

## PROVISIONAL GOVERNANCE AND PEREMPTORY RIGHTS

One of the key results of a community's transition from a state of nature to a civil union is a change in the nature of the property rights they enjoy. In the *Rechtsethere*, Kant tells us that, prior to entering into a civil union with those around us, our property rights are merely provisional. After we have joined together with our neighbors however, these rights become peremptory. The aim of this paper is to provide an analysis of Kant's account of provisional and peremptory rights, focusing especially on the restrictions of the merely provisional right, and the way that the transition into the civil union can transform it into a peremptory one.

Kant's reference to the state of nature and the social contract in his political works is not meant to be a historical account of the progress of human society. Instead, the function of the discussion is meant to consider what the laws of a civil union would have to be like if they had been created as a result of a social contract which brought us out of a state of nature.<sup>1</sup> One of the features of our modern state is the presence of property which we are allowed to exclude others from using. Where did all of this property come from? One story is that the property we have now is the result of the state dividing everything up amongst us. Another story is that we have property in virtue of our nature, and the state's job is to protect and coordinate our actions with regard to that property. The ways that a state can rightfully restrict us in our use of property is answered very differently depending on its role in that property's genesis, and different property systems seem more or less right depending on which origin story we accept.

The question about provisional rights in the state of nature is a question

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<sup>1</sup>*On the common saying...* AK 8:297

about the origin story of property in the civil union, and has great effect on our understanding of Kant's larger political philosophy. In this paper, I will begin by looking to Kant's description of provisional rights in the *Rechtslehre*, and identify a key difficulty in understanding the strength of these rights. After examining some modern efforts to diffuse this difficulty, I will offer a new reading of Kant's description of the state of nature which, I believe, ameliorates the apparent conflict. I will offer a new picture of provisional property rights in the state of nature, and then explain what makes these rights merely provisional, and not peremptory. Finally, I will discuss which elements of the social contract transform our provisional rights into peremptory ones, and describe the resulting peremptory rights which we then carry into the civil union.

## 1.

While in the state of nature, Kant claims that the rights individuals have to their property are merely provisional; once in the civil union, the same rights become peremptory. These merely provisional rights have an important role to play in the transition from the state of nature to a civil union. Kant claims that “[i]f no acquisition were cognized as rightful even in a provisional way prior to entering the civil condition, the civil condition itself would be impossible...So if external objects were not even *provisionally* mine of yours in a state of nature, there would also be no duties of right with regard to them and therefore no command to leave the state of nature.”<sup>2</sup> Provisional rights in the state of nature, therefore, seem to be an important condition of the possibility of later peremptory ones. Later in the *Rechtslehre*, Kant argues that entry into the civil union doesn't

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<sup>2</sup>[MS AK 6:312]

actually change any of the rights that we had prior to it: all of the property rights we had in the state of nature carry through into the civil union. Instead, the civil union only changes the way that people relate to each other regarding these pre-existing rights.<sup>3</sup>

So what are these elusive rights, whose existence is so necessary for the establishment of the civil union, but who also must be transformed when they enter it? In the first half of the *Rechtslehre*, Kant introduces a distinction between having a preemptory right to an object and having a merely provisional right to it.<sup>4</sup> In the section titled ‘*In a state of nature something external can actually be mine or yours but only provisionally,*’ he asserts that

Possession in anticipation of and preparation for the civil condition, which can be based only on a law of a common will, possession which therefore accords with the *possibility* of such a condition is *provisionally rightful* possession, whereas possession found in an *actual* civil condition would be *preemptory* possession.<sup>5</sup>

What is the actual character of this distinction? Kant explains that the possibility of preemptory possession

can lie only in the idea of a will of all united a priori...which is here tacitly assumed as a necessary condition (*conditio sine qua non*); for a unilateral will cannot put others under an obligation they would not

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<sup>3</sup>[MS AK 6:306]

<sup>4</sup>*provisorisch-rechtlicher Besitz* and *peremptorischer Besitz*. ‘*Peremptorisch*’ is more commonly translated into English as ‘conclusive’ (see Kant 1991 for numerous examples), perhaps due to the obsolescence of the word ‘preemptory’ in English. However, the use of the more archaic term seems important here. ‘Preemptory’ better mirrors Kant’s own language, and the word has a rich history in Roman jurisprudence which Kant was likely aware of when employing its German cognate. A *peremptorium edictum* (from the root *peremptor*) is an edict which ‘destroys or precludes all debate, i.e. *decisive, final*.’ See *Dig. 5, 1, 70*. Freund, 1879.

<sup>5</sup>[MS AK 6:257]

otherwise have. -But the condition in which the will of all is actually united for giving law is the civil condition...Hence *original* acquisition can only be *provisional*. -*Peremptory* acquisition takes place only in the civil condition.<sup>6</sup>

The difference between provisional and peremptory rights to an object seems to be importantly related to the fact that, prior to the union of our wills in the civil condition, possession of an object could only be an instance of my unilateral will putting all others under an obligation which they would not have otherwise had.<sup>7</sup> However, “my unilateral choice...cannot bind another to refrain from using a thing, an obligation he would not otherwise have; hence I can do this [possess an object] only through the united choice of all who possess it in common.”<sup>8</sup> Once I enter the civil condition with those around me, we can choose to all put each other under the obligation to refrain from using objects which others possess, and the right that we have to those possessions becomes a peremptory one.

But this remains an account only of what provisional possession is not: it is possession which has not been ratified by the united will of a civil union. The question, then, is what provisional possession actually *is*: what are the permissions granted with regard to an object I only provisionally possess, and what features of this kind of possession correspond to its provisionality? These questions prove much harder to answer, in part because of an apparent tension between the descriptions Kant gives of provisional possession. On the one hand, he seems to

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<sup>6</sup>[MS AK 6:264]

<sup>7</sup>“But the will that a thing (and so too a specific, separate place on the earth) is to be mine, that is, appropriation of it (*appropriato*) in original acquisition can only be *unilateral* [*einseitig*] (*voluntas unilateralis s. propria*). Acquisition of an external object of choice by a unilateral will is *taking control* of it.” [MS AK 6:263]

<sup>8</sup>[MS AK 6:261]

claim that such possession is still ‘real’, that we really can bind others not to use our objects prior to our entry into the civil union. On the other hand, he often seems to claim that having a right to an object prior to a social contract would count as an impermissible, unilateral constraint on everyone else around me. In this paper, I give an account of provisional rights: the permissions they accord and the nature of their provisionality. I will begin by briefly turning to Kant’s account of possession in the first chapter of the *Rechtslehre*, paying specific attention to the role of the postulate of practical reason as *lex permissiva* which makes rights to objects possible. I will then turn to the current scholarship on provisional rights in the *Rechtslehre* in order to show the approach taken there to negotiate the relationship between the postulate of practical reason and the problem of unilateral obligation. I suggest that this kind of view finds the wrong source of the provisionality of property rights in the state of nature. Instead, I will suggest an alternate account of provisional right according to which all of the features required for it to be a true right are met. The source of provisionality of the right instead lies in its being potentially subject to revision in order to fulfill our duty to enter into a civil union with those around us. This sense of provisionality is drawn out by its counterpart right being preemptory, as in no longer subject to debate or revision.

