

Three Defects in the State of Nature

STATES CLAIM POWERS that no private person could have. Not only can they collect taxes and imprison wrongdoers; they can impose binding resolutions on private disputes, restrict agents on grounds of public health, and regulate other aspects of social life. Defenders of limited government insist that the state's power to do these things must be subject to fundamental restrictions. Prior to any question of what factors properly *limit* the exercise of those powers, however, is the more basic question of the justification of the powers themselves: how can an institution, whose offices are filled with ordinary fallible human beings, be entitled to do things to people, or demand things of them, that none of those same human beings are entitled to do or demand on their own? As Kant puts it, all positive laws are contingent and chosen (*willkürlich*) by the persons giving them. How can one person change the normative situation of others, consistent with everyone else's entitlement to be independent of the choice of another? This is the basic question of political authority.

In this chapter, I develop Kant's account of political authority as it is presented in his account of the transition from private right to public right. Those arguments are expressed in the social contract tradition's vocabulary of a state of nature and the need to exit it. Despite this common vocabulary, Kant does not follow Hobbes or Locke in focusing on

the empirical defects of the state of nature, such as self-preference and limited knowledge. Kant's arguments are *a priori* because all internal to the concepts of acquired rights. Kant presents the state of nature as a pure system of private right, containing only the moral principles that govern interaction between private persons.¹ Understood in this pure form as a system of private rights without public law, the state of nature is morally incoherent from the standpoint of rights, in three distinct ways. First, the postulate of practical reason with regard to rights shows that acquired rights are a morally necessary extension of freedom. But, Kant will argue, it is impossible to acquire a right to anything in a state of nature. Second, rights are necessarily enforceable—a right is a title to coerce—but acquired rights cannot be enforced in a state of nature. Third, as aspects of a system of equal freedom, the application of private rights to particulars can only be determined in accordance with standards that are not unilateral exercises of the judgment of one of the parties to a dispute. But such objective standards cannot be established in a state of nature. Each of the defects in a state of nature is a conceptual problem concerning the internal requirements of a system of rights. Unlike the defects identified by Hobbes or Locke, they do not reflect human limitations; they apply “no matter how good and right-loving human beings might be.”²

The remedy for each of the three defects is an institution that has moral powers that private citizens lack. Taken together, the three remedies are related as the three branches in a republican system of government are. The legislative branch is charged with making law, the executive with implementing and enforcing law, and the judiciary with applying it to particulars in cases of dispute.³ The functions are distinct because only the legislature has the power to make law. It does so as the voice of the people, so that they rule themselves; Kant remarks that the people are “represented” by the sovereign, which means that they can only speak and act together through institutions. The executive branch does not make general rules, but takes up means to give effect to them. The judiciary resolves

1. Kant, *Lectures on Ethics*, trans. P. Heath (Cambridge: Cambridge University Press, 1997), 27:589.

2. 6:312.

3. 6:313.

particular disputes. Each is both coordinate with the others and subordinate to them, and “through the union of both each subject is apportioned his rights.”⁴ By the time Kant announces that the obligation to enter a rightful condition can be “explicated analytically” from the concept of right in contrast with violence, he has provided the resources to show why each branch is needed.

As he summarizes it in his lectures on natural right:

Justitia distributiva determines right through a *lex publica*, applies it to each case, and enforces obedience. Renounce your intention to seek right according to your own judgment and leave it to the legislator to determine, to the judge to pass judgment, and give up your power with which you could force the other.⁵

The three defects are distinct, but have a parallel structure: nobody is under any obligation to defer to the deeds, claims, or judgments of others, unless appropriate institutions are in place. The distinctive powers that each institution must have require that those institutions differ in kind from any sort of private association. A private association can only have such powers as its particular members transfer to it. The powers to authorize one person to change the normative situation of all others, to enforce private rights in the name of all, and to impose closure on private disputes are all powers that no private person could have. The point of each argument is to show that these powers are morally required even though private persons lack them.

This chapter will focus on the defects of the state of nature as a system of pure private ordering and the form that any solution to all three of them must take. The next one will turn to Kant’s argument that a state can solve them in a way that is consistent with everyone’s freedom.⁶

4. 6:316.

5. Kant, *Naturrecht Feyerabend*, trans. Lars Vinx (unpublished, 2003), 27:1390.

6. Versions of each of the three defects have drawn the attention of commentators. To mention only some of these, the argument from unilateral action is considered in Bernd Ludwig, “Whence Public Right? The Role of Theoretical and Practical Reason in Kant’s *Doctrine of Right*,” in Mark Timmons, ed., *Kant’s Metaphysics of Morals: Interpretive Essays* (Oxford: Oxford University Press, 2002), and Katrin Flikschuh, “Reason, Right, and Revolution: Kant

I. Unilateral Choice: Property and the Problem of Political Authority

The most general argument focuses on the problem of unilateral choice. Positive law requires a person, or group of persons, to formulate, apply, and enforce it. In each case, that person makes a choice, and the power to do so must be reconciled with the freedom of those who are bound by it. Kant's explanation of how such authorization is possible comes in the course of his discussion of the acquisition of property, but his solution to it applies to all political authority, including the power to make laws in pursuit of public purposes, to enforce laws, and to apply them to particular cases.

Kant's use of property as the central point of analysis provides a direct and powerful argument against the Lockean view that property rights are already fully conclusive in a state of nature. It might be thought to engage less fully with other accounts of private property. Many of these regard property as a conventional way of managing useful resources, or as a reflection of the choices made by a society. Although Kant does not directly address such views, his argument is directly relevant to them. The same form of question arises for any social convention or public policy choice as arises for initial acquisition of property: by what authority does the conventional practice bind people who were not party to it? From the standpoint of freedom, the claim that a certain conventional way of doing things works to everyone's advantage in the long run—however the truth of such a claim might be established—is not sufficient to show that any particular person is bound by it. As we saw in our discussion of Kant's theory of contract, others are not entitled to force you to participate in ar-

and Locke," *Philosophy and Public Affairs* 36, 4 (2008): 375–404. Assurance is central to Robert Pippin's analysis in "Mine and Thine? The Kantian State," in Paul Guyer, ed., *The Cambridge Companion to Kant and Modern Philosophy* (Cambridge: Cambridge University Press, 2006), 416–446, and Otfried Höffe, "'Even a Nation of Devils Needs the State': The Dilemma of Natural Justice," in Howard Williams, ed., *Essays on Kant's Political Philosophy* (Chicago: University of Chicago Press, 1992). Among those who focus on versions of the indeterminacy argument are Leslie Mulholland, *Kant's System of Rights* (New York: Columbia University Press, 1990), 284; Howard Williams, *Kant's Political Philosophy* (New York: St. Martin's, 1983), 169; Paul Guyer, "Kant's Deductions of the Principles of Right," in Timmons, *Kant's Metaphysics of Morals*, 23–64.

rangements that benefit you. More generally, the more artificial the rules of property are taken to be, the more pressing the need for an account of their authority is. If property rules are just the rules of a conventional game, they do not bind anyone other than a voluntary participant. Characterizing such arrangements as a choice “made by society” raises the question of society’s entitlement to make that choice: what is the space of possible choices it might have made, and how could it bind anyone who neither participated in the making of the choice nor agreed to be bound by it? That is just to say that the question of society’s entitlement to make a decision about how resources will be used presupposes some account of how a collective could have acquired the entitlement to determine how things will be used. But that is just a large-scale version of the question of initial acquisition: how does one person’s decision bind others?

The discussion of property in Chapter 4 established Kant’s arguments for several claims. First, Kant’s account showed that it must be possible to have things as one’s property, because otherwise the use of objects that can serve as means for setting and pursuing purposes would be forbidden or conditional on the particular purposes of others. That argument, as we saw, grounds the possibility of property in human purposiveness. It thereby precludes any requirement that all others consent to any acquisition. Such a requirement would make the use of a usable thing depend on the *matter* of other people’s choices, and so subject everyone to the choice of each other private person.

