

Original citation:

James, David. (2016) Independence and property in Kant's Rechtslehre. *British Journal for the History of Philosophy*, 24 (2). pp. 302-322.

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Publisher's statement:

"This is an Accepted Manuscript of an article published by Taylor & Francis in *British Journal for the History of Philosophy* on 13/01/2016 available online:

<http://dx.doi.org/10.1080/09608788.2015.1121134>

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Independence and Property in Kant's *Rechtslehre*

Right and independence

In *The Metaphysics of Morals* Kant argues that the universal principle of right provides the means of determining how the freedom of each and every person can be made to coexist in accordance with a universal law. He states that an action is right ‘if on its maxim the freedom of choice [*Freiheit der Willkür*] of each can coexist with everyone’s freedom in accordance with a universal law’ (AA 6: 230; PP, 387).¹ From this statement it appears that the freedom of choice of each and every person is what must be made to coexist by means of a universal law, as long as one assumes that the general term ‘freedom’ used in this statement also signifies freedom of choice. It would then be a matter of limiting a person’s freedom of choice in accordance with a universal law if and only if this person’s exercise of freedom of choice would make it impossible for other persons to exercise free choice. This interpretation is supported by Kant’s definition of right as ‘the sum of the conditions under which the choice [*die Willkür*] of one can be united with the choice of another in accordance with a universal law of freedom’ (AA 6: 230; PP, 387). Other statements, however, suggest an alternative interpretation of the freedom for the sake of which freedom of choice is to be limited in accordance with a universal law.

The idea that right concerns not only freedom of choice but also a different, more fundamental notion of freedom is signalled by Kant’s later claim that the ‘only original right’ possessed by individuals in virtue of their humanity alone is the following one: ‘Freedom (independence from being constrained by another’s choice [*Unabhängigkeit von eines Anderen nöthigender Willkür*]), insofar as it can coexist with the freedom of every other in accordance with a universal law’ (AA 6: 237; PP, 393). Thus the form of freedom that right protects is more fundamentally the freedom that consists in not being subject to the choices of

another person in such a way that this person's exercise of free choice, and not one's own exercise of it, determines what one does.²

This independence cannot be identified with freedom of choice, however, because it is a negative condition of any genuine act of free choice and must, therefore, be regarded as a logically distinct form of freedom. In short, independence must be presupposed in order to explain the possibility of not being subject to the choices of others in such a way that their choices determine, and thus constrain, one to act in certain ways and not in others independently of what one oneself wills (or would will) to do. This independence is fundamental to Kant's *Rechtslehre* in the sense that it is what ultimately determines whether or not an action can be considered to be a rightful one and what laws and institutions are the conditions of right. It is therefore not the case that guaranteeing right is simply a matter of securing or promoting a certain outcome (that is, independence), in which case right would be reduced to the means to an end which remains external to it. Rather, the end of securing independence is constitutive of the concept of right itself. What does this independence of the choices of another person or persons really mean, though? And how can the idea of this independence serve to determine the rightful scope of freedom of choice? In what follows, I shall show how another central feature of Kant's *Rechtslehre*, namely his apparent presumption in favour of private property, is of major significance in relation to such questions.

Kant speaks of an 'innate *equality*, that is, independence from being bound by others to more than one can in turn bind them; hence a human being's quality of being *his own master (sui juris)*' (AA 6: 237; PP, 393f.). This claim provides a clue as to the source of his understanding of independence and how it can be guaranteed within a legal and political community in which each and every member enjoys an equal status. The notion of freedom as independence is here associated specifically with the idea of being one's own master, in

the sense of not being subject to the arbitrary will of another person to whom one is in some way one-sidedly bound. Yet what does being subject to the arbitrary will of another person mean in practice? Does it, for example, concern only direct forms of interference that prevent or undermine a person's exercise of freedom of choice, or does independence of the constraining choice of others also concern the absence of the mere possibility of being subjected by others to interference on an arbitrary basis, as defenders of a distinctively republican conception of freedom argue?³ Support for the view that Kant has in mind the second notion of independence can be provided with reference to certain key ideas found in the writings of Jean-Jacques Rousseau, who deeply influenced Kant and can, therefore, justifiably be assumed to be an important source for his understanding of the form of freedom expressed by means of the idea of being one's own master and how this freedom can be guaranteed within a legal and political community.⁴

Kant's characterization of the criterion of independence in terms of 'not being bound by others to more than one can in turn bind them' echoes Rousseau's claim that with regarding a legitimate social contract each and every party to this contract must completely renounce his or her natural freedom, because only in this way can the condition be 'equal for all', with no one having 'any interest in making it burdensome to the rest'.⁵ In other words, a minimum requirement of a legitimate legal and political order in which genuine personal independence exists is that all its members are equal in the sense of being subject to the same fundamental conditions (that is, laws and obligations) to the same degree. If, by contrast, some people were subject to conditions to which others were not equally subject, they would bear additional burdens, and this state of affairs would be inconsistent with the idea of equality. We may assume, moreover, that the people who bear additional burdens would be dependent on the arbitrary wills of individuals or of social groups who are not subject to the same burdens or are not subject to them to the same degree. These individuals or social

groups would then be in the position to constrain the choices of others by demanding that they fulfil the obligations associated with these additional burdens without their freedom of choice being correspondingly constrained.

