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Coercion and the State

A Review of B Sharon Byrd and Joachim Hruschka, *Kant's Doctrine of Right: A Commentary* (Cambridge University Press, 2010) 336 pp, Hbk ISBN: 978-0521196642 £68.

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Kant scholarship is thriving at the moment, and Byrd and Hruschka's commentary on Kant's 'Doctrine of Right'—Kant's main legal and political work—is an excellent contribution to this scholarship. Their book addresses at length many of the core issues raised in the Doctrine of Right, such as Kant's analysis of rights in the state of nature, or 'private right' (chapters 1–6, 11–12); the structure of the Kantian just state, or 'public right', including criminal punishment (chapters 1, 7–8, 10, 13); and Kant's conception of global justice, or 'international' and 'cosmopolitan' right (chapter 9). In addition, Byrd and Hruschka include a separate chapter on the distinction between '*homo noumenon*' and '*homo phenomenon*' (chapter 14), as well as a discussion 'On the logic of "ought" implies "can"' (Appendix 1) and on Kant's rules of imputation (Appendix 2). Particularly novel, in my view, are Byrd and Hruschka's attempts to outline, throughout the book, the differences and similarities between the theories of right as defended by Kant and by Gottfried Achenwall (a figure relatively unknown to Anglo-American scholarship), as well as the authors' extensive technical discussion of Kant's Table of Contracts (chapter 12). This comprehensive and impressive book is clearly the result of years of careful study of Kant's texts. Overall, it will be an invaluable companion to Kant scholars and advanced students working with the issues at hand.

In this review, I first situate the book and some of its core claims in the wider context of Kantian scholarship, and then engage with these claims more critically. The core claims I focus on are found in Byrd and Hruschka's account of the need for the state and of the structure of the just state. Unfortunately, Byrd and Hruschka do not extensively address the recent secondary literature on these issues in Kant's Doctrine of Right. I will argue that they consequently fail to demonstrate that the position they attribute to Kant is better than any of the available alternatives. Indeed, I will suggest some reasons why, as a matter of both textual interpretation and philosophical

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strength, the kind of position defended by other interpretations may have the upper hand in this debate.

A core question to be answered by Kant scholars and political-legal scholars alike is the question of why we need the state in the first place; why not just live together peaceably in the state of nature, understood as the pre-state condition? That is, why is it insufficient for justice that we simply interact as individuals in ways respectful of each other's rights? Answers to this question can be seen to fall into two main strands of interpretation. For a long time, most of what was written on Kant presumed that he viewed the need for the state as fundamentally prudential in nature. According to these interpretations, given humankind's notoriously 'crooked timber'—which includes our typical tendency to act in passionate, biased and ignorant ways—realising justice in the state of nature is awfully hard to do, and hence the rational and reasonable choice is simply to enter the state. Given these unfortunate facts about human nature, that is, it is just plain stupid to stay in the state of nature. Since rightful interactions are so hard to realise here, it is also absolutely unreasonable to demand of others that they agree to interact in this condition. The rational and reasonable choice is to seek justice within the framework of the liberal state, and Kant, on these readings, is seen as arguing that people can thus be forced to enter civil society. In the Anglo-American tradition, we find this kind reading defended in the writings of Paul Guyer, Jeffrie G Murphy, Onora O'Neill and (the earlier) Howard Williams, among others. It also seems fair to say that this strand in Kant interpretation has been losing ground in recent years. Indeed, even some of its earlier proponents, such as Howard Williams, have changed their minds on this issue. It is particularly refreshing therefore to see that Byrd and Hruschka aim to defend it. As we shall see shortly, Byrd and Hruschka argue that the need for the state, including the right to force people to enter the state, issues from what they call prudential concerns of 'security'.

