Duties Towards Oneself and Self-Regarding Actions in the System of Reciprocal Duties

Deberes contraídos con uno mismo y acciones relacionadas con uno mismo en el sistema de deberes recíprocos

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Abstract: In this article, we aim to examine the relationship between behaviors that are exclusively governed by internal legislation and those that are also subject to external legislation. The former are governed exclusively by prima facie duties towards oneself, while the latter establish the scope of prima facie duties towards others. We propose that the sphere of duties towards oneself serves as the basis for the entire system of reciprocal duties. The self-determination of the individual constitutes the cornerstone of a system of duties and rights across various levels or corresponding to the individual, social, and public spheres. Duties towards oneself allow for the evaluation of options in the cognitive process of self-regulation of the individual. From those premises, rational individuals can determine their own ends and exercise free will. This internal process is expressed in the world of the senses through behavior, which may include acts relating to oneself in the private sphere or acts relating to others in the social and public spheres. Therefore, their effects are not limited to the internal sphere but are part of complex reciprocal relationships.

Keywords: reciprocal duties; self-regarding acts; principle of reciprocity; duties towards others; free will.

Resumen: En este artículo, nos proponemos examinar la relación entre las conductas regidas exclusivamente por la legislación interna y aquellas sujetas también a la legislación externa. Las primeras se rigen exclusivamente por deberes *prima facie* hacia uno mismo, mientras que las segundas establecen el alcance de estos deberes hacia los demás. Proponemos que la esfera de los

deberes hacia uno mismo sirve de base para todo el sistema de deberes recíprocos. La autodeterminación del individuo constituye la piedra angular de un sistema de deberes y derechos en diversos niveles o correspondientes a las esferas individual, social y pública. Los deberes hacia uno mismo permiten la evaluación de opciones en el proceso cognitivo de autorregulación del individuo. A partir de estas premisas, los individuos racionales pueden determinar sus propios fines y ejercer el libre albedrío. Este proceso interno se expresa en el mundo de los sentidos a través de la conducta, que puede incluir actos relacionados con uno mismo en la esfera privada o actos relacionados con otros en las esferas social y pública. Por lo tanto, sus efectos no se limitan a la esfera interna, sino que forman parte de complejas relaciones recíprocas.

Palabras clave: deberes recíprocos; actos propios; principio de reciprocidad; deberes hacia los demás; libre albedrío.

I. Introduction

According to Kant, ethics is characterized by internal legislation that occurs through the autonomous determination of an individual's maxim of will. In contrast, the legal system (Recht) is the framework that governs external relations between individuals insofar as their actions can affect each other.[1] Fichte refined this idea. The concept of law presupposes two necessary conditions. In first place, a group of rational beings find themselves in a social sphere. Only in this case is law possible. If no such social sphere exists, then everyone can follow their own understanding and will. In second place, in this common sphere, there must be the possibility that the freedom of one person interferes with that of another. This interference can be remedied only by the legal system. If there is no possibility of interference, then there is no law.[2]

Kant classifies the duties to oneself within the field of ethics, which is separate from the legal system. This dichotomous scheme is characteristic of deductive logic based in a priori principles; a distinction is made between opposing concepts: "...of every A, the opposite is not A".[3] However, this article proposes establishing relationships that allow for the integration of concepts, forming

[1] Immanuel Kant, *Die Metaphysik der Sitten. Metaphysische Anfangsgründe der Tugendlehre*, in Kant`s gesammelte Schriften 230 (hg. von der Königlich Preußischen Akademie der Wissenschaften, Band VI, 1914).

[2] Johann Gotilieb Fichte, Rechtslehre: vorgetragen von Ostern bis Michaelis 1812 7 (Felix Meiner Verlag, 1980).

[3] Immanuel Kant, Immanuel Kants Logik: Ein Handbuch zu Vorlesungen. § 113 (Königsberg, Bey Friedrich Nicolovius, 1800).

thus a reciprocal duties system, where ethics and law coexist. We aim to understand the complex interplay between situations determined solely by internal legislation in the sphere of prima facie duties toward oneself and situations that also admit external legislation, which establish the content and scope of prima facie duties toward others. First, we ask what place duties toward oneself have within a holistic system of reciprocal duties. We will consider Kant's moral doctrine from the perspective of his predecessor, Pufendorf, his contemporaries, Humboldt and Fichte, and the evolution of the theory of self-regarding acts of Mill and Feinberg.

In this article, we aim to examine the relationship between behaviors that are exclusively governed by internal legislation and those that are also subject to external legislation. The former are governed exclusively by prima facie duties towards oneself,[4] while the latter establish the content and scope of prima facie duties towards others. We will maintain that the sphere of duties towards oneself serves as the basis for the entire system of reciprocal duties. The self-determination of the individual constitutes the cornerstone of a system of duties and rights across various levels corresponding to the individual, social, and public spheres. From those premises, rational individuals can determine their own ends and exercise free will. This internal process is expressed through a person`s behavior, which may include acts relating to oneself in the private sphere or acts relating to others in the social and public spheres. Therefore, the effects of an individual`s action are not limited to the internal sphere but are part of complex reciprocal relationships regarding rights and duties towards others.

In chapter 1, we will study the concept of prima facie duties towards oneself and their relationship with the free will of the individual. In chapter 2, we will examine the role of duties towards oneself within the framework of jural relations. We will argue that an individual's will, free from external coercion, is a fundamental component of individual rights. From this perspective, subjective rights can be seen as the external expression of duties towards oneself. Once an individual has autonomously chosen their maxim of will, the function of individual right acts as the execution of that will and is directed against the social will, to make the individual will a prima facie duty of all people. From a factual perspective, the above process may be divided into two scenarios: non-conflictual relationships and conflictual relationships. We will distinguish between non-conflictual jural relationships, which contain elements that do not admit or require external legislation, and conflictual jural relationships, which must be resolved to reestablish a peaceful state of no-right.

In chapters 3 and 4, we will review several problematic aspects of the doctrine of self-regarding acts, based on case studies. We will analyze the relationship between the concept of self-regarding acts and the model of spheres. We will distinguish between the intimate sphere (as the core of the private sphere), in which the individual acts as the sole and final judge of acts referring to himself, and the social and public sphere, in which conduct is subject to duties towards others, based on criteria of justice derived from the social contract. In

[4] We will use Pufendorf's division between duties towards oneself and duties to others.

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chapter 5, we will attempt to determine whether and to what extent the doctrine of self-regarding acts is applicable to contractual relationships. The reference to duties towards oneself and towards others also serves to delineate the subject matter; we will not address issues relating to subjects who do not have full capacity to act rationally and who, therefore, cannot be the bearers of duties.

II. Duties Towards Oneself

The prima facie duties towards oneself are the reasons that allow the conscience to act as an internal judge in order to comply with the duty. This process constitutes the initial step of a system of duties and rights based on the principle of autonomy. Pufendorf first distinguishes between the divine, natural and civil spheres, which may overlap and conflict.[5] Natural law is divided into two categories: the duties that individuals owe to themselves and the duties that individuals must exercise towards others. The content of the duties towards oneself is "to put himself into the best condition he can, and to obtain all the Happiness of which he is innocently capable".[6]

According to Pufendorf, the duties of the individual towards himself have a twofold foundation. On the one hand, such duties are rooted in "that love which every Man by Nature hath of himself".[7] However, these responsibilities extend beyond mere egoistic considerations. Given that each person is not born for himself alone but has been created by God to become a valuable member of human society, there is a responsibility to cultivate and improve those gifts and to contribute to the benefit of human society to the greatest extent possible.[8] From this perspective, these duties stem from religion and sociability. Therefore, a connection is formed between the personal sphere of the individual and the social sphere of the citizen. This connection challenges the dichotomy relationship between personal interests and social interests. It serves as a point of reference and overlap between these two spheres of life.[9]

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[5] Michael Seidler, *Introductory essay,* in Samuel Pufendorf's On the natural state of men: The 1678 Latin edition and English translation 22 (Michael Seidler ed. and trans., Edwin Mellen, 1990).

[6] Samuel Pufendorf, The whole duty of man according to the law of nature 56 (R. Gosling, 1735).

[7] *Id.*; Samuel Pufendorf, *Officia Hominis & Civis, in* Samuel Pufendorf, Gesammelte Werke 133 (Wilhelm Schmidt-Biggemann ed., Band 2, 1997) (1673).

[8] Pufendorf, *supra* note 6, at 56; Pufendorf, *supra* note 7, at 133.

[9] Raz has rejected the dichotomy between self-interest and the moral demands of others and with it the dichotomy between egoism and altruism. The conflict between individual welfare and the common good coexists with an essential mutually sustaining connection between them: "Instead of essentially competing with the well-being of the individual, the common good is presupposed by it." Joseph Raz, *Rights and Individual Well-Being*, in Ethics in the Public Domain. Essays in the Morality of Law and Politics 57, 58 (Clarendon Press, 1992).

To become a useful member of human society, an individual has the duty to take the utmost care of his body and soul. He must be instructed so that he can form a just opinion about everything pertaining to his duty and office.[10] We must use our utmost care and endeavor to procure and preserve our reputation as good and honest men. If this reputation is affected by the lies and slander of wicked men, we must do everything in our power to dispel them.[11] Everyone should learn something appropriate to their ability and status, so they do not become useless to himself and to society.[12]

Duties to oneself also occupy a central place in Kant's system of duties:

> For suppose there were no such duties: Then there would be no duties whatsoever, and so no external duties either. For I can recognize that I am under obligation to others only insofar as I at the same time put myself under obligation, since the law by virtue of which I regard myself as being under obligation proceeds in every case from my own practical reason; and in being constrained by my own reason, I am also the one constraining myself".[13]

Next, we will review objections to the concept of duties to oneself (1) and distinguish between their individual and social obligatoriness (2). Then, we will conclude with their prima facie character (3) and highlight their relationship to the valuation of conduct in both the private and social spheres (4).

1. *An Apparent Contradiction*

Kant recognized the relevance of clarifying the apparent contradiction inherent in the concept of duties towards oneself. He observed that such an expression could be interpreted as an obligation in which the condition of active and passive subject, who demands and who must fulfill is united in the same person. At the same time the passive subject could be released from the obligation at any time, so that he would not be obligated. [14] Similar objections have been raised by Marcus Singer. Singer rejected the possibility of the existence of a right against oneself and argued that the power to release oneself is incompatible with the concept of duty.[15] However, Singer notes that duties to oneself are not socially binding unless they are also duties to others.[16]

To address this apparent contradiction, Kant first emphasizes the fundamental role of practical reason, from which derives the law by virtue of which the

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10 Pufendorf, *supra* note 6, at 57; Pufendorf, *supra* note 7, at 133.