Kant's debt to Rousseau is shown by what he has to say about the role of interest in determining the terms of the social contract. In the following passage, Kant assumes either (1) that no one would willingly wrong him- or herself by submitting him- or herself to conditions that are contrary to his or her own fundamental interests, including that of securing personal independence, even if he or she would willingly harm the interests of others, or (2) that even if the act of voluntarily submitting to such conditions is sufficient to render them legitimate in one's own case, it would not make them legitimate in the case of others who have not consented to them. The first assumption appears to be what Rousseau has in mind. For Kant, it is by generalizing such an assumption that the laws to which individuals could reasonably subject both themselves and others can be determined:

Now when someone makes arrangements about *another*, it is always possible for him to do the other wrong; but he can never do wrong in what he decides upon with regard to himself (for *volenti non fit iniuria*). Therefore only the concurring and united will of all, insofar as each decides the same thing for all and all for each, and so only the general united will of the people, can be legislative. (AA 6: 313f.; PP, 457)

Yet what exactly are the conditions to which each and every member becomes equally subject and that are discoverable by means of an ideally conceived social contract based on the act of generalizing that which individuals would willingly accept given certain fundamental interests that they are assumed to share? Is it simply a matter of being subject to the same laws and subject to them to the same extent as others are, or is something more

required, such as the removal of any other real or potential threats to freedom in the sense of independence of the arbitrary wills of others?

It is of particular significance in this regard that Kant accepts the existence of certain property rights and social relations based on them that make one person subject to the arbitrary will of another person *within* a rightfully constituted legal and political community. Thus the problem arises as to how property rights whose existence results in an absence of full independence in the case of some citizens can be justified when Kant himself identifies independence as the single innate right that individuals possess in virtue of their humanity alone. This tension between Kant's commitment to the idea of independence in the sense of not being subject to the arbitrary will or freedom of choice of another person and his acceptance of one-sided forms of dependence based on property rights means that his account of property rights is of central importance when it comes to the question of the coherence of his *Rechtslehre*. Although Kant's account of property rights will be shown to imply a presumption in favour of private property, I shall argue that there are, in fact, no reasons internal to his *Rechtslehre* for denying the legitimacy of alternative forms of ownership, nor even for preferring private property in all possible cases. Although there could be reasons for preferring private property to other forms of property in some particular cases, deciding such an issue concerns only the application of the principles of Kant's *Rechtslehre* and not these principles themselves.

Property and dependence

Kant's acceptance of the legitimacy of one-sided forms of dependence based on property relations is evident from the distinction he draws between active and passive citizenship.⁶ For Kant, the status of citizen is the only relevant qualification when it comes to being fit to vote. Yet he restricts active citizenship, which confers the right to vote, to individuals who already

possess the quality of being independent in virtue of their status as the owners of property of a certain type. This is shown by some of his examples of people who are *not* independent in the relevant sense and must, therefore, be denied the right to vote, namely, those individuals who have only their labour to sell (for example, the ‘woodcutter I hire to work in my yard’) and tenant farmers who do not own the land they cultivate (AA 6: 314f.; PP, 457f.).

These examples imply that lack of full independence typically derives from the way in which a person’s ability to live from his or her labour is dependent on another person’s will, with this dependence being a function of existing property relations and the nature of that which one owns. The relation of the wage labourer to the person who employs him is one in which the latter possesses for a specific period of time the labour of the former, while the tenant farmer’s activity depends on the landowner’s agreement to lease him the land that he wishes to cultivate without owning it. In both cases there exist relations of dependence that are ultimately to be explained in terms of the absence of any property other than one’s own labour in the case of one party and the means of purchasing the labour-power of others or the ownership of some productive means other than one’s labour in the case of the other party. Kant claims that this type of dependence on the will of another person and the political inequality that it entails are not incompatible with the freedom and equality that passive citizens enjoy in common with others as human beings, because the passive citizen’s lack of the right to vote does not violate the other attributes of citizenship that Kant identifies, including equal legal status. There must, moreover, exist the possibility of being able to work oneself up from the position of passive citizen to that of active citizen (AA 6: 314f.; PP, 458f.).

Given that Kant identifies independence as an innate right that a person possesses in virtue of his or her humanity alone, it is far from self-evident that property rights should be allowed to override this innate right in the case of people who have only their own labour to

sell, resulting in their absence of full independence. Rather, any restrictions on the scope of a citizen's independence would themselves have to be justified in terms of this innate right. Since Kant's distinction between active and passive citizenship is connected with the right of full political participation, it may have been motivated largely by the thought that individuals who are economically dependent on others may be forced to vote in a certain way on matters of general concern so as to protect their livelihoods. This reason for not granting them full political independence simply invites the question, however, as to why relations of economic dependence which give one individual power over the free choice of another individual should not instead be removed. Given the way in which this form of domination depends on the existence of property rights of a certain type, the question can be reformulated as follows: why should such property rights and any social relations based on them be allowed to override the innate right of independence when this right is something that right itself ought to guarantee? The precise nature of this problem can be made clearer with reference to the way in which Kant's distinction between active and passive citizenship shows that he himself recognizes that relations of economic dependence favour indirect forms of coercion based on different degrees of social power, with the weaker party being forced to act in conformity with the choices of another party without the latter needing to exercise any direct form of coercion.

