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Kant and the Duty to Stay in the State of Nature

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ENG **Abstract:** The paper tackles the question whether Kant has successfully substantiated his claim that there exists a moral and juridical duty to leave the state of nature. Our thesis is that he has not. In the first step, it is demonstrated that Kant's concept of provisional ownership is a logical impossibility. Thus, property rights themselves cannot generate the duty to submit to the state. The only way to argue for the duty to exit statelessness that the Kantian is left with is, therefore, to conceive of that duty as implied directly by the right to freedom. Yet, one may plausibly argue that at the conceptual level, public law runs afoul of Kant's notion of freedom to a greater degree than private law does. Therefore, in virtue of the innate right to freedom, a *prima facie* duty arises to stay in the state of nature.
Keywords: social contract, property rights, freedom, anarchy, the state.

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1. Introduction

In his political writings,[1] Kant famously held that by virtue of the innate right to freedom, the individual ought to leave the state of nature and institute government as the provider of the system of rights (in particular, property rights) that makes freedom possible. In what follows, it shall be claimed that on Kant's own grounds, no such inference occurs. To the contrary, if anything, there exists a duty *not* to exit statelessness. We offer a two-pronged case for this thesis. As a preliminary step, it is argued that (1) since property rights do not exist in the Kantian state of nature, they cannot generate the obligation to leave the natural condition. More important still, (2) the state is not a prerequisite for the realization of the right that presumably does exist already in the state of nature: the right to freedom. Rather, the state and public law turn out to be *conceptually* incompatible with that very right to a greater degree than anarchy and private law are[2]. Therefore, absent a plausible *a posteriori* argument to the contrary, the right to freedom entails that there is a *prima facie* duty *not to* abandon anarchy.[3]

1 The present study is largely based on the perusal of Kant's *Metaphysics of Morals* as well as works included in *Kant's Political Writings* (ed. H.S. Reiss). The titles, in accordance with the Johanes Gutenberg Universität guidelines, are abbreviated throughout as "MS" (*Metaphysics of Morals*), "SF" (*The Contest of Faculties*), "TP" (*On the Common Saying: This May Be True in Theory, but It Does Not Apply in Practice*), and "ZeF" (*Perpetual Peace*). Other works invoked in the article are referred to as "GMS" (*Groundwork of the Metaphysics of Morals*), and "RGV" (*Religion within the Boundaries of Pure Reason*). Feyerabend's notes from Kant's *Natural Right* lectures (*Naturrecht Feyerabend*, "V-NR") have also been consulted.

2 Throughout, the words "state" and "government" are used interchangeably.

3 In Kant, it is not entirely clear what exactly is meant by the "state of nature." At times Kant seems to have in mind a stateless society, at other times - an unlawful one (see e.g. V-NR: 1383; *R*, 106-107). This poses a terminological difficulty, for as the present paper argues, there is a world of difference between the two. Throughout, following *The Metaphysics of Morals* as well as *Naturrecht Feyerabend*, the term will denote a stateless (anarchic) society, characterized, as Kant (MS, 306; V-NR, 1338; cf. Achenwall 2020, 26:55)) opines, by the governance of natural law and positive private law as well as the lack of public law.

The article advances the classical liberal tradition in Kant scholarship (Buchner 1996; Byrd and Hruschka 2010; Gregor 1962; Höffe 2022; Kuznicki 2016; Verhaegh 2004). In this spirit, we critically scrutinize Kant's belief in the necessity of leaving the state of nature in light of the central themes of his political philosophy: freedom and property. This, of course, has already been widely discussed in the literature (Byrd and Hruschka 2010; Christmas 2021; Gregory 2021; Ellis 2008; Hodgson 2010; Kersting 1992; Ripstein 2009; Stiltz 2014; Szczepański 2017, 2019; Wood 2007, 2014; Varden 2008, 2010). While virtually all relevant researchers embrace Kantian statism, Billy Christmas (2021) has argued plausibly that Kant's view on the impossibility of conclusive property rights emerging under statelessness is ill-founded, and that consequently the state is not necessary to institute justice. More recently (2025), this same author made a convincing case that statism offers no satisfying solution to the major deficiency of the state of nature emphasized by Kantians: the unilaterality of property title acquisition. For in actuality, the act of state-formation is itself no less unilateral than homesteading under anarchy is.

This paper adds to Christmas's contributions in a twofold manner. First, it challenges Kantian statism from a different angle. Namely, it identifies a contradiction between the very concept of rights in Kant and his notion of only provisional ownership.[4] The main novelty, however, lies in suggesting that whilst the state miserably fails to fulfill the Kantian idea of freedom under the rule of law, anarchy is, at least in principle, capable of realizing it to a far greater extent. Thus, the state is not a precondition for freedom; it is a negation of it. Differently said, instead of addressing the issue of unilaterality, the state seems to only aggravate the problem.

In submitting this, the article proposes a surprising twist in the time-honored debate on the relationship between individual rights and the state. For one thing, historically, it was Lockeans who, by grounding their views in a conception of pre-state property rights, were faced with the problem of whether the state is morally justifiable in the first place, with some of them answering this question in the firm negative (e.g., Rothbard 1998). Kantians, on the other hand, seemed to be wedded to some form of statism from the outset, by virtue of their claim that property rights can emerge only where statelessness is left behind (see Christmas 2025). This paper, in turn, argues that Kantianism may supply grounds for anarchism as well.

For another thing, it was Kant's ambition to prove the indispensability of the state in a purely analytic fashion: by showing that anarchy is incompatible with the very concept of freedom (Hodgson 2010; Ripstein 2009, 23, 145-181; Williams 2003; Varden 2008, 2010).[5] *Pace* Kant, this article maintains that conceptual analysis alone cannot do the trick. It is so because anarchy and statism alike are fraught with the danger of unilateralism in duty imposition even when probed through the prism of their *ideal* versions. The difference between them, from the Kantian standpoint, is not one in kind but of degree. And even though, as will be seen, there are sound theoretical reasons to believe that anarchy may in fact fare better in alleviating unilateralism than statism ever could, whether that is really the case is, at the end of the day, a highly complex, *a posteriori* question. The claims of this paper, then, should not be taken to imply too much. We offer no ultimate proof that anarchy is superior to statism. Rather, what is presented is a somewhat sketchy case highlighting the prospects for a lawful society without a state, which – as mentioned – establishes a *prima facie* duty to stick to anarchy.

On the other side of Kantian spectrum, there are authors (Ellis 2008; Guyer 2000; Hodgson 2010; Kersting 1992; Wood 2007, 2014; Varden 2008, 2010) who go to great lengths trying to demonstrate that the practical philosophy of Kant not only comprises a duty to establish the state but also entails a government far more comprehensive and redistributive than Kantian classical liberals would like to have it. As the below argument hopes to prove, nothing can be further from the truth. For if no state whatsoever can be defended on Kantian grounds, the same, for that matter, is true of any form of welfare state.

