Tracing the Permission to Act in Necessity in the Germanic Tradition:

From 'alleged right' to 'absolutely ascertained principle of our law'[1]

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[1] This paper traces the intellectual history of necessity beyond my remarks in *Erlaubte Notstandshandlungen und zivilrechtliche Ausgleichsansprüche* (Vienna: Jan Sramek, 2022) pp. 38-65. I would like to thank the anonymous reviewers of the Vienna Law Review for their helpful suggestions and Donna Stockenhuber for her careful proofreading. Unless otherwise indicated, translations in this article are my own.

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I. Between moral debate and legal doctrine

The moral dilemma of causing harm in an emergency is fascinating and where professional, public or private debates touch on related issues, a heated debate is practically guaranteed. Dire situations are presented, such as doctors taking one patient off a ventilator to save another,[2] pilots reflecting on whether to shoot down a kidnapped plane full of innocent people to save many more lives,[3] an astonishing variety of trolleys, trains or trams rapidly approaching innocent bystanders on forked tracks,[4] and persons destroying property to voice their resistance against potentially disastrous policies of their government.[5] A prominent way of structuring such debates is to oppose *deontological* and *consequentialist* views on the problem.[6] Deontological accounts are based on concepts such as principles, rights or duties and tend to deny – or at least regard as suspicious – privileges for emergencies of any kind. By contrast, consequentialist accounts focus on the aim of producing the most desirable *outcome* and tend to allow emergency actions where they maximise a relevant value (i.e., happiness, efficiency, life span).

Sometimes, the moral debate and its two main contenders – deontology and consequentialism – also claim to be directly relevant for the *legal concept of necessity*.

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[2] An often-debated scenario in the recent COVID-19 crisis. See, eg, Kathleen Liddell et al, 'Who gets the ventilator? Important legal rights in a pandemic' 46 (2020) *Journal of Medical Ethics* 421-6; Reinhard Merkel and Ino Augsberg, 'Die Tragik der Triage – straf- und verfassungsrechtliche Grundlagen und Grenzen' 75 (2020) *Juristenzeitung* 704-14.

[3] Such is the hypothetical in German Constitutional Court 15 February 2006, *Entscheidungen des Bundesverfassungsgerichts* 115, 118 (declaring a state power to down planes with innocent victims on board unconstitutional) and the plot of the 2015 play 'Terror. Ihr Urteil' (Terror. Your Judgement) by Ferdinand von Schirach.

[4] A now-classic example going back to Philippa Foot: 'The Problem of Abortion and the Doctrine of the Double Effect', in: *Virtues and Vices* (Oxford: Blackwell, 1978) 19-32; Judith Jarvis Thomson, 'The Trolley Problem' 94 (1985) *Yale Law Journal* 1395-415.

[5] See Kant's 'Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis' 2 (1793) *Berlinische Monatschrift*, 201-284; reprinted in the edition Königlich Preußische Akademie der Wissenschaften (AA., see bibliography) 8:300. Indeed, political activists often plead necessity: England and Wales Court of Appeal, 30 November 1999, *Monsanto v Tilly* [1999] All ER (D) 1321 (GMO crops); New Zealand Court of Appeal, 25 October 2023, *Attorney General v Leason* [2013] NZCA 509 (military installations); Washington Court of Appeals, 8. April 2019, *State v Ward* 438 P.3d 588 (Wash. Ct. App. 2019) (pipeline); Austrian Supreme Court (*Oberster Gerichtshof*, OGH) 24 June 1997, 1 Ob 152/97b (infrastructure, Austrian case-law is available at ris.bka.gv.at/Jus/ via their case number). A climate activist pleading necessity had surprising success in Amtsgericht Flensburg, 7 November 2022, 440 Cs 107 Js 7252/22 (available at openjur.de).

[6] For a good introduction to this perennial debate, see Larry Alexander and Michael Moore, 'Deontological Ethics', *The Stanford Encyclopaedia of Philosophy* (Winter 2021 Edition), Edward N. Zalta (ed.), plato.stanford.edu/archives/win2021/entries/ethics-deontological/.

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To give an important example: Deontology's central philosopher, Immanuel Kant, directly spells out his objection to a legal entitlement to act in necessity in his Metaphysics of Morals. He writes: 'The motto of the right of necessity says: "Necessity has no law" (*necessitas non habet legem*). Yet there could be no necessity that would make what is wrong conform with law.'[7] In plainer English, Kant appears to say: If something is wrong in principle, it remains wrong in practice, and it is irrelevant how much a person might seem forced to do it, or how much good it would do. Kant therefore dismisses the right to act in necessity as a merely 'alleged right'. Kant's view still has a considerable grip on legal debates on necessity, although it is not always made explicit and only rarely defended with its original rigour. By contrast, partisans of consequentialism – usually relying on a utilitarian or economic approach – regard the doctrine of necessity as a model for interference with others for the sake of maximising the relevant value (such as welfare). Thus, their natural inclination is to expand the general pattern of permissible interference not only in morals but also in the law.[8]

This article provides *warning from historical experience* against such tendencies to simplify the legal problem of necessity by directly applying the arguments used for moral dilemmas. It will show that legal debate need not – at least not for philosophical reasons – regard necessity as either deeply suspicious or be expanded far beyond its current limits. This would fail to distinguish a second class of emergencies, where the convincing legal solution seems quite commonsensical. For instance, consider harmdoing in 'ordinary' catastrophes, such as when a crew saves a ship by keeping it bound to another person's dock in order to save it.[9] Or consider cases of an imminent attack by a third party, such as a terrorist attack, where persons save themselves by harming or using the property of others.

This article seeks to show that tenable commonsensical rules can be created: Over time, Germanic law has developed nuanced solutions to the emergency problem in a wide range of cases, permitting or excusing acts of necessity based on a number of

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[7] Immanuel Kant, *Metaphysics of Morals* (Königsberg: Nicolovius, 1797) AA. 6:236 ('Der Sinnspruch des Notrechts heißt: „Not hat kein Gebot (necessitas non habet legem)"; und gleichwohl kann es keine Not geben, welche, was unrecht ist, gesetzmäßig machte.') Translation based on MJ Gregor (trans.), revised edn. (Cambridge: Cambridge University Press, 2017).

[8] John Stuart Mill, *Utilitarianism* (London: Parker, Son & Bourn, 1863) pp. 93-4 provides a classic example (for the realm of morals): compelling a doctor to officiate to save a life is right in the circumstances. For suggestions to read consequentialism into the law (and the sometimes surprising conclusions), see text in fn. 154-161.

[9] Minnesota Supreme Court, 14 January 1910, *Vincent v. Lake Erie Co.*, 109 Minn 456, 124 NW 221 (1910).

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criteria. For this purpose, it will be necessary to show how German legal doctrine arrived at this compromise, with a strong focus on how it came to consider the *permissibility* of some acts of necessity as unavoidable,[10] even if different historical patterns of reasoning persist under the surface of this consensus.

A brief outline of the result – the common ground under contemporary Germanic law – may be helpful. Regardless of whether the contemporary rules are predominantly statutory (Germany),[11] predominantly based on case law (Austria) [12] or to a considerable extent only discussed in legal literature[13], they roughly converge on the same principles. A person commits a wrong if she kills, severely injures, or endangers innocent bystanders, even if done for the sake of saving a life. She may merely be *excused* if the situation is so pressing as to produce a comprehensible

[10] As a secondary goal, the article also aims to further the international accessibility of the Germanic experience with necessity. For instance, Kantian interpretations of necessity by authors in the common law tradition do not usually discuss developments after German idealism, e.g., Ernest J Weinrib, *The Idea of Private Law* (Oxford: Oxford University Press, 1995); Arthur Ripstein, *Force and Freedom - Kant`s Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009). Yet, they do not appear entirely satisfied with the results since they do present views that mitigate Kant's critique of necessity: Weinrib, *Idea of Private Law,* pp. 199-203 (assuming property is encumbered by a mutual servitude for emergency situations); Arthur Ripstein, *Private Wrongs* (Cambridge, MA: Harvard University Press, 2016) pp. 146-158 (assuming that self-defence against a person in necessity is disproportional).

[11] § 904 German Civil Code (*Bürgerliches Gesetzbuch*, BGB; German statutes can be accessed via gesetze-im-internet.de). See also the more detailed rules and distinction between justification and excuse in criminal law codes, §§ 34-5 German Penal Code (*deutsches Strafgesetzbuch*) (providing for justification and excuse), § 10 Austrian Penal Code (*österreichisches Strafgesetzbuch*, Austrian statutes can be accessed via ris.bka.gv.at) (providing merely an excuse – the justification is accepted in case law); Arts 17-8 Swiss Penal Code (*Schweitzerisches Strafgesetzbuch*, Swiss federal statutes can be accessed via fedlex.admin.ch) (providing justification and excuse). § 1306a Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*, ABGB) and art. 52 (2) Swiss Code of Obligations (*Obligationenrecht,* SwissOR) merely impose equitable liability in cases of necessity, but do not clarify whether such acts are permitted, excused, or ordinary delicts under private law.

[12] Austrian Supreme Court (*Oberster Gerichtshof*, OGH) 16 April 1937, 3 Ob 576/36 *Rechtsprechung* 1937/163 (comment by Karl Torggler) (mail bomb, see below at fn. 16); 13 December 1988, 5 Ob 573/88 *Juristische Blätter* 1989, 386 (warehouse detective damaging a car in pursuit of a thief).

[13] *Austria* (regarding the permission of acts of necessity in general): Helmut Koziol, *Österreichisches* Haftpflichtrecht, vol. II, 3rd edn. (Vienna: Jan Sramek, 2018) C 3; Franz-Stefan Meissel '§ 19 ABGB', in Attila Fenyves, Ferdinand Kerschner and Andreas Vonkilch, *Klang-Kommentar zum ABGB*, 3rd edn. (Vienna: Verlag Österreich, 2014) para. 3; Helmut Fuchs and Ingeborg Zerbes, *Österreichisches Strafrecht*, vol. I, 10th edn. (Vienna: Verlag Österreich, 2018) para. 17/53; *Germany* (regarding the excuse of acts of necessity in private law): Karl Larenz and Claus-Wilhelm Canaris, *Lehrbuch des Schuldrechts*, vol. II/2, 13th edn. (Munich: Beck, 1994) p. 668; *Switzerland* (regarding the permission of acts of necessity in private law): Roland Brehm, 'Art 52 OR' in *Berner Kommentar zum Obligationenrecht*, 5th edn. (Zürich: Schulthess, 2021) paras. 36-7; Karl Oftinger and Emil W. Stark, *Schweizerisches Haftpflichtrecht* vol. II/1(Zurich: Schulthess, 1987) paras. 182, 290.

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limitation of her freedom of choice (*entschuldigender Notstand*). However, she is justified if she saves her or someone else's life, liberty or disproportionally more valuable property by invading another person's property, where no other means are available (*rechtfertigender Notstand*). Consequently, Germanic private lawyers put the distinction between justification and excuse, or between permission of an act and consideration of individual fault, to use in private law: Justifying circumstances enjoin that the act of necessity must not be prevented, while exculpatory circumstances only mitigate some of the act's consequences, such as compensation and punishment.

Thus, Germanic law accepts that there are circumstances permitting the interference with another's property. In a popular textbook example,[14] a hiker is allowed to save herself by breaking into a cabin. In real-life cases, a ship's crew was at liberty to save the vessel by destroying sea cables,[15] and guardsmen were allowed to save their lives and a valuable printing machine by throwing a mail bomb into an empty neighbouring outdoor restaurant.[16] More generally, cases are resolved by reference to principles of proportionality: the standing of the affected goods of both involved parties and the chances of harm and rescue, while further criteria are subject to debate.[17] Apart from proportionality, the permission to act in necessity is kept in check by limits common to all instances of self-help.[18] Self-help is generally barred if other ways of rescuing the entitlement in question exist, including aid by public authorities or purchases via the market system. It is also important to add that in all cases the victim of the act may claim *compensation* for any ensuing harm without regard to wrongdoing or fault. Swiss and Austrian law merely allow a reduction of the award in some cases (art. 52 (2) Swiss OR, § 1306a ABGB).

The willingness to agree on these and further nuanced distinctions in the face of a difficult and controversial practical problem can be seen as one of the strengths of

[14] See, e.g., Karl Lenckner, *Der rechtfertigende Notstand* (Tübingen: Mohr Siebeck, 1965) p. 7.

[15] German Imperial Court (*Reichsgericht*, RG) RG 12 October 1881 *Entscheidungen des Reichsgerichts in Zivilrechtssachen* (RGZ) 5, 160 (wirerope); 29 April 1926, RGZ 113, 301 (torpedo boat).

[16] OGH 16 April 1937, 3 Ob 576/36 *Rechtsprechung* 1937/163 (comment by K Torggler). Strictly speaking, the court does not spell out that the act was permitted, but its language of a 'set-off of interests' does not leave much room for a different interpretation.

[17] See, e.g., Koziol, *Haftpflichtrecht* vol I C 3.

[18] On these general limits, see the excellent analysis for North American common law by Zoe Sinel, 'De-Ciphering Self-Help' 67 (2017) *University of Toronto Law Journal* 31-67, with pp. 54-6 on necessity, and, on a much more mundane example, David Messner, 'Probleme der Selbsthilfe am Beispiel des Abschleppens unzulässig abgestellter Kraftfahrzeuge' 142 (2020) *Juristische Blätter* 209-222 and 291-299, pp 211-7.

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the traditional Germanic emphasis on doctrine (*Rechtsdogmatik*), which – to some extent – isolates legal rules from their political, moral, or economic merit through its practical focus.[19] This allows for more or less consistent rules on necessity without requiring discussions on fundamental normative theories or excessive speculation on moral dilemmas.

Yet, the aim of this article is not strictly limited to the problem of necessity. It is also concerned with the implications of doctrine on how the protection of personal interests should be conceptualised more generally. It seeks to make plausible that a *lesson* about how the protection of individual interests may be conceptualised may be learned from the Germanic consensus on how to deal with cases of necessity. As we shall see, the doctrine of necessity now universally accepted is difficult to reconcile with a popular kind of thinking, according to which the ownership of an object is identical with a general right to exclude all others from it.[20] Accepting a permission to act in necessity means that an owner must *not* exclude persons in need. Necessity therefore makes questionable whether exclusion can be a paradigmatic characteristic of ownership.

With this is mind, the present article will argue that it is indeed more attractive to understand the protection of property and other central interests as '*entitlements*'[21]. Entitlements are the framework for more specific rights to exclusion, damages, restitution, and other remedies, but they do not strictly determine which of them is

[19] For a powerful defence of the practical understanding of *Rechtsdogmatik*, see Franz Bydlinski, *Juristische Methodenlehre und Rechtsbegriff*, 2nd edn. (Vienna: Springer, 1991) pp. 8-17. However, it must be admitted that, according to a common contemporary picture, *Rechtsdogmatik* is in a state of utter confusion and reflection on its purpose (see, e.g., Christian Bumke, 'Rechtsdogmatik: Überlegungen zur Entwicklung und zu den Formen einer Denk- und Arbeitsweise der deutschen Rechtswissenschaft' 69 (2014) *Juristenzeitung* 641-650; who concludes on a more sober tone than Bydlinski that the defining property of *Rechtsdogmatik* is a focus on practice). But the present paper is not the place to discuss its comparative merits and weaknesses.