Kant does not restrict possible violations of the external freedom which is the object of right to direct forms of interference. Rather, he identifies the concept of right 'with the external and indeed practical relation of one person to another, insofar as their actions, as deeds, can have (direct or indirect) influence on each other' (AA 6: 230; PP, 387). Thus, there could be a type of coercion in Kant's sense that takes the form of hints or suggestions of what will happen if one person does not act in conformity with the choices of another economically and socially more powerful person or group. The difficulty of voting

independently in the face of relations of economic dependence itself provides an example of how the freedom of choice of one person could be constrained by the freedom of choice of another person in the absence of any direct form of coercion (provided one ignores such measures as the introduction of secret ballots). This is because it represents a situation in which a person is not in the position to decide independently who should represent him or her and is thereby not able to exercise genuine freedom of choice through engaging in a practice that occurs in the phenomenal world. This person is instead indirectly made to choose in accordance with the views or interests of another person. The individual with more economic and social power with whom another individual stands in an asymmetrical relation of dependence may admittedly choose not to interfere with the freedom of choice of another. He or she may, in fact, be benevolently disposed towards the other individual and will tend to act in accordance with a paternalistic sense of duty in relation to him or her. Yet this situation would itself be incompatible with the republican conception of freedom as independence of the arbitrary wills of others, for which the mere possibility of being subjected by others to some form of interference on an arbitrary basis is sufficient to render people unfree because of the potential for domination contained in such a situation.⁷ Legal protection from possible as well as actual interference is therefore a necessary condition of genuine independence.

Kant's acceptance of forms of domination based on different degrees of economic and social power that are a function of property rights and the social relations based on them appears, then, to render his account of citizenship incompatible with the republican notion of freedom found in his *Rechtslehre*. This notion of freedom implies that the freedom of choice of one person can coexist with the freedom of choice of another person in accordance with a universal law if and only if both persons possess full independence of the arbitrary wills of others. From the standpoint of right, therefore, it is legitimate to limit freedom of choice with

the aim of guaranteeing the full independence of all citizens whenever republican freedom and freedom of choice turn out to be incompatible.

Kant is clearly uncomfortable with certain features of the property relations that underlie his distinction between active and passive citizenship in so far as it depends on the existence of people who have only their own labour to sell and are confronted by others who are in a position to purchase it. This is despite his acceptance of the legitimacy of the type of contractual relation which he describes in terms of the ‘possession of another’s choice, in the sense of my capacity to determine it by my own choice to a certain deed in accordance with laws of freedom’ (AA 6: 271; PP, 421), and in terms of the act of ‘granting another the use of my powers for a specified price’ (AA 6: 285; PP, 433). Nevertheless, Kant indirectly imposes moral limitations on the permissible use of another person’s labour-power in connection with the contract between master and servant. This example is of wider import because it could be extended to include any contract between an employer and the person who sells him his labour.

Kant maintains that the ‘contract of the head of a household with servants can ... not be such that his *use* of them would amount to using them up; and it is not for him alone to judge about this, but also for the servants (who, accordingly, can never be serfs)’ (AA 6: 283; PP, 432). This claim leaves room for the idea that even when a person has sold his or her labour-power to another person for a limited period of time, restrictions on how intensely the employer may use this labour-power within this period of time ought nevertheless to apply, and these restrictions ought, moreover, to be determined by the employee as well as by the employer. In short, Kant appears to grant workers certain economic rights. He also appears to be hostile to the idea that human beings own themselves and therefore have the right to dispose of themselves as they please when he states that ‘someone can be his own master [*sein eigener Herr*] (*sui juris*) but cannot be the owner [*Eigenthümer*] of himself (*sui*

dominus) (cannot dispose of himself as he pleases) (AA 6: 270; PP, 421). He does not, therefore, appear to endorse unequivocally the idea of self-ownership that underpins the right to dispose freely of one's own labour by entering into contractual relations with others whatever the conditions specified in a contract may be.

The fact that property rights often concern physical objects, and typically did so in Kant's own time, makes them into a prime example of the external freedom that forms the object of right, as Kant himself makes clear by discussing such rights under the heading 'Concerning what is externally mine and yours in general'. As I have shown above, Kant appears to accept that the independence of one person may be legitimately constrained by another person's exclusive right to parts of the world or to specific objects within it, even though guaranteeing independence is an end that is constitutive of the concept of right.

One way of explaining this tension in Kant's *Rechtslehre* between the principles of freedom and equality, on the one hand, and his acceptance of forms of domination, on the other, is to view it as the product of a more fundamental tension between *a priori* principles of right and an *a posteriori* notion of independence drawn from a traditional conception of the form of independence enjoyed by a citizen.⁸ In short, the concept of right as a matter of pure practical reason and the normative implications of this concept are compromised by their association with certain defining characteristics of citizenship uncritically derived from traditional views of what it means to be a citizen. This explanation still leaves us with the question, however, as to whether Kant is able to provide a justification of property rights and social relations based on them that generate one-sided forms of dependence which have the potential to allow one person to determine the freedom of choice of another person, and to do so, moreover, in such a way as not to compromise his commitment to the idea of freedom as independence of the arbitrary wills of others.

Kant appears to want to justify certain pre-political property rights that constrain the ways in which any legal and political community may legitimately seek to achieve the end of securing the independence of its all members, in the sense that to violate these rights would itself undermine their independence in so far as it requires being able to choose how one employs the means at one's disposable independently of the choices of others.⁹ In short, property rights are to be regarded as constitutive of the independence that right ought to guarantee, in the sense that they are conditions of being able to exercise free choice independently of others. This argument, which depends on the idea that to be independent requires having the right to dispose freely of one's property, begs the question, however, because it assumes that property rights of this type are indeed conditions of independence. If property rights of a certain kind turn out to be incompatible with the full independence of others, as Kant recognizes they can be, this assumption begins to look problematic, especially when the right of property is for Kant only an acquired right, whereas independence is an innate one. One could argue instead that determining the legitimacy of property rights according to what is required to secure the genuine independence of *all* citizens will, in fact, generate considerable limits on the right to dispose freely of objects to which one allegedly possesses an absolute right. Here independence provides the criterion against which any claim to possess a right to exclude others from parts of the world or from objects within it must be judged, rather than independence being measured in terms of the right to dispose freely of property, in which case the possession of this right is merely assumed to define (if only partly) what it means to be independent.