11 Pufendorf, *supra* note 6, at 62; Pufendorf, *supra* note 7, at 135.

12 Pufendorf, *supra* note 6, at 136.

13 Immanuel Kant, *supra* note 1, at 418.

14 *Id.*

15 Marcus G. Singer, *On Duties to Oneself,* 69 Ethics 202 (1959). http://www.jstor.org/stable/2379349.

16 *Id.*

subject can consider itself bound to itself and to others.[17] Kant distinguishes between the aspect of a person that is morally legislative and the aspect that is morally constrained.[18] On the one hand, a person is a sensory being and, on the other hand, a rational being. This being, endowed with inner freedom, is capable of being bound and can recognize a duty to itself.[19]

Although consciousness is an internal process, philosophers have used a second-person perspective to refer to it. In the metaphor of internal judgment, consciousness determines whether behavior conforms to the individual's established sense of duty. According to Pufendorf, conscience is accompanied by peace or uneasiness of mind depending on whether "it makes us expect the peace or anger of the legislator and the benevolence or hostility of others toward us."[20] Kant concurs with Pufendorf. It would be illogical for the court to be under the sole authority of a single person, as this would result in the accused individual always losing.[21] Similarly, Feinberg draws inspiration from the metaphor of self-government in Plato's Republic. In Feinberg's democratic model, government is entrusted to "King Reason", who functions as a traffic cop, ensuring that desires move in an orderly fashion towards their respective destinations without congestion or collisions.[22] For Darwall, moral agency refers to an individual's capacity to adopt a second-person perspective, making judgments, and regulating their behavior.[23] From this perspective, the concept of moral obligation suggests that the obligated individual has the capacity to hold themselves accountable as a representative person.[24]

2. *Enforceability of Duties Towards Oneself*

External coercion is not an inherent element of the concept of duty. Kant distinguished two elements of all legislation. The first is a law representing an objectively necessary action. In other words, such law makes the action a duty. The second element is an artificial incentive that connects the law to a ground

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[17] Immanuel Kant, *supra* note 1, at 418.

[18] Lara Denis, *Kant's Ethics and Duties to Oneself*, 78 Pac. Phil. Q. 321, 335 (1997). https://doi.org/10.1111/1468-0114.00042.

[19] Immanuel Kant, *supra* note 1, at 418

[20] Sam. L. B. A Puffendorf, *De Jure Naturae et Gentium: Libri octo (Buch 1)* 541 (Ex Officina Knochiana, 1744) (1672).

[21] Immanuel Kant, *supra* note 1, at 438.

[22] Joel Feinberg, Harm to Self: The Moral Limits of the Criminal Law 41 (Oxford University Press, 1989).

[23] Stephen Darwall, *Moral Obligation: Form and Substance*, in Morality, Authority, and Law: Essays in second-personal ethics 40, 47 (Oxford University Press, 2013).

[24] Stephen Darwall, *Introduction, in* Morality, Authority, and Law: Essays in second-personal ethics I, XIII (Oxford University Press, 2013).

for each individual to determine a choice subjectively. Ethical law combines necessity and motive. Duties toward oneself are not enforced by external coercion, nor do they correspond to the rights of others. They are based only on "free self-constraint".[25] In contrast, duties towards others (duties of right) do admit external coercion. The ability or power to free oneself from duties towards oneself is available to the obligated subject, unlike duties of right.

3. *Prima Facie Duties Towards Oneself*

In contrast to Kant's view, Pufendorf asserts that lying is only wrong when the other party has a right to understand the matter accurately and we have a duty to clearly express our intentions. However, an individual is not held accountable for lying when he employs a false narrative for a good purpose, such as entertaining children, protecting the innocent, appeasing an angry man, comforting someone who is suffering, or cheering someone who is afraid.[26]

Considering these circumstances, Ross identified the presence of a plurality of principles[27] or reasons that determine the qualification of a given conduct as either correct or reproachable. This enables a resolution of an emerging conflict between duties. Therefore, Ross affirmed the need to distinguish between prima facie duties and actual or absolute duties.[28] In contrast to rights and duties proper, the enforceability of prima facie rights and duties can be assessed on a gradual scale and weighed against the eventual intervention of some other, stricter prima facie obligation.[29] Ross explained that the term "duties" was chosen instead of "rights" because the latter have the disadvantage of posing the issue from the point of view of the persons affected by the action. "Rights" would be appropriate only for duties towards other persons. However, "duties" more accurately describes the relationship between the agent and his will to improve his own character or his own intellect, i.e., his duties towards himself.[30]

Pufendorf recognized the possibility of two conflictual prima facie duties. In such cases, it is reasonable to prioritize the one that can be justified as the better or more useful of the two.[31] This is exemplified by the scenario of self-defense,

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[25] Immanuel Kant, *supra* note 1, at 383.

[26] Pufendorf, *supra* note 6, at 128.

[27] W. David Ross, Foundations of ethics: The Gifford Lectures delivered in the University of Aberdeen, 1945-6 88 (Oxford at the Clarendon Press, 1951) (1939); Bert Heinrichs, *Single-Principle Versus Multi-Principles Approaches in Bioethics*, 27 J. Applied Phil. 72, 73 (2010). https://doi.org/10.1111/j.1468-5930.2009.00474.x

[28] David Ross, The Right and the Good 28 (Oxford University Press, 2003) (1930).

[29] Ross, *supra* note 27, at 271.

[30] Ross, *supra* note 27, at 85.

[31] Samuel Pufendorf, On the duty of man and citizen according to natural law *[De officio hominis et civis]* 111 (James Tully ed., Michael Silverthorne trans., Cambridge University Press, 1991) (1673).

where the duties of self-preservation and non-interference conflict.[32] Kant admitted the possibility of a collision of grounds of obligation (rationes obligandi) in order to establish which duty expresses the objective, practical necessity of certain action, and thus, when an act is in accordance with or contrary to the duty. If two similar reasons oppose each other, then the stronger reason to obligate retains the position (fortior obligandi ratio vincit).[33] Scanlon eventually employs the term "prima facie reason".[34] According to Phillips, Ross' concept of prima facie duties can be redefined in terms of normative reasons if it includes moral and selfish reasons.[35] Hohfeld recognized the distinction between privileges or liberties and rights. Freedom is defined as the privilege to act or refrain from action, and the existence of a right "is ultimately a question of justice and policy; and it should be considered, as such, on its merits".[36]

4. *Rationality and Free Choice (Freie Willkür)*

In Pufendorf's work, the concept of human dignity is intricately tied to the social contract theory. The rational nature of all individuals endowed with the light of intellect makes it possible to consider each of us as members of human society and thus governed by social contract, the rules of which can be recognized by all.[37] From natural reason flows the general guilt of people, through which they learn to behave well toward one another in human society.[38] The understanding of natural law can be achieved through the light of reason, considering that "the general and most useful points thereof are so plain and clear, that they initially compel agreement and become firmly established in the minds of people, that nothing can eradicate them afterwards."[39] Pufendorf defines the capacity for rational self-determination as the ability to "understand the general precepts of the natural law, which are those most frequently used in common life, and to perceive how they are compatible with the rational and moral nature of man."[40] Pufendorf's perspective aligns with that of Hobbes,

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[32] *Id.* at 48.

[33] Immanuel Kant, *supra* note 1, at 224; On the relationship between Kant's grounds of obligation and Ross's prima facie duties, see Jens Timmermann, *Kantian Dilemmas? Moral Conflict in Kant's Ethical Theory*, 95 Archiv für Geschichte der Philosophie 36, 47 (2013). https://doi.org/10.1515/agph-2013-0002; Richard McCarty, *Moral Conflicts in Kantian Ethics,* 8 *History of Philosophy Quarterly* 65 (1991). http://www.jstor.org/stable/27743963

[34] T. M. Scanlon, What We Owe to Each Other 65 (Harvard University Press, 2000).

[35] David Phillips, Rossian Ethics: W. D. Ross and Contemporary Moral Theory 37 (Oxford University Press, 2019).

[36] Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L. J. 16, 36 (1913). https://doi.org/10.2307/785533

[37] Pufendorf, *supra* note 20, at 40.

[38] Samuel Pufendorf, *Vorrede des Herrn von Pufendorff* 101, *in* Gesammelte Werke. Bd. 2. De officio (Gerald Hartung Hrsg., Akad. Verl, 1997) (1673).

[39] Pufendorf, *supra* note 6, at 41.

[40] Pufendorf, *supra* note 20, at 40.

recognizing the capacity to comprehend natural law as the pivotal factor in assessing civil capacity. "No man of mature age and endowed with reason is so stupid as to be incapable of understanding the general precepts of the natural law".[41]

The rational nature of man is the foundation for his moral freedom, and from this, the concept of equality and the freedom of all human beings is derived.[42] Pufendorf defines freedom as "the intrinsic faculty of doing or omitting what one judges for oneself".[43] While slaves are only permitted to engage in tasks with the authorization of their masters, free citizens are autonomous in their own actions.[44] Those in a natural state have not placed their will under anyone else's authority. Rather, their actions are guided solely by their own judgment, adjusted to the natural law.[45] If an individual places significant trust in the counsel of another whom they perceive as more knowledgeable, or if the other voluntarily offers guidance, perhaps the latter's counsel will become more valuable to the individual. However, the ultimate decision regarding one's personal affairs rests with the individual.[46] This concept is also central to Kant's conception of the innate right to freedom. Freedom can be defined as "independence from being constrained by another's choice (Willkür)", insofar as it can coexist with the freedom of any other according to a universal law.[47]

The theory of will is rooted in this concept of freedom. A subjective right is defined as the power or sphere of the will of the individual.[48] In our opinion, the determination of ends, grounded in reasons for duties towards oneself, is inextricably linked to the will, which is intrinsic to subjective rights and serves as the foundation for the entire system of reciprocal duties. The internal process of autonomous determination of the individual's maxim of will is expressed externally through conduct protected by the right of freedom. While these two concepts are interconnected, the distinction between them is decisive for the Kantian differentiation between ethics and law (Recht). The concept of individual rights pertains exclusively to the external and practical relationship between two parties, namely the reciprocal relationship between one's choice

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41 Pufendorf, *supra* note 20, at 40.

42 Hans Welzel, Die Naturrechtslehre Samuel Pufendorfs: Ein Beitrag Zur Ideengeschichte des 17. und 18. Jahrhunderts 6 (Walter de Gruyter, 2012); Albrecht Randelzhofer, Die Pflichtenlehre bei Samuel von Pufendorf: Festvortrag gehalten am 2. Dezember 1982 im Kammergericht aus Anlass der Feier zur 350. Wiederkehr seines Geburtstages in Anwesenheit des Herrn Bundespräsidenten 27 (Walter de Gruyter,1983).

43 Pufendorf, *supra* note 20, at 142.

44 Samuel Pufendorf, *On the natural state of men*, *in* Samuel Pufendorf's 'On the Natural State of Men'. The 1678 Latin Edition and English Translation 109 (Michael Seidler ed. and trans., Lewiston, 1990) (1678).

45 *Id.* at 120.

46 *Id.* at 120.

47 Immanuel Kant, *supra* note 1, at 237.

48 Marietta Auer, *Subjektive Rechte bei Pufendorf und Kant: Eine Analyse im Lichte der Rechtskritik Hohfelds*, 208 Archiv Für Die Civilistische Praxis 584, 594 (2008). http://www.jstor.org/stable/40996023

and the other's.[49] The internal process of determining ends produces external effects regulated by law, but not the other way around; law cannot regulate the internal process. This establishes a standard for differentiating between the private sphere of the individual and the social sphere of the citizen.[50] This criterion serves as the basis for immunity from external coercion in self-regarding acts. As we will discuss later, this is an objective area of non-law.

