

Human Nature and the Right to Coerce in Kant's *Doctrine of Right*

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Abstract:

This paper explores the alleged role of a conception of human nature for Kant's justification of the duty to leave the state of nature and the related right to coerce others to enter the civil condition in the *Doctrine of Right* (1797). I criticise the interpretation put forward by Byrd and Hruschka, according to which Kant's postulate of public right is a preventive measure based on a "presumption of badness" of human beings. Although this reading seems to be supported by §42 of the *Doctrine of Right*, I shall argue that the paragraph neither offers a justification of why we have a duty to leave the state of nature, nor explains why individuals are allowed to coerce others to do so. I offer an alternative interpretation of §42 by focusing on the difference between *formal* and *material* violations of right and argue that the rationale behind the postulate of public right is the idea that remaining in the state of nature is a *formal* violation of the concept of right. It is therefore not prudential reason which *authorizes* us to coerce others to enter the lawful condition.

I. Right and Coercion in Kant's legal philosophy¹

Any action is *right* (*recht*) which or in accordance with its maxim, the freedom of choice (*Freiheit der Willkür*) of each can coexist with everyone's freedom in accordance with a universal law.² If then my action or my condition generally can coexist with the freedom of everyone in accordance with a universal law, whoever hinders me in it does me *wrong*; for this hindrance (resistance) cannot coexist with freedom in accordance with a universal law. (RL §C at VI: 230-1)³

In the *Doctrine of Right*⁴ (1797), the first part of the *Metaphysics of Morals*, Kant defines a rightful or legal action (*recht*) as an action which can coexist with the freedom of choice (*Freiheit der Willkür*) of everyone in accordance with a universal law. If my action satisfies the condition of mutual compatibility with the freedom of all, anyone interfering with my agency would be *wronging* me from the perspective of Right. Any action hindering a rightful exercise of freedom is therefore unlawful (*unrecht*), that is, incompatible with the concept of Right. Although Kant says that an action itself or “in accordance with *its maxim*”⁵ must be compatible with the freedom of choice of everyone in accordance with a universal law, the question for the domain of Right is primarily not the quality of the agent's intention in doing the action (its moral worth or

¹ Earlier versions of this paper were presented at the Bogazic University, Instabul, Johannes Gutenberg University of Mainz and Georg-August University Goettingen, Germany. I would like to thank Lucas Thorpe, Courtney Fulgate, Bernd Ludwig, Andreas Brandt, Philipp Hirsch and an anonymous referee of the *Archiv für Geschichte der Philosophie* for very useful comments.

² I have replaced Mary Gregor's more grammatical translation of this sentence with a formulation which is slightly awkward, but closer to the original: „eine jede Handlung ist recht, die oder nach deren Maxime die Freiheit der Willkür eines jeden mit jedermanns Freiheit nach einen allgemeinen Gesetze zusammen bestehen kann.”

³ Kant's writings are cited according to the volume: page number of the Prussian Academy Edition of Kant's Complete Works (1900-, *Gesammelte Schriften*, Ausgabe der Preußischen Akademie der Wissenschaften, Berlin: Walter de Gruyter). I use the following abbreviations for the individual works cited:

-RL *Metaphysische Anfangsgründe der Rechtslehre* (*The Doctrine of Right*), the first part of *Die Metaphysik der Sitten* (*The Metaphysics of Morals*),

-KrV *Kritik der reinen Vernunft* (*Critique of Pure Reason*),

-KpV *Kritik der praktischen Vernunft* (*Critique of Practical Reason*).

I use Bernd Ludwig's edition of the *Metaphysische Anfangsgründe der Rechtslehre*, Felix Meiner Verlag, 2009 and Mary Gregor's translation of the *Metaphysics of Morals* in *Immanuel Kant, Practical Philosophy*, Cambridge University Press, 1996.

⁴ Although the German *Recht* has been often translated as “justice”, it has a broader meaning. *Recht* means a system of laws or “the rule of law” while “justice” or “just” would be better translated by *Gerechtigkeit* and *gerecht*, successively. In order to avoid these ambiguities, I shall use *Right* as a translation of *Recht*. I have also opted for “rightful/unrightful” and “lawful/unlawful” for the German *recht/unrecht* (in accordance with Right), even though these expressions are unusual in English.

⁵ “Maxim” in this case is merely the underlying principle of the action (whatever the agent thinks she is doing when she acts) and not the agent's disposition (her *Gesinnung*) when doing the action (whether she is ethically motivated or acts from a self-interested motive). See Reinhard Brandt, “Das Erlaubnisgesetz”, In: R. Brandt (ed.), *Rechtsphilosophie der Aufklärung. Symposium Wolfenbüttel 1981*, Walter de Gruyter, 1982, p. 282-3, n. 50.

lack thereof), but the *external* compatibility of her action or maxim of action with the freedom of others. For instance, if I take your coat home by mistake, I have done something unlawful even though I did not intend to *steal* your coat. The fact that I unintentionally took what belongs to you does not entitle me to keep your coat: I have a juridical duty to return the object to its rightful owner. If for some reason I fail to do so, I can be *coerced* to give your coat back (you can go to the police and make a complaint against me). This is not to say that intentions are *never* relevant or taken into account in the juridical domain; however, the point is that in contrast to the *ethical* domain, Right regards actions from a purely *external* perspective. Juridical duties or duties of right are therefore those which it is possible to satisfy without acting from the motive of duty.⁶ Compliance with what is right can thus be externally *coerced*, even though it is still possible to act from the consciousness that it is also a *duty* to do so (i.e. to be *ethically motivated* to comply with Right). In contrast, because moral maxims and ends can only be *freely* adopted, it does not make sense to coerce a person to be virtuous. One can thus be externally coerced to do what is right, but never to do what is right from a virtuous motive, since virtue only allows *internal* coercion (VI: 219). If someone's action is compatible with the freedom of all, the agent has a *right* to be free from the interference of others. The specific motive or ends one chooses to pursue are secondary from the perspective of right: it is sufficient that actions be externally compatible with the external freedom of everyone else, in accordance with universal laws.