Rousseau's account of the transition from a state of natural freedom to a civil condition made possible by means of a legitimate social contract illustrates the full force of the difficulty faced by Kant once he is understood to be attempting to establish a pre-political right of property that constrains the ways in which any legal and political community may

legitimately seek to achieve the end of securing the independence of its members. The republican notions of equality and freedom are central to this account. Rousseau asserts that the clauses of the contract in question ‘all come down to just one, namely the total alienation of each associate with all of his rights to the whole community’.¹⁰ This claim could be taken to mean that any provisional property rights - assuming that it is meaningful to speak of such rights at all - cannot simply be assumed to be valid once the transition to the civil condition has been made. Rather, all such rights must be examined in the light of the principles of equality and freedom that determine the form of any legal and political community which meets the requirements of a legitimate social contract. If these provisional property rights turn out to be incompatible with the principle of equality and/or the principle of freedom conceived in terms of independence of the arbitrary wills of others, the claims on which these rights are based would have to be dismissed as incompatible with the very foundations of right.¹¹

In the next section, I shall argue that if Kant is seeking to justify the idea of certain pre-political property rights that would limit what can legitimately be done to secure republican freedom, he must ultimately be thought to fail in this endeavour. Kant’s commitment to the universalization of the republican principles of equality and freedom understood as independence of the arbitrary wills of others renders the idea of such pre-political property rights so insecure that it would have been better to reject the possibility of any such rights altogether. There are, moreover, good (if not conclusive) reasons for thinking that Kant connects such pre-political, provisional property rights with private property in particular. The problematic nature of these rights also means, therefore, that there can be no presumption in favour of private property, though there may be particular cases in which private property represents the best means of securing each citizen’s independence.

Kant on property

Kant implies that there can be provisional, pre-political property rights when he identifies private right (*Privatrecht*) with natural right (*Naturrecht*), and accordingly speaks of private right as existing in a state of nature, thereby contrasting it with public right (*das öffentliche Recht*) which is possible only within a legal and political community (AA 6: 242; PP, 397). The possibility of right in a state of nature implies the existence of a pre-political form of right based on principles of pure practical reason. This form of right is the topic of the first part of the *Rechtslehre*, and it is here that we encounter Kant's account of rights of possession.

This account of rights of possession develops into what can be regarded as an attempt to justify private property in particular, for by the end of the section on 'property right' (*Sachenrecht*) Kant has come to speak of an 'external object which in terms of its substance belongs to someone is his *property (dominium)*, in which all rights in this thing inhere (as accidents of a substance) and which the owner (*dominus*) can, accordingly, dispose of as he pleases (*ius disponendi de re sua*)' (AA 6: 270; PP, 421). The right to dispose of an external object as one pleases distinguishes private property from other possible forms of ownership such as the right to use something only under certain conditions and without the right to alienate it to others. Kant's use of the phrase 'mine and thine' implies, moreover, exclusive possession of an object and thereby private ownership in particular, as does his statement that 'is *rightfully mine (meum iuris)* with which I am so connected that another's use of it without my consent would wrong me' (AA 6: 245; PP, 401). Thus there are some clear grounds for viewing Kant's account of private right as an attempt to justify private property in particular.¹² Property rights of this kind would exist even in the state of nature and would constrain the ways in any legal and political community may legitimately seek to secure the independence of its all members.

Kant explains the possibility of an external object that is rightfully one's own in terms of the idea of intelligible possession. This form of possession does not depend on the empirical (that is, physical) possession of an object. The idea of intelligible possession is introduced because only it can explain the wrongness of an act whereby another person uses a thing which is rightfully mine even though I do not physically possess this thing and it did not, therefore, need to be forcibly taken from me. Thus intelligible or '*merely rightful*' possession 'must be assumed to be possible if something external is to be mine or yours' (AA 6: 249; PP, 403). In this way, Kant can be seen to assume that there are indeed cases of the rightful possession of external objects and then to seek to identify the necessary conditions of the possibility of this type of possession. This explains his use of the term 'deduction' in the relevant part of his *Rechtslehre*. From what he means by this term in the *Critique of Pure Reason* (KrV, A 84f./B 116f.), he can be taken to mean a justification of our use of the concept of rightful possession of an external object through the demonstration of the necessity of such a concept when it comes to explaining our general experience of the world. The fact that Kant's use of the phrase 'mine and thine' together with the notion of a right to dispose of an object as one pleases imply the exclusive possession of an object and thus private ownership in particular means, however, that he cannot proceed on the assumption that recognition of the object of the deduction he is undertaking can be taken for granted in the same way as experience in general can be, and that it is, therefore, only a matter of demonstrating the necessary conditions of this object's possibility. Rather, the object itself is one whose legitimacy has been, and continues to be, disputed. It is not surprising, therefore, that Kant's attempt to establish the validity of an exclusive right of ownership appeals in particular to the conditions of the possibility of the use of a thing.