[20] See, e.g., § 354 ABGB ('Understood as a right, ownership is the power to deal with substance and use as one sees fit, and exclude any other from it', in German: '*Als ein Recht betrachtet, ist Eigenthum das Befugniß, mit der Substanz und den Nutzungen einer Sache nach Willkühr zu schalten, und jeden Andern davon auszuschließen*'); Jules Coleman, *Risks and Wrongs* (Cambridge: Cambridge University Press, 1992) pp. 300-2 ('Property rights confer powers to exclude and alienate'); Gregory C. Keating, 'Property Right and Tortious Wrong in Vincent v. Lake Erie' 5 (2005) *Issues in Legal Scholarship* issue 2, article 6, 1-57, p. 21 ('the right to exclude others is, along with the rights to use and to alienate what one owns, one of the three cornerstones of private property ownership').

[21] The language is borrowed from Guido Calabresi and Arthur Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' 85 (1972) *Harvard Law Review* 1089-1128. This does not imply a commitment to these authors' precise substantive position. The German term 'Rechtsgüter' is used in a similar manner.

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proper.[22] To stick to the example of necessity, even where the entitlement to property does not give the 'victim' of an act of necessity a specific right to exclusion, it may still award her a right to damages. In light of this more general outlook, which will be further developed at the end of this paper, the following analysis of the doctrine's history will prefer the term 'entitlements' even where historical debates literally use the term 'rights' (*Rechte*). The language of rights has developed out of and has come to be identified with strict analytical perspectives. They tend to assert a logical primacy of specified rights and scepticism towards the claim that general concepts – such as the proposed understanding of 'entitlements' – are of much use.[23] This is certainly not a premise shared by historical authors, who – at least also – thought of entitlements to life, property, liberty and other objects when they spoke of subjective rights.

The remainder of this paper is structured in three parts and a conclusion. It will first introduce the development from a casuistic *permission* of acts of necessity under Roman and medieval law towards a generally hostile stance to necessity under the newly developed individualist justifications of entitlements, of which Kant's Metaphysics of Morals is an important milestone (II.). Second, it will show how the view that it is permissible to interfere with others' entitlements in necessity prevailed again and became enshrined in § 904 of the German Civil Code of 1900, art. 54 (2) Swiss law of Obligations, as amended in 1911, an unwritten, unanimously accepted rule in Austria, and an established rule of criminal law in all three jurisdictions (III.). Third, it will show that the issue of necessity continues to be relevant to historical debates despite the consensus which has been reached and speaks in favour of conceiving the protection of interests in terms of entitlements rather than rights (IV.).

II. From 'necessity has no law' to 'alleged right'

A. Roman case law and Christian teleology

Under Roman law, it appears that, in times of need, using another's property was permitted. According to the Digest, seamen are not liable if they cut ropes entangling

[22] Compare the idea of 'basic rights': Jansen, 'The Idea of Legal Responsibility' 34 (2014) *Oxford Journal of Legal Studies* (OJLS) 221-252, pp. 241-2.

[23] Two famous sources of this analytic skepticism are Wesley Newcomb Hohfeld, (Some) Fundamental Legal Concepts as Applied to Legal Reasoning, 23 (1913) Yale LR 16-59; 26 (1917) Yale LR 711-770 and Hans Kelsen, *Pure Theory of Law*, Max Knight (trans.) (Berkely: University of California Press, 1967), pp. 125-145. A good example for the resulting view on necessity is John Oberdiek, 'Specifying Rights out of Necessity' 28 (2008) OJLS 127-146.

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a ship.[24] That exoneration does not only seem to hinge on lack of intent or culpability. A plausible interpretation assumes that the crew commits no wrong (*injuria*),[25] which would mean Romans would have regarded the action as permissible. Somewhat more extensively, the classics discussed whether a person was liable in damages for tearing down the house of another if the motive was to prevent fire from spreading to one's own. Roman jurists denied responsibility of the actor, and Celsus explains the action was driven by 'just fear' (*iusto enim metu ductus*), even where the intervention ultimately proved unnecessary.[26] Again it remains a plausible interpretation that Celsus assumes that acts of necessity are not wrong.[27] Whether Roman jurists would have generally endorsed the maxim expressed in Cicero's speech on self-defence in Pro Milone, according to which 'if our life were subject of treason, or open violence ... every way of winning salvation would be truthful,'[28] is unclear. The number of cases is limited and it is likely that multiple layers of thought succeeded each other.[29]

Medieval scholarship arrived at similar results, although writers focused on a different problem. Theologians discussed petty larceny – theft in case of hunger – which art. 166 of the early modern *Constitutio Criminalis Carolina* (1532) exempted from punishment. Writers in the Aristotelian-Thomistic tradition up to the late scholastics provided differing justifications for such a rule.[30] The main argument was that saving

[24] *Digest of Justinian* (D.) 9.2.29.3. (Ulpian 18 ed.).

[25] Phillip Klausberger, *Objektive und subjektive Zurechnungsgründe im klassischen römischen Haftungsrecht* (Habilitation thesis, University of Vienna, 2018) p. 46.

[26] D. 9.2.49.1 (Ulpian 9 disp.).

[27] Reinhard Zimmermann, *The Law of Obligations* (Oxford, Oxford University Press, 1996) pp. 1000-3, citing as another important idea that the house of the other was 'doomed anyway'. Andreas Wacke, 'Notwehr und Notstand bei der aquilischen Haftung' 106 (1989) *Zeitschrift für Rechtsgeschichts - Romanistische Abteilung* 469-501, pp. 494-5 understands both cases reported in the Digest as cases of 'defensive necessity' (*defensiver Notstand*), a Germanic concept (codified in § 228 BGB) allowing defence against animals and objects, without the strict compensation rule for ordinary acts of necessity under § 904 BGB. One may wonder whether this interpretation is too strongly shaped by modern Germanic concepts.

[28] 'Pro Milone' in *Marcus Tullius Cicero, Die politischen Reden,* vol. II (Artemis und Winkler: München, 1993) para. 10 ('si vita nostra in aliquas insidias, si in vim et in tela ... incidisset, omnis honesta ratio esset expediendae salutis.').

[29] See Alfred Pernice, *Marcus Antistius Labeo. Das römische Privatrecht im ersten Jahrhunderte der Kaiserzeit*, vol. II (Halle: Verlag der Buhchandlungen des Waisenhauses, 1878) p. 18, accessible at digitale-sammlungen.de.

[30] For Aquinas' account, see *Summa theoleogica,* vol. IIa IIae quaestio LXVI, art VII, Fathers of the English Dominican Province (trans.) (Benzinger Brothers, New York 1947), accessible under ccel.org/a/aquinas/summa/home.See further Nils Jansen, 'The Idea of Legal Responsibility', p 237.

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human life served a *higher purpose* or the common good,[31] and, since individual property was regarded as a *mere practical institution* to prevent strife and invite productivity, it could be limited for the sake of the obviously more important life of a person.[32] To underline this view, Aquinas himself cites Ambrose of Milan's exhortation: 'It is the hungry man's bread that you withhold, the naked man's cloak that you store away, the money that you bury in the earth is the price of the poor man's ransom and freedom.'[33] Some canonists did not stop at this idea of the 'poor man's' permission to regard what he needs as his. They argued that the Christian *duty of self-preservation* was also a legal one, which prevailed over the attribution of property to others.[34] But regardless of whether survival at the cost of another's property was merely permitted or a duty, it was seen as a matter of course to suspend the ordinary rules of property and re-establish a fundamental rule of common use in cases of need.

B. Towards individualist justifications of entitlements

1. Grotius and the emergence of individual entitlements

Hugo Grotius is famous for his monumental synthesis of developments in legal thought up to his time, and indeed, his account of necessity gives a good indication of where legal doctrine was headed in early modern times. At first sight, Grotius seems to follow a medieval pattern of common good reasoning, but at a closer look he departs significantly from Aquinas. Like Aquinas, Grotius characterises the permission to use another's property in times of need as a latent, omnipresent part of an ordinary property structure that derives from a common entitlement to property in an imagined state of nature.[35] But it is important that Grotius took this entitlement

[31] See Aquinas' reasoning: *Summa theoleogica,* vol. IIa IIae quaestio XC.

[32] See, e.g., Jan Hallebeek, 'Thomas Aquinas' Theory of Property' 22 (1987) *The Irish Jurist* 99-111, pp. 106-7 and, with a contemporary defence of the view, James Gordley, *Foundations of Private Law* (Oxford: Oxford University Press, 2007) pp. 7-31 (general, 'purposive' theory of rights) and pp. 130-139 (on necessity).

[33] Ambrose, D. Dist. xlvii, can. Sicut ii; cited by Aquinas, *Summa theoleogica,* vol. IIa IIae quaestio LXVI, art VI.

[34] See Virpi Mäkinen, 'Duty to Self-Preservation or Right to Life? The Relation between Natural Law and Natural Rights (1200–1600)', in Andreas Speer und Guy Guldentops (eds.), *Das Gesetz – The Law – La Loi* (Berlin: DeGruyter, 2014) 457-70, pp. 464-7.

[35] *De iure belli ac pacis*, Stephen Neff (trans.) (Cambridge: Cambridge University Press, 2012) vol. II cap. 2 art. VI-IX. For a useful contemporary defence of Grotius' theory, see Denis Klimchuk, 'Property and Necessity', in James Penner and Henry E Smith (eds.), *The Philosophical Foundations of Property Law* (Oxford: Oxford University Press, 2013) 47-67.

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to be more limited than Aquinas did. For Grotius, both property and necessity exist not only because of divine teleology. Rather, Grotius represents the beginning of a *social contract tradition*: He pictures basic rules as passed down by fictional, but rational founding fathers of a community. According to Grotius, these founding fathers thought it useful to break up common property into individual entitlements because this will generally further the common good. But they also considered it useful to leave the door back to common property open for exceptional cases where this general assumption manifestly does not hold in specific cases, namely in emergencies. Thus, Grotius defends a right of necessity, in particular petty larceny to assure one's survival.[36]

The emphasis on rational founding fathers draws Grotius some way towards an individualist foundation of entitlements.[37] Although he still clearly approves of acts of necessity, he finds it visibly more difficult to justify them, and even notes that: 'Some perchance may think it strange that this question should be raised, since the right of private ownership seems completely to have absorbed the right which had its origin in a state of community of property.'[38] That the dormant right is just a general *use-right*[39] must be seen in the light of Grotius' relatively stronger attachment to individual property in comparison with Aquinas. Suggesting a use-right is certainly a weaker claim than that the person in need acquires ownership (as Ambrose pictures it, and as Aquinas might be understood). And, building on the late scholastics' theory of restitution,[40] Grotius insists that 'the right here was not absolute, but was restricted by the burden of making restitution, when necessity is over'.[41] That the victim of an act

[36] Compare Joachim Renzikowski, 'Solidarität in Notsituationen – Ein Historischer Überblick von Thomas v. Aquin bis Hegel', in Andreas von Hirsch, Ulfried Neumann and Kurt Seelman (eds.), *Solidarität im Strafrecht* (Baden-Baden: Nomos, 2013) 13-34, pp. 20-1 and Klimchuk, 'Property and Necessity', p. 53.

[37] See Marietta Auer, *The Ethics of Private Law* (Harvard SJD Thesis, 2011) pp. 81-82. On the balance of individualist and absolutist elements in Grotius' thought, see, e.g., Stephen Buckle, *Natural Law and Property*, 2nd edn. (Oxford: Clarendon Press, 2002) pp. 4-5. Klimchuk, 'Property and Necessity', pp. 52-56 focusses on the egalitarian, social foundations of Grotius' thought.

[38] *De iure belli ac pacis* vol. II cap. 2 art. VI ('quod quaeri mirum forte aliquis putet, cum proprietas videatur absorpsisse ius illud omne quod ex rerum communi statu nascebatur.').

[39] On which see in detail Buckle, *Natural Law and Property*, ch. 1, especially pp. 45-8.

[40] See Jansen, 'Idea of Legal Responsibility', pp. 231-232.

[41] *De iure belli ac pacis* vol. II cap. 2 art. IX ('jus hic non fuisse plenum, sed restrictum cum onere restituiendi ubi neccessitas cessaret.') My translation, in line with Richard Tuck (ed.), John Morrice et al (trans.) (Indianapolis: Liberty Fund, 2005), available at oll.libertyfund.org/title/grotius-the-rights-of-war-and-peace-2005-ed-3-vols. Stephen Neff (Cambridge: Cambridge University Press, 2012) translates 'ubi necessitas cessaret' with 'where necessity allowed'.

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of necessity is allowed to recover compensation can be understood as a vestige of individual empowerment.[42] All these limitations indicate that necessity was increasingly thought of as an *exception* rather than as a consequence of the common good as the fundamental justification of property.

2. Open controversy in early enlightenment

By the time Kant began to be interested in law and morality (around 1762[43]), and until he wrote the Metaphysics of Morals, it seems that the recognition of individual entitlements already visible in Grotius had further increased. This may have produced an intuition that there is something wrong in Grotius' view on necessity. In any case, the matter was already very controversial among eminent authors.

By the middle of the 18th century, some had turned against a permission to act in necessity completely. Heinrich Cocceji's commentary on Grotius offered a scathing critique of the very idea of an initial community of goods and, consequentially, also criticised Grotius' idea that a permission to act in necessity could be inferred from it.[44] Samuel Cocceji, Heinrich's son, followed his father's opinion.[45] The Coccejis' legal philosophy was (even) more *individualistic* than that of Grotius, for they assumed that *divine will* was sufficient as a direct foundation of individual entitlement. Thus, in their view, already in a state of nature, individuals had the power to acquire property through occupation, and defend it, even against those in an emergency if need be.[46]

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[42] That Grotius uses a synthesis of communitarian and individualist arguments is even more visible in Grotius' famous theory of expropriation and eminent domain. See, e.g., Mathias Schmoeckel, 'Omnia sunt regis. Vom allgemeinen Eigentum des Königs zur Enteignung des Bürgers. Ein Überblick zur Geschichte der Enteignung bis zum 18. Jahrhundert', in Otto Depenheuer and Foroud Shirvani (eds.), *Die Enteignung* (Berlin: Springer, 2018) 3-24, pp. 16-9. On the inconsistency of granting compensation with the idea of an initial community of goods, see Jean-Christophe Merle, 'Notrecht bei Kant und Fichte' 11 (1997) *Fichte-Studien* 41-61, p. 43.

[43] See, e.g., Manfred Kuehn, 'Kant's Metaphysics of Morals: The History and Significance of its Deferral', in Lara Denis (ed.), *Kants Metaphysics of Morals: A Critical Guide* (Cambridge: Cambridge University Press, 2010) 9-26, p. 11; Werner Busch, *Die Entstehung der kritischen Rechtsphilosophie Kants, 1762–1780* (Berlin: DeGruyter, 1979) p. 4.

[44] Heinrich von Cocceji in Samuel von Cocceji (ed.), *Grotius Illustratus*, vol. I (1744/Halle, Saale: Universitäts- und Landesbibliothek Sachsen-Anhalt 2014, available at digital.bibliothek.uni-halle.de/hd/content/titleinfo/1989091) pp. 443-5 (ad vol. II caput. 2 § IV lit. i) (The book is based on a draft by H von Cocceji, edited and expanded by the notes of S von Cocceji).

[45] See his additions in S von Cocceji, *Grotius Illustratus*, vol. I, pp. 444-5.

[46] One of the Coccejis' general aims was to deconstruct the foundation of law in *society* as advocated by Grotius and made popular by his follower, Samuel Pufendorf, in 18th century German discourse.

