

Kant's Non-Voluntarist Conception of Political Obligations: Why Justice is Impossible in the State of Nature

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Introduction¹

In this paper, I present and defend Kant's non-voluntarist conception of political obligations.² I argue that civil society is not primarily a prudential requirement for justice; it is not merely a necessary evil or a moral response to combat our corrupting nature or our tendency to act viciously, thoughtlessly or in a biased manner. Rather, civil society is constitutive of rightful relations³ among persons because only in civil society can we interact in ways reconcilable with each person's innate right to freedom. Civil society is the means through which we can rightfully interact even on the ideal assumption that no one ever succumbs to immoral temptation. Kant's account, therefore, provides ideal reasons to support the claim that voluntarism cannot be the liberal ideal of political obligations.⁴

The view presented in this paper challenges the common assumption in Kant interpretation that 'the circumstances of justice' for Kant are the same as those for Hume or Locke. On this view, the need for justice (in the sense of coercive rights) arises primarily due to limited personal virtue, and political institutions are needed primarily to remedy the resulting 'inconveniences of the state of nature'. Justice is seen fundamentally as what Arthur Ripstein (2004) calls a 'remedial virtue', and the establishment of the state is viewed as the superior instantiation of this remedy.⁵ Many prominent Kant scholars attribute this remedial conception of justice and the state to Kant. Their interpretations vary somewhat as to whether Kant's justification for the state is given strictly in terms of prudential

arguments or as also involving arguments concerning the proper, moral response to our corrupting nature. Despite these differences, they agree in their portrayal of Kant as justifying the state by means of its superior ability to alleviate and solve conflicts created by humanity's 'warped wood'.⁶

A brief look at a few examples illustrates the prevalence of the prudential reading⁷ in contemporary Kant interpretation. Howard Williams emphasizes that freedom for Kant always involves acting in accordance with law (2003: 86–97), and the reason why we need 'institutionalized law' is that 'there can be no external freedom without' it (2003: 92). More specifically, external freedom requires the establishment of 'the possibility of external constraint' because we often do not act as we ought (2003: 81). Williams argues that, '[a]s rational or noumenal beings we can obey the law because we know it to be right . . . [but] as also phenomenal beings we need to be reminded by a physical incentive that we should obey the law' (2003: 82–3, cf. 84–5, 100).⁸ On Williams's interpretation of Kant, therefore, ultimately we need the state because it is the best moral and prudential response to the fact that our phenomenal being needs to be tamed.⁹

Onora O'Neill takes a similar tack. She argues that Kant does not consider the state the ideal solution, because the state curbs individuals' external freedom. Nevertheless, since the human condition is imperfect, the state is necessary.¹⁰ So again, Kant is seen as considering the state as necessary primarily because human beings are not fully virtuous. Finally, Thomas Pogge argues that on Kant's position the main reason for entering into the civil condition is fundamentally prudential, though in the sense of being necessary to maximize external freedom. He interprets Kant as arguing that 'persons tend to benefit, on balance, from the existence of a juridical condition' since it enhances external freedom – and this is why they must enter it (2002: 147).

It is also important to note that contemporary Kantian theorists typically build their theories of justice on the assumption that the Kantian view *should* consider justice a remedial virtue. For example, the early John Rawls assumes that the Kantian circumstances of justice are Humean and thus entail that if people were more beneficent and resources less scarce, then 'there would be no occasion for the virtue of justice' (1999: 110).¹¹ Indeed, the way in which the early Rawls and many contemporary Kantians, including

O'Neill, analyse rightful coercion in terms of hypothetical consent shows that the remedial conception deeply informs contemporary Kantian thought.¹² Because justice is seen as remedial, these contemporary Kantian approaches do not argue that the state is in principle *necessary* to enable rightful interactions. Rather they typically argue that the state is justified in its use of coercion in so far as it simply enforces each individual's rights. These Kantian theorists, therefore, tend to be in agreement with the fundamental Lockean claim that the rights of the state are, to use Nozick's formulation, 'de-composable without residue into those individual rights held by distinct individuals acting alone in a state of nature' (1974: 89, cf. 118, 133). The rights of the state are seen as in principle reducible to the rights of individuals, and the state is seen simply as an abler enforcer of individual rights.

I challenge these remedial interpretations both of Kant and the Kantian position. Justice and the state are not needed due to inconveniences, but rather are the necessary preconditions for rightful relations among interacting persons. I argue with Kant that only the state can rightfully use coercion and that justice cannot be realized without the state, regardless of how virtuous are individuals and favourable the material conditions. For this reason, justice is also prior to virtue in that only a public political authority can provide solutions to problems of rightful interaction among persons: virtuous individuals acting alone cannot in principle solve these problems. And since the establishment of civil society is constitutive of interacting rightfully, individuals cannot be seen as having a right to remain in the state of nature.¹³ Rather, we have an enforceable duty to enter civil society, which entails that our political obligations are non-voluntarist in nature.¹⁴

To support these conclusions it is necessary, first, to see that on Kant's conception justice is a *rightful relation* between interacting persons' external (spatio-temporal) use of choice or freedom and that external freedom requires the possibility of rightful possession of external things. These two points form the basis of the argument for why there is rightful private property only in civil society. I then argue that similar arguments yield the same conclusions with regard to contractual and status¹⁵ relations. From these analyses I draw two conclusions: first, that it is textually wrong to attribute a remedial conception of justice to Kant's political theory, and second, that

the arguments presented yield strong support for the claim that voluntarism cannot be the liberal ideal of political obligations.

Kant's Conception of Rightful Relations

Right, for Kant, is solely concerned with people's actions in space and time, or what he calls our 'external use of choice' (6: 213–14, 224–7). When we deem each other and ourselves capable of deeds, or see each other and ourselves as the authors of our actions, we 'impute' the actions to each other and ourselves. Such imputation, Kant argues, shows that we judge ourselves and each other as capable of freedom (under laws) with regard to external use of choice – or external freedom (6: 227). Moreover, when we interact, the added puzzle is that we need to enable reciprocal freedom, or enable a way of interacting that is consistent with everybody's external freedom. And this is where justice, or what Kant calls 'right', comes in. Right is the relation between interacting persons' external use of choice such that reciprocal freedom is realized (6: 230). This is why Kant says that a rightful interaction is one that is reconcilable with each person's innate right to freedom, namely the right to 'independence from being constrained by another's choices . . . insofar as it can coexist with the freedom of every other in accordance with a universal law' (6: 237). This is also the principle expressed in Kant's universal principle of right, which states that '[a]ny action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law' (6: 230–1, cf. 8: 289–90). For Kant, justice requires that universal law rather than anyone's arbitrary choices regulate individuals' external freedom when they interact.

By 'universal law' Kant means non-arbitrary restrictions, where 'non-arbitrary restrictions' are understood as symmetrical or reciprocal¹⁶ and non-contingent restrictions. Reciprocal or symmetrical restrictions restrict external freedom in the same ways, while non-contingent restrictions do not constrain or force a person to pursue any particular ends. Asymmetrical and contingent restrictions are arbitrary from the point of view of freedom, because they permit some particular person (person A) to choose at the expense of some other particular person's (person B's) freedom. Asymmetrical

and contingent restrictions permit person A to subject person B's freedom to her arbitrary choices in the sense that A's ends are either given priority over those of B (asymmetrical) or A is permitted to set ends for B (contingent). In both cases, B's freedom is subjected to the arbitrary choices of A and not to universal law. Protection from this kind of subjection to another person's arbitrary choices is exactly what the innate right to freedom secures.

Justice, then, is a condition in which each interacting person's external freedom is restricted symmetrically and non-contingently, that is, their choices as they appear in space and time are regulated by non-arbitrary or universal laws. Note also the implications this conception of right has for our notion of coercion. Coercion is a hindrance of external freedom, and coercion is rightful only if the hindrance itself is necessary to bring the interactions under universal law. Conversely, a wrongful or unjust use of coercion is simply an arbitrary hindrance (an asymmetrical and contingent restriction) of a person's external freedom.¹⁷

Why does this conception of justice entail that the state of nature is necessarily a state of wrongdoing? That is to say, why does Kant's understanding of justice entail that our political obligations are non-consensual in nature and that persons can be rightfully coerced to enter civil society? To answer this question, we must first see the relation between external freedom and rightful possession. Kant argues that external freedom requires what he calls 'external objects of one's choice', namely rightful possessions, or external objects subject only to our own choices. The necessity of the state arises when we consider how to apply the conception of justice understood above to the problem of rightful acquisition and possession of external objects of choice in the empirical world. Kant gives two arguments here: one concerning rightful assurance – or how to 'have something external as one's own' (6: 245), and one concerning rightful acquisition, or how to 'acquire something external' (6: 258). Both arguments lead to the conclusion that we have a non-consensual obligation to leave the state of nature, because the provision of assurance and rightful acquisition is impossible without a public authority. In the absence of a public authority individuals cannot subject their interactions to universal laws, for the external freedom is necessarily restricted arbitrarily. Such arbitrary restriction is to deny oneself and others external freedom. Thus, Kant's account of private right shows that forcing persons to enter civil society is a

rightful use of coercion: it is a hindering of a hindrance to freedom. Resisting entrance, therefore, is a wrongful use of coercion.

Kant's Conception of Rightful Possession

To have external freedom it must be possible that I have means (actual external objects of my choice) with which to set and pursue my own ends. External objects of my choice are any means that I not only 'have the *physical* power to use' (6: 246), but that also constitute part of my *ability* to set and pursue ends. Possession of such objects requires that all interacting persons recognize that particular objects can be objects of some particular person's choice without that person having physical possession of it.¹⁸ This is Kant's distinction between 'intelligible' ('noumenal') and 'sensible' or 'empirical' ('phenomenal') possession – that the right to an object does not require the empirical possession of it. As we will see, intelligible possession plays the crucial role in enabling external freedom. I will consider first how these two kinds of possession are seen as united with regard to our own bodies before turning to objects of choice that are distinct from us. We can then see why Kant argues that considerations of assurance and rightful acquisition lead to the conclusion that political obligations cannot be voluntarist in nature.