Kant argues that in the absence of exclusive possession of parts of the world or objects within it use of things in accordance with a universal law would not be possible. In

this connection he speaks of ‘the postulate of practical reason with regard to rights: “that it is a duty of right to act towards others so that what is external (usable) could also become someone’s”’ (AA 6: 252; PP, 406). In this way, Kant introduces an argument that depends on the premise that the use of things is possible *only* if there is already an exclusive right to them. This argument can be related to the idea of independence if the condition of being independent is assumed to require being able to choose independently of the choices of others how one employs any means at one’s disposal.¹³ Can the notion of use by itself, however, really justify an unlimited right to exclude others from the use or benefit of something and to dispose of it as one pleases?

Although Kant’s appeal to the conditions of the use of external objects does not mean that intelligible possession and the rights of ownership connected with it are established by the act of using a thing, the notion of use is invoked to justify exclusive possession of parts of the world and objects within it in the following passage:

For an object of my choice is something that I have the *physical* power to use. If it were nevertheless absolutely not within my *rightful* power to make use of it, that is, if the use of it could not coexist with the freedom of everyone in accordance with a universal law (would be wrong), then 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. (AA 6: 246; PP, 405)

The final part of this passage assumes the existence of a rightful condition in which the freedom of choice of one person can coexist with the freedom of choice of others in so far as the exercise of free choice concerns external actions and the use of objects. Since it is a matter of free choice, the use of objects must be taken to mean use of them in accordance with ends that a person has formed. This implies the notion of effective use in the sense of the appropriateness of the object in relation to an end. The rightful existence of mine and thine, that is to say, the existence of objects that are the rightful property of someone who possesses the right to exclude others from the use of them, is here simply presupposed. It is therefore not the case that the use of an object establishes a right to an object. Rather, Kant appeals to the idea of the absurdity of a hypothetical situation in which the freedom to dispose freely of objects of freedom of choice was counterfactually conceived to be contrary to right.

This situation would be absurd because the restriction in question would make the use of objects in accordance with ends impossible, by denying agents an exclusive right to things external to them and thereby ruling out altogether the possibility of their being able to exercise free choice, which is assumed to require having a thing completely at one's disposal. Kant here appears to claim that (1) the use of external objects in accordance with ends is possible only if the rightful possession of them is an exclusive one, and so for an external object to be an object of free choice at all its owner must possess an exclusive right to it, and then to argue as a consequence (1) that (2) only a condition in which property rights are of an exclusive kind will be one in which the freedom of choice of one person is able to coexist with the freedom of choice of others in accordance with a universal law not only formally but also with regard to the actual use of objects. The first claim will be shown to represent nothing more than an assumption on Kant's part. This undermines in turn claim (2) which clearly depends on it.

The possibility of the use of objects in accordance with ends does not self-evidently depend on having an exclusive right to dispose of them as one pleases, and the possibility of free choice cannot, therefore, be held always to depend on exclusive possession, as Kant implies it does when he states that ‘an object of my *choice* is that which I have the physical capacity to use as I please, that whose use lies within my *power (potentia)*’ (AA 6: 246; PP, 406). It is not the case, then, that private property is a necessary condition of the coexistence of the freedom of choice of one person with that of all others in accordance with a universal law. Rather, as Kant himself is aware, if an exclusive right of possession is taken to mean an absolute or near-absolute right to exclude others from the use or benefit of something and to dispose of it as one pleases, the enjoyment of this right on the part of some is, in fact, likely to make the exercise of genuine free choice on the part of others impossible, or at least significantly more difficult.

Kant states that the ‘real definition’ of the concept of what is externally mine is that ‘something external is mine if I would be wronged by being disturbed in my use of it *even though I am not in possession of it* (not holding the object)’, whereas the nominal definition would be ‘that outside me is externally mine which it would be 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’ (AA 6: 248f.; PP, 403). In making this distinction, Kant presumably intends to draw attention to what this concept means when it is viewed from the standpoint of his *Rechtslehre* (the real definition) and what it is generally (and perhaps mistakenly) taken to mean (the nominal definition). The reference to being prevented from using something as I please in the nominal definition of the concept of what is externally mine points to two defining characteristics of private property: the right to exclude others from the use or benefit of an external object and the absolute right to dispose of it as one pleases, that is to say, in accordance with freedom of choice in a purely arbitrary sense. The

real definition, by contrast, implies the right to exclude others from the use or benefit of an external object that one does not directly physically possess or occupy *only in so far as* their use of it would be incompatible with my use of it. The real definition of what is externally mine does not, in short, entail an exclusive right to an external object in the same way as the nominal definition does,¹⁴ and it is only the validity of *this* definition of what is externally mine that Kant thinks he has established. To establish a pre-political right to private property, he would also have to establish the validity of the nominal definition, but he makes no real attempt to do this.

It is relatively easy to conceive of scenarios in which the conditions of use are met in such a way that one's freedom of choice is not in any obvious sense harmed at the same time as the independence of others is made possible despite the absence of private property. The same external object could, for instance, be freely used by two or more persons without the effective use that one person makes of the object interfering with another person's effective use of it, as when the same piece of land is used for two unrelated activities which can be performed without either one of them undermining the successful performance of the other activity.¹⁵ An external object (in this case a piece of land) would in this way be an object of free choice, in the sense of an external object that is used with the intention of realizing certain ends, without any single person possessing the exclusive right to it, nor the right to dispose of it as he or she pleases. Given that the idea of intelligible possession for Kant requires that 'abstraction is made from all spatial and temporal conditions and the object is thought of only as *under my control*' (AA 6: 253; PP, 407), there are, moreover, no clear grounds in any case for allowing considerations of space and time to justify private property, as if the fact that two persons could not occupy the same piece of ground or use some other material object at exactly the same time would justify exclusive possession of it even when the one who is assumed to possess this right of possession is not using the object.

