

Nozick's Kantian Roots

for *Nozick's Anarchy, State and Utopia at 50*, ed. Ralf Bader, Cambridge University Press.

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Introduction¹

The 1970s marked the beginning of a revolutionary development in Kantian legal and political scholarship. Up until this time, Kant scholarship had been most notable in legal and political philosophy for its absence; now, new and philosophically exciting Kantian theories were emerging. Monumental figures in the transformative Kantian debates in the English-speaking world in the 1970s were John Rawls, Onora O'Neill, and, of course, Robert Nozick. This chapter starts by providing a brief overview of this development. From the point of view of the history of philosophy, these Kantian theories were peculiar in that they were not grounded in Kant's main legal and political text – the Doctrine of Right in *The Metaphysics of Morals* – but primarily in Kant's (meta-)ethical writings – the *Groundwork for the Metaphysics of Morals* and *Critique of Practical Reason*. A main challenge facing any Kantian working within these textual parameters is Kant's insistence that imperfect duties are unenforceable. This seemingly entails that coercive (re-)distribution of material resources in response to human need and suffering is morally impermissible. And this is indeed the line of argument Nozick defends by combining and transforming arguments found in Kant's (meta-)ethical writings as well as those found in the work of John Locke into a right-wing libertarian position. Section 2 outlines these Kantian-Lockean features of Nozick's theory, from his arguments regarding "side constraints" to "historical," "patterned," and "end-result" theories. Section 3 then turns to Nozick's account of the establishment of the state, from the formation of the "protective agencies," to the "ultramiminal state," and, finally, to the "minimal state." I critique Nozick's account throughout by means of arguments found in Kant's Doctrine of Right. The chapter concludes by sketching how recent, contemporary Kantian accounts that primarily use the Doctrine of Right rather than Kant's (meta-)ethical writings end up with legal and political philosophies closer to or further away from Nozick's minimal state.

1. Locating Nozick's *Anarchy, State, and Utopia* in Kantian Scholarship from the 1960s Onward

From the 1960s and well into the 2000s, most Kantians considered Kant's theory of economic justice to be something of an inherited Achilles' heel (Gregor 1963: 36-37; Höffe 1994: 184-86; Murphy 1970: 144-46; O'Neill 2000: 65; Rawls 1989: 81-95; Rawls 1999: 221-27; Rawls 2000: 217-34; Rosen 1993: 196-98). Poverty, human suffering, and material misery—whether on the global and domestic economic scene—was, on these readings, seen as beyond the concerns of justice for Kant; redistribution of material resources to alleviate society's inequalities was not within the proper scope of the state's authority. Nozick was *the* exception among Kantians; rather than viewing Kant's theory of economic justice as something of an albatross, in *Anarchy, State, and Utopia* (1974; hereafter *ASU*), he defended the kind of philosophical position commonly attributed to Kant, and he did so, in part, by appeal to Kant. This first section briefly

¹ Thanks to Ralf Bader, Arthur Ripstein, James Warren, and the participants at the workshop for this volume at the University of Fribourg for helpful engagements with (the ideas in) this text. As always, this scholarly generosity does not mean that they necessarily agree with the article's contents. We each publish in our own names.

situates Nozick's philosophical position among the other core Kantian alternatives from the 1970s into the 2000s.

"Individuals have rights, and there are things no person or group may do to them (without violating their rights)," Nozick starts the Preface of *ASU* before clarifying that he will be defending a "libertarian," "minimal state" position that is likely to offend (xix).² His position will be perceived as "callous," he continues, because it maintains that "the state may not use its coercive apparatus for the purpose of getting some citizens to aid others" (xix). Nozick argues that this basic commitment follows from Kant's Categorical Imperative, according to which nobody should use others "simply as a means"; rather, others must always be viewed as ends in themselves, as inviolable, or as having dignity (32). Relatedly, one of Nozick's core proposals is that individuals' rights should operate as "side constraints" on people's interactions, where the aim of these side constraints is precisely to "express the inviolability of other persons" (32). Correspondingly, the rights of the state are "decomposable without residue" into the rights of individuals (89; see also 6, 118, 133) and "[a]nything an individual can gain by such a unanimous agreement [the social contract] he can gain through separate bilateral agreements" (90, cf. 18f, 118). The rights of the state are, in other words, co-extensive with individuals' rights. A society that does not function within the parameters of the side constraints is correspondingly one in which individuals' rights to freedom are not respected, and consequently, there will be unjustifiable practices involving some people partially enslaving others by, for example, subjecting them to forced labor, by being legally permitted to treat them paternalistically, by stealing from them without legal consequence, etc.

As mentioned, most Kantians engaged this presumed inheritance from Kant differently than Nozick in that they set out to develop alternative Kantian theories of justice. Indeed, most scholars responded to Nozick in the way most Kantians in this period responded to Kant's apparently callous view of poverty, namely by both criticizing their theories and exploring ways to overcome the perceived problem by reimagining the Kantian account of economic justice. For example, Onora O'Neill, Allan D. Rosen, and John Rawls agree that the root of the problem is the way in which Kant's position is unresponsive to material aspects of the human condition. O'Neill (1989: Chs. 10 and 12; 1998: Chs. 5-7; 2000: 65) and Rosen (1993: 173-208) re-envisioned Kant's philosophy by arguing that the state (but not private individuals) can enforce charity (beneficence),³ while Rawls (1989: 81-95; 1999: 221-27, and 2000: 217-34) tried to make sure his principles of justice as fairness incorporate the material concerns of the human condition through his list of "primary goods."⁴ Against the grain of using Kant's (meta-)ethical writings, Hannah Arendt (1992) and Alexander Kaufman (1999), in turn, viewed the *Critique of Judgement* as providing philosophical resources by means of which to make Kant's philosophical system responsive to the human condition.

Unsurprisingly, Nozick was among the strongest critics of such Kantian rescue attempts. He argued that insofar as Kantians develop a coherent conception of justice – one that understands justice in terms of freedom – they cannot appeal to anything but freedom when delineating rightful coercion. Hence, he continued, Kantian positions cannot permit nature (material needs, capacities, basic goods) to set the boundaries of or limits on freedom – and this is what all these kinds of Kantian positions do. Nozick focuses his criticisms on John Rawls's

² All references to *Anarchy, State, and Utopia* throughout this chapter are to page numbers alone.

³ Two Kantians who follow this basic lead of making imperfect duties central in their theorizing about justice are Katrin Flikschuh and Carol Hay.

⁴ In the 2000s, responses to this presumed problem in Kant's philosophy use his Doctrine of Right instead. For example, Paul Guyer (2000) and Sarah Holtman (2004, 2018) argued that by reformulating aspects of Kant's Doctrine of Right, we can make room for considerations of redistributive justice.

theory as presented in *A Theory of Justice*, but similar objections can be made to the revisions of Kant offered by the others.⁵ In a Nozickian spirit, we can convincingly argue that a major problem with such positions is that they are not positions according to which everyone has a right to set and pursue their own ends (full stop!) because everyone's right to do so is made conditional on certain (natural) ends being met, on an "end-result" being met, or on an unjustifiable "pattern" of material redistribution.⁶

The revisions of Kant offered by O'Neill and Rosen, according to which the state can enforce charity, encounter not only these problems, Nozickians can furthermore argue, they also misrepresent something undoable as doable, namely enforcing charity or beneficence. Kant argues that charity or beneficence requires us not only to act on specific maxims (those that involve making another person's happiness our own end) but also to act on such maxims *because* it is the right thing to do, that is, to incorporate the moral motivation into the maxim or to act from duty. Hence, charity or benevolence is in principle an unenforceable, imperfect duty; it is impossible to make anyone set a particular end (act on a specific maxim), let alone on a moral motivation.⁷ And since the sphere of justice is delimited by what can be enforced, not only beneficence but virtue is beyond the direct reach of justice. Therefore, whatever we are doing when we coercively redistribute material resources, it is not the enforcement of charity or beneficence. Finally, the fundamental problem with Arendt's and Kaufman's proposals, one may argue with Nozick, is that the resulting positions are simply not positions of freedom but rather positions partly delineated by nature; the conditional is wrongly depicted as rightfully limiting the unconditional.

