

States claim to be entitled to tell you what to do, and to force you to do as you are told. This dual claim to authority and coercion is familiar in the context of the criminal law. It claims to apply even, perhaps especially, to those who reject its claims. But it is also a familiar feature of the tax code, and the law of private remedies. If I owe you (or the IRS) money, the law says I must pay, where “must” here means something like “on pain of having my assets attached, or wages garnished.” And that “must” applies to me no matter what I happen to think about it.

The dominant tradition in political philosophy over the past century and a half has contended, implicitly or explicitly, that the state’s claim to authority takes priority over the claim to coerce. As a result, this tradition contends that the primary normative question of political philosophy concerns the authority of society over the individual. Thus, the principal task of political philosophy is to define the moral limits of the state’s authority. Questions about coercion are regarded as secondary, and as governed by additional considerations, about such matters as efficacy or fair opportunities to avoid sanction.

My aim in this article is to propose and defend a different view about the relation between authority and coercion, according to which the state’s claim to authority is inseparable from the rationale for coercion. Instead of asking what people ought to do, or what the state ought to tell them to do, and then asking which of those things they may be forced to do, we ask when the use of force is legitimate. On the view I will defend

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here, both the use of official force and the claim of states to tell people what to do are justified because, in their absence, arbitrary individual force prevails, even if people act in good faith. I will present my account, and offer support for it, through a discussion of Kant's views on the matter. Kant's views about coercion have, I think, been widely misunderstood, no doubt in part because they have been assimilated to the dominant tradition. In order to highlight their distinctiveness, then, I will begin by saying something about the dominant view, before turning to Kant's approach.

### I. THE SANCTION THEORY

For the tradition that I will regard as dominant, the fundamental normative question of political philosophy concerns the range of laws that states are entitled to make; the secondary one concerns the question of whether sanctions can be used to achieve compliance. States do not always issue directives to citizens; the state might, for example, require my employer to deduct tax from my income, or instruct the relevant officials to quarantine people with communicable diseases. Nonetheless, the key normative question is whether the state can demand that these things be done, and whether the state's saying so is enough to obligate those so directed to carry out the directions. A prominent version of this view receives a forceful statement by Mill in his discussion of justice in his essay *Utilitarianism*. Mill there writes, "we do not call anything wrong unless we mean to imply that a person ought to be punished in some way or other for doing it; if not by law by the opinion of his fellow creatures; if not by opinion by the reproaches of his own conscience." For Mill, we only attach sanctions to a proper subset of the things that people should not do, identified by the seriousness of the harm those acts cause others. So political philosophy is concerned with those moral demands a state can make and back with threats. Mill goes on to add "reasons of prudence, or the interests of other people, may militate against actually expecting it; but the person himself, it is clearly understood, would not be entitled to complain."<sup>1</sup> Mill himself develops this

1. John Stuart Mill, *Utilitarianism*, in *Essays on Ethics, Religion and Society: Collected Works of John Stuart Mill*, Vol. 10, ed. J.M. Robson (Toronto: University of Toronto Press, 1969), p. 245.

picture in detail in his essay *On Liberty*, where he looks to both the likely consequences and interests of other people that militate against coercing people for their own good.

For the tradition from which I have selected Mill as spokesman, coercion has two key features. The first of these is that it interferes with a person's liberty, and does so by imposing a cost on that person that he or she would not otherwise have borne. The second is that it is extrinsic to the wrong that it is supposed to address.<sup>2</sup> Let me explain these two features more carefully. The basic idea of the first is that coercion is to be identified with the deliberate setting back of a person's interests in order to shape his or her behavior. The second is perhaps more familiar. The basic idea is that a person's interests are set back in order to accomplish something, and that setting back those interests is an effective way of accomplishing that thing. The person who steals something gets locked up for a few years, so that he, and others like him, will not be tempted to steal.

Others, less sympathetic to Mill's overall utilitarianism, nonetheless share the basic picture that he put forward. Questions about coercion are to be answered by considering the potential costs of giving a certain type of power to the state. For example, in his monumental discussion of the moral limits of the criminal law, Joel Feinberg considers a series of questions about the legitimate limits of coercive prohibition of things that are in their own right potentially troubling. Feinberg shares Mill's distrust of the state, but not his utilitarianism, or his distrust of the concept of a right. Again, from a very different perspective, G. A. Cohen, who shares neither Mill's utilitarianism nor his liberalism, argues, contra Rawls,<sup>3</sup> that political philosophy is not essentially concerned with the coercive structure of society, since he contends that the coercive structure of a state makes relatively little difference to a person's comparative life prospects.<sup>4</sup> But if he wants to move away from an emphasis on

2. For another example, see Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), pp. 148–49.

3. For a different account of the place of coercion in Rawls's thought, see Michael Blake, "Distributive Justice, State Coercion, and Autonomy," *Philosophy & Public Affairs* 30 (2002): 257–96.

4. G.A. Cohen, *If You're an Egalitarian, How Come You're So Rich?* (Cambridge, Mass.: Harvard University Press, 2000), pp. 134–48; Joel Feinberg, *The Moral Limits of the Criminal Law*, 4 Vols. (New York: Oxford University Press, 1985–1988).

coercion, Cohen plainly supposes that coercion is to be understood in just the terms in which Mill suggests it is to be understood, that is, in terms of sanctions.

For those who accept Mill's way of characterizing coercion in terms of sanctions, the idea that law or the state is essentially connected to coercion is an easy target for a familiar line of objection, made prominent by H.L.A. Hart.<sup>5</sup> According to Hart, sanctions do not lie at the heart of any adequate conception of law, because the concept of a rule, the violation of which invites sanction, is conceptually prior to the concept of a sanction, and cannot be reduced to it. Instead, any adequate account of law must begin with the concept of a rule or norm. On Hart's understanding, law is a special sort of instrument, which shapes social behavior by formulating rules, and, where it is fair and effective to do so, backs those rules with sanctions.

But Mill's approach faces a serious difficulty insofar as it seeks to explain the legitimate use of force. The problem is that, once coercion is understood as secondary, it is remarkably difficult to show that it is warranted. The obvious, perhaps only, available strategy is to begin by developing an account of what people ought to do, and then go on to show that, in the circumstances in question, it is acceptable to force people to do as they ought. The difficulty is serious because almost no one is prepared to accept that, as a general matter, people may be forced to do what they ought to do, just because something important is at stake. Yet much political philosophy seems to move in precisely this pattern: some significant moral requirement is identified, and shown to be particularly important, and from that it is concluded that the requirement in question may be enforced. People ought, for example, to respond to the needs of strangers, and so the tax system is justified in exacting resources from them, by force if necessary, in order to get them to do as they should. The dominant contemporary version of the Millian strategy is more constrained than this, and limits the acceptable use of force to those situations in which what people ought to do is a matter of justice, so that, for example, it is a matter of justice that people bear their fair share of the burdens of social cooperation. Yet this narrower strategy, while it makes progress in limiting enforceable demands to the

5. See H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1962), pp. 20–25.

demands of justice, does not, at least on its own, explain why those demands should be enforceable. Indeed, as A. John Simmons has argued, such an approach opens up a gap between justification, that is, a defense of the morality of the claims that states make, and legitimacy, that is, the authorization to enforce those claims coercively.<sup>6</sup> Simmons himself recommends a Lockean approach to these questions, insisting that coercion is only justified when it has been consented to. Rather than exploring this Lockean solution, I want to offer an alternative, Kantian approach, to the question of the use of force.

## II. EXTERNAL FREEDOM AND COERCION

My aim in this article is, as I said, to argue that Mill's approach to the question of coercion is the wrong place to start in political philosophy. I want to suggest instead that the appropriate starting point for political philosophy concerns the way in which private people interact. This is not the moral philosopher's familiar question of how people *ought* to treat each other, but the distinctively political question of how they may legitimately be *forced* to treat each other. But it is not, at least in the first instance, a question about force or coercion in the sense to which Mill has drawn so much attention. I will argue that legitimate authority starts from the question of how private parties may treat each other, and is always traceable to it.

A secondary aim of the article is to suggest that, as well as having the wrong conception of the problem which political philosophy is supposed to address, the tradition for which Mill here speaks has the wrong conception of coercion. An ancillary aim, related to the second, is to show that this conception of coercion is related to a widespread misunderstanding of the significance to political philosophy of choice and voluntary action. Choice and voluntariness are extremely important, but are only important within a certain context.

