CHAPTER 8

Kant on Permissive Law

Martin Brecher

8.1 Introduction

The concept of permissive law (*Erlaubnisgesetz*) figures prominently in both *Towards Perpetual Peace* and the *Doctrine of Right.* In both writings permissive laws come into play to establish special privileges for juridical agents – states in the former, individuals in the latter. In the literature on Kant's legal and political philosophy, there is considerable debate about how to understand Kant's notion of permissive law. In particular, there are two prominent but opposing views.[1] The first, which has long been the common view, is that permissive laws are meant to permit certain actions that are legally or morally forbidden. Thus, Reinhard Brandt in his landmark contribution to the discussion has suggested that permissive law has the function of provisionally permitting something that is prohibited as such. Thus, according to Brandt, permissive laws provisionally enable the use of force in lieu of right, and in some sense even contrary to it, and prevent other agents from enacting their rightful claims against the agent who acts on the basis of the permissive law. In this way, Brandt

The interpretation of permissive law that I present here has been originally developed in the context of my work on Kant's marriage right, in order to account for the 'natural permissive law' of marital acquisition (6:276) (see Martin Brecher: *Vernunftrecht und Verdinglichung: Eine Rekonstruktion von Kants Eherecht*, Berlin: De Gruyter, 2025, ch. 8). For valuable feedback on previous versions of the present chapter I thank audiences at XXIV. Deutscher Kongress für Philosophie, Berlin 2017, at GAP.11, Berlin 2022, and at the conference, 'Law and Morality in Kant', Göttingen 2022. I especially thank my commentator Jakob Huber for his nuanced criticism and helpful remarks.

[1] Joel T. Klein adds as a third main kind of approach Brian Tierney's reading that 'stress[es] the systematic-conceptual unfitness of permissive laws' (Joel T. Klein, 'Permissive Laws and Teleology in Kant's Juridical and Political Philosophy', *Kantian Review* 27 (2022), 215–36, at 215). See Tierney's 'Kant on Property: The Problem of Permissive Law', *Journal of the History of Ideas* 62 (2001), 301–12, and 'Permissive Natural Law and Property: Gratian to Kant', *Journal of the History of Ideas* 62 (2001), 381–99. In what follows, I will not discuss Tierney's interpretation.

argues, the permissive law is required in order to actually bring about juridical and legal institutions, that is, to enable the realization of right.[2]

The second prominent account has more recently been put forward by Joachim Hruschka. Hruschka opposes the common assumption that Kant would employ the same notion of permissive law in both *Perpetual Peace* and the *Metaphysics of Morals*, and he argues that we find a revised understanding of permissive law in the *Metaphysics of Morals*: the permissive law in the *Doctrine of Right*, Hruschka submits, should not be taken as a norm establishing exceptions to prohibitions (as in *Perpetual Peace*), but as a norm regulating previously *indifferent* actions. Specifically, the permissive law, Hruschka argues, changes the legal character of certain actions by conferring particular legal powers on the agents who act in these ways, specifically the power to acquire external objects of choice.[3]

In what follows, I will propose a reading of permissive law that differs from both approaches in important respects. As I will argue, in both *Perpetual Peace* and the *Doctrine of Right*, Kant takes permissive laws to indeed grant exceptions to prohibitions. However, contrary to the common reading advocated by Brandt and others, permissive laws do not permit wrongful actions, either in the sense of tolerating, or excusing, transgressions of prohibitions, or in the sense of suspending other demands

[2] Reinhard Brandt, 'Das Erlaubnisgesetz, oder: Vernunft und Geschichte in Kants Rechtslehre", in Reinhard Brandt (ed.), *Rechtsphilosophie der Aufklärung*, Berlin: De Gruyter, 1982, 233–85, see in particular 244–6, 256. In a similar vein, Oliver Eberl and Peter Niesen propose that permissive laws suspend certain legal or moral requirements, but only temporarily, thereby tolerating transgressions of the laws of pure practical reason on the grounds that this facilitates the introduction of new norms, such as institutions of international law ('Kommentar', in Immanuel Kant, *Zum ewigen Frieden*, ed. by Oliver Eberl and Peter Niesen, Berlin: Suhrkamp, 2011, 202–3). Christoph Horn, pursuing the overall aim of showing that Kant regards legal or political normativity as specifically distinct from moral normativity, submits that the permissive law allows an agent 'to violate the general law of the inviolability of external freedom', albeit on the grounds that the agent has 'the idea of right on his side' (Horn, *Nichtideale Normativität: Ein neuer Blick auf Kants politische Philosophie*, Berlin: Suhrkamp, 2014, 215; my translation).

[3] See Joachim Hruschka, 'The Permissive Law of Practical Reason in Kant's *Metaphysics of Morals*', *Law and Philosophy* 23 (2004), 45–72, and 'Das Erlaubnisgesetz der praktischen Vernunft und der ursprüngliche Erwerb von Stücken des Erdbodens', in *Kant und der Rechtsstaat und andere Essays zu Kants Rechtslehre und Ethik*, Freiburg: Karl Alber, 48–88. This interpretation is also defended by B. Sharon Byrd, 'Intelligible Possession of Objects of Choice', in Lara Denis (ed.), *Kant's* Metaphysics of Morals*: A Critical Guide*, Cambridge: Cambridge University Press, 2010, 93–110, see 96–99, and 'The Elusive Story of Kant's Permissive Laws', in Lara Denis and Oliver Sensen (eds.), *Kant's Lectures on Ethics. A Critical Guide*, Cambridge: Cambridge University Press, 2015, 156–69, at 164–6. See also their co-authored *Kant's* Doctrine of Right*: A Commentary*. Cambridge: Cambridge University Press, 2010, ch. 4. Hruschka's interpretation has been adopted, for instance, by Arthur Ripstein, *Force and Freedom*, Cambridge, MA: Harvard University Press, 2009, 103–4 n. 19, and Rainer Friedrich, *Eigentum und Staatsbegründung in Kants* Metaphysik der Sitten, Berlin: De Gruyter, 2004, 113–18.

of right or morality. As I will show, permissive laws proceed from antecedent prohibitions and specify conditions under which an action is permissible that would *otherwise* be wrongful, namely if these conditions are not fulfilled; this makes the permitted acts genuinely, albeit conditionally, allowed, not merely tolerated. This implies that the actions that fall under permissive laws are not, as Hruschka thinks, indifferent actions as such: while it is true that permissive laws grant certain legal powers to agents, I will argue that the actions in question are not indifferent, but would indeed be forbidden if they were not subject to permissive laws and the conditions they set.