According to the second strand of Kant interpretation—increasingly prominent in Anglo-American writings of late—individuals cannot realise rightful interactions on their own regardless of how virtuous their intentions and characters are. Rightful interaction is seen as in principle impossible in a state of nature. Consequently, on these readings, Kant doesn't view the need for the state as only or fundamentally prudential in nature or as a response to an unfortunate fact about humankind. Proponents of this interpretive strand naturally do not deny that entering the state is the rational and reasonable thing to do. Rather, they argue that even on the ideal assumption that everyone has a virtuous character and intends nothing but to interact virtuously, rightful interaction is impossible since there are problems in the state of nature that individuals cannot in principle solve on their own or as private individuals. To support their claims, these writers usually appeal to so-called assurance ('security') arguments, although not understood in merely prudential terms, as well as to two types of 'indeterminacy' arguments, namely concerning the specification and application of Kant's proposed principles of private right. In the Anglo-American tradition, philosophers such as Sarah Holtman, Pauline Kleingeld, Thomas Pogge, Arthur Ripstein, Jeremy Waldron, Ernest Weinrib, (the later) Howard Williams and my own work fit squarely within this camp.

Answering this question concerning the need for the state takes up roughly half of Byrd and Hruschka's book. This is no coincidence, since tackling this issue requires solutions to a series of questions about the nature and structure of individuals' rights. Most interpreters agree that according to Kant, we have an innate right to our person and body and acquired rights to things (private property right), services (contract right) and persons (family and domestic right, or what Kant calls 'status' rights). Private property, contract right and family right are therefore the three categories of private right, and the principles they express delineate the kinds of acquired rights private individuals have against one another. The disagreement between the first and the second strand of Kant interpretation mentioned above concerns whether private right is ideally or in principle realisable in the state of nature or whether its realisation ideally depends on the state. At the beginning of their book, Byrd and Hruschka focus their attention primarily on property right,[1] and they claim—contrary to the second strand of interpretation—that 'the argument that property ownership rights [ideally] depend on [the] state … is simply wrong' (95).[2] Byrd and Hruschka's project is primarily textual, even though they also reveal in the introduction that their work is guided by the 'maxim … that Kant got it right' (9). As mentioned above, I believe that Byrd and Hruschka's interpretation of Kant's stance on the need for the state is neither the most textually plausible nor the most philosophically rigorous position available. Had they engaged some of these alternative interpretations we could have seen why they think their view should prevail. Since they do not, I will spend a few minutes revealing some of the textual and philosophical problems that these alternative readings would point to in relation to Byrd and Hruschka's interpretation. This requires a brief detour into Locke's analysis of the state of nature.

Although Kant clearly seems to engage Locke's arguments in the Doctrine of Right, especially in his analysis of private property appropriation, Byrd and Hruschka pay very little attention to Locke in their interpretation of Kant. This oversight is unfortunate, in my view, since Locke defended individuals' so-called 'natural executive right'—or an individual's right to interpret, apply and enforce one's individual rights in the state of nature. Locke famously claims that if we can show the possibility of justice in the state of nature, then we also show that individuals have a natural executive right. In *Two Treatises on Government*, Locke argues that the 'inconveniences' of the state of nature—namely individuals' typical lack of knowledge of the principles of justice, their tendency to judge in biased and passionate ways, and the unequal distribution of power among individuals—makes justice near impossible to realise. That is to say, in the state of nature there are no posited laws to compensate for individuals' typical lack of knowledge (no public legislative authority), there are no unbiased judges who can help individuals judge their cases more appropriately or without letting self-interest and passion determine their judgments (no public judi-

1 For their analogous discussion of contract right, see chapter 11 'Contract Law I: Why must I keep my promise?', pp 232–44. Byrd and Hruschka do not engage the category of 'status' relations (family and domestic right) at any length.

2 I inserted 'ideally' in this passage since Byrd and Hruschka do hold that property ownership prudentially (for security reasons, prudentially understood) requires the state.

cial authority), and there is no powerful police force that can ensure that individuals' unequal power does not deteriorate 'right' into 'might' (no public executive authority). Although these facts about the state of nature make it terribly difficult to realise justice, Locke maintains that justice is still possible in this condition and that, even if wildly imprudent or even stupid, an individual does nothing wrong simply by choosing to stay there. After all, to act in imprudent or stupid ways is not to wrong another person. To wrong another is to interact with that other in a way that is inconsistent with respecting their rights, and since it is possible for individuals to interact rightfully in the state of nature, choosing to remain in this condition is not to do anything wrong as such. Hence, individuals have a natural executive right—or a *natural* right to specify, apply and enforce their natural rights in their interactions with each other. The only way a state can *acquire* such a right is through individuals' actual consent to entrust it with their natural executive right.

