Authority and acquisition: Kant on property in the state of nature

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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 that no one would have were it not for this act of mine to establish a right.

- MM 6:255

Introduction

In this chapter, I engage with Kant's theory of property by examining a condition in which he says we fail to have conclusive property rights: the state of nature. The Kantian claim that a state is necessary for enforceable claims of right (including property rights) is now familiar in the literature. However, there is still disagreement over what makes rights inconclusive prior to state entry. Here, I argue against a recent proposal that property rights are inconclusive because individuals lack the authority to acquire property in the state of nature (§2). Instead, property rights are subject to disputes that no individual has the authority to adjudicate and require guarantees of reciprocity that no individual can provide (§3). Prior to setting out these arguments, I explain some of the basic commitments of Kant's political thought (§1).

Two quick notes before moving on. First, my focus will be on the need for the state, and not the way that the state solves the problems that arise in a state of nature. My aim here is to contribute to diagnosing the problem, not to setting out the solution.[1] Second, while the focus of this chapter is property, what I say below will be relevant to the other "acquired rights" in Kant's political philosophy—rights of contract and rights concerning relations of status. We shouldn't assume that there is something distinct about property acquisition that requires we single it out. Each of the three

[1] For discussions of the Kantian solution, see Ripstein, *Force and Freedom* (Harvard 2009); Sinclair 'The Power of Public Positions: Official Roles in Kantian Legitimacy' (2018) *Oxford Studies in Political Philosophy*: 28; Christmas (2021) 'Against Kantian Statism' *The Journal of Politics:* 1721.

classes of acquired rights impose duties on others (for example, the duties to not interfere with the completion of a contract, and to respect parental rights), are equally subject to disagreement, and require assurance.[2]

1. Kant on right

Kant's political philosophy is primarily concerned with the articulation of a system of equal external freedom. It focuses on setting out the ways in which we can (and must) rightfully interact with others. For Kant, property forms an important part of this system. This is because, by acquiring property he takes us to extend our sphere of freedom to cover external objects. Interference with what another owns is thus characterised as an interference with that person's freedom on the Kantian account. This section explains some of Kant's basic political commitments in order to better situate and explain this general characterisation.

Kant's external, relational focus is affirmed in his definition of what he calls the 'moral concept of right'. This concept has to do,

> first, only with the external and indeed practical relation of one person to another, insofar as their actions, as deeds, can have (direct or indirect) influence on each other. But, second, it does not signify the relation of one's choice to the mere wish of another [...] but only a relation to the other's choice [*Willkür*]. Third, in this reciprocal relation of choice no account at all is taken of the matter of choice. (MM 6:230)[3]

Let me expand a bit on this. First, right is concerned with the reciprocal influence of the deeds of distinct individuals. A deed is an action that can be imputed to the agent who performed it (MM 6:223). Right is thus concerned with the relation between the imputable actions of distinct individuals. Second, right only concerns the relation between the choices of each. It takes no account of an agent's wishes. On Kant's theory of action, both choices and wishes result from the human faculty of desire. We can only choose something when we take ourselves to have the means to bring about the object or state of affairs we desire (MM 6:213). When we do not take ourselves to have sufficient means for this task, we can only wish for the object or state of affairs. Since the wishes of one cannot interact with the external actions

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[2] *Pace* Pinheiro Walla, 'Private Property and the Possibility of Consent' (2018) *Kant's Doctrine of Right in the 21st Century* (University of Wales Press): 29.

[3] References to Kant's works refer to volume and page numbers of the Academy text (*Kants gesammelte Schriften*, Berlin: G. Reimer/W. de Gruyter, 1902) as well as abbreviated titles of individual works. Abbreviations used are the following: MM = Metaphysics of Morals, NF = Feyerabend lectures on Natural Right, PP = Toward Perpetual Peace, Rel = Religion within the Bounds of Mere Reason, Refl = Reflections. The *Critique of Pure Reason* is cited according to the standard A/B format.

of another (wishes do not terminate in external action on Kant's account), they are excluded from consideration. Third, right is concerned only with the form of the relation of choice between the agents involved, not the matter of their choice. That is, right is indifferent to the ends that people are pursuing and their reasons for that pursuit. What matters is how the actions of each impact on the actions of others. To sum this up, for Kant right is concerned with the formal, external relation between the imputable actions of distinct individuals.