The next two sections outline Nozick's alternative, libertarian conception of economic justice, including distributive justice. Section 2 shows that Nozick draws heavily on Locke's account of private property appropriation in *Two Treatises of Government* to do this, while Section 3 delineates how some surprising and apparently *redistributive* features arise in his account as a result of his theory of the necessary transformation of the ultraminimal state into a minimal state. Along the way, I argue that Nozick would have done better if he followed Kant's first possession/control account of private property appropriation in the Doctrine of Right and that Nozick's transformation argument is of a kind similar to Kant's public right arguments regarding poverty in the Doctrine of Right. This latter argument is therefore one that Nozickians today should accept because it is more consistent with principles of justice as freedom. It is also an argument that resolves some, but not all, of the philosophical problems that motivate the alternative Kantian positions above. The end of Section 3 furthermore argues that Nozickians would do better if they distinguished between private and public right arguments more generally in ways akin to Kant because this provides a way out of problems haunting Nozick's "compensation" arguments. Together, Sections 2 and 3 put us in a position to see related patterns in and puzzles confronting the most recent contemporary Kantian theories of justice in Section 4.

2. Nozick's Theory of Distributive Justice

⁵ I compare Rawls, Nozick, and Kant's account of economic justice in Varden (2016). There is naturally some overlap in content where both papers describe the same historical and philosophical puzzles that arise in the Nozick, Rawls, and Kant conversations.

⁶ See especially Ch. 7: "Distributive Justice" in *ASU* for more on this.

⁷ For examples of where Kant makes these kinds of arguments, see (*Groundwork* 4: 397-99, 440-41, 449, *Critique of Practical Reason* 5: 20-21, *Metaphysics of Morals* 6: 220-21, 225-26, 239, 379-80, *Lectures* 27: 517, 526). All references to Kant's works in this article are given by means of an abbreviation for the work in question as well as the Prussian Academy Pagination.

Nozick shares with his libertarian colleagues the conviction that justice is possible in the state of nature. Nozick's Kantian approach maintains that justice obtains when individuals interact within the Kantian perfect duties to each other. Interacting in ways respectful of these perfect duties requires us not to wrong or harm each other, such as by physically assaulting or stealing from each other. Given this set-up, it is necessary to determine exact boundaries between "mine and thine." After all, only if something really is mine can we say that others wrong me by coercively taking it from me; only then does stealing exist. There are no arguments in Kant's (meta-)ethical writings that Nozick can draw on here – since they do not address this issue – which is why Nozick takes a different route. He starts from the intuitively plausible assumption that my body is mine originally⁸ and then zooms in on the question of private property appropriation. Unsurprisingly, Nozick turns to John Locke's *Two Treatises of Government* for help here. Locke's theory envisions each person as having a sphere of choice delineated by the laws of nature or principles of justice, within which they can set and pursue their own ends, and to which no one else can gain access by their mere choice. Locke develops his theory of private property, in turn, by means of his accounts of labor and the "enough-and-as-good" proviso. The alternative, and historically very influential, account of private property appropriation is the first possession/control account, which is the one chosen by Kant. Toward the end of this section, I show how Nozick's choice to adopt Locke rather than Kant on private property appropriation is unfortunate since it leads his theory into troubles anticipated by Kant's critique of labor and property principles invoking quantity and quality in the Doctrine of Right.

Nozick introduces his theory of justice by approvingly quoting Locke's description of freedom: "Individuals in Locke's state of nature are in 'a state of perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave or dependency upon the will of any other man' (sect. 4 [Second Treatise])" (10).⁹ Freedom, therefore, is not being able to do whatever one wants – that would be "licence" – but to do whatever one wants *within* the laws of nature. The laws of nature protect, in turn, each person's freedom from being subjected to or enslaved by any other person's "absolute power" (II: 17), understood as "the inconstant, uncertain, unknown, Arbitrary Will of another Man" (II: 22). To be free is not to be subjected to another's arbitrary will but to have one's interactions subjected to the laws of nature; to be free is not to be enslaved.

With this apparatus in place, Locke sets out to explain how individuals can originally appropriate natural resources from the commons unilaterally without thereby wronging anyone – an argument that is necessary to explain how we can interact justly in the state of nature. Locke's proposal is that persons can unilaterally, rightfully appropriate private property by laboring on the natural resources subject to the condition of leaving "enough and as good" behind of these resources for others (II: 27). Nozick's revision of Locke's account of private property is motivated by a problem that arises in Locke's account. His famous "zip back" argument shows why Locke's account of the "enough-and-as-good" proviso cannot account for problems arising with scarcity of natural resources. As scarcity arises, a newcomer cannot appropriate a fair share (as determined by the "enough-and-as-good" criteria), since there is not a fair share (so understood) left for them to appropriate.¹⁰ This, in turn, entails that the person

⁸ Although intuitively plausible, it is seemingly impossible to defend if one ascribes to a labor account – a fact that both Locke and Kant recognized. For more on this, see Varden (2021, forthcoming).

⁹ Nozick here makes a reference to John Locke's *Two Treatises of Government*. I refer to this work by (TT book number: paragraph number).

¹⁰ Ralf Bader has suggested to me (in conversation) that "the zipping back argument does not require scarcity to arise. The backwards induction on which the argument rests applies just as much in a situation in which the

who appropriated before the newcomer cannot have left behind “enough and as good” of the natural resources after all. If so, however, then the person who appropriated before the last person who appropriated also cannot have appropriated only their fair share. This argument “zips back” because it applies to, and therefore undermines, all previous appropriations (176).

Nozick sets out to solve this problem of rightful appropriation under conditions of scarcity. To do so, he first interprets the main point of the “enough-and-as-good” proviso to be that newcomers should not be in a “worsened condition” due merely to the temporal circumstances of their arrival on the land (175). He suggests that by softening the proviso—by reading “worsening” not in terms of “appropriation” (“stringent” proviso) but “use” (“weaker” proviso)—the “zipping back” problem can be solved (176). On this theory, persons can rightfully appropriate under conditions of scarcity given that they *compensate* any newcomer who, as a result of existing appropriations, faces conditions under which original appropriation is no longer possible (178). The general principle of compensation is $1/n^{\text{th}}$ of the value of the original natural resources (rather than, say, also the added value that the original appropriators created on the basis of their larger share of natural resources), where n refers to the number of appropriators at the time in question.¹¹ Compensation, in turn, is seen as consisting either in access to use the landowners’ land or in access to use or acquire (through labor or employment) some of the social product that landowners have produced upon their land.¹² Moreover, because the capitalist market system produces a large social product, and because its markets give newcomers access to this social product (through employment and businesses), the landowners’ original appropriation of all the land with regard to newcomers can be redeemed through it. Thus, via compensation, Nozick maintains that the capitalist market system fulfills the requirements of the Lockean proviso when scarcity arises.¹³

Another significant part of Nozick’s reimagination of Locke’s theory of private property involves rejecting Locke’s other restrictions¹⁴—the waste restriction, the charity restriction, and the restriction concerning children’s rights—as unenforceable due to their incompatibility with the possibility of freedom. These rejections reflect Nozick’s conviction that end-result and patterned theories of economic justice are inconsistent with freedom. An end-result theory

available resources (as well as demand for these resources) remains constant.” In other words, even though Nozick came up with this argument to respond to the problem of scarcity in Locke scholarship—Nozick starts this reflection with “Consider the first person Z for whom there is not enough and as good left to appropriate”—the logic of the argument applies without scarcity. My current view is that without scarcity, the logic of the zipping back argument is not triggered in a specific situation; without scarcity, everyone can appropriate private property on a fair share of natural resources and everyone’s obligations under the proviso are satisfied.