Because I am embodied, my person and my body are necessarily united. Consequently, my body is necessarily an object of my choice only, since the physical limits of my person will be my body. In other words, that I am embodied entails that empirical and intelligible possession are necessarily united with regard to my own body. My right to my body must consequently be thought of as an innate right, and it is the only empirical thing I have an innate right to possess. If others were to have a non-consensual right to make choices about my body, then my person would be subjected to their arbitrary choices, which is inconsistent with my innate right to freedom. Therefore, my body can be rightfully subject only to my arbitrary choice.¹⁹

Nevertheless, I cannot be externally free or set and pursue ends if the only means I have at my sole disposal, or that is subject only to my arbitrary choices, is my body. To have external freedom I must also have rights to objects distinct from me. Yet those rights must be considered *acquired* rights, since the objects are not necessarily

physically connected to me (as is my body). Kant proposes therefore that the conception of rightful possession of external objects (beyond our own bodies) cannot be simply an empirical conception. As mentioned above, Kant maintains two different senses of possession, 'namely *sensible* possession and *intelligible* possession, and by the former could be understood *physical* possession but by the latter a *merely rightful* possession of the same object' (6: 245) or 'possession of . . . [it] *without holding it*' (6: 247, cf. 255). Intelligible possession is a kind of possession in which having external objects of our choice is independent of spatial considerations. I have intelligible, or rightful, possession of an empirical object when I have sole discretion in how to use it, regardless of whether or not I am physically holding it, that is, regardless of whether or not I have empirical possession of it.²⁰ According to Kant, 'something *external* would be mine only if I may assume that I could be wronged by another's use of a thing even *though I am not in possession of it*' (6: 245, cf. 249). If something really is mine, then any rightful use of it requires my consent.²¹

For example, on Kant's account, if I 'intelligibly' or 'rightfully' possess an apple, it is a part of my rightful ability to set and pursue my ends, and I have the exclusive right to determine how to use the apple regardless of whether or not I physically possess it. Though you do not wrong my person by using my apple without my consent in so far as you do not interfere with my physical body, you still wrong me. For example, if I have left my apple on my windowsill, you do not wrong my person by snatching it, since in so doing you have no physical contact with my body. However, by non-consensually taking my apple you wrong me because you treat my means as if they are subject to your arbitrary choice rather than to my arbitrary choice only. Your use of external choice is wrongful since you do not limit it in a way reconcilable with my use of external choice as restricted only by universal law. Your rightful means mark the limits of your rightful choices and thus set the limits for the ways in which you can use your external choice rightfully. Since the apple is not your means (external object of choice), it follows that you can only desire it or wish for it – you cannot both rightfully and non-consensually use it to pursue your ends. Thus, rightful possession entails that a person can commit a wrong against another without physically interfering with the person of another.²² Consequently, there are two kinds of wrongdoing: one against my person (my

body) and one consisting in depriving me of my means (external objects of choice) as considered separate from my body.²³

Kant's Conception of Rightful Assurance

We have seen that external freedom requires the possibility of intelligible or rightful possession beyond our bodies and that rightful possession requires that we recognize and respect one another's exclusive right to own external objects. Rightful possession, then, is possible only if a person can 'put all others under an obligation' to respect her rightful possessions (6: 247). But how can persons put one another under such an obligation?²⁴ Since the 'putting' involved here is essentially related to interaction in space and time, the only way to put each under an obligation must involve establishing a spatio-temporal or physical power of sorts. Hence, Kant answers that we can be put under such obligations only if we provide *assurance*; it is not enough simply to promise to respect one another's property. Moreover, since only a power that can restrict reciprocally and non-contingently can issue rightful obligations, that is, obligations consistent with the innate right to freedom, the provision of such assurance is possible only by a powerful, public authority. Rightful assurance, Kant concludes, is possible only in civil society. Thus, Kant's account of rightful assurance provides a non-prudential reason for civil society. No matter how virtuous we are, justice demands a public authority.

Consider why promises, in the sense of virtuous promising, are insufficient for engendering obligations between interacting persons. A virtuous promise cannot serve as a solution to justice because a virtuous promise concerns what Kant calls 'internal use of choice' (6: 214), which cannot be appealed to in the regulation of justice since it concerns 'external' uses of choice.²⁵ Attention to how virtuous promises subject the promisee to the promisor's arbitrary (internal use of) choice helps to make this point. With respect to one another's rightful possessions, all property owners are both promisors and promisees. If all they do is promise to respect one another's rightful possessions, their uses of external choice remain subject to each other's internal uses of choice, namely for each to keep his promise. Since virtuous promises concern internal and not external uses of choice, virtuous promises cannot yield

obligations of right. Thus, virtue cannot provide the solution to problems of right. Rather, the source of the obligation must be external in nature: putting people under an obligation of right must involve providing assurance through the establishment of a strong power in space and time.

Because the power providing assurance must be a strong power in space and time, some Kant interpreters argue that the reason why a unilateral will cannot provide sufficient assurance is that a single individual literally cannot be strong enough.²⁶ These interpretations appear to find direct support in Kant:

a unilateral [an individual's] will cannot serve as a coercive law for everyone with regard to possession that is external and therefore contingent, since that would infringe upon freedom in accordance with universal laws. 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. (6: 256)

On these prudential interpretations, Kant, in this passage, is understood to be arguing that individuals can provide assurance only by unifying their separate wills into a collective, 'powerful will'. The thought is that only a supremely powerful will can ensure that no one can opt out of the obligations to respect one another's rightful property, and hence provide us with sufficient motivation not to yield to our corrupting nature. Moreover, it is interesting to note that the solution involving virtuous promises (considered above) and this prudential reading of assurance can be seen as complementary in that they both express the prudential understanding of justice. If people were ideally virtuous, the virtue suggestion proposes, promises could yield the obligations required for rightful interaction. But instead of being ideally virtuous, people, as Kant describes them, are 'warped wood' and hence, the prudential interpretations conclude, a strong power is needed to tame their natural inclinations.

Though I agree that an aspect of providing assurance must involve making it physically impossible²⁷ for individuals to opt out of their obligations to respect one another's possessions, I disagree with the prudential reading of Kant here. The reason why we need to provide assurance is not because of our 'warped wood', but

because establishing rightful relations must be understood in terms of the regulation of external interactions. Consequently, the account of how we put ourselves under obligation by providing assurance must itself be presented in spatio-temporal terms and so involve the establishment of a spatio-temporal power. But this is not the only reason why the prudential interpretation seems mistaken. The other reason is that it makes sense only of a part of the passage above. Note that Kant also argues that the provider of assurance must be more than just powerful. When he says that the will providing assurance must not be a 'unilateral' but a 'general' will that puts 'everyone under obligation', he means that the will must be a *public* or omnilateral will. That is to say, if assurance requires only that we put a powerful will in place, then Kant's position is compatible with private solutions along the line of Nozick's dominant protective association.²⁸ This sort of solution, like the Kantian interpretations discussed above, implies that the problem of assurance is merely a problem of power in response to our corrupting nature.²⁹ But the problem cannot simply be one of power, for Kant considers the assurance provided by a private person, including a private security company, even in the best of worlds, to be irreconcilable with his notion of rightful relations. Since we are after the rightful exercise of external choice, being put under an obligation must involve not only being put under a common power in space and time, but also a power that can be the source of obligations of right. In other words, the power that provides assurance must be reconcilable with each person's right to freedom. This reconcilability is possible only if the coercion exercised by the power meets the criteria for rightful relations as outlined above: the power providing assurance must restrict interacting persons in accordance with universal (non-contingent and symmetrical) laws. The problem with any private solution to the assurance problem is that even though a very powerful private person, such as a 'dominant' private security company, can both determine and enforce the restrictions governing the relationships among persons, a private person cannot do so in the way demanded by the requirement of universality (non-contingency and reciprocity of restrictions).

The problem with private provisions of assurance is twofold. First, the restrictions enforced will be those of the private company, and thus contingent. Second, the private company cannot provide assurance that it will be regulated by these restrictions, which is

to say that it cannot provide assurance for the (private) relation between itself and its customers. Since the powerful private provider of assurance is the coercive authority and since it is not subject to its own restrictions, it does not have equal standing with all other private persons with regard to *its* coercive power. After all, it cannot coerce itself. In order to overcome these problems and provide assurance with regard to its clients, another private protection agency is needed to assure that the first one acts rightfully. In order to make the relation between this new agency and the old agency and its clients rightful, however, yet another agency is needed — and so on ad infinitum. The attempt to establish a private solution to the problem of assurance therefore leads to an infinite regress rather than to a rightful relation. Consequently, a private powerful protection agency cannot provide the means through which persons provide one another assurance for rightful possessions. Therefore, Kant's argument concerning assurance should not be interpreted as merely focusing on the need for power.³⁰

In sum, the solution to the problem of assurance not only requires the establishment of a powerful will, but also a will that is neither private nor unilateral. Rather, it must be a 'collective *general (common) . . . will*' that puts '*everyone* under obligation' (my emphasis), namely a *public* will or civil society. Since the public authority's judgement is not that of a private individual or of a private agency with its own private interests, its judgement is not contingent, and since it is powerful, it can restrict all private individuals reciprocally.³¹ Thus, the public authority constitutes the means through which persons provide one another assurance in accordance with universal law. As a powerful public authority it can provide assurance, and as the will of all unified as one totality (a *public* authority), it can provide assurance *for the right reasons*, namely reasons reconcilable with the requirements of right. The fact that contingency and asymmetry characterize any private solution to the problem of assurance explains why Kant argues that assurance cannot be provided in the state of nature. Rightful assurance, which is constitutive of external freedom, is possible only in civil society.³²

Since it is impossible to solve the problem of assurance in the state of nature, choosing to stay in this condition is to engage in wrongdoing. Thus, no one can rightfully refuse to enter civil society, and everyone has the right to force those with whom she interacts

also to enter it. Of course, if a person is unable to convince or force those with whom she is interacting to enter civil society, then she can rightfully protect her possessions as best she can against them (6: 256–7, 307). Nevertheless, this argument from non-ideal considerations does not undermine the ideal argument that civil society is constitutive of rightful relations. Therefore, the conclusion remains that due to considerations of rightful assurance civil society is an enforceable precondition for rightful (external) possession, and we have given a first reason why the ideal of political obligations must be understood in non-consensual terms. There are, however, other reasons to adopt a non-consensual understanding of political obligations that follow from Kant's conception of justice. Throughout the analysis of assurance we supposed that individuals already have acquired *rightful* objects of choice, but it has not yet been shown how rightful possession is achieved in the first place. The possibility of rightful acquisition yields further reasons why the liberal ideal of political obligations must be non-consensual in nature.

Rightful Acquisition: the Problem of Indeterminacy

The second argument for a non-consensual conception of political obligations focuses on the possibility of *rightful* acquisition of particular objects of choice. The previous argument concerning rightful assurance simply assumes that the possessions in question already have been rightfully acquired. Since rightful acquisition is acquisition of something external to ourselves, there must be an explanation of how affirmative acts can give rise to acquired rights in external objects of choice (6: 237).³³ There must then be an account of rightful acquisition that is reconcilable with Kant's conception of rightful relations. The argument here is that rightful acquisition requires a civil authority.

For Kant there are three kinds of external objects of choice: things, other persons' deeds and other persons' status in relation to oneself.³⁴ Corresponding to the different kinds of objects are three spheres of private right: private property, contract and domestic right. For the purposes of this paper, it is not necessary to go into every detail concerning the three spheres of private right. Rather, it is sufficient to focus on the central problem arising in each of the three

spheres of private right when individuals attempt to establish rightful relations amongst themselves in the state of nature. Essentially, that problem is how to apply the general principles of private right to particular interactions in such a way that the resulting relations are consistent with the innate right to freedom or the universal principle of right. Attention to the problem of application suffices to show that civil society is strictly necessary to realize justice.