As mentioned above, Byrd and Hruschka attribute to Kant the view that rights are ideally realisable in the state of nature, and hence that it is wrong to see the state as in principle or ideally necessary to enable property rights. Nevertheless, they also want to maintain that Kant, by appeal to security considerations, can justify coercing others into the state. In other words, against Lockean claims to the contrary, they argue that the possibility of justice in the state of nature does not entail a natural executive right, and consequently that actual consent is not necessary for the rightful establishment of the state. After outlining their argument, I provide some textual and philosophical reasons to be skeptical of this interpretation of Kant.

In a section where Byrd and Hruschka comment on the possibility of justice in the state of nature, they state:

> The problem with the state of nature is not that we have no rights, but that these rights are not secured and thus have only provisional character. It is in the juridical state—the *Rechtsstaat*—that our rights become peremptory. Our rights are peremptory in the juridical state because in that state we have a judge to reach a final binding decision when rights are in dispute and a state power to enforce the judge's decision. Kant's idea of the *Rechtsstaat* is the idea of a state that secures individual rights. (26)[3]

A little later, they further explain that:

> Kant describes private as law as the law 'where everyone follows his own judgment'. It is 'the right to do what one thinks is *right and good*, independent from another's opinion'. It is not *necessarily* a state of injustice because everyone involved in a disagreement about what is right can act justly. Still it is a state that lacks any official statement of exactly what is just in a multitude of possible situations. Thus although the substance of private law is the same in the juridical state as it is in the state of nature, individuals' ability to see what that law is in the state of nature can be clouded by limitations on their ability to discover a priori truths, or their own self-interest in the situation. (31–32)[4]

3 Note that both strands of Kant interpretation can agree with this passage as it stands. The difference between their interpretations is only revealed once we explore what Byrd and Hruschka mean by saying that rights both cannot be secured and can be in dispute in the state of nature. This is therefore why I have chosen the passage below; it reveals this important point in their interpretation.

4 For further examples see pp 25n, 39, 46.

If justice is in principle possible in the state of nature, as it needs to be in order to justify the claim that the realisation of individual rights does not depend upon the state, then the argument here (as anticipated in the description of Locke's position, above) is roughly as follows. Because we are the imperfect kinds of beings we are, it is hard for us to see clearly what justice requires of us in specific situations—oftentimes our judgement is clouded by our self-interest and lack of knowledge—and hence we often end up in disputes over rights. However, we can end up acting justly in this situation, namely if we all take the time to figure out what justice really requires of us in the particular situation at hand, and then act on that judgement rather than on a judgement fundamentally informed by bias. The greatness of the state, then, does not issue from the fact that it solves any problem we cannot in principle or ideally solve on our own; rather it issues from the fact that it provides the prudent or reasonable way of dealing with the non-ideal situation we find ourselves in: it makes it easier for us to act on reason rather than on self-interest. The state merely provides an official statement of what is just in a particular situation. Obviously, as Byrd and Hruschka often point out, actual states often get this wrong. But they are more likely to get it right, presumably because public officials are often experts (they act on knowledge), and because they are external to the conflict, they have no self-interest in the case (they act without bias).

Let us return to the case of original private property acquisition in order to illustrate the point about possibility of rightful interaction in the state of nature. Kant argues that there are three 'aspects of *original* acquisition', namely

> (1) *Apprehension* of an object that belongs to no one; otherwise it would conflict with another's freedom in accordance with universal laws. This *apprehension* is taking possession of an object of choice in space of time, so that the possession in which I put myself is *possession phaenomenon*. (2) *Giving a sign* … of my possession of this object and of my act of choice to exclude everyone else from it. (3) *Appropriation* … as the act of a general will (in idea) giving an external law through which everyone is bound to agree with my choice. (6: 258f)[5]

Byrd and Hruschka do not explicitly remark on this passage, but their overall take on the principle it outlines can be deduced from what they say in various places. At one point, they refer to the first two stages of original property appropriation—and their interpretation here seems uncontroversial (212). As they say, according to the principles involved, the first two steps of originally appropriating private property in the state of nature are taking something unowned under our control and then signalling to others that we have made it ours. The controversial aspect of their interpretation concerns the third or last step as described in the passage. Given what they say elsewhere, it seems clear that they think the reason the unilateral act of choice involved in the first two steps issues in an obligation on others is that we own the earth in common. Hence Byrd and Hruschka must interpret 'the general will (in idea)' in the last sentence to mean owning the earth in common. For example, they emphasise (132) that '[t]he original community of the land and the things upon it