## 2.

In §6 of the first chapter of the *Rechtslehre*, Kant deduces the ‘possibility of merely rightful possession.’ Kant explains that “that is *rightfully mine* (*meum iuris*) with which I am so connected that another’s use of it without my consent

would wrong me.”<sup>9</sup> He continues by explaining that “something external is mine if I would be wronged by being disturbed in my use of it *even though I am not in* [physical] *possession of it* (not holding the object).”<sup>10</sup> The question becomes one of how a relationship with right can be established with an object, even when we are not in physical contact with it.

Kant’s methodology in his deduction is to combine two elements: the first is the postulate of practical reason, a *lex permissiva* whose truthfulness he examines in §2 of the chapter.<sup>11</sup> The second is the concept of intelligible possession, whose possibility and nature he analyzes in §5 and §6 of the chapter.<sup>12</sup> The postulate of practical reason with regard to rights states

[i]t is possible to have any outer object of my choice as that which is mine; that is, a maxim according to which, if it were a law, an object of my choice must in itself (objectively) be ownerless (*res nullius*) is contrary to right.<sup>13</sup>

Since, according to Kant, “an object of my choice is something that I have the *physical* power to use,” the postulate means that it is possible for another person to wrong me by using an object which I have physically connected myself to (in order to use).<sup>14</sup> If someone were able to wrong me by attempting to use an object which I had already begun to try to use, it must be the case that my taking something into my physical power (connecting myself to the object physically so

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<sup>9</sup>[MS AK 6:245]

<sup>10</sup>[MS AK 6:249]

<sup>11</sup>§2. *Postulate of practical reason with regard to rights.* [MS AK 6:246-247]

<sup>12</sup>§5. *Definition of the concept of external objects that are mine or yours.* [MS AK 6:248-249] and §6. *Deduction of the concept of merely rightful possession of an external object (possessio noumenon).* [MS AK 6:248-252]

<sup>13</sup>[MS AK 6:246]

<sup>14</sup>[MS AK 6:246]

that I might subject it to my choice) was itself right.<sup>15</sup>

I have offered extensive analysis of the meaning of the postulate of practical reason, its truthfulness, and its role in the deduction of merely rightful possession in other writing. For the purpose of this paper, therefore, I will only draw out a few points which I take to be highly relevant to the future discussion and set aside any further investigation. The first point I would like to draw attention to is the exact nature of the claim Kant is making in the postulate. In the first place, since the objects mentioned are ones which I have the physical power to use, the claims are restricted to ones in my physical control. This means that the kind of object is constrained: I cannot have an intellectual object in my physical control (as in ideas), and I cannot have another's choice in my physical control (as in contracts). The kinds of things I can exert physical control over are those I can make physical contact with, and this category seems to be largely filled by physical (corporeal) objects in the world, like apples or pens or books. So the postulate makes a claim about a very limited range of objects which might be mine,

The second point is that the postulate rejects the rightfulness of a law which says that an object *in itself* would have to be ownerless. That is, that there is some feature of an object which I could have in my physical possession which would itself make it contrary to right for me to have as mine. Kant expands on this point a bit more in the section following the postulate of practical reason, where he maintains that

[w]hoever wants to assert that he has a thing as his own must be in possession of an object, since otherwise he could not be wronged by

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<sup>15</sup>This is captured in a later definition Kant gives of what is externally mine, as that “which it could be a wrong (an infringement upon my freedom which can coexist with the freedom of everyone in accordance with a universal law) to prevent me from using as I please.” [MS AK 6:248-249]

another's use of it [the object] without his consent. For if something outside this object which is not connected with it by rights affects it, it [the third thing] would not be able to affect himself (the subject) and do him any wrong.<sup>16</sup>

In order for something which affects an object to affect someone else, that object must be externally connected to that person— either physically, or by right (by being their possession). There is nothing internal to a corporeal object which necessarily connects it with other people, meaning there is nothing internal to a corporeal object which necessarily affects other people. This, in turn, means that there is nothing internal to a corporeal object which necessarily affects the freedom of those around me were I to affect the object by choosing to use it. Because of this, it is possible that my taking an object into my physical possession (and thereby making it subject to my physical power) can be consistent with the freedom of others in accordance with a universal law.

Kant continues the deduction of merely rightful possession in the first chapter of the *Rechtslehre* by introducing the concept of intelligible possession. By abstracting away from the empirical conditions of physical possession, one can come to see that, in choosing to use an object I have physical power over, I also attach that object to my will. Insofar as my will employs the object as a means to my end, it has a continuous connection with that object independent of my physical relationship to it. Kant calls this connection between the object and the will that employs it 'intelligible possession' of the object.<sup>17</sup> The possibility of intelligible possession of an object has two further implications: the first is that my connection to an object does not end with my physical connection to it, since I can

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<sup>16</sup>[MS AK 6:247]

<sup>17</sup>[MS AK 6:250-252]

continue to employ an object as a means to my end without needing to have physical power over it. The second is that I can be affected by something which affects the object even when I am not physically connected to it, since another's affecting the object can disturb my use of it to achieve some end— hence Kant often refers to the wrong that another does me in interfering with my possessions as interfering with my use of them.<sup>18</sup>

Kant deduces the rightfulness of intelligible possession (which he sometimes calls 'merely rightful possession') from the permission in the postulate of practical reason. If it was consistent with right for me to use an object in my physical possession, then the part of that use which consists of attaching my will to the object must have also been right. That is, since intelligible possession is implicitly present in "hav[ing] any external object of my choice as that which is mine" the possibility of intelligible possession's being consistent with right is also secured by the truth of the postulate of practical reason.<sup>19</sup> While the postulate of practical reason does not itself consist in the possibility of merely rightful possession, it is clear that as a permissive law it is an essential and central condition of such a possibility.

In the introduction to the *Rechtslehre*, Kant explains the concept of a right contains a permission to coercively enforce that right. He explains that "[s]trict right rests...on the principle of its being possible to use external constraint that can coexist with the freedom of everyone in accordance with universal laws."<sup>20</sup> It would ordinarily be inconsistent with the freedom of another for me to physically interfere with an action they were trying to perform. Were I to wrench an apple

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<sup>18</sup>"that outside me is externally mine which it could be a wrong...to prevent me from using as I please." [MS AK 6:248-249]

<sup>19</sup>[MS AK 6:252]

<sup>20</sup>[MS AK 6:231-232]

out of someone's hand, I would be violating their freedom— wronging them. However, when I have a right to that apple, this interference with the other's action is no longer wrong. My right to the apple permits me to use otherwise impermissible force to bring my possessions back under my control. The deduction of merely rightful possession therefore shows that it can be consistent with right to physically prevent others from using my possessions without my permission, since such a use of my objects would itself be a wrongful act. This permission corresponds to the obligation that all others have not to use what is mine (not to wrong me), since I exercise the constraint in such an obligation when I prevent another from performing an action they otherwise could have.