Why private property right is possible only in civil society³⁵

In Section I: On Property Right, Kant deals with *original* acquisition of external things, or private property.³⁶ As noted above, external use of choice requires the possibility of acquiring external things as one's own. It is also clear that the innate right to freedom requires that rightful acquisition is not subject to any particular individual's consent. If a person's right to appropriate external things is subject to another person's consent, then external freedom is impossible. One person's use of external choice would then be subject to one another's arbitrary choices rather than to universal law. Thus, it appears that the only way we can rightfully appropriate originally is through unilateral choice. But the problem with unilateral choice is that it cannot give rise to obligations on others since that would violate the constraint against subjecting one person's external use of choice to the arbitrary choices of another. The question, then, is how to appropriate something originally without consent, but yet in a way that gives rise to obligations and rightful relations. Kant's answer, we shall see, goes through Rousseau's notion of the general or public omnilateral will (the will of all and yet the will of no one in particular). That only the institution of a public will can provide for rightful acquisition is another reason why we cannot be seen as having a right to refuse entrance into civil society.

Kant's relational conception of justice, according to which right concerns only interactions, understands original acquisition primarily as a relation between persons and not as a relation between an appropriating person and a thing appropriated. Moreover, external use of choice or external freedom is essentially about setting and pursuing ends. It is reasonable, then, that the principle governing original acquisition states that a person establishes a provisional claim to a thing by making that thing a part of his means (establishing control) and by signalling his apprehension to others (6: 258–9).

Thus, Kant argues that interacting in accordance with this principle establishes 'provisional' justice.

But why does interaction in agreement with the principle as defined above enable only provisional justice? The reason is that a person cannot be seen as having the right to apply and enforce the principle against others without thereby subjecting them to her arbitrary choice rather than to universal law. After all, were I to have the right to apply and enforce the principle, then I could obligate others by my mere choice to appropriate an object and signal this to others. But surely this cannot be. On the one hand, there is no relation established between the others and me merely by the fact that I appropriate some external object of choice. The only relation established is between the object appropriated and me – not an obligatory relation and certainly not an obligatory relation between other persons and me. On the other hand, in beginning to interact, we must establish relations between ourselves with regard to empirical objects of choice such that others are obliged to respect our particular objects of external choice. And mere signalling what I have appropriated cannot give rise to such obligations on others. That is, we have a right to interact subject only to universal law. Hence, though the general principle of external acquisition states that the first person who makes something a part of his means should have a right to it, it must also entail that private individuals cannot apply and enforce the principle, since they cannot do so without denying others their innate right to freedom. The only way to apply the general principle in a way consistent with each person's innate right to freedom is by applying it through a public person or by an act of omnilateral choice.³⁷ Enforcing my unilateral application of the general principle of acquisition against others cannot in principle enable a rightful relation between us. Enforcing my application of the principle subjects others to my arbitrary choice rather than to universal laws. This is why rightful private property relations are impossible in the state of nature. There is no reason why others should agree with my particular determination of how much, and what, I get to acquire of the earth's material goods. In fact, those disagreeing are not unreasonable, but quite right in refusing to be obliged by my unilateral determinations. This is the problem of indeterminacy regarding application.³⁸

It is also important to note that this position on private property not only entails that it is conceptually meaningless to speak of

private property in the state of nature, but also that private property requires interactions with others. For example, a person living alone on a deserted island cannot be said to have any private property. This is not only because things cannot be obligated, but because for there to be private property there must be a rightful relationship between at least two persons' external use of freedom. Private property requires obligations between persons, and it is impossible to generate obligations with regard to an external thing with only one person.³⁹ Moreover, in order for there to be rightful obligations between interacting persons, the relations between them must be determined by a will that is not reducible to any one of them, so that it restricts non-contingently or symmetrically. Thus, Kant argues that private property presupposes common property in the sense that private property is possible only in civil society where the public authority posits and enforces laws to regulate original acquisition.⁴⁰ Because only a general united will can give rise to reciprocal obligations, property is common in that everyone regulates it through the general will. That the property is common does not mean that the public authority owns it as private property, since the public authority does not appropriate private property. As the general will, it merely regulates the original acquisition of private individuals, and so enables rightful relations between them when they originally appropriate.⁴¹ Hence, private property presupposes civil society and is conceptually meaningless without it.

To illustrate this point, consider the following two scenarios. First, presume a situation in which there are conflicts with regard to who can appropriate, or has appropriated, particular external objects of choice. Second, presume a scenario in which there are no conflicts with regard to who appropriated what first. Kant's point is that in neither scenario can there be rightful relations except through the establishment of a public authority. Take the first case: when there are conflicts, the problem is that a unilateral application of the general principle of acquisition results in restrictions that are necessarily contingent and asymmetrical. Such restrictions are not rightfully enforceable. For example, assume that two people arriving in the same geographical area at the same time try to establish how they should go about dividing up the land and its resources. It is impossible to determine non-contingent and symmetrical restrictions for how to divvy up the land and its resources since there is no single non-contingent way to determine the quantity and quality

of the land to be divided. Hence, it is impossible for them to be restricted reciprocally and non-contingently with regard to the external objects of choice. In fact, even if the two persons were to agree on using the Lockean ‘enough-and-as-good’ proviso as a condition upon their acquisitions, still there would be more than one reasonable way to apply the principle. Who is to determine the value of this piece of land compared to that piece of land? There is no single reasonable answer here, and any enforcement of one’s own suggestion, even if it is a reasonable suggestion, results in an irreducible relation of might rather than right.

Alternatively, we may assume that the two persons are neighbours who become aware of each other only after they have appropriated quite a lot of the land. In this case, too, it is impossible to establish the rightful boundaries of their individual properties. For example, unbeknownst to each other, they may both have appropriated the same piece of land or they may not have thought very carefully about the exact boundaries of their properties. The problem is that any determination of the boundaries is necessarily the arbitrary imposition of one person’s choice over another’s. In the state of nature, any conflict must be resolved either by letting one person’s choice decide, by letting luck (arbitrarily tossing a coin) decide or by letting might decide. In any case, the exercise of external choice is not limited by universal law but by arbitrary (contingent and asymmetrical) restrictions.

It is important to note that the disagreement regarding application is a *reasonable* disagreement. It is not due to our ‘warped wood’ and the inconveniences of the state of nature. Enforcing one’s own reasonable choice against another necessarily entails a unilateral relation with regard to others that is inconsistent with respecting another’s innate right to freedom.⁴² What is more, the problem of indeterminacy regarding application is not an epistemological problem of determining the boundaries of objects. It is true that some things have fuzzy borders, such as rivers, whereas others things do not, such as horses. But this kind of indeterminacy is not Kant’s concern. Rather, Kant is concerned to draw the boundaries not of objects, but the boundaries between persons with respect to objects to which there can be rightful claims. The problem lies in determining the boundaries between what is yours and what is mine. And any determination of that boundary by an individual application of the general principle governing acquisition is necessarily contingent

and therefore irreconcilable with the innate right to freedom (8: 289–90). That you are applying the right principle with the best of intentions matters not, since the way in which it is applied (in the state of nature) is inconsistent with the innate right to freedom.

In the second scenario, there is no conflict with regard to how to apply the principle of acquisition. Nevertheless, actual unanimous consent amongst individuals in the state of nature is not a *rightful* solution to the problem of indeterminacy regarding original acquisition. Consent among persons indeed makes the unilateral use of coercion superfluous, but the absence of unilateral coercion is not in itself sufficient to establish rightful relations. Even if we assume that persons happen to agree on how to apply the principle of acquisition, individuals still fail to regulate their interactions as required by the universal principle of right. Consent cannot establish the requisite *independence* from one another’s choices required for rightful relations, for everyone’s use of external choice remains subject to the arbitrary choice of another whether or not to consent to any particular application of the principle.⁴³ Thus, universal law does not regulate the use of external choice. Moreover, unanimous consent cannot provide an *enforceable* right to original acquisition, because my right to acquire and exclude you from any objects of my choice remains dependent on your consent. And if my right to acquire property is dependent upon your consent, then I do not have a *right* to acquire it. The fact that it would be stupid or silly for you not to give consent is irrelevant. What matters is that solving the problem by way of consent subjects my external use of choice to your arbitrary choice.

To sum up, the problem for Kant is to reconcile unilateral apprehension with the universal requirement of right. And in a Rousseauan move, Kant maintains that the reconciliation is achieved only through the establishment of the general, public or omnilateral will, namely a will that is the will of each and yet the will of no one in particular. Rightful acquisition, therefore, does not involve only a notion of apprehension, or a bringing of something under one’s control and a signal to others that they are excluded from that thing, but also a notion of ‘appropriation’, understood ‘as the act of a general will (in idea) giving an external law through which everyone is bound to agree with my choice’ (6: 259).⁴⁴ Hence, the only way to conceive of rightful acquisition goes through postulating or stipulating a general will or a public authority. Obligations to

respect particular property boundaries can arise only by establishing a *public* authority, or ‘the *lawgiving* of the will of all thought as united *a priori*’ that has standing to authorize particular acquisitions on behalf of everyone (6: 268).⁴⁵ Only through a public authority can the problem of indeterminacy regarding application be overcome in a way reconcilable with each person’s innate right to freedom and hence give rise to conclusively rightful private property. With respect to any pair of interacting individuals, the general will is the will of each one of them – united as one will. Because a general united or public will is necessary to make relations between persons rightful with regard to property acquisition, a public authority is necessary to enable private property rights.⁴⁶

Even though persons may actually resist the establishment of civil society by withholding actual consent, everyone is nevertheless under an enforceable duty to do so. Obviously, if one cannot make others participate in establishing civil society, one can use might to enforce one’s provisional rights.⁴⁷ Nevertheless, the general point still stands, namely that, although unilateral apprehension of a corporeal thing and giving others a signal that you have done so gives rise to a *provisional* title to the thing, it does not give rise to *conclusive* property rights in that thing. And without conclusive property rights, there are no rightful obligations.⁴⁸ Therefore, for Kant, conclusive private property right requires civil society.

The impossibility of conclusive private property right in the state of nature is a second reason for Kant’s conclusion that staying in the state of nature is to commit wrongdoing in ‘the highest degree’ (6: 308). Because only a public authority can provide a non-contingent application (specification) of the principle governing appropriation and because only a public authority has standing to adjudicate disagreements concerning property boundaries, only a public authority enables the possibility of rightful property claims for all persons regardless of the actual choices of any one particular person. If we were to have a right to refuse to enter civil society, then we would have a right to use coercion to enforce wrongful private property relations. That is, we would have the right to subject others’ use of external freedom to our arbitrary choices rather than to universal law, and this just is to deny justice. And to deny justice is to do wrong in ‘the highest degree’. Consequently, there must be an enforceable duty to enter civil society, since justice requires enforceable private property rights.⁴⁹

Why contract right is possible only in civil society

The second kind of rightful acquisition Kant calls ‘personal right’, or the right one person has against another to perform a certain deed.⁵⁰ These acquisitions involve only persons capable of deeds, that is, morally and legally responsible persons. Since each person has an innate right to freedom she cannot rightfully be coerced into performing a deed. So, we cannot have a right to acquire somebody else’s deeds (external choices) *originally*, since this would be a right to coercively subject that person’s external freedom to our arbitrary choices. Therefore, ‘personal right’ can arise only through a voluntary bilateral or ‘united’ choice, namely a contract.