In order to make good on my claim, I will offer an alternative account of consent, coercion and authority, an account that I will claim to find in Kant's *Doctrine of Right*. I will begin by sketching, albeit too briefly, the way in which Kant supposes that coercion is always at issue in the

6. See A. John Simmons, "Justification and Legitimacy" in his *Justification and Legitimacy* (Cambridge: Cambridge University Press, 2001), pp. 122–57.

ways in which people interact. So too is justice, and the relation between coercion and wrongdoing explains why coercion may be used to enforce obligations of justice. Early on in the *Doctrine of Right*, Kant tells us that right always includes the authorization to coerce.<sup>7</sup> I hazard to guess that no single sentence in Kant has been as widely misunderstood (fully aware of just how high the bar is for such a claim). Unfortunately, this claim, when read in light of Mill's conception of coercion, leads to at least three misunderstandings. Many have taken this claim to direct them to the discussion of punishment late in that work. That is because they understand the concept of coercion in the way in which Mill would have us understand it, that is, in terms of a sanction extrinsic to the wrong. Most of those who have followed this lead have come up disappointed, supposing right to be the set of moral wrongs for which punishment is appropriate.<sup>8</sup> Second, Kant tells us that external freedom can be protected coercively, so that its protection can be guided by ulterior incentives, making his position sound eerily like the sort of economy of threats account that lies at the heart of Bentham's legal and political thought.<sup>9</sup> Third, Kant sometimes speaks of the need for assurance from others in order to ground the obligation to respect the goods of other persons, making him sound alarmingly Hobbesian, and making him appear to endorse Hobbes's view that coercion is necessary to ensure that justice is in the interest of all.<sup>10</sup>

Although Kant says each of these things, I want to suggest that we must understand all of them in light of a conception of coercion that is fundamentally different from that offered to us by Mill. Kant's examples of coercively enforceable obligations are drawn from the juridical categories of Roman Private Law, and he was presumably aware, as are all students of that legal system, that it existed without a centralized

7. Immanuel Kant, *The Metaphysics of Morals*, trans. Mary J. Gregor, *Practical Philosophy* (Cambridge: Cambridge University Press, 1996.), p. 388. In keeping with custom, I give page references to the Prussian Academy pagination (Ak. 6:231), followed by references to the Gregor translation.

8. The earliest such example of this reading, which appeared before the published version of the *Doctrine of Right*, is Paul Johann Anselm Feuerbach, *Kritik des natürlichen Rechts als Propädeutik zu einer Wissenschaft der natürlichen Rechte* (Altona: Bei der Veringgesellschaft, 1796), discussed in Hermann Cohen, *Kant's Begründung der Ethik*, 2nd ed. (Berlin: Cassirer, 1910), p. 394.

9. Ak. 6:219, Gregor, p. 383.

10. Ak. 6:256, Gregor, p. 409.

enforcement mechanism for private actions.<sup>11</sup> His initial, and indeed, paradigmatic, example of coercion is the right of a creditor to demand payment from a debtor, a right to compel payment, not a right to punish nonpayment. The only way to understand this concept of coercion, I suggest, is by looking at his account of how people may rightly treat each other, which is found in his discussion of private right. Private right divides into three sections. By looking at each of these three sections, we find in Kant a distinctive account of the relation between rightful relations and coercion.

First, some preliminaries. For Kant, coercion is the interference with external freedom. The best way to understand that idea, I suggest, is that external freedom is a matter of being able to set and pursue your own ends. The sense in which freedom is a central issue for political philosophy is relational: to be free is to be independent, that is, to not be subject to the choice of another person. If I require your leave to use the means that I have, I am for that reason unfree. In the same way, if you can use my means without my consent, I am also unfree. So a slave is always unfree, because his or her decision about what ends to pursue is always subject to the will, or grace, of his or her master. Even with a benevolent master, and a wide space of actual options, the slave is no less unfree, because any choices remain at the master's discretion.<sup>12</sup>

Anything another person does that interferes with the capacity to set ends for yourself is therefore coercive, because it makes the question of which ends you will pursue depend upon the choice of that person. Another person can do that in three ways: by depriving you of the means you use in pursuit of those ends, or making you pursue ends you do not share, or using your means to pursue those ends. For Kant, external freedom contrasts with internal freedom—the capacity of the will to follow its own law. Some have doubted that internal freedom, as Kant conceives it, is possible at all. I do not want to address that issue here

11. See, for example, Barry Nicholas, *An Introduction to Roman Law* (Oxford: Oxford University Press, 1962), p. 27.

12. The wrongfulness of slavery is, in an important sense, the starting point for Kant. He describes the idea of the innate right of humanity in one's own person in terms of the saying "do not make yourself a mere means for others, but at the same time an end for them" (Ak. 6:236, Gregor, p. 392).

because external freedom is so plainly of independent normative and philosophical interest.

The ability to set an end for myself, and the ability to pursue it, are distinct, but cannot be separated entirely. A necessary condition of my setting something as one of my ends, rather than, for example, wishing or hoping for that thing, is for me to take up means towards it.<sup>13</sup> The capacity to set ends for myself is not simply the capacity to entertain an end, a capacity which I might be able to exercise while in chains, but rather, the capacity to take steps toward its achievement. I can only do that provided that I take myself to have some means with which to pursue it, that I be able to do something that counts as taking steps towards achieving it. Otherwise, I have not made it my end at all—I have only wished for it. This way of making the point is perhaps too instrumental: the point is not that I need particular means in order to pursue whatever ends I happen to have. Instead, the connection goes in the opposite direction. If I am to be the one who sets ends for myself, I must have means fully at my disposal, so that I am the one who decides which purposes to use them for. The point here is contrastive: I am free to use my means to set ends only if my ability to do so does not depend on what others might have to say about it.

It is perhaps worth contrasting this conception of external freedom with another, perhaps more familiar from the Millian tradition, according to which freedom is a matter of getting to do what you want. Such an account of freedom contrasts with the Kantian view under consideration here in two ways. It conceives of freedom in a way that is narrower in some respects but broader in others. The Millian view is narrower insofar as it regards only some of the wrongs against which it supposes citizens to need protection as violations of their freedom. Thus for Mill and those who follow him, injury and property damage are things to be prevented because they are harmful, but not because they are violations of freedom as such. Again, for Mill the various wrongs commonly characterized as invasions of privacy, illegal searches and the like, have nothing to do with freedom as such. For Kant, by contrast, rummaging through my home or my goods for purposes that I do not share violates my ability to be the one that determines the purposes to which they will

13. Ak. 6:213, Gregor, p. 374.



be put.<sup>14</sup> Second, the Millian view is broader, inasmuch as it at least implicitly regards success in pursuing one's particular ends as just as important as the capacity to set and pursue them. The Millian tradition is not monolithic on this question, but, according to one current within it, an act that makes some course of action more costly thereby compromises the freedom of those for whom the act becomes, as we say, "prohibitively expensive." Within the Millian camp, there is a debate about whether, and when, to consider such limits as implicating freedom. By contrast, on the Kantian view, external freedom is not implicated in my success or failure at achieving my ends.

If we start with a picture like the one that Mill offers us, we are likely to pose the question of external freedom in the wrong way from the outset, because we are likely to start with the idea that we are asking when "we" are allowed to interfere with some person's pursuit of his or her own purposes. Or, put differently, we are likely to ask when the state is allowed to stop someone from, or aid someone in, doing something that he or she would like to do. But that is the wrong question.