The individual right then serves as the execution of the will. According to Kant,

> When I declare (by word or deed), I will that something external is to be mine, I thereby declare that everyone else is under obligation to refrain from using that object of my choice, an obligation no one would have were it not for this act of mine to establish a right".[51]

The act of choice is mandatory, based on the principle of reciprocity, which means that "the limitation that I place on the actions of others in relation to myself implies a like restriction of my actions in relation to them".[52] This creates an internal obligation that corresponds to the external obligation.[53] In contrast to the will of the individual Kant conceives the existence of an a priori unified will (vereinigten Wille)[54] or collective-general (common) will (kollektiv-allgemeiner (gemeinsamer) Wille).[55] It can be affirmed a priori that the equivalent element to the will in the individual sphere is the social will in the social sphere, in the same way that individual interests are equivalent to social interests[56] and the individual rights to social or societal rights. In this way, the individual right is directed against social will, making the individual will a prima facie duty of all.

III. From Duties Towards Oneself to Self-Regarding Acts

There is a close relationship between the idea of duties towards oneself and the theory of acts relating to oneself. Just as the performance of duties to oneself is not subject to social control, the doctrine of self-regarding acts asserts its total immunity from the law. Duties towards oneself are located in an internal sphere

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49 Immanuel Kant, *supra* note 1, at 230

50 Adela Cortina Orts, *Preliminary study*, in Immanuel Kant, La metafísica de las costumbres, at XXXIX (A. Cortina & J. Conill trans., Tecnos, 2008).

51 Immanuel Kant, *supra* note 1, at 256

52 Mary Gregor, Laws of Freedom 59 (Blackwell, 1963).

53 *Id.*

54 Immanuel Kant, *supra* note 1, at 263.

55 Immanuel Kant, *supra* note 1, at 256; Also in this sense, Friedrich Carl von Savigny, System des heutigen Römischen Rechts: Bd. 1 24 (Veit und comp., 1840).

56 Roscoe Pound, *A Survey of Social Interests*, 57 Harv. L. Rev. 1, 2 (1943). https://doi.org/10.2307/1334970

and are the object of a cognitive process. This process of self-regulation leads to the determination of the ends and the arbitrium in the individual will.

Wilhelm von Humboldt developed the harm principle as a mechanism for limiting State action. He argued that "any State interference in private affairs, not directly implying violence done to individual rights, should be absolutely condemned."[57] In his essay "Über den Gemeinspruch", Kant refers to the harm principle as a criterion for delimiting the private sphere. "[E]verybody may pursue his happiness in the manner that seems best to him, provided he does not infringe on other people's freedom to pursue similar ends".[58] Mill held that "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."[59]

The right to liberty protects the external expression from the internal process of determining duties towards oneself. From a factual perspective, the process could be followed by jural relations that can be either conflictual or non-conflictual. In situations involving conflictual relationships, two or more individuals propose ends that are incompatible with each other. Alvin's right of prima facie imposes on Beto a prima facie social duty that conflicts with his own duties to himself. Equally, Beto's prima facie right generates a conflict of Alvin's prima facie duties.

A non-conflictual jural relationship can arise in three circumstances. As we will see below, the first occurs in the absence of a factual conflict of rights, i.e., when all other members of human society recognize the validity of an individual's claim and conform their conduct to the performance of the required obligation. This scenario aligns with Hohfeld's concept of privilege. The second scenario of a non-conflictual jural relationship arises in so-called self-regarding acts. The third possibility corresponds to a legal relationship of right-duty in the Hohfelian sense. In this case, a prima facie conflict of duties has been resolved, and the existence of a definite relationship of rights and duties has been established.

1. *The Absence of a Factual Conflict of Rights*

According to Hohfeld, a privilege is the opposite of a duty. It is to refrain from doing something. «X» has the privilege of entering on the land; that is, he has no duty to stay off.[60] Alf Ross adds that freedom means that «X» has neither a

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[57] Wilhelm von Humboldt, The Sphere and Duties of Government 20 [Chap. 3 par. 1] (Coulthard Joseph trans., ed., John Chapman 1854) (1791).

[58] Immanuel Kant, *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis*, in Kant`s gesammelte Schriften 290 (hg. von der Königlich Preußischen Akademie der Wissenschaften, Band VIII, 1910) (1793).

[59] John Stuart Mill, On Liberty (Stefan Collini Ed., Cambridge University Press, 2012) (1859).

[60] Hohfeld, *supra* note 36, at 32.

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duty to do something nor a duty to abstain.[61] Hohfeld's argument, which draws on the analogy with legal relations of individual rights and legal duties, asserts that the correlative of a privilege is a "no-right". Therefore, "the correlative of X's privilege of entering himself is manifestly Y's "no-right" that X shall not enter".[62] Privilege is then the freedom to do something at will because there is no contrary right of another. However, since the freedom of «X» does not necessarily imply a duty of everyone not to interfere, Hohfeld rejects the possibility of claiming that the correlative of the freedom to do something is the duty of others not to interfere.[63]

Hohfeld's argument sought to refute the classical notion that the existence of freedom inherently entailed the imposition of a duty on others to refrain from interference.[64] In our analysis, we disregard the notion that an individual's liberty rights are established through a relationship with the State (State action doctrine). However, it does not constitute an immediate horizontal relationship with another individual. Instead, it is regarded as a relationship with all members of society or, as Kant would say, a collective-universal (common) will. It only establishes a mediate relationship with an individual as part of the collective.

However, the representation of the legal relation of the privilege of «X» to do «Z» as opposed to the no-right of «Y» to demand from «X» a contrary conduct «-Z» can lead to the error of supposing that we are dealing with an actual no-right, that is, the same type of no-right that is opposed to the legal right. Conversely, the legal right and the privilege belong to categories of a different nature.[65] While the legal right is part of an actual legal relationship, in which rules are established that regulate the conduct of two parties, the privilege is part of a prima facie jural relationship, in which the interests of the participants concur as principles or values. These prima facie rights are only considered definitive when there are no other, more compelling interests to consider.[66]

[Case 1: Right to exclude] Alvin is the owner of the land upon which his home is situated. He has demarcated the boundaries of his property with a fence and visible signs indicating that he does not wish to allow trespassers to enter. Alvin's property is located at the midpoint between Beto's residence and the city. Beto exercises caution and respect for Alvin's property by avoiding crossing it. We will assume that there is no social interest in allowing others to enter Alvin's property. All participants are competent adults, well informed, capable of acting rationally, and free from undue pressure.

In a non-conflictual relationship, Alvin's right to exclude others from his property is opposed (‹›) to Beto's no-right to enter the property. The absence of controversy in the procedural sense has led some authors to argue that this

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61 Alf Ross, On Law and Justice 198 (Oxford University Press, 2019).

62 Hohfeld, *supra* note 36, at 33.

63 *Id.* at 36.

64 Joseph William Singer, *The legal rights debate in analytical jurisprudence from Bentham to Hohfeld*, Wis. L. Rev. 975, 993 (1982).

65 Hohfeld, *supra* note 36, at 33.

66 Ross, *supra* note 27, at 271.

is not a true jural relationship.[67] However, this approach obscures a more complex scheme. This relationship is characterized by a combination of ethical and legal components.

The owner's right of defense is correlated with the duty of non-interference by others.[68] Hohfeld recognized that the structure of certain rights of freedom corresponds to in rem rights (multital rights).[69] Feinberg has demonstrated that, akin to property rights, rights of freedom function as rights of defense against duties of non-interference.[70]

The mediate correlation between the prima facie right to defense and the prima facie social duty of all to refrain from interference stems from the principle of reciprocity. Pufendorf refers to the reciprocal duties of each man towards each other: "what one Man may rightfully demand or expect from another, the same is due to others also (Circumstances being alike) from him".[71] Kant explains that in the declaration that something external is mine "...involves, however, acknowledging that I in turn am under obligation to every other to refrain from using what is externally his..." [MS:254].[72]

Among several *prima facie* duties towards himself, Alvin has chosen to exclude others from his property. This decision is equivalent to interference in the freedom of others. Beto does not demand a contrary right and refrains from crossing Alvin's property. Beto has a *prima facie* no-right to enter, either as an individual or as a member of society. This means he has a *prima facie* no-right of defense against Alvin's intervention. This leads to Alvin's prima facie social no-duty to refrain from excluding Beto. Thus, Alvin has a *prima facie* no-duty of non-interference.

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67 Regarding the discussion of whether legal liberties that are not accompanied by corresponding duties on others constitute a legal category, Singer, *supra* note 64, at 991.

68 On the principle of correlativity, see H. L. A. Hart, *Are There Any Natural Rights?*, 64 Phil. Rev. 175, 188 (1955), https://doi.org/10.2307/2182586; J. Raz, *Legal Rights*, 4 Oxford J. Legal Stud. 1, 20 (1984), https://doi.org/10.1093/ojls/4.1.1; Tom L. Beauchamp & James F. Childless, Principles of Biomedical Ethics 371 (Oxford University Press, 5th ed., 2001); Arthur Ripstein, Force and freedom: Kant's legal and political philosophy 109 (Harvard University Press, 2009).

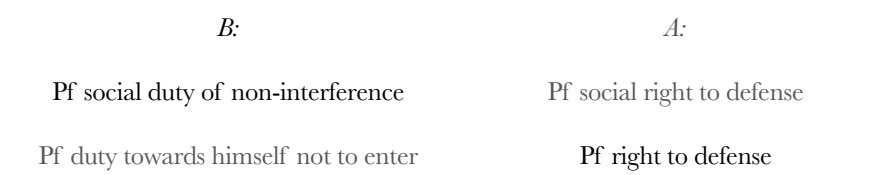
69 Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L. J. 710, 733 (1917), https://doi.org/10.2307/786270.

70 Joel Feinberg, *Duties, Rights, and Claims*, 3 Am. Phil. Q. 137, 139 (1966), http://www.jstor.org/stable/20009200; Joel Feinberg & J. Narveson, *The nature and value of rights*, 4 J. Value Inquiry 243, 249 (1970), https://doi.org/10.1007/bf00137935; Ripstein, *supra* note 70, at 69; Gregory S. Alexander & Eduardo M. Peñalver, Introduction to Property Theory 76 (2012).

71 Pufendorf, *supra* note 6, at 97.

72 Immanuel Kant, *supra* note 1, at 74.

Beto acknowledges the validity of Alvin's *prima facie* right. Among several *prima facie* duties to himself, Beto has chosen the mutual benefit of not interfering with the property of others. On the other hand, Alvin asserts that society should respect his decision. As a result of his internal process of self-regulation, Alvin has the *prima facie* right to defend his own ends. Alvin's right of defense does not stem from an individual contract, but rather from the principle of reciprocity inherent in the social contract. The owner's freedom to choose is an interest that members of a civilized society recognize as worthy of protection. As a member of civilized society, Beto has a *prima facie* social duty to refrain from interfering with the property of others. He has a *prima facie* duty of non-interference.



There is no conflict of duties. Alvin's *prima facie* duty to himself to exclude is opposed (‹›) by a *prima facie* social no-duty not to exclude. Beto's *prima facie* duty towards himself not to enter is opposed (‹›) by a prima facie social duty not to enter. There is no conflict of rights. As a result, we can affirm a mediated correlative relationship (~) between Alvin's *prima facie* right of defense and Beto's *prima facie* social duty of non-interference. The same is true for Beto's *prima facie* no-right to enter and Alvin's *prima facie* social no-duty to refrain from excluding Beto. This same scheme would apply in reverse. Suppose that, given that entering Alvin's property is the best route between Beto's residence and the city center, Beto chooses to enter Alvin's property (pf right of freedom), and Alvin decides not to interfere with Beto's freedom of choice (pf no-right).