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But defenders of the traditional view that acts of necessity were permitted held ground. These included, first and foremost, the famous German philosopher Christian Wolff, who continued to rely on the medieval canonists' justifications of acts of necessity in two of his publications, that is, the duty of self-preservation prevailing against property,[47] and the idea of an initial community of goods.[48]

Others sought a compromise. Some theories introduced a sophisticated *distinction between several layers of rights and duties* in order to conclude: Acting in necessity is wrong in some respects, but not in others.[49] Gottfried Achenwall, influenced by many of the authors mentioned,[50] was a proponent of this kind of multi-level compromise. In his Ius Naturae, Achenwall explained that the aim of humankind – human perfection – is threatened where a life is lost. Thus, at first, he seems to concur with scholars such as Wolff, who still assumes that duties to self-preservation prevail over the duty to respect property, thus allowing acts of necessity. His preliminary conclusion, with an unmarked reference to Cicero:

> Insofar [as a human has to neglect necessary duties to preserve his life] it is true: necessity has no law, so that all law tacitly adopts an exception of necessity, and every way of winning salvation is truthful.[51]

For a good introduction to this topic, see Martin Otero Knott, 'Cocceji on sociality', (2021) *History of European Ideas* available at doi.org/10.1080/01916599.2021.1915539.

[47] *Ius Naturae Methodo Scientifica Pertractatum*, Pars Prima (Halle/Saale: Renger, 1740) paras. 1012, 1017; Pars Sexta (Halle/Saale: Renger 1746, available at digitale-sammlungen.de) paras. 572-3. See also, Joachim Georg Darjes, *Discours über sein Natur-und Völkerrecht,* vol. I (Jena: Johann Wilhelm Hartung, 1762) pp. 401-8; Karl Anton von Martini, *Der Lehrbegriff des Naturrechts* (Vienna: Blumauer, 1797) paras. 392-3.

[48] *Institutiones Juris Naturæ Et Gentium* (1750, Halae Magdeburgicae: Renger, available at digitale-sammlungen.de) para. 304.

[49] Apart from Achenwall, who is discussed in the main text, the influential earlier author, Heinrich Köhler, refers to Heinrich Cocceji for his generally dismissive opinion on necessity, but concedes that at least as a matter of 'internal' natural law, the person so acting was justified, and that they could thus not be punished: *exercitationes iuris naturalis*, 2nd edn. (Jena: A.O.R., 1732) para. 1218. On the distinction between 'internal' and 'external', see further discussion in the main text.

[50] See, generally, Busch, *Entstehung,* pp. 38-50.

[51] 'Atque eatenus verum est: necessitas non habet legem, seu omnis lex tacitam admittit exceptionem necessitates, et omnis honesta ratio est expediendae salutis'. *Ius naturae in usum auditorium* (Göttingen: Victor Bossiegel 1755, available at digitale-sammlungen.de) para. 91; a shorter, similar passage appears in the abridged *prolegomena ius naturae*, Pauline Kleingeld and Corinna Vermeulen (trans.) (Groningen: Groningen University Press, 2020, based on 2nd edn. Göttingen: Victor Bossiegel, 1762) para. 144. The last half-sentence is from 'Pro Milone' para. 10 (with 'est' instead of Cicero's 'esset'), cited above.

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However, Achenwall added a decisive qualification to this statement. Achenwall's own conclusion that 'necessity has no law' was only true from the perspective of 'internal' natural law, but there is also an 'external' or 'strict' natural law, which would *not* recognise a permission of acts of necessity:

> [F]rom the point of view of external natural law and from that of him against whom it is exercised the privilege of necessity cannot be called a right, indeed that man as the wronged party has the right to resist and to defend himself and that which is his own, and to demand restoration of the loss caused to him.[52]

Achenwall's reader may now wonder whether this addition does not reduce the 'internal' *permission* of necessity to mere wordplay – after all, the victim of the act may defend herself and demand compensation. But Achenwall explicitly acknowledges an effect of the 'internal' permission: It makes the wrong *inculpable*.[53] Thus, the point of Achenwall's view is that the actor is not punished, although the victim may defend herself and demand compensation. As to the reasoning behind this consequence, simply put, Achenwall imagined *two dimensions of the law* and two tiers of rights and duties, with different effects: a strict one, awarding specific entitlements to self-defence and compensation, and a more lenient one, decisive only for the actor's guilt and punishment. It seems that the first one related to others and the second one to the subject, differing in their judgement and consequences.

C. Kant's dictum revisited

Achenwall's view is important not only as a testimony to the general thought of his time, but also because his Ius Naturae is widely understood to have served as the basis for Kant's work when the latter drafted his own lectures on natural law and later his Metaphysics.[54] It is perhaps because of this relationship that Kant arrives at results similar to Achenwall's on the matter of necessity: Necessity is a wrongful act, but the agent may not be punished.

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[52] Achenwall, *prolegomena* para. 149, cross-references omitted. ('Quare favor necessitates respect iuris naturalis externi et respectu eius, contra quem exercetur, ius appellari nequit, quin potius hic tamquam laeso competit ius resistendi, seque suumque defendendi et si quid mali ipsi oritur, eius mali tamquam damni sibi dati reparationem exigendi.'). Note that the phrase's pathos stylistically resembles Kant's later verdict.

[53] It is tempting to read a prominent modern distinction into this passage, that of justification and excuse (see above text to fn. 11-13). But, while it is true that Achenwall's statement is one of several precursors to this distinction, it is important not to overemphasise this aspect in light of his own unique ideas.

[54] See, e.g., Kuehn, 'Kant's Metaphysics of Morals', p. 19 and Busch, *Entstehung*, p. 50.

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However, while it is important to show that Kant's view was by no means unprecedented, in other respects the impression that he merely follows Achenwall would be mistaken. Kant added his own unique philosophy as a basis to his doctrinal opinion, and therefore, his arguments for these conclusions are in fact very different.

Kant offers what may be called a 'will theory' of entitlements.[55] According to this view, the legal protection offered by entitlements should aim for the protection of the *will* of the entitled and offer a protection independent of the consequences it may or may not have. In line with the general type of normative reasoning Kant developed, his justification of entitlements is *deontological*, meaning that it is entirely independent of consequences such as efficiency, utility or the 'mere' physical needs of another person. The independence of a deontological rule is not only contingent in the sense that the laws of a particular legal system *typically* disregard consequences in their construction of entitlements, but *conceptual* in the sense that it is within the very meaning of a 'right' (entitlement) in the Kantian sense not to be justified by consequences. This is why Kant denies a right to acts of necessity, because it would limit a deontologically justified entitlement on the basis of the 'mere' need of a person.

Yet, in Kant's discussion of necessity itself, this fundamental reason for his opposition to a doctrine of necessity is rather obscure. To see the numerous problems with it, it is necessary to reproduce Kant's dense passage at length:

> This alleged right [of necessity] is supposed to be an authorization to take the life of another who is doing nothing to harm me, when I am in danger of losing my own life. It is evident that were there such a right the doctrine of law [*Rechtslehre*] would have to be in contradiction to itself. For the issue here is not that of a wrongful assailant upon my life whom I forestall by depriving him of his life (*ius inculpatae tutelae*), in which case a recommendation to show moderation (*moderamen*) belongs not to law but only to ethics. It is instead a

[55] See, e.g., Nigel E Simmonds, 'Rights at the Cutting Edge', in Matthew Kramer, Nigel E. Simmonds and Hillel Steiner (eds.), *A Debate over Rights* (Oxford: Oxford University Press, 2000) 113-232, pp. 122-134; Gordley, *Foundations*, pp. 7-31; Gonçalo Almeida Ribeiro, *The Decline of Private Law* (Oxford: Hart Publishing, 2019), pp. 101-18, all three with useful discussions. There is a reason to be uneasy with this term: It is commonly associated with the positivist claim that something may be *described* as a right (entitlement) *if* it awards someone the power to pursue a claim at will (one recent example of such a theory is David Owens, 'The Role of Rights', in Paul B. Miller and John Oberdiek (eds.), *Civil Wrongs and Justice in Private Law* (Oxford: Oxford University Press, 2020) 3-17).

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matter of force being permitted against someone who has used no force against me.

It is clear that this assertion is not to be understood objectively, in terms of what a law prescribes, but only subjectively, as the verdict that would be given by a court. In other words, there can be no *penal law* that would assign the death penalty to someone in a shipwreck who, in order to save his own life, shoves another, whose life is equally in danger, off a plank on which he had saved himself. For the punishment threatened by the law could not be greater than the loss of his own life. A penal law of this sort could not have the effect intended, since a threat of an ill that is still *uncertain* (death by a judicial sentence) cannot outweigh the fear of an ill that is *certain* (drowning). Hence the deed of saving one's life by violence is not to be judged *inculpable* (inculpabile) but only *unpunishable* (*inpunibile*), and by a strange confusion jurists take this *subjective* impunity to be *objective* impunity (conformity with law).

The motto of the right of necessity says: 'Necessity has no law' (*necessitas non habet legem*). Yet there could be no necessity that would make what is wrong conform with the law. ... [56]

[56] 'Dieses vermeinte Recht soll eine Befugnis sein, im Fall der Gefahr des Verlusts meines eigenen Lebens, einem anderen, der mir nichts zu Leide tat, das Leben zu nehmen. Es fällt in die Augen, daß hierin ein Widerspruch der Rechtslehre mit sich selbst enthalten sein müsse – denn es ist hier nicht von einem ungerechten Angreifer auf mein Leben, dem ich durch Beraubung des seinen zuvorkomme (ius inculpatae tutelae), die Rede, wo die Anempfehlung der Mäßigung (moderamen) nicht einmal zum Recht, sondern nur zur Ethik gehört, sondern von einer erlaubten Gewalttätigkeit gegen den, der keine gegen mich ausübte.

Es ist klar: daß diese Behauptung nicht objektiv, nach dem, was ein Gesetz vorschreiben, sondern bloß subjektiv, wie vor Gericht die Sentenz gefället werden würde, zu verstehen sei. Es kann nämlich kein Strafgesetz geben, welches demjenigen den Tod zuerkennete, der im Schiffbruche, mit einem andern in gleicher Lebensgefahr schwebend, diesen von dem Brette, worauf er sich gerettet hat, wegstieße, um sich selbst zu retten. Denn die durchs Gesetz angedrohete Strafe könnte doch nicht größer sein, als die des Verlusts des Lebens des ersteren. Nun kann ein solches Strafgesetz die beabsichtigte Wirkung gar nicht haben; denn die Bedrohung mit einem Übel, was noch ungewiß ist (dem Tode durch den richterlichen Ausspruch), kann die Furcht vor dem Übel, was gewiß ist (nämlich dem Ersaufen), nicht überwiegen. Also ist die Tat der gewalttätigen Selbsterhaltung nicht etwa als unsträflich (inculpabile), sondern nur als unstrafbar (inpunibile) zu beurteilen und diese subjektive Straflosigkeit wird, durch eine wunderliche Verwechselung, von den Rechtslehrern für eine objektive (Gesetzmäßigkeit) gehalten.

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Generations of readers who scrutinised this text were puzzled or disappointed by Kant's apodictic treatment of the matter.[57] At first glance, Kant seems to base his critique of necessity on two things: A dismissive language against the permission to act in necessity as a merely 'alleged' right and an unfavourable comparison of necessity with self-defence.[58] Moreover, he focuses on arguments why necessity is 'impunibile' in spite of all his view's strictness,[59] rather than explaining his hostility to the doctrine in much detail. Worst of all, observers find it is far from 'evident' that law would be 'in contradiction to itself' if it accepted a permission to act in necessity:

Der Sinnspruch des Notrechts heißt: 'Not hat kein Gebot (necessitas non habet legem) '; und gleichwohl kann es keine Not geben, welche, was unrecht ist, gesetzmäßig machte.'

Metaphysics of Morals (Berlin: De Gruyter 1968 [1797]) AA. 6:235-6, translation based on Mary Gregor (trans.), revised edn. (Cambridge: Cambridge University Press, 2017). A well-known problem where the present translation differs is the translation of Recht with its dual meaning, 'right' and 'law'. Gregor generally translates '*Recht*' with 'right' rather than 'law'. It may be suggested that Kant's strong equation of individual empowerment and rights, which made it difficult to see in necessity anything but a contradiction, also has linguistic aspects.

[57] For German legal history see, with many references, Wilfried Küper, *Immanuel Kant und das Brett des Karneades* (Heidelberg: Müller, 1999) pp. 1-2, 4; in English language, see, e.g., Gonçalo Almeida Ribeiro, *The Decline of Private Law* (Oxford: Hart Publishing, 2019) pp. 116-8.

[58] Some authors have suggested that problems are produced by Kant's exclusive focus on a very special scenario, that of two drowning persons fighting over a plank ('Karneades' plank'), where intuition drew him on the side of the attacked. See Küper, *Brett des Karneades*, pp. 3-4, 12-13. There is some evidence for this, since the philosopher's occasional remarks before writing the Metaphysics suggest that he was heavily concerned with – or even appalled by – the idea of necessity as a doctrine in particular because of its application to moral dilemmas. He had discussed the subject repeatedly in class (*Vorlesungen über Moralphilosophie* [Berlin: De Gruyter, 1975] AA. 26:191 [Powalski]; 378 [Collins]; 26:513-6, 26:598-601 [Vigilantius]; 26:1353 [Naturrecht Feyerabend]; 26:1505-6 [Mrongovius]), had assumed in his notes that a person saving their life at the price of another was worthless (Reflection 7192 in *Moralphilosophie, Rechtsphilosophie und Religionsphilosophie* AA. 19:268), and later denied that necessity could justify a right to revolutions in his 'On the Old Saw: That May Be Right in Theory But It Won't Work in Practice' ('Gemeinspruch', AA. 8:300).

[59] Kant argues that any punishment would be useless where the agent's life is in danger. This idea is already mentioned by Johann Christian Quistorp, *Grundsätze des deutschen peinlichen Rechts*, 4th edn. (Rostock and Leipzig: Johann Christian Koppe, 1789, available at digitale-sammlungen.de) para. 374; and by Kant's follower Paul Johann Anselm von Feuerbach, *Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts*, 1st edn. (Gießen: Georg Friedrich Heyer, 1801) para. 79. However, Kant's use of the idea is a recognised weakness of his discussion of necessity, because his own 'absolute' (deontological) theory of criminal law does not allow the consideration of the consequences of punishment. See, e.g., Franz von Zeiller; 'In welcher Art entschuldiget ein Nothfall von der Zurechnung zum Verbrechen?' (1825) *Zeitschrift für österreichische Rechtsgelehrsamkeit und politische Gesetzkunde* issue I 103-110; Wolfgang Wessely, *Die Befugnisse des Nothstandes und der Nothwehr nach österreichischem Rechte* (Prague: Tempsky, 1862) pp. 11-2; Hans Albrecht Fischer, *Die Rechtswidrigkeit* (München: Beck, 1910) pp. 222-3; Ribeiro, *Decline*, p. 116. Küper's interpretation in *Brett des Karneades,* pp. 49-52 defends Kant to some extent, since Küper argues that Kant does imagine two 'sides' of the legal system in a way very similar to Achenwall.

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From a positivist perspective, a legal system is free to implement rules as it sees fit. If a system of law chooses to implement a rule which makes acts of necessity lawful, what contradiction should there be? It is rather the final verdict, 'there could be no necessity that would make what is wrong conform with the law' that appears circular to those critics:[60] Necessity is only incompatible with the law if the law does not adopt it. So, it could seem Kant's verdict presupposes its own conclusion, namely that the law takes an unfavourable position on necessity.

