presumes a World State, which poses the obverse problem of imperialism.

The structure of these juridical intuitions can also be demonstrated *architectonically*. The Appendix to the *Doctrine of Right* sets out a 'logical preparation' for Kant's third category of private right, which, to recall is curiously named 'a right to a person akin to a right to a thing,' which we scripted as fiduciary rights. First, a dichotomy is drawn between two juridical categories: 'rights to things' and 'rights against persons.' Then, by 'the mere form of joining these concepts together into one, two more places are opened up for concepts…: that of a right to a thing akin to a right against a person and that of a right to a person akin to a right to a thing.'[222] Thus the fourth category of fiduciary rights is derived by triangulating contract with tort/property. A fiduciary 'possesses' a beneficiary in the sense of binding them by their pronouncements but cannot 'use' them self-interestedly. Overlaid

[218] Barcelona Traction, Light and Power Co. Ltd., Belgium v. Spain, 1970 I.C.J. Rep 3, 45 (May 2, 1970).
[219] ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 17-18 (§34) (2009).
[220] Andreas F. Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law and Some Suggestions for Their Interaction*, 163 RECEUIL DE L'ACADÉMIE DE DROIT INTERNATIONAL 311, 344 (1980).
[221] In re Ross, 140 U.S. 453, 462 (1863). *See* also Paweł Czubik & Piotr Szwedo, *Consular Jurisdiction*, MAX PLANCK ENCYCLOPEDIA PUB. INT'L L. (2013).
[222] *DoR* 6:357, 493.

across these three categories are three 'bases of acquisition': unilateral, bilateral, or omnilateral, or *facto*, *pacto*, and *lege*.[223] Tort/Property rights are acquired *facto*, contractual rights *pacto*, whereas fiduciary obligations are imposed *lege* and not left to the discretion of the parties. In contrast, the remaining possibility of 'a *right to a thing akin to a right against a person* drops out without further ado, since no right of a *thing* against a *person* is conceivable.'[224] It is nonsensical for you to owe obligations to a thing (your wallet), or for your wallet to be obligated to make some performance (roll over on command). This incoherence is only conceptual, not empirical: for the longest time there has been a class of things that was expected to perform obligations – *slaves*. As such, what makes slavery illegal is *juridical* incoherence, not that it is unethical, even though it is certainly that as well. This last category is therefore empty, or *vacat*.[225] Exactly this pattern is repeated in Public Right. Kant begins with a dichotomy between the 'right of a state' (municipal law) and the '*right of nations* (*ius gentium*).' He applies this distinction against itself to derive a third category of a '*right for a state of nations* (*ius gentium*)', also described as 'cosmopolitan right (*ius cosmopoliticum*)'.[226] Municipal law arises *facto* – as we saw in section 4, from the consolidation of power over a territory. International law arises *pacto* – from the consent of nations. Accordingly, the rules of cosmopolitan right are *lege*: states may not opt out of them. The remaining possibility – of a right of nations conceived as the right of a single state – is empirically possible, but only in regional or global empires where one state determines the external relations of another as a colony. Empires and colonies have existed in history, but are juridically incoherent, and so, *vacat*.

This structure of three-parts-with-a-missing-fourth explains the footnote in the *Perpetual Peace* where Kant describes the idea of a constitutional order as

> (1) one in accord with the right of citizens of a state, of individuals within a people (*ius civitatis*),
>
> (2) one in accord with the right of nations, of states in relation to one another (*ius gentium*),
>
> (3) one in accord with the right of citizens of the world, insofar as individuals and states, standing in the relation of externally affecting one another, are to be regarded as citizens of a universal state of mankind (*ius cosmopoliticum*).[227]

Such a 'division is not made at [choice] but is necessary with reference to the idea of perpetual peace.'[228] That is to say, a state's discretion in defining its doctrines of private international law is not unbounded but conditioned by the rights of other nations. Were it to 'opt out' of basic cosmopolitan legal principles altogether, it would be repudiating international law *externally* in such a manner that 'the condition of war would be bound up with this…'[229] It would also undermine its *internal* constitutional order: a legal system that safeguards the property rights of natives but not of visitors is just as much an apartheid state as one that segregates its hotels.

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[223] *DoR* 6:260, 412.
[224] *DoR* 6:358, 493.
[225] *DoR* 6:241, 396.
[226] *DoR* 6:311, 455.
[227] *PP* 8:349, 322.
[228] *Id*. In the original, the word in brackets is *willkürlich*. Mary Gregor translates this as 'will'. I suggest it would be better rendered as 'choice', given the distinction between *Will* and *Willkür* in Kant's technical vocabulary.
[229] *Id*.