Other scholars adopt a different – in a sense, more radical – kind of Kantian statism. Along the lines of legal positivism (for an exposition of a positivist outlook on Kant, see Waldron 1996), they argue for at least one of the two contentions: (1) even the right to freedom (not to mention property rights) is not a conclusive right whose binding force predates the emergence of the state, since "there is no such thing as a right without a system of rights" (Sangiovanni 2012, p. 466). (2) Kant's legal theory is in no way grounded in his ethics; specifically, there exists no logical connection between Kant's views on human dignity, the categorical

4 Indeed, some commentators interpret Kant precisely to the effect that what he meant by provisional rights were not so much rights proper (i.e., enforceable claims) as "the imperfection of an action (that of acquiring ordinary rights) where public authorization is lacking" (Stone and Hasan 2022, p. 51). The original import of this article consists in showing, by means of rational (logical) reconstruction, that (a) if this is the case, then no duty in the sense of enforceable obligation is generated, and (b) that in the absence of pre-state property rights, state-made rights fall short of being the robust protective perimeter of freedom that Kant wants them to be.

5 In his first *Critique*, Kant famously dismissed all traditional metaphysics on the grounds that the pure reason seeking to grasp the nature of reality by strictly conceptual means transgresses its own limits. Kant did, however, rely on analytic judgments in his practical philosophy. Indeed, the entire edifice of Kantian ethics was to be built upon "concepts of pure reason" (GMS 4:389), as otherwise laws could not "hold morally, that is, as a ground of an obligation," which "must carry with it absolute necessity" (GMS 4:389). Hence the very term "metaphysics of morals," of which the doctrine of right is part: for what is "called metaphysics" is nothing other than "a system of *a priori* knowledge from concepts alone" (MS 6: 217). As Kant makes clear, that such a metaphysics is both possible and necessary is due to the fact that unlike theoretical philosophy, practical philosophy "has not nature but freedom of choice for its object.... and every man also has it [the metaphysics of morals] within himself, though as a rule only in an obscure way; for without a priori principles how could he believe that he has a giving of universal law within himself?" (MS 6:217). In other words, Kant's criticism of the analytic method (e.g., his rejection of the ontological argument) extended solely to the matters of theoretical reason. It is only in the realm of "is" judgments that the problem of incompatibility between concepts and reality (the *Ding an Sich*) arises; as far as "ought" judgments go, there is simply no outside reality which a concept may fail to correspond with.

imperative, and duties of virtue on the one hand, and the legal rights that individuals may have on the other (Flikschuh 2022).

In stark contrast to this approach, this article commences with what Katrin Flikschuh (2022) calls the "free choice" reading of Kant's *Rechtslehre*. This account, characteristic of both the classical- and the statist-liberal traditions in Kantian scholarship, conceives of the innate right as foundational for Kant's entire legal philosophy and anchored in his ethics via autonomy of the will (see Flikschuh 2022 for a critical overview). Our critique is directed precisely at the welfare-statist variety of this reading. What is shown is that the corollaries of the free choice account might instead be anarchist.[6] The positivist perspective, in turn, is left on the cutting-room floor precisely because it precludes even asking the question as to what the implications of Kantianism for the theory of just rights are.[7]

The method of the research is so-called rational reconstruction (Lakatos 1981, Linsbichler 2017). Thus, we do not hesitate to call Kant's position into question whenever it turns out to be at odds with the inner logic of his system.[8] In order to grasp the latter, the Hohfeldian matrix of jural correlatives and opposites is applied. Nonetheless, our case still represents an immanent critique of Kant in that modern analytical apparatus is harnessed to capture the logical ramifications of his own core tenets. Accordingly, the article is critical rather than historical, which is why we target contemporary Kantianism and Kant scholarship as much as we deal with the historical Kant and his original body of work.

The article proceeds in the following order: in section 2, the foundations of Kant's practical philosophy are concisely reconstructed, including his notions of freedom and property, as well as the way Kant purports to have derived the obligation to leave the state of nature from these desiderata. This sets the stage for a detailed criticism of Kant's justification of the state. Section 3 tackles the Kantian distinction between provisional and conclusive ownership, which underpins the belief in the indispensability of government. More specifically, with the aid of the conceptual framework borrowed from Wesley N. Hohfeld, provisional ownership is presented as a logical impossibility. The remainder of the text addresses Kant's claim that the individual is under a juridical obligation obligation to submit to omnilateral law and thus to the state, an inference which is shown here to be a *non sequitur.* On the contrary, as section 4 submits, the state is an institution inherently inimical to property rights. Along the same lines, we turn Kant's notorious case against the right of rebellion on its head by pointing out that what the argument in fact implies is that in a statist regime, individuals are necessarily stripped of the rights Kant ascribes to them. Therefore, if Kant were right in positing that the state is the only institution capable of establishing conclusive rights to begin with, then freedom would be doomed. In section 5, it is argued that in positing the superiority of civil society over the state of nature, Kant fell prey to what would later be dubbed by the economist Harold Demsetz (1969) the "nirvana fallacy." This made Kant overlook those features of statism that thwart freedom under the rule of law and those characteristics of anarchy that may promote it. The last section summarizes the points of the paper.

2. Freedom, property, and the duty to leave the state of nature

Kant's doctrine of right is premised on the concept of external freedom: the "independence from being constrained by another's choice." It is this freedom that, "insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity" (Kant, MS, 6:238). For this coexistence to be possible, intersubjective norms are necessary that allow us to limit our own and others' arbitrary choice (*Wilkür*). The observance of these cannot depend on mutual benevolence. Were this the case, freedom would rely solely on the obligation of virtue. Duties of Right, on the other hand, involve coercion. Legitimate coercion is, in a sense, never a violation of freedom; it is, instead, retaliatory – it constitutes a necessary response to a freedom violation. Kant argues:

> Therefore if a certain use of freedom is itself a hindrance of freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a hindrance of a hindrance to freedom) is consistent with freedom in accordance with universal laws, that is, it is right. Hence there is connected with Right by the principle of contradiction an authorization to coerce someone who infringes upon it (MS, 6:231).

6 Lucas Thorpe and Sun Demirli (2024) recently argued that citizenship in the realm of ends (i.e., in the realm of reciprocal law-giving) is implicit in the very idea of autonomy in Kant. The case presented here is by no means incompatible with this account, since, as those authors admit (p. 44), the realm of ends is a postulated moral community of all rational creatures rather than a particular republic, even though Kant's position was inspired by Rousseau's general will, an unequivocally political concept, to be sure.