Second, Kant argued against the thesis that property rights are to be understood as extensions of rights to one’s own person. Variants of this thesis can be found in the otherwise differing accounts of property in Locke and Hegel. Locke’s example of eating an apple involves explicit incorporation; Hegel’s more abstract analysis in terms of putting your will into a thing captures the same intuitive idea. These accounts of property submerge the significance of acquisition for others, by representing the obligation to respect the property of another as an *instance* of the obligation to respect that person. As we saw, the Lockean/Hegelian strategy cannot explain why such acts of self-relation change the rights of others. Locke incorporates a “proviso” requiring that “enough and as good” be left for others through any appropriation. No saving clause of this sort can address the basic issue, however. Even if it restricts unilateral acquisi-

tion to cases in which doing so does not worsen the ability of others to provide for themselves, it fails to address the question of how one person can place another under an obligation. It may be worse to have others impose obligations on you if those obligations are onerous, but your right to freedom is at issue when others change your normative situation, even if you have other options so that the situation is not burdensome.

Third, Kant introduced an account of unilateral acquisition: the transition from an object's being unowned to its being owned depends on a unilateral act of appropriation. The acquisition of property is nothing more than the change in the status from being subject to the choice of no person to being subject to the choice of some particular person, its owner. The affirmative act required to acquire an object is simply taking control of it and giving a sign that you intend to continue controlling it.

Acquisition requires taking control, giving a sign, and bringing your act into conformity with a "general will." Although a person acquiring an object does so on his or her own initiative without consulting others, the *power* to do so requires an omnilateral will to make the unilateral act binding on others.⁷ Kant thus treats initial acquisition as a special case of political authority.

If you acquire an unowned object, you do not need to consult everyone who could conceivably be affected; such a requirement would violate the postulate of practical reason with regard to rights. Instead, you are entitled to act entirely on your own initiative. This raises an obvious question: why am I bound by your unilateral act? Your innate right prevents me from interfering with your act, but the fact that I may not interfere does not mean that your act has further consequences for my rights.

Your act of acquisition casts a long shadow: you are entitled to exclude others from that object even when you are not using it. You are also entitled to dispose of it as you see fit, subject only to the requirement that you not violate the rights of others in so doing. You can give the fox to whom-ever you like, though you may not dump its rotting carcass on someone else's land without the owner's permission. Your right to exclude is established through your unilateral act, but the mere fact that you act unilater-

7. 6:262.

ally raises the question of how that action can bind me. As Kant puts it, a unilateral will is not a law for anyone else.⁸

The acquisition of property differs from other ways in which one person might be said to change the normative situation of another. If I wrongfully injure or interfere with you or your property, it is now permissible for you to claim damages from me. Such changes can (though need not) be thought of as changing your normative situation by creating new permissions to proceed against me. Your right to person and property is not changed, however, and, most significantly, you are under no new obligations. Your right to proceed against me is just your right to your person and property. Again, if I move from one place to another, I occupy space which is not available for your occupation while I am there. This change does not place you under a new obligation, but simply applies it to a different circumstance. In these examples, one person's act does not change any other person's obligations, but merely the way in which antecedent obligations apply. The acquisition of property is different: in acquiring a piece of land I make it unavailable to you even when I am not occupying it.

The normative issue is illustrated by considering other examples that John Simmons has suggested are analogous:

I may make a legal will, unilaterally imposing on all others an obligation to respect its terms (which they previously lacked), for the very purpose of limiting others' freedom to dispose of my estate in ways contrary to my wishes. I may occupy a public tennis court to practice my serve, or we may take the softball field in the park for our game, unilaterally imposing on all others obligations to refrain from interference, and do so for the very purpose of enjoying our activities unhindered by such interference. Or I may rush to the patent office and register my invention, unilaterally imposing certain obligations of restraint on all others, for the very purpose of limiting others' freedom to likewise take advantage with their competing inventions. I may buy the rare stamp that many others are busy saving their money to buy, or I may organize a nature walk for children along trails many others use

to seek solitude. How different are the rights and obligations involved in these contacts from the right of the original appropriator to take unowned goods, unilaterally imposing obligations of noninterference in all others, for the very purpose of restricting their liberty to the free use and enjoyment of the goods? Not, I think, very different.⁹

Simmons is right that the appropriation of property is not the only unilateral act that changes the situation of others, and his examples make it clear that there are many ways in which it is morally acceptable for one person to do so. But the examples also underscore Kant's point about the need for omnilateral authorization in changing not only the situation of others, but their entitlements. Most of the examples could not even occur in a state of nature. So: making a will presupposes an antecedently and publicly established property right in the objects of the will. Kant also emphasizes that to affect a transfer by a will, there must be a public possessor, entitled to exclude others between the testator's death and the heir's acceptance of the legacy. That is, a "legal will" presupposes public institutions entitled to make the testator's choice binding. Both the "public tennis court" and "the park" presuppose public forms of property with standardized rules of access. Although we can take over the tennis court for our game, we are not allowed to build a house on it, and there are typically rules limiting the number of games in a row that we can play. Such public forms of property will be the topic of Chapter 8, but it is worth noting here that the entitlement to use public spaces is not a natural right that can be either exercised or even conceived in the absence of a rightful public authority, for there could be no such spaces without such an authority. (If there could be such rights without a public authority, they would be cases in which groups rather than individuals acquired unowned objects, and so just cases of first possession by a group rather than an individual.) However exactly we understand patent rights, they are validated through public statutory mechanisms, as the phrase "the patent office" suggests. You cannot register your invention with some other private person, who then grants you the right to prohibit others from making

9. A. John Simmons, "Original-Acquisition Justifications of Property," in *Justification and Legitimacy* (Cambridge: Cambridge University Press, 2001), 220.

substantially similar things, because that private person has no more right than you do to change the entitlements of others.

Simmons's remaining examples create no new obligations; they all illustrate each person's entitlement to exercise his or her freedom in ways that change the context in which others subsequently exercise theirs. Organizing a nature hike for children may disappoint the expectations or wishes of others, but it does not place them under any new normative requirements. Purchasing things that others had hoped to buy narrows the range of things that those others might do, but does not place any new obligations on them. Others were already under an obligation to refrain from interfering with the stamp that you wanted to acquire; they face no new obligations as a result of your acquisition of it. Only their hopes have been dashed. They are in the same position as against you that they were in as against the previous owner: they can still try to make you an offer to convince you to sell it to them, even if you do not actively invite offers.

The original acquisition of property remains distinctive because it does not simply change the world: it places others under new obligations. As we saw in Chapter 4, the basic structure of a property right is if one person owns an object, it is not part of the context which others may change in the exercise of their freedom. Your rights are not violated if people use, damage, or destroy things that are not your property, but they are violated if they interfere with your property in any way. The original acquisition of an object as property changes it from being something that others may use or change at will, or as a foreseeable side effect of their own activities, into something that others are under an obligation not to use, damage, or destroy; it thus places them under a new obligation.

Kant's specific account of the change that appropriation makes to the normative situation of others—that it renders them liable to coercion—is not required for his argument about the way in which property requires omnilateral authorization. The need is the same whether rightful acquisition is supposed to place me under an obligation, give you a power to forcibly remove me from your property, or limit my freedom in some other way. The philosophical literature on promising raises questions about how you could change your *own* normative situation through an act you perform on your own initiative. Kant's point is that the theory of property raises a deeper problem of how one person's act can place *an-*

other person under a new obligation. How can an act done entirely of your own initiative, to which others are not parties, have binding effects on them?

Kant's answer focuses on public authorization. As we saw in Chapter 4, the unilateral aspect of acquisition is not that *having* property is inconsistent with freedom. Nor is it that the acquisition of property narrows other people's range of options. Instead, it is the simple fact that one person changes the normative status of another. Kant's introduction of this point comes at the beginning of his explanation of acquisition in general, which he divides into a three-stage sequence:

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 phaenomenon*. 2) *Giving a sign (declaratio)* of my possession of this object and of my act of choice to exclude everyone else from it. 3) *Appropriation (appropriatio)*, as the act of a general will (in Idea) giving an external law through which everyone is bound to agree with my choice.¹⁰

The third member of this sequence is crucial to the argument for public right: it is only if my choice is exercised in light of an (ideally) publicly conferred power to appropriate that it could possibly be binding on others, apart from my physical possession of the object. As we saw in Chapter 3, a "permissive law" that entitles me to acquire things makes a merely permissible unilateral act have rightful consequences for others. However, it could only have this status provided that it is authorized by everyone, so that my unilateral act is also the exercise of a publicly conferred power. If the public authority is entitled to confer the power on me in the name of everyone, then my specific exercise of the power is also in everyone's name.

