Kant on Property Rights and the State[1]

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I.

The central claim of Kant's political philosophy is that rational agents sharing a territory can justifiably be forced to live under a state; they have, in Kant's words, a *duty of right* to leave the state of nature.[2] Perhaps something along these lines is entailed by any theory of state legitimacy, but the point raises special difficulties for Kant. He believes that rational agents have a *right to freedom*; that is, he believes that a rational agent's external freedom – her ability to set and pursue ends for herself without being subject to the choices of others – can justifiably be restricted only for the sake of external freedom itself.[3] To establish that human beings can be forced to join a civil condition, it will therefore not do to show that the state promotes security, prosperity or any other such value: Kant has to show that human beings living side by side need a state to be *free*.[4]

The general structure of Kant's argument for this point is clear enough. It comprises two premises: first, that human beings living side by side are free only if they enjoy certain rights against one another (including the right to bodily integrity, the right to hold property and the right to enter into contracts with one another); second, that these rights can be enjoyed only in a civil condition, because in the state of nature they are either provisional or imperfectly realized.[5] What is less clear is *how* exactly Kant thinks the two premises can be established; on that point, the relevant passages of the Doctrine of Right are anything but transparent. Yet, despite the shortcomings of his exposition, I believe that Kant has a much stronger argument for his position than is commonly

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acknowledged. My goal in what follows is to reconstruct that argument. I focus specifically on the case of property rights, which offers the clearest illustration of Kant's general point, to show why life outside the state is incompatible with the right to freedom that Kant ascribes to human beings.[6] Kant's reasons for thinking that we have such a right are not my concern here, and would in any case require a full-length treatment on their own;[7] here I simply assume that he is correct on this point.

My discussion is structured around the two premises of Kant's argument. First, I explain why Kant believes that the possibility of having determinate and enforceable property rights is essential for freedom. The main idea here is that setting and pursuing ends for oneself without being subject to the choices of others requires the possibility of excluding them from the use of certain objects, and hence the possibility of having full-fledged property rights to those objects. Second, I present an argument for the view that property rights can be made determinate and enforceable only by the state. On this point, I read Kant as providing a powerful argument against the traditional Lockean view that any person has the authority to enforce property rights in the state of nature. Kant's main contention, I argue, is that the state alone is fully justified in enforcing property rights, because it alone can do so in a way that is fully consistent with everyone's right to freedom.

II.

What does it mean to say that property rights are essential for freedom? For our purposes, the crucial feature of property is the possibility of *rightfully excluding* others from the use of a certain object.[8] If I own a certain apple, then that means that you wrong me if you use the apple without my permission, and hence that you can forcibly be prevented from doing so. Importantly, this is the case regardless of whether I am physically holding the apple or not.[9] The point is worth stressing. I can exclude you from using an apple simply by holding it. I then exclude you physically, since we cannot both hold the apple at the same time; I also exclude you normatively, since using force to wrestle the apple from me would violate my right to freedom (assuming that you have no property right in the

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apple).[10] Still, this form of exclusion falls short of what is required for genuine property, because it makes my right to the apple entirely derivative from my right to bodily integrity, and hence leaves me with no complaint if I accidentally drop the apple and you pick it up. Genuine property rights do not depend on physical possession in that way: if an apple is genuinely mine and I drop it, then you wrong me if you pick it up and walk away with it; that I was not physically holding the apple at the time is irrelevant.[11]

The question we need to ask, then, is why freedom demands that it be possible for me to exclude others from using certain objects even though I am not in physical possession of them. How can freedom place such demands with respect to objects that are external to me – objects that are neither physically connected to my body, nor essentially connected to me in the way my body is? Kant's answer has two parts. First, he tells us that the possibility of property is the object of the postulate of private right:

> It is possible for me to have any external object of my choice as mine, that is, a maxim by which, if it were to become a law, an object of choice would *in itself* (objectively) have to *belong to no one* (*res nullius*) is contrary to right.[12]

Second, he explains the necessity of this postulate as follows:

> an object of my choice is something that I have the *physical* power to use. If it were nevertheless absolutely not within my *rightful* power to make use of it, that is, if the use of it could not coexist with the freedom of everyone in accordance with a universal law (would be wrong), then freedom would be depriving itself of the use of its choice with regard to an object of choice, by putting *usable* objects beyond any possibility of being *used*; in other words, it would annihilate them in a practical respect and make them into a *res nullius*, even though in the use of things choice was formally consistent with everyone's outer freedom in accordance with universal laws.[13]

The problem is that this seems to get things precisely backwards. Kant stresses that external freedom demands that the use of *some* objects be rightful. That seems obvious enough: there would be no external freedom to speak of if the external world were entirely off limits. But that hardly establishes a link between freedom and property in the stronger sense that concerns us here. Kant explains

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why it is not possible for *every* object to be off limits to all; the question we need to ask is how it is possible for *any* object that I am not physically holding to be off limits to others.

The difficulty I am pointing to can be brought out by considering an alternative to a system of property: a system of mere empirical possession in which everything in the world can rightfully be used, so long as it is not under someone's physical control. In this system, the ground on which I stand and the objects I carry around with me are off limits to you, but the rest of the world – including objects I put down or dropped a moment ago – is up for grabs. Such a system does not put '*usable* objects beyond any possibility of being *used*' in any straightforward sense. Yet, if Kant believes that freedom demands the possibility of full-fledged property rights, he must think that a system of empirical possession unjustifiably restricts freedom. How is that the case?

The problem, in a nutshell, is that a system of empirical possession only allows me to pursue projects taking place within the space I occupy at a given moment and involving objects that I can hold for the entire duration of the project. Any other project – and this means any remotely complex project – will involve objects whose use I cannot rightfully determine through my choices, and for whose use I am therefore inevitably dependent on the choices of others. Put differently, a system of mere empirical possession makes my (eminently restricted) ability to occupy space and to hold objects the measure of my ability to make objects into my means, and thus to set and pursue ends for myself. This unjustifiably restricts my external freedom, because there is no reason why my having only two hands (to name only one obvious physical limitation) should determine what means I can rightfully secure for myself.

To illustrate the point, suppose that I want to build myself a house. Suppose that one of the means I need to pursue this project is a hammer, and that I happen to find just the hammer I need. The problem that a system of mere empirical possession poses is not that it makes the hammer off limits to me, as Kant seems to suggest in the passage I quoted above, but, rather, that it makes my right to stop you from taking the hammer contingent on my ability to hold on to it. As soon as I put it down for a second, you are perfectly entitled to pick it up and walk away with it. Worse, once you have grabbed the hammer, it is *yours* in the sense appropriate to the system, and I cannot rightfully take it back so long as you are holding it. The

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same holds for the land on which I plan to build my house: my right to exclude others from it only extends to the ground on which I am standing at a given time. You are perfectly entitled to move around on the rest of the land I intend to use, regardless of whether I have fenced it off or started building on it. Indeed, if you decide to stand on part of the land that I claim, you make it off limits to *me*, and thereby make it impossible for me to realize my project without wronging you.

That I would be wronging you is important here: it shows how your interference differs from other unforeseen circumstances I may face in pursuing my project. An earthquake could destroy most of what I have built, and thereby hamper my pursuit far more than you would by grabbing the hammer. But the earthquake does not raise normative problems for how I may pursue my end. If it destroys my house, then I can just rebuild it; indeed, if I have the means, I am justified in stopping the earthquake from happening altogether. In this way, the earthquake only presents me with an instrumental problem: it requires me to revise my calculations for how I am to achieve my goal. Interference of that kind does not restrict my ability to set and pursue ends; it is simply part of what exercising that ability involves for a finite being.