### 3.

All the same, the possibility of merely rightful possession of an object in the state of nature will only ever be the possibility of a provisional right to an object. Now that we have a sense of the right which is being modified by provisionality and peremptorality, we can turn to the question of what such a modification actually amounts to. The problem we encounter here, however, is that Kant seems to say a number of apparently contradictory things about provisional right in the state of nature.

On the one hand, it seems as though provisional right must carry the permissions identified in the deduction of merely rightful possession, since neither element of this deduction (the postulate of practical reason and the concept of intelligible possession) seem to refer to the presence of a unified will. Indeed, Kant says that

provisional acquisition is true acquisition;<sup>21</sup> for, by the postulate of practical reason with regard to rights, the possibility of acquiring something external in whatever condition people may live together (and so also in a state of nature) is a principle of private right.<sup>22</sup>

He also says that

there is also a rightful *capacity* of the will to bind everyone to recognize the act of taking possession and of appropriation as valid, even though it is only unilateral. Therefore, provisional acquisition of the land, together with all its rightful consequence, is possible.<sup>23</sup>

But it also seems as though provisional right in the state of nature is in some sense a restriction of the right described in the deduction of merely rightful possession. Per the quotes in the first section of this paper, this seems to be related to the fact that in taking an object into my possession, I unilaterally authorize *myself* to coercively prevent others from using that object. By taking an object into my possession, I make another's use of it, which previously could have been consistent with right, wrong. This obligation (which, according to Kant, is necessarily connected to and even contained in the concept of a right) might be a problem in the state of nature, because others' actions are restricted based on my arbitrary choice, which makes it seem as though such an arbitrary choice could not be consistent with the freedom of others. Indeed, Kant points out that

[A] unilateral will cannot serve as a coercive law for everyone with regard to possession that is external and therefore contingent, since that would

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<sup>21</sup> *eine wahre Erwerbung*

<sup>22</sup>[MS AK 6:264]

<sup>23</sup>[MS AK 6:267]

infringe upon freedom in accordance with universal laws. 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.<sup>24</sup>

And Kant continues on to say that this unilaterality might interfere with the entitlement one has to acquire objects in the state of nature:

But the *rational title* of acquisition can lie only in the idea of a will of all united a priori (necessarily to be united) which is here tacitly assumed as a necessary condition (*conditio sine qua non*); for a unilateral will cannot put others under an obligation they would not otherwise have.<sup>25</sup>

So we seem to find ourselves at a kind of impasse in understanding provisional right: on the one hand, the right is deduced from the postulate of practical reason and seems to permit possession of objects without any reference to a universal will. On the other hand, Kant clearly thinks that when we exercise this right in a state of nature, we put others under an impermissible unilateral, unidirectional obligation. What to do?

#### 4.

It seems as though the meaning of ‘provisional’ can fall between two extremes. On one extreme, the provisionality of a right might totally deprive it of the compulsory (obligating) force which usually backs a right, since that force would be applied unilaterally. On the other extreme, the provisional right might have just as much compulsory force as any ‘non-provisional’ right, since that seems to be contained in the possibility of merely rightful possession. Since the former

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<sup>24</sup>[MS AK 6:256]

<sup>25</sup>[MS AK 6:246]

seems to eliminate the possibility that the provisional right could really be a right, and the latter the possibility that it was really provisional in some sense, modern interlocutors have worked toward identifying middle points (some stronger, some weaker) at which they claim there is textual justification to believe the strength of the provisional right ends.

In his 2018 paper, “The Provisionality of Property Rights in Kant’s Doctrine of Right,” Rafeeq Hasan offers a rather neat way of dividing up the views in the current secondary literature. He takes arguers to generally fall into either ‘weak’ or ‘strong’ provisionality camps, based on the degree to which they take the ‘provisionality’ of the right to limit its effectiveness.<sup>26</sup> ‘Weak provisionality’ means that the *provisionality* of the right in the state of nature is weak, and therefore the restrictions placed on the permissible use of force are small. The advocate for weak provisionality therefore argues that the provisional right carries much of the force of a peremptory one. ‘Strong provisionality’ is its opposite— the provisionality of the right in the state of nature has a great deal of effect on it, largely constraining the possibility of the right placing an obligation on others.<sup>27</sup> Actually, some of the

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<sup>26</sup>Hasan uses this analysis in his paper as part of his case for rejecting this kind of ‘polar’ approach more generally. Indeed, he suggests that one feature of the positive view of provisionality which he offers in his paper is that it escapes a form of argumentation which has led, so far, only to impasse. This is a creative move which results in a creative view, but I am not sure that such a goal is necessary, nor that Hasan achieves it. True, Hasan defines ‘strong’ and ‘weak’ provisionality in such a way that the technical details of his view do not fall under either description— although some of these distinctions miss some of the nuances in the works placed on either side, and the reader suspects that they may be there more in order to meet Hasan’s structural goals rather than his argumentative ones. On the more general reconstruction of Hasan’s playing-field given above, his 2018 view would clearly fall on the ‘weak provisionality’ side of the argument, and the view given in Stone and Hasan 2022 is a clear example of strong provisionality. For my part, I don’t take this to be a true defect in Hasan’s 2018 argument— I will argue for a view which Hasan might consider an ‘extremely weak’ form of provisionality. Moreover, I don’t regret that Hasan framed his argument as he did, since it is a very helpful way to give an overview of the dialectic.

<sup>27</sup>Hasan 2018, pp. 2–4

authors in the ‘strong provisionality’ camp take provisional rights to not really be rights at all, but instead outlines of the structure property rights might have at a future (post-social contract) time.<sup>28</sup>

In addition to the quotes pointed out earlier, supporters of the ‘null-hypothesis’ (that provisional rights are not really enforceable rights at all) often point to the following place in Kant’s text

No one is bound<sup>29</sup> to refrain from encroaching on what another possesses if the other gives him no equal assurance that he will observe the same restraint toward him. No one, therefore, need wait until he has learned by bitter experience of the other’s contrary disposition; for what should bind him to wait till he has suffered a loss before he becomes prudent, when he can quite well perceive within himself the inclination of human beings generally to lord it over others as their master (not to recognize the superiority of the rights of others when they feel superior to them in strength or cunning)? And it is not necessary to wait for actual hostility; one is authorized to use coercion against someone who already, by his nature, threatens him with coercion.<sup>30</sup>

It seems extremely plausible that, by this quote alone, Kant means that no one is bound by the wrongfulness of their action not to interfere with others’ possessions in a state of nature (where no general laws are known to be followed which could give parties assurance of how their neighbors would act).<sup>31</sup> To have a right to

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<sup>28</sup>For examples of this kind of view, see Waldron 1996, Ripstein 2009, Flikschuh 2000, or Stone and Hasan 2022. The shared conclusion is summarized well in Ripstein’s words: “[i]t is in this sense [as an idea of reason] then, that property can be understood in terms of the state of nature: both its relation to freedom and the characteristic violations of it can be explicated without reference to positive legislation. That does not mean that property can be acquired, or its norms be applied to particulars or enforced in the absence of a rightful condition. It means only that the form of interaction in which property rights constrain the conduct of others does not depend on positive law.” Ripstein 2009, p. 87.