In order to act consistently with the requirements of right, we must structure our actions in accordance with the Universal Principle of Right (UPR). The UPR states that,

> Any action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law. (MM 6:230)

The UPR requires the compatibility of both one's actions, and the maxims of one's actions, with the external freedom of others.[4] It is a sufficient condition for the rightness of an action that it is compatible with the UPR. Kant also tells us that if an action is incompatible with the UPR (and so it is incompatible with the freedom of all others under a universal law), then it is wrong (MM 6:230-31). This means that acting in accordance with the UPR is both a necessary and a sufficient condition for the rightfulness of an action. Actions that are inconsistent with the UPR are ones that one is not free to perform, and so their performance may be rightfully hindered by others. Thus, you don't wrong someone by coercively enforcing your rights against them. The general constraint imposed by the imperatival form of the UPR (called the 'universal law of right', see MM 6:231) is made more specific by individual rights claims. The actions that an agent is free to perform are determined by the rights of that agent; Kant has a moralised account of external freedom.[5] The rights that can be possessed by that agent are, in turn, limited by the idea of a system of equal external freedom under law. There can be no individual rights claims that are incompatible with such a system.

There is one individual right that Kant says we all possess, and so will form part of any (rightful) system of equal freedom under law: the innate right to freedom. There is only one innate right, Kant tells us, and it belongs to us by virtue of our humanity (or by nature, see MM 6:237). Here is Kant's explanation of this right:

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[4] For a helpful discussion of the requirements of the UPR, see Newhouse 'Two Types of Legal Wrongdoing' (2016) *Legal Theory*: 59.

[5] On moralised accounts of freedom, see Bader 'Moralised Conceptions of Liberty' (2018) *Oxford Handbook of Freedom*, OUP: 59; Cohen, *Self-Ownership, Freedom, and Equality* (Cambridge 1995).

> *Freedom* (independence from being constrained by another's necessitating choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity. (MM 6:237)

Kant here characterises the innate right to freedom in terms of independence (*Unabhängingkeit*) from the necessitating choice of another.[6] It protects those actions that can coexist with the freedom of every other under universal law. This should be understood as a negative claim against others that one not be interfered with when performing permissible actions. The innate right does not protect against every interference with permissible actions. It only protects against *wrongful* interference with those actions. A simple example[7] will help to illustrate this: if you go to the shop in order to buy a pint of milk, only to find that I have taken the last one, you are not wronged by me even though there is a sense in which I have interfered with your action. This is because my interference with your action isn't wrongful. You do not have a claim against me, stemming from your innate right, that I not change the circumstances in which you act such that you can no longer achieve your goal.

One of the basic entitlements provided by the innate right is a claim that others not wrongfully interfere with your body.[8] Kant views our entitlement to our body as analytically connected to the moral status of those who are subject to the universal principle of right (see MM 6:249-250). This means that you have normative possession of your body without the need for any prior act establishing this possession (though in the state of nature this is provisional, see §3.2). We do not acquire our bodies in the way in which we acquire objects that are only contingently related to us. (What would such an acquisition look like?) Rather we have a right to bodily integrity by virtue of the innate right to freedom.

The innate right also entitles us to non-interference with external objects that we are (rightfully) holding. This use is called 'empirical possession' (see MM 6:249). Let's

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[6] There are (at least) two notions of 'independence' in Kant's political philosophy, which correspond to two different terms that he uses: *Unabhängingkeit* and *Selbstständigkeit*. The latter of these is primarily used to distinguish active from passive citizens and should not be identified with innate independence. On this distinction see: Davies 'Kant on Civil Self-sufficiency' (2021) *Archiv Für Geschichte der Philosophie*: 1; Dierksmeier (2002) 'Kant on 'Selbständigkeit'' *Netherlands Journal of Legal Philosophy:* 49; Shell, 'Kant on Citizenship, Society and Redistribution (2016) *Kant and Social Policies,* Palgrave Macmillan: 1.

[7] Due to Ripstein [n.1] 101.

[8] For discussions of the innate right and bodily integrity, see Pallikkathayil, 'Persons and Bodies' (2017) *Freedom and Force: Essays on Kant's Legal Theory*, Oxford: 35; Varden, *Sex, Love, & Gender: A Kantian Theory* (Oxford 2020). Flikschuh is a notable dissenter from the view that the innate right includes bodily rights ('A Regime of Equal Private Freedom? Individual Rights and Public Law in Ripstein's Force and Freedom' (2017) *Freedom and Force: Essays on Kant's Legal Theory*, Palgrave Macmillan: 55).