The right question can only be asked and answered provided that we begin with a picture different from the one that Mill offers us. If we accept Mill's picture of norms as prohibitions on the individual, and political philosophy as concerned with which restrictions we should impose, it looks like we can just say "we should have as few restrictions as possible." But if we look at them as reciprocal limits on what private parties may do to one another, any increase in my freedom thereby decreases yours. With that idea in mind, we need to shift our focus. Instead of asking about the beleaguered individual in the face of the powerful state, we ask instead about how a plurality of separate persons with separate ends could be free to pursue their own ends, whatever they might be, to the full extent that is compatible with a like freedom for

14. Another example shows just how deep the Kantian conception runs in contemporary political culture. Defenders of reproductive rights often invoke a woman's freedom to decide what happens in her body. For a Millian, this must appear as an abuse of language, for the only freedom interest that is visible is her interest in terminating a pregnancy without interference. Yet the intuitive idea is plainly one of freedom. Quentin Skinner notes the Roman and early modern origins of this idea of freedom as nondomination in "A Third Concept of Liberty," *London Review of Books* 24, 4 April 2002, pp. 16–18. Philip Pettit discusses a related idea of freedom as independence in his *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997).

others. The pursuit of separate purposes, in turn, requires reciprocal limits on freedom that reflect the different ways in which separate persons interact. For the limits to be reciprocal, they must bind all in the same way; that is to say, they must be “in accordance with a universal law.”

The idea of reconciling competing freedoms, and the related idea that coercion is always at issue in the way free persons treat each other, can be brought into focus by considering the ways in which freedom might be interfered with. Kant addresses this problem by identifying three ways in which something can be “one’s own,” where being one’s own is a contrastive concept; to say that something is mine is to say that it is mine, not yours, that is, that you wrong me by interfering with my having of it: one can be entitled to an object, be entitled to the performance of a specific deed by another person, or have what Kant calls “a right to a person akin to a right to a thing.” Underlying these divisions is the intuitive idea that separate persons who are free to set their own purposes can interact in three basic ways. Sometimes they pursue their separate ends separately, which requires rights to person and property. Sometimes they pursue them interdependently. If they do so consensually, they give each other rights by contract. If they do so nonconsensually, their relationship is one of status.

### *Rights to Person and Property*

In order to set an end for myself, that is, to take it up as an end that I pursue, I must take myself to have the power to achieve it. There are two ways in which I can have such powers: first, I have my own personal powers, which I have innately, that is, my right to them does not depend upon any act that I, or anyone else, has performed. The development of my powers may be the result of previous acts of mine or of others—I might have my exercise routine, or my personal trainer, to thank for my strength, for example. But my right to my powers, as against anyone else who might wish to use them, does not depend upon how I came to have them. Second, I might have powers that are external to me; that is, I might have means at my disposal. Whether I can adopt a particular end will depend upon the powers and means I have at my disposal.

For Kant, property in an external thing—something other than my own powers—is simply the right to have that thing at my disposal with

which to set and pursue my own ends. Secure title in things is prerequisite to the capacity to both set and pursue ends.<sup>15</sup> Secure title has two parts to it, possession and use. I have rightful possession of a thing provided that I am entitled to control the thing, and exclude others from it. Thus I am wronged if my property is damaged, or if another person trespasses against it.<sup>16</sup> If my property is damaged, I am deprived of means I could have used to set and pursue ends. If my property is trespassed against, it is used in pursuit of ends that I have not set for myself. Moreover, trespass or damage to it limits my freedom even if, as a matter of fact, I had no inclination (or even empirical ability at that moment) to pursue those particular ends, and even if I can think of no use to which I might put it. I am wronged because I am deprived of my ability to be the one who determines how the thing will be used. I have the right to use a thing if I am free to exploit it to pursue such ends as I might set, that is, I do not require the consent of anyone else in order to do so.

Because of the connection between having things at one's disposal and setting ends for oneself, Kant develops his conception of property as an account of its metaphysics, rather than as an account of its place in specifically human societies. In particular, Kant makes no reference to scarcity or need in developing his account. Although, for reasons that will become clear, the things in which human societies will protect property rights will depend in part on the particular circumstances, needs, and vulnerabilities of humans, the basic structure of property is a reflection of the connection between having means and setting ends.

If we think about property in the terms in which Kant suggests, we come to a distinctive, and I think deeper, understanding of the relation between wrongdoing and human need and vulnerability. H.L.A. Hart once suggested that law and morality are likely to overlap in human societies, since both are concerned, among other things, with avoiding injury to human beings in the ways in which they are most vulnerable.<sup>17</sup> So, Hart suggests, if we had an invulnerable armored exterior, like giant land crabs, and were able to extract nutrition from the air, we would not

15. This does not rule out shared possession. If we own something in common, we have the right to exclude others, and determine its use together. But this must be a derivative case, because it presupposes the idea of exclusive ownership (Ak. 6:251, Gregor, p. 405).

16. Ak. 6:248, Gregor, p. 402.

17. H.L.A. Hart, "Positivism and The Separation of Law and Morals," reprinted in his *Essays in Jurisprudence and Philosophy* (Oxford: Oxford University Press, 1983), pp. 49–87.

have a law of battery, or of murder, or much of our law of property. But for Kant, law and morality demand prohibitions on trespass as well as injury, and would demand them even if trespasses were unusual, or injury unlikely, because Kant understands wrongdoing as the interference with freedom, not as the setting back of interests. Hart's giant land crabs might have little temptation to trespass on each other, but if they did so, they would do wrong, because they would use one another for ends they did not share. More vulnerable beings, such as humans, are perhaps more likely to be attacked, and attack each other. But, for Kant, the structural reason for protecting person and property is the same, that is, to ensure freedom.

Much of the structure of rights to property applies in just the same way to my rights with respect to my own person, since it too is something that I can use to set and pursue ends; indeed I could not set or pursue ends without it. Strictly speaking, I do not have property in my own person; there are some inherent limits on my possessory rights, so that, for example, I may not alienate my own person. But I have rights in my person like those I have in external things. A traditional way of understanding property, found, for example, in Locke, sees it as an extension of the sort of ownership that we have of our own selves. For Kant, by contrast, the manner in which I have rights in my own person in an important sense subtends the manner in which I have rights in property. Like rights in property, those rights are rights that I have as against all other persons. And like rights in property, they extend to both possession and use. Just as property can be both injured and trespassed against, so too can my person. If you tie a balloon to my toe while I sleep, but remove it before I wake up, you do me no harm. But you wrong me because you trespass against my person—you use me for a purpose that is not my own. So property must be understood broadly, to include my right to my own person.<sup>18</sup>

18. Rights to the security of the person are in one sense prior to rights in property. Kant maintains that we have an "innate right of humanity" in our own person, one that requires no affirmative act to establish. We need what he calls a further "postulate" to explain how it is that one can have a right to an external thing. Again, it might appear that the state can appropriate my land and compensate me, in a way that it does not seem to be able to appropriate my person. And it can tax me, but not press me into forced labor. Yet even these examples are less clear than they might appear to be: the state can conscript me to fight a war or a forest fire, just as it can commandeer my car for the same ends. With the exception of the limits on my ability to alienate my person, the differences are of degree

Property is a kind of rightful relation. It is also definitive of a distinctive type of wrong, the wrong of interference. If you damage my property (or person) you do not merely set back my interests. You limit my external freedom because you limit my ability to pursue my own ends. If you trespass on my property, that is, use it without my permission, you limit my ability to set the ends for which it will be used. Because rights to person and property protect persons from others with whom they interact independently, the law of both persons and property consists in negative prohibitions: I am not allowed to injure or trespass against you or your goods. By contrast, contract and status create affirmative obligations, because they are cases in which separate persons interact interdependently.