<sup>29</sup>*Niemand ist verbunden...*

<sup>30</sup>[MS AK 6:307]

<sup>31</sup>This seems to be the major positive argument against the reality of provisional rights in

an object makes others' unpermitted encroachment on that object wrong, so it seems as though, in a condition where no one's unpermitted encroachment on that object is wrong, no one has any rightful possession of things. Kant's claims here could be part of a powerful case against the strength (or reality) of provisional rights.

I maintain that we should reject this reading of Kant's claim. I believe that this quote can be made sense of best in Kant's discussion of the necessity of the transition from the state of nature to the civil union. In particular, I take him to be making a point about certain necessary practical features of human freedom in individuals, and not about the strength of rights in the state of nature. I will offer a fuller explanation of this interpretation a little later in the paper, when I discuss the transition from the state of nature to the civil union. However, I do think that there are additionally several substantial textual considerations which suggest that we should be suspicious of the 'self-evident' nature many readers seem to attribute to the quote.

There are two strong textual reasons to be circumspect in reading Kant's claim about the impossibility of binding others in a state of nature as being about provisional right. First, Kant does not mention provisional or peremptory right in this paragraph or the surrounding ones. Indeed, this paragraph appears at quite a distance in the text from the discussion of provisional rights. Kant introduces the topics of unilateral obligation and provisional rights in §§8 and 9 [MS AK 6:255], and then continues to refer to and discuss them regularly through to the end of the

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Stone and Hasan 2022, combined with a rather confusing and uncharitable reading of Kenneth Westphal's analysis of the postulate of practical reason in Westphal 2002. Indeed, for an account of the postulate of practical reason which bears more resemblance to the one addressed in Stone and Hasan 2022, see Gerber 2019. This paper also includes an analysis of the postulate that is clearly not harmed by the kind of objection Stone and Hasan seem to lob at it.

first section of the *Privatrecht*, at MS AK 6:270. He then discusses contract right, the rights to a person akin to a right to things, money, books, ‘ideal acquisition of an object of choice’ (like inheritances), recovery of lost things, acquiring guarantees by oath, and the transition to discussion of a ‘rightful condition generally’— none of which make reference to provisional or peremptory rights. It is only after all of this, in the second to last paragraph of the entire *Privatrecht* [§42; MS AK 6:307] that Kant returns to the discussion of rightful possession. And the sections following the quote also don’t refer to provisional or peremptory right; the topic doesn’t come up again until 6:312 (now in the second part of the *Rechtslehre: öffentliches Recht*) where Kant asserts that “if external objects were not even provisionally mine or yours in the state of nature, there would also be no duties of right with regard to them...”<sup>32</sup>

Instead of appearing in his analysis of private and peremptory rights, the discussion of being bound by another’s action appears in a short section on the distinction between formal and material wrongs in interpersonal relationships. Kant gives two other example actions in the section: people who fight amongst one another in a state of nature, and armies which try to trick their enemies by violating the norms of warfare to gain the upper hand.<sup>33</sup> In these cases, Kant argues that the actions can really be described as both right and also, at the same time, wrong. They can be viewed as right insofar as the relevant actors hold themselves and others to the same set of (wrong) principles. But the actions are wrong, and more seriously wrong (indeed, “wrong in the highest degree”), because in using the principles that they do, the actors “take away any validity from the concept of right itself and hand everything over to savage violence, as if

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<sup>32</sup>[MS AK 6:312]

<sup>33</sup>[MS AK 6:307-308]

by law, and so subvert the right of human beings as such.”<sup>34</sup> If we take the case of encroaching on others’ land to be like the cases it appears next to, then it seems as though Kant might be saying that doing so is ‘wrong in the highest degree’, or at least not right in the sense that the action conforms with the universal principle of right.<sup>35</sup>

## 5.

The ‘null-hypothesis’ view lies at the extreme end of the ‘strong provisionality’ pole of the argument. There are, however an even greater number of views which fall at different points along the scale, differentiated by the degree of restriction they take the claim of ‘provisionality’ to exercise on merely rightful possession.<sup>36</sup> What these views have in common is the underlying thought that Kant generates a proof about the possibility of using objects vis a vis their status as such, and then subsequently amends that proof when it is considered from the perspective of interpersonal obligations.

I would like to suggest that it is a mistake to think that the ‘provisionality’ of

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<sup>34</sup>[MS AK 6:308]

<sup>35</sup>Hasan 2018 is one of the few writers who engages with this quote in context, and he uses the discussion surrounding it to support his own view, which is certainly not a ‘no-right’ view. Instead, he sees the material as substantiating his claim that the obligation which corresponds to the provisional right is *first* to enter into a civil condition with those around you, and only second to refrain from using a particular object.

<sup>36</sup>The degrees of strength naturally get cashed out in different ways by different authors. For example, both Guyer 2002 (weak provisionality) and Hasan 2018 maintain that the right to possession of property in the state of nature is conditioned by its being “one that could be agreed to through a common or united will by all who could also claim it” Guyer 2002, p. 62 or when “agents are acting in such a way as to bring about a public condition” Hasan 2018, p. 18. The effects of this play out in slightly different ways: Hasan thinks that the permission to coerce others not to infringe on our property rights is only given in the case where they refuse to enter a civil union with us, whereas Guyer thinks we can coerce others not to use our property if our rights are “claimed with an eye to the creation of the civil condition” Guyer 2002, p. 63.

property rights in the state of nature arises directly from a constraint on our capacity to coerce those around us. I think that this point can be made in two ways. First, I want to suggest that the proof of the postulate of practical reason and the deduction of merely rightful possession are a kind of ‘all-or-nothing’ deal. That is, if taking possession of objects in the state of nature were to place problematic demands on those around us, then such possession would not be possible at all—possession would not even be provisionally possible. Since Kant says that provisional possession in a state of nature *is* possible, and that it corresponds to *true* acquisition, I take this to be a highly unsatisfactory result. Instead, I will offer an alternate resolution to the difficulty of unilateral obligation, one which can take place in the state of nature. This means that although there may be attempts to take possession of objects in the state of nature which place unilateral obligations on others, such an attempt need not *necessarily* do so, and when it does not, it can be an instance of provisional possession. The upshot of this view is that the provisionality of possession in the state of nature does not lie in its being restricted by the problem of unilateral obligation of those around us.