¹¹ This is why Michael Otsuka (1998) argues that “Nozick denies that the fact that someone must work on pain of death is a sufficient condition of forced labour, since he denies that the propertyless worker who must work on pain of starvation is forced to work” (73n; see also O’Neill 1983). It is also why Jonathan Wolff (1991: 111) argues that newcomers who are denied laboring opportunities must be offered compensation for this lack of access to material resources (unemployment benefits) (111).

¹² Gopal Sreenivasan (1995: 54) argues that Nozick’s proviso captures Locke’s actual conception of the proviso under conditions of high scarcity. Nozick seems to disagree with this, since he argues that his version of the proviso is (merely) “similar to the weaker of the ones we attributed to Locke” (178; my emphasis).

¹³ Since his account rests on an empirical assumption about the increased social product allegedly produced by a capitalist system (182), Nozick considers it is an empirical matter whether or not his claim that a capitalist system of private property is the best way to ensure just appropriation opportunities for newcomers. He also emphasizes that his claim that a capitalist system of private property will not leave people “worse off” requires the establishment of an “appropriate base line for comparison” (177), which he does not provide beyond the abstract $1/n^{\text{th}}$ of the original natural resources.

¹⁴ Whether or not Locke endorsed such an incoherent conception of liberty depends on whether he viewed these other restrictions (charity, waste, and children’s rights) as enforceable. This is a textual controversy beyond my present purposes, though see Varden (2021, 2012, 2010) for more on this topic.

looks at the overall structure of the social product in a society and then judges the resource distribution as just only if this structure is consistent with a certain end-result. A patterned theory is one that singles out “some natural dimension, weighted sum of natural dimensions, or lexicographic ordering of natural dimensions” (156), such as IQ or age, and then argues that the just distribution is one that redistributes in accordance with this natural dimension. These theories maintain that “to each according to his _____”, which problematically presupposes social goods “appear... from nowhere, out of nothing” (160), as “manna from heaven” (198 and 219; see also 151-54, 168, 201-2, 214, 238). The end-result and patterned theories of economic justice are irreconcilable with the demands of freedom, Nozick argues, because they are inconsistent with individuals having the right to use their own bodies and the means they obtain through their labor on a fair share of resources to set and pursue ends of their own (157).

To illustrate this reasoning, note that if people are only lawfully permitted to use their private property in particular ways—such as only in non-wasteful, productive manners or with a legal requirement to provide charity to the poor, to the unemployable, or to needy children—then they cannot be at liberty to do as they please with their own property. To be free is to set and pursue ends of your own with your private property, which means that the law cannot distinguish right from wrong according to these restrictions. In fact, such legal restrictions would in effect enable one person to gain access to another’s property by their mere choice. Imagine, for example, someone choosing to spend his entire fair share of the natural resources on luxury goods, such as expensive gifts, travelling the world, and reading philosophy, and that this lifestyle leaves him destitute relatively quickly. If the charity restriction is enforceable, then this imprudent person now has an enforceable right to access the prudent person’s wealth. Hence, all redistribution of these kinds fails to respect the “inviolability of... persons,” since using some person “for the benefit of others, uses him and benefits the others. Nothing more... To use a person in this way does not sufficiently respect and take account of the fact that he is a separate person” (32-33). Only persons’ actual consent, Nozick argues, can justify the redistribution of resources suggested by end-state or patterned theories (163, 167, 219-20). Hence, such theories are inconsistent with the side constraints understood as rights enabling freedom; they are ahistorical rather than historical in that they do not track the history of how means were obtained and exchanged correctly. These kinds of reasons are, of course, exactly the kinds of reasons Nozick leverages against Rawls and that we can leverage against the other Kantian (and most non-Kantian) theories of economic justice of this period.

There are many problems with Nozick’s theory of economic justice beyond the fact that, as Nozick recognizes, it is not an intuitively convincing theory with regard to how it engages the issue of poverty and human suffering resulting from a lack of guaranteed, continuous legal access to means as needed to survive. For our purposes here, let me only show two important problems that Kant draws our attention to in the Doctrine of Right. The first problem concerns labor and the indeterminacy of quantity and quality with the “enough-and-as-good” proviso, and the second Nozick’s appeal to capitalist markets as fulfilling the requirements of the proviso. Regarding the first problem, on the one hand, Kant anticipates an important objection Nozick raises to labor theories via a famous example. Nozick (175) asks (but does not answer) the following question: why does pouring a can of tomato juice into the ocean mean not that you gain the ocean but that you lose the tomato juice; why, in other words, is the pouring to waste the tomato juice rather than to labor with it? And, we could add, if I take a photo of the beautiful mixing of tomato juice and the ocean, have I now magically labored instead, and the ocean is mine after all? Why (not)? Alternatively, imagine ten of us arriving on an island and one of us picks a fair share of coconuts (say, one coconut) and opens it. I then take a bamboo straw and suck the coconut milk out of their coconut. Why have I wronged them? For Kant,

what is the magic of labor that encloses (only some) specific empirical boundaries in the world as ours? Given that Nozick gives up the distinction between labor and waste, this problem only intensifies.

On the other hand, Kant argues, “The indeterminacy, with respect to quantity as well as quality, of the external object that can be acquired makes... [the] problem... of the sole, original external acquisition... the hardest to solve” (MM 6: 266). The indeterminacy problem is, in fact, impossible to solve for any theory that uses the “enough-and-as-good” principle to delineate the empirical boundaries of private property. The problem is there is no one objective valuing of the quantity and quality of empirical goods. When we use quantity and quality – two categories of understanding – to judge the value of empirical objects, we do not find an objective fact in the world that determines the correct answer. In fact, there are many reasonable answers. For example, there is no one way to measure the quantity (size, weight, density, etc.) or the quality (sweetness, juiciness, crunchiness, softness, etc.) of a coconut, which means that if we enforce our choice here, we are subjecting others to our arbitrary will, to use Locke’s language, and not to universal laws of freedom.¹⁵ If Nozick had followed Kant’s choice of the other prominent type of property appropriation, namely the first possession/control account, he would have avoided these problems since limitations here are understood in terms of control (and not quantity and quality) and since there is no appeal to an objective evaluation of the value of resources, no reshuffling (zipping back) arises either.¹⁶ And, as we will see toward the end of the next section, if Nozick had also gone along with Kant’s approach to public right in the Doctrine of Right, he would also have been able to avoid a series of problems involved in trying to argue – consistent with the bilateral, libertarian logic of thinking – that the rights of the state are, in Nozick’s words, decomposable without residue into individuals’ rights. Before doing so, I would also like to comment on the second problem with Nozick’s theory that Kant’s Doctrine of Right draws our attention to: the idea that we can appeal to markets to solve the problem of individuals appropriating private property under conditions of scarcity in the state of nature.