(...) If a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a *hindering of a hindrance to freedom*) is consistent with freedom in accordance with universal laws, that is, it is right. Hence there is connected with right by the principle of contradiction an authorization to coerce someone who infringes upon it. (RL §D at VI: 231)

It follows from the principle of contradiction (*Satz des Widerspruches*) that if an action hinders a "hindrance of freedom", it must be in accordance with the principle of Right. Although such an action would be coercive, it is nevertheless lawful once it "cancels out" an impediment to external freedom. Coercion in this sense is not only compatible, but "analytically contained" in the concept of Right: the concept of Right *entails* an

⁶ As Ludwig expresses it, one *can* satisfy a juridical duty (*Genüge tun*) without acting from duty. This however leaves open the possibility of being ethically motivated to comply with the juridical duty. Bernd Ludwig, "Die Einteilung der Metaphysik der Sitten im Allgemeinen und die der Metaphysischen Anfangsgründen der Tugendlehre im Besonderen." Forthcoming in: A. Trampota, O. Sensen and J. Timmermann (eds.), *Kant's Tugendlehre. A Comprehensive Commentary*, De Gruyter, p.2.

entitlement to coerce (note however that not all forms of coercion are lawful, only coercion aimed at preventing a violation of rights). Therefore, it seems that whoever *has a right* is at the same time *allowed to coerce others to respect her right*. Since the relation between having a right and entitlement to coerce is analytical, coercing others seems to be possible independently of the existence of juridical institutions for deciding and enforcing conflicts of rights. Kant therefore appears to be affirming Locke's view according to which whoever transgresses rights in the state of nature has "declared to live by another rule than that of reason",⁷ thereby allowing all others to take "the executive power of the law of nature" into their own hands.⁸ As will become clear in this article, Kant does not recognize a Lockean entitlement to coerce in the state of nature, although the scenario we have in Kant's state of nature may seem identical to Locke's (individuals unilaterally enforcing what they think right).

According to Kant, we already have rights in the state of nature. Due to the humanity in our persons, every human being has an original, innate right⁹ not to be bound by others in a way she cannot bind them in return (innate equality) and consequently to be her own master (*sui iuris*, RL VI: 238). In virtue of the innate right, however, we can also **acquire** further rights given our particular deeds in relation to others (by making agreements and entering contracts), our personal relations to some persons (for instance, by being the parent or spouse of someone) or by taking possession of external objects or pieces of land. These rights exist independently of the existence of states or other juridical institutions, although, as Kant stresses, before the establishment of a condition of distributive justice, *possession* will be only *provisionally* and not yet *peremptorily* rightful (RL §9 at VII: 257).¹⁰ The civil condition therefore does not

⁷ John Locke, *The Second Treatise of Government*, Thomas Peardon (ed.), The Liberal Arts Press, New York, 1952, § 8.

⁸ John Locke, *op. cit.* §13.

⁹ Although widely used by English speaking Kant scholars, the formulation "innate right to freedom" is misleading, (see for instance Arthur Ripstein, *Force and Freedom. Kant's Legal and Political philosophy*, Harvard University Press, 2009, pp. 31, 36, 209, 210 and 241). Strictly speaking, it is unnecessary to talk about a "right to be a free agent", since freedom is already contained in the concept of human beings as rational agents. The right in question is therefore a right to exercise freedom *in regard to other agents*, that is, to be free from *their* arbitrary interference in one's exercise of freedom, when one's actions are not unlawful. It is also possible to violate the innate right in one's own person by letting oneself become a mere means to the purposes of others. Kant identified this last prohibition with the duty of rightful honour (*honeste vive*, RL VI: 236).

¹⁰ For peremptory property, a condition of distributive justice would have to be instituted not only at national level, but would ultimately have to include all nations and persons on the earth. Kant's idea that property before that would nevertheless be "provisionally" rightful is his answer to Robert Filmer's objection to Hugo Grotius that a contractualist foundation of property would require making a contract with all mankind. Locke's labour theory of property in chapter 5 of the *Second Treatise* is also an attempt

create new private rights, distinct from those in the state of nature (RL §41 at VI: 306). However, I will argue that the civil condition is required not only to *secure* the property claims of individuals against the threat of others, but in order to make the *coercion* required by property rights compatible with the concept of right in the first place. (I shall develop this view later in the article). For our present purposes, it is enough to stress that since we already have rights in the state of nature and cannot avoid interaction with other persons indefinitely, we “must unite ourselves with all others, with whom we cannot avoid interaction” (RL VI: 312) and thus must assume a duty to enter a lawful condition with others (*exeundum esse e statu naturali*).