The role of the public does not turn property into a sort of instrument or by-product of public policy. The basic structure of property is governed by individual purposiveness; as a matter of private right, you can have external objects as your own because of the postulate of private

10. 6:258.

right. A public authority is required to authorize you to acquire things, because that changes the normative situation of others. But authorizing acquisition is not a discretionary purpose that a public authority might decide about based on some assessment of the desirable consequences or balance of benefits and burdens that will result. A public authority could not be entitled to prohibit all acquisition, as doing so would limit human purposiveness as such. It could, in principle, restrict initial acquisition in various ways—for example, setting aside areas as nature preserves for future generations—and it can impose conditions on properly recording acquisitions. Its power to do such things in particular cases, however, can only be exercised consistent with each person's entitlement to have external objects of choice as his or her own, so it cannot preclude all acquisition.

Kant's invocation of a general will to authorize private appropriation also differs from the view, put forward by Grotius and Pufendorf, which seeks to authorize appropriation in terms of a historical or hypothetical agreement by the people who own the Earth in common to permit people to divide it up. Such accounts incorporate a sort of primitive community of land, and so already presuppose some concept of ownership. As soon as any such content is presupposed, however, given the concept of property, a hypothetical agreement to divide up is not sufficient to bind the parties. Only an actual one could be. The difficulty is that any such common ownership could only function in the Pufendorf/Grotius argument if it was a form of private ownership by a group of persons. As Kant remarks, such a primitive community "would have to be one that was instituted and arose from a contract by which everyone gave up private possessions, and, by uniting his possessions with those of everyone else, transformed them into a collective possession [*Gesamtbefitz*]; and history would have to give us proof of such a contract. But it is contradictory to claim that such a procedure is an *original* taking possession and that each human being could and should have based his separate possessions on it."¹¹ The only form of common possession of the Earth prior to appropriation must be the "disjunctive" possession of the Earth's surface entailed by innate right, that is, that each person is entitled to be "wher-

11. 6:251.

ever nature or chance” has placed him or her, except in whatever place is occupied by another person. Persons who are in merely disjunctive possession of the Earth’s surface, considered separately, are in a position neither to authorize anything nor to bind anyone.

The problem here is not just one of an incoherent imagined history. More fundamentally, an actual agreement in the distant past could only bind future generations if the parties to it had the authority to do so—which is just to say that the Grotius/Pufendorf model reproduces the problem of authorization it is supposed to address.¹² The ability of ancestors to place their descendents under obligation to respect private acquisitions is just an instance of the question raised by initial acquisition: how can their act bind later generations who are not parties to it? A hypothetical agreement based on perceived advantage does no better, because no private person has standing to force another to do what he or she *would* agree to unless he or she *has* agreed.

Kant’s appeal to the idea of a united will makes the object of agreement the rule of law through political institutions, so that individual acts of rule-making are themselves instances of a more general law. The argument is not supposed to show that an agreement has happened, or even that it would be wise or prudent for people to enter into such an agreement so that it would happen under ideal circumstances. It shows only that a form of public authorization on behalf of everyone is required to underwrite private appropriation. Private property requires public right because they are both instances of a single, common problem, which has an irreducibly public element. Rather than trying to reduce the public to the private, Kant’s argument shows that the private is only rightful in the context of the public.

The requirement of public authorization to underwrite private appropriation shows the acquisition of private property to be an example of the familiar features of legal systems that H. L. A. Hart describes as “power conferring” rules. Hart’s own examples involve contracts and wills, which empower a person to change his or her *own* legal situation. Hart remarks

12. Locke’s discussion of the failure of a father’s consent to bind his son to political authority thus applies to the Grotius/Pufendorf account of acquisition. See Locke’s *Second Treatise of Government*, §118.

that they empower people to act as small-scale legislatures.¹³ Kant's example of property makes the legislative aspect of those rules especially clear: my appropriation can only change your legal situation if everyone, including you, has conferred a power on me to appropriate. My act of appropriation is thus a unilateral exercise of an omnilateral power, rather than a unilateral act. That is the point of the third moment in the three-stage sequence. However, if the third moment is presupposed by any possible act of acquisition—I unilaterally act *so as to bind everyone*—my act genuinely binds them only when the general will has authorized it.

The solution to the problem of unilateral will is, then, an omnilateral will, through which everyone authorizes appropriation. An omnilateral permission to appropriate makes private appropriation rightful, and so entitles a private person to bind others through a unilateral act. The act is unilateral, but the authorization for the act is omnilateral.

Kant does not deny that the people might come to recognize each other's claims to property or under contracts without an omnilateral authorization. He characterizes these as "societies compatible with rights (e.g., conjugal, paternal, domestic societies in general, as well as many others); but no law."¹⁴ Members of such societies might well in fact accept rules and dispute-resolution procedures governing their interactions, but whether they accept them or not depends on the matter of their choices, that is, on the particular ends they happen to have. Such associations are purely voluntary arrangements from which any member might withdraw unilaterally if his or her particular ends were to change. The members themselves might not see things this way, and might think they are morally bound to recognize each other's claims, think it prudent to do so, or fear sanctions if they do not comply. None of these possibilities is sufficient to give either the rules or the procedures genuine authority, because there is no general entitlement to compel the members to accept them. Such societies are like the international order as Kant conceives it: each state has a right to withdraw from any alliance if it perceives that it is endangered by getting drawn into disputes between other members. We

13. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1994), 26–42.

14. 6:306.

shall return to this contrast between voluntary and binding associations in our discussion of enforcement.

Kant's account solves the problem he identified with Grotius's view, according to which private holdings are grounded in some historical agreements to divide up the land. By focusing on the omnilateral authorization of a general power-conferring rule entitling people to acquire things as their own by taking possession of them, Kant does not need to presuppose a prior, collective form of property, and show that private property is consistent with it. The only thing that private property needs to be consistent with is freedom, and that can only be achieved through an omnilateral will capable of binding everyone.

Kant's argument about the need for omnilateral authorization of power-conferring rules focuses on the simple example of the acquisition of property. However, he gives further examples of cases in which a specific rule is required in order to make private rights systematically achievable, but the rule itself must be chosen by a competent public authority. That is, rules conferring the power of appropriation require a further "principle of politics, the arrangement and organization of which will contain decrees, drawn from experiential cognition of human beings, that have in view only the mechanism for administering right and how this can be managed appropriately."¹⁵ These intermediate principles are required to confer the power, in this case of appropriation, in the same specific way on everyone. Thus what counts as taking control of an object will require some sort of further specification; that control is required can be established *a priori*. In certain familiar examples, such as holding an apple in your hand, the requisite act of taking control will be clear to the point of obviousness. However, when it comes to the appropriation of land, which, as we saw in Chapter 4, is control of a region of the Earth's surface, there can be no straightforward characterization of what it is to be in physical control of the land, only various possible but potentially conflicting accounts. Thus the legal system must choose something that counts as taking possession by taking control. In the same way it must choose something that counts as giving a sign. All of these lawmaking powers generate

15. Kant, "On a Supposed Right to Lie from Philanthropy," 8:429.

more specific rules so as to make the power-conferring rule governing acquisition clear enough to guide conduct.

To show the necessity of an omnilateral will to underwrite the private appropriation is not the same as explaining its possibility. Like the three branches of government that address them, the three branches of Kant's argument are coordinate, and the solutions are only possible taken together. Both the explanation of how a general will is possible and Kant's account of the authorization to force others into a rightful condition depend on the other two dimensions of political power, executive and judicial, so we must consider those before returning to it.