say I snatch an apple from your hand. If we are only considering empirical possession, the wrong done to you by my action has to be explained by appeal to your innate right. This is because in order to take the apple from you I must interfere with your body. Empirical possession does not constitute a property right in the object being held. To see this, compare the case in which I snatch the apple from your hand with a case in which I interfere with what you have *without* interfering with your body. For example, imagine that you have a cup of water, and that I have a straw that allows me to drink that water without touching you (or the cup). If I use my straw, then have I wrongfully interfered with your empirical possession on Kant's view? No, because my interference with the water is not also an interference with your body, and interfering with your body is a necessary condition for violating empirical possession.[9]

An external object of choice rightfully belongs to someone when they stand in a relation to it such that interference with that object would be wrongful without their permission even if that interference does not affect their body.[10] Kant calls this 'noumenal possession'. There are three kinds of external objects over which we can have noumenal possession on Kant's view (see MM 6:247): "a (corporeal) *thing* external to me" (property rights), "another's *choice* to perform a specific deed" (contract rights), and "another's *status* in relation to me" (status rights). As examples of the latter Kant includes: the rights of a parent over a child, a husband over a wife, and a master over a servant. In contrast to the one innate right, property, contract and status rights must all be acquired through some act.

The question for Kant, when it comes to these acquired rights, is: how is a relation of noumenal possession possible? How can I be so connected to an external object of choice such that interference with it without my permission would wrong me even when I am not holding it? Briefly, with many details and complications set aside, Kant claims that there could be no maxim consistent with principles of right requiring that objects of choice remain unowned even when the acquisition of those objects would not violate the freedom of others. To turn such a maxim into a law would be "a contradiction of outer freedom with itself" (MM 6:246), as it would prohibit an action on grounds other than those of equal freedom. Kant's argument is that the denial of all claims of acquisition would amount to a kind of practical

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[9] Kant says, "the proposition about empirical possession in conformity with rights does not go beyond the right of a person with regard *to himself*" (MM 6:250, my emphasis). See Penner for a related discussion of the austerity of Kant's innate right (*Property Rights: A Re-Examination* (Oxford 2020): ch.8). It is worth noting that, in order to make sense of the example above, we need to specify that a person only counts as holding an object if interference with that object would also count as an interference with their body. You do not count as holding the water in the cup in the above example. You are only holding the cup itself (or, if they are separable, the parts of the cup you are touching).
[10] See MM 6:249: "something external is mine if I would be wronged by being disturbed in my use of it *even though I am not in possession of it* (not holding the object)."

contradiction.[11] However, that it must be (normatively) possible for us to acquire property does not yet tell us about the conditions under which we are entitled to do so. Indeed, Kant tells us that it is only in a properly constituted state (a rightful condition) that we have conclusive possession of external objects of choice. In a state of nature, our possession is merely *provisionally rightful* (MM 6:256-57). There is significant disagreement in the Kantian literature over the reasons why possession is declared merely provisional in the state of nature. I turn to this in the next two sections.

2. Property acquisition, reciprocity, and authority

In this section, I discuss a recent argument for the claim that property acquisition is impermissible in the state of nature on Kant's account put forward by Rafeeq Hasan and Martin Stone. This argument contributes to an existing literature on the 'problem of unilateral choice'. Those who endorse this problem can broadly be characterised as holding that acquisition of external objects of choice in the state of nature—in particular, property—constitutes a violation of the freedom of all others due to the fact that it unilaterally imposes duties on those others.[12] In endorsing this position, proponents of the problem of unilateral choice seek (at least in part) to explain Kant's claim that the state is necessary for property rights to be conclusive.

Hasan and Stone's version of this argument focuses on the claim that the innate right entitles us to innate equality, understood in terms of not being "bound by others to more than one can in turn bind them" (MM 6:237-38). Acquisition disrupts this equality. Whereas prior to any given act of acquisition, "each of us has just what the other has",[13] following an act of acquisition the person who has acquired something has bound another in a way that they are not themselves bound—i.e., they now have a right that the other lacks. Hasan and Stone seek to clarify the problematic status of property acquisition by comparing it to a right that is non-contingent and 'internal': the right to occupy space. Kant says that this right follows from the innate right. It is not an entitlement to acquire any specific piece of land,

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[11] For relevant discussions of Kant's argument for the necessity of property, see Byrd and Hruschka, *Kant's Doctrine of Right: a commentary* (Cambridge 2010): chs. 4-5; Messina, 'The Postulate of Private Right and Kant's Semi-Historical Principles of Property' (2021) *British Journal for the History of Philosophy*.