From private right in the state of nature there proceeds the postulate of public right: when you cannot avoid living side by side with all others, you ought to leave the state of nature and proceed with them into a rightful condition, that is, a condition of distributive justice. - The ground of this postulate can be explicated analytically from the concept of right in external relations, in contrast with *violence* (*violentia*). (DR §42 at VI: 306)

Kant connects the duty to leave the state of nature and enter the state (the postulate of public right) with a right to coerce others who are unwilling to join in this enterprise.¹¹ Given Kant’s definition of coercion as analytically contained in the concept of right (§D at VI: 231), one is inclined to conclude that forcing others to enter the state is just an instance of a lawful “hindrance of a hindrance of freedom.” However, when bearing in mind what Kant says about coercion to protect private possession in the state of nature, it becomes clear that the alleged right to coerce others to leave the state of nature and enter the civil condition is far from obvious. As Kant observes in §8 of the *Doctrine of Right*, a unilateral will in regard to external property cannot serve as a coercive law for everyone, because a unilateral will is *contingent* and thus incompatible with freedom according to universal laws (RL VI: 256, ll. 21-4).¹² Note that the argument is not that unilateral actions are insufficient to *secure* property rights; Kant’s point is that insofar as appropriation is *always* contingent, it lacks universality and consequently the authority to impose an *obligation* on all others (*Verbindlichkeit*, RL

to address this objection. See Ludwig, “Whence Public Right? The Role of Theoretical and Practical Reasoning in the *Doctrine of Right*.” In: M. Timmons, *Kant’s Metaphysics of Morals. Interpretative Essays*. Oxford University Press, New York, 2002, p. 179, note 30.

¹¹ As I shall explain, although Kant speaks about an authorization to coerce in §42, his justification of the right to coerce others to enter the state only appears at RL §44 at VI: 312 ll. 31-33.

¹² „Nun kann der einseitige Wille in Ansehung eines äußeren, mithin zufälligen, Besitzes nicht zum Zwangsgesetz für jedermann dienen, weil das der Freiheit nach allgemeinen Gesetzen Abbruch tun würde.“

§8 at 255-6, see also RL VI: 222). The question is thus *under which conditions* unilateral acts of appropriation are able to impose an obligation on everyone else to respect them. Kant's definition of coercion as analytically contained in the concept of Right cannot provide the answer for this problem, since a coercive act can only be regarded as authoritative if it can be seen as proceeding from the will of all (*Gemeinwille*), which is only possible under a condition of public justice. We are however in the state of nature and do not satisfy this condition. We must thus conclude that all coercion happening outside a condition of public justice can only proceed from the unilateral will of individuals and cannot bind all others reciprocally. Reason requires us to enter a civil condition *precisely* because the right to coerce respect for one's possessions can only be compatible with the freedom of all according to universal laws if we are in a condition of public justice.

So it is only a will putting everyone under obligation, hence only a collective general (common) and powerful will, that can provide everyone this assurance. - But the condition of being under a general external (i.e., public) lawgiving accompanied with power is the civil condition. So only in a civil condition can something external be mine or yours. (RL §8 at VI: 256, my emphasis)

It is the *public* character of a condition of distributive justice, that is, the equal binding force and reciprocity of a system of laws *laid down as right* for all individuals in a given state as well as the *state monopoly of coercion* which ensures the legitimacy of laws and the use of coercion in that state. A condition of public justice is thus the only way to render coercion compatible with the freedom of all in accordance with a universal law. From this, it becomes clear that the state in Kant's legal theory is not needed only to protect rights more efficiently against violations; instead the Kantian state is *rationally required* as the condition for the compatibility of private property and of the use of coercion in the defence of property rights with the freedom of all. However, insofar as coercing others to enter a lawful condition is also unilateral coercion in the state of nature, it faces the same problem as unilateral coercion in the protection of private property. Since individuals in the state of nature have no authority to impose an obligation on all others and consequently to coerce others unilaterally, what entitles them to coerce others to enter the civil condition?

II. The postulate of public Right

In §42 of the *Doctrine of Right*, Kant seems to give the following justification of the right to coerce others to leave the state of nature:

No one is bound to refrain from encroaching on what another possesses if the other gives him no equal assurance that he will observe the same restraint toward him. No one, therefore, need wait until he has learned by bitter experience of the other's contrary disposition; for what should bind him to wait till he has suffered a loss before he becomes prudent, when he can quite well perceive within himself the inclination of human beings generally to lord it over others as their master (not to respect the superiority of the rights of others when they feel superior to them in strength or cunning). And it is not necessary to wait for actual hostility; **one is authorized to use coercion against someone who already, by his nature, threatens him with coercion.** (*Quilibet praesumitur malus, donec securitatem dederit oppositi*). (RL VI: 307, my emphasis)

In the state of nature, individuals have no guarantee that others will respect their rights and must thus hope for the “good will” of others. However, because we are aware of our own tendency to play “master over others,” we have no reason to assume that other people will have different dispositions towards us. Besides, trusting that people will respect my rights is not only risky but would also be too costly should this charitable assumption prove wrong. I have much more to lose if I assume people are good and am wrong than if I assume that are bad and am wrong. We thus have good prudential reasons to view the human disposition for dominance and aggression as a matter of fact and take the necessary preventive measures to defend our rights. This seems, at first sight, to be the reason why Kant thinks we have a right to coerce others to leave the state of nature and enter the civil condition, in which the rights of all are secured. Based on this passage, Byrd and Hruschka have argued in their influential commentary of the *Doctrine of Right* that the postulate of public right is to be understood as a form of “preventive defense.”¹³ Their interpretation relies on a seldom discussed Latin sentence in this paragraph, which Kant, as usual, does not translate: *quilibet praesumitur malus, donec securitatem dederit opposite* (“everyone is presumed to be evil until he provides