II. Enforcement: Why Equal Rights Require Assurance

The second problem concerns the enforcement of rights consistent with the freedom of everyone. Like the argument about property, it is driven by the tension between unilateral choice and freedom under universal law. Where the property argument focuses on the power to put others under new obligations, the assurance argument focuses on the entitlement to enforce existing rights, and does not "require a special act to establish a right."¹⁶ Every right is a title to coerce and a part of a system of rights under universal law. Kant's argument shows that these aspects of rights can only be reconciled through public assurance.

To bring it into focus, put the other two problems aside and imagine that people have somehow acquired property, and that there is no controversy about exactly what belongs to whom. In this situation, without public enforcement, people lack the assurance that others will refrain from interfering with their property and, as a result, have no obligation to refrain from interfering with the property of others. The basic thought is that without such a system, nobody has a right to use force (or call on others to do so) to exclude others from his or her property, so nobody has an enforceable obligation to refrain from interfering with the property of others.

Kant introduces the idea of assurance in §8 of Private Right, arguing "I am therefore not under obligation to leave external objects belonging

16. 6:256.

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.” Instead, rights to external objects of choice are only consistent in a civil condition, because it is “only a will putting everyone under obligation, hence only a collective general (common) and powerful will, that can provide everyone this assurance.”¹⁷

Before turning to the details of the argument, it is worth remarking that a duty conditional on the conduct of others shows that the *Doctrine of Right* does not impose duties to do what you would do in ideal circumstances, regardless of the actual circumstances in which you find yourself.¹⁸ Whatever the difficulties of this as an interpretation of Kant’s *Groundwork*, no such principle applies to duties of right, because they always concern the claims that one person can enforce against another. You cannot have an obligation of right to accommodate yourself to the specific purposes of others; all obligations of right must be within a system of right “in accordance with universal law.” The only obligation of right that you can owe to another person must be part of the system of reciprocal limits; they have no standing to compel you to do what you would have had an obligation to do had such a system been in place.

It is also worth remarking that the duty is one of right. Kant does not deny that there could be grounds of virtue for accommodating claims of others that would not be enforceable as a matter of right. Instead, the assurance argument shows that acquired rights are not enforceable in a state of nature, so that any attempt to enforce them is unilateral force that others may resist with right.

The assurance argument follows the broader structure laid out in the Introduction to the *Doctrine of Right*. As well as distinguishing between innate and acquired rights, and between public and private right, Kant provides what he calls a “division” of duties of right, which he expresses in terms of the “precepts” of the Roman jurist Ulpian, as they are recorded in Justinian’s *Institutes*. Ulpian says that justice consists in living

17. Ibid.

18. Bernard Williams attributes this view to Kant in his essay “Moral Luck” in his *Moral Luck* (Cambridge: Cambridge University Press, 1981), 20–39. The same attribution is made in Isaiah Berlin’s “Two Concepts of Liberty” in his *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), 138n.

honorably (*honeste vive*), not wronging others (*neminem laede*), and giving each what is his (*suum cuique tribue*). Conceding that his interpretation involves a departure from narrow explication, Kant casts Ulpian's infinitives in the form of imperatives:

1. Be an honorable human being. Rightful honor consists in asserting one's worth as a human being in relation to others, a duty expressed in the saying "do not make yourself a mere means for others but be at the same time an end for them."
2. Do not wrong anyone even if to avoid doing so you should have to stop associating with others and shunning all society.
3. (if you cannot help associating with others), enter into a society with them in which each can keep what is his own.

The same division is said to organize duties of right into internal duties, external duties, and duties that "involve the derivation of the latter from the principle of the former by subsumption."¹⁹

The problem of assurance and its solution follow the pattern of reconciling the first precept with the second through the third. Kant's gloss on the third notes that "Give to each what is his" is absurd, "since one cannot give anyone something he already has." In its place, he suggests the paraphrase "enter a condition in which what belongs to each can be secured to him against everyone else."²⁰ The pattern of the argument is to show how rightful honor and the injunction against wronging others are only possible in a rightful condition.

As Kant formulates it, the assurance argument applies only to acquired rights. Your entitlement to use force to exclude others from your own person is consistent with your obligation to refrain from interfering with the person of another, because your right to self-defense is purely protective. That same right gives you a right to defend whatever is in your physical possession, since others can only dispossess you by touching or moving

19. 6:236. The details of this transition can be spelled out in a number of different ways. The simplest and most forceful presentation of it is still Julius Ebbinghaus's. For a succinct formulation, see "The Law of Humanity and the Limits of State Power," *Philosophical Quarterly* 3 (1953): 14–22.

20. 6:237.

you and so interfering with your person. Two people may have potentially conflicting rights to self-defense, but innate right does not give anyone a right to interfere with the person of another except to protect his or her own person. External objects of choice, including property, contractual, and status obligations, are different, because others are only entitled to compel you to refrain from their possessions if such an entitlement is consistent with your independence.

The assurance problem comes up because our entitlements in relation to things we are not in physical possession of are in tension with each other. The second precept requires you to refrain from taking what is mine. If you refrain from taking what is mine, without assurance that I will refrain from taking what is yours, then you are permitting me to treat what is yours, and so an aspect of your capacity to set and pursue purposes, as subject to my purposes. Exactly the same problem comes up for me: my rightful honor demands that I only refrain from using what you possess if I have assurance that you will do the same for me. So if either of us refrains from taking what belongs to the other without assurance, we restrict our choice on the basis of the other's particular choice, rather than in accordance with a universal law.

How frequently the absence of assurance will lead to actual conflict depends entirely on our particular ends—the “matter” of our choices. If I have trained guard dogs and weapons and you do not, I can simply help myself to your possessions, confident that you will be able neither to defend them nor to take mine. In so doing, I treat you as a mere means, because your entitlements are used in the pursuit of my ends. In this situation, your prudent course of action may be just to give in and let me treat you as a mere means. It is bad enough to have me pillage your goods, without making fruitless and dangerous attempts to do the same to mine. But the prudence of your course of action does not render it morally unproblematic. Whether you give in or not is simply a matter of my strength.

Other, more appealing motives might also lead someone to refrain from using things claimed by others. The sympathetic person might allow others to do wrong, forgiving their deeds out of a general philanthropy. Kant does not need to deny that such a person is empirically possible; the problem of assurance arises so long as no person is under an obligation to

be sympathetic or assume that others are. A parallel point applies to the virtuous person, who will not have an undifferentiated sympathy for every aggressor or wrongdoer. Even the virtuous person, however, is under no obligation of either right or virtue to act on the assumption that others are equally virtuous. She is under an obligation of right not to allow others to treat her as a mere means.²¹ Neither of us is under any obligation of right to assume that the other is virtuous.

Kant's remark that we do not need to wait for "bitter experience of the other's contrary disposition; for what should bind him to wait till he has suffered a loss before he becomes prudent?"²² suggests that the experience will indeed be bitter. The assurance argument does not depend on any such premise, however. It may be prudent to use a strategy of tit for tat, waiting for the other to reveal a hostile disposition, before interfering with his or her possessions. What you are entitled to do does not depend on the particular choices of others. Obligations of right are always owed to other persons as parts of a system of reciprocal limits; a free being can only owe another person an obligation of right to accept a system of restrictions together with others; it follows that a free being can only be compelled to respect the rights of others under such a system of restriction. Where others do not restrict their conduct, they may not force you to restrict yours.

Kant invokes the Latin maxim *Quilibet praesumitur malus, donec securitatem dederit oppositi*²³ ("Everyone is presumed bad until he has provided security to the contrary"), not because of any views about the "radical evil" of human beings, such as those he defends in his *Religion*,²⁴ but

21. Kant's discussion of servility in the *Doctrine of Virtue* treats the general failure to stand on your rights as a serious vice. Although you have the rightful power to consent to acts by others, to make the purpose of every other person your own whenever they demand something of you is inconsistent with both rightful honor and virtue.

22. 6:307.

23. *Ibid.* Gregor mistranslates the maxim as "The party who displaces another's right has the same right himself." A better translation is found in B. Sharon Byrd and Joachim Hruschka, "From the State of Nature to the Juridical State of States," *Law and Philosophy* 27, 6 (November 2008): 605.