[12] The discussion in what follows should not be taken to represent all the ways of understanding the problem of unilateral choice. Hasan and Stone do, however, give a particularly well worked out articulation of the problem that builds on prior literature. It is for that reason that I focus on their account. For other discussions, see: Brudner 'Private Law and Kantian Right' (2011) *University of Toronto Law Journal*: 279; Messina, 'Kant's Provisionality Thesis' (2019) *Kantian Review*: 439; Ripstein (n1.), Stilz, *Liberal Loyalty: Freedom Obligation and the State* (Princeton 2011). For further arguments against reading this problem into Kant, see Davies 'Kant on Welfare' (2020) *Kantian Review*: 1.

[13] Hasan and Stone, `What is Provisional Right?' (2022) *Philosophical Review*: 51.

only to occupy that space we find ourselves in through no fault of our own. There are two salient points of contrast between this right and property rights that Hasan and Stone emphasise. The first is that, in the case of the right to occupy space, our rights are symmetrical. You are bound to exclude me from the place you are standing in exactly the same way as I am entitled to exclude you from the place I am standing. That we are standing in different places, or that we can move around, does not alter the symmetry of our claims against each other. In contrast, the acquisition of property leads to a situation in which our rights are not symmetrical. Once you acquire that pinecone, I am bound in a way that you are not. Second, occupying space does not impose any new duty on all others. When I move from one place to another, the duty you have to allow me to occupy space does not change. To use a phrase from Hasan and Stone, the right to occupy space is not "juridically innovative".[14] The opposite is the case with duties following from acquisition. When I acquire something, I create a new duty for you that would not exist were it not for my act of acquisition.

With this contrast in mind, Hasan and Stone claim that acquisition disrupts innate equality both (i) because it disrupts the symmetry of our rights and (ii) because it imposes new duties on others. Since innate equality forms part of the foundational right of Kant's political philosophy, no supposed right that contradicts it can be a right at all (see MM 6:238). For this reason, on their account, there can be no rightful acquisition prior to state entry.[15] Here are two objections to this account.

(i) Hasan and Stone claim that reciprocity of obligation requires that we stand in *symmetrical* relations of obligation. Their view seems to be that to be reciprocally bound by a particular duty, our individual obligations under that duty must be the same.[16] This is too strong. Being reciprocally bound by the same duty does not entail that the content of our specific obligations will be identical. For example, the application of the rule "finders keepers" may result in my acquisition of a pine cone and your acquisition of a fossil. That our acquisitive acts resulted in different obligations does not mean that we were not reciprocally bound. Reciprocity should not be understood as each of us having the same obligations, but rather as each of us having the same obligations *if we find ourselves in the same circumstances*. In cases in which our circumstances are different, so too is the content of our obligations. Consider an analogy: we are all duty bound to keep our promises, but this does not mean that the content of our promissory obligations is symmetrical. This is

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[14] Hasan and Stone (n.13): 71.

[15] Their view is more complicated than this, since they argue that the state of nature is a mere idea in Kant's work, and that it is used as part of a stepwise argument setting out the nature of right. Due to space restraints, I must leave this interesting proposal aside.

[16] On Kant on the relation between duty and obligation, see: Timmermann 'Kantian Dilemmas? Moral Conflict in Kant's Ethical Theory' (2013) *Archiv für Geschichte der Philosophie*: 36.

explained by the fact that each of us makes different promises. Property acquisition works the same way. Reciprocity of obligation in this case should not be understood in terms symmetry in the content of the obligation, but in terms of the duty to respect whatever property the other has (rightfully) acquired.

(ii) Hasan and Stone may object to this on the grounds that it is precisely the putting-under-obligation of others that is problematic about property acquisition. By acquiring property, I (at least partly) determine what you can do. But, according to their reading of the innate right, I do not have the authority to determine your actions in this way. Here is a problem for this: recall that the mere restriction of the number of options available to you on Kant's account does not, on its own, count as a restriction of your freedom. Your freedom is only restricted when you are deprived of an option to which you have an entitlement. But, no one has any entitlement to external objects of choice prior to having them in their possession. From this it seems to follow that no one is done any wrong by having their choices restricted by the acquisition of others. Such a restriction does not violate any right that another has. For this reason, my acquisition of a previously unowned object looks a lot like the situation, mentioned above, in which I get to the shop before you to buy the last pint of milk. I haven't wronged you by doing this, I've merely changed the circumstances in which you now act.[17]

I believe these points speak against Hasan and Stone's account of the wrongness of acquisition in the state of nature. Acquisition does not violate reciprocity or disrupt innate equality in the way they suggest.[18] In the next section I set out the two problems that I take to be endemic to the Kantian state of nature: the problem of disagreement and the problem of assurance.