7 Let us indicate on a side note that we do not find the positivist interpretation plausible in the first place. As regards (1), if the right to freedom is to imply any enforceable duties, including the duty to leave the state of nature (as it in fact does in Kant), then, by Hohfeldian equivalence, it must be a legal right (more on this below). Moreover, for (1) to be true, (2) must be false. If, as per (1), the right to freedom is not a legal right, then, given Kant's exhaustive (but not necessarily mutually exclusive) division between legal and moral rights, it is a moral right. Kant's philosophy of law must therefore have something to do with ethics. Finally, the standard argument for (2) is a *non sequitur.* Flikschuh (2022, p. 3) writes "Kant expressly denies that a person's external freedom is a function of her internal freedom: for an action to be right, hence externally free, it need not be based on a morally good maxim; mere outward conformity of action with universal law suffices." But from the fact that internal and external freedom are two different things it does not follow that there is no logical link between them in the way of one justifying the other.

8 Anna Stilz (2014, p. 209) names two schools of thought with regard to law in Kant's state of nature. According to one of them, property rights acquired in the state of nature are binding, per the other they are not. Of course, in Kant's political statements, enough evidence for both approaches can be found. Depending on which passage we focus on, contradictory conclusions may be derived. This is one reason the reconstructive approach appears more promising than a strictly historical one insofar as one is to treat Kantianism as a living body of thought, open to substantive debates and challenges.

This *innate* right to freedom and legal rights are therefore not to be confused with *inner* freedom (the inner capacity of each person to act in accordance with rational maxims). But Kant appears to see a connection between the two. Our metaphysical status as free, self-determining beings (dignity) creates a moral ground for some claims to independence in the external dimension (see, e.g., Guyer 2000; Ripstein 2009).[9] This, in a world of corporeal objects, necessitates the definition of property rights as spheres of what is mutually recognized as Mine and Yours. For it is only property rights that make it possible to delineate intersubjective borders outside of which the actions of individuals in the external world become unlawful license (MS, 6: 247; see also Ripstein 2009, p. 12, 86-106). «It is therefore an *a priori* presupposition of practical reason to regard and treat any object of my choice as something that could objectively be mine or yours" – says Kant (MS, 6:246).

Property rights are thus an extension of human freedom. Accordingly, people must have the power to appropriate unowned things (V-NR: 1339). Yet, *pace* Locke, Kant does not recognize homesteading in the state of nature as a sufficient basis for title acquisition. First of all, the declaration of will to exclude others from the liberty to use a thing would create an obligation unilaterally, outside the realm of objective law (Guyer 2000, p. 247-251). Kant writes: «...in the expression 'this external object is mine'..., an obligation is laid upon all others, which they would not otherwise have, to refrain from using the object (MS, 6:253)." Therefore, what is requisite in order to sanction particular acts of homesteading is the consent of all potentially interested in the resource one has appropriated: the Roussovian general will, which may be expressed only by public law. In Kant's view:

> So it is only a will putting everyone under obligation, hence only a collective general (common) and powerful will, that can provide everyone this assurance. But the condition of being under a general external (i.e., public) lawgiving accompanied with power is the civil condition. So only in a civil condition can something external be mine or yours (MS, 6:256).

The second problem with natural property rights that Kant identifies is that absent a public law, even when individuals do not actually fight, they remain vis a vis one another in the condition of potential war. In effect, greater force prevails and might is right. A crucial requirement for law, then, is to guarantee for everyone «equal liberty,» which institutionally reflects and safeguards «innate equality that is independence from being bound by others to more than one can in turn bind them ... (Kant, MS, 6:238)."

Last but certainly not least, Kant reasons that homesteading cannot be all there is to property title acquisition, since it is not immediately clear what the object of the title extends to exactly. To Kant, the act of appropriation begins with first possession. He writes:

> The question arises, how far does authorization to take possession of a piece of land extend? As far as the capacity for controlling it extends, that is, as far as whoever wants to appropriate it can defend it – as if the land were to say, if you cannot protect me you cannot command me. (MS, 6:265).[10]

Now there are cases where no empirical investigation can determine who possesses what. When two men come across each other in the woods, both claiming to have been the first to exclusively control the intersection of two overlapping parcels of the forest, there is no principled way of resolving the dispute. To remedy this shortcoming, the system of property rights needs to be sealed up by a legal convention. However, if such a convention were to be enacted by an individual actor or a group of individuals, then, yet again, nothing other than an act of unilateral imposition would take place. It is only public law, that is, a set of norms articulating the general (impersonal or omnilateral) will, that can do the job (Hodgson 2010, p. 62; Ripstein 2009, p. 170; Varden 2010, p. 334).

Thus arises the imperative: «Enter a condition in which what belongs to each can be secured to him against everyone else (MS 6:237)." The system of private law, whereby individuals independently enforce what they believe their property rights are, is, in turn, termed by Kant "provisional law".[11] The label indicates three major limitations of private law (the law which stems from private will) relative to public law (the law based on general will): (a) the arbitrariness in the imposition of obligations, which represent one-sided constraints on the will of all by some; (b) the inequality in the position to enforce rights, and therefore the lack of universal coercion to protect the rights of all equally; (c) the indeterminacy of law, consisting in the lack of non-arbitrary means of resolving conflicts between rival claims and interpretations. In short, Kant holds that the defects of natural condition are not merely accidental or empirical, but purely conceptual. If, as Kant (MS 6:230) has it, Right is to be defined as "the sum of conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom," and freedom means "independence from being constrained by another's choice," then the unilaterality embedded in all three shortcomings of the natural condition excludes lawfulness to begin with. In other words, it is not that anarchy is *unlikely* to produce law and order. Worse: what it produces is *by definition* short of the very concept of law (Hodgson 2010; Ripstein 2009, p. 23, 145-181; Williams 2003; Varden 2008, 2010).[12]

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9 As mentioned, some commentators negate this connection (Sangiovanni 2012; Flikschuh 2022).

10 Kant then understands possession as it is customarily defined, i.e., as exercising control over a resource to the exclusion of all others (Achenwall 2022, pp. 43-44; see also von Savigny 1979, p. 2; Steiner 1994, p. 39)

11 Stiltz (2014, 213-217) distinguishes provisional law on the basis of four important characteristics: "1) A provisional right reflects particular claims to specific pieces of land ...2) Provisional rights are defeasible by considerations of distributive justice...3) Provisional rights impose present duties on other subjects of right....4) Provisional rights entail duties on their claimants to work to establish rightful authorities... ."

12 As Christmas (2021) pointedly argues, problems (a) and (b) are in fact parasitic upon the problem of indeterminacy. It is therefore

Consequently, property titles acquired in the state of nature are likewise provisional, to be rendered conclusive only when the state is instituted. That is to say, as long as anarchy obtains, no one is obliged to forbear from seizing the possessions of others, and everyone is free to preempt a possible onslaught by invading their neighbor first (MS, 6:307).[13]

To sum up, Kant reasons that (a) in the state of nature, property titles can only be provisional, that (b) this is intolerable, since it compromises the innate right to freedom, and that (c) to render the provisional titles "conclusive", it is requisite to create a state. These three premises are supposed to support the conclusion that individuals are under moral obligation to leave the state of nature by instituting a government.[14]

Having thus reconstructed Kant's case, we are now ready to challenge it. More specifically, while (b) indeed cannot but be accepted on Kantian grounds, (a) will be shown to be analytically fallacious, and (c) debunked as a *non sequitur*.