It is important to understand the nature of this positivist argument. The critique starts from the assumption that acting lawfully excludes acting wrongfully by definition and vice-versa. It further assumes that this is all that can be said about lawfulness and wrongfulness, and that it is up to the legislator of a specific legal system to decide what is lawful or wrongful.[61] If this were true, Kant's critique would indeed be trivial and beside the point.

Yet, Kant does have a reason to emphasise the wrongfulness of acts of necessity: the already mentioned will theory of entitlements. It is necessary to appreciate the appeal of such a theory in constructing entitlements as well as its consequences in further detail now. First and foremost, on the basis of such a view, it is not necessarily circular to say that wrongs cannot be made lawful, because *specific* entitlements and therefore specific wrongs must be presupposed a priori. In Kant's legal philosophy the law cannot incorporate any rule whatsoever. Rather, his will theory comes with a specific idea about the *content* of law; it understands the law through a philosophy of *individual freedom and individual rights*, and these form the natural law frame a legislator must proceed from.[62] Consequently, Kant's denial of a right to act in

[60] See, e.g., Fischer, *Rechtswidrigkeit* p. 222.

[61] This perspective is implicit in a contemporary analytical debate on whether a 'right to do wrong' is a logical contradiction, as Kant might be understood to say in the first paragraph cited. Generally, 'having a right to act' is taken to entail 'acting lawfully' (although not all instances of acting lawfully presuppose having a right to act), and so – if wrongfulness and lawfulness are opposites – it would seem that having a right also entails not committing a wrong. For a modern view of this kind, see John Mackie, 'Can There Be a Right-based Moral Theory?' 3 (1978) *Midwest Studies in Philosophy*, 350-59, p. 351 (on moral rights). The debate has been incited by authors who questioned that 'having a right' and 'acting wrongfully' are really contradictory terms or opposites. See, for instance, Jeremy Waldron, 'A Right to Do Wrong' 92 (1981) *Ethics* 21-39 (distinguishing 'rights' and 'rightness' in morality) and, for further comments on this debate, Izhak Englard, 'The strange endeavour to establish a right to do wrong' 47 (2016) *Rechtstheorie* 13-24. However, this is because these authors attack the premise that 'having a right' entails 'acting lawfully', not because they doubt that 'lawfulness' and 'wrongfulness' are opposites. Generally, the debate does not assume – as we shall see Kant implicitly does – that rights and wrongs should have a specific *content*.

[62] But see, on the conflict of this natural law frame and Kant's view on positive law, Jeremy Waldron, 'Kant's Legal Positivism' 109 (1996) *Harvard Law Review* 1535-1566.

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necessity does not seek to make the claim that having a right conceptually entails not acting wrongfully,[63] but that specific kinds of wrongs – those interfering with deontologically justified entitlements to such objects as life or property – cannot be justified. This is a marked contrast to the earlier theories from Aquinas to Wolff, where the aim of property is to prevent strife and encourage productivity, and where the physical preservation of persons is an acceptable and even obvious aim of the law.[64] The point of saying that there is no right to do wrong, then, is to say that allowing such wrongdoing would go against Kant's specific idea of an entitlement.

How does one ascertain the content of such an entitlement? For Kant, the foundation of an entitlement is not divine will, but individual freedom, understood as the capacity of persons to form their will and act on it. Kant's theory is based on the 'universal law of freedom': A person has an innate right to freedom 'insofar as it can coexist with the freedom of every other in accordance with a universal law'.[65] From there, he arrives at the conclusion that every person's full control over their body and things is compatible with that of all others and therefore a necessary aspect of the law. Kant does not, of course, equate full control over one's body and things with unlimited control: A person might lose a thing through *misuse*. Thus, he allows self-defence, and in relation to the defender 'a recommendation to show moderation' even 'belongs not to law but only to ethics'. But, as Kant highlights, a person who becomes the target of an act of necessity has done nothing wrong herself ('used no force against me') which also means that she has in no way misused her entitlements. Therefore, if such acts were permitted, the fate of her things would not be under her control, since she may find herself deprived of them for reasons entirely independent of her actions. Or, as a modern Kantian puts it, it would place others in a position to be in charge of the person's things.[66] Sustaining independence from such interferences is the essence of a will theory of entitlements.[67]

An important argument against the will theory is that a prohibition to interfere with things or physical integrity does not follow from the universal law of freedom. For why is freedom best served, of all things, by full control over one's *body* or *property* (as far as the person does no wrong)? Why would it not be sufficient or even better for individual freedom to control things as long as there is no emergency, while being

[63] On the debate on this conceptual problem in contemporary debates, see above fn 61.

[64] See, e.g., Buckle, *Property and Natural Law*, p. 45.

[65] Kant, *Metaphysics of Morals,* AA. 6:231.

[66] Ripstein, *Private Wrongs*, pp. 146-158.

[67] Simmonds, 'Rights at the Cutting Edge', pp. 134-41.

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free to use another's things in dire circumstances? The potential for such shifts is one aspect of the critique of *formalism* often invoked against Kant.[68] And it is true that, where Kant arrives at substantial conclusions about the law – as he does in his discussion of necessity – he relies on additional, tacit assumptions.

One of these is that the object of rights is a *complete thing* rather than an abstract entity such as a use-right. This is implicit in Kant's development of entitlements from *physical possession*:[69] the assumption that entitlements should primarily be defined in terms of control over *complete* bodies and property *as they are found in physical space*[70] rather than more abstract entities, such as 'things outside emergencies.' Although he does conceive of ownership as a right against other persons[71] (rather than 'to' a thing), the Kantian entitlement nonetheless implicitly *refers* to physical space. Thus, Kant would not accept, as Aquinas and Grotius would have, that an individual entitlement might be limited by circumstances and the use-right of others. He rather envisages an entitlement as relating to physical space that its holder is empowered to defend at will.

Whether these assumptions are themselves justified, whether entitlements should indeed primarily award control over things of the physical world, full stop, and why, are difficult questions on which Kant's writings do not give much further guidance. And this problem – the dogmatic assumption of the boundaries of physical integrity and property, as well as its consequences – persists from Kant to the legal conceptualists of the 19th century and beyond.[72]

An interesting and perhaps unsolvable question is whether Kant thought that, in spite of his basic picture of entitlements, the law of a particular state could allow acts of

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[68] Already by Hegel, *Outlines of the Philosophy of Right*, Thomas Malcom Knox (trans.), revised edn. (New York: Oxford World's Classics, 2008, based on Berlin: Nicolai, 1820) para. 135 (= *Gesamtwerke* [GW] 14:118). See further Wolfgang Kersting, 'Politics, freedom and order: Kant's moral philosophy', in Paul Guyer (ed.), *Cambridge Companion to Kant* (Cambridge: Cambridge University Press, 1992) 342-366, pp. 348-9.

[69] *Metaphysics of Morals*, AA. 6:247-257.

[70] Kant, *Metaphysics of Morals*, AA. 6:247, giving an account of three things which can be 'outer mine and thine' (*äußeres Mein und Dein*). The two other physical objects are, briefly, (1) the will of another to a particular act and (2) their status in relation to me. See also Ripstein, *Force and Freedom*, pp. 79, fn. 26, 95.

[71] *Metaphysics of Morals*, AA. 6:260.

[72] For a contemporary critique of the will theory's way of thinking, see, e.g., Larissa Katz, 'Exclusion and Exclusivity in Property Law' 58 (2008) *Toronto Law Journal* 275-315, p. 283 with fn. 30; Marietta Auer, *Der privatrechtliche Diskurs der Moderne* (Tübingen: Mohr Siebeck, 2014) pp. 96-7.

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necessity under some circumstances.[73] But it is important to remember that Kant's basic idea of an entitlement does not include any such limitations; it asserts a principally unlimited control over things and other objects that certainly had a powerful influence on developments to come.

D. The shift of opinions in practice: the example of the Austrian Civil Code

1. Martini and Zeiller on entitlements and necessity

It is sometimes said that the reception of Kant's Metaphysics was slow because contemporaries dismissed it as senile.[74] In a remarkable contrast to this, others say that Kantian thought dissipated very quickly in the Germanic legal discussion.[75] It appears that neither version is true. Rather, Kant's view of entitlements and necessity, or in any case the shift to an individualist justification of entitlements, did have a lasting influence on how entitlements were imagined and put into practice in the time to come.

The original Austrian Civil Code from 1811 provides a good example as to the actual consequences of this theoretical shift. The developments can be shown by reference to the principal drafters of the original Austrian Civil Code from 1811: Karl Anton von Martini was part of the earlier natural law movement and served as a reporter for an advanced intermediary draft, which exhibited the communitarian spirit of the social contract tradition.[76] The very first paragraph of Martini's draft declared the purpose of private law to further the purposes of society.[77] Part 2 § 2 proclaims a natural right, inseparable from humankind, to maintain one's life and to acquire all

[73] For such a Kantian view, see the following text, up to fn. 98 on Franz von Zeiller.

[74] A popular reference to illustrate this view is Arthur Schopenhauer, *The World as Will and Representation* Richard E Aquila (trans.) (London: Routledge 2016, based on 3rd edn., Leipzig 1859, 626), vol. I, p. 609 ('such a weak one that, while I totally disapprove of it, I regard polemic against it as superfluous'); see further Küper *Brett des Karneades*, pp. 26-8.

[75] See Thomas Gutmann, 'Paternalismus - eine Tradition deutschen Rechtsdenkens?' 122 (2005) *Zeitschrift für Rechtsgeschichte – Germanistische Abteilung* 174-192; but see also Marietta Auer, 'Subjektive Rechte bei Kant und Pufendorf' 209 (2009) *Archiv für die civilistische Praxis* 584-634, pp. 629-31.

[76] See further Herbert Kalb, 'Grundrechte und Martini – eine Annäherung', in Heiz Barta, Rudolf Palme and Wolfgang Ingenhaeff (eds.), *Naturrecht und Privatrechtskodifikation* (Vienna: Manz, 1999) 235-260, p. 235; Wolfgang Ingenhaeff, 'Martini und die Freiheit', in Heinz Barta and Günther Pallaver (eds.), *Karl Anton von Martini* (Berlin: LIT-Verlag, 2007) 245-53.

[77] §. 1 'Bei einer jeden Gesellschaft werden Bestimmungen und Vorschriften zum Grunde geleget, nach welchen die darin vereinigten Mitglieder ihre Handlungen zur Erreichung eines vorgesetzten Endzweckes einzurichten verbunden sind.' Text in Philipp Harras von Harrasowsky (ed.), *Der Codex Theresianus und seine Umarbeitungen*, vol. V (Vienna: Carl Gerold's Sohn, 1885) pp. 3-4.

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means and things therefore necessary.[78] It allowed self-help, and assumed that in some cases it is necessary that individuals sacrifice what is theirs for the greater good.[79] Martini's opinion was that acts in necessity were not only permitted, but that there was even a *duty* to save one's life in order to continue one's service to the community.[80] The slightly modified pre-draft (*Urentwurf*) of the ABGB was written in a similar spirit, although it already shortened the relevant parts.[81] Under the leadership of Franz von Zeiller, the reporter for the final draft, the provisions on self-help were reduced to what is now § 19 ABGB, a provision cautiously implying that there is a right to *self-defence* where the competent authorities cannot be summoned for help in time, but which makes no mention of a permission to act against innocent parties, and thus does not expressly acknowledge a right to acts of necessity. In his own writings on natural law, Zeiller denies that there is such a right.[82]

The personal and political differences between Martini and Zeiller are sometimes exaggerated.[83] One should note that both Martini and Zeiller, as well as all drafts of the ABGB, understood entitlements, such as to property, as *control* over something. Yet the background assumptions relevant for this view and the view on exceptions changed,[84] and necessity is one of the cases marking a practical consequence of this change. This shift is partly related to philosophical determinations (II.). However, it is also worth emphasising that theoretical convictions were not the only matter that

[78] Harrasowsky, *Codex Theresianus*, vol. V, p. 16.

[79] Draft Martini, Book 1, caput 2, § 14; Book 3, caput 12, § 11, Text in Harrasowsky, *Codex Theresianus*, vol. V, 18, 207-8. See also ibid., vol. II (Vienna: Carl Gerold's Sohn, 1884) p. 28, fn. 15: One draft included a permission to save a life at the cost of property but demanded compensation in case of success.

[80] KA von Martini*, Der Lehrbegriff des Naturrechts* (1797) §§ 392 ff.

[81] See the draft in Julius Ofner (ed.), *Der Ur-Entwurf und die Berathungs-Protokolle des Österreichischen Allgemeinen bürgerlichen Gesetzbuchs,* vol. I (Vienna: Alfred Hölder, 1889) § 1 (p. III) (law serving or constituted by common good), § 40 (p. VI) (self-help as natural right),

[82] Franz von Zeiller, *Das Natürliche Privat-Recht*, 3rd edn. (Vienna: Karl Ferdinand Beck, 1819) pp. 129-131, 162.

[83] In particular, Heinz Barta assumes that Zeiller tried to limit the influence of Martini's ideas on natural rights in bad faith: see, e.g., 'Martini-Colloquium: Begrüßung und Einleitung', in Heinz Barta, Rudolf Palme and Wolfgang Ingenhaeff (eds.), *Naturrecht und Privatrechtskodifikation* (Vienna: Manz, 1999) 1-92, pp. 44-5, fn. 44. Against this critique, see Franz-Stefan Meissel, 'Verfassungsrechtliche Aspekte des § 16 ABGB', in Clemens Jabloner et al. (eds.), *Vom praktischen Wert der Methode. Festschrift für Heinz Mayer* (Vienna: Manz, 2011) 371-389, pp. 374-5.

[84] See Gernot Kocher, *Höchstgerichtsbarkeit und Privatrechtskodifikation* (Graz: Böhlau, 1979) pp. 130-1; Laurent Pfister, 'La proprieté dans l'ABGB, entre modernité et tradition', in Laurent Pfister and Franz-Stefan Meissel (eds.), *Le code civil autrichien* (Paris: Editions Panthéon-Assas, 2011) 49-88, pp. 62-3.

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weighed in against permitting necessity. The jurists in the commission also took practical concerns into consideration (III.). This general perspective, a Kantian view mediated by practical concerns, had a lasting influence on thoughts on entitlements and necessity far beyond the ABGB (IV.)

2. Reception of deontological theories of entitlements

Kant's influence on Zeiller is well established. Although it has sometimes been exaggerated[85] and does not extend to each and every aspect of Zeiller's views (and much less the Austrian Civil Code), the universal law of freedom is clearly relevant to Zeiller's convictions on entitlements. In his treatise of natural private law, Zeiller writes:

> All acts are lawful where they are compatible with the equally free effective activity of all; those contrary are wrongful, or violations of rights. ... The right of a person includes the entitlement to *coerce*, ie, to forestall the violation of rights with force... This force cannot be reproached as a limitation of the *lawful* freedom of the tortfeasor, not be reproached as a wrong; because one merely relegates the offender into the lawful limits of his use of freedom.[86]

There are also signs that, like Kant, Zeiller tended to imagine entitlements *spatially*, that is, as something that follows the boundaries of physical objects and bodies:

> The (ideal) space delimited by the concept of law and the main principle of the doctrine of law [*Rechtslehre*], in which all actions of humankind are lawful, constitutes his lawful sphere of influence (his sphere of rights, his domain of

[85] (In)Famously by Ernst Swoboda, *Das Allgemeine Bürgerliche Gesetzbuch im Lichte der Lehren Kants* (Graz: Möser, 1926). For a balanced account of this relationship, see Gerhard Luf, 'Zeiller und Kant', in Heiner Bielefelt (ed.), *Würde und Recht des Menschen. Festschrift für Johannes Schwartländer* (Würzburg: Könighausen & Neumann, 1992) 93-110.