Another example would be the use of books borrowed from a public library. Here an object is not owned by any single person. Rather, it is collectively owned and administered in the name of all and for the benefit of all, that is to say, in accordance with a general or common will.¹⁶ In this particular case the idea of the effective use of an object as a condition of independence could be extended beyond the idea that such use implies the existence of some end in relation to which the object is assumed to serve as an appropriate means. To be genuinely independent one needs to have access to certain objects or resources which enable one not only to experience oneself as a being with the power to effect changes in the world in accordance with one's own ends, but also to develop the capacities that are either preconditions of independence or ways of enhancing it. These capacities can be thought to include the ability to read about, understand and discuss social and political issues, capacities which are conditions of being able to think and to judge independently. These conditions might best be secured for all citizens in certain cases by some form of collective ownership, whereas private ownership would limit the availability of the necessary resources to those who happen already to possess them or are able to afford them. The use of objects would then be temporally limited, and in this sense no one would have an exclusive right to the relevant external objects, at the same time as some of the fundamental conditions of genuine independence are satisfied. This type of case becomes problematic only even if independence is equated with the idea of objects being completely subject to a person's free choice in a purely arbitrary sense. Yet it is difficult to see how right could guarantee the independence of all citizens in accordance with the principle of equality without significantly limiting freedom of choice in this sense. This is not to say that a collective form of ownership would necessarily always be the most appropriate one when it comes to securing the independence of individual citizens. I shall return to this point shortly.

Although Kant speaks of the original common possession of land, he invokes the notion of effective use to deny that common possession of the land would be compatible with the will to use it. Rather, the common possession of land would undermine the will to use it because ‘the choice of one is unavoidably opposed by nature to that of another’, and effective use of the land would therefore be impossible if this same will to use it ‘did not also contain the principle for choice by which a *particular possession* for each on the common land could be determined (*lex iuridica*)’ (AA 6: 267; PP, 418). Kant’s claim that common possession of land is incompatible with effective use of it, and thus with freedom of choice in so far as its exercise requires the use of external objects, simply assumes that the absence of fixed patterns of exclusive ownership will inevitably generate conflict between human beings. This is shown by the mere assertion that the choices of individuals are ‘unavoidably opposed by nature’.¹⁷ This claim is based on a view of human nature which can itself be regarded as conditioned by historical experience, in that the way in which private property dominates existing patterns of ownership can be regarded as the cause, as opposed to an effect, of human conflict. Kant would have to show, moreover, that private property does indeed prevent conflict, whereas the resources employed by states to protect it suggest that this is not, in fact, the case. It is also far from self-evident that even under conditions in which resources were scarce conflict could not be avoided at the same time as common ownership of the land exists, provided that people adjusted their expectations accordingly or had not already developed expectations that are liable to generate conflict in such conditions. Moreover, a condition of scarcity could conceivably compel people to cooperate as opposed to competing with each other for as large a share as possible of what is available.

As we have now seen, the idea of different people using the same external object at different times or using the same external object at the same time for different purposes allows us to conceive of ways in which the independence of citizens could be maintained in

the absence of an exclusive right to dispose of an object as one pleases and to deny others the use or benefit of it. This possibility raises the question of who determines the conditions of use and when they have been violated. Given Kant's views on the type of independence that right ought to guarantee, rights of possession and use would surely be conditional on what is needed to secure each and every citizen's independence. It is important to note in this connection that Kant does not say anything that in principle rules out a collective decision-making process concerning the allocation of property rights, in the broad sense of rights of possession and use that are legally recognized and enforced, in accordance with the end. Indeed, the possibility of a collective decision-making process governed by the law or principle of right is explicitly acknowledged by Kant himself when he claims in relation to the distribution of land that

the law which is to determine for each what land is mine and yours will be in accordance with the axiom of outer freedom only if it proceeds from a will that is united *originally* and a priori ... Hence it proceeds only from a will in the civil condition (*lex iustitiae distributivae*), which alone determines what is *right*, what is *rightful*, and what is *laid down as right*. (AA 6: 267; PP, 418)

Once it is viewed in the light of such claims as this one, Kant's failure to establish the rightful nature of provisional forms of ownership that simply need to be transformed into a legal right of private property in the transition to the civil condition implies that what is really required is a malleable regime of property rights. By this I mean a system of property rights that is determined by decisions regarding the distribution of land and other resources that are collectively reached on an ongoing basis with the aim of securing the independence of all citizens after some kind of deliberative process. Consequently, there ought not to be a

presumption in favour of private property, and even when private property is considered to be the most appropriate means of securing independence in particular cases of possession or ownership, it may be decided at a later point that it is no longer so. Technological developments and changes in the ways of organizing production that were inconceivable to earlier generations might, for example, open up to later generations the possibility of adopting alternative patterns of ownership, such as common ownership of external objects which were previously considered to be appropriate objects of private ownership. If an alternative distribution of land or resources favoured the maintenance or enhancement of the independence of all citizens more than any previous one did, Kant would surely have to endorse the rights associated with this new pattern of distribution even if it was incompatible with private property. Yet he does not explicitly draw such a conclusion. Instead, there is a tendency on his part to suggest that the transition from the state of nature to the civil condition will be one in which existing claims regarding the ownership of external objects typically receive legal recognition and protection by the state, as when he claims that a civil constitution is a rightful condition in which ‘what belongs to each is only secured, but not actually settled and determined’ (AA 6: 256; PP, 410).