If Kant’s claims about the unilaterality of obligation in the state of nature are meant to bear on the postulate of practical reason, they would actually entirely undermine the truth of the postulate. Kant says that the postulate of practical reason is true because, otherwise, “freedom would be depriving itself of the use of its choice with regard to an object of choice, by putting usable objects beyond any possibility of being used; in other words, it would annihilate them in a practical respect and make them into *res nullius*, even though in the use of things choice was formally consistent with everyone’s outer freedom in accordance with universal

laws.”<sup>37</sup> This means that denying the postulate of practical reason would mean that we could not use objects of our choice, on the hypothesis that such a use would conflict with the freedom of others. But this denial of the postulate is met with contradiction through the actual fact that use of objects of our choice need not conflict with the freedom of others. The denial of the postulate therefore directs us to act in a contradictory manner: to treat something whose use was consistent with the freedom of others as though its use were not consistent with the freedom of others.<sup>38</sup>

For this argument to go through, it must be a matter of fact that using some objects of choice need not interfere with the freedom of others. However, if acquiring an object in a state of nature placed a unilateral obligation on those around us, it seems as though it isn’t true that using an object of choice need not interfere with the freedom of others. In fact, the opposite would seem to be the case: that any attempt to use an object of our choice would necessarily restrict the freedom of others, by unilaterally placing an obligation on them which they would not have otherwise had. In denying the possibility of having an object as mine, freedom would therefore *not* be constraining itself from performing an action which was in fact consistent with the freedom of others—freedom would be instead constraining itself from performing an action that was *inconsistent* with the freedom of others. But this is exactly the way that the freedom of others is supposed to constrain us, and no contradiction is generated. We would have no reason to reject a denial of the postulate; instead, denial of the postulate would seem to capture real facts about the world.

But it is evident from the text that Kant does not think the postulate of

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<sup>37</sup>[MS AK 6:247]

<sup>38</sup>For a more detailed explanation, see Gerber 2019, pp. 13–16.

practical reason ceases to be true in the state of nature. For example, at §13, Kant says that “any piece of land can be acquired originally,” a proposition which “rests on the postulate of practical reason (§2).”<sup>39</sup> He continues by asserting that “[i]n original acquisition, the act required to establish a right is taking control (*occupatio*)...No insight can be had into the possibility of acquiring in this way, nor can it be demonstrated by reasons: its possibility is instead an immediate consequence of the postulate of practical reason.”<sup>40</sup> Kant continues to treat the postulate of practical reason as applicable through the remainder of the *Privatrecht*; in §15 he maintains that “provisional acquisition is true acquisition; for, by the postulate of practical reason with regard to rights, the possibility of acquiring something external in whatever condition people may live together (and so also in a state of nature) is a principle of private right...”<sup>41</sup> And in the ‘deduction of the concept of original acquisition,’ Kant asserts that “possession is nothing other than a relation of a person to persons, all of whom are bound, with regard to the use of the thing, by the will of the first person, insofar as his will conforms with the axiom of outer freedom, [and] with the postulate of his capacity to use external objects of choice...”<sup>42</sup>

In addition to Kant’s specific references to the postulate in the *Privatrecht*, we have to consider the way he chose to structure the *Rechtslehre* as a whole. If the postulate of practical reason’s argument is only valid once people have joined together in a civil union, why place that argument in the very beginning of the *Privatrecht*? Why include a deduction which depends on the truth of the postulate of practical reason in a section where that truth cannot yet be shown?

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<sup>39</sup>[MS AK 6:262]

<sup>40</sup>[MS AK 6:263]

<sup>41</sup>[MS AK 6:264]

<sup>42</sup>[MS AK 6:268]

Indeed, why spend two of the three chapters in the *Privatrecht* explaining all of the different applications of the postulate and the deduction it enables, prior to being able to prove any of it?

The postulate of practical reason, the deduction of merely rightful possession, and the acquisition of external things all have to be included in the *Privatrecht* because they are the basis on which the necessity of *öffentliches Recht* arises at all. In the ‘transition from what is mine or yours in a state of nature to what is mine or yours in a rightful condition generally,’ Kant describes public justice as including

[F]irst, merely what conduct is intrinsically right in terms of form (*lex iusti*); second, 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 (*lex iuridica*); third, what is the decision of a court in a particular case in accordance with the given law under which it falls...The first and second of these conditions can be called the condition of private right, whereas the third and last can be called the condition of public right. The latter contains no further duties of human beings among themselves than can be conceived in the former state; the matter of private right is the same in both. The laws of the condition of public right, accordingly, have to do only with the rightful form of their association (constitution), in view of which these laws must necessarily be conceived of as public.<sup>43</sup>

He elaborates on this at the beginning of *Öffentliches Recht*, where he claims that

If no acquisition were cognized as rightful even in a provisional way prior to entering the civil condition, the civil condition itself would be impossible. For in terms of their form, laws concerning what is mine or yours in the state of nature contain the same thing that they prescribe in the civil condition, insofar as the civil condition is thought of by pure

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<sup>43</sup>[MS AK 6:306]

rational concepts alone...So if external objects were not even provisionally mine or yours in the state of nature, there would also be no duties of right with regard to them and therefore no command to leave the state of nature.<sup>44</sup>

Possession of objects is made possible by the postulate of practical reason, and we must have possessions prior to entering into the civil union because otherwise, according to Kant, it would be impossible to do so. A conception of the problem of unilateral acquisition which undermines the postulate of practical reason therefore simply cannot accurately describe the provisionality of property rights in the state of nature.

## 6.

I think that there is a way of reading Kant's claims about provisionality that does not involve some kind of restriction on the permissive principle in the postulate of practical reason. While it is true that some instances of taking possession in the state of nature would impose a unilateral obligation on others, it turns out that such an act *need* not do so. It is possible, while still in the state of nature, to take possession of an object in a way that counts as an instance of a preexisting omnilateral obligation. In order to see this, we will need to return to Kant's original discussion about possession and provisional rights in the second chapter of the *Rechtslehre*.

In §17. *Deduction of the concept of original acquisition*, Kant claims

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<sup>44</sup>[MS AK 6:312]; – *Es würde also, wenn es im Naturzustand auch nicht provisorisch ein äußeres Mein und Dein gäbe, auch keine Rechtspflichten in Ansehung desselben, mithin auch kein Gebot geben, aus jenem Zustand herauszugehen.* Note here that the duty of right arises from the provisional mine or yours in the state of nature, which suggests that they must impose some form of obligation there.

that

[P]ossession is nothing other than a relation of person to persons, all of whom are bound, with regard to the use of a thing, by the will of the first person, insofar as his will conforms with the axiom of outer freedom, with the postulate of his capacity to use external objects of choice, and with the lawgiving of the will of all thought as united a priori.<sup>45</sup>

When we disregard the corporeal object which is being possessed, we can better see the nature of the interpersonal relationship which constitutes rightful possession of objects. And this relationship consists in the binding of all others by means of three connected components: first, the choice of the individual to use an object in accordance with the axiom of outer freedom. Second, the postulate of practical reason, which posits the possibility of an individual's using an external object, and, finally, the "lawgiving of the will of all" which is thought of, a priori, as united. A complete understanding of the possession therefore requires understanding not only of these three separate elements, but also the way that they interrelate to create something entirely new. In order to bring these specific interrelations to the fore, I will actually address these elements in the reverse order: first, the lawgiving will of all united a priori, second, the constraint that the postulate of practical reason places on this will, and finally, the way the individual can realize this will of all in their individual choice to take some object as their own.