### *Contract*

Contract enables parties to transfer rights, so that one person is entitled to depend upon the specified deed of another. If you and I make a contract, each of us agrees to confer a benefit upon the other, and each of

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rather than kind. Moreover, as important as these differences are, they do not reflect the difference that some places in Kant's text might seem to suggest, namely the idea that, since the boundaries of the body are clear, we do not need public law in order to honor them, and, so, public law and the state only enter in order to render the boundaries of external property secure. (For a carefully developed example of this reading, see Paul Guyer, "Kant's Deductions of the Principles of Right," in *Kant's Metaphysics of Morals*, ed. Mark Timmons [Oxford: Oxford University press, 2002], pp. 24–64.) There are four difficulties with this analysis. First, for reasons that are developed in Section IV, Kant is explicit that both contract and status require public law to make them determinate, and relations of contract and status need not involve any property whatsoever. Second, to assert that the boundaries of the body are clear is to assert that they raise no casuistical questions. Yet, in the *Doctrine of Virtue*, the second part of the *Metaphysics of Morals*, Kant raises countless casuistical questions about the body, which suggests that he must have appreciated the way in which such questions might arise. Third, in every developed legal system, including even Roman Law, the law of persons and of wrongs against the person includes questions about the way in which, for example, frightening a person into a fall might count as a battery. Such questions raise issues about the boundaries of my person, as that through which I act, from two directions: as agent and as sufferer of a wrong. Thus, although what Kant calls the innate right is inseparable from our bodies as that through which we act, the conceptual clarity of this point does not change the need for casuistry in its application. Fourth, as a matter of textual interpretation, Kant introduces the idea of a wrong in connection with the right to external things (Ak. 6:236; Gregor, p. 392). He must do so because wrong is explained in terms of the absence of consent, and the possibility of consent is only explicated in terms of contract.

us transfers the right to expect that benefit to the other. We act interdependently and consensually. Through our agreement, I do not acquire an external thing, but your deed.<sup>19</sup> People may rely upon the behavior of others in a variety of ways; contract is distinctive because it creates an entitlement: you can complain if I fail to perform, because I have failed to give you something to which you have a right. Without a contract, you cannot complain if your expectations are frustrated. In the case of a contract, I do not possess you: I only have the use of your powers in the manner specified by the contract.<sup>20</sup>

As a rightful relation, contract also makes a distinctive type of wrong possible. I wrong you if I deprive you of a means, my performance, to which I have given you a right. Where you have a right to my performance, should I fail to perform, I thereby deprive you of something to which you have a right. Put slightly differently, the wrong consists in my failure to advance your ends in a way that you have a right to have me advance them. That limits your external freedom, because you had a means toward some end, and I deprived you of it. It is coercive for the same reason.

Because I acquire your deed, I have a right in contract only against you. So I have no right against a third person who does something that prevents you from performing your part of the contract. I have only recourse against you (though you may have recourse against the third person). Again, although third parties may benefit from our completion of the contract, they have no rights in virtue of it. Precisely because contract is a way in which two of us may give each other rights, it has no bearing on the rights of anyone else; for the same reason, two persons may not enter into a contract to limit the rights of a third.

### *Status*

The third category, which Kant calls “domestic right,” has generated the most attention from commentators.<sup>21</sup> I do not want to get drawn into

19. Ak. 6:248, Gregor, p. 402.

20. Talking about having use but not possession of another person's choice is potentially misleading, since my contractual rights lie within my “possessions” broadly understood. But what I possess is the particular use of your choice that you have given me, and I possess it only as against you.

21. Most of it derisive or dismissive, even from those who are sympathetic to Kant's overall ambitions. See for example, Georg Lukacs, who characterizes Kant's view of mar-

those disputes, so I will begin by describing the category somewhat differently. The category of status is made up of those relationships in which people interact interdependently but not fully consensually. The best way to think about this category is by considering the more general role of consent in private right. Consent is significant from the standpoint of external freedom because it can make otherwise wrongful acts rightful. But those acts can be wrongful in two very different ways. Sometimes, consent makes an interaction rightful because one person permits another to do something that would otherwise be an interference with his or her person or property. I invite you to dinner at my home. Without my consent, you would be interfering with my property by consuming my food. Having invited you, I render what would have been wrongful rightful. Thus our interaction is reciprocal because bilateral. I invite, you accept.

But consent does not only prevent that type of wrong. The other type of wrong that it is able to right is the wrong of use, which, from the standpoint of external freedom, we can understand as forcing a person to act for an end that she does not share. If you permit me to use your dishes at the dinner party, my use of them to pursue my own ends is not wrongful, for, by consenting to that use, you have made my use of your things one of your ends. There is no interference with your external freedom. But if I use you to pursue my ends in other ways, without your consent, I thereby wrong you. Suppose that I break into your home and eat dinner at your table while you are out. (I bring my own food, and clean up after myself.) I do not harm you in any way, but I help myself to a benefit to which I am not entitled. I use your property in pursuit of one of my own ends, an end that you do not share. In so doing, I wrong you. Of course, if you consent, I do you no wrong. But the wrong in question, the wrong that consent serves to make right, is depriving you of your freedom to be the one who sets the ends that you will pursue, or that will be pursued with your goods. I thereby also violate reciprocity, for I enlist you in support of ends you do not share in a way that you cannot enlist me in

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riage as an example of “the naively cynical frankness peculiar to great thinkers,” in his *History and Class Consciousness*, trans. Rodney Livingstone (Cambridge Mass.: MIT Press, 1971), p. 100. For a more sympathetic treatment, see Barbara Herman, “Could It Be Worth Thinking About Kant on Sex and Marriage,” in *A Mind of One’s Own*, 2d ed., Louise Antony and Charlotte Witt (Boulder: Westview, 2002), pp. 53–72.

support of ends I do not share. This is particularly evident in cases of status, where the party who is incapable of consent is not in a position to enlist the other party in anything at all.

I should perhaps pause at this point to remark that it is easy to be seduced by the idea of consent, and to suppose that it is a self-standing source of moral significance. This is certainly the view of many libertarians, for example. But I do not think that consent works that way at all. Consent can render rightful what would otherwise be wrongful, as between private parties. But we do not worry about the lack of consent except where we are concerned with an action that would be wrongful but for the presence of consent. So if you want to know what is wrong with exploitative relationships, say, it is not that they are nonconsensual. It is that they are exploitative. It is just that consent can make a relationship in which one person pursues the ends of another nonexploitative, precisely because the former has made the latter's ends her own. As we shall see, the fact that a wrongdoer does not consent to the redress to which his victim is entitled does not make that redress wrongful. Nor do we determine the nature of that redress by asking what the parties would have agreed to in advance. Instead, we need to ask what would right the wrong.

I said earlier that for Kant the starting point for political philosophy concerns the ways in which people may be forced to treat each other. We are now in a position to see his answer to that first question. There are three limits on the ways in which people may treat each other. First, one person may not interfere with another's person or property without the latter's consent. Second, where one has, through contract, transferred to another one's right to something, one must follow through on that transfer. Third, one person may not enlist another in pursuit of his or her own ends without the latter's consent. To violate any of these limits is to coerce the other person.

This now brings us to the category of status. There are some situations in which one person is unable to consent to certain kinds of use. Of the examples Kant discusses, the case of children is the clearest. Kant notes that parents bring children into the world without their consent.<sup>22</sup> As a result, they are nonconsenting parties to a relationship in which they find themselves. Precisely because they are nonconsenting parties,

22. Ak. 6:280, Gregor, p. 430.



parents may not use their children in pursuit of their own ends. Instead, they may only act for the benefit of those children. Parents have possession of their children, but they do not have the right to use them.<sup>23</sup>

The category of status is just the category of cases in which persons find themselves in a relationship in which one party is not in a position to consent to the modification of the terms of that relationship. As a result, the other party is not allowed to enlist the nonconsenting party in the pursuit of his or her own ends. In this, the situation is no different from other cases of nonconsent. It is just a feature of the relationship that makes consent impossible, rather than, as in the ordinary case, consent simply being absent.

There are many other examples that fit this pattern. The legal relation between a fiduciary and a beneficiary is one such case. Where the beneficiary is not in a position to consent or decline to consent, or the inherent inequality or vulnerability of the relationship makes consent necessarily problematic, the fiduciary must act exclusively for the benefit of the beneficiary.<sup>24</sup> Of course, it is easier for the fiduciary to repudiate the entire relationship than for a parent to repudiate a relationship with a child. But from the point of view of external freedom the situation is exactly the same: one party may not enlist the other, or the other's assets, in support of ends that the other does not share.

Again, consider a different example of a relationship subject to exploitation, namely that between teachers and students. Is it appropriate for a professor to have his or her graduate students help him or her move house, or to ask them to house-sit and can the vegetables in his or her garden? The answer, I take it, depends upon whether we think of these kinds of interactions as fully voluntary. Insofar as we do, it is just one person doing another person a good turn at the latter's request, and merely a coincidence that the two persons also stand in another relationship. But where there is much turning on that other relationship, we

23. Ak. 6:260, Gregor, p. 412. The difference between Kant's account and the common law approach at that time is striking. At Common Law, a parent was entitled to the services of his minor children. See *Dean v. Peel*, 5 East 45, 102 Eng. Rep. 986 (K.B. 1804).