Your interference raises a different problem. As a rational agent, you are not just some circumstance that I have to work around: your right to freedom means that you can make things off limits to me simply by holding on to them. If you choose to stand on the ground where I intended to build, you thereby put a stop to my project of building a house there; if you choose to pick up an object I left lying around, you make it impossible for me to use it for my project. All a system of mere empirical possession allows me to do to avoid such occurrences is to plead with you not to interfere with my project. In other words, on such a system, it is always partly up to you whether I can rightfully make use of an object that I am not currently holding, or of a piece of land on which I am not currently standing. The only means I can have at my disposal to set and pursue my ends with are objects to which I am physically connected. As I said above, this makes my limited ability to hold objects the measure of what means I can have at my disposal, which arbitrarily restricts my ability to set and pursue ends for myself.[14]

Now on Kant's view, as I said at the outset, such a restriction *can* be justified, but only if it is required by freedom. In our case,

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this means that the restriction imposed by the system of mere empirical possession is acceptable only if my having a full-fledged property right in the hammer – that is, my being allowed to stop you from using it even when I am not holding it – would somehow be incompatible with your freedom. We can easily show that this is not the case. One way to make the point is to stress that your freedom depends on your *ability* to set and pursue ends for yourself, which does not depend on your access to any particular object; therefore, I do not restrict your freedom by making the hammer off limits to you.[15] There is also a more direct way to make the point in the present context. One can simply note that, from the point of view of your access to the hammer, there is no relevant difference between a system of full-fledged property rights and a system of mere empirical possession, since both systems allow me to exclude you entirely from using the hammer. Of course, on the latter system, I can do so only by physically holding on to the hammer for the rest of my life, whereas the former system allows me to set the hammer down while still excluding you. But from your standpoint the two scenarios amount to the same thing, since what matters is simply that I exclude you from using the hammer, not *how* I do it. A full-fledged system of property thus brings about no further restriction on your freedom. Consequently, any restriction of freedom associated with a system of mere empirical possession cannot be grounded in the need to protect freedom itself and hence must be unjustified on Kant's view.

Let me close this section by stressing the general character of the conclusion we have reached. We have seen that freedom requires property. This is not to say that freedom requires the specific form of private property found in modern capitalist societies. Kant's argument only requires *some* system of rights allowing one to exclude others from using a certain object for a certain amount of time, regardless of whether one is holding it or not. That could be achieved by a system under which the means of production are communally owned, so long as it appropriately determines who has the right to use a given object at a given time.[16] The considerations presented here thus do not amount to an endorsement of capitalism, or of the sort of absolute private property rights advocated by libertarians.[17] They support a broader thesis: that, if rational agents are to live together without undermining one another's freedom, then they must have a system that allows them to control certain

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objects through their choices without having to hold on to them physically. Nothing more is required for the rest of our argument.

III.

We have seen so far that freedom requires property, understood as the right to exclude others from the use of certain objects, regardless of whether one is physically holding them. As we saw at the beginning of the previous section, Kant takes this link between freedom and property to ground the postulate of private right, which on his view is essential to the very possibility of property rights. More specifically, Kant tells us that the postulate acts as a 'permissive law', providing

> an authorization that could not be got from mere concepts of right as such, namely to put all others under an obligation, which they would not otherwise have, to refrain from using certain objects of our choice because we have been the first to take them into our possession.[18]

It is important to keep in mind why such an authorization is needed here: Kant is not saying that the postulate provides an authorization to create a moral obligation for others to refrain from using certain objects, but rather that it provides an authorization to exclude others *forcibly* from the use of certain objects that one is not holding. Since using force against you to secure my continued access to a given object is prima facie incompatible with your right to freedom, an authorization is required for this. Without the connection between property and freedom that grounds the postulate, there would be no such authorization, since nothing would then justify using force against you to secure my continued access to an object.

The permissive law contained in the postulate holds independently of the state, but Kant does not believe that it is sufficient to ground full-fledged property rights. He holds that property rights can only be provisional in the state of nature, the contrast being with conclusive rights, which only obtain in the civil condition. Kant puts the point as follows:

> [An] 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 (distributive) justice and secured by an authority putting this right into effect.[19]

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This suggests that there are two distinct aspects to the provisional character of property rights, both springing from the absence of adequate institutions in the state of nature. The fact that there is no 'public justice' gives rise to an indeterminacy problem, while the fact that there is no 'authority' to enforce rights gives rise to an enforcement problem. One or both of these problems must account for Kant's claim that rights cannot be conclusive in the state of nature, and we must therefore take a closer look at each of them.

The general idea behind the indeterminacy problem is that, although the postulate gives rise to the possibility of property rights, it remains insufficient to allow individuals, however well intentioned they may be, to decide all particular cases. Countless examples can be conjured up to illustrate this point. Imagine for instance that we are neighbours, and that we have jointly erected a fence to mark off the limit between our respective lots. Now suppose that you plant an apple tree on your side of the fence, and that some of its branches come to grow over my land. Does the postulate by itself allow us to determine the rightful owner of the apples growing on those branches? It seems at least arguable that we both have a claim to them – you because you planted the tree, and I because they are over my land. If this is correct – if the postulate by itself does not decide between the two claims – then neither of us can in good faith claim a definite right to the apples in question. This is not to deny that any actual system of property rights will give a definite answer to this question – it may even be that, as a matter of fact, they all give the same answer. The point is that there is no answer that you and I *must* accept in the state of nature for this case, let alone for all the more convoluted cases that might come our way.

The example I just gave does not show that all, or even most, property rights are indeterminate in the state of nature. There are situations in which claims of indeterminacy appear implausible. Suppose for instance that you have occupied a given piece of land for the past twenty years, that you have fenced it off, and that I have just moved to the area; and suppose that I refuse to recognize the limits of your property, despite there being plenty of land left for me to cultivate. Here your right to your property (at least with respect to me) seems as determinate as can be. Likewise, if you put down an apple for a moment, it seems undeniable that I cannot thereby gain a right to take it. In such cases, one might say, your rights lie at the very core of the notion of property: denying them

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would undermine the very possibility of a workable institution of property.[20] If there are such core property rights, then it is hard to see how the indeterminacy reading could account for Kant's claim that property rights *in general* are provisional in the state of nature. More significantly, it is hard to see how the reading could provide adequate foundation for the claim that rational agents living side by side can justifiably be forced to leave the state of nature. If rights are only indeterminate in a few odd cases, then the claim that it is necessary to put in place a momentous political machinery to correct that problem will seem overblown. To establish firmly the duty to leave the state of nature, one would have to show that indeterminacy is rampant.

Perhaps a case can be made that it is, or that the core of the notion of property is very small. But the suggestion would run into a further difficulty. The plausibility of the indeterminacy approach rests on the assumption that rational agents in the state of nature have nothing to go on but the postulate of private right and the concept of property. Friends of the idea of pre-institutional property rights are unlikely to agree. As they see it, agents in the state of nature can rely on a full-blown theory of property rights such as that put forward by Locke in his *Second Treatise of Government* (or something along those lines).[21] The possibility cannot be dismissed out of hand: if such a theory is correct about the content of property rights, and if it has the extensive applicability that its defenders take it to have, then rights in the state of nature will be subject to very little indeterminacy at all. To establish that property rights are provisional in the state of nature, we need to show that the Lockean theory fails to make property rights conclusive in the state of nature.