3. The need for the state

Imagine two people, *A* and *B*, in a highly idealised state of nature. In this condition both agree that some acts of acquisition are to be thought of as reasonable and other acts are to be thought of as unreasonable. Reasonable acts of acquisition are those that are not greedy or wasteful and that respect the prior such acts of others. Unreasonable acts don't fit this characterisation. To be more concrete, for the

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[17] Cf. Sage, 'Original Acquisition and Unilateralism: Kant, Hegel, and Corrective Justice' (2012) *Canadian Journal of Law and Jurisprudence*: 119.

[18] Due to space constraints, I have not dealt with the textual evidence provided by Hasan and Stone for their position. Most notably, Kant's claim that, "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" (MM 6:255-56). I will simply note here that this passage occurs in a discussion of the problem of equal *assurance* that others respect my right, and it does not conclusively speak in favour of ascribing the problem of unilateral choice to Kant.

purposes of this example, we can suppose that Lockean principles of just acquisition are true.[19] We can suppose further that both *A* and *B* have direct access to those principles, are symmetrically placed to enforce their own reasonable acts of acquisition, and can police acts of unreasonable acquisition by the other. In this highly artificial situation *A* and *B* do not violate each other's equal moral status, even when they perform acts of unilateral acquisition. Given that both *A* and *B* have access to the true principles of just acquisition and given their equal ability to defend themselves and police the actions of the other, their unilateral acts do not constitute a wrongful restriction of the freedom of choice of the other.

This judgement is supported by a claim Kant makes in his lectures on natural right. He states that perfect insight into the requirements of justice and a natural disposition to refrain from harming others would make it the case that a state is not morally necessary: "If I assume that the nature of a human being is just, i.e. that such a human being would not have the intention to wrong anyone, if I posit that all human beings would have the same insight into right and the same good will, then a *status civilis* would not be necessary" (NF 27:1381). In my example above, I have substituted the robust intention not to harm others with the capacity of each to enforce their own rights but the result is much the same (namely, assurance that one's rights will be upheld). This passage is important because it indicates that the combination of knowledge of both the relevant principles and good dispositions of others combined with the assurance that those principles will not be violated by oneself or others would lead to the state not being necessary. If the state isn't necessary, that means there is no problem left in such a situation for the state to solve. This further indicates that it is not unilateral acquisition itself that Kant is worried about. If he had worried about unilateral acquisition, then perfect knowledge and assurance would be insufficient for ridding us of the need of a state.[20]

By looking at the ways in which an actual state of nature would deviate from this highly idealised version, we can see the ways in which property rights are problematic on the Kantian view absent a state.

3.1 Disagreement

It is not true that we all have access to Lockean principles of just acquisition (nor is it correct to say that those principle are true, at least from the Kantian perspective).

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[19] This setup is modified from Sinclair (n.1).

[20] These lectures were delivered 13 years before the publication of the *Metaphysics of Morals* and some features of Kant's political thinking changed in that time. Nevertheless, this particular claim is consistent with what Kant tells us in his later work. This suggests that his concerns regarding the state of nature are with disagreement and enforcement but not unilateral choice, even at the time of the *Metaphysics of Morals*. Though it would be a stretch to think that the passage above speaks *definitively* in favour of this view.

For that reason, we might think that one problem that arises with unilateral acquisition is that what counts as a reasonable act of acquisition is subject to dispute. *A* might disagree over whether *B*'s taking some particular object is justified because they might disagree about what counts as reasonable acquisition. They might also disagree about what was acquired by any specific act of acquisition. This indicates that while we might agree that two people who are equally positioned to make reasonable changes to the rights and duties of the other is permissible, we might still worry about how to determine what counts as a reasonable change. This might not initially seem problematic if we also think that one of the two parties to the disagreement is correct in their interpretation. However, the assertion of one's own interpretation of right over the interpretation of another is itself an assertion of authority that is incompatible with the equal moral status of each. There is no way to resolve disagreements compatible with this equal moral status. Let us explore this in more detail.