A contract, then, is ‘[a]n act of the united choice of two persons by which anything at all that belongs to one passes to the other’ (6: 271). Contracts do not give us a right directly to a thing, but rather a right of one person against another to perform a particular deed, namely to perform some service or transfer some thing. Contracts, therefore, enable the rightful transfer of rightful possessions (goods and services) amongst one another. Moreover, just as with original appropriation, contracts are relations between persons rather than relations between persons and things. Thus, through a contract the promisee acquires a legal claim against a person to deliver an object – not the object itself. And since contracts are relations between persons, the *final* title to actual objects is not transferred before the thing or service has actually been delivered. If the promisor fails to deliver, the promisee is entitled to compensation, but not necessarily to the thing or service contracted (6: 271–6).⁵¹

Consistent with Kant’s view, we can expect that contractual arrangements between persons in the state of nature do not generate conclusive contract rights. But Kant offers little explicit explanation. Nevertheless, given the account at hand, a reasonable account can be suggested. First, it is clear that the problem cannot be indeterminacy as we met it with regard to private property, since we have already rightfully acquired the objects to be exchanged. Rather, Kant is best understood as seeing the problem as that of determining how to enact the exchange agreed to. Contracts involve a normative idea of a united choice among (two or more) persons. This idea consists in how persons see themselves as having agreed in their commitments to exchange goods and services. The problem arises because there are many equally reasonable ways in which this normative idea can be realized in our actual exchanges. Well intentioned and reasonable

persons may very well find that they have differing conceptions about how to carry out what they have agreed to – leading to disputes about whether or not the contract has been fulfilled. For example, assume that I have hired you to paint my garage. Entailed in your conception of garage painting is that you are required to give the garage one coat of paint plus a primer, while I believe that fulfilling the contract requires that the garage be given two coats plus the primer. Alternatively, we may have differing conceptions of the way in which the contract deals with unforeseeable empirical circumstances, such as whether the deadline should be met independently of the weather, illness and so on. Because of this indeterminacy, it is impossible for any one of the parties objectively or correctly to determine whether the contract has been fulfilled and, therefore, the contract is not rightfully enforceable. Thus, Kant concludes that without a public authority there is ‘no judge competent to render a verdict having rightful force’.

Contractual interactions, like private property relations, must be subject only to non-contingent and symmetrical restrictions. Therefore, contract right also calls for a public authority, because private solutions prove insufficient. That is to say, private persons may, of course, consent to let a third party settle their disagreements, but such a private solution does not suffice to generate enforceable contract right. The problem with an external arbiter is twofold. On the one hand, since the establishment of an external arbiter is subject to the consent of the disputing parties, there is no reason why the parties should ever come to agreement about who in particular should arbitrate the dispute. After all, the arbiter is no better equipped to solve the dispute than the parties themselves.⁵² Moreover, consenting to an arbiter seems irrational in that the parties merely subject themselves to his contingent judgement rather than to their own – say, to the arbiter’s view about whether the garage should be painted with one or two coats of paint. Solution by way of a private arbiter does not allow the contracting parties independence from the arbitrary choices of others but subjects them to the arbiter’s arbitrary choice. On the other hand, there may arise conflicts over whether an agreed-upon arbiter performs his duty. In this case, the parties need another arbiter to solve the dispute about whether or not the first arbiter appropriately exercises his entrusted task – resulting in an infinite regress of arbitration. The third-party, private solution therefore is not sufficient for *enforceable* contract

right: it amounts to a contractual solution to the problem of contracts, which merely generates the contractual problem once again.

Solving the contractual problem requires that a judge, impartial in its form, that is, a public judge, has standing in contractual relations. The rightful standing of the public judge in contractual relations derives from the fact that the judge’s rulings are consistent with the requirements of justice: they are in the form of universal law. That is to say, enforceable contract right requires a *public* judge, since only a public person is impartial in its form. Since such a judge *qua* judge has no private interests, his judgement cannot be contingent. And a public judge’s rulings are symmetrical because all particular private cases are ruled in accordance with posited laws that settle otherwise indeterminable questions.⁵³ Only by ensuring that contracts are undertaken within such a public legal framework can we make sure that in contracting we do not hinder one another’s external use of choice arbitrarily, but only in accordance with universal law. For these reasons, rightful contractual relations require civil society.

Why domestic right is possible only in civil society

The last sphere of private right concerns status relations, and the right involved in status relations Kant calls ‘personal right akin to right concerning corporeal things’. It is a ‘personal right akin’ to private property right in that it gives one person the right to ‘make arrangements’ affecting the private life of another – that is, a right, in a sense, to the private life of another (6: 259). Because such rights give persons rights to set private ends for one another, these rights are ‘most personal’ and concern ‘what is mine or yours *domestically*’ (6: 277). But because it is a person’s private life that is ‘possessed’ in this way, it is wrong to analyse the relation as one of private property. Moreover, neither contract nor consent can provide the correct analysis. Consent cannot do the legitimating work it does in contracts, because a person cannot (consensually or not) enter into a relation where another person has the right to set private ends for her: this would be slavery. Hence, a separate perspective, the category of status, is needed to analyse domestic relations.

According to Kant, status relations arise when ‘a *man* acquires a *wife*; a *couple* acquires children; and a *family* acquires *servants*’ (6: 277, cf. 27: 642).⁵⁴ In each case, one person acquires another in the sense that he obtains standing within the other person’s private life. Rightful relations, however, require persons not to subject one

another to each other's arbitrary choices, but only to universal law. The question is how can a person obtain standing within another person's private life without also depriving that person of her innate right to freedom? In part, Kant meets this requirement in status relations by arguing that acquisitions of persons must involve giving the possessed person rights reciprocal to those of the possessor. Such reciprocal possession is necessary to reconcile possessing a person with that person's innate right of freedom. Reciprocity is partially secured in these relationships by giving children, wives and servants legally enforceable claims against their parents, husbands and families. But reciprocity is only partially secured, since true reciprocity requires also that the interacting parties are not subject to the choices of the stronger party in the relation. In status relations, as we have seen in other relations, full reciprocity cannot be secured in the state of nature. Since any private person's choices regarding what constitutes the best or better alternative in any given situation is a contingent choice and since it necessarily will be the stronger person's choices that will be enforced, domestic relations in the state of nature cannot be rightful. Rather than universal law, the interacting parties will be necessarily subject to the stronger person's arbitrary use of external choice. Therefore, Kant argues that rightful status with respect to the private life of another person, or rightful status relations, can be established only 'by law' (*lege*) (6: 276). Without a public authority to act as a 'civil guardian' over the parties involved in status relations, it is impossible to enable a rightful domestic relationship.

Consider first the parent-child relation. Because we are all born with an innate right to freedom, children, too, are born with the right not to have their external use of choice subjected to the arbitrary choices of others (6: 280–2). Nevertheless, because children are unable to exercise external choice responsibly, others must act on their behalf and teach them how to do so. Since parents have unilaterally chosen to acquire their children, they, Kant argues, bear this responsibility. Yet, fulfilling their responsibility must be reconcilable with the children's innate right to freedom, and so cannot involve parents subjecting their children to their arbitrary choices. On the one hand, parents must make sure that they do not treat their children as mere means to their (or anyone else's) ends, such as by making them into free domestic labour (6: 281).⁵⁵ Instead, parents must provide their children with care. On the other hand,

parents' good intentions to provide the requisite care are insufficient to establish rightful relations with their children. And the reason is, as always, that good intentions fail to fulfil the requirements of symmetry and non-contingency.

In short, the main problem is that in the state of nature a child's innate right to freedom is necessarily unprotected. Parents are the only ones with standing in relation to their children: no one other than the parents is authorized to act on behalf of the child. This entails that children's rights necessarily are unprotected in the state of nature. The problem is not that children are at the mercy of other morally responsible adult persons interfering in cases of severe mistreatment or abandonment, though this is, of course, a problem too. Rather, the problem is that within the conceptual framework of the state of nature, children are necessarily subject to the arbitrary choices of their parents. In relation to the child, no one has the appropriate standing or authorization to evaluate the parents' ability to act on the child's behalf, namely to provide adequate care. The judgement whether or not a particular parent is acting in the child's best interests rests solely with that parent. Thus, status relations are inherently abusive in the state of nature. Rightful parent-child (status) relations require establishment of a *public* person, since only a public person has the appropriate standing to regulate the relationship. By representing both the parents and the child, the public person – through public family law – enables parents to relate to their child in a way that preserves the child's innate right to freedom.⁵⁶

Relations between husbands and wives and between families and their servants are also status relations, and hence, in the state of nature, they encounter the same formal problem.⁵⁷ That one person is entitled to set private ends for another gives rise to the problem of ensuring that the relation is not one according to which the weaker person becomes subject to the stronger person's arbitrary choice. Although wives and servants are morally responsible persons, and so their consent is necessary to establish any rightful status in relation to them, consent alone is insufficient to make the relation rightful. Again, what is needed is the establishment of a 'public guardian' or a public person with standing in the domestic relationship, since only a public person can be the will of all and yet the will of no private person. Entering civil society – or the establishment of family law and laws governing servant/family relations – is therefore necessary

to ensure that one does not subject one's domestic partners to one's arbitrary choice, but rather interacts in ways reconcilable with everyone's innate right to freedom.⁵⁸

Concluding Discussion Concerning the Strict Duty to Enter Civil Society

I can now substantiate the two central claims introduced earlier. First, only in civil society can interacting persons respect each other's innate right to freedom. Second, the argument establishing this conclusion is not grounded in rational self-interest, and justice is therefore not a remedial virtue for Kant. In regard to the first claim, justice is a condition governed by the universal principle of right, meaning that it is a condition under which interacting persons respect one another's innate right to freedom. The right to freedom protects each person's right to independence from subjection to another person's arbitrary choices, and the right to have her external freedom subject only to universal (non-contingent and symmetrical) law. But external freedom requires the possibility of acquiring and possessing external objects of choice as one's own. Yet only a public authority can provide assurance of possession and also overcome the problems of indeterminacy constituent of acquisition in a way consistent with each person's right to freedom. Therefore, a public authority is necessary for external freedom.

It is with this account in hand that Kant concludes that we must accept the postulate of public right:

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 . . . [public] justice . . . Given the intention to be and to remain in this state of externally lawless freedom, human beings 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 . . . But . . . they do wrong in the highest degree by willing to be and to remain in a condition that is not rightful. (6: 307)⁵⁹

In short, public right is needed to give effect to private right in a way reconcilable with each person's innate right to freedom. It is not the 'inconveniences' of the state of nature that make the postulate

of public right necessary. Rather, rightful relations simply are not possible in the state of nature, and that is why justice is not a remedial virtue. That is, *even if* all individuals act on the best intentions, only by postulating a public authority is it possible conceptually to overcome the problems of assurance and indeterminacy by methods consistent with the universal principle of right. Though we may obtain provisional justice in the state of nature, it still remains a state of wrongdoing, and the heart of the wrongdoing is a lack of universal (non-contingent, symmetrical) restrictions upon the actions of interacting persons. Therefore, the only use of coercion consistent with the innate right to freedom is that involved in establishing the conditions under which justice is possible, namely civil society. Having a right to refuse to enter civil society is tantamount to having a right to refuse justice for oneself and everyone else. And this is equivalent to reserving the right to engage in wrongdoing.