One could perhaps argue that the Lockean theory itself falls prey to the indeterminacy problem, because it leaves the borders of an agent's property fundamentally indeterminate.[22] There may be something to the point, but it fails to capture the depth of Kant's objection to the Lockean outlook. If the Lockean theory runs into problems of indeterminacy, it is because of contingent features of the physical world – most notably, because the boundaries of Lockean property are not self-identifying. One can imagine a world that is radically different from ours in this respect – a world, say, in which each agent has a distinct colour that is transferred to any object in which the agent is the first to invest her labour, so that the rightful owner of an object according to the Lockean theory

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can be ascertained simply by looking. Better yet, one can imagine a world in which objects are programmed to *tell* us who their rightful owner is according to the Lockean theory. Such possibilities may seem far-fetched, but there is nothing logically inconsistent about them. Yet, although the indeterminacy problem would not arise in such worlds, I do not think that the status of property rights in the state of nature would be fundamentally altered. The reason is that what makes property rights provisional in the state of nature is not something about the world we live in but something about the kind of beings we are. Property rights would remain provisional outside the state in our imagined worlds, I want to suggest, because their enforcement would remain inconsistent with the demands of our rational nature. That is ultimately what undermines the Lockean theory of rights: it rests on a view of rights enforcement that is fundamentally incompatible with our right to freedom.

IV.

The Lockean view of rights enforcement exerts a powerful attraction upon us. Whether or not we agree with Locke's theory of property, we are tempted to follow him in thinking that any individual in the state of nature is entitled to use force, so long as she does so for the protection of a genuine right.[23] Indeed, the claim seems so natural that one may doubt that it is part of Locke's *theory* at all – it seems a platitude that any theory of rights must incorporate. On that view, the enforcement problem is at best derivative: so long as I can have determinate rights in the state of nature – so long as the indeterminacy problem can be overcome – there is no specific problem with enforcing those rights, since to say that I have a right is just to say that the use of force to prevent its infringement is justified.

What I take to be distinctive of the Lockean view on this point is the idea that using force to protect a right is prima facie justified regardless of who does it. No particular title is needed to enforce rights: so long as one uses force to protect an actual right, and so long as one does so in a proportionate manner, one is fully justified. If I have a right to a piece of land, then I am justified in using force to keep would-be trespassers out – as is any other agent in the state of nature or the state in a civil condition. In all these cases, the use of

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force is justified on the same ground: it aims to protect a right that I have independently of anyone's recognizing or protecting it. In other words, on a Lockean view, there is no fundamental difference between the private and the public enforcement of a right: the two activities ultimately amount to the same thing – the use of force to protect a pre-existing right – and are justified in the same way. Enforcing rights in the state of nature may present difficulties – as Locke points out, individuals will often refuse to admit that they are in the wrong, so that attempting to enforce one's rights against a stronger individual will often be dangerous – but these are merely practical.[24] They show that our rights are less secure in the state of nature than they would be in a civil condition, but they do not call into question the legitimacy of private rights enforcement.

It can be tempting at times to read this view into Kant's text. The formulation of the postulate may seem to imply that each person is authorized to use force to protect her rights in the state of nature. Other passages appear to pull in the same direction: Kant writes that '[r]ight and authorization to use coercion . . . mean one and the same thing', that the use of force is compatible with everyone's freedom so long as it constitutes a 'hindering of a hindrance to freedom', and even that an agent in the state of nature is 'provisionally justified' in preventing others from interfering with her possessions, provided that she was the first to acquire them.[25] Yet it would be hasty to conclude that Kant agrees with Locke on this point. Kant repeatedly insists that one has the right to use force to defend one's property in the state of nature only when the person with whom one has a conflict 'does not want to enter with [one] into a condition of public lawful freedom'.[26] The qualification is important: it suggests that one is justified in using force in the state of nature only if putting in place a civil condition is not an option – that is, only if a fully rightful use of force is not possible.

Let me explain. Kant holds that the use of force can be fully rightful only in a civil condition. I say 'fully rightful,' because the claim is not that the use of force can never be *justified* in the state of nature – Kant clearly thinks that it can be, provided (among other things) that no state can be put in place.[27] But that is compatible with saying that an agent who uses force in the state of nature necessarily falls short of the ideal she should want to live up to, namely, that of respecting the right to freedom of all rational beings. I take that to be what underlies Kant's position: although the postulate of private

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right grants us the right to exclude others from the use of certain objects, the right cannot be exercised consistently with everyone's right to freedom prior to entering a civil condition. That is ultimately why property rights must remain provisional in the state of nature – *all* property rights, since the point holds independently of any worries about indeterminacy, and hence also applies to core rights. Now, why exactly is the use of force in the state of nature necessarily in tension with the right to freedom? And what resolves that tension in the civil condition? For answers to those questions, we must turn to the derivation of the duty to leave the state of nature that Kant presents in §8 of the Doctrine of Right.[28]

V.

The aim of Kant's argument is to flesh out the implications of the authorization contained in the postulate of private right, and to show why exercising this authorization in a fully rightful manner is only possible in a civil condition. To be exact, the argument establishes that the fully rightful exercise of the authorization simply amounts to entering the civil condition: there is no conceptual distance between enforcing rights in a way consistent with everyone's right to freedom and being in a civil condition. I try to show here that the reasoning behind this claim turns on two ideas: first, that exercising the right to exclude others in a way consistent with their right to freedom requires that conditions of reciprocity be fulfilled; and second, that such conditions are jointly constitutive of the civil condition.

Kant's argument starts with a statement of what it implies to claim something as one's own:

> When I declare (by word or deed), I will that something external is to be mine, I thereby declare that everyone else is under obligation to refrain from using that object of my choice, an obligation no one would have were it not for this act of mine to establish a right.[29]

We must bear in mind that Kant is concerned strictly with obligations of right here: to say that everyone else is under obligation to refrain from using an object is just to say that the use of force to prevent them from using that object is justified, whether I am currently in

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physical possession of that object or not. This explains what Kant goes on to say:

> This presumption involves, however, the acknowledgement: I am in turn under obligation to every other to refrain from using what is externally his; for the obligation here arises from a universal rule of external rightful relations.[30]

Kant is not saying that, insofar as I claim any objects as mine in the state of nature, I am in turn *morally* obligated to respect other people's claims to external objects. That is undoubtedly true on his view, but it is not the concern of the doctrine of right. The claim is rather that obligations of right have to be reciprocal, because they arise from universal rules. What does that mean exactly? One way to understand the point is to say that, if obligations of right are based on universal rules, then any obligation of right that I can create for you by performing a certain action is one that you can also create for me by performing a similar action; there is, in that sense, a requirement of reciprocity on obligations of right. The alternative would be to say that there is something about my choices *in particular* that makes them obligate you in a way that yours cannot obligate me – a claim that I can hardly make in good faith.

There is another way to understand the point Kant is making here, one that I think brings out more sharply the role that the right to freedom plays in the argument. One can understand the requirement of reciprocity as springing directly from the right to freedom. The claim that obligations of right must be based on universal rules is then a consequence of the requirement of reciprocity, rather than the other way around. This reading finds support in Kant's claim, early on in the Doctrine of Right, that the right to freedom contains as a corollary an authorization he calls 'innate equality', which consists in the right to 'independence from being bound by others to more than one can in turn bind them'.[31] This effectively states that a rational agent can only justifiably be bound according to reciprocal terms; the requirement of reciprocity thus turns out to be a corollary of the right to freedom.