The alternative view of the status of property rights outlined above is nevertheless suggested by Kant’s own definition of citizenship in terms of the independence which comes from a person’s ‘owing his existence and preservation to his own rights and powers as a member of the commonwealth, not to the choice of another among the people’ (AA 6: 314; PP, 458). This alternative view of the status of property rights also finds expression in Rousseau’s idea of the ‘total’ alienation demanded of each associate with all his rights to the community as a whole. This can in part be taken to mean that a radical questioning of all existing claims to the rightful possession of objects forms a necessary condition of the establishment of a society in which the genuine independence of each and every person is

guaranteed. Otherwise the equality and independence which define citizenship will be threatened, or in some cases rendered impossible, by the greater bargaining power enjoyed by some individuals or groups on the basis of their possession of exclusive rights to objects that can allegedly in some way be traced back to pre-political rights that then only needed to be legally recognized and protected by the state. As we have seen, Kant himself provides reasons for subjecting such claims to collective scrutiny in a condition founded on the principles of equality and independence. Despite the practical difficulties to which it may give rise, this arrangement would, I contend, be more appropriate to a condition in which the citizens of the state live, to use Kant's own words, 'in accordance with laws of their own independence', and in which 'each is in possession of himself and is not dependent upon the absolute will of another alongside him or above him' (AA 6: 317; PP, 460).

The idea that the form that property rights ought to take is to be determined by the collective will of the people through an ongoing deliberative process that aims to identify how the independence of all citizens can be secured may appear to reduce such rights to something that must be decided on a case-by-case basis, and this in turn would appear to be incompatible with the aim of Kant's *Rechtslehre* to provide principles according to which such matters can be decided. This is not entirely the case, however. To begin with, there will be a principle at work, namely, the principle that external objects ought to be distributed and secured with a view to establishing the conditions of genuine independence for all citizens. Secondly, the fact that the precise form that property rights assume within a society concerns only the application of this same principle does not exclude the possibility of certain general rules along the lines that a certain type of external object generally favours one form of ownership to the exclusion of other ones when it comes to establishing the conditions of genuine independence in a certain type of case. This might in regard to some type of external object justify a presumption in favour of private property, but only in relation to this type of

external object, and there must also be an openness to the possibility that this form of ownership may one day no longer be the most appropriate one even in relation to this type of external object.

It is in any case difficult to see how this kind of objection could justify a presumption in favour of private property more generally. Rather, the principles of equality and independence must be regarded as fundamental, and it will therefore simply be wrong to prejudge what would in each and every case be the best means of honouring these principles, especially since people may in time become conscious of possibilities of which they were not previously aware regarding the possession and distribution of external objects. Even when private property may look like the better option, as with goods that deteriorate with use to such an extent that later users of these goods would not gain the same benefit from them as earlier users did, the issue is not especially clear-cut. If the collective will of the people so decided, the state could, for example, distribute goods of this type in such a way that each and every user of them received them in more or less the same condition (for example, as new or with the same degree of functionality) without, however, granting them an absolute or near-absolute right to dispose of them as they please. In this case, it is not clear why we should here speak of private property. The general objection might be made that such a mode of distribution together with the idea of an ongoing deliberative process that aims to determine what form of property rights will best secure the independence of all citizens raise considerable practical difficulties. Yet this objection would itself amount to introducing considerations that are external to Kant's *Rechtslehre*.

This brings me to a final point. If the distribution of external objects is to be undertaken with the aim of securing the genuine independence of all citizens, there will be limits to each citizen's independence simply in virtue of the fact that human beings living together in society exist in a condition of mutual dependence. What must be secured is,

therefore, a sufficient amount of independence in the face of the limits that mutual dependence imposes on each individual's independence. Sufficient independence can here be understood to mean enough independence to avoid the generation of asymmetrical relations of dependence in which one citizen has little choice but to do the bidding of another one, even when the latter does not directly coerce the former. Although private property may secure some citizens from this form of dependence, it can also allow some citizens to dominate other ones, as Kant himself recognizes. If it is here argued that private property therefore needs to be distributed in such a way as to avoid this outcome, the question arises as to how this is to be achieved in a way that does not violate the principle of private property itself through a radical curtailment of the right to accumulate property and to dispose of it freely by means of acts of exchange to which all relevant parties have consented. Collective ownership, by contrast, threatens to introduce a high level of dependence on the state as the body responsible for distributing external objects in the appropriate way. This form of dependence would, moreover, ultimately make citizens dependent on others in the shape of state functionaries. What form of property rights will best secure sufficient personal independence in relation to particular types of external objects in this respect must depend on such factors as past experience and forms of social and political experimentation. Clearly, this is a matter that cannot be decided at the level of principles of right alone. Given this element of indeterminacy, a deliberative model of the kind mentioned above, by the mere fact that it can accommodate such indeterminacy, looks to me to be far more favourable to the establishment of a condition of equality and independence than does a legal and political system based on a presumption in favour of private property which does not, therefore, provide sufficient space for the consideration of alternative forms of ownership.

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¹ I use the following abbreviations for the writings of Kant listed in the bibliography: AA – *Kant's gesammelte Schriften*, cited by volume and page number; AHE – *Anthropology, History, and Education*, cited by page number; KrV – *Kritik der reinen Vernunft/Critique of Pure Reason*, cited by first (A) and second (B) edition page numbers; OFBS – *Observations on the Feeling of the Beautiful and Sublime and Other Writings*, cited by page number; PP – *Practical Philosophy*, cited by page number.