Kant also expresses this point by saying that, at most, the state of nature is a condition '*devoid of justice*'. In the best-case scenario, namely one in which no conflicts happen to occur, the state of nature is a condition in which particular individuals do not wrong *one another*, but yet in choosing to remain in this condition they do wrong *in the highest degree* by renouncing any concept of right in their interactions (6: 312). That is to say, individuals do wrong in the highest degree by staying in the state of nature even if the wrong they do is not necessarily done to particular individuals. Forcing someone to enter civil society is therefore to 'hinder a hindrance to freedom' in accordance with a universal law (6: 232), meaning that it is to force persons to ensure that their actions, or use of external choice, 'can coexist with everyone's freedom in accordance with a universal law' (6: 230). This is why Kant argues that in order to avoid renouncing any concept of right when interacting with others we must establish a condition in which each is 'assured of what is his against violence' (6: 308), namely a condition under which the problems of rightful assurance and rightful acquisition are overcome.⁶⁰

It should now be clear why it is incorrect to argue, as many do, that the Kantian circumstances of justice are those of Locke. Rather than demonstrating that the state is prudentially necessary, Kant's aim is to show that the state is the condition for the possibility of rightful relations. His justification for civil society has nothing to do with how well disposed people are towards one another or how

plentiful are our resources. Indeed, at the beginning of his discussion of public right in *The Metaphysics of Morals*, Kant explicitly denies prudence-interpretations of his position. Instead he confirms the interpretation I have defended, namely that problems arising from indeterminacy concerning acquisition and assurance for the right reasons are what make entrance into civil society strictly necessary:

It is . . . not some fact that makes coercion through public law necessary. On the contrary, however well disposed and law-abiding [right-loving] men might be, it still lies *a priori* in the rational idea of . . . [the state of nature] that before a public lawful condition is established individual human beings . . . can [können] never be secure against violence from one another, since each has its [his] own right to do *what seems right and good to it [him]* and not to be dependent upon another's opinion of this. So, unless it [he] wants to renounce any concepts of right, the first thing it [he] has to resolve upon is the principle that it [he] must leave the state of nature, in which each follows its [his] own judgment, unite itself [himself] with all others (with which it [he] cannot avoid interacting), subject itself [himself] to a public lawful external coercion, and so enter into a condition in which what is to be recognized as belonging to it [him] is **determined by law** and is **allotted to it [him] by adequate power** (not its [his] own but an external power); that is, it [he] ought above all else to enter a civil condition.

It is true that the state of nature need not, just because it is natural, be a state of *injustice (iniustus)*, of dealing with one another only in terms of the degree of force each has. But it would still be a state *devoid of justice (status iustitia vacuus)*, in which when rights are *in dispute (ius controversum)*, there would be no judge competent to render a verdict having rightful force. Hence each may impel the other by force to leave this state and enter into a rightful condition; for although each can acquire something external by taking control of it or by contract in accordance with its [his] *concepts of right*, this acquisition is still only *provisional* as long as it does not yet have the sanction of public law, since it is not **determined by public . . . justice and secured by an authority putting this right** into effect. (6: 312, my emphasis in boldface)⁶¹

Kant's fundamental claim is that there is no way to establish a rightful distinction between what is mine and what is yours simply by being 'right-loving' or by reasoning well. He points out that, although human beings often fail to live as they ought to, and, thus, the state of nature is most 'inconvenient' to use Locke's phrase, he emphasizes that the necessity of civil society is not due primarily

to this fact about humankind. We have a strict duty to enter civil society, not because it is prudent given the inconveniences involved in staying in the state of nature, but because the state of nature is necessarily a state of wrongdoing.

This does not mean, as Höffe explains, that Kant's conclusion regarding the necessity of the state is inconsistent with an argument from enlightened rational self-interest.⁶² Still, though the establishment of the state can be demonstrated to be in conformity with the requirements of enlightened rational self-interest, the duty to enter civil society is not derived from a rational self-interest argument. Rather, Kant argues that staying in the state of nature is to engage in wrongdoing, since it is impossible for private individuals to specify and assure rightful (symmetrical, non-contingent) rules for their interactions in this condition.⁶³ Remember that the freedom at issue is freedom with respect to *external* uses of choice, not freedom with respect to *internal* uses of choice. So as long as there is external freedom, civil society can be a nation of 'devils'. Justice requires only that people act externally in conformity with civil laws – it does not and cannot require them to act on a particular maxim or from a moral motivation (*because* it is the right thing to do) (6: 231). People's maxims and motivations are beyond the reach of coercion, yet since it is the maxims and motivations that make action distinctively virtuous (6: 218–21), there is a sense in which a just society may comprise only immoral people. That there is justice says nothing about whether there is virtue, even though virtuous actions (internally free uses of choice) will be consistent with rightful actions (externally free uses of choice). There is an additional reason why we should resist the prudential explanation of the duty to enter civil society. From the point of view of Kant's Doctrine of Right, we cannot have an enforceable duty to act in accordance with rational self-interest without also denying the innate right to freedom. Hence, rational self-interest cannot be presented as an enforceable duty of right on Kant's view.

Finally, note that even if there is no dispute or actual conflict existing regarding the holding and acquisition of rightful possessions, it is still necessary to leave the state of nature in order to engage in rightful relations with one another. Only in civil society is it possible to subject our interactions to symmetrical, non-contingent restrictions rather than to one another's arbitrary choice. This is why, in the passage above, Kant says that until what belongs to each is

‘determined’ and ‘secured’ by a public authority, rightful relations have not been established. Therefore, the duty to enter civil society has nothing to do with our tendency to act viciously. Rather, the strict necessity of the state follows from the innate right to freedom, making non-voluntarism the liberal ideal of political obligations.

Conclusion

I have defended Kant’s non-voluntarist conception of political obligations through an analysis of his thoroughly individualistic, relational account of justice. Each argument can be traced ultimately to its ground in each person’s innate right to freedom or her right to be subjected not to the arbitrary choices of others, but only to universal law. We saw that the exercise of one’s innate right to freedom depends upon being able to rightfully acquire and possess external objects of choice as one’s own. But the contingency and asymmetry of individually specified restrictions on external objects of choice and privately provided assurance entail that all solutions available in the state of nature fail. Staying in the state of nature is therefore to engage in wrongdoing – a wrongdoing in the highest degree – since it is impossible for private individuals to draw and secure rightful distinctions between what is yours and what is mine. In order to specify and secure non-contingent and symmetrical laws to regulate our interactions, a public authority is needed. Therefore, our innate right to freedom requires us to enter civil society, and the liberal ideal of political obligations must be non-consensual in nature.

Notes

¹ I want to thank Svein Eng, Arnt Myrstad, Arthur Ripstein, Sergio Tenenbaum and Shelley Weinberg for their generous help in writing this paper. An earlier version of this paper was presented at the Norwegian Kant Society at the University of Oslo (January 2006) and at the Pacific Study Group of the North American Kant Society (21–22 October 2006, University of California-Riverside). I would also like to thank those audiences for their stimulating questions. Finally, I am grateful to the editor, Howard Williams, and an anonymous reviewer at *Kantian Review* for their comments and suggestions. References to

the *Metaphysics of Morals* are given in the volume and page numbers of the Academy edition.

² Voluntarism, as I will use it here, involves a defence of four claims describing the liberal state’s use of coercion: (1) state authority requires coercion; (2) coercion by an unauthorized state is illegitimate since it is inconsistent with respecting each individual’s rights; (3) only individuals’ consent can give the state rightful authority and (4) individuals can authorize the state to enforce their individual rights on their behalf as well as to enforce new laws that regulate their interactions within the sphere permitted by their individual rights or the laws of nature. Therefore, all rightful use of coercion, whether by the state or by individuals, is seen as exercised within the framework set by the laws of nature. The main difference between the state and individuals’ exercise of rights is that the state’s right to enforce the laws of nature coercively is seen as *artificial* in that it must be explained through individuals’ consent to its authority, whereas individuals are seen as having a *natural* right to enforce these laws. So, voluntarism consists in the view that political obligations arise only through consent, but consent is typically seen as coming in one of two possible forms. *Strong* voluntarism is the view that only *actual* (explicit and tacit) consent can give rise to obligations to a particular political power. On this view, a particular political authority’s use of coercion remains illegitimate without an actual authorization by each individual, since only an actual authorization can fully reconcile the state’s artificial authority with each individual’s natural political power (‘natural executive right’). In contrast, *weak* voluntarism defends the view that *hypothetical* consent is sufficient to give rise to political obligations. This means that if persons, as rational or reasonable beings, *can be seen* as consenting to a particular state’s use of coercion, then they are politically obligated to recognize its rightful authority, which is to say that this political authority is legitimate. It goes without saying that if we change our conception of voluntarism, then the argument presented here may no longer hold. The aim here, however, is not to refute any possible conception of voluntarism, but to engage a rather uncontroversial and commonly employed conception of it. For example, this conception of voluntarism appears fully consistent with the one found in Patrick Riley’s influential work *Will and Political Legitimacy* (1999).

³ I will use the terms ‘right’, ‘justice’ and ‘rightful relations’ interchangeably throughout this paper.

⁴ This claim naturally assumes that the liberal ideal of political obligations takes as its first principle an individual right to freedom.

⁵ Locke (1998) argues that it is the *prudent* choice given ‘the inconveniences’ of the state of nature (*Second Treatise*, § 127) that makes ‘the enjoyment of the property . . . [the individual] has in this state . . . very unsafe, very unsecure’ (ibid. §§ 123, cf. 124, 149, 222). So, although entering civil society is required by prudence and is a moral response to the inconveniences of the state of nature, it is not strictly required from the point of view of justice. If civil society were in principle necessary

for justice, individuals could not (in opposition to Locke) be seen as having a natural executive right.

- ⁶ The Lockean A. John Simmons, in 'Justification and Legitimacy' (2001), argues that Kantian approaches do not demonstrate how the state becomes authorized to act on behalf of individuals in the first place. In this paper, I suggest that, because many Kantians view Kant and the Kantian project through 'remedial lenses', they struggle to respond to this Lockean challenge.
- ⁷ Here and for the remainder of this paper I use 'remedial interpretations' to include all (moral and prudential) accounts that make humanity's typical lack of virtue essential to their argument (as outlined above).
- ⁸ Williams's interpretation of Kant's political philosophy regarding the issue in question has changed somewhat over the years. In his earlier writings, Kant was seen as arguing that 'because any use of force is, in conception, opposed to man's freedom . . . the state to Kant is from the standpoint of virtue and individual morality simply a necessary evil' (1983: 71, cf. 10–11, 70, 73, 164, 169–70, 185). In later writings, external law is increasingly seen in a more positive light. This more positive regard for the establishment of the state is seen already in his 'Kant on the Social Contract' (1994: 137–8, 145), but even more clearly in *Kant's Critique of Hobbes*. Here Williams argues that external freedom requires private property and so the only way to enjoy external freedom goes through '[t]he observance of the laws of property ownership' (2003: 100). It should be noted also that in one place Williams says that '[o]nly within a civil society does right and not force determine what is mine and not mine. In a civil society rightful coercion replaces the one-sided use of force . . . Liberty is . . . a system of possible reciprocal coercion. I put myself under an external law . . . which I make myself. I agree to limit my right to rights I agree to give others as well' (2003: 100).