¹³ Byrd and Hruschka, *Kant's Doctrine of Right: A Commentary*. Cambridge University Press, 2010, Chapter 9, p. 188.

security for the opposite”).¹⁴ As the passage makes clear, that “it is not necessary to wait for actual hostility” and to become cleverer by “bitter experience”; one is authorized to coerce someone “who already, **by his nature** threatens him with coercion” (*der ihm schon seiner Natur nach damit droht*, my emphasis). The threat in question belongs to the *nature* of human beings; it does not need to erupt into *actual* aggression in order to become a threat. Since presuming that humans are bad is not only plausible but *prudent*, the fact that we have rights we want to protect requires that agents give each other a *guarantee* (*Sicherheit*) that they will not infringe upon each others’ rights (a *reciprocal* assurance that everyone is willing to restrain themselves in regard to everyone’s rights). If this guarantee is not given, there is no reason why one should restrain oneself in regard to the rights of others, thereby making an easy prey of oneself to the attacks of others; in the absence of such a guarantee, one would be entitled to coerce others to defend one’s rights.

As Byrd and Hruschka show, Kant was well acquainted with the philosophical tradition of using “presumptions” as normative propositions in reasoning as found in Leibniz, Pufendorf, Thomasius and Achenwall, and has adapted its traditional use to suit his own purposes in legal theory. It is this presumption of badness, so Byrd and Hruschka, which allows us to coerce others to move into a juridical state.¹⁵ While Kant uses the presumption of innocence as a presumption of law referring only to past external actions, the presumption of badness refers to a person’s character and to possible actions in the future. The presumption that human beings are prone to domination and violence and will act accordingly whenever they believe they can get away with it, provides according to Byrd and Hruschka “the foundation for a proposition of law” which “although located outside the system of legal propositions, is nonetheless properly included in a doctrine of right.”¹⁶ This proposition is that we need not wait for another’s attack and have a right to interfere with another’s possessions in case security is not guaranteed. This guarantee is of course not a proof of the goodness of one’s character, which is impossible to provide, but our willingness to give up the

¹⁴ As Byrd and Hruschka note, Mary Gregor’s translation (“he is presumed evil who threatens the safety of his opposite”) is incorrect. Mary Gregor (transl.), *Immanuel Kant, Practical Philosophy*, Cambridge University Press, 1996. While Mary Gregor’s translation suggests that we should consider a person evil who *actually* threatens the safety of another, Byrd and Hruschka’s translation implies that anyone is to be considered evil who has not yet given a *guarantee* of the opposite. Byrd and Hruschka, 2010, p.190. footnote 10.

¹⁵ Byrd and Hruschka, 2010, p. 190.

¹⁶ *Ibid.*, p.193.

private enforcement of one's judgments about what is just or unjust. Submitting oneself to the authority of the state is thus a sufficient guarantee that one is no longer a threat to others.

Provision of security cancels the right to exercise preventive defense. On the level of law we cannot require a change in another's attitudes (we have reason to presume he has). It is necessary and sufficient that we mutually guarantee security *through a certain act*. This act is entering the juridical state. Thus Kant's reformulation of the presumption of badness is: "Everyone is presumed to be evil until he provides security for the opposite." On the level of law, the presumption of badness is dispelled by entering a juridical state and thus providing security through submitting oneself to coercive law. (Byrd und Hruschka, 2010, p.193)

If I agree to enter the civil condition with you, this certainly counts as a guarantee that I am willing to respect your rights. This is because my act of submitting to coercive law amounts to *renouncing* my right to preventive defense (under the assumption that everyone else will do the same). However, one might ask oneself whether *coercing* others to enter the state can count as a guarantee in the same way as willingly entering the state. It is not clear why being coerced instead of freely submitting oneself to the juridical state would also *cancel* my right to exercise preventive defense. Even if we accept that under a well functioning coercive system there is no longer reason to regard others as a constant threat, it seems that the requirement to provide a "mutual guarantee of security through a certain act" is superfluous since *bringing* others under coercion is just as good. However, it is still possible to make sense of Byrd and Hruschka's interpretation by interpreting the "guarantee" in another way. Since juridical duties can also be satisfied without acting from duty and allow external enforcement, those who were forced to enter the state have also complied with the postulate of public right and provided the guarantee to dispel a presumption of badness. If so, we should thus understand the "act" functioning as a guarantee in a merely external sense: "entering" the state, even if against one's will, would also count as such an act. Now, if a purely external state of affairs (being under coercive laws) is sufficient to dispel a presumption of badness, it follows that even the devils in the famous satanic nation of *Perpetual Peace* can no longer be presumed bad. Although this implication may be somewhat surprising, it is not a problem for Byrd and Hruschka's interpretation. The problem is that their proposed interpretation of §42 does not solve the problem of unilateral coercion. Byrd and Hruschka take Kant's formal definition of coercion as analytically

implicit in the concept of right as the reason why we have a right to coerce others to leave the state of nature: “the use of coercion to enforce a right is permitted to the extent it is required to defend the right.”¹⁷ Since entering the state is required for defending our rights, we would have a right to coerce others to enter the state. However, as argued before, the definition of coercion of §D cannot justify why *unilateral* coercion in this case would be rightful. Although it is *prudent* to expect security from others and to take pre-emptive security measures, it is still not clear why prudence would make unilateral acts of coercion compatible with the freedom of all in accordance with universal laws.