[86] *Natürliches Privat-Recht*, pp. 10, star-footnote („*") and 11 ('Jede unserer Handlungen ist rechtlich, welche mit der allgemein gleichen freyen Wirksamkeit vereinbaret werden kann; Handlungen, die damit nicht zusammenstimmen, sind widerrechtlich. ... Das Recht einer Person schließt zugleich die Befugnis zu *zwingen*, d.h., die Rechtsverletzung mit Gewalt hintanzuhalten, in sich. ... Dieser Zwang kann nicht als eine Beschränkung der *rechtlichen* Freiheit des Rechtsverletzers, nicht als ein Unrecht getadelt werden; weil man den Beleidiger dadurch nur in die rechtlichen Gränzen seines Freiheitsgebrauches zurückweiset.') Emphasis in the original. See also, among other evidence, ibid. pp. 33-4 on the basis of law in 'pure reason' and a critique of consequentialist thinking, citing Kant's endorsement of the saying 'fiat iustitia, pereat mundus' in *Zum Ewigen Frieden* (Belin: De Gruyter, 1923 [1795]) AA. 8:378-9.

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> rights), which mainly ... extends to the just use of his *personal* energy and his outer goods.[87]

In both cases, Zeiller does not prominently cite Kant in his treatise, but the influence is unmistakable. Yet it also draws on other sources. Zeiller's critique of a permission to perform acts of necessity cites Heinrich Cocceji and Heinrich Köhler as primary references and Kant only at the margins. In any case, the conclusion fits well with Kant's thought:

> As little as the scrooge, who buries his treasures, may be labeled a wrongdoer because he is impeding others in their right to perfection, and be held to allow them use of his property against compensation, just as little does natural private law allow sustaining oneself through the use of another's property. There can be no *right* to violate other rights in order to save one's own, and no more does morality make sustaining life a duty in a case where it cannot be sustained lawfully (without violating the higher duty of justice).[88]

3. 'The lawmaker cannot sanction this utmost strictness in the state': Between ideal and practice

Writing a treatise on natural law is different from preparing a draft for a civil code. Zeiller was well aware of this and did not insist on passing his theoretical convictions into law. Nor could he have done so, because not all of his co-drafters shared them, and his room for action was generally limited by political circumstances.[89] Zeiller was

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[87] *Natürliches Privat-Recht*, p. 10, star-footnote („*") ('Der durch den Rechtsbegriff und den Hauptgrundsatz der Rechtslehre beschränkte (ideale) Raum, innerhalb dessen alle Handlungen des Menschen rechtlich sind, macht seinen rechtlichen Wirkungskreis, (seine Rechts-Sphäre, sein Rechts-Gebieth) aus, welcher hauptsächlich ... den gerechten Gebrauch der *persönlichen* Kräfte und der *äußeren* Güter in sich faßt.') Emphasis in the original.

[88] *Natürliches Privat-Recht*, p. 130 ('So wenig also der Geizige, der seine Schätze vergräbt, unter dem Vorgeben, daß er andern in dem *Vervollkommenungsrechte* hinderlich sey, für einen Rechtsverletzer erkläret, und, den Gebrauch seines Eigentums gegen Wiedererstattung genöthiget werden darf; eben so wenig gestattet das natürliche Privat-Recht, sich gegen den Willen des Eigenthümers mit fremdem Eigenthume zu erhalten. Es kann kein *Recht* geben, fremde Rechte zu *verletzen*, um die unsrigen zu retten; und die Moral macht die Erhaltung des Lebens in dem Falle, da es auf eine rechtliche Weise (ohne Verletzung der höheren Pflicht der Gerechtigkeit) nicht mehr erhalten werden kann, auch weiter zu keiner Pflicht.') Emphasis in the original.

[89] See Franz-Stefan Meissel, 'De l'esprit de modération – Zeiller, das ABGB und der Code civil', in Thomas Olechowski, Christian Neschwara and Alina Lengauer (eds.), *Grundlagen der österreichischen Rechtskultur. Festschrift für Werner Ogris zum 75. Geburtstag* (Köln: Böhlau, 2010) 265-292, pp. 267-9.

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ready for compromise. Although in matters of civil liability, for instance, he admits in a speech that 'more recent teachers of natural law' would demand universal strict liability (i.e., liability without fault), he rather follows the traditional Roman and then-contemporary basis of liability in fault.[90] In his commentary, he adds: 'Yet, the lawmaker cannot sanction this utmost strictness in the state, where continuous societal communication should take place and general interchange should invigorate industrial activity.'[91]

Given this readiness to set theoretical convictions aside, one could imagine that if the matter had been pressing enough, the drafters would have adopted a permission to perform acts of necessity notwithstanding Kant's and Zeiller's academic hostility to the idea. But this was not the case. Apodictically, Zeiller notes in his commentary that the question of necessity was an idle dispute that did not matter much, since even defenders of a permission to perform acts of necessity admitted that the actor must compensate the harm he caused.[92] Why did the unfairness of not permitting acts of necessity in extreme cases not weigh as heavily as it now does in the eyes of many commentators?[93]

There are at least three answers to this question. The first is the perspective this article wants to criticise, namely an exclusive focus on moral dilemmas where harmdoing is difficult to accept. The second is empirical uncertainty as to what would happen if a permission to act in necessity were allowed: In his natural law treatise, Zeiller refers to the apprehension that such a right could easily be abused to invade the property rights that he thought of fundamental importance, and that it is difficult to say whether the owner did not have a more important use for their things than using them to save another person.[94] But perhaps the most important answer is the third: Defenders of

[90] Julius Ofner, *Ur-Entwurf*, vol. II, p. 182.

[91] Franz von Zeiller, *Commentar über das allgemeine bürgerliche Gesetzbuch für die gesammten deutschen Erbländer der oesterreichischen Monarchie*, vol. III/1 (Vienna/Trieste: Geisterer, 1812) p. 707 ('Allein, diese äußerste Stränge kann der Gesetzgeber im Staate, wo ein stätes geselliges Wechselwirken, und ein allgemiener, die Industrie belebender, Verkehr Statt finden soll, nicht sanctionieren.') See further Herbert Hausmaninger, 'Roman Tort Law in the Austrian Civil Code of 1811', in Herbert Hausmaninger et al. (eds.), *Developments in Austrian and Israeli Private Law* (Vienna: Springer, 1999) 113-136, p. 121.

[92] Zeiller, *Commentar*, vol. III, p. 729.

[93] See below under C.3.

[94] Zeiller *Natürliches Privat-Recht*, p. 129. It may matter that evidentiary standards were not as flexible as today, which may have added to the problem of abuse.

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a control theory of entitlements had a way to deal with unwelcome conclusions provoked by their view.

For writers such as Zeiller, the way out was accepting a permission to act as part of specific laws. He allowed that 'positive law', in the form of 'public' or 'political' law, could intervene to change some of the *substantial rules* that followed from 'natural' private law.[95] Thus, states can go beyond merely holding an actor 'unpunishable' (a suggestion Zeiller also supported in his natural law); they can introduce permissions to act, although usually under the condition of compensation. Zeiller refers to necessity as a candidate for this treatment in his natural law treatise,[96] and seems to acknowledge more generally that existing specific laws (on forestry, hunting, firefighting, etc.) contain permissions to interfere with the property of others based on private interests, although they also entail duties to compensate the affected persons.[97] Thus, even if the permission of some acts of necessity went against natural law ideals, proponents of natural law were ready to say that a legislator could, or even should, intervene, but that interventions of this kind were not strictly demanded or determined by principles of natural law.[98]

4. Lasting influence

Zeiller was not alone with his view. A Kantian framework of entitlements combined with ways to limit its strictness in practice remained powerful over the course of the 19th century.[99] This framework admitted no general permission to act in necessity but

[95] On Zeiller himself, see Dieter Grimm, 'Das Verhältnis von politischer und privater Freiheit bei Zeiller', in Herbert Hofmeister and Walter Selb (eds.), *Forschungsband Franz von Zeiller* (Köln: Böhlau, 1980) 94-106, p 97. For a similar modern Kantian perspective, see Ripstein, *Force and Freedom*, pp. 275-6.

[96] Zeiller, *Natürliches Privat-Recht*, p. 131. The cross-reference ibid. at pp. 34-5 suggests that the permission is *demanded by reason* under the condition of a state, in which case it would be latent in deontological rights but only become effective once a state is created. Zeiller calls this class of rules general civil law (allgemeines bürgerliches Recht), ibid., pp. 29-30.

[97] Zeiller, *Commentar*, vol II/1 pp. 126-7.

[98] The spirit of this view is contained in § 17 ABGB to date. The provision stipulates that 'what is appropriate for natural rights is held existent as long as a lawful limitation of these rights is not proven'. On the liberal spirit of §§ 16-7 ABGB, see further Meissel, 'Verfassungsrechtliche Aspekte des § 16 ABGB', pp. 374-5.

[99] On this much-debated period more generally, see, e.g., Franz Wieacker, *A History of Private Law in Europe*, 2nd edn., Tony Weir (trans.) (Oxford: Clarendon Press, 1995) pp. 304-441 (classic narrative); Hans-Peter Haferkamp, 'The Science of Private Law and the State in Nineteenth Century Germany' 56 (2008) *American Journal of Comparative Law* 667-689 (especially pp. 678-689, balanced account); Ribeiro, *Decline,* pp. 119-171 (critical account interested in the development of 'liberal legalism').

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allowed for the possibility to permit interferences with entitlements via special laws. Whether this was done or not was in the hands of the legislator and could at least not directly be deduced from the framework. This way of thinking survived the Kant-inspired late natural law school and was adopted by the most famous German scholars of the classic liberal period, including Savigny, Puchta, Windscheid and the early Jhering.[100] They conceived of entitlements similarly, and did not acknowledge a right to perform acts of necessity, a continuity in substance despite very different jurisprudential views.[101] The influence of these ideas even extended into the 20th century. They were popular among conservative jurists, who remained influential in Austria. The drafter of a 1916 amendment of the ABGB, Josef Schey, expressly relied on the 'proven and tested rules of the ABGB' and insisted that rights to self-help must be clearly defined or end in a 'law of the jungle of the concerning kind'.[102] Like the drafters of the ABGB more than 100 years earlier, he decided against introducing any permission of necessity. But, in contrast to 1800, the Austrian position was already exceptional, because the first signs of another shift had already manifested.

III. Necessity redeemed

A. Hegel's critique...

Like the critique of necessity, its redemption is understood by many to have had a single protagonist. German criminal lawyers credit Hegel with turning the discussion back to an acknowledgement that necessity must be permitted under some

[100] For a discussion of their theories of entitlements, see Walter Wilhelm, 'Private Freiheit und gesellschaftliche Grenzen des Eigentums in der Pandektenwissenschaft', in Helmut Coing and Walter Wilhelm (eds.), *Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhunderts*, vol. IV (Frankfurt: Klostermann, 1979) 19-39; Simmonds, 'Rights at the Cutting Edge', pp. 122-134.

[101] Compare Auer, 'Subjektive Rechte', pp. 629-31.

[102] Bericht der Kommission für Justizgegenstände über die Gesetzesvorlage betreffend die Änderung und Ergänzung einiger Bestimmungen des Allgemeinen Bürgerlichen Gesetzbuchs. 78. der Beilagen zu den stenographischen Protokollen des Herrenhauses des Reichsrates. 21. Session (1912) [report of the commission for affairs of justice on the draft law concerning the modification of some provisions of the ABGB, 78 of the documents to the stenographic protocols of the upper chamber of the Reichsrat, Session 21 (1916, available at alex.onb.ac.at). These are the travaux preparatoires for the third partial amendment to the ABGB enacted in 1916.] p. 262.

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circumstances. Unfortunately, Hegel's treatment of the matter is even more apodictic than Kant's.[103] He writes:

> The particularity of the interests of the natural will, taken in their entirety as a simple whole, is personal existence or *life*. In *extreme danger* and in conflict with the rightful property of someone else, this life may claim (as a right, not a mercy) a *right of necessity* [*Notrecht*], because in such a situation there is, on the one hand, an infinite injury to someone's existence and the consequent loss of rights altogether, and, on the other hand, an injury only to a single restricted existence of freedom, whereby both right as such and the injured person's capacity for rights continue to be recognized, since the injury affects only *this* property of his.[104]

One idea in this paragraph is straightforward: A person's life is more important than some instance of damage to property. Contrary to an injury of the former, an injury to the latter does not deny a person their capacity to make use of property more generally, and thus such acts are permitted. En passant, Hegel criticises those (like Kant) who would leave it to the mercy of the owner whether they allow a person in distress to use their things.

In other respects, the text is shrouded in mystery and says very little about how this permission is to be squared with the control-based outlook on entitlements, which Hegel shares with Kant.[105] Fortunately, Hegel was not the only person to criticise Kant's position, and we may turn to his contemporaries for clearer ideas supporting the renewed limitation of entitlements in emergencies.

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[103] For a helpful short discussion, see Wilfried Küper, "Unendliche' gegen 'partielle' Verletzung des Daseins der Freiheit', in Gerhard Dannecker et al. (eds.), *Festschrift für Harro Otto* (Köln: Carl Heymanns Verlag, 2007) 79-88.

[104] *Outlines of the Philosophy of Right*, § 127 ('Die Besonderheit der Interessen des natürlichen Willens, in ihre einfache Totalität zusammengefaßt, ist das persönliche Dasein als *Leben*. Dieses in der *letzten Gefahr* und in der Kollision mit dem rechtlichen Eigentum eines anderen hat ein *Notrecht* (nicht als Billigkeit, sondern als Recht) anzusprechen, indem auf der einen Seite die unendliche Verletzung des Daseins und darin die totale Rechtlosigkeit, auf der andern Seite nur die Verletzung eines einzelnen beschränkten Daseins der Freiheit steht, wobei zugleich das Recht als solches und die Rechtsfähigkeit des nur in *diesem* Eigentum Verletzten anerkannt wird.') *Grundlinien der Philosophie des Rechts* (Hamburg: Meiner, 2010) GW 14:112, emphasis in original. In the translation, I replaced Knox' translation of *Notrecht* as 'right of distress' with the legal term, 'necessity'.

[105] On the significant common ground between Kant and Hegel, see, e.g., Gutmann, 'Paternalismus', pp. 173-4.

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B. ...and that of his contemporaries and followers

1. Collision of rights or of goods

In 1822, Danish jurist, Anders Sandøe Ørsted[106] criticised Kant's theory of necessity and individual rights more generally, arguing that it is impossible to define individual spheres of autonomy as rigidly as imagined by classic liberal theory, e.g., in terms of some physical space assigned to a person. It is then reasonable to form a second essential thought, which is usually attributed to Hegel's paragraph on necessity: If entitlements are not defined by their physical boundaries, it is conceivable that they *overlap* (in principle), and thus this *conflict of 'prima-facie' entitlements* must be resolved in favour of one, limiting the other. Situations of necessity can thus be interpreted in this way: In the hiker example, the hiker's life extends to what she needs to save her life, and the cabin owner's entitlement must retreat. Later lawyers, predominantly criminal law theorists (the 'Hegelians'), broadened this to the point that all rights, even of the same kind, as well as legal goods, could be 'weighed' against each other, culminating in the *theory of balancing*, which dominates contemporary German private and public law theory.[107]

2. Social limits of rights

Another string of theories argues that property, although perhaps 'naturally' or conceptually without limits, must be limited within society. As we saw, Zeiller's position was already open to such moderation in his earlier years when he conceded the possibility of statutory limitations of natural rights. In his later years, this aspect seems to have become even more prominent. In a journal article from 1825, he expressly distances himself from the Kantian view on necessity and assumes that in a state – with or without express approval of the legislator – some acts of necessity are permitted.[108] He argues that the establishment of society means that some measure of

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[106] 'Über das Nothrecht, als ein einflussreiches Prinzip in die [sic] Strafrechtspflege', 5 (1822) *Neues Archiv des Criminalrechts* 345-374 and 625-678, pp. 345-374.