When Kant speaks about the problem of disagreement, he casts it in terms of the state of nature as a condition in which many different opinions about right are possible. For example, he tell us,

> However well disposed and right-loving human beings might be, it still lies *a priori* in the rational idea of such a condition (one that is not rightful) that before a public lawful condition is established individual human beings, peoples and states can never be secure against violence from one another, since each has a right to do what seems good and right to it and not to be dependent upon another's opinion about this. (MM 6:312; see also DMM 23:278-79, NF 27:1381)

In this passage, Kant claims that even if people were right-loving, they might still disagree about the requirements of right. That is, even those who want to perform rightful actions may disagree about what those actions are. Moreover, no person is required to heed the decision of another in the state of nature; each can follow their own judgement of what is good and right. When disagreement arises between individuals in the state of nature, the judgement by one party to the disagreement that they are in the right constitutes an assertion of authority over the other. This is because the judgement requires the assumption that the person making it has access to the relevant empirical and normative facts that the other lacks. Since it cannot be the case that both are equally situated to make such a judgement—it is not the case that both can tell the other to interpret the matter in conformity with their own interpretation—the possibility of disagreement raises the problem of equal authority and thus equal moral status in the state of nature.

It is important to note, given what I have argued above, that the concern we have with disagreement is not a concern with the imposition of duties themselves, but

rather with the adjudication of disputes about the existence or scope of some particular duty. We can have disagreements of this kind without also thinking that all unilateral acquisition is off the table. ("I agree that you've acquired *some* land, just not the land right next to my fence!" or "I claimed this first, *you* arrived later!"). So, one problem that will arise in the context of acquisition of private property in the state of nature is disagreement about the bounds of each person's rights. Since such disagreement inevitably raises claims of authority, it seems that the resolution of those claims by the individuals cannot be compatible with their equal moral status. Again, this is not a problem with *acquisition*, but with the scope of the rights that follow from it.

Some commentators believe that the state of nature is one in which different opinions about right are possible because rights are necessarily indeterminate in that state. Rather than speaking of a problem of disagreement, they speak of a problem of indeterminacy.[21] Here is Stilz on the problem of indeterminacy:

> [While] a principle of equal freedom provides us some information about what just property distributions should look like, the principle's content is underspecified, and therefore cannot be directly applied [...]. Many possible systems of property—collective allocation, market socialism, unfettered private ownership—are potentially consistent with that sense of equal freedom. And under each one of these many possible systems, there will again be many possible particular rules consistent with everyone's freedom.[22]

The idea here is that principles of right (Stilz is primarily interested in the innate right) are insufficient to determine the bounds of rightful property acquisition. Since many different systems of right are possible, and each person's entitlements under those systems would differ, there simply isn't a fact of the matter when it comes to our possible acquired rights in the state of nature.

What should we say about this way of understanding the grounds of disagreement? I will admit that I am unsure what it would look like for individuals to acquire external objects of choice in the state of nature with different systems of property in mind. On the view I prefer, the acquisition of external objects of choice does not rely on any explicit (or implicit) appeal to a system of property into which the individual act of acquisition is integrated. Rather, we simply take unowned objects as our own and make use of them. Perhaps we work with others and jointly take something into our possession or institute a form of communal ownership. Different people and groups may do this in different ways, and that is consistent with what Kant tells us. What is important for Kant is that, when we come to enter

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[21] See Mulholland, *Kant's System of Rights* (Columbia 1990); Ripstein (n.1); Stilz (n.12).
[22] Stilz (n.12): 40.

a state, these various acts of acquisition are taken seriously as real acquisition (see MM 6:264). The state cannot simply wipe the slate clean.[23] Thus, it is not that we acquire with specific systems of property in mind, but that the state must create a system of property that (at least to a large extent) takes our current acquisition into account.

There are also textual considerations that speak against the view that disagreement can be explained by indeterminacy. Kant characterises natural right as "that [which] can be cognised *a priori* by everyone's reason" (MM 6:296-97). So, we might think that while it is possible that we do in fact disagree about whether I am entitled to some particular external object of choice, there can be no disagreement in principle. That is, we may think that there can be no *justified* disagreement between individuals. If everyone did in fact cognise right a priori, there would be no scope for disagreement at all. Just think back to the passage from Kant's lectures in which he says that perfect knowledge and robustly good intentions would make the state unnecessary. Perfect insight into underspecified principles does not rid us of the need for a state; the state would still be necessary for making claims of right determinate. Moreover, not all relevant disagreements concern the scope and application of abstract principles of right. We may also disagree about the relevant empirical facts that are being subsumed under those principles. For example, we may agree that the general rule for acquisition of land is "*prior temper, potior iure*", but disagree about who arrived first. This is not disagreement about a general principle, or about the application of that principle to a specific case. Rather, it is disagreement about an empirical fact relevant to the claim of right. Since there will be a fact of the matter about who arrived first, this disagreement cannot stem from indeterminacy.