That there is such a tight conceptual link between reciprocity and freedom should not be surprising, given that Kant understands freedom in terms of independence from the choices of others.[32] If you can bind me unilaterally, then I am subject to your choices in the relevant sense, since you can simply impose your choices upon

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me through the use of force. You can decide that I may not enter a certain area, for instance, and then proceed to use force to impose that choice upon me. By imposing a particular course of action upon me in this way, you violate my right to freedom.[33] By contrast, if we can bind each other only according to reciprocal terms, then neither of us is subject to the other's choices, since each can bind the other only according to terms that she also allows the other to impose on herself. Obviously, the idea needs further unpacking, but this outline of the relation between freedom and reciprocity should at least make plausible the idea that the use of coercion is justified only if it meets conditions of reciprocity. A more precise picture of what the requirement consists in will emerge as we look at the rest of the argument of §8.

The claim that follows the last passage I quoted shows the requirement of reciprocity taking centre stage:

> I am therefore not under obligation to leave external objects belonging to others untouched unless everyone else provides me assurance that he will behave in accordance with the same principle with regard to what is mine.[34]

Once again, I take this to mean that I cannot justifiably be *forced* to refrain from using objects belonging to others unless I have assurance that everyone will likewise refrain from using objects that belong to me. Why does the need for assurance suddenly enter the picture here? At first glance, the point may seem a simple variation on an old Hobbesian theme, according to which obligations obtain only if there is a power that guarantees, through threat and coercion, that rights will be respected. In fact, Kant's point is radically different from Hobbes's.[35] The driving force behind Hobbes's argument is a concern for security. The thought is familiar. On his view, reason commands each individual to do what is necessary for her preservation. It thus requires that each person conform as much as possible to terms of peaceful coexistence – as Hobbes puts it, it requires that each follow the 'laws of nature' that command to seek terms of peaceful coexistence, to abide by one's covenants and so on. The problem is that, absent a guarantee that others will do the same, obeying such principles amounts to making oneself a prey for others. As Hobbes puts it:

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> if other men will not lay down their right [to all things] as well as he, then there is no reason for anyone to divest himself of his; for that were to expose himself to prey (which no man is bound to), rather than to dispose himself to peace.[36]

The claim is straightforward: one cannot be required to abide by one's obligations in the absence of a guarantee that others will abide by theirs, since that would amount to jeopardizing one's security, which one cannot be required to do. As Hobbes famously goes on to argue, this means that the laws of nature become binding only once a central power is in place to force individuals to respect them, since only the guarantee provided by such a power can make obedience to the laws of nature compatible with the need for security.

Kant is not asking, like Hobbes, how a group of individuals sharing a territory can achieve a sufficient level of security, but rather how individuals can share a territory consistently with their freedom. As we saw above, that amounts to asking how individuals can exclude one another from the use of certain objects without violating one another's right to freedom. So it cannot be a quest for security that grounds the requirement of mutual assurance; ultimately, it must be the need to make the use of force compatible with the right to freedom. Why would mutual assurance be necessary for that? I believe that this is a direct consequence of the requirement of reciprocity: mutual assurance is a condition that must be fulfilled for reciprocal relations to obtain in the realm of rights.

To see this, we must distinguish two ways in which a system of rights can fail to be reciprocal. Most straightforwardly, it can fail to be reciprocal in its *content*. For instance, if people with your skin colour are granted the right to order around people with my skin colour, then I am obviously subject to your choices, and our system of rights fails to realize even the most basic condition of reciprocity. The other way in which rights can fail to be reciprocal is somewhat less obvious. A system of rights may be consistent with reciprocity in its content, yet still fail to realize conditions of reciprocity by not being *effectively* reciprocal. That is the case if we have ostensibly equal rights against one another, but your rights turn out to be effectively protected and mine not. There can be different reasons for this: perhaps you are stronger than I am, and willing to overlook your obligations; perhaps your warlord is stronger than mine, and makes sure that any dispute between us is decided in your favour;

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or perhaps the local judges and police force are corrupt. In all these cases, the consequence is that we no more relate on reciprocal terms than if our rights were unequal to begin with. Your rights hold against me in a way that mine do not against you, since you have effective rights against me, but not I against you. It is thus not sufficient for the content of our rights to live up to the demands of reciprocity: unless the application and enforcement of our rights do so as well, I remain subject to your choices.[37] This explains the role that mutual assurance plays in Kant's argument: the enforcement of your rights against me can only be justified if I have assurance that my rights can also be enforced against you, since only then do we have truly reciprocal rights against one another.

VI.

One might object at this point that the private enforcement of rights allowed by the Lockean view is also reciprocal, since it grants each individual equal authority to use force to protect her rights. If my right to use force against you matches your right to use force against me, isn't the requirement of reciprocity satisfied after all? I have argued that this leaves open the possibility that you have effective rights against me, but not I against you. But the Lockean can retort that we need to distinguish two things: what rights I have against you, which is a normative question, and how secure my rights actually are, which is an empirical question. On a Lockean view, a theory of rights should be concerned only with the former. I have already suggested that the demands of reciprocity are more complex than this suggests; let me now try to articulate the point further by explaining more precisely what I take to be wrong with the Lockean picture of rights enforcement in the state of nature.

Suppose that you and I are in the state of nature, and that you use force against me to protect your right to a certain piece of land. To rule out any issues of indeterminacy, assume that we are dealing with a core right. Suppose, as in the example above, that you have been living and working on this piece of land for the past twenty years, and that I have just moved to the area; and suppose that, despite there being plenty of land for everyone, I refuse to respect the limits you have set for your property. Imagine then the following situation: I am walking toward your property with the avowed

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intention of taking any object I may need that you are not holding at that particular time. The question is, once you have taken reasonable steps to dissuade me verbally from taking your belongings, are you *fully justified* in using force to keep me off your property?

On the Lockean view, your use of force has all the justification one could ask for: you unquestionably have a right to your property, and are therefore fully justified (as any other agent would be) in using force to protect it. Now, I concede that this position initially appears plausible, but I want to suggest that it is only because we tend to conflate two questions. The first concerns how strong a claim of right is; in our scenario, this hinges notably on whether you are correct in thinking that you are invoking a right that any workable system of property would have to recognize. The second issue concerns whether a given person has the authority to use force against another to enforce her claim. The Lockean position assumes that our answer to the first question must determine our answer to the second, but that is far from obvious. On the contrary, even if you have as strong a claim against me as one could imagine, it does not follow that you are fully justified in forcibly imposing it on me. The reason, in a nutshell, is that your having a strong claim against me is not in itself sufficient to reconcile your use of force with my right to freedom.[38]

To see this, consider what your use of force looks like from my point of view. For some reason, I take myself to be entitled to step on the land that you have fenced off – perhaps because I subscribe to an odd conception of property rights, or because I fail to see how your particular claim against me rests on a core property right. At the same time, you take yourself to be entitled to keep me off the land. Now, I clearly cannot object to your invoking all the resources of argumentation to convince me to stay off your land. In doing so, you simply attempt to make me change my mind; that does not undermine my freedom, since I am still the one deciding what I am to do. But matters are different once force enters the picture. If you use force against me, then you are not merely trying to make me change my mind about what I am to do: you are trying to override my choices, to make it the case that *you* get to determine what I am to do. That clearly jeopardizes my freedom. I can therefore ask you what authority you have to override my choices in that way – what gives you the right to decide for me.