[107] On this development, see Paul Bockelmann, *Hegels Notstandslehre* (Berlin: DeGruyter, 1935); Michael Pawlik, *Der rechtfertigende Notstand* (Berlin: DeGruyter, 2002) pp. 98-103.

[108] 'In welcher Art entschuldiget ein Nothfall von der Zurechnung zum Verbrechen?' In a remarkable contrast to this, Zeiller declared performing an abortion to save a pregnant woman as legal on seemingly different grounds: He argued that it was self-defence. Nevertheless, this too can be read as a more favourable view on persons in emergencies. Zeiller's inclusion of a critical discussion of Kant's view on necessity further suggests a less pronounced distinction between self-defence and necessity than in his earlier work. See Franz von Zeiller, 'Beytrag zur Beantwortung der Frage: ob im Falle der Geburt, wenn das Kind nicht geboren werden kann, die vom Geburtshelfer vorgenommene Perforation des noch lebenden Kindes als Tödtung angesehen werden kann?' (1825) *Zeitschrift für österreichische Rechtsgelehrsamkeit und politische Gesetzkunde* issue II 211-220.

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mutual support is necessary. Zeiller points out that men are drafted for war, emergencies and harvesting, while taxes and goods are levied to prevent public harm. His question therefore is: Why should exceptions of this kind never be possible in a two-party scenario, where it is obvious that without them, great harm would be done to one of the persons involved?

The basis of this inductive search for exceptions to entitlements can be called a theory of *solidarity* or of *social* limits of law, which became much more influential at the turn of the 20th century.[109] It is important to note that it is not the same kind of departure from Kantian rights as the Hegelians' collision of rights theory: Entitlements still have their boundaries, but there may be *exceptions* based on solidarity. Perhaps, some writers suggest, this is what Hegel really meant to say,[110] while others say it is implicit in Fichte's theory of rights.[111] But this dispute on the precise origin of solidarity as a legal principle complementing and correcting Kantian entitlements is immaterial for present purposes. The reception of this thought by later lawyers is clear enough. The Hegelians were read by private lawyers such as Lehmann[112] and Rudolf Merkel,[113] who then reintroduced a permission to perform acts of necessity in private law.

3. Welfare-based interpretations of the law

A third string of theories goes beyond these plausible interpretations of Hegel and comes closer to a pre-Kantian appreciation of the common good, not only as the basis for a critique of individual rights (as in the theory of solidarity), but as the fundamental basis to justify *all* law, including individual entitlements themselves. The modern version does not subscribe to the existence of a metaphysical common good, rather, it 're-imagines' the common good as a utilitarian sum of individual interests or an economic sum of individual preferences.

[109] Tilman Repgen, *Die soziale Aufgabe des Privatrechts* (Tübingen: Mohr Siebeck, 2001), especially pp. 68-120; Ribeiro, *Decline*, pp. 172-215.

[110] In particular, Pawlik, *Notstand*. pp. 98-103, on whose view see below fn. 166.

[111] Merle, 'Notrecht', pp. 59-60 (duty of sharing as part of the just order of property); Renzikowski, 'Solidarität', pp. 25-29. Fichte is more generally known for his theory that law cannot exist in the moral dilemma cases of necessity, see his *Grundlage des Naturrechts* vol II: Angewandtes Naturrecht (Iena and Leipzig: Gabler, 1797) pp. 85-6.

[112] 'Über die civilrechtlichen Wirkungen des Nothstandes' 13 (1874) *Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts* 215-250, p. 217.

[113] *Die Kollision rechtmäßiger Interessen und die Schadenersatzpflicht* (Strasbourg: Trubner, 1895).

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As to the central figure of this approach, some may be tempted to cite Rudolf von Jhering,[114] who heavily criticises the Kantian view that entitlements protect someone's control or will,[115] and is instead primarily concerned with the interest which the entitlement in question serves. Generally, making entitlements depend on the interest they serve implies that where another person's interests are (clearly) more valuable than those of an owner, the rights conferred by ownership must be limited. Necessity would be a prime example where exclusion of others does not further general welfare and must therefore be limited. And it is true that Jhering assumes a priority of society over the individual and pointed to cases of public necessity – fires and war – to show how individual rights may be limited.[116] However, Jhering's work is rather ambiguous. It is based on open-ended ideas of social purpose which are close to, but not necessarily identical with, utilitarianism or even an early economic approach; he may equally be understood as taking a step back to medieval thinking in terms of the common good.[117] The same is true for Andreas von Thur, who treated property rules as a rule of thumb, which could be corrected by statutory law where welfare demanded it,[118] and, again, Rudolf Merkel,[119] who blended the thought of balancing entitlements and utilitarian language. Direct predecessors of contemporary welfare-based approaches such as Victor Mataja[120] did not study doctrinal problems such as necessity in detail.

Even without a paradigmatic advocate in academic writing, the general idea of necessity as an inroad of welfare considerations fitted into the spirit of the time. Germanic academics and lawmakers already discussed such inroads for more

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[114] See for instance – on a more abstract level – Stephan Vesco, 'The Invention of Economic Jurisprudence. From Jhering to Posner' 5 (2021) *Vienna Law Review* 82-101, pp. 87-9, who acknowledges different phases of Jhering's thought but ultimately interprets Jhering as a genealogical step to a purely economic orientation of private law.

[115] *Der Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, vol. III, 4th edn. (Leipzig: Breitkopf und Härtel, 1888) pp. 327-350.

[116] *Der Zweck im Recht*, vol. I (Leipzig: Breitkopf und Härtel, 1877) pp. 416-419; see also Rudolf Stammler, *Darstellung der strafrechtlichen Bedeutung des Nothstandes* (Erlangen: Andreas Deichert, 1878) p. 74.

[117] Gutmann, 'Paternalismus', p. 186. By contrast, Auer, *Diskurs*, pp. 130-8 cites Jhering's role in a development towards 'social rights' which does, in her view, not mean a full return to the pre-modern view.

[118] *Nothstand im Civilrecht* (Heidelberg: Carl Winter, 1888) p. 79.

[119] *Kollision* pp. 18, 41, 129 (balancing interests) and 45 (insisting on respect for a person's legal sphere and responsibility, i.e., autonomy).

[120] Victor Mataja, *Das Recht des Schadenersatzes vom Standpunkte der Nationalökonomie* (Leipzig: Duncker & Humblot, 1888).

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practically relevant scenarios. With industrialisation under way in German-speaking countries, they noted that the old way of thinking about property rights – in terms of absolute control over a thing – would also mean that running trains and factories would be wrongful and even culpable per se, because they foreseeably interfere with other persons' property, sometimes intentionally, and sometimes through a manifest frequency of accidents.[121] Regardless of the precise theoretical justification of denying a wrong in such cases, contemporaries increasingly found it implausible that individual entitlements were important enough to prohibit such activities sanctioned by state, public opinion and common sense.[122]

4. Commonsensical case law

It is also worth noting that court practice of the time may have also reflected changing attitudes. The courts did not strictly follow through with the classic liberal interpretation of rights. Rather, they permitted acts of necessity on a case-by-case basis. The German Imperial Court decided that – much like in the Digest – a crew was not liable (and arguably not committing a wrong) when cutting a wire rope in order to free a ship,[123] while the Austrian Supreme Court allowed entering another's land in an emergency.[124] Although the courts did not refer to specific theories in their decisions, they clearly did not strictly follow the will theory of entitlements inspired by Kant.

C. Consolidation and codification of an entitlement to act in necessity

Given the potential theoretical bases for a permission to act in necessity and the available case law, the view that a certain range of acts in necessity should be permitted

[121] On this development see, e.g., Christian von Bar, *Common European Law of Torts*, vol. II (Oxford: Clarendon Press, 2000) no. 313; Miquel Martín-Casals, 'Technological Change and the Development of Liability for Fault: A General Introduction', in Miquel Martín-Casals (ed.), *The Development of Liability in Relation to Technological Change* (Cambridge: Cambridge University Press, 2010) 1-38.

[122] In Germany, this was pointed out by Carl Ludwig Bar, *Die Lehre vom Causalzusammenhange im Rechte* (Leipzig: Tauchniz, 1871) p. 154 and Edgar Loening, *Die Haftung des Staats aus rechtswidrigen Handlungen seiner Beamten* (Frankfurt a.M.: Keip, 1879) pp. 72-5, in Austria by Leopold Pfaff in Leopold Pfaff, Anton Randa and Emil Strohal, *Drei Gutachten über die beantragte Revision des 30. Hauptstücks im II. Theile des a.b. Gesetzbuches* (Vienna: Carl Fromme, 1880) pp. 49-54.

[123] RG 12 October 1881 RGZ 5, 160 (wirerope). See also Oberappelationsgericht Wolfenbüttel 12 July 1872 *Seufferts Archiv* 27/202 (draining off water to neighboring land).

[124] OGH 21 February 1871 Julius Glaser and Josef Unger (ed.), Sammlung von Civilrechtlichen Entscheidungen des k.k. obersten Gerichtshofes (GlU, available at alex.onb.ac.at) 4057; 28 December 1895 GlU 15662.

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started to gain traction in private law scholarship towards the end of the 19th century. In the field of private law, the most important doctrinal defence of a right to acts of necessity was authored by Rudolf Merkel.[125] In his monograph, he argues that the problem of necessity had been overlooked in the first two drafts of the German Civil Code (BGB). His theoretical argument in favour of a right to perform acts of necessity draws on the idea of a collision of (individual) rights and welfare arguments. However, his text is mainly a masterpiece of inductive reasoning, drawing on rules for specific emergencies that were well-established but largely ignored by theoretical writers. He cites local laws which permit chopping wood in order to repair carts or lighting dangerous fire in times of extreme cold,[126] the permission to use another's property if a way was blocked,[127] or in order to chase escaped animals.[128] He relates these acts of necessity to other cases such as the problem of harm caused by trains and industrial activity as well as factories. In all of these scenarios he seeks to explain the absence of a wrong by referring to the preponderance of interests on the side of the actor and draws on the language of a collision of entitlements as well as economic thought.[129] Remarks of his contemporaries show the influence of Merkel's monograph in interested circles. For instance, Max Rümelin praised Merkel to have 'convincingly, or even conclusively, shown that modern laws cannot avoid acknowledging some acts in necessity as lawful.'[130]

The drafters of the BGB did not follow Merkel in his broader claims, but they were impressed enough by his suggestions[131] that they introduced a rule on necessity into the sections on property law. In its final form, the rule states:

> § 904 BGB Necessity [literally: state of emergency]

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[125] Merkel, *Kollision*.

[126] Merkel, *Kollision* pp. 52-3.

[127] Merkel, *Kollision* pp. 51-2.

[128] Merkel, *Kollision* p. 53. This liberty is recognised, for instance, in the Austrian § 384 ABGB.

[129] Merkel, *Kollision* pp. 58-9. Comparing jurisdictions, it is noteworthy that the option of separating the problem of traffic and industrial accidents from cases of intentional harm caused in necessity was not attractive in German law, because intentional torts were not and are not perceived as an independent field.

[130] Max Rümelin, *Die Gründe der Schadenszurechnung und die Stellung des deutschen bürgerlichen Gesetzbuchs zur objektiven Schadensersatzpflicht* (Freiburg i.Br.: Mohr, 1896) p. 36. Similarly Fischer, *Rechtswidrigkeit*, p. 226.

[131] That his intervention must have been the reason for introducing § 904 BGB is clearly apparent from the language used in the discussions; see Andreas Hatzung, *Dogmengeschichtliche Grundlagen und Entstehung des zivilrechtlichen Notstands* (Frankfurt a.M.: Lang, 1984) pp. 162-163.

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> The owner of a thing is not entitled to prohibit another from interfering with the thing when such conduct is necessary to avoid a present danger, and the damage threatened by it is unreasonably large compared to the damage arising to the owner from interfering with his thing. The owner can require compensation for the damage that occurs to him.[132]

The drafters gave no uniform theoretical justification for this rule:[133] Some follow the theory of a collision of rights, while others vaguely point to legal intuitions, the limits of self-defence and social responsibility. Jointly, they add that a right to save valuable property could have economic advantages. Thus, they draw upon all of the main arguments for a right to perform acts of necessity present in the literature of the time while not endorsing a specific one. In spite of these divided motivations, the rule itself can justly be seen as a milestone: It is the first clear modern, positive endorsement of a right to necessity. There has since been little doubt that it is desirable to permit acts of necessity in some cases.

A good example of the power of Merkel's conclusions is the fate of necessity in Austrian law. The previously-mentioned conservative reform of the Austrian Civil Code (ABGB) 1916 took note of the German § 904 BGB but decided against permitting acts of necessity. The commission merely conceded that full compensation seemed too harsh, because the actor's fault appears limited in necessity.[134] It therefore merely introduced a rule that allowed mitigation by reference to considerations of equity (§ 1306a ABGB).[135] The background assumption of the

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[132] 'Notstand. Der Eigentümer einer Sache ist nicht berechtigt, die Einwirkung eines anderen auf die Sache zu verbieten, wenn die Einwirkung zur Abwendung einer gegenwärtigen Gefahr notwendig und der drohende Schaden gegenüber dem aus der Einwirkung dem Eigentümer entstehenden Schaden unverhältnismäßig groß ist. Der Eigentümer kann Ersatz des ihm entstehenden Schadens verlangen. ' My translation, based on James Gordley, *Foundations*, p. 133.

[133] Reichs-Justizamt (ed.), *Protokolle der Kommission für die zweite Lesung des Bürgerlichen Gesetzbuch,* vol. VI (Berlin: J. Guttentag, 1899) pp. 213-5.

[134] Bericht der Kommission für Justizgegenstände über die Gesetzesvorlage betreffend die Änderung und Ergänzung einiger Bestimmungen des Allgemeinen Bürgerlichen Gesetzbuchs. 78. der Beilagen zu den stenographischen Protokollen des Herrenhauses des Reichsrates. 21. Session (1912) pp. 261-2.

[135] § 1306a ABGB states: 'If a person in an emergency causes damage to avert imminent danger to himself or others, the judge has to decide whether and to what extent the damage has to be compensated, thereby taking into account whether the person harmed refrained from taking defensive action out of consideration for the imminent danger to the other, the relationship between the extent of the damage and the danger and lastly, the financial means of the harm-doer and of the person harmed.' ('Wenn jemand im Notstand einen Schaden verursacht, um eine unmittelbar drohende Gefahr von sich oder anderen abzuwenden, hat der Richter unter Erwägung, ob der Beschädigte die

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legislator was that all acts of necessity are wrongful. Yet this assumption did not prevail for long. Criticised even during the drafting process,[136] it was rather soon forgotten. After a while, it became a matter of course that there must be a permission for some acts of necessity.[137] In criminal law, even prior to contemporary codifications of a permission to act in necessity,[138] courts were so convinced of this that they accepted the institution of necessity 'above the law' (*übergesetzlicher Notstand*).[139] Austrian criminal law scholarship also accepted – to this date, without any clear textual basis in the law – that there are circumstances under which acts of necessity are permitted.[140]

That there are permitted acts of necessity (apart from, potentially, excused acts of necessity) is the predominant opinion today and is hardly ever questioned in spite of the remaining controversies surrounding the doctrine and its complexities.[141] In the

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Abwehr aus Rücksicht auf die dem anderen drohende Gefahr unterlassen hat, sowie des Verhältnisses der Größe der Beschädigung zu dieser Gefahr oder endlich des Vermögens des Beschädigers und des Beschädigten zu erkennen, ob und in welchem Umfange der Schaden zu ersetzen ist. ') Translation by Barbara C Steininger, 'Austria', in Barbara C Steininger and Ken Oliphant (eds.), *European Tort Law: Basic Texts*, 2nd edn. (Vienna: Jan Sramek, 2018). Contemporary observers applaud this rule for its circumspection and flexibility, see, e.g., Kristian Cedervall Lauta, 'When a Right is a Wrong: Compensation for Acts of Necessity', 8 (2017) *Journal of Europan Tort Law* 297-323, pp. 319-322; Amalia Diurni, *Notstand und Nothilfe* (Bielefeld: Gieseking, 1994) p. 191. However, this only concerns the useful flexibility regarding damages, while the lack of guidance on the permission of acts of necessity is rarely noted.