3. Kant's Provisional Ownership

As promised in the introduction, Kant's notion of provisional ownership will now be subject to criticism as a logical impossibility. It will be shown that provisional property rights are either full-blown, "conclusive" property rights, or they are no property rights at all, meaning that the coercion inherent in the act of state-formation cannot be justified on their grounds. To this end, let us first clear the field by invoking the current state of the art with respect to what rights exactly are.

Per standard view, articulated in Wesley Hohfeld's (1919) classic matrix of jural positions and foreshadowed by Kant's own *Doctrine of Right* (MS 6:240; V-NR, *Introduction*), rights are enforceable claims, i.e., logical correlates of legal duties. That is to say, A has a right to X if and only if somebody else, B, has a duty to X, with X meaning either a performance (B doing something) or a forbearance (B abstaining from doing something). To exemplify, our having property rights in the keyboards we are typing on while preparing this paper entails (in the sense of logical correlation) that others are duty-bound to refrain from any uninvited intercourse with the keyboards. Conversely, others are so bound precisely because we have property rights in our keyboards. Such rights are typically referred to as "claim-rights" or "rights *sensu stricto*." Understood thusly, they are easily distinguishable from another type of jural relations designated in ordinary language as "rights:" liberties. These represent mere permissibilities, that is, they imply no duties on anybody's part. Hence, A is at liberty to do X if and only if he has no duty not to do X. In other words, A is perfectly free to do X, yet others are under no obligation to abstain from interfering with him doing X (see Kramer 2002). In a football game, both teams are at liberty to score a goal, but neither of them is obliged to grant the opponents safe passage.

An acute reader can perhaps already sense what is amiss in the idea of provisional ownership. Recall that according to Kant (MS, 6:307), in the state of nature "No one is bound to refrain from encroaching on what another possesses...." It transpires, then, that Kant's provisional ownership rights are rights without duties, which means precisely that they are no rights at all: a veritable "wooden iron" that Otto Liebmann famously spoke of.

The Kantian is thus confronted with a dilemma: either property rights in the state of nature are conclusive rights or there are no property rights in the state of nature at all. The latter reading is entertained by the vast majority of contemporary Kant scholars (e.g., Ellis 2008; Hodgson 2010; Kersting 1992; Ripstein 2009; Stiltz 2014; Stone and Hasan 2022; Wood 2007, 2014; Varden 2008, 2010). Indeed, in light of the above conceptual distinctions, one cannot but agree with Martin J. Stone and Rafeeq Hasan that what "provisional ownership" designates is not so much a "strangely anemic kind of ownership" (2022, p. 55) as "the impossibility of comprehending property purely as private right" (2002, p. 56).

Yet, Kant himself appears to suggest every now and then that property titles do preexist the state. As pointed out by Anna Stiltz (2014), Kant's remarks on colonialism entail that original appropriation is somehow binding even in the state of nature. Europeans, for instance, may not resort to fraud when purchasing natives' lands (MS 6:266), create a settlement on indigenous territory without their permission (MS 6:353), or even homestead an unoccupied parcel should it impinge on "hunters" or "shepherds" using 'great open regions' to make a living (MS 6:353). As Stiltz (2014, p. 208) notes, "this implies that the natives' first possession of their lands imposes some duties on Europeans." These contextual hints seem to be no coincidence given the justificatory role property rights play in the Kantian theory of the state. As Kant puts it:

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the last issue upon which the entire rationale for Kantian statism hinges. For if facts of the matter can be objectively ascertained (be it in virtue of natural law or an auxiliary convention preexisting both the state and individual parties to a dispute as the rules of language do), then there is nothing unilateral about original appropriation: it just particularizes a duty that has existed all along, i.e., one to honor others' legitimately acquired possessions (see also van der Vossen 2015). And with the unilaterality problem resolved, the other problems also disappear. The judiciary and law enforcement organizations, whoever and whatever they are, i.e., whether they are private or public agents, may mete out objective justice rather than the will of the strong. See the penultimate section of this article.

13 Provisionality, therefore, is not to be confused with temporariness. What Kant means is not that there is one set of property rights in the state of nature, and another one to supersede it under the auspices of the state. For such a set of temporary rights would be burdened with the exact same defects that, in Kant's account, beset any ownership titles in statelessness.

14 This line of reasoning is reflected closely in Varden (2008, 18): "although unilateral apprehension of a corporeal thing and giving others a signal that you have done so gives rise to a provisional title to the thing, it does not give rise to conclusive property rights in that thing. And without conclusive property rights, there are no rightful obligations. (...) If we were to have a right to refuse to enter civil society, then we would have a right to use coercion to enforce wrongful private property relations. That is, we would have the right to subject others' use of external freedom to our arbitrary choices rather than to universal law, and this just is to deny justice."

> Prior to a civil constitution (or in abstraction from it) external objects that are mine or yours must therefore be assumed to be possible, and with them a right to constrain everyone with whom we could have any dealings to enter with us into a constitution in which external objects can be secured as mine or yours (MS, 6:256).

Now the property titles that give rise to the social contract, if the "right to constrain everyone" to submit to the state is to really come "with them," must be binding, "conclusive" claims. If they are not, there are no property rights the violation of which would be remedied by forcing dissenters to live under public law, and without rights, there are, correlatively, no duties, including the duty to abandon statelessness.

A prominent Kantian resolution to this conundrum has it that even though provisional rights do not generate any duties in and of themselves, the homesteader still assumes the obligation to leave the state of nature implicitly, in the very act of appropriation. Since he demands, so the argument runs, that others honor his property claim, he simultaneously commits himself, on pain of contradiction, to enter a *system* of rights whereby the claims of his and others alike are respected (Stone & Hasan, 2022, p. 31). But this rebuttal will not do. If the duty to exit the state of nature exists, it exists, quite trivially, already in that state. Moreover, whatever the origin of that duty, transcendental or otherwise, it must be, as Kant (MS 6:237) makes abundantly clear, a duty of Right: if it were not, it could not be enforceable, which it is given that it justifies coercion. Now, being a duty of Right, the duty to leave the natural condition has to correlate with others' holding some enforceable right. Furthermore, if that right were to be created by the act of appropriation, then, again pretty trivially, it would constitute nothing other than an enforceable (conclusive) property right. Yet that is exactly what a number of passages from Kant and a massive bulk of Kantian literature forcefully deny. In a word, by asserting the provisionality of ownership in the state of nature, Kant forwent any possibility to argue for the state from duties ostensibly arising from acts of appropriation in the state of nature. If there are only provisional ownership rights in statelessness, then what those rights generate are provisional (i.e., unenforceable) duties, one of them being the duty to exit the state of nature.