24. For example, a physician must act for the benefit of the patient. Although doing so includes making sure that the patient is in a position to give her informed consent to any procedures performed for her benefit, it precludes the physician entering into other arrangements with the patient, even if consensual. See for example the judgment of *McLachlin J.* (as she then was) in *Norberg v. Wynrib*, (1992) 92 D.L.R. 4th 449 (SCC).

may worry about the quality of the student's consent. We worry about it, not because it necessarily harms the student to can the vegetables, but because it exploits the student.

The problem illustrated by the teacher/student example is not that the transaction in question lies outside of the terms of the contract (implicit or explicit) between them. It is rather that the relationship of dependence in which the student has been placed (if it is one), albeit via contract, makes the conferral of this sort of benefit an unacceptable term of the contract.

We are now in a position to triangulate the category of status in relation to property and contract. In property, I have both possession and use of the thing. In contract, I have a limited right to the use of you, but I do not possess you. In the third category, I have possession of you but I am not entitled to use you. Let me perform the same triangulation in terms of the wrongs in question. The wrong in property is that of interfering with another's ability to set and pursue such ends as he has set for himself. The wrong in contract is failing to advance another's end in a way that you have given him a right to have it advanced. The wrong in status is using another person to advance my ends. In so doing, I deprive that person of the freedom to set his or her own ends.

The other examples that Kant offers in his discussion of domestic right are harder to explain, and I will not attempt to do so here. My reason is not just my interest in avoiding interpretive embarrassment. My further reason is that I believe the examples he offers to be ambiguous in certain ways, and I want to postpone drawing your attention to the kind of ambiguity in question, and to its importance to political philosophy.

Are these three types of wrong—taking advantage, interfering, and failing to complete a transfer—the only possible types of wrongs against external freedom that one private person can commit against another? I believe that they are, and I will offer a brief and intuitive argument to show why. External freedom is a matter of being able to set and pursue one's own ends. The only ways it can be interfered with is by interfering with either the capacity to set or the capacity to pursue those ends. As a private person, you can only interfere with another person's capacity to pursue ends in two ways—either by depriving someone of a means to their ends, or by failing to provide them with a means to that pursuit to which you have given them a right. And you can only interfere with the

capacity to set ends in one way—by making someone pursue an end he or she has not set for himself or herself.<sup>25</sup>

The argument that these exhaust the possible interferences with external freedom depends on two premises, both of which need to be made explicit. The first is that we are concerned here with the ways in which one private party may wrong another. As we shall see in Section V, the state will have obligations to uphold individual freedom in ways that are different from the obligations that one private party can owe another. The second is that harm, as such, is not a category of wrongdoing. In particular, interference with the successful attainment of a particular end is not an interference with external freedom. Harms and benefits—the advancing or setting back of the interests of a person—are only incidental to this analysis. A pair of examples will illustrate this. Suppose that you and I are neighbors. You have a dilapidated garage on your land where our properties meet. I grow porcini mushrooms in the shadow of your garage. If you take down your garage, thereby depriving me of shade, you harm me, but you do not wrong me in the sense that is of interest to us here. You do not wrong me, not because you limit my freedom in a way that is not wrongful, but because you do not limit my freedom at all. You do, of course, interfere with my successful pursuit of a particular end. But you do not interfere with my capacity to set and pursue my own ends. In case you think that this example has something to do with the difference between action and inaction, stand it on its head: if I grow sunflowers in my yard, and you put up a garage in yours, thereby depriving me of light, you harm me but do not wrong me.

My right to my property needs to be understood as a right to use that property as I see fit, but, precisely because my right to property must be the same *type* of right as you have to your property, my right does not extend to my ability to demand or compel you to use your property in whatever way best suits my purposes. My right to a thing must limit the ways in which others may interfere with what *I* own, but cannot extend to a right to require others to use what *they* own in ways that suit my par-

25. Many apparent counterexamples actually illustrate this division. For example, some have suggested that such practices as advertising or religious indoctrination (perhaps especially when aimed at young children) interfere with freedom. They are controversial because people disagree about whether they fall into our third category.

ticular purposes.<sup>26</sup> The same point can be put in a more general way: People may not spew toxic wastes onto my land if that interferes with my ability to use it. But I cannot demand that they refrain from using their land at all so that I may use my land in the way in which I most prefer.

This is the converse of the point made earlier in discussing the connection between having means and adopting ends. If you deprive me of shade, you harm me without wronging me because I still have the means to which I had a right—my backyard. The only thing that has changed is that I no longer have the use of something to which I had no right, that is, the shade from your garage. As a result, the means to which I have a right are no longer useful for a particular purpose. This sort of the change in the usefulness of a particular thing raises no issues of right, because I have no right to compel you to use your property in the way that suits me.

Again, I may benefit from your shade (or light), and I do not need to secure your consent in order to derive that benefit. I can just help myself to it. Nor can you demand payment as a condition of my reaping that benefit, except in the sense that you can threaten to exercise your right to withdraw it unless I agree to pay. But my liberty to use it is not a feature of your implicit consent. It is just my good fortune.

To sum up, there are three ways in which I might interfere with your external freedom, that is, your ability to set and pursue your ends:

- (1) interfering with your capacity to pursue your ends, for example by injuring your person or property;
- (2) failing to aid you in pursuit of some end when I have contracted to do so, for example by failing to cut your lawn when I promised to;
- (3) forcing you to adopt an end that is mine but not yours, either by doing so literally, as when I use you or your property in pursuit of my purposes, or indirectly, in those cases in which your ability to consent to that use is vitiated by youth, impairment, or status.

These three types of wrong are, I have suggested, exhaustive of wrongs that interfere with external freedom. They need not be mutually

26. Kant makes the connection between property rights and the occupation of space explicit at Ak. 6:262, Gregor, p. 414 and Ak. 6:286, Gregor, p. 419. My property right in land is the right to exclude others from the physical space that makes it up, and so cannot extend to limit what you do with your space.

exclusive. For example, in cases of fraud, one person might violate the freedom of another in each of the three ways. If I fraudulently sell you an unprofitable business, and, not realizing your mistake, you throw good money after bad, trying to make it profitable, I interfere with your freedom, because I mislead you into squandering your resources. As between us, it is as though I had destroyed those resources. But, in the same case, I also enter into and breach a contract with you, and you are entitled to complain that I have failed to do that which I undertook to do, namely sell you a valuable business. Again, on the same facts, I use you in a circumstance in which your consent is vitiated (because you are operating under a mistake I have created) and you can rightfully demand that I be deemed to be acting on your behalf. Of course, on particular facts, perhaps only one description will actually fit. But, the fact that I have interfered with your freedom in one way does not mean that I have not interfered in another.

### III. COERCION

Because each of these three types of wrong interferes with the ability of the aggrieved party to set or pursue his or her own ends, each of these wrongs against external freedom is inherently coercive. Of course, that wrongs are inherently coercive does not show that the prohibition of wrongs—a set of reciprocal limits on freedom—is coercive. Indeed, if everyone acts within those limits, and no one commits a wrong of any of the three types, no coercion occurs. Coercion enters the account in a different way.

Kant explains the idea of coercive enforcement in terms of the hindrance of a hindrance.<sup>27</sup> This is perhaps not the easiest way to make the point. Like so many mechanical metaphors in philosophy, it may seem to describe the phenomena without explaining them. So let me make the same point differently. The basic idea has two parts, one prospective and the other retrospective. The first depends on a literal reading of the idea of hindrance: those who hinder the freedom of others in any of the three ways may be prevented from doing so. You can grab your coat to prevent me from taking it, even though in so doing you frustrate my pursuit of my ends. You can refuse to aid me when I enlist you in one of my pro-

27. Ak. 6:232, Gregor, p. 388.

jects, so, for example, you can lock your doors to hinder me from taking my afternoon nap in your bed. And, if I am about to abuse a relationship in ways to which you are incapable of consent, I can be removed from that relationship, even if I prefer to remain in it.<sup>28</sup> In each case, the fact that I wish to persist in hindering your freedom—the fact that I do not consent to be hindered—does not matter, because in each case our reciprocal freedom is being protected. The fact that I object to it unilaterally does not entitle me to complain, because, as we have seen, consent is only relevant where the conduct in question would otherwise be wrongful. In these examples, however, allowing me to persist would be wrongful; hindering my wrong would not, so consent is not required. In the first instance, then, the idea of a hindrance of a hindrance is just the idea that norms of external freedom are supposed to guide conduct, but, being norms of external freedom, they can guide it externally.