[136] Karl Adler, 'Ergänzungen zu meiner Notstandslehre' 34 (1911) *Zeitschrift für die gesamte Strafrechtswissenschaft* (ZStW) 914-923, pp. 919-21; Max Mihurko, 'Revision des Schadenersatzrechts in den Entwürfen einer Novelle zum allgemeinen bürgerlichen Gesetzbuche', (1911) *Gerichtszeitung*, 297-300, 305-307, 314-8, 325-8, 330-2, p. 305.

[137] See already Rudolf Bienenfeld, *Die Haftungen ohne Verschulden* (Berlin: Springer, 1933) pp. 77, 474; Walter Wilburg, *Elemente des Schadensrechts* (Marburg an der Lahn: N.G. Elwert, Braun, 1941) pp. 44-5. Manfred Hohenecker, 'Die Notstandsregelung des ABGB' 125 (1993) *Juristische Blätter* 363-380 and 440-451, pp. 365-7 pointed out that the original understanding of § 1306a ABGB had been entirely based on limited fault.

[138] See above fn. 11.

[139] RG 11 March 1927, *Entscheidungen des Reichsgerichts in Strafsachen* (RGSt) 61, 242 (abortion in necessity justified); OGH 17 March 1972, 13 Os 29/72 *Juristische Blätter* 1972, 623 (comment Liebscher) (obiter, plane kidnapping unjustified); 20 March 1989, 15 Os 41/89 (obiter, daughter under the thrall of a religious sect); Peter Lewisch, 'nach § 3 StGB', in Frank Höpfel and Eckart Ratz (eds.), *Wiener Kommentar zum Strafgesetzbuch*, 2nd edn. (Vienna: Manz, 2020-) nos. 16-22.

[140] See Diethelm Kienapfel, 'Der rechtfertigende Notstand' 30 (1975) *Österreichische Juristen-Zeitung* 421-31; Helmut Fuchs and Ingeborg Zerbes, *Strafrecht*, no 17/53.

[141] Two of these complexities deserve to be mentioned in the present footnote. First, it came to be accepted that necessity can not only justify a permission to act but may also *additionally* serve as an *excuse.* Second, it became questionable whether criminal law concepts of both kinds of necessity (excuse and justification) are necessarily identical to their corresponding private law concepts of the

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words of an eminent criminal law scholar: It has become an 'absolutely ascertained principle of our law.'[142] Remarkably, there appear to be no suggestions to deny a permission of acts of necessity in present law or to abolish it in the future, in spite of a renewed controversy on the precise arguments supporting this permission.[143]

IV. Lessons for the current dispute on necessity and entitlements

A. Why think any further?

Despite the consensus on permitting some acts of necessity – and even important black-letter provisions such as § 904 BGB, § 34 German Penal Code, and art. 17 Swiss Penal Code – problems remain. One, of course, is the precise extent of the permission in difficult cases, its relation to interventions and aid by public authorities, etc. Another is the often-neglected question concerning the *private law consequences* of necessity. While a duty to *compensate harm* caused by permitted acts of necessity is as generally accepted as the permission itself, it poses many unresolved questions, such as the extent of compensation and who is liable in case a person helps another by damaging a third party.[144]

Especially in private law scholarship, the answers commonly given to such questions may finally reveal a negative effect of legal doctrine (*Rechtsdogmatik*) as practised in Germanic jurisdictions. In its commentaries on necessity, the almost unanimous 'dominant opinion' endorses a rather abstract formal thought rather than a substantive theory on the merits of entitlements and liability rules. The assumption is that, in cases of necessity, the person in an emergency may demand from others an 'exceptional sacrifice' where proportional, but is subject to the qualification that she must compensate any harm done.[145] The present article is not the place to extensively

same name. See Merkel, *Kollision*, as well as Fischer's discussion in *Rechtswidrigkeit*, pp. 221, 232. Both propositions produce numerous problems of their own, which are not the focus of this paper.

[142] Lenckner, *Notstand*, p. 7.

[143] See, in particular, the sections on criminal law and economic analysis of law, text to fns. 154-66 below.

[144] Questions provoked by necessity such as these remain key for any systematic approach to tort law, because necessity 'brings to the fore the core normative issues in tort law and so provides a useful test case for any theoretical and doctrinal explanation of it': Nils Jansen, *The Structure of Tort Law*. Sandy Steel (trans.) (Cambridge: Cambridge University Press, 2021) p. 12.

[145] Horst Konzen, *Aufopferung im Zivilrecht* (Belin: Duncker & Humblot, 1966) pp. 107-110; Karl Larenz and Claus-Wilhelm Canaris, *Lehrbuch des Schuldrechts*, pp. 655-656; Erwin Deutsch, 'Zivilrechtliche Haftung aus Aufopferung', in Erwin Deutsch, Ernst Klingmüller and Hans Josef Kullmann (eds.), *Der Schadenersatz und seine Deckung. Festschrift für Erich Steffen zum 65.*

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discuss and criticise this view;[146] it suffices to say that it failed to provide much guidance in solving practical questions, mainly because it what 'exceptional' means ultimately remains too unclear[147] if no underlying, more substantive theory of entitlements explains both norm and exception. However, if one cuts through the formal language of sacrificing rights, contemporary Germanic law is not without attempts to rationalise necessity more fully. Rather unsurprisingly, these rationalisations follow the historic paradigms identified above. The present discussion will conclude by briefly discussing their merits (B.) and suggesting an alternative in the next subsection (C.).

B. Persistence of historical paradigms

1. No persistence of the will theory in pure form

Today, few authors[148] completely share Kant's views about how entitlements are formed, and, consequently, a prevalence of control and exclusion over the interests of a person in an emergency is virtually never defended. Even views that would endorse such a prevalence in principle are now limited to the common law tradition.[149]

Geburtstag (Berlin: DeGruyter, 1995) 101-20, pp. 101-2, 104, 111; Jürgen F. Baur and Rolf Stürner, *Sachenrecht*, 18th edn. (München: Beck, 2011) § 25 no. 4.

[146] See, in English, briefly (and critically) Jansen, *Structure of Tort Law*, pp. 12-4.

[147] This much is a common observation, see, e.g., Vollert Hemsen, *Der allgemeine Aufopferungsanspruch* (dissertation thesis Hamburg, 1961) pp. 62-76; Peter Rummel, *Ersatzansprüche bei summierten Emissionen* (Vienna: Manz, 1969) pp. 88-9; Hans Schulte, *Eigentum und öffentliches Interesse* (Berlin: Duncker & Humblot, 1970) pp. 48-65 and Lerke Schulze-Osterloh, *Das Prinzip der Eigentumsopferentschädigung im Zivilrecht und im öffentlichen Recht* (Berlin: Duncker & Humblot, 1980) pp. 19-23.

[148] A notable exception is Florian Rödl, *Gerechtigkeit unter freien Gleichen* (Baden-Baden: Nomos, 2015) pp. 254-64 (claiming acts of necessity are civil wrongs, though conceding that differing criminal law values prohibit self-defence against acts of necessity).

[149] Besides Weinrib and Ripstein (cited in fn. 10 above) see e.g. James Goudkamp, *Tort Law Defences* (Bloomsbury: London, 2016) pp. 80-1; John CP Goldberg and Benjamin Zipursky, *Introduction to US Law: Torts* (Oxford: Oxford University Press, 2011) pp. 238-241; John CP Goldberg, 'Inexcusable Wrongs' 103 (2015) *California Law Review* 467-512, pp. 481-483; Nathan Tamblyn, *The Law of Duress and Necessity* (London: Routledge, 2017) pp. 138-139. That such views exist in the common law tradition has several reasons besides the reception of Kant. It suffices here to refer to a looser connection between interference with an entitlement or wrongful action and remedies in the common law tradition: It may thus appear more natural for the common law to seek a solution to the necessity problem by simply denying any entitlement to self-defence against a person in an emergency– as the authors cited generally do – rather than regarding acts of necessity as permitted. By contrast, German lawyers tend to equate 'wrongful' with 'should be prevented by way of injunctions or defensive self-help'. On the latter function of the conception of 'wrongful' in German law, see § 1004 BGB and

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2. Persistence of the collision theory

The idea of a bilateral *collision of entitlements* (collision of rights, collision of goods) is particularly alive in *Austrian legal doctrine*,[150] where it is spelled out in the terminology of later jurisprudential developments. In particular the 'jurisprudence of interests' (*Interessenjurisprudenz*) and the 'jurisprudence of values' (*Wertungsjurisprudenz*) picture a person's entitlement to their physical integrity or property not as a right to control bodies or things, but as a 'protected interest' or 'prima facie right' which must be balanced against, in particular, the interests of others; thus, deciding on whether a person has a right to exclusion, compensation and so forth can only be decided by a balancing of interests (*Interessenabwägung*) about which only formal things can be said in general. In constitutional theory, Robert Alexy spearheaded a version of this view in reference to Dworkinian 'principles'.[151] This theory can easily make room for a permission to perform acts of necessity. However, a perceived weakness is that it is too ambiguous in its results.[152] Moreover – in cases of necessity – it apparently cannot explain why compensation can be claimed, because, after deciding that one entitlement 'outweighs' the other, no entitlement is 'left' to explain the compensation claim.[153]

3. Persistence of welfare-based interpretations

By contrast, unapologetically *consequentialist* arguments are championed by a number of authors who favour a law and economics approach to Germanic law,

further Rüdiger Wilhelmi, *Riskoschutz durch Privatrecht* (Tübingen: Mohr Siebeck, 2009) pp. 12-4 and 42-5; for a helpful discussion of remedies in common law, see Nicholas Cornell, 'What do we remedy?', in Paul B. Miller and John Oberdiek (eds.), *Civil Wrongs and Justice in Private Law* (Oxford: Oxford University Press, 2020) 209-230.

[150] On necessity in particular, see OGH 13 December 1988 5 Ob 573/88 *Juristische Blätter* 1989, 386; Helmut Koziol, *Österreichisches Haftungsrecht* vol. I, 4th edn. (Vienna: Jan Sramek, 2020) C 1, no. 104-5.

[151] Robert Alexy, *A Theory of Constitutional Rights.* Julian Rivers (trans.) (Oxford: Oxford University Press, 2002). For a recent defence of the idea, see Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford: Oxford University Press, 2012).

[152] Critiques focus on balancing while not usually offering a critique of the observation that entitlements may collide. See, among many statements, Joachim Rückert, 'Abwägung – die juristische Karriere eines unjuristischen Begriffs' 66 (2011) *Juristenzeitung* 913-23. On constitutional rights, see famously T Alexander Aleinikoff, 'Constitutional Law in the Age of Balancing' 96 (1987) *Yale Law Journal* 943-1005.

[153] See, recently, Luís Greco, 'Der Anteil der Gesellschaft. Eine Theorie des rechtfertigenden Notstands', 134 (2022) ZStW 1-96, pp. 50-1.

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although they have so far failed to gain significant ground.[154] Only two contributions on necessity can be cited.[155] Necessity is not a pressing issue to most economically-oriented lawyers because, at least at first glance, the economic perspective moves closer to a pre-Kantian mindset where the preservation of life and valuable property can easily justify exceptions to protective rules, because property again serves a functional purpose in relation to a more fundamental value (efficiency instead of the common good).

However, the broad spectrum of law and economics literature is not homogenous. Those authors who did discuss necessity assume that courts cannot ascertain and compare the weight of two individuals' preferences, and therefore assume that the doctrine of necessity is so problematic that it must be reimagined. While – as all authors in the tradition – they emphasise the aim of maximising welfare, they seek to pursue this aim by establishing conditions where individuals can reveal and realise their preferences by *agreement*: that is, conditions with low 'transaction costs'.[156] But in cases of necessity, this is not possible: In emergencies, limited time, physical absence of the owner of the affected things, and, in particular, an uneven bargaining situation do not permit free negotiations. In such a situation, the proponents of the transaction cost approach ask what conditions the parties themselves *would have agreed* to if, hypothetically, there were no transaction costs. The resulting hypothetical contract and its terms, they assume, is what the law should impose between the parties.

The consequences of this view are rather dramatic and are in fact apt to show the limits of the economic approach. Because it is based on the axiom that (only) the preferences revealed by an agreement of the parties are normatively relevant – as they are what determines how law should be formed and interpreted – a property owner who becomes the 'victim' of an act of necessity may, in theory, claim that she would

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[154] For the current state of debate, see Thomas MJ Möllers, *Juristische Methodenlehre*, 4th edn. (Munich: Beck, 2021) pp. 203-215.

[155] Johannes Köndgen, 'Rechtsverletzung im Notstand – das 'effiziente Delikt'?', in Theodor Baums et al. (eds.), *Festschrift für Ulrich Huber zum 70. Geburtstag* (Tübingen: Mohr Siebeck, 2006) 377-400; Florian Maultzsch, *Zivilrechtliche Aufopferungsansprüche und faktische Duldungszwänge* (Berlin: Duncker & Humblot, 2006) pp. 141-192, 208-214. The view taken therein is very similar to that in William M Landes and Richard A Posner, 'Salvors, Finders, Good Samaritans, and other Rescuers: An Economic Study of Law and Altruism' 7 (1978) *Journal of Legal Studies* 83-128, p. 113, fn. 74.

[156] The transaction cost paradigm is inspired – but not proposed – by Ronald H. Coase, 'The Problem of Social Cost' 3 (1960) *Journal of Law & Economics* 1-44. For a general application from a German law perspective, see Hans-Bernd Schäfer and Claus Ott, *Economic Analysis of Civil Law*, 4th edn. (Cheltenham: Edward Elgar, 2004) pp. 86-92.