In short, Nozick’s appeal to the capitalist market system to satisfy the conditions of the proviso appears inconsistent with the binary logic constitutive not only of his project but also of any successful libertarian solution to the original puzzle regarding private property appropriation under conditions of scarcity. Locke’s ambition, remember, is to explain how anyone can unilaterally appropriate goods from the commons without thereby wronging anyone. Correspondingly, Nozick’s bilateral voluntarism requires him to explain the rightful, enforceable relation the proviso establishes between newcomers and landowners in bilateral terms. Indeed, this is exactly what Nozick believes he does. Nozick claims to give an account of all rightful relations, that is, of individuals interacting within their rights, in terms of bilateral relations only. The problem that arises for Nozick is that the market is a multilateral *system* within which everyone interacts, a system involving relations between many and not just two

¹⁵ Instead of using Locke’s “arbitrary will,” here one can, as Ralf Bader has pointed out to me, appeal to possible harmful consequences of an appropriation to others. If we do this, Bader contends, we avoid this problem. I disagree with this. I think it’s fine to try this as a matter of Nozick interpretation, but notice that if we do this, then we put Nozick further away from Kant and closer to consequentialism (of a kind that, for example, A. J. Simmons defends). More importantly, however, once we spell out who gets to specify whether or not there are harmful consequences, including who gets to specify what constitutes harm, the problem re-emerges in a different form.

¹⁶ This doesn’t mean that indeterminacy problems disappear altogether. As we see below, Kant thinks that for reasons of assurance and indeterminacy, there are no rightfully enforceable private property claims in the state of nature; the concept of a public will is necessary to envision conclusively (rather than merely provisionally) rightful private property claims against one another.

people. As a multilateral rather than a bilateral system, it cannot issue rights enforceable by particular individuals against one another (which the libertarian framework requires). Therefore, if a person's right to his particular piece of land is undermined when scarcity arises, then insofar as Nozick wants to stay within his bilateral voluntarist framework, he cannot argue that an economic *system* can rectify the problem. Hence, when Nozick concludes that "I believe that the free operation of a market system will not actually run afoul of the Lockean proviso" and so "the proviso will not play a very important role in the activities of protective agencies" (182), he is ducking the problem of explaining how his bilateral theory can permit an argument that appeals to the advantages and disadvantages of the multilateral capitalist system.

To illustrate this point, imagine a society in which there is scarcity, but also a particular person who is both tremendously industrious and generous to newcomers. This person keeps producing a large surplus and gives it to newcomers for free. Note that this person's generosity does not entail that the other landowners in this society are relieved of their obligations under the proviso. Similarly, a particular landowner cannot appeal to a general relation between landowners and newcomers established through markets to justify their particular relation to particular newcomers. So, even if there are benefits that persons can obtain by participating in a capitalist economic system, this, as such, cannot be used by a particular landowner in relation to a particular newcomer to justify their claim that they have fulfilled their duties under the proviso. Instead, the appropriator must ensure that *they* (and not some other possible person or system) leave each newcomer no worse off than if the original appropriation had not taken place. If the market is to fulfill a particular landowner's obligations toward another particular newcomer, then we need an account of how any particular individual can utilize the capitalist system to compensate any particular newcomer. Nozick never provides us with such an account – and it may be impossible to provide. Exactly how must each person participate, including which and how much resources must each contribute, where, when, at which price, etc.? In addition, a considerable problem facing any attempt to provide such an account is that an individual cannot in principle provide assurance that the system will fulfill his duties on his behalf. The markets are fundamentally multilateral relations and so presumably cannot be controlled by any one of the participating individuals. So, if an individual appeals to the system to redeem his appropriations, then he presumably must provide assurance that newcomers really will enjoy such general conditions. Yet it seems impossible for an individual to provide rightful assurance that the "system" or "everyone" will act in such a way that each newcomer is given access to appropriate their fair share of the resources, that the system really is regulated by laws. On the one hand, if I am to provide assurance that the system as a whole fulfils my obligations under the proviso, I must have control over the system. But if I have control over the system, then it cannot simultaneously be the means through which everyone else provides assurance, since they would need the same control. On the other hand, if I assume control over the system, then I deprive others of their natural executive right with regard to private property, which is an unjustifiable move on a Lockean account.

Of course, one might respond here by saying that the various landowners may come together and sign a contract stipulating how the operations of the system should work. A first problem with this solution, however, is that the possibility of rightful appropriation of private property has now become subject to actual consent. And avoiding such an appeal to actual consent is characteristic of the Lockean project: the aim, remember, is to provide a non-consensual conception of private property appropriation, an account of each individual's right to private property appropriation consistent with their natural executive right. An alternative here is to argue that a professional protection association (PA)—a private security company—

will provide assurance that the system will fulfill duties on landowners' behalf; it will be part of the contract they sign with the PA.¹⁷ A first problem with this solution is that if the PA is to provide this assurance, then it cannot be yet another private actor operating in markets for anything. In fact, it must, it seems, be a public authority in that it does not have private interests at all.¹⁸ If so, however, then only a public authority can provide assurance and we have a principled need to establish a public authority.¹⁹ And if so, then the obligation to enter civil society is no longer merely prudential, but ideal—a result that neither Locke nor Nozick would welcome.²⁰

One might challenge this last objection by arguing that a better interpretation of Nozick is that capitalist markets *as such* are not seen as fulfilling the requirements of the proviso. Indeed, we might add to this by arguing that the capitalist system is simply a set of bilateral interactions – and hence presenting the capitalist system as a multilateral system is misleading in its own right. Instead, we can continue, an original landowner engaging in the capitalist markets *in the right way* is thereby seen as fulfilling his requirements under the proviso. But this view makes little progress over the previous one, since we are now back again where we started before Nozick, namely with the problem of establishing what each particular

¹⁷ More on Nozick's conception of protection associations below.

¹⁸ Ralf Bader wonders if it is an option for Nozickeans to argue that the PA cannot be a private actor in the domestic market, but can be one in the international market. In my view, the answer must be no. A full answer would be beyond what I can take on here, but the short answer is military power operates either in the international spheres – air and water – or on somebody's territory. The PA cannot, in my view, enable rightful relations in either sphere as it cannot exercise rightful coercion anywhere.

¹⁹ This is related to another problem in Nozick's account. As noted below, Nozick believes that private protection agencies (PAs) can function as a police force, understood as the means through which we provide each other assurance that we will respect one another's rights. The main problem stems from the fact that the PA is just yet another private person, albeit an artificial (rather than a natural) person. In short, the problem is that the PA cannot provide assurance for the relations between itself and its clients. Hence, even if there is no violation at any time, the PA cannot provide the assurance that this will be the case. If we introduce the problem of Lockean inconveniences into the scenario and use Nozick's language, notice that even if we assume that the PA acts as it ought most of the time, some of the time it does not. Sometimes it will fail to act on behalf of its clients and instead pursue its own interest to the detriment of its clients. And yet if this is the case, then we need a second PA to provide assurance for the relation between the first protection agency and its clients. And yet this also does not overcome the problem, because we now need a third PA to provide assurance for the relation between the second PA and the first one and its clients, and so on ad infinitum. The only way to stop the regress is to introduce a person who is not just yet another private person into the relation. Only an impartial person, or a person who per definition does not have private interests and so merely represents each of the interacting persons and yet no one of them in particular, can therefore stop the regress. That is to say, only a public authority can provide a rightful solution to the problem of assurance – which is why, in my view, Kant argues for exactly this position. For Kant, the problem of assurance is not only the inconvenience of trying to establish lawful relations in the state of nature but also the impossibility of doing so. The rule of law requires not only authoritative specification of the general laws and authoritative application of the general laws to specific cases but also authoritative threat of violence against lawbreakers (assurance). The republic must, as Kant argues in the *Anthropology*, combine law (Gesetz), freedom (Freiheit), and violence (Gewalt); it is this combination that makes the republic's use of coercion (Zwang) rightful (A 7: 330f). Alternatively, without rightful assurance – authoritative threat of spatiotemporal violence – no rule of law exists in a territory analogously to how a law of nature, say of gravity, does not exist if it does not capture how spatiotemporal causality works in the world in some regard. (More on this below and in Varden 2022.)