This first, prophylactic sense of hindering a hindrance is not fully coercive in Kant's sense, however, because, in each of our examples, the hindrance frustrates my achievement of a particular aim, but does not interfere with my ability to set and pursue my own ends. That is, at least in part, an artifact of the particular examples. But at least some prophylactic hindrances do not hinder external freedom.

The idea of the hindrance of a hindrance has a second, retrospective aspect to it as well. What is hindered in this case is not wrongful action but its impact on external freedom. In an ideal world, no person hinders the external freedom of another, either because such hindrance does not happen, or because, if it does, it is hindered directly. But sometimes a wrong will be completed, and, if it is, its effects must be hindered in order to maintain the external freedom of the aggrieved party. If one person acts coercively against another, the latter is entitled to redress. So, for example, if I injure you or damage your property, you are entitled to compensation. You must be made whole, so that the embodiments of your external freedom are as they would have been had I not wronged you. The same applies if I failed to honor a contract I have made with you. You are entitled to be put in the position you would have been in had my choice—itself an embodiment of your freedom because transferred to you in return for something—been exercised on your behalf.

28. Thus the claim about hindering a hindrance is not a causal claim requiring empirical support (or even “synthetic” in Kant's terms) but an explication of the idea of a limit.

Again, if I manage to enlist you in support of my projects without your consent, I must surrender to you any gains I make as a result. I must do so because the use I made of your right to set your own ends must be treated as an embodiment of your freedom, and therefore given back to you. Thus, for example, if you invite tourists to explore the caves under your land, and lead them underground to the caves under mine, you must disgorge any gain you received from the use of my caves, even if I could not have capitalized on them on my own, and even if, had we entered into a contract, I would have likely agreed to let you use them on more favorable terms.<sup>29</sup> Right does not ask what parties would have agreed to. Instead, it asks what is consistent with the freedom of each. Using another's person or property without his or her permission is never consistent with freedom for all. Because the property exists for the benefit of its owner, the only way to redress another's use of it is to treat that use as though it were done solely for that person's benefit. Another way of making the same point is to say that I am entitled to the proceeds of my property, since it is a means towards the ends I choose to adopt. Should you use my property in pursuit of the ends I do not share, I am entitled to the proceeds of that pursuit, as I would have been had your act been done rightfully, that is on my behalf. The fact that you wronged me by acting in ways to which I did not consent cannot be used as a basis for depriving me of my right to the proceeds of my property.<sup>30</sup>

In each of these examples, the wrong is redressed coercively, in just the same sense in which, in our prophylactic examples, the wrong was hindered coercively. That is, the redress is coercive in the sense that the wrongdoer does not need to make its redress one of his ends. Instead, the aggrieved victim is entitled to reclaim what is rightly his, regardless of what the wrongdoer might think. So, for example, I can take back my property from you, even if you took it by mistake. Moreover, I can require that you return it in the condition in which you took it. That is because my right to equal freedom just is my right to set and pursue my ends with the means to which I have a right, and keeping my property is a matter of being able to set and pursue my ends.

29. *Edwards v. Lee's Administrator*, 96 S.W. 2d 1028 (Ky. App. 1936).

30. The same act may also harm you, and, in seeking redress, you may need to decide which form of redress you want. I cannot be taken both to be acting on your behalf and to be harming you.

Because wrongdoing grounds redress, coercion can also operate to deter wrongdoing, for deterrence is just the public manifestation of the prophylactic sense of coercion. If I am allowed to interfere with your freedom to protect my own—by locking my doors, or taking the bicycle you promised me—I am thereby allowed to operate on your capacity for choice indirectly. But there is nothing special about those indirect means. So if I honor my contracts, or keep my hands off your goods, because I fear that I will be made to disgorge my gains or repair your losses, you operate on my capacity of choice indirectly. Any indirect means of bringing your conduct into conformity with right will be acceptable, provided only that they be means that can apply to all and do not interfere with freedom any more than they must to hinder the initial hindrance. But that is just to say that threats may be used to protect right.

If we think of the coercive rights inherent in the law in terms of restraint and redress, we have rejected the key elements of Mill's account. Recall that, for the tradition for which I have selected Mill as spokesman, coercion has two key features. The first of these is that it interferes with a person's liberty, by imposing a cost on that person that he or she would not otherwise have borne. The second is that it is extrinsic to the wrong that it hopes to address.

We have rejected the first strand in Mill's account that says coercion involves making a person bear a cost she would otherwise not have borne because we lack the relevant baseline. Against the background of norms of equal freedom, the person prevented from completing a wrong is not being made to bear a cost she otherwise would not have. The same point applies if the wrong is completed and the wrongdoer is made to pay damages or disgorge a wrongful gain. It is no doubt true that, had we left the loss where it falls, or let her keep her gain, she would have kept something she must now give up. But that is the wrong comparison. The appropriate baseline is not the having of the wrongful gain, but its lack. Again, the baseline is not the loss lying where it falls, but rather the loss lying where it belongs, that is, with the wrongdoer.

We have also rejected the second strand, which says that the sanction is extrinsic to the wrong. In cases of redress, the use of force is supposed to undo the wrong, restoring a regime of equal freedom. Of course, it may also provide a disincentive to the wrongdoer, or to other wrong-



doers. From the point of view of equal external freedom it does not matter why people act in conformity with the demands of right, so long as they do so. Provided they do so, they do not interfere with the ability of others to set and pursue their own ends. But, the point of coercive enforcement is not to provide such incentives, but rather, quite literally, to set things right. Perhaps the best way to see this is to think about the example where the wrong has occurred as a result of an honest mistake. I mistakenly take your coat, thinking it to be my own, having absent-mindedly forgotten that I did not bring a coat this morning. You are entitled to reclaim your coat, even if I persist in my honest mistake. It would, I think, be peculiar to suppose that your right to forcibly reclaim your coat is to be understood in terms of its incentive effects. You are allowed to reclaim your coat, not because allowing you to do so will lead me or anyone else to be more careful in keeping track of whether they wore a coat in the morning, or even to be more careful in general in keeping track of our stuff. You get to reclaim your coat because it is your coat.

#### IV. FROM RIGHTFUL RELATIONS TO THE STATE

External duties thus limit the things people can do to each other. As a result, they give shape to a specific kind of social order, one in which people stand in rightful relations to each other, and one in which those rights are clearly defined in accordance with general laws binding on all. Yet the very clarity of definition that is implicit in Kant's account makes it unsustainable in a state of nature.

The root of the problem is that rights are understood as reciprocal limits on the freedom of everyone, which means that, if people are to have rights, all must be subject to the same limits. Otherwise, my attempt to enforce what I take to be my rights will be, from your perspective, simply my unilateral imposition of my will upon you. So we must be subject to a single system of rights if we are to have rights at all. Where limits are not reciprocal, right turns out to be merely "provisional." That is, it is not enforceable and so, it would seem, is not right at all, since it is not really a set of limits on freedom.

Kant sees the state of nature as lacking in this sort of reciprocity for two distinct, but related, reasons. The first is a problem about determinacy: even if everyone recognizes the fundamental principles of right,

and the limits on freedom that they demand, and also agrees about every situation where rights are in dispute, there is, Kant contends, no basis to expect unforced agreement on the application of the general principles to particular facts. The problem is not just that the principles are too general—though that, too, is a problem—but rather, that the application of interpersonal norms to facts always generates problems of determinacy, for reasons that we will explore. When different people apply the same standards differently, people are not subject to reciprocal limits on their freedom. As reciprocal limits on freedom, those rights are enforceable even if people do not agree about them. But they must be made reciprocal in order to be enforceable.

The second is a problem about assurance, which Kant makes in the Hobbesian-sounding passage to which I referred earlier: I do not need to refrain from interfering with the possessions of others unless I can be assured that they in turn will refrain from interfering with my possessions. That is because, for Kant, right requires a reciprocal authorization to coerce, and where an authorization to coerce is not reciprocal it is not a matter of right. If the ability to secure compliance from others depends upon the incidental features of my strength, we are not subject to a universal law after all. The two problems, taken together, require a single solution, that is, a state that will render the demands of right determinate, through legislation and adjudication, and will render the enforceability of those demands reciprocal through an enforcement mechanism, so that the enforceability of rights is not a reflection of the strength of the particular parties to a dispute.