I will carve out this notion of permissive law from Kant's discussion of permissive law in *Perpetual Peace*, for it is there that Kant clarifies his understanding of this type of norm. By relating Kant's remarks to the notion of *lex permissiva* found in the relevant textbooks by Achenwall and Baumgarten, I will show that Kant takes permissive law to be a special kind of prohibitive law: specifically a law that, against the background of a general prohibition, licenses certain acts under specific conditions (Section 8.2). I will then argue that we find the same basic understanding of permissive law in the *Vigilantius* lecture notes, despite the statement there that permissive law allows 'might to hold for right' (Section 8.3).

In the second half of the chapter, I will turn to the *Metaphysics of Morals*. I will first argue, against Hruschka, that the understanding of permissive law that Kant articulates in the Introduction of the *Metaphysics of Morals* does not in fact depart from that found in *Perpetual Peace* (Section 8.4). I will then turn to the *Doctrine of Right* and attend to the different instances of permissive law in Private Right. I will highlight how each instance of permissive law has to be understood as granting a permission subject to certain conditions against the backdrop of a general prohibition: it is only through the indication of certain specific conditions that the relevant acts must fulfil that these acts are permitted and the juridical institutions or relations in question can be established by them (Section 8.5).

8.2 'A Kind of Prohibitive Law': The Concept of Permissive Law in *Towards Perpetual Peace*

In his published writings,[4] Kant uses the term 'permissive law' for the first time in *Towards Perpetual Peace*, and it is there that he elaborates on his

[4] There is evidence in Kant's handwritten notes that he mentioned the concept of the permissive law in his ethics lectures (Refl 7031, 19:231; Refl 7256, 19:295). In the student notes of the moral philosophy lectures from the 1770s we find the simple statement that '*Leges* [. . .] *permissivae*' are

understanding of it. Kant introduces the notion in a remark following the presentation of the preliminary articles for establishing peace. All six preliminary articles, Kant says, are '*laws of prohibition*', but while some of them 'put[] a stop' to certain state practices '*at once*', with respect to other provisions there is the possibility of '*postpon[ing]* putting these laws into effect' (8:347).[5] The provisions in question 'contain permissions', 'taking into consideration the circumstances in which they are to be *applied*' (8:347). In a footnote to the passage, Kant explains the extent to which one can speak of permissive laws with respect to such provisions. There he clarifies his understanding of this type of norm by distinguishing it from what he considers to be two false understandings of permissive law, thus establishing the defining marks of his notion of permissive law.

8.2.1 Permissions and Prohibitions

The first understanding of permissive law that Kant rejects is the idea that permissive laws are required for indifferent acts to be possible. This, according to Kant, would be absurd. Since laws contain 'a ground of objective practical necessity' of actions, whereas permissions contain a reason 'of the practical contingency of certain actions', a permissive *law* would present a contradiction: for a permissive law would express the 'necessity to an action such that one cannot be necessitated to do it' (8:348 fn.). In other words, a permissive law regarding an action φ would, on the one hand, *qua law*, state the practical necessity to φ, but on the other hand it would at the same time, *qua permission*, imply the absence of this necessity. Thus, permissive laws are not required for actions that are morally indifferent.[6]

As Kant goes on to argue, it only makes sense to speak of permissive laws insofar as necessitation and permission refer to different actions, but not if 'the object of the law has the same meaning in both kinds of relation' (8:348 fn.). As a case in point, both in the main text and in the footnote, Kant refers to the second preliminary article, which prohibits the acquisition of one state by another 'through inheritance, exchange, purchase or

such laws 'whereby actions are permitted', and that one 'could also think of *jus permissi*' (V-Mo/Collins 27:274). I will turn to the later *Vigilantius* lecture notes in Section 8.3.

[5] The articles to be implemented immediately are articles nos. 1, 5, and 6; delayed implementation is possible for articles nos. 2, 3, and 4 (8:347).

[6] In an addendum to the second edition of the *Religion within the Boundaries of Mere Reason,* published one year before *Perpetual Peace*, Kant states that 'neither *command*, nor *prohibition*, nor yet *permission* (*authorization* according to law), intervenes or is necessary' with respect to 'a morally indifferent action' (RGV 6:23 fn.).

donation' (8:344). Since such acquisitions lack 'the necessary legal title', the preliminary article implies the duty that the states that have acquired other states in these ways restore the freedom of those states (8:347; translation modified). Now, while the article directly prohibits any acquisition of states by others in the future, the reversal of past acquisitions, Kant argues, can be adapted to the circumstances of each specific case. Thus, a past acquisition may still be regarded as valid for a certain transitional period until the restoration can be realized: 'the prohibition here concerns only the *way of acquiring*, which from now on shall not hold, but not the *status of possession*' (8:347). To the extent that prohibition and permission refer to different objects, it is possible, Kant submits, to speak here of a permissive *law* (8:348 fn.).

It is important to note that the prohibition is the primary component to which the permission refers, as Kant's formulations show: 'the prohibition presupposed', 'the exemption from this prohibition, i.e., the permission' (8:348 fn.).[7] On the one hand, the prohibition is a precondition of the permission, in that the conduct regulated by the law is generally prohibited and permitted in certain circumstances only. On the other hand, the prohibition sets limits to the permission by tying the permitted action to specific conditions. Thus, the restitution of state autonomy may be delayed if 'implementing the law prematurely [will] counteract its very purpose' (8:347), but the permission does not extend so far that the restitution could be postponed forever, 'to a nonexistent date', so that the delay would amount to not restoring the other state's freedom (8:347). We can therefore say that the permission is limited by the underlying prohibition, or by the grounds of that prohibition.