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Perhaps you could reply that you are not deciding for me: you are simply doing what right requires. And perhaps you have excellent reason to think that this is the case. But that does not answer my challenge. If I sincerely disagree with you – if I sincerely believe that the considerations you put forward do not have the force that you claim they do – then, by using force against me, you are simply imposing your judgment as to what right demands on me, and I can ask you what authority you have to do *that*. Surely, you cannot answer simply by saying that your judgment is correct, or by restating your reasons for thinking that it is: I have reached a different conclusion on the issue and, if the requirement of reciprocity is to have any content at all, it must entail that I am as entitled to my judgment as you are to yours. This is true even if you think my position unreasonable, since you are not entitled to decide for the two of us what counts as a reasonable position. And it is true even if I concede that you are in general a more reliable judge of matters of right than I am, since I am entitled to refuse to defer to your expertise in the case at hand. The problem, after all, is not that your judgment is likely to be mistaken; it is that you have no standing to impose it upon me. From my point of view, you are merely a private individual; in resisting you, I simply follow my judgment above yours, which is something I must be entitled to do if I have a right to freedom.

The Lockean view of rights enforcement sweeps these complications under the rug, and says that what matters is only that you actually get it right – that you enforce a right that you have, as a matter of metaphysical fact. This oversimplification is symptomatic of a deeper problem with the Lockean approach, namely, that it makes your entitlement to use force against me depend entirely on your relation to certain objects, and not at all on your relation to me. This comes out most clearly in the fact that you can be justified in using force against me regardless of whether I have any reason to agree with you or not. Thus it could be that all the evidence I have suggests that you are not the rightful proprietor of the land you claim; on a Lockean view, that would not affect your right to use force against me. Whether or not your use of force is justified turns only on whether or not you actually have the right to the land that you claim; assuming that the provisos are satisfied, that depends only on whether you have invested your labour in the land – not on anything having to do with me.

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On a Kantian view, by contrast, whether you are justified in using force against me depends entirely on the relation we stand in to one another: it depends on whether anything grants you the authority to use force against me. The point I am making is that your having a definite property right against me is not sufficient to grant you this kind of authority, since it is not sufficient to reconcile your use of force with my right to freedom. This is not to deny that your taking it upon yourself to enforce your right may be the best that can be done in the circumstances; as I said above, if it is not possible for us to put in place an agent that has the authority to enforce rights, then you have some justification to do so yourself. The point is that your use of force cannot be fully justified, because it fails to live up to the ideal of reciprocity set by the right to freedom. That is why the right you claim in our scenario can only be provisional, and that is why, on my understanding of the Kantian position, property rights in general can only be provisional in the state of nature.

Let me stress once again that the argument I have presented here is independent of the indeterminacy problem I outlined earlier. The key idea is not that the best theory of property rights fails to make the contours of rights sufficiently precise, or the worry that abstract principles cannot fully determine their own application to particular cases,[39] but rather that rational agents in the state of nature are equally entitled to follow their judgments on matters of right. No private individual has the standing to impose her judgment on others, regardless of how determinate rights might be, or of how confident she might be in her judgment. Even if nature provided the sort of guidance we imagined above in our fanciful scenarios involving colour codes or talking objects, the problem I have outlined here would still arise, because such changes to our physical surroundings would leave intact our equal entitlement to stand by our judgement, and hence do nothing to grant anyone the authority forcibly to impose her judgment on another.

The upshot is that the enforcement problem rests only on a minimal presupposition, namely, that some agent has to take it upon itself to enforce rights, so that the question arises who is entitled to do so. Only in a world in which rights were self-enforcing would the enforcement problem not arise, but, unlike the worlds we imagined in which rights are self-determining, such a world is not a logical possibility. One can of course imagine a world in which trespassers and thieves, as defined by Locke's theory, are struck by lightning

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just as they are about to perpetrate their mischief. But that is not a world in which property rights are self-enforcing; it is a world in which there are no property rights at all. In that world, Locke's theory is not a normative theory about the justified use of force, but an empirical theory about when people get struck by lightning. The problem a theory of property rights is meant to solve – that of justifying the use of force to secure an individual's continued access to an object – simply does not arise.

VII.

We may seem to have wandered away from the text, but in fact we have prepared the ground for the thesis that Kant puts forward in the second half of §8. He writes:

> a unilateral 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.[40]

We saw in the previous section why a particular (or unilateral) will cannot enforce property rights in a way that is fully consistent with freedom; we now need to ask what difference it makes to have property rights enforced by a will that is 'general' and 'powerful'. The short answer is that such a will realizes conditions of reciprocity, and in so doing makes it the case that no one gets to impose their private choices on anyone else; it thus prevents the problem I described in the previous section from arising. To see exactly why that is the case we need to take a closer look at the notion of a general will.

This is of course a notoriously difficult topic, and not one to which I can hope to do justice here. But for present purposes it will suffice to note one central feature of the general will on Kant's conception, namely that its aim must be to secure equal rights for *all* who share a given territory – that is, it must be a will through which 'each decides the same thing for all and all for each'.[41] The link between this idea and the condition of reciprocity on content I laid out above should be obvious, as should be the link between the requirement that the will be powerful and the requirement of reciprocity on the

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application and enforcement of rights. Concretely, the implication is that, to have enforceable rights against one another, you and I must be subject to an authority that upholds a system of equal rights for the two of us, that decides disputes impartially, and that wields sufficient power to enforce rights reliably in the face of any opposition we might put up.

How does appealing to a general will in this way allow Kant to avoid the difficulties encountered by the Lockean approach? Consider again the case in which your rights are enforced against me, but assume now that there is an appropriate authority to do so. If that is the case, then you are no longer imposing your conception of what your rights are on me. The enforcement is carried out by an agent whose task it is systematically to enforce your rights against me, but also mine against you. Such an agent subjects me, not to your choices, but to a system of reciprocal coercion that is essential for my freedom as much as yours. The point is central to Kant's conception of the general will. It entails that I cannot intelligibly choose to oppose the agent that is in charge of protecting our rights, since I would thereby choose to undermine my freedom, and hence my own power of choice. In other words, there is a sense in which I *must* consent to the rule of an agent that fulfils conditions of reciprocity; that is precisely why it is appropriate to say that such an agent represents our general will: its aims are ones that you and I cannot consistently reject.[42]

How does all this show that rational agents sharing a territory can justifiably be forced to live under a state? The situation we have considered so far involves only you and me. But if there are others living close by, then the same argument will apply to our relations to them, since we can also come into conflict with them about who can use what objects. We thus need to have property rights against them, and they against us, which is possible only if we are all subject to one authority that enforces those rights. The implication is that any authority we put in place to secure property rights must rule over all individuals with whom we may come into conflict about such rights – all those with whom we must live 'side by side', as Kant puts it.[43] This means, at least in first approximation, that the authority must rule over all who live on the same territory as we do. We can therefore rephrase as follows the two conditions that an agent has to fulfil to enforce rights in a way consistent with everyone's right to freedom: it must aim to protect the property rights of all who

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find themselves on the relevant territory; and it must be sufficiently powerful to impose its decisions against any individual or association of individuals on the territory.

With these territorial conditions in place, it becomes obvious that any agent with the authority to enforce rights will be a state in the minimal sense. An agent can resolve disputes of right on a given territory only if it is the only agent with the authority to do so; otherwise, it stands in the same relation with respect to other agents enforcing rights as one private party does to another in the state of nature, and the enforcement problem arises all over again. This means that the agent we put in place will have to claim (with reasonable success) a monopoly on the legitimate use of force on its territory; that is, it will have to be a state in the classical Weberian sense.[44] The outcome of our argument is thus that enforcing our property rights in a fully justified manner simply amounts to putting in place a state; there is no conceptual distance between the two ideas. Since we must have determinate and enforceable property rights in order to live side by side without undermining one another's freedom, it follows that our right to freedom itself demands that we enter the state. This completes the argument for the claim that we have a duty of right to leave the state of nature. We can justifiably be forced to live under a state, because only then can we have conclusive property rights against one another, and thereby live together without making one another unfree.