2. *The Self-Regarding Acts*

Self-regarding acts refer to conduct that is carried out and only has effects within the sphere of privacy reserved for the individual. In Mill's words, it is the "sphere of action [...] comprehending all that portion of a person's life and conduct which affects only himself, or if it also affects others, only with their

free, voluntary, and undeceived consent and participation."[73] In this scenario, the individual's prima facie duties to himself are in opposition to the prima facie social no-duty towards others.

[Case 2: Voluntary intoxication] In his personal life, Alvin engages in alcohol consumption, which temporarily hinders his ability to perform tasks requiring rapid decision-making and physical agility («Z»). We will assume that his actions do not harm other individuals. Beto is worried about Alvin. He wonders if he can legally intervene and force him to change his habits. All participants are competent adults, fully informed, capable of acting rationally, and free from undue pressure.

While this behavior may have constituted a violation of a duty to himself,[74] its control lies solely with his own conscience. And, since it does not affect Beto's interests, Beto has a *prima facie* no-right to prevent or hinder Alvin from becoming intoxicated. Alvin has a *prima facie* social no-duty to refrain. The will of the active subject is opposed to a social no-duty.

A:	*B:*
Pf social no-duty to «-Z»	Pf social no-right of interference
Pf duty towards himself to «Z»	Pf no-right of interference

Alvin's *prima facie* right of defense derives from the determination of his own ends. From Beto's point of view, his concern for Alvin's well-being stems from his duty of beneficence, which is opposed to Alvin's right to self-defense and the social duty of noninterference. For Kant, the paternalistic beneficence of forcing another to be happy according to one's own concepts of happiness would be contrary to the legal duty to respect their freedom to make themselves happy according to their own choice.[75] As a result, all other things being equal, the individual right of Alvin is correlated with the social duty of Beto to not interfere.

B:		*A:*	
Pf social duty of non-interference	◀	Pf social right of defense	◀
▶ Pf duty towards himself to «-Z»	▶	Pf right of defense	▲

It can be concluded that society lacks the authority to impose prohibitions or obligations on conduct related to oneself. In these cases, the individual has a

[73] Mill, *supra* note 69, at Chap. 1, par. 12.

[74] Immanuel Kant, *supra* note 1, at 427.

[75] *Id.*, at 454.

social non-duty to refrain from pursuing his own ends. According to Kant, external legislation is only possible for duties of law (officia iuris), while in the case of duties of virtue (officia virtutis s. ethica), such legislation is not possible.[76] Mill distinguishes between the external relations of the individual, in which one is responsible to those whose interests are concerned or to society, and self-regarding acts, in which the conscience of the agent himself must take the place of the judge in a case that cannot be submitted to the judgment of his fellow men.[77]

In this instance, the relationship is analogous to that outlined in the section on the absence of a factual conflict of rights. The distinction lies in the fact that, in the absence of a factual conflict of rights, the act affects the freedom of others. The passive subject's no-right derives from their own self-regulation. Whereas in self-regarding acts, the no-right of all is the result of the active subject's conduct not significantly affecting other individual, social, or public interests.

3. *Conflictual Relationships*

Conflictual jural relationships arise from a factual conflict of prima facie opposing rights. In determining their own ends, Alvin and Beto desire something that is mutually exclusive. Both have chosen to do «Z», and their conduct expresses the exercise of a right of defense not to be prevented from doing «Z». This is a situation equivalent to the Hobbesian state of nature: "if any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies...".[78] Kant also recognizes that this is a factual relationship between one person and another, "insofar as their actions, as facts, can have (direct or indirect) influence on each other".[79] According to Fichte, the freedom of two rational beings cannot be in conflict with each other. Rather, a conflict between them only arises when one makes use of their freedom in a manner contrary to law and duty, with the intention of oppressing the freedom of another.[80] As a result, the factual conflict between *prima facie* opposing rights is followed by a conflict of *prima facie* social duties, by virtue of the social will, that is, a collective-universal (common) will.[81]

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[76] *Id.*, at 239.

[77] Mill, *supra* note 59, at Chap. 1, par. 11.

[78] Thomas Hobbes, Leviathan 190 (Ch. 13) (Noel Malcolm ed., Clarendon Press, 2012) (1651); Thomas Hobbes, Leviatán o la invención moderna de la razón 222 (Cap. XIII) (Editora Nacional, 1979) (1651); Daniel Eggers, Die Naturzustandstheorie des Thomas Hobbes: Eine vergleichende Analyse von|'The Elements of Law', ‚De Cive'und den englischen und lateinischen Fassungen des' Leviathan' 163 (Vol. 84) (Walter de Gruyter, 2008).

[79] Immanuel Kant, *supra* note 1, at 230.

[80] Johann Gotlieb Fichte, S*ystem der Sittenlehre nach den Principien der Wissenschaftslehre*, *in* Sämmtliche werke 300 (Vol. 10) (Veit und comp,1834) (1798).

[81] Immanuel Kant, *supra* note 1, at 256.

[Case 3: Dinner with friends] Alvin has organized a dinner party for friends. However, he has decided to exclude Beto based on discriminatory grounds. Beto insists on his right to be invited.

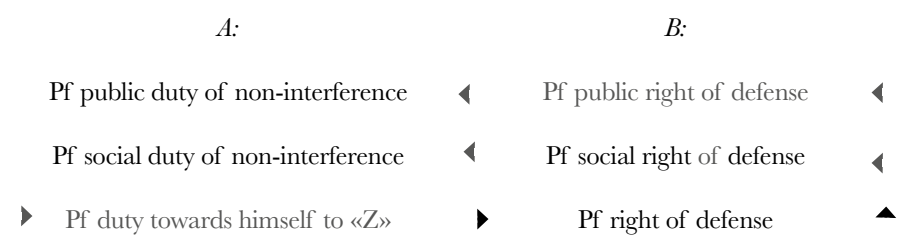
[Case 4: Private school] Alvin is the proprietor of a private school that has decided to exclude Beto on discriminatory grounds. Beto insists on his right to be admitted.

[Case 5: Private town] Alvin has decided to exclude Beto from a town he owns due to the nature of Beto's ideas. Beto insists on his right not to be prevented from expressing his opinion on sidewalks that are open to the public.

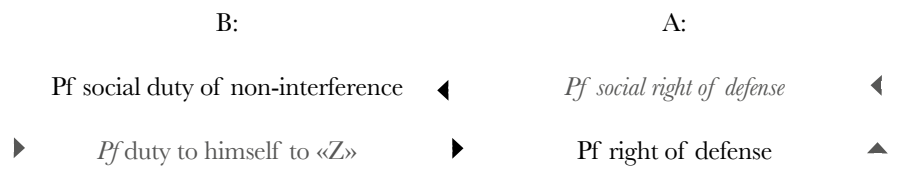
We will assume that Alvin's conduct does not affect any other social interest. All participants are competent adults, well informed, capable of acting rationally, and free from undue pressure.

In cases 3 and 4, Alvin's *prima facie* duty to himself to exclude others is opposed (‹›) to his own *prima facie* social duty not to interfere with Beto's *prima facie* right:

In Case 5, Alvin's *prima facie* duty to himself to exclude others, conflicts (‹›) with his own *prima facie* social duty not to interfere with Beto's *prima facie* right and with his *prima facie* public duty not to interfere with the free market of ideas. Beto has a right to defense as an individual, as a member of civilized society, and as a member of a democratic society:



And in cases 3, 4 and 5 Beto also faces a conflict of prima facie duties. Beto's *prima facie* duty to himself is opposed (‹›) to his own *prima facie* social duty not to interfere with Alvin's *prima facie* right to property:

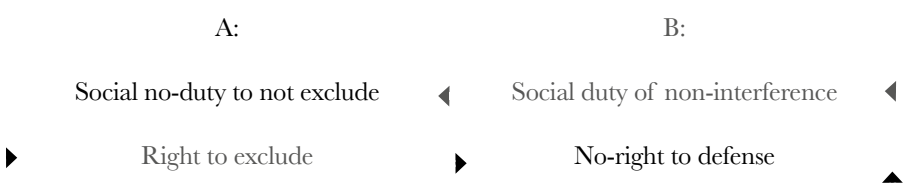


The conflict is resolved in the first instance in the internal forum through a judgment that weighs the conflictual duties. The result may also be subject to external review, as far as it does not refer only to a conflict of *prima facie* duties towards himself but to the determination of the fulfillment of social or public duties.

4. *Conflictual Relationships and Actual Rights*

The resolution of a conflictual jural relationship, through the determination of the actual rights and duties of the parties, gives rise to a non-conflictual legal relationship:

In his private sphere (Case 3), Alvin has an actual right to exclude Beto, despite Beto's insistence on being invited to a dinner with friends. According to the concurring opinion of Judge Harlan II in Peterson v. City of Greenville (1963), we must recognize the preferential value of Alvin's *prima facie* right to "...chose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations."[82] Alvin has a no-duty to refrain and the actual right to exclude Beto from his residence. Alvin's right is correlated (~) with Beto's duty to stay off the property and is opposed (‹›) to the Beto's social no-right to be invited.



In the social sphere (Case 4), Alvin has no right to exclude Beto from the private school he owns on discriminatory grounds and has a social duty to admit Beto.[83] Beto has an actual right to be admitted to Alvin's school and no duty to refrain from entering. Beto's right correlated with Alvin's duty to admit him, and it is opposed to Alvin's no-right to exclude Beto.

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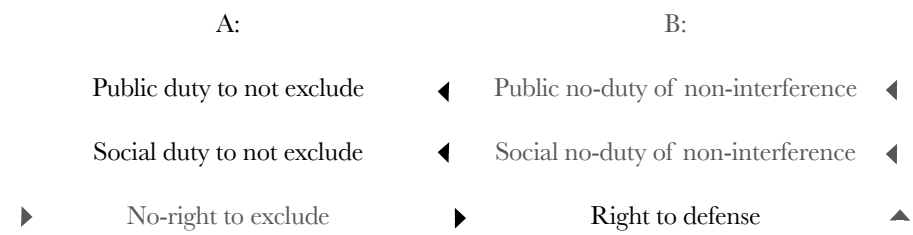
[82] Peterson v. City of Greenville, 373 U.S. 244, 250 (1963), *available at* https://supreme.justia.com/cases/federal/us/373/244/.

[83] Runyon v. McCrary, 427 U.S. 160 (1976), *available at* https://supreme.justia.com/ca-ses/federal/us/427/160/.

In the public sphere (Case 5), Alvin has no right to exclude Beto and a social and public duty to allow him to enter. Beto has an actual right not to be prevented from expressing his opinion on the sidewalks of a private town owned by Alvin,[84] and he also has no social duty to refrain. Beto's right to enter is correlated (~) with Alvin's duty to allow access to the property. It is also opposed (‹›) to Alvin's no-right to prevent expressive activities of public relevance in areas of free public access.