Now consider the following statement in §44.

It is not experience from which we learn of the maxim of violence in human beings and of their malevolent tendency to attack one another before external legislation endowed with power appears, thus it is not a fact (*Factum*)¹⁸ that makes coercion through public law necessary. On the contrary, however well disposed and law-abiding human beings might be, **it still lies a priori in the rational idea of such a condition (one that is not rightful)** that before a public lawful condition is established individual human beings, peoples and states can never be secure against violence from one another, since each has its own right to do **what seems right and good to it** [und zwar aus jedes seinem eigenen Recht zu thun, was ihm recht und gut dünkt] and not to be dependent upon another's opinion about this. (RL §44 at VI: 312, my emphasis)

Kant's argument in the passage is that *even if* human beings could be presumed to be well disposed and law-abiding, they would still be rationally required to abandon the lawless state of nature and enter a lawful condition with others.¹⁹ This is because, Kant notes, the problem lies *a priori* in the rational idea of a lawless condition and not in human nature. The state of nature is *by definition* a condition in which “each has its

¹⁷ Byrd and Hruschka, op. cit., p.189.

¹⁸ I have changed Mary Gregor's translation of 'Factum' as 'deed', since Kant is clearly speaking of a matter of fact as given by experience as an alleged justification of the postulate of public right: “es ist nicht etwa die Erfahrung, durch die wir von der Maxime der Gewaltätigkeit der Menschen belehrt werden, und ihrer Bösartigkeit, sich, eher eine äußere machthabende Gesetzgebung erscheint, einander zu befehlen, **also nicht etwa ein Factum, welches den öffentlichen gesetzlichen Zwang notwendig macht** (...).“

¹⁹ I deliberately use here the strong notion of a “presumption of goodness” instead of merely *conjecturing* that persons may be good rather than bad. The last case allows for uncertainty; not being able to ascertain whether persons will harm us or not would presumably justify taking preventive measures against them just as in the case of a “presumption of badness”. My argument is that even if we could know for sure that persons are good, we would still have a duty to leave the state of nature, for reasons that I shall explain in the course of the section. My point is that presumptions about human nature play no major role for Kant's account of the duty to leave the state of nature and the right to coerce others to enter the civil condition.

own right to do what seems right and good to it.” And *this* is actually the problem. Even well meaning persons may arrive at different, conflicting verdicts about what is just or unjust in a given situation: in other words, we can *disagree* about matters of right. In the state of nature, disagreement is a problem insofar as individuals are on equal footing with one another: there is no *authority* above them, only individuals alongside other individuals. In principle, no one has more authority over anyone else; therefore, when it comes to making decisions, there is no reason why I should follow someone else’s judgment rather than my *own* best judgment on the same matter. Possibly, I may come to think that you are cleverer and wiser than me and come to accept your judgment, but the point is that nothing *binds* me to do so. There is no reason why your well intentioned best judgment should be more authoritative to me than my own well intentioned best judgment about the same matter, if they diverge. The problem is thus not about a person’s character or about human nature in general: whether good or bad, we end up with the same scenario, namely, individuals trying to enforce their own private judgments about justice because no one has more *authority* to decide than anyone else. Surprisingly, the problem of adjudication in the domain of right seems to be a side effect of an ideal of Kant’s ethics, namely, of *thinking for oneself*.²⁰ The problem we face in the state of nature is not the incapacity of individuals to reach a morally permissible and appropriate verdict about what would be just or unjust in a given situation, but that even when a verdict satisfies the conditions of permissibility and reasonableness, different individuals may nevertheless arrive at different, contingently incompatible results.²¹ Since in principle no result has more authority than others, we are left with the question of who is entitled to decide when judgments about rights conflict (*quis iudicabit?*).

Although Kant speaks of a “right of each to do what seems right and good” to him or her, what actually follows from the rational idea of the state of nature is that no one is *bound* to follow another’s judgment rather than her or his own. Individuals’ judgments

²⁰ I use “thinking for oneself” instead of “autonomy” since autonomy for Kant is strictly restricted to the moral determination of one’s maxims. In contrast, “thinking for oneself” has a broader application: it is the ability to make use of one’s own understanding without being guided by another. It is opposed to *Unmündigkeit*, a condition of “minority” or dependency in thinking, which can also be self-incurred. See *An answer to the question: what is enlightenment? (1784)* [*Was ist Aufklärung?*] VIII: 35.