If Cosmopolitan Right is not optional but mandatorily entailed in a constitutional order, so too must a legal-institutional order regulating the high seas and skies be peremptory. The high seas are neither Grotian wildernesses, nor can they be deemed former wildernesses actively brought under legal order at an identifiable point in history. Rather, as global public goods, they were, juridically speaking, *always already* under jurisdiction. As such, the sovereign states of the world, as joint public fiduciaries of the high seas, are always already authorities over the Citizens of the World passing and repassing them. To paraphrase Holt CJ, where a subject of the international order takes it upon itself – as it must – the global public trust of policing the seas to constitute the rightful travel of its citizens, it is *eo ipso* bound to serve all other Citizens of the World in the things that are within the reach and comprehension of that office. Note that this is not a general requirement: a state may rescue only its citizens from a warzone without extricating all others. Foreign territories are not thoroughfares for international *commercium*; the high seas are. Declining to extricate foreign citizens from warzones merely fails to confer benefits upon other states. By contrast, not rescuing them on the high seas is inconsistent with the right of other nations to interact with one another, and so, with the cosmopolitan right of Citizens of the World to travel.

This 'structure' of the special dependency between Citizens of the World and sovereign states is in fact presumed by the *AS v Italy* joint dissentients. They were none of them unaware of the problem of maritime legal black holes; for the sake of argument, they conceded the majority's approach 'could be suitable… in areas for which no state is internationally responsible for search and rescue operations', but that it was 'inappropriate for areas where such a responsible state is available and is in fact assuming its responsibilities.'[230] The second statement tells against the first: to say general obligations of rescue might obtain in areas not yet allocated to specific states is to concede that states have general obligations to rescue on the high seas, which is also to say, that they were already zones of jurisdiction. If so, it is not evident how jurisdiction/obligation can be alienated so lightly, unless we treat sovereignty like property to be bought and sold. This produces a second apparent disanalogy between public carriers and sovereign states. A ferry operator is only a *semi*-public official; if it suits her, she can give up ferrying altogether and refit her boat as a fishing trawler not required to serve travelers. By contrast, a state cannot exit the sovereignty business; its public fiduciary status is not its own to dispose, but a thing rightfully possessed by its subjects. The special character of the high seas, however, requires this public fiduciary status to extend to all Citizens of the World. Accordingly, the SOLAS and SAR treaties must be understood merely to organize pre-existing sovereign obligations, not create them. Should the State party with primary responsibility over a SAR region default, the next nearest party must do its part to maintain the sea as a global public good.[231]

We now have a full answer why Citizens of the World have personal rights to rescue on the high seas, corresponding to obligations against any state receiving distress signals through their naval, coast guard, or other public vessels. The dependency of seafarers arises from the fact that states are joint fiduciaries of the high seas as global public goods, not because omissions to rescue adversely affect travelers, or because of institutionally unmediated ethical 'promptings of humanity.'[232] Rather, any

[230] *AS v. Italy*, *supra* note 4, Individual Opinion of Yuval Shany, Christof Heyns and Photini Pazartzis (dissenting), at ¶ 6.
[231] *Id*., Individual Opinion of Gentian Zyberi (concurring), at ¶ 2 (2021).
[232] Scaramanga v. Stamp, (1880) 5 C.P.D. 295, 304 (Eng.).

such effects or promptings are actionable only because states are obligated to provide authority over the high seas, which in turn is because individual travelers have rights as Citizens of the World to a system of international public highways.

6.3 Citizens of Nowhere

Cosmopolitan rights, like *all* legal rights, require membership of a rightful condition somewhere. If so, what of 'Citizens of Nowhere,' who travel the high seas not by right but because they are forced to do so? The final link in the chain is to show that Citizens of Nowhere must be presumed to have the same rights as Citizens of the World notwithstanding their lack of an institutional order to constitute their right to move, let alone travel the world. As with section 4.1, the focus is on the formal relation between the parties, not the material context they are in. What matters is not the actual case, but what the parties *can be heard to say* is the case.

To illustrate, imagine you visit a strange land with no discernible political institutions, leaving you with no idea who is actually in charge. One thing is nevertheless certain: you, the *visitor*, are not in charge.[233] The 'international' State of Nature is importantly distinct from a domestic State of Nature. In the latter you can force others to join a rightful condition with you because their mere presence threatens your independence. By remaining outside a Rightful Condition, they reserve for themselves a license to use violence against you as and when they please. You need not – indeed, must not – tolerate this.[234] 'Cosmopolitan' encounters, in contrast, are different; they are chosen by persons already within a constitutional order. If so, forcing the people you visit into a rightful condition is beyond your power as a Citizen of the World, because those powers are conferred upon you only *in subsidium* of your home state's right, which is restricted to offering commerce to other nations, not colonizing them. As such, you and your state must presume that all foreigners are always already in a rightful condition somewhere, even if they are not. Accordingly, Kant declares in the discussion of Cosmopolitan Right in the *Doctrine of Right* that settling in the neighborhood of a foreign people is permissible only if 'there is no encroachment on anyone's use of his land…', and that

> if these people are shepherds or hunters (like the Hottentots, the Tungusi, or most of the American Indian nations) who depend for their sustenance on great open regions, this settlement may not take place by force but only by contract, and indeed by a contract that does not take advantage of the ignorance of those inhabitants with respect to ceding their lands.[235]

This presumption operates on the high seas to give Citizens of Nowhere *simulacra* of the rights possessed by Citizens of the World. To wit, human beings are under mandatory obligations to enter a rightful condition. If so, a rightful condition is under an equally mandatory obligation to accept such offers. The distress signal is just such an offer. Put differently, the humanity in Citizens of Nowhere makes them capable of, and entitled to, 'provisional' Citizenship of the World. As joint guardians of

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[233] RIPSTEIN, *supra* note 131 at 196–197.