These observations also apply to the permissive laws that Kant hints at in the appendix of *Perpetual Peace*. There Kant argues that shortcomings in the constitution of a state do not have to be eliminated in one fell swoop but can be remedied step by step through gradual reforms: there are 'permissive laws of reason that allow a situation of public right afflicted with injustice to continue' until the conditions are such that the

[7] Accordingly, Wolfgang Kersting believes that permissive laws are 'necessarily derivative in nature'. In his view, they 'can only appear in the form of exceptional rules that restrict the scope of existing laws of prohibition and thus allow certain previously prohibited acts under the conditions formulated in them' (Wolfgang Kersting, *Wohlgeordnete Freiheit: Immanuel Kants Rechts- und Staatsphilosophie*, Berlin: De Gruyter, 1984, 65; my translation). However, as I will show in Section 8.2.2, permissive laws do not represent separate norms that would restrict laws of prohibition distinct from them; rather, the permissive law is a particular kind of law of prohibition, so that prohibition and permission are part of the same law.

constitution may safely be changed, that is, 'until everything has either of itself become ripe for a complete overthrow or has been made almost ripe by peaceful means' (8:373 fn.).[8] The permission in question applies if 'a *premature* reform' threatens to undo the juridical condition so that a relapse into the 'anarchy' of the state of nature is to be feared (8:373 fn.). The reason for the permission to change the constitution step by step accordingly lies in the fact that '*some* rightful constitution or other, even if it is only to a small degree in conformity with right, is better than none at all' (8:373 fn.; my emphasis).

As with preliminary articles 2, 3, and 4, the permission to forgo a complete revision of a faulty constitution and postpone certain changes holds against the background of a general prohibition, in this case the inadmissibility, itself grounded in 'the ideal of public right' (8:373 fn.), of an unjust state constitution. Moreover, in this case, too, the permission is at the same time limited by the prohibition: the postponement is only allowed insofar and as long as it is necessary for change to be actually possible and it is conjoined with the 'duty' to work towards the realization of the provision, to 'make reforms in keeping with the ideal of public right' (8:373 fn.). Now, it may seem as if the permissive law in question would indeed tolerate a wrongful action, insofar as it allows 'a situation of public right *afflicted with injustice* to continue' (8:373 fn.; my emphasis). But it indeed '*allow*[*s*]' deferring certain constitutional changes (8:373 fn.; my emphasis), and it does this insofar as it is required for the injustice to be remedied. The permissive law hence declares that retaining the current constitution, as long as changing it is not possible, is genuinely allowed, based, ultimately, on the idea of Public Right.

8.2.2 *Permissive Law as a Kind of Prohibitive Law*

The second understanding of permissive law that Kant rejects in his elaboration in *Perpetual Peace* is the idea that permissive laws are independent norms of exception that are, as it were, attached to, or placed alongside, prohibitive laws. According to Kant, examples of this are often found in positive law ('in civil (statutory) law'): 'Then it is said that this or that is prohibited, *except* for number 1, number 2, number 3, and so forth indefinitely' (8:348 fn.). In such cases, the relationship between prohibition and permission is such that 'the prohibitive law stands all by itself and

[8] Kant probably had in mind the hasty reforms implemented in Austria by Joseph II. See Brandt, 'Erlaubnisgesetz', 249–55.

the permission is not included in that law as a limiting condition (as it should be) but is thrown in among exceptions to it' (8:348 fn.). Kant's criticism of this approach is that the exemptions from the prohibition are added to the law 'only contingently, not in accordance with a principle but by groping among cases that come up' (8:348 fn.).

In contrast to this approach, Kant holds that if one wishes to identify '*permissive laws* [. . .] of pure reason' (8:347 fn.) a properly systematic approach is required in which 'the conditions [are] introduced *into the formula of the prohibitive law*' (8:348 fn.; Kant's emphasis). If this is done, that is, if the conditions under which a certain action shall be permitted are specified in the formula of the prohibition, the prohibitive law ('it') becomes '*at the same time* a permissive law' (8:348; my emphasis). By including the conditions under which the prohibition shall not hold into the law itself, the law assumes a dual character: in relation to the generally required omission of a certain course of action, the law is a law of prohibition, but in relation to those conditions under which that course of action is allowed it is a permissive law. Thus, Kant characterizes permissive law as a form of prohibitive law that specifies conditions for exemptions from its prohibition, thereby establishing a particular permission.

Permissive law is thus a kind of prohibitive law. This is reflected by Kant's distinction, in his remark at the end of the section on the preliminary articles, between prohibitive laws 'of the *strict* kind (*leges strictae*), holding without regard for differing circumstances', on the one hand, and 'laws that, taking into consideration the circumstances in which they are to be *applied*, *subjectively* widen [one's] authorization (*leges latae*) and contain permissions', on the other hand (8:347).[9] In a similar vein, in the *Vigilantius* lecture notes, Kant distinguishes between prohibitive laws that hold universally ('*universales*'), that is, which are 'valid under all circumstances, so that an exception is therefore impossible, and a permissive law not to be thought of here at all', and merely general prohibitions ('*generales*'), 'where the prohibition holds good in the great majority of cases (in

[9] I think Aaron Szymkowiak overshoots the mark when he argues that Kant would claim that 'there are prohibitive laws that become intelligible only when attended by certain permissions' and that 'the permissions must constitute laws in themselves in order to preserve the lawful status of the commands or prohibitions they are intended to supplement or complete' (Aaron Szymkowiak, 'Kant's Permissive Law: Critical Rights, Sceptical Politics', *British Journal for the History of Philosophy* 17 (2009), 567–600, at 570). As we have seen, it is the prohibitive component that makes permissive laws proper laws, not the other way around. Hence, I believe the correct picture is simply that there are certain prohibitive laws that include certain exceptions, and a permissive law is simply such a limited prohibitive law considered with respect to the exceptions, that is, permissions, it includes.

general)' and where therefore 'exceptions are conceivable' (27:514). As the texts clearly show, Kant in both cases regards permissive law as a kind of prohibitive law.