24. Kant, *Religion within the Bounds of Mere Reason*, 6:32, in Immanuel Kant, *Religion and Rational Theology*, trans. Allen Wood and George Di Giovanni (Cambridge: Cambridge University Press, 1996). In "From the State of Nature to the Juridical State of States,"

because the alternative is a merely material principle based on the particular motives of those you interact with. All they can force you to do is enter with them into a rightful condition, and that authorization obtains “no matter how good and right-loving human beings might be.”²⁵

The point can be made from the other direction, focusing not on interference but on the right to defend property. If I have no assurance that you will not interfere with my property, I am entitled to regard your attempt to reclaim goods from me as a unilateral use of force against me, which I may resist with right. The same applies to you: you may resist with right my attempts to exclude you from what is mine. As Kant remarks, in such a situation we “do each other no wrong” by feuding among ourselves, even though we “do wrong in the highest degree by willing to be and to remain in a condition that is not rightful, that is, in which no one is assured of what is his against violence.”²⁶

Kant’s analysis of assurance thus differs from the more familiar Hobbesian problem of first performance of a mutually advantageous contract. The Hobbesian argument focuses on a strategic problem: nobody wants to be played for a sucker; absent assurance, nobody will ever perform, and contracts will be factually impossible. The Kantian argument focuses on a moral one: nobody can rightfully be compelled to serve the purposes of another unilaterally. Absent assurance, first performance of contracts is an instance of a much more general moral problem: any act done on the basis of another person’s claim to an external object is an instance of serv-

Byrd and Hruschka attempt to relate Kant’s argument to the “radical evil” of human beings in the *Religion*, and point to his endorsement, in the *Naturrecht Feyerabend*, of Thomasius’s use of a related Latin maxim as a principle of moral philosophy (27:1340). On the interpretation developed here, no such hypothesis is required. Nor does the *Naturrecht Feyerabend* represent Kant’s considered view on this issue. In it he rejects the *Doctrine of Right*’s central claim that the need to enter such a condition is an *a priori* requirement imposed exclusively by concepts of right. In the *Feyerabend*, Kant makes the opposite claim: “No man is obliged *a natura* to enter into civil society with the other. If I could take human nature to be just, i.e. as such a nature that cannot have the intention of harming the other, if I could posit that all human beings have the same insight into right and the same good will, a *status civilis* would not be necessary. But since the opposite is the case, everyone has the right to demand of others that they exit the *status naturalis*” (27:1381).

25. 6:307.

26. *Ibid.*

ing the purposes of another. It is *permissible* to serve the purposes of another, but each person is entitled to decide whom to cooperate with, so there can be no obligation to do so.

Without an obligation of right, nobody is under any obligations with respect to external objects of choice, and nobody is entitled to enforce any acquired rights they (suppose themselves to) have. As a result, all rights to external objects in a state of nature are merely *provisional*, because they are all titles to coerce that nobody is entitled to enforce coercively. A provisional property right is thus a right to use force to exclude others from an external object while you are in possession of it; although physical possession gives provisional title, in anticipation of a condition in which rights can be made conclusive,²⁷ your entitlement to use force is limited to the case in which interfering with your possession thereby interferes with your person. Any other use of force to secure an object against another is just aggression against that person, which can be resisted with right.

Private rights of enforcement are the cornerstone of Lockean political philosophy; Kant's premise that rights must form a consistent set under universal law preempts that entire line of argument. If I am entitled to coerce you, and you may resist with right, neither of us has a title to coerce consistent with our respective independence under universal law, so neither of us has a right, properly speaking.

If the problem is one of reconciling rightful honor with the duty not to interfere with others, the solution is to "enter a condition in which each can be secure in what is his," by means of "a will putting everyone under obligation, hence only a collective general (common) and powerful will, that can provide everyone this assurance."²⁸

Only a "common and powerful will" can "provide this assurance" because only it can provide everyone with systematic incentives in relation to the possession of others. The incentive has two dimensions. First, it assures the private right holder that the right will remain intact, even if another violates it. Second, it makes rights violations prospectively pointless. If a right holder is assured of a remedy, others will not normally have

27. 6:257.

28. 6:256.

any incentive to violate rights, because a violator will expect to gain nothing and could possibly lose something through a violation.

First, as we saw in Chapter 3, a remedy in the case of the violation of a private right is not something new, but is rather simply the right itself, which survives the wrongdoing unchanged. If I take your pen without your authorization, you do not stop having a right to your pen. Your entitlement to recover it from me follows from the fact that your right survives the wrong against it. In the same way, if I destroy your pen, your right to have it replaced, or to the cost of replacing it, follows from the fact that your right to your pen survives the violation of it. So on the one hand, rights are vulnerable to wrongdoing; on the other hand, they survive any wrongs against them. The fact that you lose your physical possession of your property does not mean that you lose your rightful possession of it. The same point applies to contractual rights: if I breach my contract with you, you still have a right that I perform. This normative structure is familiar in informal contexts: if I am supposed to meet you at noon, and for whatever reason I am late, I still need to show up at 12:15. The reason I need to show up at 12:15 is just that I was supposed to show up at noon. My obligation, and so your correlative right, survives its own violation. Kant summarizes this thought when he remarks that the right to compensation for an injury just “gives me back what I already had.”²⁹ Thus a publicly assured enforceable right to compensation can guarantee that your right will be effective, even if I violate it, because the object of the right will once again be subject to your choice. In the same way, if I use your property without your authorization, I can be compelled to surrender my gains to you, so that it is as if I had been using your property on your behalf. In either case, whether I damage what is yours or use it without your authorization, your right to have that thing subject to your choice remains effective, because my wrongful act has no effects on the rights of others. Against the background of such public assurance, you have grounds to refrain from interfering with my property. Each of us can respect what

29. In a civil action for a private wrong, the aggrieved party (or in cases of legal incapacity, his or her guardian) must bring a cause of action on his or her own initiative. The state will not step in to guarantee the outcome. This requirement simply reflects the more general feature of private rights: each person is always entitled to decide whether to stand on his or her rights.

belongs to the other without thereby allowing ourselves to be subject to the other's choice.

Second, because a public executive authority provides a remedy in cases of private wrong, it also provides an external incentive to refrain from wrongdoing by depriving wrongdoing of its point. The external incentive is secondary, but supports the assurance provided by the remedy itself. The point of the remedy is not to discourage others from committing similar wrongs; the remedy simply makes the aggrieved party's rights effective, by making factual possession correspond to rightful possession. Against the background of effective rights, however, any violation of rights carries potential disadvantages. If you use what belongs to another without authorization, you do not stand to gain; if you fail to look out properly for the security of others in their person and property, you will end up bearing a burden. These incentives are admissible under right, because right does not need to be the maxim of action. They are derivative of the underlying rights, because all they do is give effect to them. Their effects will sometimes be uncertain, since a private wrong can be committed carelessly or inadvertently, and might even occur despite the wrongdoer's best efforts. I may follow the coal seam under your land, disoriented because I am so far underground, and so trespass against your land and your coal. I may make a contract that, in changed circumstances, I am unable to honor. In these cases, your entitlement to a remedy guarantees that your right is effective in space and time. The further incentive makes no difference to *my* conduct, because an incentive can only guide me if I can recognize that it applies to a particular case. But the remedial aspect of the enforcement gives you all the assurance you need: you have what is yours, because if another wrongs you, you will be able to get it back. Private remedies secure private rights by ensuring that they will be effective in space and time. Norms apply even after they are violated, and coercive enforcement is just their effectiveness in space and time. Without that guarantee, rights are not secure, because whether they are effective depends entirely on the particular purposes of other persons.

When they are authorized by the state, these two incentives combine in a way that renders them consistent with rightful honor. If you act on the prudent consideration of *another private person's* threat advantage, you prudently give up on defending your rightful honor. By contrast, act-

ing on the consideration of a threat issuing from a public authority is consistent with your rightful honor, because the incentive itself has been publicly authorized. Your self-restraint does not make you a means to any other private person's purposes.