4. The expropriating property protector and the sovereignty question

Having exposed the notion of provisional ownership as metaphorical at best and misleading at worst, we must now turn to the Kantian belief in the state as a (indeed, *the*) creator and guarantor of property rights. Let us start by defining what the state is. According to the famous definition coined by Max Weber (2004, p. 33), the state is a "human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory." This monopoly of violence comprises two indispensable prerogatives: 1) to obtain revenue through mandatory payments, typically taxation; 2) to prohibit citizens from patronizing competing agencies that offer services of protection or adjudication (Hoppe 2021, p. 190). Now, on the Lockean view, these two features of the modern state pose a serious difficulty: they seem to contravene the very pre-state property rights the state is supposed to safeguard (see Locke 1988, Hoppe 2006; Nozick 1999; Rothbard 1998). As regards the first prerogative, taxes are, by definition, involuntary payments. They are levied against the will of private proprietors, thereby undermining their ownership rights to the exact same amount of money that is subject to taxation (Nozick 1999). The second power of the state, in turn, is at odds with the freedom of contract, which can be uncontroversially conceived of as an incident in the bundle of rights that ownership constitutes, or stated more precisely, as part of the right to manage and the right to capital (Honore 1993, p. 372).

This tension between the very existence of the state and property rights has long been thought to be absent within the Kantian framework. For Kant, in contrast to Locke, dismissed the notion of pre-state ownership, instead ascribing the task of defining property rights to the public law (see Christmas 2025; Stone & Hasan 2022). Yet, as will be demonstrated below, the said tension looms large in Kantianism as well.

A good starting point to see that this is indeed the case is to have an unbiased look at Kant's notorious argument against the right of rebellion. Although it is sometimes seen as a sign of Kant's statist prejudice rather than a cogent philosophical argument, we claim that in positing that one cannot simultaneously have a government and the right to overthrow it by force, Kant was actually onto something. This, in a nutshell, is the gist of Kant's argument:[15] the point of the social contract is to create a sovereign entity to which individuals would be subordinated. But individuals having the right to topple the government would imply that the body politic is not really sovereign, as its subjects would retain the power to overturn its laws. In effect, the state of nature would still obtain. And since returning to that condition would represent an anathema, once the state is around, citizens have a duty not to oppose it by means of force (TP, 8:303).

Kant's logic is impeccable here. As long as sovereignty denotes ultimate decision-making powers, it does follow that there cannot be two sovereigns (two ultimate decision-makers) in the same place and at the same time. Incidentally, ultimate decision-making happens to be what property rights also consist in (Thrasher 2019). Moreover, according to the so-called will (or choice) theory of rights, *all* rights are exactly legally protected choices (Steiner 1994, p. 55-59). Hence Herbert Hart's (2001, p. 183) well-known designation for having a right: "small-scale sovereignty." As it happens, Kant is commonly regarded in the literature as the originator of the will theory (Simmonds 2002; Steiner 2002). This comes as no surprise: as we have seen, Kant construes rights precisely in terms of freedoms and choices, and entire edifice of law, recall, is to constitute nothing other than "the sum of conditions under which the choice of one can be united with the choice of another in accordance with the universal law of freedom" (MS. 6:230).

15 Certainly, that is not the only argument Kant offers. It is, however, the most instructive one from this paper's standpoint.

With that in mind, where Kant errs is not in contending that the state's sovereignty and the right to rebel are mutually incompatible but in his further allegation that in overthrowing the authority, the people would "put an end to the only state in which men can possess rights (TP, 8:295)." In actuality, the exact opposite is the case: by toppling the government, the people *abandons* a state in which, in the last analysis, it has no rights. Surprisingly enough, Kant (MS, 6:324) is at the verge of spelling this out himself when speaking of the sovereign as "the lord of land, or rather as the supreme proprietor." Well, in strict logic, with a "supreme proprietor" above me, I am no proprietor at all. Consequently, if the state is supposed to be a protector of property rights, it is an "expropriating property protector," a "contradiction in terms (Hoppe 2006, p. 391)." If, as per the received exegesis scrutinized in the previous section, no conclusive property rights exist outside the state, then individuals can never enjoy any property rights, and, concomitantly, any meaningful freedom at all. The Kantian thereby finds himself in the direst of straits: property rights are a prerequisite for external freedom, yet they cannot come into being either in the state or outside it.

Of course, the foregoing does not mean that the existence of the state conflicts with property rights under any position endorsing some form of private property. On innumerable political and legal theories, property rights are thought of as limited by some overriding values such as freedom, welfare, the common good or the needs of have-nots. At any rate, the state seizing income in taxes and delegalizing competition would amount to abridgement of property rights, not to violation thereof.

However, sacrificing ownership rights for any communal interests is precluded by Kant's systematic commitments. As an ethical deontologist, Kant explicitly denied that the goal of the state is to promote any goals such as welfare or common good. Instead, he believed the purpose of the state to be the protection of justice, within whose framework everyone is free to pursue their own values as long as they do not infringe upon the like liberty of others (V-NR, 1382). Furthermore, the whole edifice of Kantian *Rechtslehre* testifies to the thesis that in Kant, justice is construed solely in terms of rights to freedom and property. Kant writes:

> But the whole concept of an external right is derived entirely from the concept of freedom in the mutual external relationships of human beings, and has nothing to do with the end which all men have by nature (i.e. the aim of achieving happiness) or with the recognised means of attaining this end (TP, 8:289).

Accordingly, we are left with but one value that may possibly outweigh property rights: freedom itself (Wood 2014, p. 83-89). All in all, as "the only innate right", at least the right to freedom must be thought of as conclusive and thereby present already in the state of nature. Otherwise, what would "innate" even mean and how could freedom generate any enforceable duties, including the one to exit anarchy?[16] It is nevertheless worth remembering that spheres of rightful, orderly freedom are, per Kant, to be demarcated precisely by means of property rights definition. While this certainly does not entail that no conflict between liberty and property can arise,[17] one then needs to be very cautious when entertaining possible limitations on ownership. One reason any attempt to reconcile Kantianism with the welfare state must be deemed inconsistent with the overarching themes of Kant's thought is that it requires a big, vastly redistributive government, freely altering the very ownership rights that are supposed to protect one from the arbitrary choice of others (including government agents).[18] Yet, the existence of the state alone, not to mention its assuming any supraminimal functions, undermines freedom, equality, and the rule of law as Kant conceives of them.

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16 It would also seem that at least the right to freedom must escape the unilaterality problem: it is original, so, unlike rights to external property, it does not create any new, unilateral obligations.