²¹ For a similar interpretation, see Jeremy Waldron, “Kant’s theory of the State” In: Pauline Kleingeld, *Toward Perpetual Peace and Other Writings on Politics, Peace and History*, Yale University Press, New Haven and London, 2006.

are unilateral (*einseitig*) and lack the binding force (*Verbindlichkeit*) to impose an *obligation* on others to abstain from their own individual best judgment. It is important to stress that Kant's distinction between *einseitig* and *allseitig* concerns the binding force (i.e. the possibility of imposing an obligation on others) and not the *content* of such judgments (RL VI: 256, cf. also 312, ll. 26-31). Given the lack of *Verbindlichkeit* in the state of nature, talking about a "right" to follow one's own judgment is thus secondary, if not irrelevant. The state as "external legislation endowed with power" (RL VI: 256) solves the problem of the entitlement to decide by providing a unified standard for adjudication: a system of positive laws equally valid and binding for everyone. The establishment of a condition of public justice thus has two implications: (1) agents are no longer left to *decide* for themselves what is just or unjust in the case of conflicts of rights (this becomes the task of a public court of justice, although individuals may still form a *private* judgment about what they think right) and (2) agents are no longer allowed to *enforce* rights verdicts (be these their own private judgments about what is just and unjust or the decision of a court of justice). The enforcement of what is laid down as right (*was rechtens ist*) is now the task of the state.²²

The decision of a court of justice may therefore differ from or even collide with individuals' private verdicts about justice. It is striking that Kant refers to private verdicts of individuals in the civil condition as *objective*, while the verdict of a court of justice is merely *subjective*, although this verdict must be considered *necessary*, given its public character (RL §36 at VI: 236). Kant calls the verdict of the court of justice subjective due to the specific conditions the judge is constrained to adopt for his decision making: for instance, his verdict must take into account what is specifically stated in a contract, the constitution and its statutes (i.e. *empirical* principles). Individuals' private judgments, in contrast, are based on reason (non-statutory law) and are not constrained by the "subjective conditions" a court of justice must observe. We must nevertheless accept the decision of a court of justice as valid due to the "need" for a well functioning system of public laws. In this sense, there is a certain price to be

²² Acts of immediate self-defense may be exempt from this. If my life is in danger and I cannot wait until the police rescue me from an aggressor, nothing prohibits me from defending myself (although I may be made responsible for any harm to the aggressor that is not required for self-defense). In the *Doctrine of Right*, Kant does not discuss the right to self-defense against an unjust aggressor, which I assume he takes for granted, but only the *alleged* right (*vermeintes Recht*) to kill an innocent person in order to save one's life (*Right of Necessity, Nothrecht* or *ius necessitates*, RL VI: 235), which Kant rejects.

paid for entering the civil condition.²³ However, we pay this price not for mere commodity or prudential reasons, that is, in exchange for state protection against the violence of others (although security will also be a consequence).

As Bernd Ludwig argued, the assumption that Kant “derives the state” from anthropological considerations is only possible if one takes §42 of the *Doctrine of Right* to offer a complete and definitive argument for the postulate. However, as Ludwig notes, the following §43 interrupts the argumentation of §42, which is then readopted one paragraph later in §44 and dismissed as an appropriate justification of why we must enter the state. Ludwig has made the case for rearranging the paragraphs and setting §44 immediately after §42 (that is, in place of §43).²⁴ By doing so, it becomes clear that the strikingly Hobbesian sounding argument of §42 is not Kant’s definitive position in regard to the postulate of public right and to the right to coerce others to enter the state. Nevertheless, we might ask what the real function of §42 is and how it fits within Kant’s overall argumentation concerning the duty to leave the state of nature and the right to coerce. In the following, I will attempt to make sense of §42 by stressing the difference between *formal* and *material* wrong (*unrecht*). I shall argue that Kant’s purpose with the “Hobbesian passage” of §42 is not a *justification* of the right to coerce others to leave the state of nature but an *illustration* of the normative shortcomings of the state of nature, to which a condition of public justice is the solution. I will argue that it is the *juridical vacuum* (*status iustitia vacuus*, RL §44 at VI: 312, l. 29) in the state of nature rather than a right proper that enables individuals to use unilateral coercion against others. In other words, in the state of nature we do not have *a right to defend our rights*, but merely *do not wrong anyone when we defend our rights*.

²³ I discuss this issue in the article „When the strictest right is the greatest wrong. Kant on fairness,” unpublished manuscript. I owe this insight to Byrd and Hruschka who realized in their analysis of the “four cases” in the *Doctrine of Right* (§§ 36-40) that the need to ensure the functioning of the system of public laws and of the market must be taken into account when deciding what is just in a given case. See Byrd and Hruschka, *Kant’s Doctrine of Right: A Commentary*, Chapter 10, especially sections 2 and 3.

²⁴ Bernd Ludwig, *Kants Rechtslehre*. Felix Meiner Verlag, 1983, p.158, n. 124.