VIII.

My aim in this discussion was to provide support for the two claims that make up Kant's argument for the state. The first is that the absence of determinate and enforceable property rights is incompatible with individuals' right to freedom. The second is that an agent can be fully justified in enforcing property rights only if it fulfils two conditions: it must aim to enforce systematically the rights of all individuals on a given territory, and it must have the power to do so in a reasonably uniform manner. As we saw, this amounts to saying that only a state can be fully justified in enforcing property rights; any attempt to enforce rights privately in the state of nature will necessarily fall short of the ideal set by the right to freedom (although such an attempt may be justified if it is the only

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available option). Together, these two claims yield Kant's conclusion that forcing individuals to leave the state of nature is compatible with their right to freedom, since freedom itself demands that they leave the state of nature. In other words, all this shows that individuals have a duty of right to leave the state of nature.

Let me close by noting that the state that is justified by the argument I have presented here is undoubtedly quite minimal. All we have shown is that the state can legitimately enforce the property rights of individuals. That is a far cry from the modern state as we know it. But nothing I have said here rules out that more extensive state powers could be justified. Whether they can be ultimately depends on what other rights individuals have, since the state has to be in charge of enforcing all the rights of those living on a given territory. This last point is worth stressing. There could not be one agent in charge of property rights, say, and another in charge of other rights, since that would not put an end to the state of nature. Conflicts of rights do not respect categories: if a question arises as to who owns a given object, the conflict cannot be solved rightfully unless there is a unified agent who can determine what right demands, taking into account *all* the relevant rights – be they property rights, contract rights or what have you. To know the full extent of the state's legitimate power, we therefore have to determine the extent of the rights of individuals – a task that must be left for another occasion.

Notes

[1] For comments on earlier versions of this paper, I am grateful to the participants of the Workshop on Moral and Political Philosophy at Harvard University, including especially Kyla Ebels-Duggan, Douglas Edwards, Waheed Hussain, Japa Pallikkathayil, and David Sussman. I am indebted to Christine Korsgaard and T. M. Scanlon, who provided essential guidance and suggestions during the project's early stages, and to Arthur Ripstein, with whom I have discussed Kant's political philosophy in great detail over the years, and whose work on the topic has had a profound influence on my thinking. Finally, I want to acknowledge the generous financial support of UCLA's Law and Philosophy Program and the wonderful environment it provided for the final work on this project. The following abbreviations have been used. *MS* for *The Metaphysics of Morals*; *KpV* for *Critique of Practical Reason*; *G* for *Groundwork of the Metaphysics of Morals*; and *TP* for

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'On the common saying: That may be correct in theory but is of no use in practice'.

[2] On Kant's view, to say that I have a duty of right not to do X just *means* that I can justifiably be forced to refrain from doing X; the two expressions are interchangeable. As he puts it: 'Right and authorization to use coercion . . . mean one and the same thing' (*MS* 6: 232). References to Kant's works follow the usual system; unless otherwise indicated, all translations are from Kant, *Practical Philosophy*, ed. and trans. M. J. Gregor (Cambridge: Cambridge University Press, 1996).

[3] For Kant's view of external freedom, see *MS* 6: 230 and 382. For the idea that freedom can be restricted only for the sake of freedom itself, see *MS* 6: 231. The reading of the idea of external freedom I adopt here follows closely that put forward by Arthur Ripstein in his 'Authority and coercion', *Philosophy and Public Affairs*, 32: 2–35 (2004), pp. 8–11, and in his *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009), chapter 2.

[4] Throughout this discussion, I use the term 'freedom' without qualification to refer specifically to external freedom, since it is exclusively with that kind of freedom that political philosophy is concerned on Kant's view. I make no claims here about the kind of internal freedom that is the concern of Kant's moral philosophy. In particular, I do not claim that the state is necessary for internal freedom; given Kant's famous tenet that 'a free will and a will under moral laws are one and the same' (*G* 4: 447), that would amount to saying that the state is necessary for moral action – a thesis that Kant did not hold, and that I see no reason to endorse.

[5] Property and contract rights are provisional in the state of nature, because no agent has the authority to enforce them in a way that would be fully justified. By contrast, the innate right to bodily integrity is enforceable in a state of nature, since each individual has a right of self-defence; but it is imperfectly realized, since no one has the authority to punish transgressions after the fact (once someone's innate right has been violated, nothing can be done about it).

[6] Similar arguments could be made in terms of other types of rights; indeed, on Kant's view, this has to be the case for any type of right that can legitimately be enforced by the state.

[7] I take on the issue in my 'Kant on the right to freedom: a defense', forthcoming in *Ethics*.

[8] I shall not attempt to link the points I make here to the growing literature on Kant's conception of property, as that would unnecessarily weigh down the argument, but I do want to mention at the outset some discussions from which I have benefited. These include Howard Williams, *Kant's Political Philosophy* (New York: St. Martin's Press, 1983), chapter 4, and *Kant's Critique of Hobbes* (Cardiff: University of Wales Press, 2003), chapters 4–6; Wayne F. Buck, 'Kant's justification of private property', in B. den Ouden and M. Moen, eds, *New Essays on Kant* (New York: Peter Lang, 1987), pp. 227–44; Kenneth Baynes, 'Kant on property and the social contract', *The Monist*, 72:

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433–53 (1989); Christine M. Korsgaard, 'Taking the law into our own hands: Kant on the right to revolution', in A. Reath, B. Herman and C. M. Korsgaard, eds, *Reclaiming the History of Ethics: Essays for John Rawls* (Cambridge: Cambridge University Press, 1997), pp. 297–328 [reprinted in Korsgaard, *The Constitution of Agency* (Oxford: Oxford University Press, 2008), pp. 233–62]; Allen W. Wood, *Kant's Ethical Thought* (Cambridge: Cambridge University Press, 1999), esp. pp. 245–9; Katrin Flikschuh, *Kant and Modern Political Philosophy* (Cambridge: Cambridge University Press, 2000), chapter 4; Kenneth Westphal, 'A Kantian justification of possession', in M. Timmons, ed., *Kant's 'Metaphysics of Morals': Interpretative Essays* (Oxford: Oxford University Press, 2002), pp. 89–109; Bernd Ludwig, 'Whence public right? The role of theoretical and practical reasoning in Kant's *Doctrine of Right*', ibid., pp. 159–83; and Ripstein, *Force and Freedom*, chapters 4 and 6. I should also acknowledge that my understanding of the Doctrine of Right owes much to Bernd Ludwig's illuminating corrections to the traditional ordering of the text, as put forth in Kant, *Metaphysische Anfangsgründe der Rechtslehre*, ed. Bernd Ludwig (Hamburg: Meiner, 2nd edn, 1998). Finally, let me note that Jeremy Waldron argues for a link between freedom and property broadly construed in his 'Homelessness and the issue of freedom', in *Liberal Rights: Collected Papers 1981–1991* (Cambridge: Cambridge University Press, 1993), pp. 309–38. The argument I attribute to Kant differs from Waldron's in its detail, but the general spirit is close.

[9] Having a thing as one's property and having it in one's physical possession are thus different things. I use the term 'possession' in what follows to refer to physical or empirical possession. Kant also speaks of intelligible possession (see *MS* 6: 249–50), and suggests that the right to property should be understood in terms of that idea, but I leave that point aside for present purposes.

[10] See *MS* 6: 248 and 250.

[11] Hence Kant's claim that '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*' (*MS* 6: 245).