²⁰ This, in my view, is how Kant would respond here. I read Kant as providing an ideal, non-voluntarist account of political obligations. On this account, regardless of how virtuous and emotionally healthy we are, we have an enforceable obligation to enter civil society because it is the means through which we can interact subject to laws of freedom – and assurance is one of these ideal reasons. The assurance must be provided by a public authority, since only a public authority can provide the right kind of assurance. I return to the topic of assurance below, but for more on this see Varden (2010, 2020a).

landowner must do in relation to particular newcomers in order to fulfil their requirements under the proviso and the problems of indeterminacy regarding quantity and quality reemerge with renewed force. Also, this proposal entails that once scarcity arises, one does not have a right not to participate in the capitalist system, which would be inconsistent with freedom's demands, *or* that one has made no progress because, again, one still has to solve the problem of what the newcomer has a right to once scarcity arises. It is therefore reasonable to reject this as an interpretation of Nozick or at least as a Nozickian solution to the problem of rightful private property appropriation under conditions of scarcity.

3. Nozick's Theory of the Establishment of the Minimal State

Nozick, like others who developed Kantian theories of justice in this period,²¹ thinks that the reason individuals want to leave the state of nature is prudence.²² Justice is possible in the state of nature, but our unruly nature makes it difficult to accomplish justice here. In turn, it is because the state provides solutions to these prudential problems that it is a rational choice to enter it (by becoming citizens).²³ Below, we also see that Nozick innovates here by arguing that although the process of establishing what he calls an ultraminimal state proceeds by means of each person's actual consent, the transformation from an ultraminimal to a minimal state is morally necessary and non-consensual (coercive) in nature. After delineating this transformation argument, I argue that because both this and the argument about the proviso use compensation arguments for infringing on rights, they do not sit easily with Lockean or Kantians. I also argue that there are some similarities between Nozick's transformation argument and Kant's argument for why the state, but not individuals, have a right and duty to provide unconditional poverty relief. This argument of Kant's is, in fact, an argument that also Nozickians should defend because it conceptually follows from a theory founded on a right to freedom understood as, exactly, a right not to be enslaved.²⁴

Because Locke regards himself as having demonstrated that justice is possible in the state of nature, he views himself as having demonstrated that "the *Execution* of the Law of Nature... is [originally] put into every Mans hands" (TT II: 7), that each individual has a natural executive right. So why not stay in the state of nature? Entering civil society is, Locke argues, the

²¹ Early exceptions to this tendency in the English-speaking world include Julius Ebbinghaus (1953) and Thomas Pogge (1988). For more on related German scholarship, see Wolfgang Kersting (1992a,b).

²² If one combines this argument with Kant's account of how the state provides assurance (see, e.g., MM 6: 256), then one can argue that Kant or the Kantian is combinable with a Hobbesian-type argument regarding the right to force people into civil society. Sharon Byrd (1989) and Howard Williams (1983) argue in this way.

²³ A notable exception here is John Rawls, who never presents an account of interactions in the state of nature. In *A Theory of Justice*, Rawls simply assumes – in a Rousseauian *The Social Contract* spirit – that we find ourselves subjected to a state's coercive legal and political institutional framework, which makes the question, to state it with Rousseau, "what makes these coercive chains legitimate?" the pressing one. (From *Political Liberalism* onward, Rawls limits his reflections to the question of what makes the chains of modern liberal democracies legitimate.) A disadvantage of this approach is, naturally, that Rawls never engages the question of what individuals' rights are – the content of his first principle of justice as fairness – and, so, his philosophy has little to contribute to related discussions of what Kant would call innate and private right, including how they inform and are distinguished from public right. It also entails, in my view, that Nozick and Rawls often talk past each other: Nozick discusses for the most part in terms of what Kant calls innate and private right (individuals' rights against one another), while Rawls discusses for the most part in terms of what Kant calls public right (citizens' claims on their public institutions). However, because they and their followers never thought about their disagreements in these terms, their discussions of each other are quite unsatisfying to either camp of scholars – and little interesting, let alone new, philosophy that transcends either tradition has come out of Rawlsians and Nozickians discussing with each other over the years.

²⁴ For more on this, see Varden (2009).

prudent choice given “the inconveniencies” of the state of nature (TT II: 127), which makes “the enjoyment of the property ... [the individual] has in this state... very unsafe, very unsecure” (TT II: 123; see also TT II: 124, 128, 149, 222). However, demonstrating that entering civil society is the prudent choice is not to demonstrate that anyone can be coerced to enter; after all, we do not wrong anyone just because we are imprudent: “MEN being, as has been said, by Nature, all free, equal and independent, no one can be put out of this Estate [the state of nature], and subjected to the Political Power of another, without his own *Consent*” (TT II: 95; see also II: 15, 22, 90, 96-99, 104, 106, 112, 116, 119-22, 134-36, 175, 186). Each individual upon reaching the age of reason, Locke therefore maintains, must decide for himself whether or not to enter civil society (TT II: 73, 116-118, 191, 211) – through actual (either explicit or tacit) consent (TT II: 87-89).²⁵

For the purposes of understanding Nozick’s theory, more detail about this argument of Locke’s is unnecessary. Instead, simply note, as anticipated above, that Nozick parts company with Locke by arguing that individuals can establish private, professional protection associations (PAs) or private security companies instead of establishing public legal-political (state) authorities to deal with the inconveniences of the state of nature, namely that people often, but not always, act as they ought (131-32). The simplified version of Nozick’s hypothetical state of nature story goes as follows: Since individuals often, but not always (5), act as they ought, individuals living in the state of nature are likely to form private security companies to protect their rights (10-13). In time, it is likely that one of the PAs in each geographical territory will become dominant: “Out of anarchy, pressed by spontaneous groupings, mutual-protection associations, division of labor, market pressures, economies of scale, and rational self-interest there arises something very much resembling a minimal state or a group of geographically distinct minimal states” (16-7). In other words, when a particular PA gains dominance – which it is likely to do as soon as it gains competitive advantages over the others – it is rational for all individuals living in the area to join it rather than any less powerful PA. Therefore, in all likelihood, through an “invisible hand,” each geographical territory will eventually come under the control of a dominant protective association (DPA) (118-19). The DPA transforms itself into an ultraminimal state (UMS) when it assumes some sort of monopoly on coercion over all interactions involving its clients. Moreover, once this happens, “those operating an ultraminimal state are morally required to transform it into a minimal state [MS]” by providing some protection to everyone living on the territory, namely access to the MS’s legal system when disputes arise in independent’s (non-clients’) interactions with its clients (119).²⁶ Consequently – and this realization is a big “surprise” to Nozick – this transformation from the DPA into an MS is “*apparently* redistributive” in that the MS’s clients must pay for these legal services insofar as necessary (as the independents may not have the means to finance it) (115). Moreover, this transformation from UMS into so called MS is coercive, yet rightful in nature, and, Nozick argues, it is a process that proceeds without invoking Locke’s social contract. It is coercive because everyone who interacts with the minimal state’s clients must use its legal system, but it is rightful because the MS must do this (to secure everyone’s rights) and will provide independents with means insofar as this is necessary to use the MS’s legal system to pursue their legal claims against MS’s clients.