17 Indeed, Kant does admit that people may be taxed to provide for the subsistence of "those who are unable to maintain themselves (MS, 6:326)." Wood (2007, 194-198; 2014, 85-88) interprets this passage to the effect that the wealthy obligatorily providing for the poor is a matter of the latter group's freedom, as without such support, they would be left dependent on the former's choice. Assuming, arguendo, that Wood is correct, making everyone dependent on the choice of legislators does not seem to be a suitable remedy for the unfreedom of the destitute. The same, for that matter, goes for Wood's (2014, 88-89) own Kantian justification of liberal egalitarianism.

18 Very little caution in this regard is displayed by those Kant scholars who, like Ellis (2008, 53-68), Guyer (2000, 239-258), or Wood (2014, 83-89) postulate that the definition of property rights be, with specific circumstances of place and time in mind, constantly altered for the sake of furthering freedom in terms of social plurality or opportunities available. As a result, to Guyer's mind, Kant's political philosophy, despite its propertarian and classical-liberal overtones, can be reconstructed so as to supply justification for "the New Deal leg of liberalism" (Guyer 2000, 246). Along similar lines, Varden (2010, 336) postulates an active role of government in "poverty relief," with taxing the rich being not only permissible but indeed essential for every state's legitimacy. Alas, to raise such postulates is to jettison the very fundamentals of Kantian rights theory. The main problem with Kantian advocacy for the welfare state is that in assuming that rights should be contingent on particular, empirically identifiable challenges to liberty, Ellis, Guyer, Varden, and Wood seem to downplay Kant's ethical anti-empiricism, derived not only from the Humean is-ought dichotomy and the insistence on categorical character of laws but also from the recognition of the subjective nature of happiness. If "happiness is not an ideal of reason but of imagination" (Kant, GMS, 4:419), then the legislator cannnot ascertain whether in a given act of appropriation the proprietor leaves or gives to others "something of similar value" and whether the current distribution of property requires a redistributive correction (Guyer 2000, 251). According to both modern economic science and Kant, that is simply inconceivable, as all value is inherently subjective, unmeasurable, and intersubjectively incomparable (Robbins 1932). Thus, whatever legislation resting on individual valuations that people make or would (according to the law-giver) reasonably make is purely whimsical, clearly an anathema for any social rationalist such as Kant. By the same token, *pace* Wood (2007, 2014), untenable is the idea that equality of opportunity and outcome should be viewed not as a material end for which freedom would be sacrificed but rather as part of freedom itself, for the have-nots are susceptible to the arbitrary choice of the haves. At the end of the day, equality is equality concerning *valuable* or *desirable* goods. An egalitarian state must therefore stipulate which goods are more valuable than others, in what quantity, and to whom. (Is healthcare worth having? Compared to what? How much of it at the cost of education or anything else? And who exactly should be the recipient?) Although there is no room here to engage in a

5. The right to freedom and the rule of law: the state versus anarchy

According to Kant (MS, 6:238), we have at least one innate, i.e., pre-state, right: the right to freedom "insofar as it can coexist with the freedom of every other in accordance with a universal law." Did it, therefore, transpire that there is nothing inherently lawful in statism relative to anarchy, then Kant's case for the duty to obey the state would founder, and to coerce one into living in it would be to contravene their natural right to freedom. As we shall presently see, that is exactly the case. Kant, in trying to show that it is not, deferred to what the economist Harold Demsetz (1969, p. 1) dubbed "the nirvana fallacy." Demsetz complained that other economists all too often scolded the free market for its various imperfections and called for government intervention to correct them as though the designed government actions themselves represented unadulterated perfection with no risk involved. To Demsetz's mind, what social scientists should do instead is adopt a comparative approach, i.e., one taking account of the strengths and weaknesses of both types of institutional arrangements at hand. Admittedly, Kant did not cherish the state as literally perfect. Yet, as will be seen, Kant's political views plainly betray a soft spot for the state provision of law and order, whereas anarchy is almost never given proper attention in comparative analysis.[19] Moreover, being scornful of the unilaterality putatively characteristic of anarchy, Kant tells us every now and then that insofar as the state is concerned, we should simply put trust in the goodwill of rulers[20]. It is precisely this nirvana approach that derailed Kant's otherwise perspicacious analyses of the rule of law.

Christmas (2025) observes that both Lockeans and Kantians acknowledge the same problem: when unaided by some kind of positive law, natural law theory cannot fully determine what belongs to whom. The finer details of just how much has been homesteaded cannot be deduced from a single philosophic principle such as Locke's labor-mixing or Kant's first possession. Some part of the determining still has to be done. Now the difference between the Lockean and the Kantian camp is not, as the latter school has it, that Kantianism offers an omnilateral (statist) resolution to his problem, whereas Lockeanism settles with the unilaterality of an individual will. In point of fact, public law (championed by Kantians) and a legal convention, be it public or private (advocated by Lockeans), are both unilateral, in that a person or a group of persons must impose them first. Christmas (2025, p. 17) concludes:

> Just as the Lockean must answer the question: What happens when there is no settled convention? The Kantian must also answer the question: What happens when there is no state? Their answer is: We must establish one. But this is on an equal footing to the Lockean answer was that we must establish a convention. How do we establish one without engendering the problems that gave rise to its need? If we are not authorised even to determine the boundary of our own homesteads, how are we authorised to attempt to monopolise coercion so as to determine all boundaries?

How, indeed? Below, an argument will be outlined that private law – the only law that exists in the Kantian state of nature – may be shown to handle the unilaterality problem far better than the state and public law do.

The system of «rule of law,» whereby laws are made impersonally for all so as "subject human conduct to the governance of rules" (Fuller 1969, p. 46), reflects the Kantian postulates of equal liberty and clear definition of property rights. Following the legal theorist Bruno Leoni (1972, p. 62), we can point to at least two fundamental conditions for the rule of law:

> (1) the absence of arbitrary power on the part of the government to punish citizens or to commit acts against life or property; (2) the subjection of every man, whatever his rank or condition, to the ordinary law of the realm and to the jurisdiction of the ordinary tribunals.

Let us now critically address the state's compliance with both requirements, the focus being the ramifications of legislative monopoly.

Condition (1) may be partly construed as stability and clarity of law. After all, if rulers can alter the law on a whim, then having them bound by it is of severely limited use. Their power remains arbitrary (unilateral), and citizens are accordingly made unfree. By the same token, instability of law means that property titles are still ill-defined, as the acting subject, while making his plans, cannot know in advance what will belong to whom tomorrow. In such a system, law is subject to the ever-changing will of individuals residing in the legislative. As pointed out by Leoni (1972, p. 8): «a legal system centered on legislation, while involving the possibility that other people (the legislators) may interfere with our actions every day, also involves the possibility that they may change their way of interfering every day." [21] Technically speaking, the very idea of legislation vests a group of persons with Hohfeldian powers to control the jural positions of everyone else (see Hohfeld 1919).