III. Wrong *formaliter* and wrong *materialiter*

I shall start by analysing a puzzling claim Kant makes in §42:

Given the intention to be and to remain in this state of externally lawless freedom, men do ***one another*** no wrong at all when they feud among themselves; **for what holds for one holds also in turn for the other, as if by mutual consent** (*uti partes de iure suo disponunt, ita ius est*). But in general **they do wrong in the highest degree** by willing to be and to remain in a condition that is not rightful, that is, in which no one is assured of what is his against violence. (RL VI: 308, my emphasis)

According to the passage, when individuals have the intention to be and to remain in the state of nature *they do not wrong each other* when they feud among themselves. Whatever I do to another person in the state of nature can be paid back to me in the same way “as if by mutual consent”. If I punch someone in the face, I should not be surprised if I get punched in the same way. If you steal my property in the state of nature, you should not complain if I steal yours in return. The state of nature seems to have its own “principle of justice” which says that “right” is whichever way the parties dispose of their right (*uti partes de iure suo disponunt, ita ius est*). The only limitation to this arbitrary way of disposing of one’s rights would be physical power; in principle, however, it could go on indefinitely (Cf. Naturrecht Feyerabend, XXVII: 1362). Kant’s argument in the passage is that although individuals do not wrong *each other* when they attack and pay back attacks in the state of nature, they *do wrong in the highest degree* by wanting to play the “state of nature game” instead of entering a lawful condition with each other. Note Kant’s intransitive formulation in this last case, as opposed to the idea of wronging *each other*: Kant identifies wrongdoing in the absence of a condition of distributive justice not with *material* violations of private rights (the particular rights of specific persons) but with a purely *formal* violation of the idea of right (of right in general, *Recht überhaupt*).

Although Kant claims that individuals already have rights in the pre-civil condition, it follows from the above that, strictly speaking, there can be *no material* violations of rights in the state of nature. How is it possible to reconcile this claim with the idea that rights already exist in the state of nature? Having a right implies that one can be *wronged* in one’s rights (*Läsion*, RL VI: 249). A position such as Hobbes’, which

denies the existence of rights in the pre-civil condition (a universal “right to everything” is in fact a right to *nothing*), is obviously not threatened by the claim that we cannot wrong each other in the state of nature;²⁵ Kant’s position, in contrast, is more complex than Hobbes’. Kant holds the view that individuals already have pre-civil rights while denying that they can be wronged *as individual right holders* when these rights are violated in the state of nature. The distinction between that “which is a **mere formal** and that which is **also a material wrong**” is crucial for understanding the seemingly contradictory claim. In a footnote to the above passage, Kant stresses:

This distinction between what is **merely formally** wrong and what is **also materially** wrong has many applications in the doctrine of right. An enemy who, instead of honorably carrying out his surrender agreement with the garrison of a besieged fortress, mistreats them as they march out or otherwise breaks the agreement, cannot complain of being wronged if his opponent plays the same trick on him when he can. But in general they do wrong in the highest degree, because they take away any validity from the concept of right itself and hand everything over to savage violence, **as if by law**, and so subvert the right of human beings as such. (RL §42 at VI: 307, note, my emphasis)

The principle “regulating” interaction in the state of nature is “whatever you do to me, I am entitled to do to you” (and vice versa). The enemy’s breach of agreement is implicitly a declaration that she may be treated in the same way (provided her opponent is powerful enough) and this is why “she cannot complain.” Although the settling of disputes in the state of nature expresses a kind of reciprocity, this reciprocity is not compatible with the concept of right: it is a pseudo-law. If we were to content ourselves with a merely unilateral or private use of coercion, we would be making the realization of a rightful condition altogether impossible. To regulate external human relations by this “mutual agreement” amounts to a tacit rejection of the possibility of rightful relations between persons. It is an affirmation of the “inner logic” of the state of nature, that is, a state in which individuals must follow their own lights to judge and enforce conflicts of rights, according to their physical power. While in the state of nature individuals **do not contradict right** when they defend and enforce their private rights, this is only possible due to the **absence** of a unified juridical system: to say that someone does not wrong another when defending her right is different from having a

²⁵ „To this warre of every man against every man, this is also consequent; that nothing can be Unjust. The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common Power there is no Law: where no Law no Injustice.” Thomas Hobbes, *Leviathan*, Richard Tuck (ed.), *Cambridge Texts in the History of Political Thought*, 1991, Chap. 13, 63, p.90.

positive permission (*Befugnis*) to use coercion as derived from one's rights. It is thus the **lack of obligation** in the state of nature which entitles individuals not to wait for hostilities to happen and to take preventive measures against possible attacks (RL §42 at VI: 307), instead of the idea that they have a *proper right* to do so. One could argue against this interpretation, that even in the state of nature we already know which rights ought to be protected, that some people are "in the wrong" while others seem to act "in their right" (along the lines of Locke). If so, we can very well determine in the state of nature what counts as a violation of rights *materialiter*. Even so, it is not possible to reach a binding verdict for all agents in the absence of a condition of distributive justice. Individuals will go on enforcing what they think right *ad infinitum*, since there is no unified standard valid for all. It is, however, wrong to want to remain in a situation in which wrongs are *felt* but cannot be *determined* in a universally binding way so that reparation of wrongs is *necessary* and not merely *arbitrary* (i.e., dependent on one's power to retaliate). Only the notion of a general will can give rise to universally binding and consequently *necessary* verdicts about right and wrong; consequently it is only under a condition of distributive justice that it is possible to determine what counts as a material wrong *for all*. It follows that we can only establish rights *materialiter*, once we have rights *formaliter* in the first place. Interestingly, this normative shortcoming of the state of nature (*status iustitia vacuus*) plays an important role in Kant's argument for the permission to coerce others unilaterally to enter the state.