Nevertheless, a worry remains. This response appears to eliminate the philosophical significance of disagreement, thus rendering it puzzling why Kant would have characterised the state of nature as a condition in which disagreement is possible. If disagreement does not arise due to any indeterminacy, then one (or both) of the parties to the disagreement could simply be wrong in their judgement. There would be nothing philosophically interesting about the disagreement itself; it would only indicate that one person has not understood a general principle of right, its application to the particular case, or a relevant empirical fact.

Instead we should go back to what has been said above. The philosophical interest in disagreement is a result of the fact that no disagreement can be resolved in the state of nature without one party asserting some authority over the other. Considered first-personally, allowing another individual to make a decision about your rights is to acknowledge that they have authority over you in a way that cannot

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[23] For a helpful discussion of Kant and 'historical principles' of property, see Messina (n.11).

be reciprocated, and this is ruled out by the innate right to freedom. Thus, while acquisition of property is possible on Kant's account, disagreement creates the need for a state that can arbitrate disputes in a manner consistent with the equal external freedom of all.

3.2 Assurance

It is also not true that each person in the state of nature is equally able to defend what they have acquired and police the actions of others. For that reason, we might also worry that some of the work being done in thinking that unilateral acquisition is problematic in the state of nature is that certain non-moral capacities (in particular strength) will play a role in each person's ability to either (i) maintain what they have acquired or (ii) stop others from acquiring more than their fair share or otherwise act unreasonably. We do not stand in rightful relations to each other when some are de facto unable to maintain property due to non-moral capacities possessed by others. This speaks to a more general problem. For Kant, rights relations must be reciprocal. No person is bound to respect the rights of others if they lack a guarantee that those others will respect their rights. Cases of asymmetries in strength in the state of nature are cases in which this guarantee is perspicuously lacking. On Kant's view, a guarantee of the relevant kind requires a third party that assures us that our rights will be respected, even in cases of roughly equal strength.

Kant characterises of the state of nature as a state of war.[24] He says, for example, that "the juridical state of nature is a state of war of every human being against every other" (Rel 6:96-97). And that the "non-rightful condition is a condition of war (of the right of the stronger), even if it is not a condition of actual war and actual attacks being constantly made" (MM 6:344; see also CPR A752/B780, PP 8:348-49, Refl 7939 19:560-61). The reason that the state of nature is a state of war is that, lacking a guarantee that rights will be respected, each may legitimately view every other as a threat. A state of war is not necessarily a state of violence. It is merely a state in which pre-emptive violence is permissible as a means of responding to a threat (see Rel 6:97n). On this Kant says,

> A human being [...] in a mere state of nature denies me this assurance and already wrongs me just by being near me in this condition, even if not actively (*facto*) yet by the lawlessness of his condition (*state iniusto*), by which he constantly threatens me. (PP 8:349n)

[24] This section is indebted to Bader, 'Kant and the problem of assurance' (n.d.). However, Bader believes that the disagreement problem is a part of the assurance problem whereas I believe that they are distinct. On the assurance problem, see also: Koltonski 'Kant and the Problem of Unequal Enforcement of Law (2021) *Journal of Ethics and Social Philosophy*: 188; Pippin 'Dividing and Deriving in Kant's *Rechtslehre*' (1999) *Metaphysische Anfangsgründe Der Rechtslehre,* Akademie Verlag: 63.

By virtue of the fact that no person is able to assure any other that they will respect that other's rights, merely interacting with another constitutes a threat.[25] Moreover, as a result of the fact that each person is a threat to the rights of those with whom they interact, each person is liable to coercion with respect to their own rights. The result of this is that no one in the state of nature needs to respect the rights of those with whom they interact; rights claims in such a state are invalid due to a necessary condition for such claims being absent (namely, the reciprocity condition).[26] Here is Kant again,

> I am [...] not under obligation to every other 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 [...] [It] is only in a civil condition that something external can be mine or yours. (MM 6:255-56)
>
> 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. (MM 6:307; see also Refl 7732 19:502)

Which rights lose their validity when one constitutes a threat to others? Two options are available to us when answering this question. Either we can hold that all rights lose their validity in the state of nature, or we can hold that only acquired rights lose their validity. The answer to this question is important. It tells us which rights are doing the work in generating Kant's claim that the state is morally necessary.