² The claim that independence of the choices of others provides the foundation of Kant's *Rechtslehre* is found in Ripstein, *Force and Freedom*, 14 and Wood, 'The Independence of Right from Ethics'.

³ See, for example, Pettit, *Republicanism* and Skinner, *Liberty before Liberalism* for accounts of republican freedom understood in terms of this conception of freedom and how it differs from the liberal conception of freedom associated with freedom of choice and the absence of impediments to its exercise.

⁴ See Kant's statement that Rousseau 'set me right' found in one of his pre-critical writings (AA 20: 44; OFBS, 96). Also relevant in the present context is Kant's claim that whereas in his earlier works Rousseau presents us with a conflict between culture, which is the product of freedom, and nature, he seeks in his later writings such as the *Social Contract* the course that culture should take if it is to bring about the true development of the human race as a moral species and its eventual harmony with itself as a natural species (AA 7: 326f.; AHE, 422f., AA 8: 116ff.; AHE, 169ff.). Clearly, then, Kant views the *Social Contract* as a key text when it comes to demonstrating how human freedom might be reconciled with the development of legal and political relations.

⁵ Rousseau, *The Social Contract and other later political writings*, 50.

⁶ For account of the historical background to Kant's use of this distinction, see Malik, *Kant's Politics in Context*, 80ff.

⁷ The classic example is that of the slave whose master just happens not to practice interference on an arbitrary basis but could, nevertheless, do so at will and with impunity if he wished to do so. Cf. Pettit, *Republicanism*, 22f., 31f. and 63f. and Skinner, *Liberty before Liberalism*, 39ff.

⁸ Cf. Riedel, 'Die Aporie von Herrschaft und Vereinbarung in Kants Idee des Sozialvertrags'.

⁹ Cf. Ripstein, *Force and Freedom*, 19, 63f., 66f. and 86ff.

¹⁰ Rousseau, *The Social Contract and other later political writings*, 50.

¹¹ This goes beyond attempts to argue that property rights can be subordinated to the right to be independent of the choices of others in the sense that property may have to be redistributed in order to guarantee the independence of all (cf. Ripstein, *Force and Freedom*, 270ff. and Wood, 'The Independence of Right from Ethics', 83ff). This is because this type of claim, as it stands, assumes the legitimacy of private property and thus makes a presumption in favour of it. For an attempt to work out the implications of Rousseau's account of the conditions of a legitimate social contract in relation to property rights, see James, *Rousseau and German Idealism*, 96ff.

¹² It has been claimed, however, that in the section on private right Kant is aiming to provide a justification of possession and use only. Cf. Westphal, 'A Kantian Justification of Possession'.

¹³ This is suggested by Ripstein's claim that, 'Freedom requires that you be able to have usable things fully at your disposal, to use as you see fit, and so to decide which purposes to pursue with them, subject only to such constraints imposed by the entitlement of others to use whatever usable things *they* have. Any other arrangement would subject your ability to set your own ends to the choice of others, since they would be entitled to veto any particular use you wished to make of things other than your body' (Ripstein, *Force and Freedom*, 19).

¹⁴ Even if Kant suggests that it does when he later claims that the real definition of a property right 'would have to go like this: *a right to a thing* is a right to the private use of a thing' (AA 6: 261; PP, 413), if the term 'private' is assumed to mean an exclusive, unlimited personal right to the use of a thing.

¹⁵ Fichte indicates the possibility of this type of case in his *Foundations of Natural Right* from 1796-97 (Fichte, *Foundations of Natural Right*, 190). On the compatibility of Fichte's theory of property with collective forms of ownership, see James, *Fichte's Social and Political Philosophy*, 21ff.

¹⁶ This form of common ownership should not be identified with the aggregation of rights of possession that each and every person who makes up part of this collective will originally had. This amounts to conceiving

property rights already in terms of private property. It might be argued that the form of common ownership found in a condition in which the members of a legal and political community have only the right to use objects subject to certain conditions presupposes a right of ownership akin to that of private property on the part of the state itself. For example, after using the term ‘private property’, Ripstein makes the following claim: ‘The power of the state to allocate land and chattels based on its priorities, and to determine the ways and terms on which they can be used, is a large-scale version of a property right’ (Ripstein, *Force and Freedom*, 89). Yet what if the state administers resources in the name of the people who collectively own it, but not in the sense that what the state administers is somehow the sum of its citizen’s property rights, whether existing ones or ones that had previously been alienated to the state which now owns them? Rather, no one is held to have, or to have had, an exclusive right to any of these resources, and the state is not itself the owner of them because it has only been entrusted with the task of administering them in accordance with the collective will of the people on whose behalf it acts and therefore lacks the right to dispose of them as it pleases. Ripstein’s claim shows only how the idea of private property has become naturalized to the point that some people are apparently incapable of conceiving the possession of external objects in any other way.

¹⁷ Kant claims that it is not from experience that we learn that human relations are characterized by violent conflict prior to the establishment of a condition of right; rather, the very idea of a condition in which right was absent implies that human beings would be judges in their own cause when it comes to doing what they hold to be right and good, and this by itself would be sufficient to explain the insecurity of such a condition (AA 6: 312; PP, 455f.). It is questionable, however, that one could reach such a conclusion altogether independently of experience, for it is at least conceivable that the judgements of human beings in such a condition would happily coincide and continue to do. Admittedly, Kant’s point is that such agreement would only be contingent. Nevertheless, it is only if some general assumptions about human nature based on experience are introduced that this contingency itself appears self-evident.