Each of these points needs more elaboration than I can provide here, but, each can be given a measure of intuitive plausibility. Kant uses his favorite distinction, that between noumena and phenomena, to make the point about determinacy. A right to property, for example, gives its holder a power over a thing that continues even when she is no longer in physical possession of that thing. Kant calls this “noumenal possession.”<sup>31</sup> In so doing he is not making any abstruse or ambitious metaphysical claims, but underscoring the idea that ownership is a normative relation that cannot be identified with any physical property. To own something is not to be in physical possession or control of it, but to be *entitled* to have others forbear from interfering with it in specified ways.

31. Ak. 6:255, Gregor, p. 76.

That entitlement cannot be identified with my physical relation to the thing I own, because the primary way in which someone might interfere with rightful possession is by taking physical possession of something that is not rightfully theirs. So the two schemes must both classify the same particulars, but the very idea of right requires that they provide divergent classifications. As a result, neither on its own nor the two taken together can dictate a unique solution about how to apply norms to facts. For example, if I have abandoned something, you are free to acquire it. But not every instance of my letting something out of my reach or sight counts as abandoning it. We need some principled way of determining which ones count, and which ones do not. The abstract principles that enable us to understand our obligations with respect to the property of others do not tell us how to apply them to particulars. So even though we may all be able to appreciate the symmetry required by rights, there is no reason to expect that we will converge on a single understanding of what right requires in all particular cases, even if we act in good faith.<sup>32</sup> But if we cannot agree, then the idea that we even have rights with respect to each other begins to unravel. We can both still act on all of the correct principles, but unless we apply them to particulars in the same way, we will not act in conformity with reciprocal limits on external freedom.

The problem here arises at the level of particulars, but it arises because of the requirement of generality implicit in the idea of reciprocal limits on freedom. Kant does not mean to deny that there are easy cases—I can return something you loaned to me, or stay off the land I watched you plough—or that societies have existed that resolved dis-

32. There is some temptation, particularly among those influenced by Lockean accounts of property, to suppose that questions about property are ultimately factual questions about the way in which particular things were made or acquired. On this understanding, which Kant gently mocks as the “guardian spirit” view of property, property is a relation between a person and a thing rather than a relation between persons, with respect to things (Ak. 6:260, Gregor, p. 413). But even if we accept something like the guardian spirit view, the problem still arises, with respect to the boundaries, both spatial and temporal, of the thing acquired as well as to the manner of acquisition. I cannot physically occupy an acre of land all at once. What factual test will determine just how much I have occupied? Again, at what point in acting to acquire a thing does it become my own? How long a period of disuse is required in order for me to abandon it? The point is not that these questions cannot be answered—legal systems have answered them in systematic ways for thousands of years—but that abstract formulations of normative principles are not sufficient to answer them.

putes by custom, or a hodgepodge of inconsistent minor rules. Neither of these is enough, however. If we are to be subject to reciprocal limits on our freedom, those limits must apply systematically, so that we are subject to the same limits in a more general way. That requires a systematic solution.

Kant's argument is thus a conceptual version of Locke's famous worry about the "inconveniences" of the state of nature, first among which was the private enforcement of justice. Locke worried that the natural partiality persons tend to have toward themselves would lead to conflict, as each person, with honesty if not complete objectivity, sought to be judge in his own case. Locke's problem is empirical, and it arises because he supposes that people are pretty good, though not good enough to get by without an impartial arbiter. Kant's problem, by contrast, is deeper because it arises from the inherent problem of systematically applying interpersonal norms to particular facts. Each person is entitled to act on his own judgment in a state of nature, not in the sense that each can rightfully act in bad faith, but because there is nothing else on which anyone could act.<sup>33</sup>

Let me make this point somewhat differently with other examples. I have already offered a property example, namely that of acquisition and abandonment. Now consider the case of contract. Whether you and I have made an exchange, and what it is that we have exchanged, depends upon some way of specifying how the terms of our agreement apply to particulars. Have I accepted your offer when I send the letter of offer back to you? Or only when you receive it? This is a question that requires

33. In her *Lectures on Kant's Political Philosophy*, trans. Ronald Beiner (Chicago: University of Chicago, 1982), Hannah Arendt argues that recognition of the importance of judgment is conspicuously lacking from Kant's political writings, and so turns to his *Critique of Judgment* to understand his political ideas. On the reading offered here, however, Kant's account of the need for a political state turns in part on the importance of judgment. In the *Doctrine of Virtue*, the second part of the *Metaphysics of Morals*, Kant ends his discussions of specific virtues he considers by offering casuistical examples, that is, examples requiring judgment, asking, for instance, which specific acts fall within the scope of the prohibition on suicide, or the duty to care for one's own body. Those examples make it clear that Kant does not suppose that agreement about the application of moral principles comes automatically, or even easily. Such agreement is not necessary in the case of virtue, at least on Kant's understanding of it, since he contends that the value of a virtuous act is individual so does not depend on a common application of principles. In the case of right, by contrast, parties must adhere not to common principles of action but to common standards of external conduct if any are to have rights at all.

an answer in order for right to be possible, but right itself is silent on what that answer will be.<sup>34</sup>

The point is most vivid in examples of exploitation. I said I was not going to get drawn into Kant's treatment of marriage and domestic right. I will, however, use it to illustrate my general point. The application of general norms to particular facts will be sensitive to the manner in which those facts are described. This applies to Kant's examples of marriage and service. Like almost all of his examples, they are supposed to be relatively uncontroversial.<sup>35</sup> Whether they fit in the category depends on the description. But the controversy about that question advances, rather than hinders, Kant's general argument. There is a difficult question about how to classify a wide variety of interactions that potentially fall into the category of using another person, where there is an obvious question about whether consent is possible in the circumstances.<sup>36</sup> Kant's point is that those questions are not answered through further examination of the category of external freedom, but must be answered in order for external freedom to be possible. Like the category of property, Kant supposes that the category of status can be articulated as a matter of metaphysics, without reference to the particular facts of human vulnerability. But its application to particulars must take account of those vulnerabilities, in a way that the category itself directs us to do, but does not tell us how to do.

Indeed, the same point can be made about the examples I mentioned earlier, of the possibilities of exploitation, and dubious nature of consent, in certain academic settings. The disagreements about whether

34. That is why Kant denies that a court of equity is possible (Ak. 6:234, Gregor, p. 390). Kant is not objecting to a court having what are sometimes called "equitable powers," the power, most prominently, to prevent abuse of its processes. Instead, he is objecting to a court that enforces equity in the sense in which Aristotle described it, that is, as stepping in where law fails because of its generality. No court could do that, Kant contends, because law makes right possible because of its generality. Any denial of that generality, far from upholding right, withholds it.

35. Kant is not alone in his view that the role of consent in sexual relations is problematic. See Herman, "Kant on Sex and Marriage."

36. But it is not a question about whether the parties think of each other in objectifying terms. As Kant's discussion of the shopkeeper example in the first part of the *Groundwork* makes clear, contract is fraught with the perils of one person thinking of another in purely instrumental terms. As the discussion of contract in the *Doctrine of Right* makes clear, that is of no concern from the standpoint of right.

various forms of conduct are acceptable are just disagreements about how to classify particulars. (Almost) nobody thinks exploitative relationships are fine; the only real question is whether particular relationships are exploitative, or consensual.

In treating the three categories in parallel fashion, I do not mean to distract attention from an apparent difference among them. It may not seem to matter very much how norms of right are rendered determinate in the cases of property or contract. So long as there is some way of determining an answer to the question of whether I have abandoned the object you have found, or whether you have accepted my offer in contract, it doesn't much matter what that answer is. If there is a public answer, each of us can order our affairs around it.