The first part of this statement can reasonably be interpreted as confirming that Kant considers it impossible to arrive at a rightful distinction between 'mine and thine' in the state of nature. This would entail that Williams does not defend a fundamentally prudential interpretation of Kant. But there is no textual evidence, as far as I can see, to suggest that this is Williams's view. To claim that it is would be to superimpose a reading on his texts. Moreover, what we find in the latter part supports the view that Williams thinks that Kant considers the establishment of the state as fundamentally involving a limitation of one's own right, which again entails that fundamentally the establishment of the state is a prudential restriction of right rather than the ideal realization of right.

- ⁹ Paul Guyer argues similarly (2006: 265, 272–3, 301). It is difficult to establish Otfried Höffe's position on this issue. An assurance argument features prominently (2006: 127, 192, 197, cf. 1994: 182), though in several places he appears to appeal to more ideal (indeterminacy) arguments (2006: 10, 15, 99–100, 179, cf. 1994: 181–3). The question is whether Höffe interprets these arguments as, ultimately, moral and prudential responses to the inconveniences of the state of nature

created by our phenomenal nature or as ideal arguments that do not rest on such an appeal to our 'warped wood'. Though much can be read as supporting either view, in those places where he explicitly addresses the question, Höffe seems to affirm a moral-prudential reading: 'Since a legal state order can exist only to the extent that and for the very reason that morality does not everywhere rule mankind, the legal order is at once separated from morality and yet is a moral extension of an order determined by morality' (2006: 92; cf. 1994: 184).

In this passage, it seems clear that Höffe's considered view is that if morality everywhere ruled mankind, we would not need a legal state, which suggests that the ultimate reason for the state is a moral response to our phenomenal nature. Consider also Kenneth Westphal, according to whom Kant considers the state strictly necessary because individuals are typically biased and incapable of enforcing the principles of property right correctly (2002: 108). But also note that in other places Westphal seems to argue that justice is not a remedial virtue. For example, at one place he argues that 'rights to possession are merely provisional if they lack legitimate means of enforcement (§ 9) and if they lack publicly recognized title (§ 15) . . . [and t]he conditions that obligate us to establish rights to possession also obligate us to establish legislation and courts' (2002: 108–9, cf. 91, 104). Mary Gregor's interpretation contains a similar ambiguity. For example, on p. 43 in *Laws of Freedom* (1963) she clearly argues on the presumption that justice is a remedial virtue, whereas later (Westphal 2002: 59–60) she seems to presuppose the opposite assumption.

- ¹⁰ According to O'Neill, Kant considers it impossible 'to achieve a flawless realization of justice under human conditions. Because human beings are not always well disposed towards one another, justice requires enforcing institutions which unavoidably curtail external freedom. In Kant's view, the first task in developing a more specific account of justice is to recognize this reality, and to accept that justice requires institutions that coerce to limit coercion. The reason for accepting this is that alternative, non-state institutions – for example, anarchic or feudal structures – secure even less respect for external freedom' (O'Neill 2000: 139). See Jeffrie G. Murphy (1994: 34, 70, 75–6, 104, 107) and Alexander Kaufman (1999: 10–11, 82, 142) for similar interpretations of Kant. Finally, according to Allen Wood, Kant explains 'the creation of political states through increasing conflicts between people when they enter into civilized life' (1998: 29, cf. 25), and Kant considers the protection of 'the property rights of farmers against herders and other nomadic peoples' as having made the political state a necessity (1998: 32). Moreover, though Wood emphasizes that his interpretation is not Lockean (1998: 32), it is somewhat unclear whether it is still a fundamentally prudential interpretation. We may understand him as arguing that it was not until the agricultural event that the necessity of the state as the only rightful solution to problems of interaction became apparent to people because interaction was now unavoidable. If so, this would be an empirical claim, on which my paper is silent. The interpretation offered here would only object to

claiming that the main reason the farmers had to establish a state was to protect their land against intruders. This would be the prudential reading of Kant that I am challenging.

- ¹¹ I consider the ‘early’ Rawls to refer to work culminating in *A Theory of Justice* (1999). In my view, the stronger interpretations of Rawls’s later philosophy, such as *Political Liberalism* (1996), will not affirm the prudential understanding of justice and the state. For a non-prudential reading of Rawls’s later philosophy, see Arthur Ripstein (2006).
- ¹² Patrick Riley argues that Kant’s actual theory is a weak or hypothetical version of voluntarism (Riley 1999: 9, 18, 131, 155), meaning that ‘for Kant laws are legitimate that could have been consented to by a mature, rational people *and* that are congruent with natural law’ (1999: 132). Actual consent is not necessary on Kant’s view, Riley argues, because ‘politics only creates a context for morality . . . it . . . even enforces part of it, at least insofar as external conduct is concerned. Men are thus obliquely obliged to the political order without explicit voluntary acts’ (1999: 131). The state ‘can remove or control some of the objects that cause human will to be shaped by impulse’ (ibid: 129), it ‘blocks external impediments to . . . [moral] activity, realizes some of the ends, though not the incentives, or morality, and . . . brings an end to those practices . . . that are themselves immoral’ (1999: 155, cf. 135, 146). The state is not in principle necessary for justice – rather it is prudentially necessary for creating the context for morality. Moreover, people are obliged to obey the state’s rulings because it enforces principles they are morally obliged to obey anyway and, so as long as a particular state enforces the right principles, its people can be seen as hypothetically agreeing to it, which obligates them politically to recognize its legitimacy. In contrast, I argue that establishing the state is *constitutive* of rightful relations and not prudentially necessary to establish a context for morality. The state is constitutive of rightful relations, because only the state can, in principle, yield rightful solutions to certain problems of indeterminacy and assurance characteristic of the sphere of justice. Because there are so many and deep agreements between Riley’s interpretation of Kant and the one proposed in this paper, there is of course a danger in emphasizing this difference. Nevertheless, the emphasis is useful in illuminating my challenge to the voluntarist presupposition informing Riley’s interpretation of the history of (modern) political thought. That is to say, if the interpretation presented in this paper is plausible, then maybe it is not the case, as Riley suggests, that ‘all of social contract theory can be seen [as] a striking example of voluntarist ideas’ (1999: 2). Rather, Kant is better understood as a contractarian of sorts but not also as voluntarist. The next step constitutive of such an argument involves taking another look at how Kant, in the public right sections of the Doctrine of Right, argues that the social contract, or civil society, should be set up. This account must take as its starting point that though the requirements of justice and morality are compatible, the operations of a just state are not analogous to the actions of a virtuous individual in the state of nature. Due to considerations of

space, this topic is not investigated here. This argument is taken up in my paper ‘Kant’s Non-Absolutist Conception of Political Legitimacy: How “Public Right” Concludes “Private Right” in the Doctrine of Right’ (under revision for *Kant-Studien*).

- ¹³ Therefore, against Locke, Kant argues that individuals cannot have a natural executive right, since individuals cannot in principle apply and enforce the laws of nature (or freedom) and thereby enable rightful relations. For reasons I cannot go into here, Kant’s account also challenges the Lockean voluntarist claim that the rights of the state are in principle reducible to those of individuals, since the state has further coercive powers (‘public right’) than those individuals enjoy provisionally in the state of nature (‘private right’). Kant’s account of public right also explains why and how Kant’s non-voluntarist conception of political obligations (as presented in the private right section of the Doctrine of Right) is, rather surprisingly, not matched by an absolutist conception of political legitimacy. For Kant’s account of public right, see again my ‘Kant’s Non-Absolutist Conception of Political Legitimacy’.
- ¹⁴ Here I am in fundamental agreement with Sarah Williams Holtman (2002: 216–17), Wolfgang Kersting (1992a: 146–7 and 1992b: 353, 361–2), Bernd Ludwig (2002: 179–80), Arthur Ripstein (2004: 3) and Ernest J. Weinrib (1992: 17), who also argue that justice is not a remedial virtue for Kant. Any differences between my and their interpretations become clear below.
- ¹⁵ As we will see, status relations are relations in which one person has standing within another person’s private life, as, for example, in the parental relation.
- ¹⁶ I use the concepts ‘symmetrical’ and ‘reciprocal’ interchangeably in this paper.
- ¹⁷ Kant argues: ‘If . . . 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 . . . Therefore, 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’ (6: 230–1, cf. 8: 292–3).
- ¹⁸ Kant calls this the ‘postulate of practical reason with regard to rights’. It states that it is ‘an *a priori* presupposition of practical reason to regard and treat any object of my choice as something which could objectively be mine or yours’ (6: 246).
- ¹⁹ This is why Kant argues that my body and my person must be thought of as an analytic unity (6: 250). Robert Paul Wolff (1998: 55–6) and Katrin Flikschuh (2000: 157–8) also emphasize the importance of human *embodiment* in Kant’s theory of right, but without much further explanation. I suggest that the importance of embodiment in Kant’s theory has to do with the analytic relation between a person and

her body. Kant argues that: 'All propositions about right are *a priori* propositions, since they are laws of reason . . . An *a priori* proposition about right with regard to *empirical possession* is *analytic*, for it says nothing more than what follows from empirical possession in accordance with the principle of contradiction, namely, that if I am holding a thing (and so physically connected with it), someone who affects it without my consent (e.g., snatches an apple from my hand) affects and diminishes what is internally mine (my freedom), so that his maxim is in direct contradiction with the axiom of right. So the proposition about empirical possession in conformity with rights does not go beyond the right of a person with regard to himself' (6: 249–50). Here Kant is arguing that embodiment results in an innate right to our own bodies, and so a person's empirical and intelligible possession must be seen as united 'with regard to himself'. Consequently, from the point of view of right our person and our body are analytically and not synthetically united.

²⁰ Here, the 'I' refers to a morally and legally responsible person. Relations involving persons who cannot be responsible for their actions will, on this view, always fall under the status category (see discussion below).

²¹ Kant argues: '[t]hat is rightfully mine with which I am so connected that another's use of it without my consent would wrong me' (6: 245).

²² Cf. Ripstein (2004: 11–14) for a similar interpretation of Kant's conception of rightful possession.

²³ I suggest that Kant's explanation of why external freedom requires the possibility of the rightful possession of external objects of choice is also his justification for the idea that private property is necessary to a theory of justice.

It is important to note that it makes no difference to the general point whether you eat or damage the apple. For example, suppose you use it for the juggling part of your fabulous busking performance. Once finished, and still unbeknownst to me, you put the undamaged apple back in the window. The fact that you have not harmed me in your use of the apple or that I am ignorant of your having used it is irrelevant to the wrongdoing. If the apple is mine, then I have sole rightful discretion as to how it is used. Since you do not have an apple, you cannot rightfully set ends involving an apple – and you cannot use *my* apple without my consent. Your non-consensual use of my apple subjects me to wrongful coercion by hindering my freedom, namely by depriving me of my right to choose the ends towards which my apple (my means) is used. The same reasoning applies to other kinds of cases. For example, the fact that it will save you two hours if you cross through my estate rather than walk around it, and that it does my estate absolutely no harm that you walk across it, does not entail that you have a right to trespass. If it is my estate, then any access to it requires my consent.