From the need for assurance for acquired rights to be effective, Kant concludes that force may be used to bring the state of nature to a close. The right to defend your property can only be part of a system of rights if everyone has the requisite assurance:

Corollary: If it must be possible, in terms of rights, to have an external object as one's own, 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 constitution.³⁰

Forcing someone with whom you cannot avoid interacting to enter a rightful condition with you is consistent with that person's freedom because it secures his or her rights. The person who resists wrongs you. By contrast, those who choose to remain outside a rightful condition "do each other no wrong" by feuding among themselves. There is no material wrong in interfering with each other's goods outside of a rightful condition because nobody has a right to exclude others, so there can be no wrong against persons. Instead, the wrong is formal, "wrong in the highest degree,"³¹ because remaining in such a condition is inconsistent with anyone's having rights to external objects of choice. Thus everyone can be compelled to enter a condition in which rights are secure.

III. Indeterminacy

The third problem in the state of nature turns on the possibility of disagreement about rights. It combines aspects of the first two arguments, but it incorporates a general premise independent of them: general rules are not sufficient to classify particulars falling under them. If the applica-

30. 6:256.

31. *Ibid.*

tion of a rule or concept to some particular required a rule itself, the second rule would also require a rule governing its application, and so on, *ad infinitum*. If rules can be applied to particulars, then, it must simply be possible to apply them, without recourse to further rules.³²

Kant's argument about disputes about rights differs from contemporary arguments that focus on political society as the solution to problems of disagreement about the good life or even about the demands of justice itself. Such arguments generalize Locke's idea of the "settling" function of law: to make official determination of questions that tend to generate disputes.³³ Like Locke, such accounts treat disagreement as an empirical fact. Where Locke thinks that people disagree about moral matters that have fully determinate answers, contemporary exponents of the settling function of law sometimes write as though questions about the basic terms of social life have no answers but somehow require them, so that institutions must step in to answer them.³⁴

Kant's argument is fundamentally different. The source of disagreement is normative rather than empirical or epistemic. Disputes about rights reflect the two aspects of the concept of a right: on the one hand, it is an entitlement to restrain the conduct of others; on the other, it is a part of a system of freedom under universal law. Any entitlement to restrain the conduct of others must be an instance of a universal law rather than a unilateral judgment. If you and I cannot agree about the terms of our contract or the boundaries of our respective property, or about how to resolve our disagreement, neither of us can have rights that are part of a systematic set of reciprocal limits on freedom. Such disputes may or may not lead to actual fighting; if we are both intelligent and calm, we may see that we both stand to lose by raising the stakes.

If anything, empirical cases of disagreement may lead to more conflict, but they raise no issues of right. The person who "disagrees" with the claim that murder is prohibited, or that everyone is bound by law, or that each must refrain from the possessions of others, poses a certain

32. Kant, *Critique of Pure Reason*, A133/B172, A137/B176ff.

33. John Locke, *The Second Treatise of Government*, 66, §124.

34. Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999). Waldron attributes the same type of argument to Kant in "Kant's Legal Positivism," *Harvard Law Review* 109 (1996): 1535–1566.

kind of threat to the rightful condition, but the threat is factual rather than conceptual. No argument is likely to move such a person, but what is required is not an argument, just force, which is authorized by the fact that rights are being enforced. Such disagreements need to be contained by a rightful condition, but they do not need to be accommodated. Everyone has a right to interact with others on terms of equal freedom. Nobody has a right to exempt himself from such terms because he happens to disagree with them, because nobody could have a right, consistent with the freedom of others, to be bound only by laws that he happens to agree with.

Kant's indeterminacy argument, like the unilateral action and assurance arguments, is formal rather than empirical. Kant shows that rights are necessarily subject to dispute, not that they are always disputed. The application of concepts to particulars is always potentially indeterminate, and so requires judgment, as a result of which the classification of particulars is always, at least in principle, indeterminate. This general feature of concept application generates a special problem for right, because concepts of right govern reciprocal limits on freedom and so must apply to all in the same way. As we saw in the discussion of private right, there are some cases in which concepts of right completely determine the outcome of a dispute. No person can have a right that another person use property to accommodate his or her preferred purposes; no person who is not party to a contract has standing to compel its performance. In such cases, the complaining party is said to have "failed to state a cause of action," so the adjudication of the dispute cannot even get started. No question is raised about how to apply concepts of right to particulars. Only an unsupported allegation about the concepts of right themselves is asserted. In other cases, however, even if it is agreed that concepts of right apply, there can be a dispute about how they apply to particular cases. In this latter class of cases, concepts of right do not always generate a single answer, but because they demarcate aspects of a system of reciprocal limits on choice, their application to particulars must be given a single answer in every case. Although their internal structure requires a single answer, neither the normative concepts nor the relevant facts nor any combination of them guarantees agreement. Again, different people may find the same things obvious, and so actually agree in a wide range of cases. Any

such agreement is, from the standpoint of right, mere coincidence, and so rights are by their nature subject to dispute.

The general difficulty of applying rules to particulars raises a problem for rights in a state of nature, in which each can do no more than “what seems good and right to it.” Equal private freedom presupposes objective standards of interaction. I do not merely need to do my best in avoiding injuring you; I need to exercise the reasonable care of an ordinary person. The meaning of the terms of a contract between two persons is not based on what one or the other of them thinks; nor is it created by some accidental overlap between the thoughts of each of them. Instead, the meaning is given by what a reasonable person would take it to be.³⁵ Objective standards are required because a subjective standard would entitle one person to unilaterally determine the limits of another person’s rights. If I could avoid liability by trying my best, your right to my forbearance would depend on my abilities and judgments, and so be inconsistent with a system of equal freedom. If my contractual obligations reached only as far as I thought they did, your rights would depend on my judgment in a similar way. The point of objective standards in these contexts is not epistemic—it is not that our respective rights are fully determinate, but we have no way to discover them. Nor is it strategic: the risk of opportunistic behavior is secondary. Instead, objective standards of conduct are required by a system of equal freedom, in which no person’s entitlements are dependent on the choices of others.

In these cases, equal freedom requires an objective standard, but such a standard cannot be exhausted by what either of us thinks about it. We can try to reduce the likelihood of disagreement by being more specific, but if the world changes in ways we had not anticipated, or if each of us judges in ways that the other had not anticipated, there is still room for good-faith disagreement. Again, in cases of property, Kant remarks that “the indeterminacy with respect to quantity as well as quality of the exter-

35. This objectivity is most obvious in common law systems of private law, but animates others as well. In French contract law, the terms of a contract are fixed by the subjective intention of the parties, but where intentions appear to diverge, a contract remains enforceable on the basis of legal principles. If one party to a contract is mistaken, the contract may be enforceable, if various normative legal requirements are met. I am grateful to Catherine Valcke for discussion of this issue.

nal object that can be acquired makes this problem (of the sole, original external acquisition) the hardest of all to solve.”³⁶ Even if you and I agree that I have acquired something through my act, and that I am entitled to call upon the state’s agents to enforce that right, we might still disagree about how much I have acquired, because neither the authorization to appropriate nor the title to enforce fixes the boundaries in space and time of my appropriation. A public authorization allows me to acquire things through a unilateral action, but it does not allow me to unilaterally decide the boundaries of that acquisition.

The indeterminacy in the application of concepts of right generates analogues of the problems of assurance and unilateral action. If I believe in good faith that the boundary between our property is in one place, and you, equally in good faith, believe that it is somewhere else, neither of us has any obligation of right to yield to the other. It may be prudent to yield, either because of force or because the subject of the debate is small enough to not be worth the trouble. To yield in such circumstances is, however, to fail to stand on our rights, because the resolution of our dispute depends on the content of our particular ends. More generally, neither of us needs to give in to the unilateral judgment of the other as to how to classify particulars. Unilateral judgment cannot be a law for another person.

The solution to both of these indeterminacy-generated problems is the judiciary: a body that has omnilateral authorization to apply the law to particular cases. The highest court’s decision is final, not because it could not make a mistake, but because it has a public authorization to decide for everyone.

The court is empowered to exercise judgment in accordance with law. That does not mean that all questions of private right must be answered by a comprehensive civil code, only that the legal system as a whole authorizes officials to decide private disputes in accordance with concepts of private right. Private right can include (though it need not) a common law based on precedent, or (though it need not) a civil code that develops its concepts through a consideration of particular cases.