[12] *MS* 6: 246 (Gregor translation amended). On the notion of a postulate, with specific attention to the postulates presented in the Doctrine of Right, see Paul Guyer, 'Kant's deductions of the principles of right', in M. Timmons, ed., *Kant's 'Metaphysics of Morals': Interpretative Essays*, pp. 23–64; see also the reply by Katrin Flikschuh, 'Kant's indemonstrable postulate of right: a response to Paul Guyer', *Kantian Review*, 12: 1–39 (2007). Kant's most familiar use of the notion of postulate is in the *Critique of Practical Reason*, where he presents the 'postulates of pure practical reason' concerning the immortality of the soul, freedom and the existence of God (see *KpV* 5: 122–34). There, he defines a postulate as 'a *theoretical* proposition, though one not demonstrable as such, insofar as it is attached inseparably to an a priori unconditionally valid *practical* law' (*KpV* 5:122). That is what Kant seems to have in mind when he says that 'it is a duty of right to act

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towards others so that what is external (usable) could also become someone's despite the fact that there is 'no way of proving of itself [theoretically] the possibility of nonphysical possession or of having any insight into it' (*MS* 6:252).

13 *MS* 6: 246.

14 Let me stress that the problem I am calling attention to here is not that, absent full-fledged property rights, I cannot be *certain* that the means I need for a given project will be at my disposal. That kind of uncertainty does not as such undermine my ability to set and pursue ends for myself. I can set for myself the end of being the first human being to walk on Mars, even if there is no telling in advance exactly what means will be required to achieve that end, and no way to be certain that I shall obtain them. No system of property could be expected to solve *that* problem; more importantly, no system of property need do so, since my freedom does not depend on my ability to pursue any project in particular. The point I am making in the text is different: it is that a system of mere empirical possession undermines freedom because it arbitrarily restricts the means that I can have at my disposal.

15 For an illuminating discussion of this point, see Arthur Ripstein, 'Authority and Coercion', pp. 8–11, and *Force and Freedom*, chapter 2. Not everyone agrees with this interpretation of Kant's position. Flikschuh, who follows Brandt on this point, writes the following: 'Under conditions of unavoidable empirical constraint (i.e. the earth's spherical surface) any exercise of choice by one compromises the freedom of everyone else by removing from availability to them external objects of their possible choice' (*Kant and Modern Political Philosophy*, p. 134; see also her article 'On Kant's *Rechtslehre*', *European Journal of Philosophy*, 5: 50–73 [1997], p. 64). That is precisely the conception of external freedom against which Ripstein forcefully argues. I find Ripstein's argument compelling, although I should note that the point I go on to make in the rest of the paragraph holds on either conception of external freedom.

16 Korsgaard makes a similar point in 'Taking the law into our own hands', pp. 325–6, n. 8. Kant himself appears at times sceptical about the legitimacy of communal property, as when he writes, concerning the idea of an original common possession of the land by all men, that 'the choice of one is unavoidably opposed by nature to that of another' (*MS* 6: 267), so that the possibility of 'particular possession' is necessary if the land is to be usable. But note that this does not mean that communal property is incompatible with external freedom; only that it requires explicit rules that make it possible for the choices of all to coexist. What Kant rules out is the possibility of spontaneously sharing objects. Note also that the point I am making is compatible with Kant's claim that communal property cannot be invoked to justify private property, since the two stand equally in need of justification (see *MS* 6: 251; cf. Ripstein's discussion in *Force and Freedom*, chapter 4). My point is that both forms of property are justified, because both solve the problem posed by a system of mere empirical possession.

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[17] Indeed, insofar as libertarianism relies on the possibility of full-fledged pre-institutional property rights, it is incompatible with what I go on to say in the rest of the article. For a powerful defense of the libertarian view of rights, see Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).

[18] *MS* 6: 247. The last clause could be taken to suggest that Kant is endorsing a theory of property based on first acquisition, but that would be reading too much into the passage. First acquisition may be necessary for a claim of right in the state of nature to be provisionally valid, but it cannot be sufficient for a rightful claim, as we shall see in the next section. On Kant's use of the idea of a permissive law of practical reason, the seminal discussion is Reinhard Brandt, 'Das Erlaubnisgesetz, oder: Vernunft und Geschichte in Kants Rechtslehre', in Reinhard Brandt, ed., *Rechtsphilosophie der Aufklärung* (Berlin: de Gruyter, 1982), pp. 233–85. For useful accounts of Brandt's position in English, see Flikschuh, 'On Kant's *Rechtslehre*', pp. 63–5; *Kant and Modern Political Philosophy*, pp. 134–9; and 'Kant's indemonstrable postulate of right', pp. 22–3. On Brandt's view, the importance of the permissive law 'consists in its mediatory role between prescription and prohibition. Something which is strictly speaking prohibited is provisionally permitted in order to make possible the eventual realization of the universal principle of Right' (Brandt, 'Das Erlaubnisgesetz', p. 244; quoted and translated by Flikschuh in 'On Kant's *Rechtslehre*', p. 65). Joachim Hruschka has challenged this reading in 'The permissive law of practical reason in Kant's *Metaphysics of Morals*', *Law and Philosophy*, 23: 45–72 (2004). There, he argues that a permissive law is not one that allows individuals to commit unjust acts, but rather one that makes it possible for merely permissible acts to have consequences for rights.

The reading I adopt here is closer in spirit to Brandt's than to Hruschka's, although I should mention two counts on which I disagree with Brandt. First, his reading strikes me as too historicized. I do not think that the postulate permits one to do something that is strictly speaking wrongful, but that constitutes a necessary step toward a rightful condition. Rather, I think that the postulate allows one to do something that would be wrongful, were it not that freedom itself demands that we be permitted so to act. Actions authorized by the postulate are nevertheless merely *provisionally* rightful on my reading, not because they are only treated as rightful while we await a rightful condition, but rather because acting on the permission contained in the postulate ultimately *amounts to* leaving the state of nature (on which see Section V below). Second, I disagree with Brandt about what exactly requires the permission contained in the postulate. On Brandt's reading, as we saw above (see note 15), it is the mere taking possession of an object. Once again, I follow Ripstein in thinking that a person's taking possession of an object or of a piece of land is not in itself a restriction of external freedom in the sense that Kant is concerned with; hence I do not think that it requires special permission. What requires permission on my view, as I go

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on to explain in the text, is specifically the use of force to exclude others from a certain object.

[19] *MS* 6: 312. In the *Lectures on Ethics*, Kant suggests that the need for a state amounts to the need for three things: '[A] universal legislation that establishes right and wrong for everyone, a universal power that protects everyone in his right, and a judicial authority that restores the injured right' (Kant, *Lectures on Ethics*, ed. P. Heath and J. B. Schneewind [Cambridge: Cambridge University Press, 1997], 27: 590). I take what Kant calls public distributive justice in the passage I quote in the text to include both universal legislation and judicial authority. I do not stress the distinction between the legislative and the judiciary here, since I take it that their combined activity is necessary to make the content of law determinate in particular cases. For an interpretation of Kant's position that explicitly distinguishes between the two, see Ripstein, *Force and Freedom*, chapter 6.

[20] I am grateful to T. M. Scanlon for pressing me to consider this possibility.

[21] See Locke, *Two Treatises of Government*, ed. P. Laslett (Cambridge: Cambridge University Press, 1967). For recent discussions of Locke's views on property, see notably A. John Simmons, *The Lockean Theory of Rights* (Princeton, NJ: Princeton University Press, 1992), chapter 5; and Gopal Sreenivasan, *The Limits of Lockean Rights in Property* (Oxford: Oxford University Press, 1995). An important contribution of these two discussions is that they suggest that Locke's position can be reconciled with an egalitarian outlook; as far as I can see, this does not affect the points I make in the text. There are of course many different interpretations of Locke's theory of property, and I do not claim that the argument I present holds against all of them; I only mean to address one particularly sharp (but perhaps oversimplified) version of the theory.