²⁴ The question concerning how to make something one's rightful possession in the first place is the topic of the sub-section in this paper on 'Rightful Acquisition'.

²⁵ This is, in part, what Kant means when he says that 'the universal law of right, so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law, is indeed a law that lays an obligation on me, but it does not at all expect, far less demand, that I *myself should* limit my freedom to those conditions in conformity with the idea of it and that it may also be actively limited by others . . . When one's aim is not to teach virtue but only to set forth what is *right*, one may not and should not represent that law of right as itself the incentive to action' (6: 231). To present virtue as a solution to problems of right is fundamentally to misunderstand what right is all about, namely a rightful relation established between our external uses of choice only.

²⁶ For example, see Williams (1983: 169–70) and Guyer (2000: 236, 238–4, 256, 282–4).

²⁷ In other words, providing assurance involves establishing a monopoly on coercion.

²⁸ See Nozick (1974), pp. 10–17, for Nozick's conception of the dominant protective association. My point is not that this is the most fundamental problem with Nozick's theory. For a full critique of Nozick's position, see my paper 'Nozick's Reply to the Anarchist' (under review).

²⁹ It seems reasonable to argue that this is Hobbes's claim in *Leviathan*, and hence it constitutes another difference between Hobbes and Kant. Properly addressing this question, however, is beyond the scope of this paper.

³⁰ As Kant states: 'I am . . . not under obligation to leave external objects belonging to others unless everyone else provides me assurance that he will behave in accordance with the same principle with regard to what is mine. This assurance does not require a special act to establish a right, but is already contained in the concept of an obligation corresponding to an external right, since the universality, and with it the reciprocity, of obligation arises from a universal rule' (6: 256).

³¹ A fuller explanation of this point must involve an engagement with Kant's conception of public right. See again my 'Kant's Non-Absolutist Conception of Political Legitimacy'.

³² Westphal therefore seems mistaken when he argues that Kant's private right argument establishes reciprocity in the relations between interacting persons: 'Kant's justification of rights to possession involves no unjust unilateral obligation of others because, in obligating others to respect our possessions, we also obligate ourselves to respect their possessions' (2002: 103). I have argued that Kant's position is that only a public authority can provide reciprocal assurance or what we may call 'assurance for the right reasons'.

³³ It is interesting that Kant argues for rightful acquisition only *after* he makes the argument concerning rightful assurance. One would think that the explanatory order should be in the other direction. The reason we find assurance before acquisition, I think, is that Kant sees each argument as independently justifying the non-consensual conception of political obligations, and the reader is less likely to think the

arguments are dependent on one another as they would if the order were reversed.

- ³⁴ According to Kant, we can have three objects of our choice since there are three relational categories of the understanding: things (private property relations), causality (contract relations) and community (status relations) (6: 259–60, cf. 6: 247–8). I do not engage Kant's defence of this fundamental assumption.
- ³⁵ I believe Westphal is correct when he argues that Kant reserves the term '*Eigentum*' (property) for rightful possession in civil society (2002: 90). Mary Gregor's translation of the various sub-headings in 6: 260–84 is therefore only loosely accurate. As Gregor points out in note j in 6: 261, Kant does not introduce the notion of 'property' until 6: 270, and in note b in 6: 276 she tells us that she consistently translates Kant's text by means of the term he uses to refer to "the sum of laws" having to do with the various kinds of possession. Thus, she translates 'Vom Sachenrecht' as 'Property Right' rather than as the seemingly more correct 'On Right concerning Corporeal Things' (6: 260), and instead of translating 'Vom Persönlichen Recht' as 'On Personal Right', she translates it as 'Contract Right'. In the final section she stays quite close to Kant's own words when she translates 'Von dem auf dingliche Art persönlichen Recht' as 'Rights to Persons Akin to Rights to Things' rather than as 'Domestic Right'. Therefore, a more faithful translation would use 'Right concerning Corporeal Things', 'Personal Right' and 'Personal Right Akin to Right concerning Corporeal Things' when referring to right as analysed within the conceptual framework of the state of nature and 'property right', 'contract right' and 'domestic right' when referring to rightful relations within civil society.
- ³⁶ See 6: 260–70.
- ³⁷ Thus, we can appreciate why Kant rejects the Lockean argument that labour subject to certain particular restrictions can give rise to conclusive property rights. Kant argues that because the Lockean labour argument wrongly presupposes that right is a relation between a person and a thing, it cannot explain how binding obligations between persons arise with regard to property acquisition. Labour is a causal relation between a person and a thing, not a normative relation between persons. Kant argues: 'The first working, enclosing, or, in general, transforming of a piece of land can furnish no title of acquisition to it . . . This is so clear of itself that it is hard to assign any other cause for that opinion, which is so old and still so widespread, that the tacit prevalent deception of personifying things and of thinking of a right to things as being a right directly against them, as if someone could, by the work he expends upon them, put things under an obligation to serve him and no one else; for otherwise people would probably not have passed so lightly over the question that naturally arises . . . "How is a right to a thing possible?" For a right against every possessor of a thing means only an authorization on the part of someone's particular choice to use an object, insofar as this authorization can be thought as contained in a synthetic general will and as in accord with the law of this will' (6: 268f).

- Kant's point is that there is nothing about the unilateral act (labour) itself that can generate the obligation. See Kersting (1992b: 350–3) for a similar interpretation of this point.
- ³⁸ The general principle of external acquisition states 'that is mine which I bring under my *control* (in accordance with the law of outer *freedom*); which, as an object of my choice, is something that I have the capacity to use (in accordance with the postulate of practical reason); and which, finally, I *will* to be mine (in conformity with the idea of a possible united *will*)' (6: 258).
- ³⁹ Presumably this entails that there must be at least three persons initially – one becomes the sovereign who regulates the interactions between the other two.
- ⁴⁰ 'By the term "property right" (*ius reale*)', explains Kant, 'should be understood not only a right to a thing (*ius in re*) but also the sum of all the laws having to do with things being mine or yours. — But it is clear that someone who was all alone on the earth could really neither have nor acquire any external thing as his own, since there is no relation whatever of obligation between him, as a person, and any other external object, as a thing. Hence, strictly speaking and literally, there is also no (direct) right to a thing. What is called a right to a thing is only that right someone has against a person who is in possession of it in common with all others (in the civil condition)' (6: 261).
- ⁴¹ Kant applies this argument about original acquisition to the acquisition of land (6: 261), but for our purposes here it is not necessary to go into the details of that argument.
- ⁴² According to Kant 'the real definition [of] . . . a right to a thing is a right to the private use of a thing of which I am in (original or instituted) possession in common with all others . . . since, unless such a possession in common is assumed, it is inconceivable how I, who am not in possession of the thing, could still be wronged by others who are in possession of it and are using it. — By my unilateral choice I cannot bind another to refrain from using a thing, an obligation he would not otherwise have; hence I can do this only through the united choice of all who possess it in common. Otherwise I would have to think of a right to a thing as if the thing had an obligation to me, from which my right against every other possessor of it is then derived; and this is an absurd way of representing it' (6: 261).
- ⁴³ Since 'it must be possible, in terms of rights, to have an external object as one's own', Kant argues, 'the subject must also be permitted to constrain everyone else with whom he comes into conflict about whether an external object is his or another's to enter along with him into a civil condition' (6: 256).
- ⁴⁴ Kant says: '(1) *Apprehension* of an object that belongs to no one; otherwise it would conflict with another's freedom in accordance with universal laws. This *apprehension* is taking possession of an object of choice in space and time, so that the possession in which I put myself is *possessio phenomenon*. (2) *Giving a sign* . . . of my possession of this object and of my act of choice to exclude every else from it'

(6: 258–9). If these two aspects constituted original acquisition, then rightful private property relations would be possible in the state of nature. But Kant argues that there is a third aspect: ‘(3) *Appropriation* . . . as the act of a general will (in idea) giving an external law through which everyone is bound to agree with my choice’ (ibid.). That the first two aspects constitute provisional justice rather than conclusive justice is confirmed throughout the text. For example, in 6: 263 Kant argues that ‘[t]he only condition under which *taking possession* . . . beginning to hold . . . a corporeal thing in space, conforms with the law of everyone’s outer freedom . . . is that of *priority* in time, that is, only in so far as it is the *first* taking possession . . . which is an act of choice. But the will that a thing . . . is to be mine . . . [i]n original acquisition can be only *unilateral* . . . But the aforesaid will can justify an external acquisition only insofar as it is included in a will that is united *a priori* (i.e., only through the union of the choice of all who can come into practical relations with one another) and that commands absolutely. For a unilateral will . . . cannot put everyone under an obligation that is itself contingent; this requires a will that is *omnilateral*, that is united not contingently but *a priori* and therefore necessarily, and because of this is the only will that is lawgiving. For only in accordance with this principle of the will is it possible for the free choice of each to accord with the freedom of all, and therefore possible for there to be any right, and so too possible for any external object to be mine or yours . . . Hence *original* acquisition can only be *provisional*. – *Conclusive* acquisition takes place only in the civil condition’ (6: 264–5).

⁴⁵ See 6: 266–7, where Kant states, ‘[t]he indeterminacy, with respect to quantity as well as quality, of the external object that can be acquired makes this problem (of the sole, original acquisition) the hardest of all to solve. Still, there must be some original acquisition or other of what is external, since not all acquisition can be derived. So this problem cannot be abandoned as insoluble and intrinsically impossible . . . it is solved through the original contract . . . [Hence p]rovisional acquisition . . . needs and gains the favor of a law . . . for determining the limits of possible rightful possession. Since this acquisition precedes a rightful condition and, as only leading to it, is not yet conclusive, this favor does not extend beyond the point at which *others* (participants) consent to its establishment. But if they are opposed to entering it (the civil condition), and as long as their opposition lasts, this favor carries with it all the effects of acquisition in conformity with right, since leaving the state of nature is based upon duty’.

⁴⁶ Kant argues that ‘a unilateral will . . . cannot put everyone under an obligation that is in itself contingent; this requires a will that is omnilateral, that is united not contingently but *a priori* and therefore necessarily, and because of this is the only will that is lawgiving. For only in accordance with this principle of the will is it possible for the free choice of each to accord with the freedom of all, and therefore possible for there to be any right, and so too possible for any external object to be mine or yours’ (6: 263).

⁴⁷ In (6: 267) we find the following: ‘the law which is to determine for each what land is mine or yours will be in accordance with the axiom of outer freedom only if it proceeds from a will that is united originally and *a priori* (that presupposes no rightful act for its union). Hence it proceeds only from a will in the civil condition . . . which alone determines what is right, what is rightful, and what is laid down as right. – But in the former condition, that is, before the establishment of the civil condition but with a view to it, that is, provisionally, it is a duty to proceed in accordance with the principle of external acquisition. Accordingly, there is also a rightful capacity of the will to bind everyone to recognize the act of taking possession and of appropriation as valid, even though it is only unilateral’.