The three arguments are distinct from each other, but coordinate. The

assurance argument applies to external objects of choice, regardless of how they are acquired and whether or not their contours are determinate. Even if everybody knows who owns what, the assurance argument suggests that nobody has any claim to enforce a right to what she has, because any such enforcement will be merely unilateral, and so not part of a system of rights. The argument about unilateral choice applies to acquired objects of choice, whether or not they are determinate, and whether or not the obligations to respect them are conclusive or enforceable. The determinacy argument would arise even if rights are enforceable and can be acquired.

The three arguments generate three independent but coordinate branches of government: the legislature must authorize all acts that change, enforce, or demarcate rights; the executive must enforce rights in accordance with law, and the judiciary must decide disputes and authorize remedies, again in accordance with law.

Kant's solution to the three defects is institutional, and brings together the three branches: legislature, executive, and judiciary. Together, they comprise the sovereign.³⁷ They are coordinate insofar as they act together, but each is subordinated to the others because none can solve its own problem consistent with the realization of rights except in collaboration with the others.

The independence of each of the three arguments from the other two underwrites Kant's insistence on the independence of each of the three coordinate branches of government. A legislature and judiciary are not sufficient to render provisional rights conclusive, because to accept the authority of the legislature or the verdict of the court without assurance that others will do the same would be to allow others to treat you as a mere means. An executive and a court without a legislature omnilaterally authorizing the laws that they apply and enforce would simply be an exercise of unilateral choice by officials. And the legislature and executive without a court would leave rights subject to dispute. Taken together, the three arguments operate to establish three branches, which together are able to create a legal system that imposes closure on disputes about rights. Every legal question has a legally authorized answer. Thus neither the ex-

37. 6:316.

ercise of judgment nor the enforcement of the verdict is inconsistent with a system of equal freedom. Neither enforcement nor application is an instance of unilateral choice; and neither legislation nor adjudication involves submission to the will of another person.

Kant compares the three branches to the stages in a practical syllogism.³⁸ The major premise is the product of legislation, because it determines what conduct is prohibited, what conduct is required, and what “merely permissible” conduct has consequences for rights. Thus the activities of the other branches are dependent on law; the executive can only enforce the law, and the judiciary can only apply it. The minor premise is the executive branch, because it is the means available for giving effect to the legislation. Kant represents the judicial verdict as the conclusion, because he represents it as the making-determinate of the authorization to use force in the particular case. In a practical syllogism, the agent takes up particular means on the basis of a general principle; the verdict renders the general appropriately particular.

Although the arguments operate independently of each other, the argument about the legislative will takes priority over the others. Both the exercise of judgment and the enforcement of rights must be done in accordance with law, that is, in accordance with omnilateral choice. The only way that a judge or enforcer can be empowered consistent with right is through the act of a legislative will.

Failure to observe the proper separation prevents the executive and judiciary from solving the problems they are supposed to address. Kant’s approach to the separation of powers thus differs from the familiar form of argument that starts by showing that some kind of state is required, and then goes on to explain the separation of powers within the state as a principle of inner restraint, so as to prevent usurpation and corruption. Locating different powers in separate branches staffed by separate officials reduces the likelihood of arbitrary uses of power. This mode of argument seems to have been prominent in the framing of the U.S. Constitution,

38. Like Aristotle, Kant understands the practical syllogism as the taking up of means, with an action as its conclusion, rather than as a series of inferences between propositions that happens to have action as its subject matter. For Aristotle’s view of the practical syllogism, see *Nicomachean Ethics*, 1147 a27, and John Cooper’s discussion in *Reason and Human Good in Aristotle* (Indianapolis: Hackett, 1986), 46ff.

and is often traced to Montesquieu's *The Spirit of the Laws*.³⁹ Philip Pettit offers a forceful contemporary articulation of this view when he defends the separation of powers on grounds that it reduces the risk of arbitrary exercises of power, in part by imposing general rules and in part by adding complexity to the business of government that makes arbitrary power more difficult to organize.⁴⁰ For both Montesquieu and Pettit the ultimate rationale for the *separation* of powers is the *dispersion* of power.

Kant's argument for the separation of powers is noninstrumental. Each of the basic things that states do must be shown to be made consistent with freedom before turning to any question of how various offices might be staffed or kept under control. Anything that the state does has to be properly authorized by law: the making of law, the taking up of means to give effect to the law, and the passive classification of particulars. Failure to separate the legislative from the executive function turns into a form of despotism, through which some rule over others. The failure to separate the judiciary from the executive and legislative branches creates another version of the same problem: a dispute can only be resolved consistent with the right of the parties if its particulars are brought under a general rule; if the rules can be changed in response to a particular case there is only force, not law. In *Toward Perpetual Peace*, Kant rejects Athenian democracy on the grounds that a form of government that does not distinguish legislative from executive roles is not a form of government at all (*unform*). It cannot be thought of as a system under which people give laws to themselves.⁴¹ Without enabling legislation, there is no distinction between an act of state and an act of members of the executive acting on their own initiative. In the *Doctrine of Right*, the parallel argument makes the more modest claim that failure to distinguish legislature from executive empowers the executive to act on its own initiative, and so not in accordance with law.⁴² Kant's reference to the "practical syllogism" of the

39. Book 11, chap. 6.

40. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997), 174ff.

41. Kant, *Toward a Perpetual Peace*, 8:352.

42. As Ludwig has shown, the differences in formulation reflect Kant's application of the distinction between noumena and phenomena to public right, something that he does in the *Doctrine of Right*, but not in *Perpetual Peace*. See Bernd Ludwig, "Kommentar zum

three separate powers underscores this point: official action under the executive only counts as an action of the people as a whole, rather than the executive acting on its own initiative, if the powers of the executive are prescribed by law. As we saw in our discussion of assurance, it might be prudent to obey an unconstrained executive, but its use of force is no different from any other act of unilateral choice. All authority must come from law, because the only alternative is unilateral choice.

IV. Innate Right in the State of Nature

The three problems are distinct. Even if rules are fixed, they can be applied differently to particulars. Even if title is not in dispute, outside of a rightful condition, people need not abstain from the possession of others. And even if there is an enforcement mechanism and no dispute about particulars, without general legislation, one person's act of appropriation does not bind others.

Kant develops the three problems in terms of external objects of choice, that is, acquired rights. These rights are said to be "provisional" outside of a rightful condition. The innate right of humanity is not said to be provisional in the same way. It might be thought that the problem of determinacy does not come up in the same way with respect to each person's right to his or her own body that it can come up with respect to property or contract.⁴³ That is true of some, though not all, types of property. Horses and islands have clear boundaries, but the unilateral choice and assurance problems still arise. Nor are bodies always exempt from casuistical questions; in the *Doctrine of Virtue*, the second part of *The Metaphysics of Morals*, Kant introduces a series of casuistical problems about the body, including such matters as how a person should properly regard his or her hair. Parallel casuistical questions might come up with respect to interacting persons. If I shout loud enough to startle you when you stand on the edge of a cliff, but do not touch you, do I wrong you? This seems to be a question about our respective rights, which is not resolved

Staatsrecht (II), §§ 51–52; Allgemeine Anmerkung A; Anhang; Beschluss," in Otfried Höffe, ed., *Metaphysische Anfangsgründe der Rechtslehre* (Berlin: Akademie Verlag, 1999), 173–194.

43. Guyer, "Kant's Deductions of the Principles of Right," 62.

by some factual consideration about the number of molecules that my shout displaced toward you. I did not blow you over; I startled you. So the indeterminacy argument potentially comes up, in at least some cases.