5 All references to Kant in this review refer to *The Metaphysics of Morals*, Mary Gregor (trans and ed) (Cambridge University Press, 1996).

evokes the "originally and *a priori* united will" [6: 267], which Kant *inter alia* also calls the "omnilateral, necessarily united will" [6: 263]'. Moreover, they continue by arguing that it is our duty as owners of the world in common to divide it up so that 'each of us' can exercise the right 'to be somewhere on the earth', namely by making it possible for each person to acquire a particular piece of the earth's surface for himself (134–5). Byrd and Hruschka continue, affirming that '[i]t is the originally united will that wills the land to be divided' (134) and that it is one of our main duties to divide it up and hence to recognise that other people's unilateral choices with regard to the world (unilateral first, controlling possession and signalling) give rise to obligations on us, namely to respect their property so acquired (136). Consequently, 'the originally and *a priori* united will' or the 'omnilateral, necessarily united will' is seen as synonymous with what Kant means by 'a general will (in idea)' in the passage quoted above (6: 258). It is the act of this 'general' or 'omnilateral, necessarily united' will—our will to divide our common earth so that all can exist somewhere—that is seen as transforming the mere choice of acquisition into an act of rightful appropriation that issues obligations on everyone.

If this really is Kant's argument, then notice that there is still the question from Locke: if the argument works, and justice is possible in the state of nature, then presumably individuals have a natural executive right, in which case no one can be forced to enter civil society. Although, as mentioned above, Byrd and Hruschka do not explicitly address the issues of a natural executive right, they in effect argue that Kant denies it because of what they call the 'presumption of badness' (190), which they say is taken to be, by Kant, a 'moral presumption or a prudential rule' (192). They argue: 'It is this presumption that permits us to coerce all others to move to a judicial state' (190). Why do the authors believe this presumption of badness justifies forcing each other into a judicial state? They argue that '[w]e have to presume that our fellow human beings are evil, at least until the opposite is proved' (192), and, in turn, by entering 'a juridical state … we give "security" that we will not interfere with anyone's possessions. Provision of security cancels the right to exercise preventive defense … the presumption of badness is dispelled by entering a juridical state and thus providing security through submitting oneself to coercive law' (193). Moreover, once we're in a rightful condition, the 'provisional' private property becomes 'conclusive' in that it is made secure by the state's legal system. The legal system not only solves disputes that may arise due to our typical lack of knowledge and inability to judge in unbiased ways, it also secures everyone's possession of their property against attack from others. So, in effect, Byrd and Hruschka are claiming that, for Kant, the 'presumption of badness' which is a rule of prudence justifies coercing others to form a state as well as the political obligations issuing therefrom. But there are significant problems with this interpretation of Kant's texts. Let's begin with Byrd and Hruschka's interpretation of the will that is 'united *originally* and *a priori*'. The central passage they consider (partially cited above and in their text) reads as follows:

> All men are originally in *common possession* of the land of the entire earth … and each has by nature the *will* to use it which, because the choice of one is unavoidably opposed by

> nature to that of another, would do away with any use of it if this will did not also contain the principle for choice by which a *particular possession* for each on the common land could be determined … But the law which is to determine for each what land is mine or yours will be in accordance with the axiom of outer freedom only if it proceeds from a will that is united *originally* and *a priori* (that presupposes no rightful act for its union). Hence it proceeds only from a will in the civil condition … which alone determines what is *right*, what is *rightful*, and what is *laid down as right*.—But in the former condition, that is, before the establishment of the civil condition but with a view to it, that is, *provisionally*, it is a *duty* to proceed in accordance with a principle of external acquisition. Accordingly, there is also a rightful *capacity* of the will to bind everyone to recognize the act of taking possession and of appropriations valid, even though it is only unilateral. Therefore provisional acquisition of land, together with all its rightful consequences, is possible.
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> Provisional acquisition, however, needs and gains the favor of a law … for determining the limits of possible rightful possession. Since this acquisition precedes a rightful condition and, as only leading to it, is not yet conclusive, this favor does not extend beyond the point at which *others* (participants) consent to its establishment. But if they are opposed to entering it (the civil condition), and as long as their opposition lasts, this favor carries with it all the effects of acquisition in conformity with right, since leaving the state of nature is based on duty. (6: 267)