For the reasons sketched above, Nozick claims, contra Locke, that “civil” society can arise within the state of nature (133): individuals acting within their procedural rights can establish a minimal state without actual consent and without wronging anyone in the process.

²⁵ For explorations and defenses of this argument, see Simmons (1981, 1992, 1993, 2001).

²⁶ The textual ambiguity concerns whether a DPA and an UMS constitute the same entity, but we can set this aside for the purposes of this paper.

Nozick maintains that a series of bilateral interactions between individuals can give rise to a just state without depriving anyone of their rights – including our “natural executive right” – and without appealing to any actual consent to a Lockean social contract. It is because of this feature of Nozick’s theory that we may describe it as “bilateral” voluntarism, as contrasted with what we may call Locke’s “omnilateral” voluntarism.²⁷ That is to say, because Locke’s social contract is a relation between *all* the citizens, it is an omnilateral relation. In contrast, Nozick purports to explain the establishment of the minimal state *without* an appeal to the social contract and *only* by means of bilateral interactions between individuals who respect one another’s rights. Relatedly, he argues that the state enjoys a “de facto” and not a “de jure” monopoly on coercion (108). In this way Nozick sidesteps the need for actual consent by providing a thoroughly bilateral relational account of the just establishment of the state. A series of rightful, bilateral actions between individuals is seen as capable of unintentionally bringing about a minimal state without wronging anyone in the process.

In Sections 2 and 3 thus far, we have seen that Nozick’s solutions to the problems both of rightful private property appropriation under conditions of scarcity and of justifying the coercive authority of the state by means other than actual consent centrally involve accounts of compensation. Regarding rightful private property, Nozick argues that instead of redistributing the already appropriated land to accommodate newcomers, they can be compensated through capitalist markets, which provide both employment opportunities and access to various goods. And we just saw that Nozick employs compensation as part of a procedural rights argument to justify the monopoly on coercion enjoyed by the minimal state. In addition, a particularly attractive feature of this new type of account is its promise to specify the state’s coercive rights in terms of the rights individuals enjoy in the state of nature. The state’s “fundamental coercive power” is co-extensive with the natural executive right of individuals to enforce the laws of nature (6); “the state has no special rights” (118). Finally, for a Kantian, a draw of this account is that it proposes one way to capture Kant’s notion of individuals having a right to be treated as an end in themselves, as having dignity, or as being invaluable. Because the minimal state restricts its uses of coercion to the limits set by individual rights, it “treats us as inviolable individuals... as persons having individual rights with the dignity this constitutes... How dare any state or group of individuals do more. Or less” (333-4).

Despite the ingenuity of these compensation proposals, they have not won much acceptance among Lockeans or Kantians. One main reason, in my view, is simply that individual property rights are not inviolable if, after all, we can set them aside as long as we compensate for doing so. I simply do not know any way to persuade Lockeans or Kantians otherwise on this point.²⁸ In addition, a problem similar to the bilateral vs. multilateral problem that arises with regard to Nozick’s appeal to capitalist markets also arises here in the context of his transformation argument. In short, the problem is that if the minimal state is to enjoy a monopoly on coercion, then it must have the right to compensate any independent (non-member of the state) instead of respecting that person’s right to enforce their rights. In addition to the problem that such an argument sits poorly with any notion of rights being inviolable—with Kant’s perfect duties being, indeed, perfect—other problems arise. For example, assume that one such independent is Jo Locke and that they happen to be the most knowledgeable and virtuous person regarding enforceable rights in general and procedural

²⁷ This is why Bernard Williams describes Nozick’s theory as a “State-of-Nature theory without the social contract” (1983: 29). Similar descriptions of Nozick’s project are found in Jeffrey Paul (1983: 69), Thomas Scanlon (1983: 126-27), Peter Singer (1983: 39), and in Jonathan Wolff (1991: 40-42).

²⁸ Lockeans also deeply disagree whether or not equal rights must mean that everyone must have a right to land. For more on this dispute, see (Varden 2012).

rights in particular. If Nozick's argument is to hold up, the minimal state must have a right to force Jo Locke to use its less perfect procedures and legal system instead of enforcing their rights against its members on their own. But if so, then freedom within laws is replaced by subjection to the stronger person's "will" – a private will – and there is no libertarian freedom. In addition, if we impose the duty of proving one's case in court, this severely disadvantages anyone who has been wronged but does not have much or any evidence that is persuasive to a third party. In addition, assume that the reason why Jo Locke does not want to enter the minimal state is that they are a Black trans woman, that they have been subjected to sexual assault, that they know who their wrongdoer is, and that the minimal state in question is similar to our actual states in that they discriminate in racist, sexist, and cissexist ways. Nozick does not provide us with any reasons why such a person should rationally accept the minimal state's offer to use its legal system; whether or not it would be more rational to accept or not would fundamentally depend on the situation in question.²⁹ Notice too that libertarians today commonly contend that the state is not entitled to prohibit private discrimination on grounds of freedom of association. It is particularly troubling, then, that states that have discriminated in the past, and can be expected to continue discriminating, on this line of reasoning, nonetheless appear entitled to compel victims of discrimination to join them. Worse still, if the state really is a fundamentally private association, the permissibility of private discrimination means that it is entitled not only to discriminate if that is what its owners wish but also, on Nozick's view, to compel those against whom it discriminates to support it.³⁰ And, we might add, with Charles Mills (1999, 2012, 2017), shame not only on Nozick, but the libertarian-liberal tradition as a whole for not being more concerned with these problems given the history and realities of the actual legal and political institutions we are inheriting.

4. Situating Recent Kantian Theories of Justice Relative to Nozick's Philosophical Position

During the last couple of decades, it seems uncontroversial to say, Kantian legal-political scholarship has become much more interested in exploring Kant's own theory as presented in the Doctrine of Right. As with most Kant scholarship, many types of traditions are arising, from legal positivist, democratic, and virtue theory approaches to liberal republican and libertarian ones. Given this chapter's focus on Nozick's Kantian roots, it is not useful to go into all of these traditions. Instead, it starts by providing a short overview of the main textual and philosophical differences between liberal or libertarian approaches that use Kant's Doctrine of Right as their main entrance point and Nozick's *ASU*. I then sketch how some of these approaches differ regarding the topics of redistributive justice and political obligations.

If we build our Kantian theories on the basis of Kant's Doctrine of Right, our starting point is not the Categorical Imperative and perfect and imperfect duties but Kant's Universal Principle of Right and his general account of right ("Recht"). Right, for Kant, is solely concerned with people's interactions in space and time (our empirical world) or what he calls our external use of choice or external freedom (MM 6:213-14, 224-26). When we deem each other and ourselves capable of deeds – regard each other and ourselves as the authors of our actions – we impute the actions to each other and ourselves. Such imputation, Kant argues, shows that we judge ourselves and each other as capable of freedom under laws with regard to

²⁹ Again, for more on Nozick on procedural rights, see Varden (2009); for more on these problems in Kant, see Varden (2020).