What is the lawgiving will of all which can be thought of as united, a priori? It cannot be the general will created in some actual civil union, since the existence of that will is subjectively contingent on historical events in the world. But here, Kant explains, "the rational title of acquisition can lie only in the idea of a will of

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<sup>45</sup>[MS AK 6:268]

all united **a priori (necessarily to be united.)**<sup>46</sup>

In the *Kritik der reinen Vernunft*, Kant offers an extended analysis of what kind of thing should count as an idea. There, he points out that “[a] concept is either an empirical or pure concept. The pure concept, in so far as it has its origin in the understanding alone (not in the pure image of sensibility) is called a notion. A concept formed from notions and transcending the possibility of experience is an idea or concept of reason.”<sup>47</sup> He encourages us to follow Plato’s use of the term, pointing out that “[f]or Plato, ideas are archetypes of the things themselves...In his view they have issued from the highest reason.”<sup>48</sup>

Kant (following Plato) emphasizes that the ideas we form of things are not derived from our experiences of them; instead, they are the products of reason against which we can evaluate given experiences. The idea of the will of all united a priori, therefore, is not some imaginary representation of a specific civil union in the future, since this could only ever be an *example* of a united will, and not the idea of it. Answering the question of what could be contained in the idea of the united will of all (the kind of will through which a group of people could give themselves their own laws) is therefore an activity of conceptual analysis, and not predictions about group psychology.

Insofar as the united will of all is a kind of *will*, the laws which hold for the will (practical reason) must hold for it. The laws described in the first half of the *Rechtslehre* (*Privatrecht*) therefore continue to apply after the community transitions into a civil union. These laws would include, for example, the Universal Principle of Right, according to which any action is right if it can coexist with

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<sup>46</sup>[MS AK 6:264, emphasis mine]

<sup>47</sup>[KrV AK A320/B377]

<sup>48</sup>[KrV AK A313/B370]

everyone's freedom in accordance with a universal law. The Universal Principle of Right holds for actions occurring outside the civil condition: those which are consistent with the freedom of others are right. But the Universal Principle of right also applies to the actions in the civil condition: the actions of a citizen which are not consistent with the freedom of others are not right. The lawgiving in the civil condition, which is there administered by the united will of the citizens, is itself constrained by the principles of correct lawgiving— such as the Universal Principle of Right. The united will of the civil union could not, for example, call right everything which arose from people's needs (the right of necessity), since that law would conflict with the Universal Principle of Right. The united will of the civil union could also not call it wrong for an individual to exercise their innate right to free use of their body, when such a use is consistent with the freedom of others.

But the innate right to the use of our bodies is not the only principle of right which constrains the will. As shown earlier, there is also the postulate of practical reason, a permissive law according to which we could “put all others under an obligation...to refrain from using certain objects of our choice.”<sup>49</sup> Kant explains further that “[r]eason wills that this [the postulate of practical reason] hold as principle, and it does this as practical reason, which extends itself a priori by this postulate of practical of reason.”<sup>50</sup> Any individual will is constrained by the postulate of practical reason, and therefore so must any larger, united will (since such a will remains similarly bound by the constraints of practical reason). Moreover, since the postulate of practical reason applies to the will a priori, it will be a priori true of the united will of all that it is constrained by the postulate

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<sup>49</sup>[MS AK 6:247]

<sup>50</sup>[MS AK 6:247]

of practical reason. We could therefore know that the idea of a united will of all carries with it the constraint on action which arises from the postulate of practical reason.

In §6 of the first chapter of the *Rechtslehre*, Kant deduces the possibility of merely rightful possession from the postulate of practical reason combined with the concept of intelligible possession. Neither the concept of intelligible possession nor the postulate of practical reason carries features which would restrict their applicability only to the will of the individual. Instead, both apply to a united will of all as an instance of practical reason. Hence merely rightful possession can be deduced, a priori, as possible for the united will of all. We can therefore know, a priori and from the idea of a united will alone, that such a will would be constrained by the possibility of merely rightful possession (that is, treat merely rightful possession as possible), since that possibility holds axiomatically for practical reason.

## 7.

With this, we have two of the three elements Kant stipulates as necessary for the possibility of acquiring objects. The lawgiving will of all thought of as a priori carries with it, when examined, the constraint of the postulate of practical reason to act as though it were possible for an object to become mine or yours. The final element required is the actual choice of some individual to take something as their own: without such a choice, the constraint of the postulate of practical reason on the idea of a united will will never be made real in the world. This choice could be made by a citizen in a civil union, but it can also be made by an individual who still resides in a state of nature because they have not yet joined together

with those around them. The presence of the idea of the united will of all is not contingent on historical facts about the activities of some specific group of people at some specific location; it is a necessary fact which holds true for practical reason regardless of context.

When the individual makes the choice to acquire some object in accordance with the idea of a united will of all, those around him are placed under an obligation not to use whatever object was just acquired. However, this obligation is placed *omnilaterally*: its source is the idea of the united will of all. While it is true that the choice designates the specific object to which the possibility of merely rightful possession (and its associated obligations) applies, this is only the realization of an obligation which preceded any choice that he made. The postulate of practical reason holds independently of anyone's private choice to acquire something, and so obligates independently of that choice as well. Since our obligation only arises from the idea of the united will of all, and not the individual's choice to acquire some specific object, we can see why Kant would claim that the idea of the united will is the only one which is truly lawgiving.

Taking possession of an item in accordance with the idea of a united will will change our external actions with regard to objects. When an individual *unilaterally* imposes an obligation on others not to use his possessions, he conceives of everyone else as bound, and of himself as the binder. When the obligation not to use others' possessions issues from an omnilateral will, the individual conceives of himself and everyone else as bound, and of the idea of a united will as binder. While he still gains a permission to use those objects he acquired in the latter case, he also takes on an obligation to refrain from using anyone else's possessions. This is realized externally in those cases where he is confronted with others' possessions

and refrains from using them without permission. The unilateral-willer does not accept this obligation when taking a possession of his object, and so does not refrain from using the possessions of those around him.