A significant problem with Byrd and Hruschka's interpretation of Kant here is that they fail to account for Kant's mentioning of 'the civil condition'. As we can see, for example, after having emphasised that the appropriation of land is rightful (is in accordance with the 'axiom of outer freedom') only if it proceeds from an originally united and *a priori* will, Kant says: '*Hence* it proceeds only from a will in the civil condition.' The originally united, *a priori* will or the 'general will (in idea)' mentioned above is therefore a *public* will, or a will that does not simply refer to our individual or private, virtuous wills. It is the public will of the civil condition. So to read the 'general will (in idea)' as equivalent to 'owning the land in common', as Byrd and Hruschka do, appears to ignore important text to the contrary.

Further evidence that Byrd and Hruschka might have a problem with their textual argument is found in passages such as the following:

> By my unilateral choice I cannot bind another to refrain from using a thing, an obligation he would not otherwise have; hence I can do this only through the united choice of all who possess it in common … By the term 'property right' should be understood not only a right to a thing … but also the sum of all the laws having to do with things being mine or yours … What is called a right to a thing is only that right someone has against a person who is in possession of it in common with all others (in the civil condition). (261–2; cf 263–4)

Here, again, we find Kant stating clearly that obligations arise not from 'owning the earth in common' and a corresponding, individual duty to divvy it up, as Byrd and Hruschka argue; rather they depend on the institution of the 'the civil condition'.

In passages such as those quoted above, Kant's point seems to be that if we stay within the conceptual framework of the state of nature—or private, individual wills—we do not have the conceptual resources needed to explain or justify the transformation of unilateral acquisition of things into rightful possessions, or into

possessions issuing obligations on us. Therefore, in the state of nature, all we get is provisional possession, or possession that still requires the affirmation of our common or public will. It requires the public authority, since it must determine, ultimately, 'the limits of possible rightful possession'. Our unilateral, private wills—with an eye to what we reasonably believe can be affirmed by our public will—is therefore the best we can do in the state of nature, but it can only enable provisional private property, since conclusive private property must still be affirmed by the public authority. It is a purely conceptual argument, namely one that aims to show that if we merely appeal to private, unilateral choices we are unable to account for rightful private property appropriations. Only when our private or unilateral choices are affirmed by our public or omnilateral choices are they reconcilable with our fundamental duty not to subject each other's freedom to our arbitrary choices, but instead to interact subject only to universal law.

A second problem with the authors' interpretation is that it presupposes that Kant thinks that there is one correct way to specify the principles of private right in general and apply these general specifications in particular situations. As we have seen, this assumption is necessary if one wants to argue for the possibility of justice in the state of nature, and hence it is one that informs Byrd and Hruschka's analyses throughout the book. Remember that fundamental to their view is that the role of the state is simply to second what individuals would otherwise have justly (ideally) come up with on their own. A philosophical problem associated with this view—and so a problem accompanying the Lockean position—is that it seems implausible to argue that there is only one way to apply these principles. For example, how do we specify what it means to bring a piece of land or a river 'under control' and what do we do, more exactly, 'to signal to others' that we have taken it under control? Moreover, even if we could figure out how to specify the general rules for, in this case, private property appropriation, how do we apply these general principles to particular cases? For example, should the boundary line between your property and mine be drawn to the north or to the south of the tree over there? What if you had always assumed that the tree fell within your property, and I had always assumed that it fell within mine? And what if neither of us had ever thought about this question of application until now? And if there really is one answer to both the specification of general rules and the application of these rules in particular cases, then why do we have so many different legal systems? Regarding the existence of various legal systems, Byrd and Hruschka argue that although my private judgements 'should correspond with any other private person's judgment' since we share our reason, and hence such judgements are 'objective', the court's reasons are '*subjective*' because the court is 'bound by public law … [and] law promulgated in a concretely existing juridical state is "adventitious"', or contingent (218). But if this is so, then it becomes somewhat puzzling why individuals should rationally subject themselves to the courts' subjective decisions rather than rely on their own objective reason.