In considering permissive law as a kind of prohibitive law, Kant follows his textbook authors Alexander Gottlieb Baumgarten and Gottfried Achenwall.[10] Both regard the *lex permissiva* as a special (Baumgarten: 'peculiaris') kind of prohibitive law ('species legis prohibitivae'). Both argue that a permissive law is a law of prohibition that on the one hand establishes an obligation (in the form of a prohibition) and on the other hand grants an authorization. Thus, Baumgarten explains that 'a PERMISSIVE LAW (permission strictly considered) is a law declaring that a certain action that has indeed not been prescribed is indeed nevertheless not to be impeded'. The permissive law is therefore 'a particular species of prohibitive law' (*est peculiaris species legis prohibitivae*). It is a law 'in favour of someone who perhaps will carry out certain things' in that it 'obligates others to omit an impedition that otherwise could have been opposed to such a free determination'.[11]

Achenwall similarly elaborates:

> If a juridical law determines that a certain action, although it is not prescribed, must not be hindered either, it is a law and a kind of prohibitive law [*species legis prohibitivae*] [. . .]. But as it has a different effect with regard to him to whom it attributes the ability to do something licitly and with regard to him onto whom it imposes the obligation not to hinder the other man, with respect to the former it is a PERMITTING (permissive) law, with regard to the latter a COMMANDING one. In the former respect the law is called permitting, because by force of such law the legislator grants the ability to execute a certain action as permitted.[12]

Kant's view, however, differs from that of his textbook authors with regard to what is permitted and what is prohibited by the law. For Achenwall and Baumgarten, permission and prohibition refer to the actions of different agents addressed by the law. The law that permits an agent A to φ is a permissive law for this agent. Insofar as the law at the same time prohibits other agents from interfering with *A's* doing φ, it is a law of prohibition for

[10] Kant used Baumgarten's ethics textbooks for his lectures on moral philosophy from 1759 onwards, and Achenwall's textbooks for his lectures on natural law from 1767 onwards.

[11] Alexander G. Baumgarten, *Elements of First Practical Philosophy: A Critical Translation with Kant's Reflections on Moral Philosophy*, ed. and trans. by Courtney D. Fugate and John Hymers, London: Bloomsbury, 2020, § 68.

[12] Gottfried Achenwall, *Prolegomena to Natural Law* (1763), ed. by Pauline Kleingeld, trans. by Corinna Vermeulen, Groningen: University of Groningen Press, 2020, § 90.

those other agents. This is very clearly brought out by Achenwall's explanation of permissive law, quoted above: the law 'has a different effect' for the different agents. As Achenwall puts it succinctly in his *Ius Naturae*: '[S]uch a law is called "permitting" with regard to the person to whom it concedes the ability to do something licitly, but "commanding" with regard to the person whom it obligates not to hinder someone else.'[13]

On Kant's view, in contrast, permission and prohibition are directed *at the same agent*. For Kant, what differs are the forbidden and permitted *actions*, namely the respective 'object[s] of the law' (8:348 fn.), and they differ on the basis of the conditions or circumstances in which an agent subject to the law finds herself. Thus, while agent *A* is generally prohibited from φ-ing, *A* is permitted to φ under certain circumstances as specified by the law. Thus, it is forbidden for states to acquire another state, while they are allowed to retain their prior acquisitions until restitution of wrongful acquisition can successfully commence.

Now, Kant's notion of permissive law, like that of Achenwall and Baumgarten, also implies that other agents are prohibited from preventing the addressee of a permissive law from exercising his authority. Within the scope of the conditions specified by the permissive law, *A's* doing φ is permitted, that is, it is not subject to any prohibition. Hence, insofar as *A's* doing φ conforms with law, other agents may not interfere with it. Thus, other nations may not force state *S* to restore freedom immediately to those states it had illegitimately acquired in the past. Indeed, owing to the permissive law, *S* may rightfully resist any such attempts at interfering with conducting its own affairs. This aspect, however, is not the essence of permissive laws for Kant. In fact, the account of permissive law found in Achenwall and Baumgarten cannot suffice in Kant's eyes. On their account, the normativity of the permissive law (its being a practical law) does pertain only to the agents who are prohibited from interfering with the permitted action.[14] But unless the permitted action is also prescribed, it does not make sense, as we have seen in the previous section, to speak of

[13] Achenwall, *Natural Law* (1763), ed. by Pauline Kleingeld, trans. by Corinna Vermeulen, London: Bloomsbury, 2020, part I, § 48.

[14] Achenwall uses the term 'lex iubens' to describe any law that imposes an obligation on an agent ('obligationem imponit': *Ius Naturae*, Göttingen 1763, part I, § 48). Depending on whether the omission or the commission of an act is prescribed, it can be a law of prohibition ('LEX [...] PROHIBITIVA (vetans, negans)') or a prescriptive law ('LEX [...] PRAECEPTIVA (praecipiens, aiens[])') (*Prolegomena*, § 19). For Achenwall, then, the character of the permissive law to be a particular kind of law is due to the fact that a binding force correlating to the permission is created on the side of the other agent(s). Kant himself articulates such an understanding of permissive law in a note in the preliminary drafts for the *Metaphysics of Morals* (cf. 23:384).

laws for permitted acts. On Kant's account, in contrast, the permissive law is a proper law *for the addressee of the permission* insofar as she is at the same time the addressee of the antecedent prohibition.

Given Kant's understanding of permissive law as a kind of prohibitive law, it is clear that permissive laws do not authorize doing something that is still forbidden: as Kant says, a generally prohibitive law is turned into a permissive law by inserting 'into the formula of the prohibitive law' the conditions under which the action regulated by the law is to be permitted (8:348 fn.; emphasis removed). Since prohibition and permission are for Kant part of the same law, the permission has genuinely to allow the action in question, rather than merely tolerate it as a transgression of the prohibition: for it would be contradictory for a law to establish a prohibition and at the same time allow a contravention to it. Moreover, like all practical laws, the permissive laws with which Kant is concerned are principles of (pure practical) reason (8:347 fn.; 8:373 fn.), and reason cannot issue a prohibition while at the same time allowing its transgression. Indeed, Kant emphasizes that the authorizations granted by permissive laws do 'not' allow the agents 'to make exceptions to the rule of right' (*nicht als Ausnahmen von der Rechtsregel*; 8:347). Far from taking permissive laws as suspending the validity of the prescripts of reason, Kant thus understands permissive law as conditionally allowing, or licensing, a course of action that is otherwise forbidden, namely if the conditions contained in the law do not obtain. In this sense, a permissive law merely limits the scope of an antecedent prohibition.