## 8.

If it really is possible for someone to take rightful possession of an object in the state of nature, we may begin to wonder about the necessity of the civil union at all, and the ‘peremptory’ nature of the rights therein. Since we are able to act in accordance with a united will only in idea, what is the importance of its (merely conditional) realization, and what could that realization possibly add to the right at hand? At the beginning of §42, Kant introduces his ‘postulate of public right’

From private right in the state of nature there proceeds a postulate of public right: when you cannot avoid living side by side with all others, you ought to leave the state of nature and proceed with them into a rightful condition, that is, a condition of distributive justice.— The ground of this postulate can be explicated analytically from the concept of right in external relations, in contrast with violence<sup>51</sup> (*violentia*).<sup>52</sup>

What can Kant mean by ‘violentia’ here, such that its consideration can shed light on the analytic necessity of the transition to a civil condition? For those who subscribe to a kind of ‘null-hypothesis’ or restricted reading of provisional right, it seems like this violence will be enforcement of one’s provisional property rights in the state of nature. On these views, there is either no real (enforceable) right to property in the state of nature, or our capacity to exert rightful

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<sup>51</sup> *Gewalt*

<sup>52</sup>[MS AK 6:307]

force on those around us in protection of our property is restricted. Because of this, an individual's attempt to prevent others from interfering with items he has taken for private use would count as impermissible restrictions of their freedom. The would-be owner would be in the wrong, and his actions construed as violence.

If enforcing one's provisional property right in the state of nature would count as violence, a cursory reading of the Universal Principle of Right would suggest that such an action should simply be prohibited. However, the postulate of practical reason and the deduction of merely rightful possession suggest that the concept of right *can* be extended to include the possibility of possessing something external to ourselves, and so for the sake of consistency, right cannot also prevent such possession. Instead, the context in which such possession occurs must be transformed, so that the obligation to respect others' possessions is not placed unilaterally (wrongly) on those around us, but instead omnilaterally, by means of a social contract to form a civil union.<sup>53</sup>

This reading finds the theoretic necessity of the civil condition in the possibility of merely rightful possession itself. That the conditions of merely rightful possession require people in a community to join together and give themselves an obligation omnilaterally, combined with the fact that merely rightful possession counts as a genuine extension of the concept of right, means that right (the external freedom of all) requires entry into the civil condition. This argument ticks all of the boxes: strong necessity for entry into the civil condition which clearly comes

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<sup>53</sup>Of course, the exact mechanics of this argument vary from view to view, especially between 'null-hypothesis' views and restricted views. Waldron 1996, who holds what I have called a 'null-hypothesis' view, makes an argument very similar to the one outlined above. On the other hand, Guyer 2002, who holds more of a restriction view, considers entrance into the civil union to be the final step in Kant's argument for the possibility of rightful possession.

from consideration of freedom and the concept of right. Indeed, the success of this side of the argument is itself a persuasive reason to accept a null-hypothesis or restricted reading of provisionality.

I, or course, will be able to help myself to none of this excellent argument. I have already maintained that the conditions of omnilaterality can be met while in the state of nature, so cannot appeal to that necessity as explanation of the postulate of public right. Since I think the theoretical conditions of rightful possession can be met without entrance into the civil condition, theoretical necessity as an explanation in general seems off the table for me. Instead, I would like to suggest that the requirement of entry into the civil condition arises from a kind of practical or natural necessity, which Kant describes in more detail in his '*Idea for a Universal History with a Cosmopolitan Aim*.'<sup>54</sup>

The '*Idea for a Universal History with a Cosmopolitan Aim*'<sup>55</sup> is a 1784 essay in which Kant examines natural teleology in its relation to the species-level development of humans as rational creatures. There, he maintains that nature has instilled humans with instincts which lend themselves to their development as reasoners. For example, humans have few of the natural protections that other animals do, such as thick fur to protect from the cold, or claws to defend themselves from predators. Lack of such features pushes humans to use their reason to find ways of protecting themselves and furthering their individual ends.<sup>56</sup>

Kant maintains that nature has similarly instilled humans with instincts

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<sup>54</sup>Consideration of this essay was inspired by Waldron's use of it in Waldron 1996. Since he advocates in this work for a kind of null-hypothesis, he uses Kant's claims in the '*Idea...*' to illustrate practical consequences of the theoretical necessity of the civil condition, and not the source of the necessity itself.

<sup>55</sup>*Idee zu einer allgemeinen Geschichte in weltbürgerlicher Absicht*, AK 8:17-32

<sup>56</sup>[IG AK 8:19-20]

which push them to join together in the civil condition. He describes this as a natural ‘antagonism’ individuals have toward one another, or a kind of “unsocial sociability.”<sup>57</sup> Kant explains that

[t]he human being has an inclination to become socialized, since in such a condition he feels himself as more a human being, i.e. feels the development of his natural predispositions. But he also has a great propensity to individualize (isolate) himself, because he simultaneously encounters in himself the unsociable property of willing to direct everything so as to get his own way, and hence expects resistance everywhere because he knows of himself that he is inclined on his side toward resistance against others.<sup>58</sup>

This sort of psychological explanation seems to underlie one of Kant’s first claims in the second section of the *Rechtslehre*, where he moves from discussion of the individual in the state of nature to that of the citizen in the civil union. There, he claims that

[i]t is not experience from which we learn of the maxim of violence in human beings and of their malevolent tendency to attack one another before external legislation endowed with power appears, thus it is not some deed that makes coercion through public law necessary. On the contrary, however well disposed and law-abiding human beings might be, it still lies a priori in the rational idea of such a condition (one that is not rightful) that before a public lawful condition is established individual human beings, peoples and states can never be secure against violence from one another, since each has its own right to do what seems right and good to it and not be dependent on another’s opinion about this.<sup>59</sup>

Kant claims that it lies a priori in the idea of the state of nature that individuals

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<sup>57</sup>*ungesellige Geselligkeit*; [IG AK 820]

<sup>58</sup>[IG AK 8:20-21]

<sup>59</sup>[MS AK 6:312]

cannot be secure against the violence of others. The a priority here lies in the individual's reflection on his own nature. That is, the possibility of violence in the state of nature is not the a posteriori product of peoples coming near each other and then happening to have disagreements regarding their property. Instead, it is a basic fact about the nature of humans that, when they come together, they will want to impose their own conception of the world (and their rights in) on others, by force if necessary.<sup>60</sup> One's rights are necessarily threatened by the presence of others near him, and so he must join together with them in a way that protects his pre-existing rights.<sup>61</sup>

This explanation of the necessity of entering a civil condition with those around us relies on the provisional rights in the state of nature being real rights which carry the full weight of obligation on others. The source of the necessity of transition lays in the strength of the right itself, insofar as its practical integrity is necessarily at risk when others come near one another. The resolution of this conflict is not the institution of an entirely new system of property rights, but instead establishing mechanisms of publicly indicating and enforcing those rights. This seems much more consistent to me with Kant's claim that the condition of public right "contains no further or other duties of human beings among themselves than can be conceived in the former state [the state of nature]; the matter of private right is the same in both. The laws of the condition of public right, accordingly,

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<sup>60</sup>This seems the best opportunity to reach for Kant's claim that "[n]o one...need wait until he has learned by bitter experience of the other's contrary disposition...it is not necessary to wait for actual hostility; one is authorized to use coercion against someone who already, by his nature, threatens him with coercion." [MS AK 6:307] I have made claims earlier in the paper about the trickiness of this assertion but am tempted to read it in connection with the points made about unsocial sociability because of its location right at the transition in the *Rechtslehre* from discussion of the state of nature to that of the civil union.