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not have agreed to the act of necessity even under circumstances of life and death. The commonsensical argument that society would generally be better off with a right to acts of necessity does not count under this framework: To repeat, the basic idea is that others – especially the courts – do not have the epistemic capacities to directly judge and compare the preferences of individuals. The result is astonishing: If, for instance, the owner of a dock is a miser who would not help even if offered a fortune, she is entitled to turn a ship away, by force if need be.[157] And thus, perhaps surprisingly, those who get closest to Kant's opinion in contemporary private law doctrine are (some) economically-oriented authors.[158]

The problem of this approach is that it ignores everything relevant other than transactions and the claims of individuals about their preferences in them. There are more convincing ways to understand law and economics which have a more positive view on the assessment of preferences by third parties,[159] and they generally allow room for the doctrine of necessity in a more classic sense.[160]

Their precise assumptions vary depending on the approach, but a common core is that every individual person's normative impact is determined by her preferences. The development of such models can be useful, but it should not be forgotten that they are just that – models – and should not be confused with a system of thought from which doctrinal answers can be deduced. Wherever their proponents seek to justify the adoption of particular rules in a particular system, they cannot but leave the model behind and adopt a *normative foundation*.[161] That foundation lies hidden in its assumptions on such things as how preferences work, its intuition as to who should have the power to make which preferences matter, and what to do in cases of doubt. As long as these are not compatible with the legal system in question, they are not acceptable. While it is not possible to discuss approaches to law and economics

[157] For a critique of this view, see Stephen Sugarman, 'Vincent v. Lake Erie Transportation Co. and the Doctrine of Necessity' 5 (2005) *Issues in Legal Scholarship* no 2 Article 1, pp. 26-7.; Gordley, *Foundations*, p. 137.

[158] Köndgen, 'Rechtsverletzung im Notstand – das 'effiziente Delikt'?'. The position taken by Maultzsch, *Zivilrechtliche Aufopferungsansprüche* pp. 41-192, 208-214, is generally more cautious.

[159] A well-known example of this is Calabresi and Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral'.

[160] See, e.g., Henry E. Smith, 'Property as the Law of Things' 125 (2012) *Harvard Law Review* 1691-1726, p. 1710, who implements the rule in an information cost model.

[161] For a critique of the foundations of economic analysis of law, see Martha Nussbaum, 'Flawed Foundations: The Philosophical Critique of (A Particular Type of) Economics' 64 (1997) *University of Chicago Law Review* 1197-214 (especially pp. 1199-203); Horst Eidenmüller, *Effizienz als Rechtsprinzip*, 4th edn. (Tübingen: Mohr Siebeck, 2015).

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in further detail, the key takeaway is that the type of law and economics that aims to give conclusive answers for isolated two-party scenarios such as necessity is not convincing, while other approaches – not developed for necessity in the Germanic discourse – would not question the doctrine.

4. Persistence of reasoning from social limits

Contemporary *German criminal theory*, setting out from a Kantian understanding of entitlements, has been deeply troubled both by the balancing theory and by consequentialism more generally in recent years.[162] But it could not fully return to the view represented by Kant, because it nonetheless has to make sense of the codified doctrine of necessity in § 34 German Penal Code (*deutsches Strafgesetzbuch*, dStGB). It therefore continues on the path already taken by Franz von Zeiller in 1826 and upholds the idea of *solidarity as a critique of individual rights*, in favour of which it may cite the active duty to rescue (§ 313c dStGB) as a new paradigm application. The general idea is already suggested by the German constitution: art. 14 (2) of the German Basic Law declares that 'Property entails obligations. Its use shall also serve the public good.'[163] The reception of a similar thought for the explanation of the doctrine of necessity appears to go back to Joachim Renzikowski's[164] monograph on self-defence and necessity. Though not usually made explicit, I suggest that most authors and courts of *German private law* would find themselves drawn to a similar reasoning. It goes well with the general style of German private law thought, which tends to arrange norms in a dialectic between 'liberal' strict rules and 'social' discretionary or equitable rules found in norms such as §§ 133, 242 and 826 BGB.[165] Germanic doctrine has lived well with this for a considerable time but it has become

[162] Interestingly, this sense of there being a problem partly goes back to George Fletcher's warning to German criminal lawyers against consequentialism. See the latter's 'Utilitarismus und Prinzipiendenken im Strafrecht' 101 (1989) ZStW 803-818.

[163] Eigentum verpflichtet. Sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen. (Translation: https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0083.)

[164] *Notwehr und Notstand* (Berlin: Duncker & Humblot, 1994) pp. 185-199. I cannot hope to document the stream of monographs and articles that followed Renzikowski's argument and content myself with some examples. In English, see Ulfried Neumann, 'Necessity and Duress', in Markus D Dubber and Tatjana Hörnle (eds.), *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014) 583-606, pp. 583-8; further Kristian Kühl, *Strafrecht Allgemeiner Teil*, 8th edn. (Munich: Vahlen, 2016) para. 8, no. 8; Armin Engländer, 'Die Rechtfertigung des Rechtfertigenden Notstands' (2017) *Goltdammers Archiv*, 242-253, pp. 244-5 and, most recently, Greco, 'Der Anteil der Gesellschaft'.

[165] See, critically, Justus Wilhelm Hedemann, *Die Flucht in die Generalklauseln* (Tübingen: Mohr, 1933); Helmut Koziol, 'Glanz und Elend der deutschen Zivilrechtsdogmatik' 212 (2012) *Archiv für die civilistische Praxis* 1-62, pp. 14, 61.

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clear that several interpretations of open-textured concepts such as 'solidarity' are possible, depending on whether they are understood as an exclusive or overlapping duty, virtue or interest, and as a quality of individuals, societies, or states. The precise concepts of solidarity employed are not always clear.[166] In any case, it is not surprising that solidarity is ultimately vague, since it is construed not as a comprehensive positive theory of entitlements, but as a principle that merely corrects some of the excesses of a classic liberal theory of entitlements. The theory thus does not offer a comprehensive justification of entitlements as imagined by Kantianism, but rather the ad-hoc correction of a vaguely Kantian theory of entitlements.

C. Sketching a defensible view

Developing a convincing positive theory of necessity and entitlements requires a broader basis than a critical historical discussion. Nonetheless, I would like to sketch a defensible position in order to show that, despite all their problems, the historical lines of thought are both relevant and open to refinement.

The critique of the Kantian view of entitlements by the collision theory and the balancing view, which it shares with 'consequentialist' views, is justified in its main claim: Historical experience suggests that picturing entitlements as full control over an abstractly defined object, such as real things, is too far off from how entitlements really function. By implicitly adopting this model and allowing for a variety of rather vague exceptions – not only for necessity – the theory of solidarity likewise fails in picturing clearly what entitlements are supposed to achieve.

It must nonetheless be acknowledged that an overly ambiguous paradigm of balancing may produce an equally indeterminate picture of what entitlements are for: The historical thrust of the collisions theory, after all, was critical rather than constructive. Consequently, the questions it has to answer as a theory of entitlements in its own right are numerous: What interests matter in the equation? What weight do they have under which circumstances? How can there still be liability for acts of necessity in spite of the 'weaker' entitlement being 'balanced away'?

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[166] See Greco, 'Der Anteil der Gesellschaft', pp. 19-35. Some German authors have offered elaborate reconstructions of a principle of solidarity that emphasise a role of the *state* to ensure collaboration between individuals. Therefore, as in the case of expropriations and administrative regulations, limiting individual property is possible under narrow circumstances as *agency for the state*. See Pawlik, *Notstand*, in particular, pp. 104, 112, 120-2; id, 'Das Beispiel des rechtfertigenden Aggressivnotstands' 22 (2014) *Jahrbuch für Recht und Ethik* 137-57, pp. 152-6. While I cannot attend to Pawlik's theory at length in this paper, it suffices to say that the prescriptive claim that the state is a priori responsible for remedying all emergencies, and that it takes responsibility for all attempts to do so by individuals, is contestable as a political philosophy, and there is little basis for it as an interpretative theory of German(ic) law.

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One view that may provide a framework for answering these questions has venerable historical roots but has long been neglected. Nils Jansen[167] has shown that late scholastic theories of entitlements did not focus on exclusion. Rather, they focused on dominium. Walter Wilburg, many years later, developed a modern version of this view in order to explain important aspects of restitution law: He spoke of an 'assigning dimension' (*Zuweisungsgehalt*) of individual entitlements,[168] while I would suggest to speak of an affirmative core of entitlements. This view is acknowledged – even unrivalled – in some pockets of the current Germanic private law such as restitution law.

Thus, restitution law offers an alternative to understanding entitlements as strictly focused on exclusion and control. An entitlement's function is positive insofar as it creates a relationship between a person and resources that might matter to her. What is necessary to sustain such objects of entitlements broadly understood may overlap, and thus this can – as the collision and balancing theories showed – lead to a conflict with the entitlements of others. In this limited sense, the affirmative view is related to the balancing theory.

What are the benefits of the affirmative view? First, entitlements do retain a critical function that constitutes an important appeal of an individualist conception of entitlements. They are not determined by the common good but provide independent considerations that must be respected for the purpose of constructing specified legal rights to exclusion, damages, and restitution, among other things. Second, the view offers a technical framework for legal doctrine which does not require a strict commitment to fundamental positions, such as deontological or consequentialist views. Assigning objects to persons can have purely deontological background reasons (a body simply 'belongs' to the person living in it, full stop), but it can also just be a useful technique because the assignation tends to further positive consequences. In legal doctrine, it may often be both. In sum, the affirmative view

[167] 'Gesetzliche Schuldverhältnisse. Eine historische Strukturanalyse' 216 (2016) *Archiv für die zivilistische Praxis* 112-233, pp. 135-138, 206-7; in English language also id., 'The Idea of Legal Responsibility', 34 (2014) OJLS 221 (especially pp. 241-2 on 'basic rights'); id., *Structure of Tort Law*, pp. 354-5. See also Gordley, *Foundations*, pp. 7-31, 130-9.

[168] See in particular Walter Wilburg, *Die Lehre von der ungerechtfertigten Bereicherung nach österreichischem und deutschem Rechte* (Graz: Leuchner & Lubensky, 1934) pp. 27-39 and, further, on the development of this thought in the 20th century, Reinhard Ellger, *Bereicherung durch Eingriff* (Tübingen: Mohr Siebeck, 2002) pp. 148-248.

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excludes some reasons against granting specified rights but does not have the power to strictly determine those specified rights.[169]

The importance of taking an affirmative rather than an exclusionary view of entitlements can be shown by reference to many other institutions of the law beyond just restitution. But it must suffice here to consider a central example: tortious liability for negligent acts. If the sense of property, for instance, would really be limited to excluding others from an object, what sense would it make to award the victim of a negligent act compensation in damages? Even if the victim did have a right to exclude the negligent agent before the destruction, damages are neither identical with this right nor an obvious replacement for it.[170] Therefore, there must be a general framework holding several specific rights together. The point of claims in tort is rather to affirm that the object destroyed belonged to the claimant. Unfortunately, the consequences of this view are not always drawn.[171]

As already pointed out, this paper does not attempt to offer a comprehensive contemporary defence of affirmative entitlements, but it may have at least shown the appeal of such a theory relative to the identified historical currents: The affirmative view makes it possible to keep powerful traditional notions of what persons can be entitled to – their bodies, things, freedom and so on – largely intact. However, even if the object of entitlements remains the same, it must be 'reimagined' how particular rights can be justified on their basis: Exclusion, in particular, is not justified as such, but is rather justified by its purpose to assign the object to an individual.

Without doubt, its flexibility is the main reason for attacks on the affirmative view, because there are many who look to a theory of entitlements expecting precise solutions for any given particular case,[172] or assume that, without strictly prescribing

[169] See Jansen, 'Idea of Responsibility', pp. 241-2. Thus, the commitment of – at least – Germanic law to affirmative entitlements is premised on the antithesis to John Oberdiek's insightful but rather extreme position in 'Specifying Rights out of Necessity', which, briefly put, argues that there is no room for a legal concept such as entitlements ('general rights' in Oberdiek's terms). Oberdiek regards it as a fundamental problem that they would be located between the abstract and the concrete, between interests and legal rights/duties after considering all relevant circumstances.

[170] This is a lesson from an Anglo-American debate on the 'continuity thesis', which precisely holds that rights to damages are 'continuations' of rights to non-interference. At least in this form, where a claim in damages is a 'transformed' right to exclusion, the theory is not defensible. See John CP Goldberg and Benjamin Zipursky, *Recognizing Wrongs* (Cambridge, Massachusetts: Belknap, 2020) pp. 158-63.

[171] Compare Jansen, 'Gesetzliche Schuldverhältnisse', p. 207 and id., *Structure of Tort Law*, pp. 354-5.

[172] This expectation underlies criticism of the affirmative view as a magic formula that allows any conclusion. See, for one of many examples, Horst Heinrich Jakobs, *Eingriffserwerb und*

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specific rights, they do not fulfill their function to empower persons.[173] In the present context, I can only suggest one response to this type of critique, which fits well with the theme of this paper. If entitlements were expected to give an answer to any particular legal problem between individuals – including all questions of necessity – we would have to agree on everything that can conceivably be of normative relevance with regards to entitlements. This is the origin of the quest to construct a definitive answer to cases of necessity not only from black-letter law, but *also* from fundamental principles of deontological or welfare thought. The genealogy of necessity gives a first impression of just how unrealistic this enterprise is. We disagree about fundamental principles, they shift over time, and there needs to be some extent of compromise in a legal system: These are just some reasons why doctrinal theories on entitlements exist. They may exclude some theoretical bases of entitlements but must remain compatible with many others. I suggest that the genealogy of necessity makes plausible that principled solutions to all legal problems in a much more comprehensive way proved to be an illusion, at least in the Germanic experience. Rather, the Germanic legal tradition is oriented towards practical consensus.

And thus, we return to my introductory claims. We set out from a distinction between moral dilemmas and the legal doctrine of necessity in the Germanic legal tradition and the question of how it developed. By studying this genealogy, an even more fundamental suggestion can be made: Germanic law should endorse a theory of entitlements that does not commit to a specific fundamental view. That view is an affirmative view of entitlements.

V. Conclusions

Neither a strict deontological nor a strict consequentialist interpretation of necessity play a significant role in contemporary Germanic law, and thus an analysis of moral dilemmas (which aims to bring our intuitions on practical reason to light) and the legal doctrine of necessity (which solves a practical legal problem) should not be confused. On the one hand, individual entitlements are part of modern law, and medieval strategies to justify a doctrine of necessity by reference to the greater good are no longer the mainstream of Germanic thought. On the other hand, while Kant and his followers may have assumed that a doctrine of necessity is incompatible with

Vermögensverschiebung (Bonn: Ludwig Röhrscheid, 1964) p. 104, advocating the now extinct rival theory that restitution always requires a wrong.

[173] Compare Auer, *Diskurs*, pp. 98-9 (arguing that viewing entitlements as 'allocation of goods' – *Güterzuordnung*, which expresses the same thought with a whiff of collectivism – puts entitlements under the condition of welfare and just desert).

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a view of entitlements as full control over real objects such as bodies and property, the critique of such a harsh view on necessity was historically successful, and even suggested that the underlying model of entitlements as such was not tenable.

Three competing theories of necessity have emerged in Germanic law: (a) that entitlements are subject to balancing against other entitlements, allowing, for instance, a danger to life to prevail against property, (b) that entitlements are limited by the tenets of solidarity, and (c) that they are themselves functional concepts that allow exceptions in terms of an overall function such as efficiency. Notwithstanding the dominance of a doctrine of sacrifices (*Aufopferungslehre*) on the surface, these theories continue to offer competing interpretations of necessity, entitlements and compensation to date. The present paper suggests that a good point to converge at is an affirmative, positive view of entitlements, which serves well in understanding necessity and the compensation claims derive from it as well as many other problems of private law.

This does not mean that there is not a subset of cases falling under the doctrine of necessity that are good examples of moral dilemmas, which test intuitions underlying fundamental theories of practical reason, and which are also difficult to solve legally. The conclusion is merely that these theories are not closer to necessity than to other parts of the law, and that there are historical reasons to keep these two debates separate. Without prejudice to how affirmative entitlements must themselves be justified, it is rather the hope that this paper has at least shown this problem in a clear light, and given reason to question whether fundamental philosophical views should directly inform the doctrine of necessity.

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