Actual rights and duties establish non-conflictual relationships. The right of the active subject is opposed to the no-right, and the duty of the passive subject is its correlate. This determination results from resolving a prima facie conflict of duties. In the private sphere, Alvin's duty to defend his privacy (>) prevails over his social duty of non-discrimination. In the social and public spheres, however, Alvin's duty to society and the public prevails over his duty to himself to defend his privacy. The holder of the actual right has the power to decide whether to enforce the obligation. However, as we have seen, will is not limited to freely disposing of the right; it has a broader function in determining ends through internal judgment.

5. *Results*

Duties toward oneself belong to a different category than social and public duties toward others. The former are binding only internally; the necessity of the action and motive are determined by ethical laws. They are imperfect duties. This is because they are not correlated with rights.[85] Instead, they are the inner

[84] Marsh v. Alabama, 326 U.S. 501 (1946), *available at* https://supreme.justia.com/cases/federal/us/326/501/.

[85] Pufendorf, *supra* note 6, at 111; John Stuart Mill, *Utilitarianism* 222, *in* Utilitarianism

face of a right. The latter are binding through external coercion according to legal laws. They are perfect duties because they are correlated with the social and public rights of everyone.[86] This refutes the objection to the correlation between duties and rights that refers to the existence of duties for which there are no corresponding rights.[87] If charity or benevolence are only internal duties[88] and not duties toward others, then the theory of correlativity cannot be objected to on the grounds that there are duties that do not necessarily imply rights.[89]

Non-conflictual jural relationships play a structural role in society. In a Hobbesian state of nature, where no one considers themselves bound by obligations unless an external power intervenes, it is difficult to imagine the state's coercive power being effective enough to maintain peace. There is no public force capable of monitoring everyone at all times and in all places. Furthermore, such a force would be undesirable. Additionally, there is no judicial system capable of judging and punishing if we could not count on citizens preferring the mutual benefits of a civilized society to their immediate interests. The difference between non-conflictual and conflictual relationships is that the former are resolved internally by the parties involved, while the latter require external social intervention. The latter has been the focus of interest by jurists, while philosophers have focused on the former.

IV. From Self-Regarding Acts to the Model of Spheres

The theory of self-regarding acts is a refined development of Pufendorf's classification criterion between the duties of an individual to himself and his duties to others. This theory can also be considered a mechanism for distinguishing between private and social spheres. Among the criteria for delimitation, the element of harm occupies a prominent place. According to Pufendorf, the duty of non-interference is the most important of the reciprocal duties toward others: "It is also the most necessary, because without it Human Society cannot be preserved".[90]

AND ON LIBERTY: INCLUDING MILL'S' ESSAY ON BENTHAM AND SELECTIONS FROM THE WRITINGS OF JEREMY BENTHAM AND JOHN AUSTIN (Blackwell Publishing Ltd, 2d ed., 2003) (1863).

86 H. L. A. HART, *Legal rights, in* ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL PHILOSOPHY 168, 178 (OUP Oxford, 1982); MATTHEW H. KRAMER, *Rights Without Trimmings, in* A DEBATE OVER RIGHTS: PHILOSOPHICAL INQUIRIES 59 (Oxford University Press, 2000).

87 CARL WELLMAN, REAL RIGHTS 183 (Oxford University Press, 1995); CARL WELLMAN, AN APPROACH TO RIGHTS: STUDIES IN THE PHILOSOPHY OF LAW AND MORALS 2 (Springer Science & Business Media, 1997).

88 Immanuel Kant, *supra* note 1, at 220; JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 323 (Clarendon Press, 1907) (1823).

89 The same conclusion is reached by Beauchamp, *supra* note 69, at 372.

90 Pufendorf, *supra* note 6, at 89.

In his essay «Über den Gemeinspruch» Kant established the order of the a priori principles necessary for establishing a state: freedom, equality, and independence. The scope of human freedom in the private sphere is limited by the principle of harm: "...everybody may pursue his happiness in the manner that seems best to him, provided he does not infringe on other people's freedom to pursue similar ends...".[91] In the social sphere, the principle of equality prevails. Everyone has the same innate rights. According to universal law, subjects' freedom is mutually limited, entitling each individual to compel others to observe the bounds within which their use of freedom is compatible with that of others.[92] In the public sphere, only those who are their own masters and are not in the service of anyone else can participate in the coalition of private and individual wills to form a communal and public will (gemeinschaftlichen und öffentlichen Willen).[93] Although Mill rejects the idea of a social contract, he nevertheless acknowledges the existence of social duties of protection and non-interference. He asserts that living in society obligates everyone to not harm interests that are regarded as rights, whether by legal provision or tacit understanding, and to defend society or its members from harm and nuisance.[94]

The German Federal Constitutional Court has applied the sphere theory to distinguish between the intimate, private, and social spheres.[95] This model provides criteria for assessing the balancing process. Balancing goes beyond a utilitarian calculation of the benefits of protecting an individual's interests (his own good) versus the damage to the faculty of self-determination or the suffering caused by repressed desires.[96] In our view, balancing is not just weighing individual rights against each other, because social and public interests must also be considered. As we have seen, the principle of reciprocity plays a role in this consideration. These elements are integrated into the content of social and public duties.

To determine if and to what extent society could review the judgment made by the active subject, it must first be established if the conduct took place in the private or in the social or public sphere of the individual's life. Balancing tests should seek to strike a balance between an individual's personal and social or public duties. As Humboldt said, "...the freedom of private life increases exactly to the extent that the freedom of public life decreases".[97] However, the roles of individual and citizen are not exercised simultaneously, but rather, alternately.

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91 Immanuel Kant, *supra* note 58, at 290.

92 *Id.*, at 293.

93 *Id.*, at 297.

94 Mill, *supra* note 59, at Chap. 4, par. 3.

95 Robert Alexy, Theorie der Grundrechte 327 (Suhrkamp, 1985). Habermas's critique of the model of spheres emphasizes the shift from the liberal legal model to the social state model. Jürgen Habermas, Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats 481 (Suhrkamp, 1996).

96 H. L. A. Hart, Law, liberty, and morality 22 (Stanford University Press, 1963).

97 Humboldt, *supra* note 57, at 10 [Chap. I, par. 2].

Therefore, it is possible to establish a rule of proportionality. The greater the protection of an individual's core privacy and intimacy, the greater the justification required for intervention. To the extent that the active subject's conduct relates to his or her private life, greater value must be given to self-determination, proportionally reducing the weight of social and public duties. Conversely, conduct in the social or public sphere gives rise to a stronger duty of protection and non-interference.[98] In this case, the indirect effects of conduct may justify societal intervention. In their intimate sphere, individuals have an actual right of defense against the intervention of others and a social and public no-duty to refrain. However, the relationship between the private and social spheres is fluid, making a strict demarcation difficult. Cases of the indirect social effects of acts apparently related to oneself and cases of consent to the intervention of another are particularly problematic, as we shall see below.

Mill occasionally employs these criteria: "No person ought to be punished simply for being drunk, but a soldier or policeman should be punished for being drunk on duty."[99] Selling fermented liquors is a social act, but the solution is not to prohibit consumption, which is an act proper to the individual sphere.[100] Hart observes that the justification for criminalizing behavior depends not on its morality but on its effect on public decency when it takes place in public.[101]

1. *The Indirect Effect on Social Interests*

In our opinion, the indirect effect on social interests cannot justify the prohibition of conduct that constitutes an individual's core privacy. However, when it comes to conduct that falls within the social sphere, the indirect effects of that conduct may justify intervention by society. Thus, the balancing method may be modified by the assessment criteria specific to each sphere. We will test this thesis through case analysis.

[Case 6: The use of motorcycle helmets]. Alvin has chosen to live a carefree life full of risks and thrills. He declines to assume the duty of safeguarding himself and to wear a protective helmet during his motorcycle expeditions. All participants are competent adults, fully informed, capable of acting rationally, and free from undue pressure.

The discussion of whether an individual should submit to an apparently trivial restriction such as a motorcycle helmet or seat belt to reduce the high risk of serious injury, gives rise to a conflict of *prima facie* duties to oneself. In this scenario, the motorcycle driver must determine whether to prioritize his *prima facie* duty of self-preservation against countervailing motives. These might include

98 Hannah Arendt, *Reflections on Little Rock*, 6 Dissent 45, 56 (1959), https://www.normfriesen.info/forgotten/little_rock1.pdf.

99 Mill, *supra* note 59, at Chap. 4, par. 10.

100 Mill, *supra* note 59, at Chap. 4, par. 19.

101 Hart, *supra* note 86, at 45.

the discomfort of wearing a helmet, the desire to take risks, or the judgment that specific traffic conditions make the risk of injury unlikely. Should he choose not to wear a helmet, an objective observer will likely find a marked disproportion of interests.[102] Feinberg rejects the assessment of a trivial restriction and argues that personal sovereignty cannot be subject to a cost-benefit calculation.[103]

While Feinberg is not willing to compromise on personal freedom, he may be open to considering the admissibility of justification in cases involving indirect effects. Harcourt has warned that the debate on acts directed at oneself has shifted from the protection of the individual against himself to a focus on the indirect harms of conduct.[104] The discussion now concerns whether and to what extent the indirect effects of self-directed conduct on third parties or society can justify the restriction of freedom. This trend is also evident in German case law. The German Federal Constitutional Court has dismissed the challenge to the constitutionality of the motorcycle helmet mandate, ruling that it does not violate personal liberty.[105] The court's reasoning centered on the broader societal interests and the protection of third parties, rather than on the individual's right to personal choice. It should be noted that there is no mention of protection for oneself. Rather, the focus is on the indirect effects on others in decisions regarding the obligation to wear seat belts,[106] the criminal prohibition of homosexuality,[107] the consumption of cannabis,[108] and incest between siblings.[109]

After rejecting other potential rationales, Feinberg does not dismiss the possibility that the obligation to wear a protective helmet stems from a balance between the interest in not wearing a helmet and the psychological distress of those involved in the accident, such as medical workers, traumatized witnesses, and, above all, the other driver.[110] German case law refers to the duty to protect individuals who have been involved in a traffic accident. Wearing a protective helmet would enable motorcyclists to better contribute to preventing risks to the

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[102] Gerald Dworkin, *Paternalism,* 56 The Monist 64, 79 (1972), http://www.jstor.org/stable/27902250.

[103] Feinberg, *supra* note 22, at 94.

[104] Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. Crim. L. & Criminology (1973-) 109 (1999), https://doi.org/10.2307/1144164; Bernard E. Harcourt, *The Collapse of the Harm Principle Redux: On Same-Sex Marriage, the Supreme Court's Opinion in United States v. Windsor, John Stuart Mill's Essay on Liberty (1859), and H. L. A. Hart's Modern Harm Principle*, 437 U of Chicago, Public Law Working Paper (August 16, 2013), http://dx.doi.org/10.2139/ssrn.2311329.

[105] BVerfG, Beschluss vom 26. Januar 1982 - 1 BvR 1295/80 u.a. - BVerfGE 59, 275/279.

[106] BVerfG, 24.07.1986 - 1 BvR 331/85, 1 BvR 623/85, 1 BvR 982/85.

[107] BVerfGE 6, 389/437 – Homosexuelle, *available at* https://www.servat.unibe.ch/dfr/bv006389.html.

[108] BVerfGE 90, 145/187 – Cannabis, *available at* https://www.servat.unibe.ch/dfr/bv090145.html.