<sup>61</sup>For more thorough accounts of unsocial sociability, including its relation to Kant's claims about radical evil, see Wood 1991 and Schneewind 2009.

have to do only with the rightful form of their association (constitution), in view of which these laws must necessarily be conceived of as public.”<sup>62</sup>

At first blush, practical necessity might not seem to be a very pressing motivation to enter the civil union, especially in comparison to the force of Kant’s claim that people living near another are required to do so. This opinion, however, results from a substitution of our own impressions about the security of our property in place of Kant’s claims. The question of whether or not our property rights are jeopardized by those living near us might seem to depend on a lot of contingent facts: whether my neighbors actually desire my property, my predictions about my ability to defend my property against the intrusion of others, and so on. If, for example, I live near people who I strongly suspect have no interest in my property, then it seems as though the practical threat to my rights is very low, and the necessity that I change my current relationship with neighbors essentially nonexistent.

However, Kant simply does not accept the claim that the threat others pose to our property rights in the state of nature is contingent. As noted above, he maintains that it is a part of human nature (therefore necessarily present in all humans) to want to impose our conception of what is right (and to what we have rights) on others. The individual can become aware of this part of his nature through introspection *and* has no reason to believe that the conception of right which he has (and the individual objects to which that conception applies) is the same as those near him. The only way to truly secure his rights is to join with those near him in public acceptance of a shared conception of rights.<sup>63</sup>

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<sup>62</sup>[MS AK 6:306]

<sup>63</sup>As Rawls aptly puts it: a well-ordered society is one in which “everyone accepts and knows

## 9.

The ‘provisionality’ of the provisional right is a result of the relationship of the right to the necessity of entering into the civil union. This, in a way, might amount to a kind of restraint which the right exerts on itself in the state of nature. In the state of nature, we take (or try to take) any number of objects into our possession. The security of these possessions is in principle threatened by those around us, whose nature threatens our continued use of our possessions (this is true even though we are permitted to forcibly prevent others from using our objects, since success is not guaranteed). In order to secure our property rights, we must enter together into a condition of distributive justice (public right) so each can have what is his secured for him. However, facts about our possessions in the state of nature may come to interfere with the possibility of entering into a civil union with those around us, and *it is the necessity of changing these facts about our possession which grants us only provisional possession of them.*

Not every arrangement which we make with those near us counts as a civil union. Kant explains that “in the state of nature, too, there can be societies compatible with rights (e.g. conjugal, paternal, domestic societies in general, as well as many others); but no law “You ought to enter this condition,” holds a priori for these societies.”<sup>64</sup> Instead of merely a society which is compatible with rights, we are obligated to enter a *rightful condition*, which is

that relation of human beings among one another that contains the conditions under which alone everyone is able to *enjoy* his rights<sup>65</sup>, and the formal condition under which this is possible in accordance with the

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that others accept the same principles of justice.” Rawls 1971, p. 5.

<sup>64</sup>[MS AK 6:306]

<sup>65</sup>*jeder seines Rechts theilhaftig werden kann*

idea of a will giving laws for everyone is called public justice.<sup>66</sup>

As has been much discussed in this paper, the will which gives laws for everyone is the united will of all. To enter the civil union with those around us is to unite our wills with them so that we are ruled by an *actual* united will, and not just the idea of one. However, not every social arrangement of persons is one in which they are all united in a single, lawgiving will. Kant explains that “the members of such a society who are united for giving law (*societas civilis*), that is, the members of a state, are called *citizens of a state (cives)*.”<sup>67</sup> “The only qualification for being a citizen is being fit to vote. But being fit to vote presupposes the independence of someone who, as one of the people, wants to be not just a part of the commonwealth but also a member of it.”<sup>68</sup> People who are dependent for their livelihoods on others (such as a child is to their parent, a servant is to his master, and, at the time, a wife was to her husband) will not have the independence needed to count as an active citizen.

In order to join together to form a civil union all parties to the contract must be made active citizens by its terms, or they would not be obligated to join together in this particular union. Therefore, the terms of the contract cannot be such that they would deprive the members of the independence which is a precondition of that status. It is obvious that certain pre-existing (provisional) property rights could interfere with this possibility— if one party had a provisional right to the only water source in the area, everyone else would be dependent on that individual for their livelihood. Parties who do not have sufficient property prior to the union might have to be given more and, depending on geographical

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<sup>66</sup>[MS AK 6:305-306]

<sup>67</sup>[MS AK 6:314]

<sup>68</sup>[MS AK 6:314]

facts, this might in turn require some parties to give up property they previously held.

Provisional acquisition of objects is therefore a real, rightful acquisition which is nevertheless subject, at some future time, to the compatibility of such possession with the possibility of entering into a civil union. Peremptory possession, however, is no longer subject to such a possibility: there is no overriding duty which might later obligate a proprietor to give up what was his. This transformation is suggested in Kant's use of the word 'peremptory' in particular, since that description applies to things which are no longer up for debate. Apart from this, I contend, the provisional right carries the full force of its peremptory counterpart— in particular the permission to use force, if necessary to prevent others from interfering with one's possessions. That a provisional version of a thing would have the same powers (at least for some period of time) as its non-provisional version is not entirely foreign. A provisional governor acts with the force of an elected one, at least until a new election can be held. A provisional patent prevents others from copying your work, but only for twelve months (pending application for a non-provisional patent.) Provisional drug approval allows medication to be prescribed while further research is conducted on its safety and efficacy.

Observation and enforcement of one's provisional rights are practiced in situations where parties are near one another but not yet in a civil union. This can happen as a result of the length of the process required to arrange the terms of the future civil union: negotiating and implementing the terms of a contract can be time-consuming affairs.<sup>69</sup> Per Kant's discussion in §19 of the *Rechtslehre*, “[f]or every contract there are two *preparatory* and two *constitutive* rightful acts of

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<sup>69</sup>For example, it took Cyprus and Malta fourteen years each to join the European Union.

choice. The first two (of *negotiation*) are *offering* (*oblatio*) and *assent* (*approbatio*) to it; the two others (of *concluding*) are *promise* (*promissum*) and *acceptance* (*acceptatio*).”<sup>70</sup> One of the ways of showing good faith in contract proceedings is by taking the time to go through the process slowly and carefully. There is also the question of how a civil union should react to the property claims of a nearby non-citizen, or how two civil unions (such as two states) should treat the property claims of another, if they are not part of a larger set of united nations. Since the countries of the earth for example, are not united under some common government, it seems that the question of how they should relate to one another’s property claims is answered by the permissions and obligations contained in the provisional rights that they have to their respective lands.

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<sup>70</sup>[MS AK 6:272]

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