⁴⁸ Kant makes the point this way: ‘Something Can Be Acquired Conclusively Only in a Civil Constitution; in a State of Nature It Can Also Be Acquired, but Only Provisionally . . . the rational title of acquisition can lie only in the idea of a will of all united *a priori* (necessarily to be united) . . . for a unilateral will cannot put others under an obligation they would not otherwise have. – But the condition in which the will of all is actually united for giving law is the civil condition. Therefore something external can be originally acquired only in conformity with the idea of a civil condition, that is, with a view to it and to its being brought about, but prior to its realization (for otherwise acquisition would be derived). Hence original acquisition can be only provisional. – Conclusive acquisition takes place only in the civil condition . . . provisional acquisition is true acquisition; for, by the postulate of practical reason with regard to rights, the possibility of acquiring something external in whatever condition people may live together (and so also in a state of nature) is a principle of private right, in accordance with which each is justified in using that coercion which is necessary if people are to leave the state of nature and enter the civil condition, which can alone make any acquisition conclusive’ (6: 264, cf. 6: 257–8).

⁴⁹ In my view, Katrin Flikschuh’s *Kant and Modern Political Philosophy* is quite similar in spirit and fundamental orientation to the view expressed here. The similarity is evident, for example, in her reconstruction of Kant’s objections to Locke’s private property argument (Flikschuh 2000: 117–21) and in her treatment of the Lockean construal of Kant’s theory in general (2000: 148–9). It is impossible to engage Flikschuh’s rich exposition of Kant’s political philosophy properly here. Instead let me simply mention two main differences. First, instead of arguing (as I do) that each category of private right entails the strict duty to enter civil society, Flikschuh argues that the fact of our embodiment on a planet with a finite surface (2000: 157–8, 166–8), ultimately entails not the necessity of the establishment of the state but of cosmopolitan right (Flikschuh 2000: 149, 151). Presumably, the objection she raises against the Lockean position – that it leads to a statist framework – would also be raised against my position (2000: 149, 170, 176). Second, Flikschuh seems to suggest

that Kant's argument holds only given conflicts – and so the wrongdoing in the highest degree mentioned at the end of Private Right is not seen as entailing an argument yielding a strict necessity for public (state or cosmopolitan) institutionalization of right. Rather, on her view, it seems that it holds only given the existence of actual conflicts, since unilateral solutions to conflicts are not rightful solutions (2000: 100, 104, 120, 169, 176–7). Given the fundamental agreement between our two accounts and yet the quite different conclusions we draw, I believe it is particularly useful to contrast my interpretation with Flikschuh's. Moreover, for some of the differences between our interpretations of global justice, contrast her interpretation with mine as presented in 'Diversity and Unity. An Attempt at Drawing a Justifiable Line' (Varden 2008).

⁵⁰ Kant delineates three main types of contracts corresponding to the three categories of property acquisition (6: 259): unilateral, bilateral (of which there are two types: permanent alienation, and letting and hiring) and omnilateral contracts. Each of these contract types has three sub-categories, corresponding to the three ways in which persons can engage in relations with each other with respect to goods and services (unilateral, bilateral and omnilateral). In total, there are therefore twelve a priori types of contracts (6: 284–6). For the purposes of this essay, it is not necessary to provide any more detail here.

⁵¹ 'By a contract I acquire something external' says Kant, '[b]ut what is it that I acquire? Since it is only the causality of another's choice with respect to a performance he has promised me, what I acquire directly by a contract is not an external thing but rather his deed, by which that thing is brought under my control so that I make it mine. – By a contract I therefore acquire another's promise (not what he promised), and yet something is added to my external belongings; I have become *enriched* . . . by acquiring an active obligation on the freedom and means of the other. – This *right* of mine is, however, only a right *against a person*, namely a right against a *specific* physical person, and indeed a right to act upon his causality (his choice) to *perform* something for me' (6: 273–4).

⁵² Obviously if the dispute is a result of bias on the part of one or both parties, the arbiter's impartiality does present an asset. However, remember that in our scenario the dispute does not result from bias or unreasonableness, but simply because of the indeterminacy involved in actual contract fulfilment.

⁵³ Because the court enforces only the terms of the contracts, it can never be a court of equity. To allow for equity the judge would be seen as dealing with his own private interests rather than being the general, united will of the contractual parties. Hence, Kant rejects courts of equity in 6: 234–5.

⁵⁴ This category of right is currently very controversial. Instead of engaging the different criticisms of Kant's account of status relations, let me simply note that if Kant's argument is successful, then there is a crucial, positive role to be played by public laws in the governance

of domestic relations. This entails that in the proposed conception the domestic sphere is not considered 'the man's castle', but is seen as a proper realm of public jurisdiction. Therefore, rather than regarding Kant as a foe, as is typically done, feminists may find in him a friend.

⁵⁵ For an excellent interpretation of Kant on this point, see Mika LaVaquer-Manty's 'Kant's Children' (2006).

⁵⁶ Since a private third party, such as a godparent, lacks impartiality in its form, such a private solution does not solve the problem. See the discussion of contract right above.

⁵⁷ There seem to be other legal relationships that also have this status structure, such as relations involving physicians and their patients, lawyers and their clients, and so on. Addressing this question, however, is beyond the scope of this paper.

⁵⁸ In 'A Kantian Conception of Rightful Sexual Relations: Sex, (Gay) Marriage and Prostitution' (Varden 2007) I deal more fully with Kant's account of marriage, including why, on this view, it is so important that gay people have a right to marry. There I also argue that common views of Kant's conception of rightful sexual relations do not interpret his somewhat peculiar statements about sexual relations in light of his overall account of rightful relations – and so fundamentally misinterpret them.

⁵⁹ We also find the following: 'A rightful condition is that relation of human beings among one another that contains the conditions under which alone everyone is able to enjoy his rights, and the formal condition under which this is possible in accordance with the idea of a will giving laws for everyone is called public justice . . . A condition that is not rightful . . . is called a state of nature (status naturalis). What is opposed to a state of nature is not . . . a condition that is social and that could be called an artificial condition . . . rather the civil condition . . . For in the state of nature, too, there can be societies compatible with rights (e.g., conjugal, paternal, domestic societies in general, as well as many others); but no law, "You ought to enter this condition," holds a priori for these societies, whereas it can be said of a rightful condition that all human beings who could (even involuntarily) come into relations of right with one another ought to enter this condition' (6: 306).

⁶⁰ Contrast with R. P. Wolff's article 'The Completion of Kant's Moral Theory', which engages Kant's property arguments, but ultimately concludes that Kant cannot justify the claim that we can '*compel*' one another to civil society (1998: 59–60). Similarly, Simmons claims that Kant 'never explains very clearly why I have an obligation to leave the state of nature and live in civil society with others, rather than just a general obligation to respect humanity and the rights persons possess (whether in or out of civil society)' (2001: 140). As I have argued, Kant provides a twofold justification: (1) rightful use of coercion is impossible in the state of nature, due to the problems of assurance and indeterminacy; (2) even if we consent and honour our promises, choosing to stay in the state of nature is *necessarily* to commit wrongdoing

in the highest degree, because we remain in a condition where our freedom is subject to one another's arbitrary choices rather than to universal law. One should be careful, however, not to confuse morality with justice. Compelling others to interact with us in a rightful way is not to compel them to act morally – moral motivation cannot be compelled – but interacting in a manner consistent with our innate right to freedom can be.

⁶¹ The German text runs as follows:

‘Es ist . . . nicht etwa ein Faktum, welches den öffentlich gesetzlichen Zwang notwendig macht, sondern, sie mögen auch so gutartig und rechtlich liebend gedacht werden, wie man will, so liegt es doch a priori in der Vernunftidee eines solchen (nicht-rechtlichen) Zustandes, daß, bevor ein öffentlich gesetzlicher Zustand errichtet worden, vereinzelt Menschen . . . niemals vor Gewalttätigkeit gegen einander sicher sein können, und zwar aus jedes seinem eigenen Recht, zu tun, *was ihm recht und gut dünkt*, und hierin vor der Meinung des anderen nicht abzuhängen; mithin das erste, was ihm zu beschließen obliegt, wenn er nicht allen Rechtsbegriffen entsagen will, der Grundsatz sei: man müsse aus dem Naturzustande, in welchem jeder seinem eigenen Kopfe folgt, herausgehen und sich mit allen anderen (mit denen in Wechselwirkung zu geraten er nicht vermeiden kann) dahin vereinigen, sich einem öffentlich gesetzlichen äußeren Zwange zu unterwerfen, also in einen Zustand treten, darin jedem das, was für das Seine anerkannt werden soll, gesetzlich bestimmt, und durch hinreichende Macht (die nicht die seinige, sondern eine äußere ist) zu Teil wird, d.i. er sollte vor allen Dingen in einen bürgerlichen Zustand treten.

Zwar durfte sein natürlicher Zustand nicht eben darum ein Zustand der *Ungerechtigkeit* (iniustus) sein, einander nur nach dem bloßen Maße seiner Gewalt zu begegnen; aber es war doch ein Zustand der *Rechtlosigkeit* (status iustitia vacuus), wo, wenn das Recht *streitig* (ius controversium) war, sich kein kompetenter Richter fand, rechtskräftig den Ausspruch zu tun, aus welchem nun einen rechtlichen zu treten ein jeder den anderen mit Gewalt antreiben darf; weil, obgleich nach jedes seinen *Rechtsbegriffen* etwas Äußeres durch Bemächtigung oder Vertrag erworben werden kann, diese Erwerbung doch nur *provisorisch* ist, so lange sie noch nicht die Sanktion eines öffentlichen Gesetzes für sich hat, weil sie durch keine öffentliche . . . Gerechtigkeit bestimmt, und durch keine dies Recht ausübende Gewalt gesichert ist.’

Note that Gregor's translation of *rechtsliebend* as ‘law-abiding’ can be somewhat misleading, since it fails to capture how by the term *rechtsliebend* (right-loving) Kant points to a person's subjective willingness to be rightful. It is possible to be right-loving in the state of nature, but not to be law-abiding. Moreover, in my view, the use of *können* in the German text is not a ‘can’ in the sense that it is very difficult to secure oneself against such violence. Rather the problem is that one cannot, in the normative sense of the word, ensure that one's use of force is *rightful* – and not simply arbitrary use of force (violence) – in the state of nature. Finally,

Gregor has used ‘it’ and ‘its’ as translations of *man, er, seinem* and so forth. I find that the text reads more naturally if we use ‘he’ or ‘his’ (or ‘she’ or ‘her’).

⁶² In my view, this compatibility is particularly clear if we consult Kant's historical papers (‘Idea for a Universal History with a Cosmopolitan Intent’ and ‘Speculative Beginning of Human History’).

⁶³ Höffe himself agrees with my argument against the rational interest interpretation on this point (1994: 171–3, 181–4) even if he still seems to disagree with me about the role humanity's ‘warped wood’ plays in the normative argument (cf. note 9 above).

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