Possession in anticipation of and preparation for the civil condition, which can be based only on a law of a common will, possession which therefore accords with the *possibility* of such a condition, is *provisionally rightful* possession, whereas possession found in an *actual* civil condition would be *conclusive* possession. - Prior to entering such a condition, a subject who is ready for it resists with right those who are not willing to submit to it and who want to interfere with his present possession; for the **will of all others except for himself**, which proposes to put him under obligation to give up a certain possession, **is merely unilateral, and hence has as little lawful force in denying him possession as he has in asserting it** (since this can be found only in a general will), **whereas he at least has the advantage of being compatible with the introduction and establishment of a civil condition.** (RL §9 at VI: 257, my emphasis)

The *right to things* (*Sachenrecht*) is a special category of acquired rights: in contrast to other acquired rights such as contractual or parental rights, rights to things require the creation of a future condition of public justice as the condition under which they can become compatible with the freedom of all. To have something external as mine implies the right to exclude all others from using the object without my consent. But excluding others from using objects is a hindrance of other persons' freedom, even though, as Kant argues, freedom would contradict itself if objects were to belong to no one (*res nullius*, RL §6 at VI: 246). We thus have the problem that while we *must* make use of objects, the limitation possession imposes on the freedom of others requires a special kind of justification. The interesting aspect of Kant's account of rights to things is that the permissibility of external possession is established *prospectively*, in regard to a future lawful condition, by means of an express authorization (*Erlaubnisgesetz*, RL §6 at VI: 247).²⁶ Rights to things must be regarded as *provisionally* rightful because they make possible a future civil condition and are thus *prerogatives of right* (RL VI: 257). Since not all relations are conducive to a future rightful condition and some make this condition altogether impossible (for instance, the never-ending retaliation game in the state of nature explained above), the rights invested with a prerogative status have the idea of right "on their side": they are the rights we will take over into and preserve in the civil condition. The justification of provisional rights is thus *future-oriented*: because provisional rights have an *inconclusive normative status*, they require the institution of a condition of public justice.²⁷ Although this problem seems to be restricted to the right to things (Kant himself argues that if we did not have acquisition, there would be no duty to leave the state of nature, RL §44 VI: 312-3) the lack of normative authority in the state of nature renders all other rights conflicts unsolvable (as Kant also suggests in the first paragraph of §44).

Due to the lack of a juridical principle for determining material violations of rights in the state of nature, an individual who seeks to establish the civil condition with others has an *advantage* on her side from the perspective of right. Although unilateral acts of choice in the state of nature have exactly the same juridical force (namely, *none at all*), the fact that a unilateral act of coercion is the *condition* for the establishment of the civil condition gives it the status of a *postulate*. A postulate is an assumption we must accept

²⁶ Cf. Reinhard Brandt, „Das Erlaubnisgesetz“, In: R. Brandt (ed.), *Rechtsphilosophie der Aufklärung. Symposium Wolfenbüttel 1981*, Walter de Gruyter, 1982.

²⁷ For the crucial role of *time* in Kant's legal theory, see R. Brandt, op. cit. pp. 268-9.

as a necessary condition for some theoretical or practical purpose, even though there can be no proof of the truth or validity of such an assumption.²⁸ We must postulate that there is a duty to leave the naturally given lawless condition between persons and with it, a right to coerce, even though this requirement cannot be derived from the pure concept of right as a rational idea (and unilateral coercion even *contradicts* this concept). A similar argument applies to the permission to hinder others from interfering with one's possessions. The person who appropriates land or objects for the first time is doing something necessary to the establishment of a future civil condition; in contrast to those who make private property impossible, her action is positively in *accordance* with right, and not merely "not against it" due to the lack of unified juridical standards in the state of nature. The assumption is thus that when we force others to enter the civil condition, we are no longer playing "the state of nature game" despite the fact that we are coercing others unilaterally. In contrast, anyone hindering the possibility of a civil condition *formally* violates right.

While for Hobbes the unlimited "right to everything" was the main motivation for a purely prudential requirement to leave the state of nature, Kant gives this Hobbesian picture a completely different meaning: it is not the inconvenience and insecurity of the state of nature which underpins the duty to enter the civil condition, but the inconclusive normative status of rights in the pre-civil condition that urgently calls for leaving that state.²⁹ A formal violation of right consists in endorsing what I have called "the inner logic of the state of nature" and making impossible the realization of a condition of public justice. To want to remain in that lawless state is therefore not to wrong anyone in particular, but to do wrong *in general* and in the highest degree. It is therefore the *incompatibility* of such a condition with the concept of right, rather than the threat to the particular rights of individuals, on which the duty to leave the state of nature is based in Kant's account.³⁰

²⁸ See for instance KpV V: 122 and 132.

²⁹ See Bernd Ludwig, *Kants Rechtslehre*, Kant-Forschungen Band 2. Meiner Verlag, 1988, p.156, footnote 120. For an account of Kant's reinterpretation of Hobbes' conception of the state of nature, also see Ludwig's „Naturzustand, Eigentum und Staat. Immanuel Kant's Relativierung des ‚Ideal des Hobbes‘" (co-authored with Karlfriedrich Herb), *Kant-Studien* 83. Jahrg, S. 283-316.

³⁰ I would like to thank my audiences at the conference "Kant und das Antinomische Denken," Johannes-Gutenberg University Mainz, Georg-August University Göttingen and Bogazic University Istanbul, in special Prof. Bernd Ludwig, Philipp-Alexander Hirsch and Florian Palke for helpful discussions and an anonymous referee of the *Archiv für Geschichte der Philosophie* for a very insightful feedback on this article.

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