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thorough criticism of the abovementioned Kant scholars, let us at least indicate that the approach adopted in this essay appears closer to the original spirit of Kantianism in that it focuses on logical-analytic features of rights and laws, thereby suggesting an aprioristic and relatively robust baseline for positive law.

19 The only exception where Kant does consider anarchy as a viable social order, in fact espouses it, is his idea of perpetual peace. For it so happens that all heated disputes in the discipline notwithstanding, on one point there is unanimity among contemporary scholars of international relations: interstate politics is a realm of anarchy. There is no world government and no international police to call should a state's rights be violated. In a word, vis a vis one another, states remain in the state of nature. (Nye 2007, 4-7; Mearsheimer 2001, chap. 2). In like manner, citizens of different states also enter into their dealings with each other under statelessness (Rothbard 2000, p. 227).

20 See Kant's trust in the lawfulness of government unchecked by the menace of popular rebellion or his high hopes that a well-meaning absolute monarch can emulate the workings of a republican political order (ZeF, 8:352, 372; SF, 7:88).

21 Empirically, the outcome is, quite predictably, regime uncertainty (Hayek 1982, Kinsella 1995, Sartori 1976, 38).

As a result, legal norms become a concoction of authority. Thus, in trying to effectively secure their freedom, parties to the social contract undercut the very rights they seek to have protected.[22]

Insofar as condition (2) is concerned, under public law, citizens can at best be equal among themselves. Between citizens and rulers, Kant soberly notes, there can be no equality:

> Man's equality as a subject might be formulated as follows. Each member of the commonwealth has rights of coercion in relation to all the others, except in relation to the head of state. For he alone is not a member of the commonwealth, but its creator or preserver, and he alone is authorized to coerce others without being subject to any coercive law himself (TP, 8:291).

Observe that for this to hold true, there need not be a single "head of the state," such as a Kantian enlightened monarch. It suffices that a specific class of individuals be equipped with the exclusive (monopolistic) competence to pass laws. The legal position of persons is thereby rendered unequal. And because of the supremacy of government over the citizens, unilateral decisions made for all by some are sanctioned. If the goal of the civil pact is to substitute the omnilaterality of an authoritative will for the unilaterality of the arbitrary choice of an individual (Gregory 2021, p. 66-69), then the state miserably falls short of this purpose. At the end of the day, unless the rulers are some sort of superhumans, magically embodying the general will (a bizarre suggestion Kant would have surely never countenanced), one is left with yet another bunch of individuals controlling the entire legal system. Relative to this predicament, the one-sidedness of private land acquisitions must strike one as pretty innocuous.

There are two possible objections to this Kantian critique of legislation we can think of. First, it may be held that legislation is not an inherent feature of statism. In other words, one can have a Weberian monopoly of force that refrains from producing any laws, focusing instead on the enforcement of private contracts or other forms of private law (Hasnas 2003). Yet for the Kantian statist, this line of argument would amount to a defeat, as it would presuppose the existence of conclusive property rights emerging without government provisions. Moreover, the state being what it is, i.e., a sovereign legal entity, its not *legislating* is by no means tantamount to giving up legislative *powers*. Put differently, the state is always in a legal position to start legislating, while abstaining from doing so is but an exercise of the sovereign's arbitrary will.

Second, one may argue that as unilateral as state-made law is, it is still somehow superior to the unilaterality of private law. This brings us to our positive argument for statelessness. True enough, under anarchy, too, no equality exists insofar as the ability to enforce one's rights is concerned. Some are rich, some are poor; some are mighty, some are weak. It is nevertheless worth noting that certain interpretations to the contrary notwithstanding (Hodgson 2010, p. 71; Wood 2014, p. 88-89), this factual inequality does not matter in Kant's system. What does matter is formal equality. Here one must clearly separate entitlements – that is, enforceable claims – from actual guarantees, i.e., favorable conditions for the enforcement.[23] Only the former belong within the remit of jurisprudence. To Kant (TP, 8:291/292), equality before the law is compatible "with the utmost inequality of the mass in the degree of its possessions." To think otherwise would be an instance of «shaky principles,» i.e., making law so as to accomplish material ends (MS, 6:233). By contrast, as Kant argues, the fundamentals of law can only be known *a priori*, that is, independently of the conditions of the world of phenomena. Kant writes:

> A theory of law necessarily requires a system which would have its origin in reason itself (...). For the sake of its completeness (and this is a necessary condition for obtaining a system derived from reason), which is out of the question in the case of material drawn from experience, we must not introduce any empirical concepts into the kernel of the system (MS, 6:205).

The reciprocity of the obligations of law must, therefore, consist exclusively in everyone's being formally likewise subject to them. It is this requirement that state-made law of necessity fails to meet, as those wielding the power to stipulate the provisions of public law are, by definition, not subject to the law the same way others are.

That being said, the need for the institutionalization of law as a means of securing individual freedom and the very existence of society is beyond doubt. This need, however, does not necessitate centralization and monopoly. In Kant, the state – understood in the Weberian fashion – was not proven, but simply assumed to be the only viable way to organize society. Interestingly enough, Kant himself defined the state as «a union of a multitude of men under the laws of Right (MS, 6:313).» From this definition it by no means follows that the provision of law and order must be entrusted to whatever institution of the Weberian kind. As pointed out by

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22 Needless to say, redistributive patterns of justice can only aggravate the problem by adding to the instability and arbitrariness of statutory law. All in all, if property rights are to be assigned in response to specific exigencies of time and place, then such an assessment can be done by none other than politicians, on a basis no other than their subjective judgment. The position of the said scholars is also riddled with the nirvana fallacy to an extent far greater than what we find in Kant. Guyer (2000, pp. 258-261), for example, maintains that while always ready to trim property rights, the state ought to unwaveringly honor freedom of speech and conscience. Only a nirvana view on the workings of government, however, can make one believe that vested with sovereign powers, the state will just follow through with Guyer's wish list instead of pursuing the interests of the rulers and their supporters, which only incidentally (indeed, hardly ever) happen to consist in freedoms cherished by Guyer.

23 Still, it is worth emphasizing that the state has its own problems with ensuring effective equality of rights protection. Given that organizational capabilities, wealth, or connections not infrequently translate into policy-shaping powers, the state, instead of alleviating discrepancies in influence on law-making, is likely to magnify them. These problems, while known all too well to any careful observer of political life, have nowadays been elaborated on in great detail in the public choice literature. See e.g. Buchanan & Tullock 1965, Stringham 2015.