8.3 Permissive Law in *Metaphysics of Morals Vigilantius*

I now want to turn briefly to the discussion of permissive law in the *Vigilantius* lecture notes from 1793/4 which can be easily misread as implying that permissive laws would sanction forbidden actions. Against the backdrop of our discussion of permissive law in *Perpetual Peace* one can see, however, that Kant already entertains the same notion of permissive law in the lecture.

The discussion of permissive law in *Vigilantius* revolves around the question whether there are permissive laws in natural law just as they exist in positive law. Kant submits that 'if there are *leges permissivae*, they have to be accompanied with a prohibition' (27:514). This, however, is only possible if the prohibition in question is not a universal prohibition that is 'valid under all circumstances' but merely a general prohibition that

holds for most but not all cases (27:514). It is with respect to these general prohibitive laws that 'there are permissive laws as exceptions' (27:514).

The prohibition that Kant takes as case in point is the principle that 'might must not replace right' (27:514). He submits that with respect to this prohibition a permissive law exists if 'the conditions exist, under which we may assume that might replaces right' (27:515). These conditions exist, as Kant goes on to argue, in the state of nature, before a legal condition is established. According to Kant, the only way for a state, and hence for a legal order, to come into existence is the use of force. There is therefore, he argues, a permissive law that allows might to precede right in this case (27:515–16).

Now, since the use of unilateral force (that is, of the use of might) is morally forbidden one could assume that the permissive law here functions to tolerate an immoral action or that it suspends that prohibition. However, as Kant's elaboration makes clear, the permissive law grants the use of force only if it is used for establishing right. And this is morally justified because the state of nature, due to its lack of legal institutions and the ensuing ubiquity of unilateral exercise of choice, is a condition that we are morally required to overcome:

> this is a state of affairs in conflict with the universal imperative of morality, and we thus have to assume that nature allows us, in this fashion, to bring man's free choice into agreement with general freedom, by means of universal law; and so here there is a natural law in effect, to permit the force employed. (27:515)

The use of unilateral force, while generally prohibited, is not prohibited when it is used in the state of nature in order to establish legal institutions; indeed, it is actually obligatory insofar as it is the only way to leave the state of nature.[15] Thus, as in *Perpetual Peace*, the permissive law in question only exists, first, with respect to an antecedent prohibition and, secondly, it limits the permission to the condition that the action in question is necessary to accommodate the demand of morality.

8.4 The Concept of Permissive Law in the Introduction of the *Metaphysics of Morals*

In the preceding two sections I have established that, contrary to the common view, Kant in *Perpetual Peace*, as well as in the *Vigilantius* lecture

[15] Cf. Byrd, 'Elusive Story', 161–2.

notes, does not regard permissive law as a norm for tolerating wrongful conduct. Rather, he situates permissive laws within the overall class of prohibitive laws. The specific difference of permissive law as a kind of prohibitive law is that it specifies conditions under which the prohibition in question does not hold, thereby establishing a permission to act in a certain way. In the remainder of the chapter I will attend to Kant's understanding and use of permissive law in the *Metaphysics of Morals*, specifically in Private Right in the *Doctrine of Right.*[16]

While most interpreters assume that Kant did not change his understanding of permissive law between the publication of *Perpetual Peace* and the *Doctrine of Right*, Joachim Hruschka has argued that in the *Doctrine of Right* we find a notion of permissive law different from that in *Perpetual Peace.* This revised type of permissive law, according to Hruschka, does not formulate an exemption from a prohibition, but is an authorizing, power-conferring norm by which practical reason enables the establishment of the institutions of private right.[17] In this function, Hruschka argues, the permissive law does not refer to acts that are as such prohibited, but rather relates to acts that are fundamentally morally indifferent, that is, simply permitted.[18] While I agree with Hruschka that the permissive laws coming into play in the *Doctrine of Right* concern the establishment of legal institutions and thus can be regarded as power-conferring norms, I submit that Hruschka is mistaken in assuming that Kant in his later work takes permissive law to relate to indifferent actions only and that it does not presuppose an antecedent prohibition.

Hruschka primarily justifies his interpretation with reference to a passage in the Introduction of the *Metaphysics of Morals* in which Kant briefly brings up the question of the existence and function of permissive laws. At the beginning of the passage Kant distinguishes two meanings of the term 'permitted', a general and a more narrow sense. In the general sense, any act is permitted ('*licitum*') 'which is not contrary to obligation' (6:222), that is, any act that is 'morally possible' (6:221). With regard to permitted acts, the agent possesses an authorization ('*facultas moralis*'), so that with respect to this act his 'freedom [. . .] is not limited by any

[16] Because I am here only concerned with Kant's legal philosophy, I will not attend to the two passages in the *Doctrine of Virtue* where Kant employs the concept of permissive law (6:426, 453). (Regarding the first passage, see Martin Brecher, 'Ehelicher Geschlechtsgebrauch und Fortpflanzungszweck in §7 der Tugendlehre', in Violetta Waibel et al. (eds.), *Natur und Freiheit: Akten des XII. Internationalen Kant-Kongresses*, Berlin: De Gruyter, 2018, 1761–8.)

[17] Hruschka, 'Permissive Law', 47; 'Erlaubnisgesetz', 55.

[18] Hruschka, 'Permissive Law', 50–3; 'Erlaubnisgesetz', 59–60.

opposing imperative' (6:222). All morally possible acts are permitted acts in this sense, including those acts that are actually obligatory, namely 'morally necessary' (6:221), for no other imperative stands in the way of the performance of acts to which we are obliged. In a narrower sense, Kant labels as 'merely permitted' those acts that are 'neither commanded nor prohibited': merely permitted actions are not subject to practical necessity in any way; in relation to them there is 'no law limiting one's freedom (one's authorization) [. . .] and so too no duty' (6:223; emphasis removed). An action that is merely permitted is 'morally indifferent (*indifferens, adiaphoron, res merae facultatis*)' (6:223). While the freedom of the agent is restricted in the case of an obligatory action insofar as she may not refrain from the action, in the case of a merely permitted action the agent is free to decide whether or not to perform it.