[109] BVerfGE 120, 224 – Geschwisterbeischlaf, *available at* https://www.servat.unibe.ch/dfr/bv120224.html#Rn122.

[110] Feinberg, *supra* note 24, at 141.

life and physical integrity of other people after an accident. This would enable them to administer first aid or contact emergency medical services. They may also help prevent further damage by taking measures to secure the accident site, for example by setting up warning triangles or drawing attention to the accident site and clearing obstacles from the road.[111] In such cases, the relationship is no longer a non-conflicting relationship. Instead, the *prima facie* duties to oneself are now opposed to the prima facie social duties of protection and non-interference towards others.

While this is often considered a case of protection against oneself, traffic regulations are actually intended to govern behavior that occurs in social-public spaces. The social-public sphere is defined by the equal and voluntary participation of individuals in an activity, which is open to all and subject to public scrutiny. This environment is characterized by objective and impartial relationships. Nevertheless, they lack public relevance.[112] Driving a motor vehicle on public roads is a behavior that occurs within a social sphere. The primary objective of traffic regulation is to safeguard individuals and property in environments where accidents are likely to occur. In this case, the spheres of harm to oneself and to others are intertwined. In this social sphere, even mediate and relatively unlikely effects, compared to other direct and frequent harms in vehicle traffic, may justify a limitation of the individual's freedom of self-determination.

The driver who would have preferred to avoid wearing a helmet faces a *prima facie* conflict of duties. Alvin's *prima facie* duty to himself to autonomously choose to drive without discomfort is opposed (‹›) by the mediate *prima facie* social right of everyone to avoid increasing risk on public roads and their prima facie social duty of protection and non-interference. It is unclear how we should value individual freedom.

According to the Hobbesian concept of freedom, the decision not to wear a helmet may appear trivial. If we also take into account the freedom to choose autonomously, then Alvin's position deserves further consideration. Feinberg has proposed distinguishing the motorcyclist's interest in not wearing a helmet, depending on whether it is based on mere convenience or comfort, a sense of freedom, romantic symbolism, or an adventurous lifestyle. However, he also acknowledges the challenge of determining the significance of a particular behavior for an individual's life through rational calculation. For example, consider the case of the mountaineer who wonders how important it is for him to climb Mount Everest.[113] In our view, these parameters can be valuable in resolving an internal conflict of duties to oneself. However, in the context of behaviors

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111 BVerwG, Urteil vom 04.07.2019 - 3 C 24.17 / 21 - [ECLI:DE:BVerwG:2019:040719 U3C24.17.0].

112 Alexander P. Espinoza Rausseo & Jhenny de Fátima Rivas Alberti, *La triple dimensión de los derechos fundamentales y la doctrina del foro público en el derecho norteamericano, con especial referencia a las facultades de exclusión en las redes sociales*, 32 Derecho y Ciencias Sociales 5, e125 (2025), https://doi.org/10.24215/18522971e125.

113 Feinberg, *supra* note 22, at 103.

that impact others within a social sphere, the assessment must incorporate the principle of reciprocity. In this case, we must consider whether not wearing a protective helmet on public roads is in accordance with everyone's freedom, according to a universal law. The answer is no. It is reasonable to expect that all parties will take every possible measure to minimize the risk of accidents on public roads.

Given that social duties tend to prevail in the social sphere to the same extent that the importance of autonomously choosing a free-of-interference course of action diminishes, it could be argued that the social duties of protection and non-interference of the motorcyclist are in this case more important (>) than his duties to himself and that the obligation established by law is not a violation of his right to freedom. However, the issue of justice in specific cases remains where an individual's assessment is often more precise than a legislator's prognosis. For instance, in a scenario where the factual conditions would have precluded any possibility of social interaction, such as on a road that is inaccessible to other drivers.[114]

2. *Suicide*

[Case 7: Vertical Limit]. Boyce Garrett has decided to take a trip to Utah, where he will enjoy rock climbing with his two sons, Peter and Annie. Due to the negligence of two other climbers, they are hanging from a single anchor point. Boyce recognizes that the anchor in the rock will not be sufficient to hold the weight of all three and instructs Peter to cut the rope. Boyce falls into the void and saves Peter and Annie's lives.[115]

The exercise can be approached from the perspective of the right of necessity, in the sense of Peter's action of taking his father's life to save his own. According to Kant, this should not be judged as irreproachable but only as not punishable.[116] However, we will first review Mr. Boyce's decision in the context of his *prima facie* duties to himself. This analysis will allow us to determine whether there is a social duty of non-interference on Peter's part.

After determining that all other means of saving a life are impossible, Mr. Boyce faces a conflict of duties. On the one hand, he has a *prima facie* duty to preserve his own life. On the other hand, he has a *prima facie* duty of beneficence to do what is necessary to save Peter and Annie's lives. However, this duty of beneficence cannot be considered a legal duty toward others. Sacrificing one's life would exceed the limits of a duty of beneficence. In the context of rock climbing, a strong sports ethic is generally accepted. However, this conduct is

114 BVerfGE 90, 145/193 – Cannabis, *available at* https://www.servat.unibe.ch/dfr/bv090145.html.

115 Vertical Limit (O'Donnell, C., Paxton, B., & Campbell, M. Dir., Marmot Library Network, 2000), *available at* https://cmc.marmot.org/Record/.b2623208x?searchId=711715074&recordIndex=4&page=1.

116 Immanuel Kant, *supra* note 1, at 236.

not reasonably enforceable based on the principle of reciprocity in the social sphere. It is an imperfect duty to himself.

In principle, suicide is considered contrary to one's duty to oneself. According to Pufendorf, suicide violates the individual's duty to lead a dignified life and be useful to society. However, it would be admissible under certain conditions. It would be permissible if certain types of work would provoke a painful life for an individual but served a useful purpose for human society.[117] For Kant, using oneself as a mere means to an end distorts one's humanity. However, he leaves open questions such as whether it would be permissible to save one's country, humanity in general, or prevent others from contracting diseases such as rabies.[118]

Boyce Garrett decides to sacrifice his own life in a *prima facie* conflict of duties to himself. Since duties to oneself are not enforceable through external coercive mechanisms, an individual's decision to end his own life would not be reviewable by society on its merits. Kant argues that suicide can also be considered a transgression of duty toward others (e.g., spouses, children, rulers, fellow citizens, and God).[119] It must then be determined whether the indirect effects of the conduct can justify its reprehensible nature. In our view, all other circumstances being equal,[120] the direct effects on the individual determine that his conduct takes place in the private sphere. Mediate effects can also be part of one's duties to oneself, as in the case of self-realization for the sake of being useful to society. However, the idea of an external duty to exist would lead to the instrumentalization of the person. The principle of human dignity does not impose an objective duty on members of society to prevent Mr. Boyce from taking his own life.[121] In our opinion, this source of protection rights does not derive from the individual's capacity for self-determination, but rather from an objective value or interest of all members of human society. The principle of human dignity can only give rise to objective duties if the individual lacks the capacity to act freely and rationally. A different position would be incompatible with a system based on individual freedom.

In the social sphere, each of us recognizes the value of respecting freedom of choice, even if it endangers the individual's own life.[122] This complies with

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117 Pufendorf, *supra* note 6, at 71.

118 Immanuel Kant, *supra* note 1, at 423.

119 Immanuel Kant, *supra* note 1, at 422.

120 In the film Monsieur Lazhar, the suicide of a teacher in a classroom profoundly impacts the students, some of whom witness the incident. Monsieur Lazhar (Falardeau, P. Dir., Canadá: Aceprensa, 2011).

121 BVerfGE 153, 182 (264) – Suizidhilfe, *available at* https://www.servat.unibe.ch/dfr/bv153182.html; STC 19/2023, FJ 6 C) b) (i), *available at* https://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/29280.

122 Jacobson v. Massachusetts, 197 U.S. 11 (1905), *available at* https://supreme.justia.com/cases/federal/us/197/11/ y Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 262 (1990), *available at* https://supreme.justia.com/cases/federal/us/497/261/.

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the principle of reciprocity contained in the formula of universal law. From this derives the no-right of others and of society. The German Federal Constitutional Court has ruled that decisions about one's voluntary end-of-life do not require additional explanation or justification. According to the court, self-determination in this area belongs to the "most fundamental area of personality" of human beings. In this area, individuals are free to choose their own rules and decide according to them.[123] Boyce Garrett's decision to sacrifice his life is therefore governed by the principle of autonomy, which tends to prevail in the private sphere, especially in the absence of direct harm to others.

Mr. Boyce's choice to sacrifice himself to save Peter and Annie's lives stems from his assessment of his duties to himself in the context of a non-conflicting relationship. Mr. Boyce's freedom of self-determination opposes (‹›) the social no-right of everyone and the no-duty of Mr. Boyce to others. The right of defense is the external face of determining the end. In a non-conflictive relationship, this becomes an actual right and is correlated (~) with a duty for each of us, the other members of society, not to interfere in that resolution.

3. *Assistance in Suicide*

[Case 8: Vertical Limit II] Was Peter's decision to cut the rope a violation of his father's right to life? Peter is an adult who can make decisions independently. He faces a *prima facie* conflict of duties to himself. His duty to preserve his own life, his duty of benevolence to save Annie's life, and his duty of obedience to his father could conflict with his duty of benevolence to save his father's life. As we have noted, the latter would be supererogatory. It would therefore not be enforceable as a duty towards others. However, unlike in Boyce's case, Peter may have a duty of non-interference in his father's life. At this point, we must ask whether his father's decision releases Peter from his *prima facie* duty not to interfere with his father's life. As in the case of society's objective duty to protect people's lives, we believe that there can be no duty of non-interference on Peter's part without his father's correlated right of self-defense. As we have seen, his father had chosen an end other than preserving his life. Thus, Peter's *prima facie* duty of non-interference is not a social duty but rather an imperfect duty to himself. Although Peter's actions have serious consequences for others, consent determines that the action occurs in the private sphere.

Whether Peter's conduct in cutting the rope is reprehensible or not depends on everyone's social duty not to interfere in Boyce Garrett's decision. It is no longer just a question of Peter sacrificing the life of someone who wasn't causing danger to save his own, but rather, of him acting as an instrument to carry out his father's resolution. The father's lack of means to carry out his resolution is a factual element. Peter has the knife and carries out the experienced climb-

[123] BVerfGE 153, 182 (263) – Suizidhilfe, *available at* https://www.servat.unibe.ch/dfr/bv153182.html.

er's decision. This is the approach of the German Federal Constitutional Court regarding assisted suicide. A legal prohibition would prevent those who lack the physical capacity to do so themselves from carrying out their determination to take their own life. This would be an indirect or de facto prohibition. A social prohibition of Peter's actions in cutting the rope would contradict everyone's duty to not interfere with Boyce Garrett's decision.