[234] *See PP* 8:349; *DoR* 6:307, 452.

[235] *DoR* 6:353, 490.

the high seas, states must presume that everyone who sends them a distress signal are always already Citizens of the World, and therefore perform their second-order obligation of offering rescue. If those individuals turn out not to be Citizens of the World but Citizens of Nowhere, the first-order obligation to admit them kicks in.

Once again, this can be illustrated through a private law analogy. In the US, the colorful 19th century Kentucky decision of *Watson v Cross* serves as the precedent for why American innkeepers are prohibited from discriminating on the basis of minority. The case involved a 16-year-old minor – an 'infant' in then Kentucky judicial parlance – that had absconded from his military academy at Frankfort, and then stayed in a nearby hotel while awaiting his return home. After two weeks he vanished without paying his bills but left his things behind. He sent for them later, at which point the innkeeper reminded him of the matter of the unpaid hotel bills, and so, of his right to impose a lien on the luggage so long as payment was not forthcoming. The infant sued in detinue to reclaim his luggage, on the ingenious theory that because he lacked capacity to contract as an infant, the lien was invalid. Unsurprisingly, the Kentucky Court of Appeal had none of this, and upheld the lien because innkeepers are under an obligation 'to receive and entertain all guests apparently responsible and of good conduct, who might come to his house… and the mere fact of infancy alone in the applicant would not justify him in any such refusal.'[236] Accordingly, simply in virtue of their status as quasi-public officials, innkeepers owe second-order duties to enter into first-order obligations with human beings who, by default, cannot have *any* obligations whatsoever. The same is true of sovereign states, whose sole purpose is to take the lawless freedom of human beings in a State of Nature, and to return it back to them transformed as lawful freedom within a Rightful Condition.

The refugee's *simulacrum* of a right can arises in the same way as in the *Issa* gloss, which, to recall, imagined soldiers ordering shepherds into a truck before driving them to a cave to be shot. Even though there is no doubt that these events transpire in a barbaric condition of war, it does not lie in the mouth of the State to raise this in its defense, for to do so is to admit to committing the deepest wrong of a war crime, the essence of which lies in being irreconcilable with the possibility of a future peace. A state cannot order such its soldiers to commit such crimes, because this would 'make its subjects unfit to be citizens; [and thereby] also make itself unfit to qualify, in accordance with the right of nations, as a person in the relation of states…'[237] As Ryan Liss has recently suggested, international criminal law is, in this sense at least, cosmopolitan right in reverse: whereas 'the war criminal denies the possibility of rightful conditions among people the world over' the refugee, in contrast, 'has been denied a place in any rightful condition the world over…'[238] The whole point of a states, however, is to provide institutions for human beings with none. The high seas are not a warzone, and there is to be no war between the stateless refugee and the rescuing state. However, just such a war will be perpetuated if states order their public officials to ignore a refugee's distress signals. This would lead both to the 'destruction' of the stateless individual in the form of their civil death, and to destruction of the state as a public order.

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[236] Watson v. Cross, 63 Ky. (2 Duv.) 147 (1865), 148.
[237] *DoR* 6:347, 485.
[238] Ryan Liss, *International Criminal Law as Cosmopolitan Right in Reverse*, _ JURISPRUDENCE 1, 9 (2024).

Conclusion

Human beings have personal rights to rescue on the high seas, actionable upon the sending of a distress signal against the recipient of that signal. This right arises because the high seas are not wildernesses but global public goods, across which Citizens of the World have rights to travel, just like Members of the Public have in a domestic legal order have rights to pass and repass on the public roads. As such, human rights do not so much constrain jurisdiction as *justify* it. Those who are not Citizens of the World must be presumed to have the same rights because Citizens of Nowhere must be treated as citizens of somewhere. If they turn out not to be genuine refugees, the rescuing state may send them back in the same way it may send back the oligarch on the stricken mega-yacht. What is non-negotiable, however, is the state's obligation to mount a rescue to the best of its ability.

Near the beginning of the *Doctrine of Right*, Kant designates independence from the determining choice of others as the sole natural right of human beings. At the end of that work, after outlining a systematic vision of a world where no-one is dependent upon the arbitrary choice of another, he states that 'morally practical reason pronounces in us its irresistible *veto: there is to be no war*, neither war between you and me in the state of nature nor war between us as states…'[239] As such, 'the civil condition must not be restricted to a particular polity; since there is a state of nature outside its borders, this state of nature must also be overcome. In the end, the civil condition must encompass *all areas and inhabitants of the earth*.'[240] The very *idea* of law requires that all interactions on the surface of this globe of earth and water be brought under the rule of law, which is the same thing as universal freedom, and the same thing as eternal peace.

[239] *DoR* 6:354, 491.
[240] Pinheiro Walla, *supra* note 72 at 314.