[22] In support of this idea, one might argue, as Ripstein does in 'Authority and coercion', that the indeterminacy problem stems from the general fact that an abstract principle cannot fully determine its own application to particular cases. Thus, even if we all accept the same version of Locke's theory, questions will arise about the exact manner in which objects can be acquired or abandoned, and about the boundaries – both temporal and spatial – of the objects that are acquired. The point is easy to illustrate. Take for instance the question of when an object should count as abandoned. Surely, my land does not cease to be mine just because I walk away from it for five minutes. But what if I leave it unattended for a year? Or two years? Or ten? When exactly does it become up for grabs? Locke's theory by itself has no definite answer to offer. Of course, as Ripstein rightly emphasizes, that does not mean that there is no way to settle these questions; it just means that abstract principles of right such as those that make up Locke's theory – or any other similar theory – cannot possibly settle every particular case. Consequently, rights in the state of nature cannot have the crisp contours that they should have. A legal system, and hence

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a state, is required to remedy this problem (see Ripstein, 'Authority and coercion', pp. 26–32). Note that Ripstein does not hold that the indeterminacy problem is the only factor that makes rights provisional in the state of nature; indeed, in the most recent and detailed statement of his view, he argues that there are three problems that explain why rights are provisional in the state of nature, including the enforcement problem. The three problems in turn explain the need for the three branches of republican government (see Ripstein, *Force and Freedom*, chapter 6). I do not mean to deny that there are problems other than the enforcement problem that affect rights in the state of nature, but I do think that that problem is in an important sense the fundamental one, for reasons I go on to outline in the text.

[23] See Locke, *Second Treatise*, §§7–9. Note that Locke's view about the justification of the use of force in the state of nature is logically independent from his particular theory about how rights are acquired or transferred in the state of nature. One can disagree with him on these latter points and still think that there are rights in the state of nature whose enforcement is justified regardless of who carries it out.

[24] Locke famously finds three problems with property rights in the state of nature. The one I mention here is the third: that, in the absence of a power able to impose the demands of the law of nature against any given individual, the enforcement of the law of nature will be unreliable, and often dangerous for one undertaking it (see *Second Treatise*, §126). Locke also mentions that individuals in the state of nature are likely to be biased and ignorant, so that they will often fail to recognize the demands that the law of nature makes on them, despite the fact that its content is 'plain and intelligible to all rational creatures' (ibid., §124); and that individuals being judges in their own cases will likely be biased in their application of the law of nature (see ibid., §125). Joining political society is in our interest, Locke argues, because a good state will solve these three problems, and hence make property rights more secure; but the private enforcement of property rights in the state of nature remains entirely legitimate.

[25] *MS* 6: 232, 231 and 257.

[26] *MS* 6: 257. Cf.: 'Prior to entering [a civil condition], a subject who is ready for it resists with right *those who are not willing to submit to it* and who want to interfere with his present possession' (*MS* 6: 257; emphasis added; see also *MS* 6: 267). The central importance for Kant's approach of who is entitled to use coercion is stressed notably in Ludwig, 'Whence public right?', pp. 172–3.

[27] What would constitute jointly sufficient conditions to justify the use of force in the state of nature is a difficult question, which I must leave to one side here. Note that the question is not merely academic, since the international order as we know it is arguably a state of nature in the relevant sense.

[28] See *MS* 6: 255–6.

[29] *MS* 6: 255.

[30] *MS* 6: 255 (Gregor translation modified).

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[31] *MS* 6: 237.

[32] As he puts it, freedom consists in 'independence from being constrained by another's choice' (*MS* 6: 237).

[33] Let me stress once again that what violates my right to freedom here is not the fact that your choice deprives me of the possibility of accessing the land you claim for yourself. If you exclude me from a certain area by covering it with your body, you do not thereby make me unfree, since I remain free to set and pursue ends for myself everywhere else in the world; the same goes if what prevents me from stepping on a piece of land is the fact that you claim it for yourself (see notes 15 and 18 on this point). The violation I point to in the text occurs only when you use force to prevent me from going where I have chosen to go. By doing so, you force a particular course of action upon me, and you thereby give your choice (to keep me out of the territory) priority over my choice (to go inside the territory); that is what violates my right to freedom.

[34] *MS* 6: 255–6. Kant uses similar language in §42, when he writes: 'No one is bound to refrain from encroaching on what another possesses if the other gives him no equal assurance that he will observe the same restraint towards him' (*MS* 6: 307).

[35] The relation between Kant's and Hobbes's views is obviously a complex and multifaceted one. For a detailed treatment of the matter, see Williams, *Kant's Critique of Hobbes*. For further discussion of Kant's use of the idea of assurance, and how it differs from Hobbes's, see Ripstein, *Force and Freedom*, chapter 6.

[36] Hobbes, *Leviathan*, ed. E. Curley (Indianapolis: Hackett, 1994), chapter xiv, para. 5.

[37] Cf. Kant's claim that 'he who does not have enough power to protect each one among the people against the others does not have the right to command the people either' (*EF* 8: 383).

[38] It is perhaps worth stressing here that, even if I commit a wrong against you, I do not thereby lose my right to freedom. I make it the case that some uses of force against me will be consistent with my right to freedom that would otherwise not be (provided that the agent making use of force has the authority to do so). But I certainly do not lose my right to freedom altogether; if I did, then any use of force against me whatsoever would be justified, which is clearly not the case.

[39] Here I am paraphrasing Ripstein's suggestion that '[t]he abstract principles that enable us to understand our obligations with respect to the property of others do not tell us how to apply them to particulars' ('Authority and coercion', p. 28).

[40] *MS* 6: 256; cf. *MS* §§11 and 14, and *TP* 8: 295.

[41] *MS* 6: 314. The point is obviously indebted to Rousseau, who famously claims that the general will must come from all and apply to all – see Rousseau, *Of the Social Contract*, in *'The Social Contract' and Other Later Political Writings*, ed. and trans. V. Gourevitch (Cambridge: Cambridge University Press, 1997), book 2, chapter 4, para. 5. To be exact, two things are required for a will to be general on Kant's

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view: first, it must aim exclusively to protect rights, since that is the only purpose required by freedom, and hence the only purpose that can legitimately be imposed on individuals (the only genuinely *public* purpose); second, it must aim to protect the rights of all individuals whose freedom is codependent – that is, of all who share a given territory (a point about which I say more below).

[42] Kant's view is thus not that our general will realizes conditions of reciprocity because we actually consent to its actions, but rather that we are rightfully *presumed* to consent to its actions because they are necessary for our free coexistence (which is the case, in turn, because these actions realize conditions of reciprocity). The former position is ruled out on Kant's view, since it would mean that we depend on one another's actual consent, and hence on one another's choices, for our being in a rightful condition, when the whole point of the rightful condition is precisely to prevent such dependence from arising.

[43] *MS* 6: 307.

[44] According to Max Weber's well-known definition, the second condition I mentioned in the previous paragraph is sufficient for something to count as a state. On Kant's view, by contrast, an agent has to fulfil both conditions of reciprocity to have the authority to use force, and hence to count as a genuine state. For Weber's position, see 'Politics as a vocation', in *The Vocation Lectures: Science as a Vocation, Politics as a Vocation*, ed. D. Owen and T. B. Strong, trans. R. Livingstone (Indianapolis: Hackett, 2004).

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