V. Self-Regarding Contracts

Freedom of contract adds an additional level of complexity to the problem of self-regarding acts. Is a contract valid and enforceable if one party agrees to act in a way that falls within their intimate sphere? What is the relationship between the bilateral will of the parties and the social will? These are issues that arise in the context of marriage, concubinage, prostitution, the acquisition of human organs or tissues, and consensual slavery. Feinberg describes a hypothetical case in which a person agrees to become a slave in exchange for ten million dollars, either to be paid in advance to a loved one or a worthy cause or as payment for prior enjoyment of a supreme benefit, as in the legend of Faust.[124]

Often, the contract is deemed invalid. Kant argued that a contract by which one party completely renounces their freedom for the benefit of the other would be contradictory and, therefore, null and void "since by it one party would cease to be a person and so would have no duty to keep the contract but would recognize only force".[125] Both Rawls and Ripstein agree with Kant that slaves become objects who cannot hold obligations.[126] According to Ripstein, freedom of contract is limited to those compatible with the principle of reciprocity: "...you cannot give another person a right to treat you as a mere means by binding you in ways in which you cannot bind them".[127] Mill would concede the limitation of will for the protection of freedom. The sale of a person would be a renunciation of all future use of freedom: "The principle of freedom cannot require that he should be free not to be free. It is not freedom, to be allowed to alienate his freedom".[128] However, this is the same argument we rejected regarding suicide. The German Federal Constitutional Court rejected the argument that suicide deprives a person of dignity because suicide simultaneously renounces self-determination and status as a subject.[129] Feinberg upholds the principle of soft paternalism. According to this principle, a person's right to

[124] Feinberg, *supra* note 22, at 74.

[125] Immanuel Kant, *supra* note 1, at 283.

[126] John Rawls, Justice as fairness: A restatement 120 (Harvard University Press, 2001); Ripstein, *supra* note 69, at 135.

[127] Ripstein, *supra* note 69, at 18.

[128] Mill, *supra* note 59, at chap. V, para. 10; Dworkin, *supra* note 104, at 75.

[129] BVerfGE 153, 182 (264) – Suizidhilfe, *available at* https://www.servat.unibe.ch/dfr/bv153182.html.

self-determination prevails even over their own good. Interference is justified only when necessary to determine if a choice is voluntary and truly theirs, or to protect them from choices that are not theirs.[130] However, in the case of the slavery contract, Feinberg seems willing to extend this principle to the point of denaturing it. He argues that "the state might be justified simply in presuming nonvoluntariness conclusively in every case as the least risky course".[131]

Most authors remain faithful to the historical account, leading them to acknowledge the possibility of a de jure system of slavery. However, we do not see the usefulness of this approach. A legal system that permits the ownership of people must be based on the idea that, despite belonging to humanity, an individual or group does not deserve to be treated as a person but as a thing. This was the Court's argument in Dred Scott v. Sandford (1856), when it stated that "[African Americans] were at that time considered as a subordinate and inferior class of beings... and had no rights or privileges...".[132] And in Shakespeare's work, the power to demand or not demand fulfillment of an obligation that could lead to the death of the obligated party seems to have been transferred through the contract.[133]

In our opinion, the analysis must point out the impossibility of de jure slavery without taking a paternalistic stance. Despite historical evidence, it is necessary to maintain the claim of counterfactual validity of the law.[134] Alexy has argued that the Kantian concept of law is non-positivist. According to Alexy's inclusive non-positivism, moral defects only undermine legal validity if the threshold of extreme injustice is crossed.[135] This degree of nullity has been applied by the German Federal Constitutional Court. The Court declared that attempting to

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130 Feinberg, *supra* note 22, at 60.

131 Feinberg, *supra* note 22, at 79; Ben Saunders, *Reformulating Mill's Harm Principle*, 125 Mind 1005, 1024 (2016), https://doi.org/10.1093/mind/fzv171.

132 Dred Scott v. Sandford, 60 U.S. 393, 404 (1856), *available at* https://supreme.justia.com/cases/federal/us/60/393/.

133 Posner argues that neither civil law nor common law would impose a penalty involving physical injury for nonpayment of a debt in the enlightened 16th century. Rather, it could be a metaphor to express the injustice of the penal bond. *See* Richard A. Posner, *Law and Commerce in The Merchant of Venice*, *in* Shylock on Trial: The Appellate Briefs 8 (University of Chicago Press, 2013). On the contrary, Niemeyer has argued that Shylock's contract was possible and, according to the law at that time, valid. Th. Niemeyer, *The Judgment against Shylock in the Merchant of Venice*, 14 Mich. L. Rev. 20, 30 (1915), https://doi.org/10.2307/1276185. For a comparison between the legal systems of England and 16th-century Venice, see James Otis Rodner Smith, Felicity Ann Rodner & Ana Valentina Lameda, *Law and Justice in William Shakespeare's The Merchant of Venice*, 18 Revista Venezolana de Legislación y Jurisprudencia 57 (2022), http://rvlj.com.ve/wp-content/uploads/2022/08/RVLJ-18-57-78.pdf; Tim Stretton, *Contract, debt litigation and Shakespeare's The Merchant of Venice*, 31 Adelaide Law Review 111 (2010), https://www.austlii.edu.au/au/journals/AdelLawRw/2010/7.pdf#page=10.00.

134 Niklas Luhmann, Das Recht der Gesellschaft 222 (Suhrkamp,1993).

135 Robert Alexy, *Kant's Non-Positivistic Concept of Law*, 24 Kantian Review 503 (2019), https://doi.org/10.1017/S1369415419000281.

physically and materially destroy certain population sectors based on "racial" criteria flagrantly contradicts fundamental justice principles.[136]

According to Kant, an external object that can be owned can only be a corporeal thing toward which one has no obligation. Therefore, a person cannot be the object of ownership.[137] The a priori impossibility of a real right over a person, such as de jure slavery, derives from the ontological difference between persons and things. For Kant, the object of rights can only be something that is externally yours or mine. What is internal is an innate right, and only what is external can be acquired.[138] Private law regulates the acquisition of external objects.[139] Something externally mine is a thing outside me.[140] It is an object merely distinct from me.[141]

The determining factor of whether the involvement of one or more individuals in the body of another falls within the intimate sphere or the social sphere is the presence of valid consent. In the intimate sphere, one of the parties may consent to intervention in their body. This sphere does not adhere to the principle of reciprocity. Individuals are free to legislate on the values that determine their closest relationships. If an individual changes the determination of their ends, they are at liberty to unilaterally modify or terminate the bond. By accepting the promise, a right/duty relationship is not established; rather, a no-right/no-duty relationship is formed because the intimate sphere is excluded from the social coercion of the law.

In the absence of consent from the individual concerned, conduct falls within the social sphere. In this sphere, the legality of external actions is determined by social will. Conduct may result in harm, and its conformity to law will depend on the principles of justice that are applicable in the social sphere. Unlawful interference with a person's body is contrary to the principle of reciprocity and is therefore unlawful. However, if violence is used against an illegitimate aggressor, as in self-defense, the conduct would no longer be contrary to the criteria of justice of the social contract. As Epstein notes, "coercion is objectionable where it is a hindrance to a person's right to freedom, but legitimate when it takes the form of hindering a hindrance to freedom".[142] This criterion leads Kant to affirm the possibility of property rights over those who have been deprived of their personality by a crime.[143]

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136 BVerfGE 23, 98/106 - Ausbürgerung I, *available at* https://www.servat.unibe.ch/dfr/bv023098.html.

137 Immanuel Kant, *supra* note 1 at 269.

138 *Id.*, at 237, 245.

139 *Id.*, at 245.

140 *Id.*, at 249.

141 *Id.*, at 245.

142 Ripstein, *supra* note 69, at 55.

143 Immanuel Kant, *supra* note 1, at 283.

1. *The Merchant of Venice*

Basanio, a young Venetian, wants to win the hand of Portia, a beautiful and wealthy heiress from Belmont. He turns to his best friend, Antonio, the Merchant of Venice, and asks for a loan of 3,000 ducats. Since Antonio's wealth is tied up in his fleet, which is currently at sea, he must ask Shylock, a Jewish moneylender whom he despises, for the money. Shylock lends him the money but makes him sign a contract stipulating that, if Antonio does not repay the loan on time, Shylock can take a pound of Antonio's flesh as payment. When Antonio fails to repay the loan, Shylock demands his pound of flesh, to be cut from Antonio's heart. Assuming all parties are competent adults who are well-informed, capable of acting rationally, and free from undue pressure, the situation unfolds as follows.

We wonder if a self-regarding act can be the subject of a contract. Is this obligation legally enforceable? First, we will review Antonio's obligation to return 3,000 ducats to Shylock. Next, we will review the bond agreement, which states that if Antonio fails to repay the money within the established time frame, he agrees to settle the debt by giving up one pound of his flesh.

2. *The Jural Relationship of the Loan Agreement*

According to Kant's proposed classification, the acquisition of something external that is mine or yours can be divided in terms of the matter (the object). I can acquire either a corporeal thing or another person's performance or the status of that person himself.[144] Depending on the mode of acquisition, it is divided into real rights, personal rights, or personal-real rights.[145] The contract for the interest-free loan of money between Shylock and Antonio is a personal obligation.

According to Kant, a personal right is the possession of another's choice, as the capacity to determine it by my own choice to a certain deed in accordance with laws of freedom (what is externally mine or yours with respect to the cau-

[144] Immanuel Kant, *supra* note 1, at 259; Kant acknowledged the existence of "rights to persons akin to rights to things, which permit the "possession of an external object as a thing and use of it as a person", 276. This refers to the domestic sphere, which Kant said has characteristics like real and personal rights. Acquisition is not through a contract, but through the law. Examples include the marital contract, whereby one person uses another as a thing; the rights of parents over their children; and servitude. In this category of rights, if a spouse, child, or servant escapes, the remaining spouse, parents, or owner has the right to recover them "just as it is justified in retrieving a thing", 282; 283. In response to certain criticisms, Kant defended the a priori nature of this category in an appendix published in the second edition (1798). He acknowledged that a right to a person akin to a right to a thing, do not allow persons to be treated as things (Sachen) in all respects, 358 and that they do not imply ownership of another person, because a human being cannot have property in himself, much less in another person, 359."

[145] *Id.*, at 260.

sality of another).[146] For Savigny, the debtor's freedom is subject to limitation in a sphere where the creditor's will reign supreme.[147] The creditor has extended freedom as dominion over another's will, while the debtor has limited freedom as dependence on another's will.[148] Kant observes that a contract is the unified will of two persons, whereby what belongs to one person passes to the other.[149] If a period is allowed between accepting the promise and delivering what has been promised, the contract does not transfer ownership of the promised item. Rather, it transfers the promise of the other party to perform an act.[150] The creditor acquires the right against a natural person; that is, the right to act at their discretion to produce something for the creditor. Accepting the promise leads to performance, which is a personal right, not a real right.[151]

Money naturally belongs to the social sphere of exchange. Kant recalls Achenwall's definition: *"Money is a thing that can be used only by being alienated"*.[152] Antonio's obligation to return 3,000 ducats does not contradict the axiom of external freedom or the universal law of social will. The obligation to hand over a sum of money is in accordance with the principle of reciprocity: "...coercion which constrains everyone to pay their debts can coexist with the freedom of everyone, including debtors, in accordance with a universal external law".[153] Shylock's right allows him to act on Antonio's choice,[154] to put him in possession of the thing.[155] From this point of view, and with all other circumstances being equal, the contract is valid and enforceable. Antonio's freedom may be subject to limitation in a sphere where the creditor's will prevails.[156]

3. *Antonio's Obligation to Deliver One Pound of his Flesh*

The object of the contract, in which Antonio agrees to give 1 pound of his flesh, is the person himself. His decision to offer his body as guarantee for the loan may have been an economic calculation or the result of romantic passion. Shylock's interest probably stems from a desire for personal revenge. However,

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146 *Id.*, at 271.