In cases of the third category, however, a great deal seems to turn on the question of whether a particular relationship is exploitative. How much power should parents have over their children? Teachers over their students? What counts as acting for the benefit of the dependent party in these relationships? Is sexuality fraught with these very dangers? It is unsurprising that these examples should be controversial, because in each case these are, or are feared to be, ongoing relationships in which the parties are asymmetrically situated. By contrast, relationships of property and contract are ones in which the parties are symmetrically situated. Or, if they are not because of significant disparities in bargaining power, then the worry is that they fall into the third category after all. But if the controversies surrounding the boundaries of status are more vivid than those surrounding the boundaries of property or contract, they are not different in kind. Property rights require that I exercise adequate care for the safety of you and your property, but do not, on their own, tell me how careful I have to be. The answer to that question must take account both of my freedom and your security, and it can make a significant difference to each of us where the line is drawn, even if it is applied to us symmetrically.

The problem goes still deeper than these examples suggest, because if the boundaries of acceptable conduct are indeterminate, the boundaries of hindering unacceptable conduct must also be indeterminate. So the occasions on which one can preempt wrongdoing, or demand redress for it, are indeterminate. Thus right appears both to be a demand of justice, because a necessary condition of reciprocal external freedom,

and, at the same time, a demand that does not tell you what to do, either prospectively or retrospectively.

The problem of assurance compounds the problems of determinacy, because the right requires reciprocal limits on freedom. If my ability to enforce (what I take to be) my rights depends on my strength, those limits will not be reciprocal, because the enforceability of rights will depend on the unilateral strength of the parties, and so will not be subject to a universal law.

#### V. THE SECOND QUESTION OF POLITICAL PHILOSOPHY

Kant's solution to the problem of determinacy is political: set up an authoritative body charged with laying down what is right, and, to address any residual indeterminacy in cases of conflict, an impartial arbiter to resolve such conflicts. But that still leaves us with the problem of assurance. It too has a political solution: the problem of indeterminacy gives us a legislative and judicial branch of government; the problem of assurance gives us an executive branch, charged with seeing to it that all are symmetrically situated with respect to coercion. The sort of assurance provided is familiar in other contexts: when I hire a bonded contractor to repair my house, or the bank requires collateral or a guarantor for a loan, the bond, collateral, or guarantee serves to secure satisfaction of the obligation or debt in question, not in the sense that it is impossible for a bonded contractor to damage property, or for a guaranteed loan to be in default, but rather, in the sense that satisfaction is assured in the case of default. Only when such assurance is in place is there a sense in which all are subject to the same limits.

If any of these three branches of government is missing, there is no external freedom, only various exercises of unilateral force. People may still be under an *ethical* obligation to respect the person and goods of others. But they are not under a *juridical* obligation, precisely because they are not subject to reciprocal limits on their freedom. As I said at the beginning, Kant's legal and political philosophy does not talk about what people ought to do, and then ask what can be done to get them to do what they ought. It asks instead what people can be compelled to do, and provides an answer in terms of equal freedom. One way of getting people to do things is by telling them to do those things, and so the state has authority too.

Kant explains the need for the three branches of government in Rousseau's vocabulary of the "general will." Kant finds this concept helpful, since it manages to capture the way in which the specificity of the law and the monopoly on its enforcement do not thereby make it the unilateral imposition of one person's will upon another. Instead, it is what Kant calls an "omnilateral" will, since all must agree to set up procedures that will make right possible. All must agree, because without such procedures, equal freedom is impossible, and so the external freedom of each is impossible. But the sense in which they *must* agree is not just that they should agree; it is that they cannot object to being forced to accept those procedures, because any objection would be nothing more than an assertion of the right to use force against others unilaterally.

Once the concept of the General Will is introduced, it provides further constraints on the possibility of a rightful condition, and even explains the ways in which a state can legitimately coerce its citizens for reasons other than the redress of private wrongs. Kant's treatment of these issues of "Public Right" has struck many readers as somewhat perfunctory, especially after his meticulously detailed, if not always transparent, treatment of private right. He treats these issues as he does because he takes them to follow directly from the institution of a social contract. The details of his arguments need not concern us here, because he does not claim that these exhaust the further powers of the state. Instead, he puts them forward as additional powers a state must have if it is to create a rightful condition, and it is the structure of that argument that is of concern here.

In protecting external freedom, the General Will must also rule out other circumstances in which one person becomes entirely subject to the will of another. There are two such examples, on Kant's understanding: poverty and crime. The Kantian state must provide for redistribution, indeed, unconditional redistribution, where it is necessary to prevent one person being entirely dependent upon the generosity of others. The person who is so dependent is a mere means for others, since there is nothing that he may do without the consent of another. Since nobody could consent to becoming such a means—to do so would be to surrender external freedom entirely—nobody could agree to enter a condition in which this was possible. As a result, the General Will must include provision for those in need. Thus, a rightful condition requires



unconditional support for those in extreme circumstances, and authorizes taxation to pay for it.<sup>37</sup>

This is not the place to consider just what counts as extreme need for the purposes of this argument. The formal apparatus of right cannot answer that question, and it falls on the state to answer it in order to create and sustain a rightful condition. Whatever answer it gives, the state is also allowed to enlist those who are more fortunate in the project of ensuring that people do interact on terms of reciprocity, because their entitlement to their good fortune—that is, their right to call on the state to coercively exclude others from it—depends on the existence of a general will to which all can agree.<sup>38</sup>

For parallel reasons, the General Will must provide for a criminal law, understood as a system that prohibits the various ways in which a person might make the wronging of another the means through which he or she pursues his or her ends. The criminal law itself will authorize further coercion, in particular, the making and, where necessary, the carrying out of threats to prevent that sort of behavior. Threats that are extrinsic to the wrong in question are necessary, precisely because the criminal is the person who sets out to wrong another, as a way of advancing his own private ends, indifferent to the prospect of needing to surrender the gains, or repair the harm he does. Were the General Will merely to codify and institutionalize private right, it would permit a person to make the wronging of another person the means through which he pursued his ends. Someone might do this, knowing that he will lack the means to repair the harm, or expecting to consume whatever gains he accrued by wronging others, or perhaps because, out of spite or anger, he was happy to pay for the harm he did, in return for the opportunity to do it.<sup>39</sup> But, in setting up the social contract, the possibility that someone could do such things, as a matter of right, is not one to which persons concerned to protect their external freedom could consent, since it would license

37. Ak. 6:326, Gregor, p. 466. For reasons that I cannot go into here, Kant maintains that this is a duty of the people, not a right of those receiving aid. I am grateful to Ernest Weinrib for discussions of this issue, which he considers in his essay, "Poverty and Property in Kant's System of Rights," *Notre Dame Law Review* 78 (2003): 795–828.

38. Ak. 6:326, Gregor, p. 468.

39. This is a familiar theme in Icelandic Sagas. See *Njál's Saga*, trans. Magnus Magnusson and Hermann Pálsson (London: Penguin, 1960), pp. 100–05.

others to make them into their means. To deal with this class of cases, the Kantian state must resort to coercion in the sense that Mill regards as primary. That is, it must issue explicit prohibitions of such acts, and threaten people with unwelcome consequences should they violate those prohibitions. Moreover, it must carry out those threats. The details of the making and carrying out of threats—Kant's theory of punishment, excuses, and clemency—need not concern us here. The key point is that the state must, on occasion, make threats if it is to create a regime of equal freedom.<sup>40</sup>

The state is thus entitled to do things that no private person may do, because it does not derive its power from the transfer of powers from private parties. To the contrary, private persons only have rightful, that is, enforceable, powers within a rightful condition, which requires a state. The state creates that condition by telling people, both ordinary citizens and officials, what they are supposed to do. So it claims authority, because stating requirements is the primary way in which it can create a regime of equal freedom.

So it turns out that the Kantian state can tell people what to do, and force them to do as they are told, in each of the ways that I mentioned in my opening paragraph. As a matter of private right, it can force me to repay my debts, since in so doing it is simply guaranteeing the conditions of reciprocal freedom. It can tax me in order to sustain a rightful condition, and, in so doing, can compel me to make payments for the benefit of those in need, even if I have no inclination, and would have no enforceable private obligation, to aid them. It can lock me up if I intentionally wrong others. It can do all of these things to me, regardless what I may happen to think of them, because without a coercive state, all uses of force are arbitrary.

40. For a discussion of the role of threats in Kant's view of punishment, see Thomas Hill, Jr., "Wrongdoing, Desert, and Punishment," *Law and Philosophy* 18 (1999): 407–41.