³⁰ I'm especially grateful to Arthur Ripstein for discussion on this point.

external use of choice or external freedom or moral (ethical and legal) responsibility (6: 227). When we interact, the added puzzle is that we need to enable reciprocal freedom or enable a way of interacting that is consistent with everybody's external freedom. And this is where justice, or what Kant calls "right" comes in. Right is the relation between interacting persons' external use of choice such that reciprocal freedom under law is realized (6: 230). This is why Kant says that a rightful interaction is one that is reconcilable with each person's innate right to freedom, namely the right to "independence from being constrained by another's choices... insofar as it can coexist with the freedom of every other in accordance with a universal law" (MM 6: 237). For Kant, justice requires that universal law rather than anyone's arbitrary choices regulate individuals' external uses of choice. The Universal Principle of Right correspondingly states that "Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law" (MM 6: 230). Kant's legal and political philosophy as we find it in the Doctrine of Right is, in other words, fundamentally in line with Nozick's major concerns about freedom in his theory.³¹

The first, main part of the Doctrine of Right is an account of private right. Private right, Kant explains, is "right in the state of nature" or right as outlined when we can only appeal to private individuals and not to any public or civil authority (MM 6: 242). Moreover, private right concerns what is externally "Mine or Yours" (6: 245). What is always mine is my body – since the relation between my person and my body from the point of view of space and time is "analytic" (MM 6: 250). However, it is possible to be free, to set my own ends in space and time only if it is possible for me to acquire things external to me – that is, things distinct from my body – as mine. There are three types of objects external to me that can be mine in some normative sense: private property, services (through contracts), and people (status right) (6: 247).³² With regard to each of these spheres of private right, Kant argues that we make normative claims by making statements like "this is *my* house," "I owe you \$1000 for painting my house," or "this is *my* spouse." Kant's account of private right outlines the abstract principles enabling these three spheres of private right and then argues that these principles are not rightfully enforceable in the state of nature. Hence, he concludes this discussion by saying that "the state of nature need not... be a state of *injustice*... of dealing with one another only in terms of the degree of force each has. But it would still be a state *devoid of justice*... in which when rights are *in dispute* ... there would be no judge competent to render a verdict having rightful force" (6: 312). The problem, then, is that the abstract principles governing private right cannot function as rightfully coercive restrictions in the state of nature; they can only enable what Kant calls "provisional" justice, not "conclusive" justice, understood as the authoritative rule of laws of freedom (6: 267).

In turn, there are two types of problems that make the rule of laws of freedom impossible in the state of nature, according to Kant, namely a problem of assurance and a

³¹ The upshot of this conception of right is that anything that concerns morality as such is beyond its proper, direct grasp, since right only concerns what can be hindered in space and time, (coerced). Kant distinguishes morality in that it also requires what he calls freedom with regard to "internal use of choice" ("ethics"). Internal freedom requires a person both to act on universalizable maxims and to do so from the motivation of duty (MM 6: 220-21f) – and neither can be enforced. This is why Kant argues that only freedom with regard to interacting persons' external use of choice – right – can be enforced; freedom with regard to both internal and external use of choice – morality – cannot be enforced (MM 6: 220). And this is also why, as noted above, Kant denies, contra, for example, Rosen and O'Neill, that benevolence or charity can be enforced.

³² Ultimately, the reason why there are only three such categories of things, Kant argues, is that they are made possible by the three relational categories of the understanding, namely substance (private property), causality (contract), and community (status relations) (MM 6: 247).

problem of indeterminacy regarding the specification and application of the principles of innate and private right to actual interactions in space and time. The only way to solve these problems is to establish a public will, or a will that represents the will of each interacting person and yet the will of no one in particular. Hence, Kant concludes the doctrine of private right by claiming that it is “wrong in the highest degree” to stay in this condition, and he starts his discussion of public right of the state with the following:

[H]owever well disposed and [right-loving]³³ men 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... can never be secure against violence from one another, since each has [their]³⁴ own right to do *what seems right and good to [them]* and not be dependent upon another’s opinion about this (MM 6: 312).

In other words, we have an enforceable duty to enter civil society or establish a public authority, since it is the means through which we make the principles governing property, contract, and domestic (status) relations rightfully enforceable (6: 307-308; see also 6: 230, 232, 312-13, 345-46, 8:344, 351-52, 371). There are no rightful obligations in the state of nature, since might (“violence,” or arbitrary choice and “opinion” about “what seems right and good”) rather than right (“universal laws of freedom”) ultimately governs interactions here. According to Kant, only establishing a public authority and reasoning through it ensures interaction in ways reconcilable with each person’s innate right to freedom and her acquired rights to private property, contract, and status relations. This public authority, Kant argues in a Rousseauian fashion, represents the will of all and yet the will of no one in particular – it is an “omnilateral,” general, or common will – and thus only through it can we solve the problems of assurance and indeterminacy without violating anyone’s right to freedom, namely by instituting it as a tripartite (legislative, a judiciary, and an executive) public authority.³⁵ Therefore, the state (civil society) is the only means through which individuals can subject their interactions to universal law.

Because justice is impossible in the state of nature, Kant opens his account of the rights of the state – “public right” – in the Doctrine of Right by arguing that it is “the sum of the laws which need to be promulgated generally in order to bring about a rightful condition” (6: 311). In turn, Kant’s account of public right explains how the state enables such rightful condition through its public legal-political institutional framework. How to interpret what Kant means by saying that we cannot solve the problems of assurance and indeterminacy in the state of nature and what he means by saying that public right is the sum of laws that need to be promulgated generally to bring about a rightful condition distinguishes the libertarian from the liberal republican Kantian positions that have emerged in the last two decades.

³³ The German word used here is “rechtliebend” and Mary Gregor has translated this as “law abiding,” which I believe is misleading since Kant does not think that it is possible to be law abiding in the state of nature (it is only possible to love right in this condition). Hence, I use the word “right-loving” instead of “law-abiding” here.

³⁴ Gregor uses “its” here and since I believe this is confusing, I have instead replaced it with “their.”

³⁵ This is why Kant argues that only a will “that is united *a priori* (i.e., only through the union of the choice of all who can come into practical relations with one another) and that commands absolutely” can justify external acquisitions because “a unilateral will (and a bilateral but still *particular* will is also unilateral) cannot put everyone under an obligation that is in itself contingent; this requires a will that is *omnilateral*, that is united not contingently but *a priori* and therefore necessarily, and because of this is the only will that is lawgiving. For only in accordance with this principle of the will is it possible for the free choice of each to accord with the freedom of all, and therefore possible for there to be any right, and so too possible for any external object to be mine or yours” (MM 6: 263).