So far, Kant's exposition of these terms leaves open whether there actually are any merely permitted actions at all and, if so, whether these would require the existence of permissive laws:

> The question can be raised whether there are such actions and, if there are, whether there must be permissive laws (*lex permissiva*), in addition to laws that command and prohibit (*lex praeceptiva, lex mandati* and *lex prohibitiva, lex vetiti*), in order to account for someone's being free to do or not to do something as he pleases. (6:223)

While Kant leaves open at this point the question whether there are morally indifferent actions or not, he points out that permissive laws will not concern this class of actions:

> If so, the authorization would not in any case [*nicht allemal*] have to do with an indifferent action (*adiaphoron*); for, considering the action in terms of moral laws, no special law would be required for it. (6:223; translation modified)

Hruschka argues that in the passage just cited Kant would state that permissive law would apply to some merely allowed actions and that some merely allowed actions would accordingly require a permissive law (namely the actions by which agents can acquire rights to external objects). However, I think it is clear from the above quotations that this is not the case. If there are actions for which a permissive law is required ('If so') these actions will not be indifferent acts: for with regard to such an action, there is no practical necessity whatsoever anyway, which is why 'no special law would be required for it'. Thus, just as in *Perpetual Peace*, Kant here holds that permissive laws are not concerned with acts that are as such indifferent.

In his interpretation of the passage above, Hruschka reads the qualification 'nicht allemal' in the sense of 'not always',[19] to substantiate his assumption that Kant would distinguish between different types of merely permitted acts: namely, that he would only designate as *adiaphora* those actions that do not require a permissive law, whereas an act *qua* '*res merae facultatis*' (6:223) would indeed require a permissive law.[20] However, Hruschka does not show why the obvious reading of 'nicht allemal' in the sense of 'not in any case' (or 'certainly not', *gewiss nicht*) should not apply here.[21] Moreover, one would expect Kant to provide some information about the cases in which a permissive law concerns a morally indifferent act and the cases in which it does not.[22] But since Kant does not make any explicit terminological distinction in the way Hruschka claims, we must assume that in the formulation 'morally indifferent (*indifferens*, *adiaphoron*, *res merae facultatis*)' Kant uses the three expressions mentioned in the brackets synonymously (6:223).[23]

8.5 The Permissive Laws in Private Right of the *Doctrine of Right*

Contrary to Hruschka's reading, Kant in the Introduction of the *Metaphysics of Morals* retains his view from *Perpetual Peace* according to which permissive laws do not refer to indifferent actions, but make certain

[19] Hruschka, 'Permissive Law', 50–1 n. 16 and 'Erlaubnisgesetz', 57. This is also the way in which Gregor, in my eyes incorrectly, translates the passage. In this way Kant uses the expression in two other places in the Introduction to the *Metaphysics of Morals*: once when he explains that the 'pleasure or displeasure in an object of desire does not always precede the desire' and accordingly 'need *not always* be regarded as the cause' of desire, 'but can also be regarded as the effect of it' (6:211; my emphasis), and when he says 'that all duties belong to ethics merely because they are duties, but their legislation [. . .] is therefore *not always* contained in ethics, but of many of them outside it' (6:219; my emphasis and translation).

[20] Hruschka, 'Permissive Law', 50–1 n. 16.

[21] See Heyse's *Handwörterbuch der deutschen Sprache*, vol. 1, Magdeburg 1833, s.v., allemal'. The Grimms' dictionary also points to this shift in meaning (*Deutsches Wörterbuch*, vol. 1, Leipzig: Hirzel, 1854, col. 218).

[22] Klein criticizes the distinction made by Hruschka along similar lines (Klein, 'Permissive Laws', 218).

[23] See also, first, *On the Common Saying*, 8:282, where Kant clearly understands the term '*res merae facultatis*' simply as a legal synonym ('as the lawyers say') to designate indifferent 'acts of freedom', and, secondly, in RL § 15, where Kant also uses the term '*res merae facultatis*' for actions that are at the discretion of the agent: thus, the way in which peoples 'wish to settle on the face of the earth' – for example, as 'a pasturing people', as 'tillers' or 'planters' – 'is a matter of mere discretion (*res merae facultatis*)' (6:266; my translation). These passages provide further evidence that Kant does not use the term *res merae facultatis* to mark a terminological distinction, as Hruschka thinks, within the class of permitted indifferent actions.

actions legally possible that are otherwise prohibited. I will now show that this also applies to the permissive laws employed by Kant in the *Doctrine of Right*.

The permissive laws in Private Right allow certain actions by which legal institutions can be established, specifically they enable the establishment of legal possession in general (RL § 2), the original acquisition of land in the state of nature (§ 16), and the acquisition of another person (§ 22). As Hruschka points out, the permissive laws in these cases confer legal powers on the agents who carry out the corresponding acts, namely the power to establish new relations of right. These actions, however, are not as such indifferent, as Hruschka maintains. Rather, outwith the scope of the permissive law these acts would indeed be contrary to right. On the other hand, while the permissive laws thereby formulate exceptions to prohibitions, they do not suspend the rule of right: the actions in question are not merely tolerated, they do not remain as such wrongful, as the common reading holds, but are genuinely allowed. Finally, the permissive laws make the actions that they allow subject to certain requirements and restrictions that have to be fulfilled for the permission to take effect.[24]

8.5.1 The Juridical Postulate of Practical Reason as a Permissive Law (§ 2)

According to Kant, the 'juridical postulate of practical reason' (6:246) that he introduces at the beginning of Private Right can be described as a permissive law (6:247).[25] The postulate states that it must be possible 'to have any external object of my choice as mine' (6:246). By means of the postulate, practical reason 'extends itself' beyond innate right and opens up the sphere of the external mine and thine (6:247). The postulate thus lays the foundation of Private Right as a whole.

By virtue of the postulate – and the concept of merely juridical possession it serves to establish (6:252) – it is possible for agents to put others under obligation with regard to external objects, namely by restricting their

[24] For an interpretation of the permissive laws in Private Right, which focuses on the aspect of provisionality of rights in the state of nature, see Section 9.3 of Alice Pinheiro Walla's contribution to this volume (Chapter 9).