Let me use a different example to illustrate this general worry. In several places Byrd and Hruschka discuss traffic laws. At one point they argue that '[r]eason commands me to drive on the right, not because any natural law, or law cognizable *a priori* through reason, requires driving on the right, but because in a concrete juridical

state a concrete lawgiver enacted a law requiring driving on the right side of the road' (54). Later they clarify that '[w]e need rules such as drive on the left, or drive on the right side of the road, because otherwise the streets would be chaotic, which would not lead to more freedom but instead to mutual interference and thus to a total lack of freedom' (88; cf 140, 154). But, we might argue, if justice is possible in the state of nature, then surely there should be one correct answer to the question of how we should interact when we meet on our travels. If there is no single correct answer to this question, then it seems that the problem isn't simply the ensuing chaos, but that there is no rightful use of coercion in regard to what we do (whether to move to the left or right) when we meet. And if there is no rightful coercion, then there are no conclusive rights. Moreover, why don't we have a right to live in somewhat chaotic circumstances? Furthermore, if the problem arising from lack of traffic laws (or other laws) is simply chaos, then why can we not just talk about it and find a way of interacting—why do we need public, coercive laws to have freedom in this regard? Contrarily, if there really is no single correct answer as to how we should regulate traffic or, of course, more generally regarding how we should specify and apply the principles of private right in particular situations, then can we maintain—as Byrd and Hruschka claim that Kant does—that the legitimate law of the just state (each particular law) *ideally* is backed up by unanimous consent of its citizens (145)? This is not to deny that Kant doesn't say puzzling things about citizens' unanimous consent to all the laws they are subject to (6: 314), but perhaps his points are even more puzzling than Byrd and Hruschka lead us to believe.

Locke poses another set of challenges to the position Byrd and Hruschka attribute to Kant. To start with, it is still not clear why—on a theory fundamentally committed to freedom—we can be forced to enter civil society for preemptive or prudential reasons. If I do nothing wrong to you and pose no threat to you, then why can you force me to enter the state? Acting imprudently should not be treated as committing wrongdoing, and you cannot reasonably assume that I might attack you at any time. Indeed, if I act in threatening ways, then I quite agree that you have a right to attack me preemptively, but that is an entirely different matter from forcing me into the state. The right to attack me preemptively is an individual right you have, but this is exactly what it is: a right to attack me preemptively. It is not a right to force me into civil society; I may rightly prefer to interact with you under conditions in which we both instead exercise our rights of preemptive attack. Moreover, if there really is one right way to apply the principles of private right, then why not agree with Locke that rightful punishment should also be possible in the state of nature? That is to say, in their chapter on criminal punishment, Byrd and Hruschka correctly point out that for Kant 'punishment is inconceivable without a state. [People] cannot be punished because there are no external (positive) laws, no judge to impose punishment, and no executive officer to execute the punishments imposed' (261). But surely, if there is one correct way to specify and apply the principles of private right, then it must also be possible to punish related transgressions too.

In addition, a Lockean would naturally be sympathetic to the idea that everyone has a right to a particular part of the land—which is precisely what the Lockean so-called 'enough-and-as-good' proviso is all about. The Lockean proviso serves to

answer the question of exactly how much each individual can acquire of the earth, including when newcomers arrive. On Byrd and Hruschka's interpretation, Kant has nothing to say about this beyond stating that one cannot acquire more than one can control, and that one must leave room for others (243). But if limiting acquisition to what we can control and leaving room for others is Kant's last word on the distribution of material resources in the world, then he also has nothing interesting to say about how we should live together, once we assume circumstances of scarcity—let alone poverty. After all, it seems obvious that some can control all the land in a more limited geographical area, and hence an appeal to what each person can 'control' cannot give us the standard needed to make sure that *everyone* gets a fair share of land or material resources as such, under varying conditions of scarcity. We need, at the very least, to figure out what it means to 'leave enough room' for others. In addition, on this reading, Kant would also have little to say about the rights to material resources of all those who require more than mere room, since they are unable to exercise control over anything due to immaturity, illness or impairment.