As can be anticipated from my sketch of Nozick above, those who address the question of assurance and indeterminacy in terms of prudence – arguing that it is practically difficult (but not in principle impossible) to apply the principles of innate and private right to interactions – and who understand Kant’s position on public right and promulgation as simply making conclusive any provisional judgement end up defending libertarian, philosophical positions close to Nozick’s. Those who argue that the problems of assurance and indeterminacy are ideal (and not merely prudential) in nature – and, so, are sympathetic to my objections to Nozick above – and that the question of promulgation is not merely a question of settling conflicts regarding innate and private right, end up with liberal republican philosophical positions. Moreover, liberal republicans like myself are likely to continue the promulgation reasoning by arguing that Nozick’s surprising realization that the establishment of the state’s monopoly on coercion gives rise to new systemic questions of right is exactly in line with Kant’s position. Let me finish by sketching some of these complexities and also allocate these contemporary positions in relation to Nozick’s own as well as some of the philosophical concerns raised by the other early Kantian positions mentioned at the beginning of the chapter.³⁶

The most influential and worked out libertarian interpretation of Kant’s Doctrine of Right is the one found in Sharon Byrd and Joachim Hruschka’s (2010) *Kant’s Doctrine of Right: A Commentary*. In fact, those who have deep libertarian, yet Kantian inclinations similar to Nozick’s kind can use this work to arrive at an updated Nozickian position. If they do this, they can replace Nozick’s Locke-inspired account of private property appropriation with Kant’s first possession/control account – and thereby get rid of all related problems. (They can also supplement this account with a new type of Kant-inspired, Nozickian theory of bodily right, contract right, and status right.) These theories of innate and private right can then be supplemented by the argument that although possible, realizing these rights is notoriously difficult in the state of nature. Hence, entering a minimal state that offers to conclude these rights – through public positing, application, and assurance of laws grounded on these rights – and that also offers assurance to outsiders that they can access its legal system during disputes with its citizens, would be a rational thing to do.³⁷

The liberal republican interpretations of Kant’s Doctrine of Right have a longer, and by now, more extensive interpretive history in the English-speaking world. Core interpretive and philosophical moves in this tradition are found already in the pioneering works of Julius Ebbinghaus (1953) and Thomas Pogge (1988), though they are made more philosophically complex and powerful, and hence, influential, especially through the works of Ernest Weinrib (1995, 2003) and Arthur Ripstein (2009). In short, these interpreters argue that justice is not only prudentially difficult but also, in principle, impossible for individuals to realize in the state of nature. On these approaches, Kant explicitly rejects the idea that individuals, no matter how virtuous, can interact in ways reconcilable with one another’s innate right to freedom. The problems of assurance and indeterminacy can only be overcome in a way reconcilable with everyone’s right to freedom – for reasons illustrated in my objections regarding Nozick’s assurance and indeterminacy problems (re: “enough”/“quantity” and “as good”/“quality”) above – by the establishment of a public (not private) authority. The liberal republican type of interpretation commonly also maintains that because Kant has shown that justice is in principle impossible (and not only inconveniently or impracticably difficult) in the state of nature, no one has the right to stay an “independent.” There is, in other words, no individual natural executive

³⁶ Again, for much more on all of these interpretations, see Varden (forthcoming).

³⁷ For an account of assurance only that proceeds along these lines, see Bader (2021).

right and everybody can be forced to enter civil society. Moreover, contrary to what Nozick and all libertarians argue, the reasoning of perfectly virtuous private individuals and public officials is neither identical nor of the same kind – an argument that is commonly viewed in this tradition as putting Kant closer to Rawls on the topic of public reason. The perspective of public right is distinct from private right in that public reasoning is not idealized private reasoning.³⁸

On the libertarian republican interpretation, Kant furthermore does not argue that the above constitutes the full conception of public right, as there are further ways in which the rights of the state are not reducible to the rights of individuals.³⁹ The public authority must ensure that the legal-political institutional framework as a whole – its monopoly on coercion – is consistent with each citizen's innate right to freedom. So, to promulgate the rightful conditions, it is not enough that the state concludes innate and private right – by positing relevant criminal and private law – as it must also ensure that these institutions comprise part of an institutional framework that secures each person's innate right to freedom by providing conditions in which they can be free, equal, and independent – or through positing public law. Only in this way does the state reconcile its monopoly on coercion with the innate right to freedom of each of its citizens and thereby ensure that the citizens are dependent only on their own, shared (public) rightful coercive power. In short, the kinds of arguments we find in this literature tend to emphasize that the state must not only ensure that each of its citizens can interact with any other citizen, whether by simply visiting or trading with one another, but also that they are subject to reciprocal (equal) restrictions when so exercising their freedom. Therefore, the state must institutionally ensure freedom with respect to the land, economy, and finances. This is why the state must provide public roads, public markets, and the like that are not only available to all but also available to all as subject to the same rules (public law). And it is why the state will tax landowners to buy land for public uses, why it will assume sole control of legal tender, and why it will publicly regulate marketplaces. Permitting any private person to be in charge of any of these structures would make it impossible for everyone's freedom to be equally subject to universal law, since someone would be given the "right" to restrict others by their arbitrary choice. Once the state establishes its monopoly on coercion, it must therefore prohibit any such private subjection of one person to the arbitrary choices of another by assuming institutional control over the land, economy, and finances by issuing laws that restrict them equally. Only when everyone's freedom is subjected to universal law rather than to another's arbitrary choices is rightful interaction possible (MM 6: 325). Despite appearances, the reasoning is quite similar regarding the state's duty to provide poverty relief.

Poverty is a systemic issue on this approach. Rightful relations require that the institutional coercive framework as a whole is reconcilable with each citizen's right to freedom, understood as independence from subjection to other persons' arbitrary choices and instead subjection only to universal laws of freedom. The state therefore cannot permit a situation in which some particular person's exercise of external freedom is dependent upon another person's arbitrary choice ("will"), such as to be charitable, generous, caring, or to provide employment. Such reliance of one person's freedom on another's arbitrary choice is a private dependency relation that is irreconcilable with a person's innate right to freedom; each citizen must be in a condition where her freedom is subject only to universal laws of freedom. Therefore, the state's duty to protect each person's innate right to freedom demands a state guarantee of

³⁸ For example, see Ripstein (2006) for an earlier version of this line of argument. For more general arguments of this kind that are not limited to the Doctrine of Right as such, see Katerina Deligiorgi (2012a, 2012b).

³⁹ Most of these arguments are found in the section called "General Remark. On the Effects with Regard to Rights That Follow from the Nature of the Civil Union", or the sections marked A through E (MM 6: 319–38).

unconditional poverty relief. Reconciling the state's monopoly on coercion with the rights of each is therefore why the state must provide the legal guarantee that everyone can exercise freedom of choice, namely by guaranteeing *legal* access to means with which one can set and pursue ends.⁴⁰ This is, in other words, a type of argument that is much closer to Nozick's surprising realization regarding the UMS's moral demand to transform itself into a MS except that this argument does not appeal to procedural rights – a problem that for Kant is solved through his non-voluntaristic account of political obligations – but to the other problem, namely how to deal with private property appropriation under conditions of scarcity. In fact, contemporary Nozickians can accept both arguments since they proceed on the basis of principles of freedom that deeply unify freedom accounts of the Nozickian and the Kantian kinds. All the arguments are carried out in terms of freedom, and they are driven by a concern for allowing freedom under law rather than arbitrary choice (“will”).

Now, assume for a minute that we accept everything proposed above. Do we thereby have enough philosophical tools to do all that the alternative, earlier Kantian theories of justice and works inspired by them can do with their philosophical systems? No, definitely not. We will still need to work out how to make this philosophical freedom theory distinctly *human* and applicable to the specific histories of various states, including their deep histories of injustice associated with various isms. In addition, we need to address the question of democracy in this theory as well as more generally how to make this theory more political, as the above has a distinctly legal feel to it. And, indeed, looking at much of the most recent work in legal and political philosophy, these issues are clearly driving much of it. And, it seems fair to say, the challenge is on for aspiring Nozickians to join these discussions.

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⁴⁰ Whether it chooses to do this through providing support to private charitable institutions lies within its prerogative, the requirement is only that it provides this legal guarantee.

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