Roderick T. Long (2008), a polycentric system of private law and dispersed adjudication at least *prima facie* meets the criteria for the rule of law in that, in contrast to state legislation, it does not let any single person or a group of persons unilaterally impose legal conventions on everybody else. Quite the opposite: laws are made by contracting parties and, should a dispute between them arise, the judges they appoint. Accordingly, no one except the contractors is bound by the provisions and the judges come into play only when the parties to a dispute so will, to pass a verdict that extends to nobody but them. It is only with other, also voluntarily appointed judges using prior verdicts of their colleagues as a standard for their own rulings that the new laws are applied step-by-step to the rest of society.[24] As John Hasnas (2008, p. 113) observes, all one has to do to see that this is no science-fiction is to take a look around. The system of common law is nothing other than an order based on judge-made law and nonexistence of a monopolistic legislative body. Alas, despite his keen insights into the nature of law, Kant ultimately succumbed to what was recently termed by Edward Stringham (2015, p. 10) the deus *ex machina* account of law, i.e., the view that law is created out of thin air through the benign activity of state institutions.

Of course, there is no room here to present an in-depth comparative analysis of private and public legal systems.[25] It is enough for the purposes of this paper to point out that if the state denotes a legislation monopoly, then its laws are unilateral, which, on Kant's own account of freedom, renders individuals unfree. Contrariwise, if conventions can in principle develop under statelessness owing to customs and private adjudication (Christmas 2021, p. 1730), then, as accepted gradually and voluntarily in a bottom-up manner, they are, by definition, *multilateral:* they are voluntarily opted for by those who seek peaceful conflict resolution, and to this end patronize adjudication and law enforcement agencies that operate upon those conventions. It is in this sense that private law does not subject one to the arbitrary choice of another. Instead, it represents a spontaneous, largely impersonal order driven by abstract rules of conduct, very much analogous to the spontaneous law-giving of reason in Kant (for classic treatments of spontaneous legal orders, see Hayek 1982, Barnett 2014).

Still, as mentioned, even if the development of private law proceeds as smoothly as in the theoretical sketch offered here, a modicum of unilaterality nonetheless remains: a convention, by definition, has to be created rather than discovered. It is for this reason that it may always be said to be imposed upon a dissenting latecomer – an agent who, having a different idea for a convention, enters the picture once widely accepted conventions have already been established. One man's multilaterality might be another man's unilaterality. One might query, then, whether any difference really exists between the statist and anarchic provision of law and order insofar as unilaterality is concerned. We contend that at least two differences, both decidedly in favor of anarchism, may nevertheless be invoked.

First off, public law originates as a product of a single person or a group of persons (a legislature, a political party, a state's founding fathers, etc.) acting in concert so as to impose their will upon others. By contrast, in private-law anarchy, conventions emerge on a voluntary basis: an adjudicator *offers* a rule which his patrons and other judges may accept or not. Crucially, once the rule is embraced by a sufficiently large number of people within a given territory, it is the dissenting latecomer who may be rightly charged with the breach of the duty to enter a lawful condition by refusing to abide by an already operating convention. To exemplify, would we not be in the right punishing someone persistently driving left-hand in a right-driving country just because right-driving is, *a priori*, neither better nor worse than left-driving?

Second, and related, the original unilaterality of state-made laws and constitutions is retained in all legal acts in virtue of the state's sovereign power to alter the law on a daily basis. Even in an ideal statist society – a perfect *Rechtsstaat* – unilaterality keeps raising its ugly head permanently, staring at all the individuals concerned from each and every act (or even non-act) of the legislative monopolist. In a well-functioning anarchy, on the other hand, no private arbitrator is in a position to change the legal system overnight, without a gradually obtained consent of a multitude of his fellowmen.

With these differences in mind, if equal, rightful freedom – as Kant conceives of it – truly represents "the only innate right," then we are duty-bound to stay in the state of nature.

To preempt any misconceptions, it must be emphasized once again that the duty in question is a *prima facie* duty. The above reasoning starts with a big "if": if conventions can emerge and be sustained under anarchy, then everything else follows. But what if they *cannot*? What if a working anarchist society cannot exist for whatever reason? What if, for instance, wars between competing adjudicators and enforcers are likely to be the order of the day, as many critics of anarchism like to argue (e.g., Thomas 2008)? And what if, as numerous prominent political economists have maintained, such a society is doomed to fall victim to collective action problems, so that universally accepted conventions will never arise, let alone be effectively enforced (see Buchanan 1975; Olson 1971)? If the negative scenarios were to materialize, then, arguably, the state's unilaterality would still be preferable to the far more burdensome unilaterality of anarchic chaos. Of course, there is no *a priori* answer to these questions. Indeed, in political economy as well as in adjacent fields, plenty of ink has been spilled in the course of heated debates concerning such conundrums (see Long and Machan 2008; Stringham 2018). There is no room in this essay to investigate these complex problems. What has hopefully been proven, however, is that instead of relying on pseudo-analytic truths about the unilaterality

24 Court decisions and contracts also solve, in a step-by-step manner, the problem of property rights' indeterminacy (Verhaegh 2004). Which, if Christmas (2021) is correct in arguing that the other two problems with pre-state ownership are parasitic on the indeterminacy issue, concludes the purported provisionality of property rights in the state of nature.

25 The most recent extensive anarchist treatment of the topic can be found in Huemer (2013) and Stringham (2015). See also a highly illuminating contribution by Kinsella (1995).

of anarchy versus the omnilaterality of the state, Kantians must engage with that literature to arrive at a well-informed answer to the question they have been tackling since Kant penned *The Metaphysics of Morals*: do we need the state to be free?

6. Conclusion

Kant's work is often thought to epitomize the essence of the classic liberal ideal of equal liberty under the rule of law. In this essay, we have tried to show that Kant failed to demonstrate that this ideal implies the state, understood along Weberian lines as a coercion monopoly. First, it has been established that the notion of only provisional ownership, which justifies the transition from the private law system (the state of nature) to the statist system of public law, suffers from an analytic contradiction. Second, upon examination of Kant's notion of the right to freedom under the rule of law, it transpired that Kantian political theory does not take the anarchist alternative seriously enough. Instead, what we find in Kant is a clear, albeit mitigated by various reservations, example of the nirvana fallacy, characteristically coupled with the *deus ex machina* account of law. This means, again, that Kant's efforts to justify the state proved abortive. Therefore, by virtue of the innate right to equal freedom, there exists a duty to stay in the state of nature.

At the same time, the issue of unilaterality in terms of determination of rights is a genuine problem that calls for a system of positive law to to complete the definition of what is right and wrong. Yet this fact does not imply that the state is the only tool with which to do so. Quite the contrary, the state is demonstrably inadequate for this enterprise, since it replaces even the most ill-defined notion of freedom with unilateral state power over individual lives. The recourse to the general will does not cut much ice, as it leaves unexplained how this will is actually more general (that is, more omnilateral) than private arrangements. It is indeed a highly mysterious theory to believe that individual actions cannot provide a moral ground for any conclusive rights and duties when performed by private persons, but when performed on behalf of polities by public officials and republican majorities, they all of a sudden can. As long as this unilateral, statist public law system is not proven – by non-analytic means – to be superior to private law provision anyway, the duty to stay in statelessness holds as a *prima facie* duty.

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