147 Also in this sense, Friedrich Carl von Savigny, System des heutigen Römischen Rechts: Bd. 1 24 (Veit und comp., 1840).

148 Friedrich Carl von Savigny, System des heutigen Römischen Rechts: Bd. 8 201 (Veit und comp., 1849).

149 Immanuel Kant, *supra* note 1, at 271, 272.

150 *Id.,* at 274-275.

151 *Id.*, at 275.

152 *Id.*, at 286.

153 *Id.*, at 232.

154 *Id.*, at 74.

155 *Id.*, at 275.

156 Savigny, *supra* note 147, at 7. In Savigny's view, in every obligation the creditor has extended freedom, as control over another's will, while the debtor appears as limited freedom, as dependence on another's will. Savigny, *supra* note 150, at 201.

an individual's motives and the importance of their actions do not seem to be decisive in assessing their social duty.

To determine whether Antonio has a legal obligation to deliver 1 pound of his flesh, we must consider the following points: (1) whether Antonio can validly consent to the removal of 1 pound of flesh from his body; (2) whether Antonio's consent has an irreversible effect; and (3) whether Shylock has a legal right to demand performance of the obligation. What is the role of social will in this context? (4) Whether Shylock should be compensated for the breach, or whether he should be punished for attempting to take Antonio's life.

A. *The Validity of Antonio's Consent*

We must consider whether Antonio can validly consent to the removal of 1 pound of flesh from his body or whether, on the contrary, Antonio's promise should be null and void because of a social duty to protect all citizens, even from themselves. We have argued that Antonio faces a *prima facie* conflict of duties towards himself. According to Kant, actions such as self-mutilation, the surrender or sale of a body part, and even the onerous alienation of one's hair, would be considered forms of partial suicide. These actions would be contrary to the *prima facie* duty towards oneself of self-preservation.[157] However, Antonio decides to keep the promise he made to Basanio in his private sphere. Antonio has consented to the removal of certain organs and tissues from his body in the event of a breach of the principal obligation, an intervention that would inevitably result in his death.

This conduct only has direct effects in the sphere of privacy reserved for the individual. If it does not directly affect the interests of others or society, the act falls within the private sphere rather than the social sphere. Whether conduct breaches a duty to oneself can only be determined by internal judgment. Others or society have no right to prevent Antonio from putting himself in a situation where he could lose his life. Antonio has no social duty to refrain. His *prima facie* right of defense, which is opposed (◊) to the no-right of everyone, derives from the determination of his own ends. This right is correlated (~) with the *prima facie* duty of everyone to refrain from interference. For these reasons, we must conclude that, all other circumstances being equal, the social will cannot prohibit Antonio's promise because it is part of his intimate sphere. As can be seen, internal legislation applies in this area, not the justice criteria of the social contract.

B. *The Implications of Consent*

We have argued that it is logically impossible to have property right over a person. Given that it is not possible to acquire a real right over a person, Antonio's

[157] Immanuel Kant, *supra* note 1, at 423.

consent does not have an irreversible effect. This does not imply a complete cessation of personal identity or a renunciation of future autonomy. The situation regarding Antonio's contract to deliver 1 pound of flesh or the example of voluntary slavery is distinct from the cases of assisted suicide or irreversible interventions. In the first case, the subject retains the capacity for self-determination. In the second case, the subject's inability to change his initial position is a factual impossibility. Antonio reserves the possibility of reevaluating his decision. This enables him to reevaluate his duties to himself.

C. *Shylock's Claim-Right*

No one asks Antonio whether he would prefer to preserve his life. This may be because it is presumed that this would align with his objective interest, or rather because it is assumed that the authority to release him lies exclusively with Shylock. However, given the absence of voluntary compliance, it can be deduced that at the time of the claim, Antonio had changed his mind. On this occasion, he chooses the duty of self-preservation. Antonio's choice of the duty of self-preservation establishes his right of defense. Therefore, it is necessary to examine whether Shylock has a legal right to demand compliance.

We have argued that Antonio cannot be prevented from voluntarily surrendering 1 pound of meat. The doctrine of self-regarding acts should not only prevent intervention to protect the individual from themselves but should also have a broader scope. This is a free area of law, meaning external coercion is not possible. According to Kant, the law in general only has as its object what is external to actions.[158] This principle forms the foundation of a rule of negative competence. Society is not permitted to intervene in the internal sphere. The social will cannot demand that an individual perform an action that is detrimental to their own well-being. This is an objective no-right sphere, in which the freedom of the individual is opposed to a social no-duty. Antonio's obligation to deliver 1 pound of flesh to Shylock cannot be a duty enforceable by external coercion of the law; it remains in the sphere of duties towards oneself. In a similar way to intimate relationships in marriage, concubinage, prostitution contracts, contracts for the acquisition of human organs or tissues, or slavery, Antonio's obligation is not part of the external relationships that are regulated by law. We do not share the position that the passive subject is incapable of giving consent. Rather, we believe that the conformity of the bilateral will with the social will is subject to control when the creditor demands compulsory performance of the obligation.

The social will does categorically exclude the transformation of the human body into a market commodity. Trust in the legal system is not undermined by breaches of obligations that fall outside the domain of law. Therefore, Antonio's duty to fulfill his obligations (*pacta sum servanda*), which conflicts with his du-

158 Immanuel Kant, *supra* note 1, at 232.

ty to preserve life, is a duty to himself, which can only be binding in the internal forum. Shylock and society have no-right to demand its fulfillment. Antonio's right of defense is correlated (~) with the actual duty of all to refrain from interference. For these reasons, we must conclude that, all other circumstances being equal, Antonio's promise cannot be demanded by the social will.

Humboldt arrived at a similar conclusion. He argued that the State should not prevent the formation or execution of contracts in which one party becomes an instrument of another's designs. For instance, this occurs when a contract results in the enslavement of the contracting party. The State should only deny the right of coercion provided by its laws. According to Humboldt, certain contracts that give rise to personal obligations, such as marriage, should be revocable without the need to provide further reasons.[159] Kant argued that concubinage and prostitution cannot have legal validity because a person who enters into such a contract cannot be compelled to fulfill their promise if they change their mind. In a prostitution contract, in which one party gives themselves over to the other's control, either party may cancel the contract at any time without grounds for complaint.[160] Servitude can also be terminated because a contract in which one party renounces their entire freedom for the benefit of the other is null and void.[161]

D. *Consequences for Shylock*

We must consider whether Shylock should be indemnified for the breach, or whether he should be prosecuted for attempting to take Antonio's life. Mill's position on retraction aligns with that of Humbold. Except for contracts pertaining to monetary matters, Mill believes in maintaining the freedom of retraction. However, he also recognizes that if retraction harms the legitimate interests of another, that party must be liable for the damage.[162]

The legality of Shylock's claim can be determined in light of the categorical imperative: "Act upon a maxim that can also hold as a universal law".[163] According to Pufendorf, compelling others to engage in slavery against their will would contradict the principle of reciprocity and be considered unlawful, as it would assert a right against others that one is not willing to grant to oneself.[164] As with the contract of slavery, the obligation to deliver 1 pound of flesh would contradict the fundamental principles of humanity, which prohibit the treatment of other persons as commodities: "Act in such a way that you use humanity, both in your own person and in the person of any other, always at the same

159 Humboldt, *supra* note 57, at 104 [Chap. XI, par. 2].

160 Immanuel Kant, *supra* note 1, at 279.

161 Immanuel Kant, *supra* note 1, at 283.

162 Mill, *supra* note 59, at chap. V, par. 10.

163 Immanuel Kant, *supra* note 1, at 225, 230, 256.

164 *Pufendorf,* note 36, at 125.

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time as an end and never merely as a means".[165] Since Shylock's will does not align with the law, it would not give rise to a legitimate expectation either.

In turn, Shylock's demand cannot be regarded as an external act. The debate before the Duke of Venice is a theoretical discussion. Its purpose is to resolve the conflict of *prima facie* duties. Therefore, it is not an external interference against another and could not give rise to a criminal sanction against Shylock, as occurs in the play. Other examples of acts referring to oneself that cannot be enforced by law include the condition imposed by Antonio on Shylock to convert to Catholicism, as well as certain testamentary clauses imposing conditions of a similar nature.

VI. Conclusion

For Fichte, "only where there is a conflict of freedoms is there right".[166] This is the case with the external imposition of social duty in conflicting jural relationships. Fichte's conclusion is that the state and law only apply "insofar as moral law has not yet achieved universal validity, and as preparation for its validity".[167] The general rule of the latter would lead to the repeal of the former. The resolution of the conflict is certainly conducive to the establishment of a non-conflictual relationship, in which the non-right of one of the parties is involved. From this perspective, the state and the law serve a corrective function that is triggered when ethical law malfunctions during the individual's self-regulatory process. We are unable to ascertain whether acting in accordance with a no-right derives from the preventive effect of legal sanctions or from a sense of duty for duty's sake. However, it is important to note that the former would clearly be insufficient without the latter. If, apart from cases where there is a well-founded fear of discovery and punishment, the individual did not have a sense of duty, non-conflictual relationships would be exceptional and the whole system would collapse. On the other hand, the imposition of limitations and prohibitions under the threat of punishment does not promote the development of the ability to determine for oneself and in each case what the right choice is, or even to learn from one's own mistakes, but rather a culture of obedience. External obligation must leave room for free will.

It has been proposed that it would be reasonably acceptable for the government to have limited power to intervene when the decisions of adults demonstrate the same deficiencies as those of an incompetent person.[168] This criterion

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[165] Immanuel Kant, *Grundlegung zur metaphysik der sitten*, in KANT`S GESAMMELTE SCHRIFTEN 429 (hg. von der Königlich Preußischen Akademie der Wissenschaften, Band IV., 1911) (1785).

[166] Fichte, *supra* note 2, at 7.

[167] *Id.*, at 8.

[168] Dworkin, *supra* note 102, at 77; Ernesto Garzón Valdés, *¿Es éticamente justificable el paternalismo jurídico?*, 5 DOXA 155 (1988), https://doi.org/10.14198/DOXA1988.5.08.

is the exact counterpart of the system of duties based on individual rationality. The state could impose a maxim of conduct on the individual from above. By taking this action, the state differentiates itself from the social will to become the "ethical whole," to which, according to Hegel, the individual is subordinate.[169] This establishes a vertical relationship, like the contract of subjection in an absolute monarchy. In contrast, in a liberal state governed by the rule of law, the social will is formed based on the ability of citizens to make rational decisions autonomously. The freedom of the individual in the private sphere, the equality of citizens among themselves in the social sphere, and the independence of capable and self-determined citizens (without relations of domination) in the public sphere are interdependent elements. In this system, the impairment of one element can hinder or prevent the functioning of the rest. The principle of individual freedom, which is most strongly expressed in the private sphere, serves as the foundation of the system of spheres. If, in the private sphere, the individual is no longer regarded as a subject capable of acting autonomously, then the existence of duties could not be upheld, since citizens would no longer be accountable. Paternalism can be seen as a form of despotism.

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