Textual and philosophical worries of the kinds mentioned above are what inform many of the interpretations of Kant falling into the second (non-prudential) strand concerning the realisation of rights in the state of nature. Proponents of this strand argue, in somewhat different ways, that (1) Kant thinks there is no one, objectively correct way generally to specify the principles of private right or to apply these general principles in particular cases, and (2) (consequently,) unilateral choices cannot issue obligations on all. Both considerations lead to the ideal conclusion that justice in impossible in the state of nature, and we need a public authority both to specify (public legislative authority) and apply (public judiciary) the principles of private right in cases where there is reasonable disagreement, and to affirm private or unilateral (yet uncontroversial) applications of private right. Only coercion (in the enforcement of restrictions) undertaken by a public authority actually enables reciprocal freedom under universal law, which is what Kant's Universal Principle of Right requires. They also argue that only a public authority can make it the case that everyone interacts as subject to universal law so understood, namely by providing public assurance that they do. Again, a private force—such as a private security force—cannot do this because it would put everyone, but not itself (also a private person), under the restrictions. Hence a private force cannot enable reciprocal freedom under universal law for all. It follows from this that the second strand of interpretations also challenges Byrd and Hruschka's claim that it is the presumption of badness or fact of evil that justifies coercing people into the state. There are instead ideal reasons why we do not have a right to stay in the state of nature. A central passage supporting this alternative approach to Kant is the following:

> It is not experience from which we learn of human beings' maxim of violence and of their malevolent tendency to attack one another before external legislation endowed with power appears. It is therefore not some fact that makes coercion through public law necessary. On the contrary, however well disposed and lawabiding [rechtsliebend: right-loving] men might be, it still lies *a priori* in the rational idea of … [the state of nature] that before a public lawful condition is established individual human beings … can

> [können] never be secure against violence from one another, since each has [his] own right to do *what seems right and good to [him]* and not to be dependent upon another's opinion of this. So, unless [he] wants to renounce any concepts of right, the first thing [he] has to resolve upon is the principle that [he] must leave the state of nature, in which each follows [his] own judgment, unite [himself] with all others (with which [he] cannot avoid interacting), subject [himself] to a public lawful external coercion, and so enter into a condition in which what is to be recognized as belonging to **[him] is determined *by law*** and is **allotted to [him] by adequate *power*** (not [his] own but an external power); that is, [he] ought above all else to enter a civil condition … the state of nature need not, just because it is natural, be a state of *injustice* (*iniustus*), of dealing with one another only in terms of the degree of force each has. But it would still be a state *devoid of justice* (*status iustitia vacuus*), in which when rights are *in dispute* (*ius controversum*), there would be no judge competent to render a verdict having rightful force. Hence each may impel the other by force to leave this state and enter into a rightful condition; for although each can acquire something external by taking control of it or by contract in accordance with [his] *concepts of right*, this acquisition is still only *provisional* as long as it does not yet have the sanction of public law, since it is not **determined by public … justice** and **secured by an authority putting this right** into effect. (6:312, my boldface emphasis and alternative translations)

Here Kant seems explicitly to deny that it is a fact of evil or presumption of badness that makes civil society necessary. After all, even on the assumption that everyone is 'right-loving', or virtuous in her dispositions and intentions, there exist different judgements regarding the distinctions between yours and mine in the state of nature. Consequently, any force used to implement any one or more of these opinions will necessarily be a violent, and not rightful, use of coercion. Rightful use of coercion is the imposition of freedom under law, but because there is no single way of specifying and applying the principles of private right in concrete situations, in the state of nature freedom under law is necessarily impossible. Therefore, any force exercised in the state of nature will be private, violent force and not rightful use of coercion regulated by law.

Obviously, if people happen to agree about how to specify and apply the principles of private right, there is no injustice involved in their interactions. But these interactions still will be 'devoid' of justice, since rightful use of coercion is impossible. These interactions are still subject not to universal laws but merely to each other's choices; it just so happens that everyone agrees in their judgements and consequently no conflicts arise. Hence, one is not independent from having one's freedom subject to each other's choices and instead subject to universal law, which, again, is what the Universal Principle of Right requires. This is not to say that we cannot acquire private property provisionally in the state of nature, or that oftentimes we do know and agree about who first took control over something (acquired it) and so on, in which case no indeterminacy issues arise (cf 6: 256). It is also not to deny that it is a person's unilateral choice to assert control over things that is the proper starting point for private property acquisition (cf 6: 266). Rather, the point is that there is no rightful solution to conflicts (ideal or non-ideal) in the state of nature, since even provisionally rightful private property acquisition in this condition does not issue rightful obligations. Only when our possessions are affirmed and assured by the pub-

lic authority—an authority that represents all of us and yet no one in particular (the 'general will (in idea)')—are they transformed from provisionally rightful possessions to conclusively rightful ones. Moreover, only when such a public authority establishes a monopoly on coercion is it the case that our interactions are actually subjected to universal law.