Your right to your own person is not provisional, because of the two differences between that right and acquired rights that we saw in Chapter 3: your right to your own person does not require an affirmative act to establish it, and your person can never be physically separated from you. Thus neither the problem of unilateral appropriation nor the problem of assurance can arise. Your right in your own person is innate, so no affirmative act changes the rights of others. Your right in your own person is enforceable inasmuch as enforcing it is simply repelling others if they trespass against you; because your person is your body, to stand on your right to your own person is, at a minimum, to keep others away from it. Anyone who touches you without your authorization⁴⁴ hinders your freedom; to repel the trespasser is to hinder his hindrance. Kant characterizes the right to “forestall” a wrongful assailant as “*ius inculpatae tutelae*,” the right to blameless defense, and notes that there is no duty of right to “show moderation” in such cases.⁴⁵

When faced with apparent aggression in a state of nature, a person is entitled to shoot first and ask questions later.⁴⁶ In a civil condition, the right to self-defense is much narrower. When self-defense serves as a defense to civil action for battery, the person who claims self-defense must establish it before a court; if the court rejects the defense on the grounds that it has not been proven, then the person who engaged in putative self-defense was just an aggressor. In a situation in which two people both believe themselves to be acting defensively, a court can find that one of them was wrong. The subsequent verdict of the court does not always

44. Parents and other (authorized) caregivers do not need express permission to touch children, because their duty to care for those children generates a right to do what seems to them required to “manage and develop” those children. Thus an infant can be carried, or an older child stopped from running out into traffic.

45. 6:235. At 6:306 Kant identifies “protective justice (*iustitia tutelatrix*)” with *lex iusti*, which is in turn identified at 6:236 with the basis of rightful honor in the right of humanity in our own person, that is, innate right.

46. Kant makes this point about the right of nations in a state of nature to defend themselves against apparent aggression and even anticipated aggression (6:346).

provide a prospective guide to action when confronted with what you take to be an aggressor, but it does render defensive rights into a consistent set at the level of repair.

In a state of nature, the rights of several persons to defend themselves do not necessarily form a consistent set, because each is entitled to do “what seems good and right to it.” Different people can act in inconsistent ways, even though each acts in good faith under the idea of the right of self-defense. Any two persons in a state of nature are entitled to defend themselves, and in defending themselves they have no perspective but their own from which to assess aggression. If you act on your right to self-defense in a state of nature, you do so on your own initiative, based on what seems good and right to you. People may sometimes commit aggression in the guise of self-defense, or have sincere but groundless beliefs about the dangers posed by others. But two people can also each act in good faith, each using force purely defensively against the other.

Actual legal systems refuse the defense of self-defense to an initial aggressor, and suppose that at most one of the two can be acting defensively. The other has, at most, some sort of excuse of mistake. This structure is not an accident of positive law, but rather a reflection of the normative structure of self-defense: your right to defend yourself only holds against an aggressor. Yet just as the question of who is an aggressor in a state of nature can be answered by nothing other than what seems good and right to the person defending himself, so, too, these higher-order constraints that require there be only one genuine justified defender can only be applied by the parties themselves. It is thus a structural feature of the situation that it is possible for each party to believe, in good faith, that the other is the sole aggressor. They each make inconsistent claims of right. However, once they have made inconsistent claims of right, there is no answer, apart from what seems good and right to each of them.

The idea that there can be no answer in a dispute about defensive force may seem surprising, because the question of who was the initial aggressor appears to be a purely factual one. But the question of whether defensive force is warranted is not equivalent to the factual question of who made the first move. Your right to defend yourself against an aggressor rests on your belief that someone is wrongfully attacking you, but in a state of nature only you are in a position to judge whether you are under

attack, because you need not defer to anyone else. The entitlement to use defensive force is a reflection of the first Ulpian precept, rightful honor. To defer to the judgment of another about whether something is in fact a case of aggression is, again, to allow yourself to be treated as a mere means. If the other in question is an apparent aggressor, the difficulty with failing to defend yourself is clear. You also have an obligation (the second Ulpian precept) to avoid wronging others. The problem is that the two obligations do not form a consistent set. The other person's unilateral judgment must be both something to you via the second Ulpian precept—he thinks he is defending himself, and you must not wrong him—but also nothing to you, via the first—you don't have to defer to his judgment. Only positive law can guarantee a determinate answer to the question of who the aggressor was, because only under positive law can there be an "irreproachable" judge of such matters.

The imperfection of the right to self-defense does not, however, render that right merely provisional, because it is a conclusive authorization to coerce. Your right to repel those who invade the space occupied by your body does not require an omnilateral authorization. It is imperfect because it is not an authorization under universal laws, since any such authorization would have to be a member of a necessarily consistent set. The inconsistency in the right to self-defense in these cases is contingent, depending as it does on a factual question of whether the same or different things will seem "good and right" to different people. The problem, however, is conceptual: the idea of a rightful condition contrasts with "savage violence" because in the former, disputes are resolved by law, and in the latter, by force. How frequently force is used is entirely contingent, but that is exactly the point. Well-disposed and right-loving people might get into fewer disputes, but if so, it is still entirely contingent. You cannot be fully law-abiding without a lawgiver, no matter how "right-loving" you may be.

If rights to external objects of choice are not enforceable, then, as a specific case of this, contractual rights are not enforceable. This has two important implications for innate right in the state of nature. First, as we saw in Chapter 5, consent is a contractual (and so acquired) right, so it is not conclusive in a state of nature. As a result, the idea of consensual interaction is incomplete. Second, no contractual right to enforcement or

protection is itself enforceable. If I am under attack by some third person, it is difficult to know what it would be for me to be either able or entitled to compel you to assist me while the attack is under way. That is, in the absence of assurance with respect to *external* objects of choice, I can have no assurance that you will keep your end of a mutual protection (or even nonaggression) agreement. The only assurance I could have that you would keep your contract to protect me is if I were entitled to a remedy were you to fail to do so, but no enforceable remedy is possible outside of a rightful condition.

The absence of enforceable rights to external objects of choice also means that you can have no remedial right if someone commits a wrong against your person. As a matter of private right, if somebody wrongs you, you are entitled to damages to make good your loss. However, the possibility of damages requires the possibility of conclusive title to whatever it is that will be transferred as damages. Absent such conclusive title, your right cannot be enforced retroactively. Nor can it be enforced prospectively by the prospect of damages. Thus your right to defend yourself is genuine, but if you fail to hinder a hindrance to your own freedom, it cannot be hindered after the fact.

These difficulties for innate right in the state of nature—indeterminacy, lack of conclusive defense or nonaggression agreements, and the impossibility of a remedy in cases of completed wrongs—do not make innate right provisional in the sense of being unenforceable. They do, however, stand in the way of its being what we might call “conclusively conclusive,” that is, forming an integral part of a consistent system of rights. The fundamental feature of all rights is that they are parts of a system of equal freedom under universal law. In a state of nature, the indeterminacy of innate right and the impossibility of a remedy in cases of its violation mean that innate rights do not form a consistent set, which is just another way of saying that they do not, after all, fall under universal law. Although parallel considerations in the case of interacting nations lead Kant only to the conclusion that nations must bring their disputes before a court, in a civil condition the state must have the further power to bring innate right under universal law. Acquired rights can only be conclusive under universal law, and the universality of that law requires that innate rights also fall under universal law. If each individual were left with the power to do

“what seems good and right” with respect to his or her own person, then each person would be entitled to resist with right the state’s omnilateral claim to enforce acquired rights. Instead, the state must claim the power to define the objective standards governing each person’s person, as well as the power to resolve disputes about wrongs against persons in accordance with law that has been laid down in advance. Thus although there is no direct argument from the innate right of humanity to the creation of a civil condition—no civil condition could be mandatory if acquired rights were impossible, because nobody would have standing to force another into one—systematic enforcement of acquired rights generates the state’s authorization to make law with respect to innate right.

V. Conclusion

Kant characterizes the state of nature as a system of private rights without public right. The apparatus of private rights applies to transactions in it, but subject to three defects that make that application merely provisional. Each of the defects reflects difficulties of unilateral action. Objects of choice cannot be acquired without a public authorization of acquisition; private rights cannot be enforced without a public mechanism through which enforcement is authorized by public law; private rights are indeterminate in their application to particulars without a publicly authorized arbiter. Even the innate right of humanity is insecure in such a condition, both because no remedy is possible in case of a completed wrong against a person, and because even the protective right to defend your person against ongoing attack is indeterminate in its application. These problems can only be solved by a form of association capable of making law on behalf of everyone, and authorizing both enforcement and adjudication under law.