[25] Note that it is the postulate that is called a permissive law and not the other way around, as Klein claims ('Permissive Law', 219) and which leads him to develop a general interpretation of permissive law that builds on Kant's theory of postulates from the second *Critique*, in my eyes mistakenly. Permissive laws are not theoretical judgments, but normative principles, namely practical laws, as we have seen in the section on *Perpetual Peace*.

freedom with regard to these objects. For this reason the postulate can be called a permissive law:

> This postulate can be called a permissive law (*lex permissiva*) of practical reason, which gives us an authorization that could not be got from mere concepts of right as such, namely to put all others under an obligation, which they would not otherwise have, to refrain from using certain objects of our choice because we have been the first to take them into our possession. Reason wills that this hold as a principle, and it does this as *practical* reason, which extends itself a priori by this postulate of reason. (6:247)

How do we have to understand this extension of practical reason by the postulate? The 'mere concepts of right as such', and the universal principle of right that follows from them (6:230), contain only the power to bind other agents with regard to one's own inner freedom. Thus, the innate right of freedom allows us to use coercion if and only if another person restricts our freedom in a way that violates the universal law of right. To be sure, this also applies to objects that are in our physical possession, insofar as someone who 'wrest[s] the apple from my hand' against my will harms me 'with regard to what is *internally* mine (freedom)' (6:248). However, the permission to use coercion based on the innate right does not extend to objects that are not in my physical possession. Rather, restricting another agent's use of an object that I do not physically possess constitutes a wrong. On the basis of the universal principle of right alone, it would be morally prohibited to make juridical claims and to use coercion against other persons with regard to external objects that are not under one's physical control. With the introduction of the postulate that prohibition is restricted: on the basis of the postulate, we are justified in preventing other agents from using certain objects which are not in our physical possession but belong to us in terms of merely juridical (non-physical, but intelligible) possession only.

The juridical postulate clearly refers to an antecedent prohibition and establishes as rightful certain actions that would otherwise be prohibited. This means that the actions in question are not indifferent as such, as Hruschka holds. On the other hand, the postulate does not permit wrongful acts: it does not allow a transgression of the universal principle of right or of others' inner right. Instead, the postulate specifies conditions under which the external use of freedom is compatible with everybody's freedom. In this sense the universal principle of right is synthetically extended by the postulate. The postulate predicates the permission to restrict other agents' freedom in relation to external objects on the

condition that the objects in question be in one's merely juridical possession. Of course, legitimate merely juridical possession can only come about in the course of a legitimate process of acquisition. It is the task of the three parts of the second chapter of Private Right, 'How to acquire something external', to spell out the specific conditions under which this is possible with regard to things, services, and persons, respectively. The postulate only states that it must be possible, in principle, for agents to put each other under obligation with regard to external objects subject to the condition of merely juridical possession.

8.5.2 Possession in the State of Nature by Favour of a Permissive Law (§ 16)

Like the postulate in RL § 2, the permissive law in § 16 also refers to an antecedent prohibition and, by specifying conditions, excludes certain actions from its scope. The object of the permissive law in § 16 is the original acquisition of external things, specifically pieces of land, in the state of nature. Prior to the establishment of the juridical condition, the original acquisition of land by an agent amounts to an act of unilateral obligation of others. Considered as such, imposing obligations on others unilaterally is a violation of the universal law of right: 'the law which is to determine for each what land is mine or yours' can only originate 'from a will that is united *originally* and a priori'; such acquisition can thus only be rightful in civil society (6:267). According to Kant, however, the original acquisition in the state of nature is possible, and only possible ('needs'), by virtue of a permissive law: the agent in question has the 'favor of a law (*lex permissiva*)' on his side (6:267).

In the state of nature, the permissive law authorizes the obligation of others through the unilateral will of the first occupant of the thing in question. In virtue of the juridical postulate from § 2, mere juridical possession of things, which are one kind of external object of the faculty of choice, must be possible. Since we are not originally in possession of things, an original *acquisition* must be possible for this to have effect. Original acquisition, however, can only occur unilaterally, through first acquisition, since otherwise it would be a derivative acquisition, which would in turn presuppose the possession of the thing to be transferred. Original acquisition through a unilateral act must, hence, be possible. The permissive law grants this acquisition.

However, the permissive law in question qualifies the right of the agent who originally acquires a thing. The acquisition must take place in

conformity with the idea of the general will (see 6:259–60, 6:268) and it can only happen in the state of nature and thus only until – and in conjunction with the willingness not to resist – the establishment of the juridical condition, that is, the state. As Kant emphasizes, the 'favor' granted by the permissive law 'does not extend beyond the point at which *others* (participants) consent to its establishment', namely the juridical condition (6:267). Prior to the foundation of the state, the rights of the first occupant are merely provisional; only within the juridical condition can they be peremptory (6:267, 264; cf. 256–7).

Of the different cases of permissive laws in the *Doctrine of Right*, the case in § 16 bears the most resemblance to the cases in *Perpetual Peace*. The permission here refers to a condition that pure practical reason obliges us to overcome and is thus subject to a temporal condition. And just as in *Perpetual Peace*, for example, the toleration of unlawful possessions under international law is only permitted with a view to restitution, so too, in RL § 16, the act of unilateral first occupation of a piece of land is only permissible insofar as it is a prerequisite for possession of property.[26]

8.5.3 Legitimating the Possession of Persons: The Permissive Law in RL § 22

The third instance where Kant makes use of a permissive law is the acquisition of other persons – 'wife' or 'husband', 'children', and 'servants' (6:280; 6:277) – in the form of a personal right in the manner of rights to things ('auf dingliche Art persönliches Recht', which Gregor translates as 'rights to persons akin to rights to things'). Such an acquisition, Kant states, is made possible by the 'favor' of a 'natural permissive law' (6:276).[27] Since the personal right in the manner of rights to things allows the agent to act towards the other person in a certain way, namely, as if the other person were a thing, one might think that the permissive law in question would

[26] Oliver Laschet also highlights this point (*Metaphysik und Erfahrung in Kants praktischer Philosophie*, Freiburg: Alber, 2011, 278).