As mentioned at the beginning of this review paper, I would like to remark on Byrd and Hruschka's delineation of the just state, even though space considerations make it necessary for me merely to mention some of the puzzles I see here. It is worth pointing out that although intriguing, the authors' distinction between Kant's understanding of 'protective justice' (*iustitia tutatrix*), 'mutually acquiring justice' (*iustitia commutativa*) and 'distributive justice' (*iustitia distributiva*) is problematic. They argue that protective justice 'protects our rights … by taking the *a priori* principles of natural law [private right] and making them public, and thus binding and enforceable'. Mutually acquiring justice can also, they suggest, be called 'justice of the public market' (37), and concerns only private property and contract law, since family rights cannot be sold on the market (37–38). Finally, distributive justice is taken to refer to the public judiciary (38–39). A first worry arises from the fact that viewing 'mutually acquiring justice' as being limited to the public market doesn't seem to have much textual support. For example, when Kant defines this type of justice, he says that it refers to 'what [objects] are capable of being covered externally by law, in terms of their matter, that is, what way of being in possession is *rightful*' (6: 306). Moreover, it seems clear that Kant thinks of 'status' or family right as being rightful possession. For example, when marrying, two persons mutually acquire one another's person by forming one private home or household together. Consequently, it seems that the category 'mutually acquiring justice' should include Kant's category of status relations.

Second, Kant's actual discussion of the state's right to 'administer the state's economy … [and] finances', in section B of the domestic public right section in the Doctrine of Right, is at least strange if we follow Byrd and Hruschka's lead. And this brings me to a somewhat larger point. In many of the writings in the second strand of Kant interpretation, it is often emphasised—for example by Holtman, Ripstein and myself—that part of what makes Kant particularly interesting within contemporary discussions of the state's duties with respect to securing justice is this section of his on public right. Kant rather oddly entitles this section 'General Remark: On the Effects with Regard to Rights that Follow from the Nature of the Civil Union', and further divides it into sections A, B, C, D and E. In section A, we find Kant's famous discussion of revolution; in section B, his discussion of the state's control over land, the economy, finances, and the police; in section C, his discussion of the state's duties with regard to poverty; in section D, his discussion of public administration; and finally, in section E, his discussion of punishment. Given Byrd and Hruschka's overall take on Kant, we would or should expect all of these discussions, excepting revolution and public administration, to have taken place within the discussion of private right, since they are arguing that private right is realisable in the state of nature and the state simply concludes private right in the civil condition. Similarly,

it remains puzzling, on the authors' general approach, why Kant doesn't include regulation of the land, economy, finances and poverty in his discussion of private right or the state of nature. After all, if the state simply concludes provisional private right (by solving disputes and securing property) and nothing more, then why discuss these issues separately in the public right section? I take it that part of what is interesting in some recent work in the Anglo-American tradition—including that of Holtman, Ripstein and myself—is the proposal that Kant addresses these systemic issues in the context of public right because they concern the way in which the state reconciles its rightful monopoly on coercion with each citizen's innate right to freedom. For example, they argue that so-called 'welfare rights' and rights that citizens have in relation to the economy and the financial systems concern claims that citizens have on their public institutions (public right) only, and that these (public) rights are not matched by rights that private individuals have against one another (private right). It would have been interesting to see how Byrd and Hruschka would respond to such challenges.

In focusing on the importance of what I think is missing from Byrd and Hruschka's *Kant's Doctrine of Right: A Commentary*, I have obviously not done full justice to their rich and engaging work. For example, there are fascinating discussions of international and cosmopolitan justice, and of criminal punishment that I haven't been able to outline and engage. My aim, however, has simply been to provide a taste of some of the rewards of Byrd and Hruschka's commentary—a book that anyone who takes Kant's Doctrine of Right seriously will want to read.