According to the first passage quoted above, it is only one's acquired rights that lose their validity in the state of nature (see also MM 6:313). This is the view advocated by Ripstein.[27] For Ripstein, the assurance problem is generated by the fact that, absent any assurance that one's own rights will be respected, any respect for the rights of others is a violation of one's own innate independence (and thus conflicts

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[25] We do not constitute a threat to those with whom we do not interact, and this is why the duty that we have in the state of nature is disjunctive: either stop interacting with others *or* enter into a civil condition in which the rights of each are secure (see MM 6:237). This is also why Kant says in Perpetual Peace that we can *either* force others to enter into a civil condition with us *or* we can force them to "leave [our] neighbourhood" (PP 8:349n).

[26] The passage quoted above from *Perpetual Peace* does not sit perfectly with this interpretation. This is because Kant says in that passage that another person *wrongs* me just by being near me in the state of nature, but this presupposes that my right can be violated. We can assuage the worry caused by this passage partly by noting that the claim is not repeated elsewhere. The passages in which Kant says that we cannot wrong each other in the state of nature far outnumber those in which he says the opposite. Furthermore, we might think that Kant is speaking from the perspective of a given individual in the state of nature here. Thought of this way, the passage would be providing a first-personal justification of the use of pre-emptive force—'she has not assured me that she will respect my rights, so I am entitled to the use of pre-emptive force'. However, since each person is entitled to employ the same reasoning from her own perspective, we get the assurance problem.

[27] (n.1): 161–63, 180.

with one's duties to oneself). Lacking the guarantee of reciprocity, respect for the acquired rights of another merely amounts to allowing the choice of a particular person (and not a universal law) to determine what one can do. Moreover, any enforcement of an acquired right in the state of nature is a violation of the innate independence of the person being coerced (and thus conflicts with the duty not to wrong others). This is because, lacking a guarantee that rights will be respected, no one is obliged to refrain from interfering with the property of others. But, because no one is obliged to refrain from interfering, coercion to stop such an interference is wrong. The innate right is not made invalid by the assurance problem, Ripstein claims, because, "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".[28] My entitlement to defend what is innately mine is consistent with my obligation not to interfere with what is innately yours. For this reason, says Ripstein, the assurance problem does not affect the innate right.

The second passage quoted above says that, lacking assurance, no one is bound to refrain from encroaching on what another possesses. It doesn't say that we are only concerned with external possessions (acquired rights), but merely makes a general claim (see also MM 6:242 and MM 6:305-06). Should we read the restriction of the assurance problem to acquired rights present in the first passage into the second passage (and others that make general claims)? That is, should we believe that only acquired rights lose their validity in the state of nature? I think not. The logic of the assurance problem is not restricted to acquired rights.[29] If, as a result of their interaction, one person poses a threat to another, there is no principled reason why that threat should not also concern the innate right of each. Ripstein claims that the "innate right does not give anyone a right to interfere with the person of another except to protect his or her own person".[30] This is correct. It also tells us why Ripstein ought to conclude that the innate right is made invalid by the assurance problem. In particular, a pre-emptive response to a threat to one's body is a circumstance in which a person may interfere with the body of another in order to protect herself. As Kant tells us, "No one [...] need wait until he has learned by bitter experience of the other's contrary disposition; for what should bind him to wait till he has suffered a loss before he becomes prudent?" (MM 6:307). Just as we have no assurance that others will respect our acquired rights, so too we have no assurance that they will respect our innate right. So, the problem generated by the fact that we lack a guarantee that others will respect our rights applies equally well to the innate

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[28] (n1.): 161.
[29] Cf. Pallikkathayil (n.8).
[30] (n1.): 162.

right as to our acquired rights. For this reason, we should think of all rights as lacking validity in the state of nature, not just our rights to external objects of choice.

Conclusion

In this chapter, my aim has been to provide a perspective on Kant's theory of property by looking at the state of nature, a condition in which no property rights are enforceable. I have argued against a recent articulation of the 'problem of unilateral choice' put forward by Hasan and Stone. On the reading of Kant I prefer, there are two problems in the state of nature that make the state necessary: the problem of disagreement and the problem of assurance. The problem of disagreement arises because there is no way to resolve disagreements about rights in the state of nature in a way that is compatible with equal authority. The problem of assurance arises because, Kant claims, we are not bound to respect the rights of those who do not give us a guarantee that they will respect our rights, but no individual is in the position to make such a guarantee. By merely setting out the problems that arise when thinking about the possibility of rightful property relations, I have of course left out Kant's solution to these problems: the state. How, exactly, state institutions are meant to address problems of unequal authority and assurance is a vexed issue, over which much disagreement is possible. My hope is that, by seeking to clarify the problems faced in the state of nature, this chapter will also contribute—though only indirectly—to our thinking about the Kantian state.