[27] Why is this law called 'natural'? I submit that Kant merely points out that the permissive law belongs to natural law. For Kant, marital, parental, and domestic right are a priori juridical institutions that can exist in the state of nature. In this sense, they are based on a permissive law, which, as a '*natural*' law, 'can be recognized [. . .] a priori by reason' (MS, Introduction, 6:224). The explicit qualification of the permissive law as 'natural' in RL § 22 stresses that the conditions that make the domestic relationships morally legitimate (and that are grounded in our very personhood, namely, humanity in our own person) must not be subject to arbitrary state legislation, but are grounded in natural law. For a detailed discussion of the status of the 'natural' permissive law in RL § 22 see Brecher, *Vernunftrecht und Verdinglichung*, ch. 8, sect. 4.

indeed permit a violation of the general prohibition against treating another person as a thing, thus condoning certain violations of the other person's humanity. The permissive law in § 22 might thus be taken as a case in point for the common reading of permissive laws as allowing or condoning morally impermissible actions. However, as I will sketch out, this is not the case.

Kant defines the personal right in the manner of rights to things as the right 'of possession of an external object *as a thing* and use of it *as a person*' (6:276). The right thus has two components, possession and use of the other person, and it is only the possession of the other person that obtains in the manner of rights to things. Thus, Kant argues, the agent can fetch back the other person if he or she has 'gone astray' and the agent can vindicate the other person from any third party in whose possession the person might be (6:278, 282, 284; 6:361). It is because of this legal capacity that Kant, when he introduces the permissive law in question, states that the basis of such a right to another person must lie 'beyond any rights to things and any rights against persons' (6:276): it is the right of humanity, Kant argues, that provides this basis and from which the permissive law in question 'follows' (6:276).

Humanity – namely, the property of a human being to be a free rational being and thus a person (6:239) – limits the extent to which we can make use and dispose of our own person as well as that of others. The use a person makes of herself or of others must always conform with her own personhood and that of others, respectively (6:270). From the fact that the normative basis of personal rights in the manner of rights to things is the right of humanity it should be clear that the permissive law that grants the acquisition of such rights cannot be meant to permit wrongful actions. Rather, the permissive law attaches certain conditions to the possession of one's spouse, children, and household servants that indeed guarantee the conformity with the personhood of the persons involved. That is, in the form of the permissive law following from the right of humanity, while practical reason enables the legal possession of one person by another it at the same time ensures that the persons are *not* treated like things.

In the following, I will provide a brief sketch of how the permissive law in RL § 22 enables the acquisition of another person by imposing requirements both on the possession and on the associated use of the other person in terms of compatibility with their humanity. In the individual sections of The Right of Domestic Society, Kant emphasizes that practical reason clearly delineates what is permissible, that is, in conformity with the right of humanity, from what is impermissible, (i) in sexual relationships, (ii) in the parent–child relationship, and (iii) in the relationship of master and servant.

(i) Our humanity limits the extent in which we can make use of our own person, and this includes the use we make of our body. Thus, according to Kant, the right of humanity in our own person rules out all forms of sexual intercourse in which agents make themselves into a mere object of pleasure for the other, as this would amount to treating humanity as a thing (6:278). According to Kant, this problem indeed pertains to all relationships that fall short of being a monogamous and lifelong marriage, for as Kant argues, only exclusive and permanent relationships can avert the problem of sexual objectification that our sexual desire naturally gives rise to (6:277–8).[28] Because marriage alone eschews sexual objectification and thus conforms with the right of humanity it is the only 'sexual union [. . .] according to the *law*' (6:277), that is, according to 'pure reason's laws of right' (6:278). Only in establishing a marriage can persons, therefore, acquire each other as spouses in terms of the right to persons in the manner of rights to things. All non-marital sexual relationships, including polygamy and concubinage, Kant argues, cannot be legally valid because they necessarily involve sexual objectification; in the case of such relationships the spouses do therefore not acquire rights to each other, making the relationships legally 'null and void' (6:278–9). By permitting the acquisition of another person as a spouse only in marriage, the permissive law clearly confines the legal powers that it confers on agents to certain conditions. Rather than permitting acts that would run counter to humanity and the personhood of the persons involved, the permissive law indeed specifies that legally valid sexual relationships have to conform to the right of humanity; it is thus based on the normatively antecedent prohibition, established by reason, not to treat persons as things or mere means (6:270; 6:236).

(ii) We find a similar argument in Parental Right. As Kant makes clear, the right of parents to their children is limited such that the parents' power over their children may only serve to maintain, raise, and educate the children. In particular, parents may not treat their children like pieces of property that could be mutilated, destroyed, consumed, or alienated (6:280–2), and their right automatically ceases when the children reach the age of majority (6:282). As Kant argues, the parents' right, both in terms of personal right and in terms of right in the manner of rights to things, is grounded in the parents' duty towards their children: because the parents through their act of procreation have brought a new person into

[28] For a detailed account of Kant's theory of sexual objectification and his conception of marriage see Brecher, *Vernunftrecht und Verdinglichung*.

the world without her consent, they are required to care for this person until she can do so on her own (6:280–1). Indeed, not doing so would amount to treating the child as a thing, thereby violating the child's humanity. As Kant explains, it is the parents' duty that leads to the acquisition of their rights to the child, and it is this duty that in particular gives rise to parents' right to 'handle' their children, including the right to reclaim them from any third parties and, if necessary, to bring them back under their own control by force (6:281). Hence, while the permissive law establishes the right of parents to their children as a right to a person in the manner of rights to things, it on the one hand grounds this right in the children's humanity and, on the other, limits the parents' handling of their children to conformity with the children's status as persons.

(iii) Similarly, the master's power over his domestic servants is limited in that 'he can never behave as if he owned them (*dominus servi*)' (6:283). For instance, the labour of the servants, that is, their use by the master of the house, may not amount to consumption. In this respect, domestic servants have the right to judge the master's treatment of them and they may report violations of their rights, although, according to Kant, they may not leave the household on their own authority (6:283; 6:284). Furthermore, the employment relationship cannot be for life in a strong sense, but it must always be possible to terminate the contract (6:283). The acquisition of domestic servants is thus only possible insofar as the right to freedom of the servant, namely his humanity, is preserved. This distinguishes a contract for domestic services from the conditions of serfdom or slavery, which as Kant points out, are null and void (6:283). So in this case, too, the permissive law makes possible a certain type of legal relation, which it subjects to strict conditions, and it does so with reference to a normatively antecedent prohibition.