

Phil 114, March 16 and 19, 2012
Immanuel Kant, *Metaphysics of Morals*:
The Doctrine of Right, Introduction, Part I (Private Right), up through §18, §22–27

The *concept* of right regulates *only*:

1. the effects of one's *external, physical choices, effected in one's actions*...
2. ... on the *external, physical choices* of others, as opposed to their well-being, needs, wishes, etc...
3. ... with respect only to the *form* of their choice, as opposed to its *matter*: i.e., what matters is whether you *interfered with a choice* whether or not to pursue an end, not that you prevented someone from achieving that end.

In other words, when we think about *right*, we think about the relations between people, *abstracting away from everything internal* (in the sense of psychological) on both the part of the person acting and the person affected. Thus, I have committed no violation of right against you if...

- I *want* your competing business to fail, but take no action (1), or
- I drive you out of business simply by offering better services, but not by threatening you not to open your shop, or tying you up, or stealing your goods, etc. In this case, my actions make it the case that you do not achieve the *end* of the choices you are making: namely, to have a successful business. But I do not interfere with your choice itself (3), or
- I bring it about, by thus driving you out of business, that your wishes, desires, needs, well-being, etc. are not satisfied (2).

So far, this is just a point about the *concept* of right, not a *principle* telling us what is and is not right. But the principle of right is essentially what you get when you think about what a *universal law of freedom* would be, where “freedom” is understood as the sort of freedom that the concept of right concerns, i.e., freedom in one's external, formal choices.

Universal Principle of Right: Any action [or condition] is right if it can coexist with everyone's [external, formal] freedom [of choice] in accordance with a universal law.

What's right? What and only what is *compatible* with *everyone* having *equal* external, formal freedom of choice.

What's wrong? What and only what is *incompatible* with everyone having equal external, formal freedom of choice: e.g., any *hindrance* of an action or condition that is compatible with everyone having equal external, formal freedom of choice. Note that any action that isn't right is wrong, and any action that is isn't wrong is right. The two categories are mutually exclusive and exhaustive.

Permission to coerce: Is coercion opposed to an action that is *right* right or wrong? Wrong. Why?

- It is a hindrance of, and so incompatible with, an action that is compatible with everyone having equal, external, formal freedom of choice

Is coercion opposed to an action that is *wrong* right or wrong? Right. Why?

- Coercion of a wrong action is just a hindrance of a hindrance to freedom.
- A hindrance of a hindrance to X is consistent with X. (Why?)
- Therefore, coercion opposed to a wrong action is consistent with freedom.
- Therefore, coercion opposed to a wrong action is right.

This means that an action is right if and only if there is permission to coerce someone who infringes on it.

Apparent counterexamples:

1. Right without permissible coercion. E.g., cases of equity: one partner did more and so has a right to more, even though this right can't be coercively enforced.
2. Permissible coercion without a right. E.g., cases of necessity: neither man on a plank has a right to it, since their relations to the plank are perfectly symmetrical, but each may use force to wrest it from the other, in order to save himself from drowning.

But these are not *really* counterexamples. In these cases, we simply confuse *underlying moral rights* (which still obtain) with the possibility of *actual legal enforcement* of them (which no longer obtains). In 1, no *judge* could be authorized to *decide* the equity case, since no judge could have access to the relevant definite particulars to decide it. In 2, no *penal law* can coerce people to respect rights in the case of necessity. How could even the death penalty coerce, when to obey the law would be to die anyway?

Private right: Right to some extent possible in a state of nature: roughly, concerning one's person, property, contracts, and relations within a family or household.

Public right: Right possible only in a civil society.

As we will see, the "to some extent" is elusive; the public laws of a civil society do, and indeed are needed to, secure private right.

Innate right concerns what is "internally" one's, what *could not have been* another's.

Simplifying a bit, innate right concerns just what one does with one's own body. (Note that *here* "internal" doesn't mean "psychological.")

"Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his own humanity."

Acquired rights concern what is "externally" one's, what *could have been* another's. These concern not my body, but instead one of the following:

1. a physical thing external to me (property), a right to a thing
2. another person's choice to perform a specific deed (contract), a right against a person that he so choose
3. another person's "status" in relation to me (family and household relations), a right to a person "akin to" a right to a thing.

One example is marriage, which Kant describes as “the union of two persons of different sexes for lifelong possession of each other’s sexual attributes.” This is akin to a right to a thing in at least the following way: if one person leaves, or starts sleeping around, “the other partner is justified, always and without question, in bringing its partner back under its control, just as it is justified in retrieving a thing.”

Why is there even a problem here for marriage to solve? The thought is that when one has sex, no matter how consensual, one’s partner uses one’s sexual organs as a thing, and so, since a person is a “unity,” uses one as a thing. But one does not have a right to let another treat oneself as a thing. That is incompatible with “rightful honor”: one’s duty to assert one’s worth as a human being in relation to others. This might sound a little extreme, but note that it would explain the idea that contracts to have sex for money are not enforceable. The would-be prostitute can always back out, because it was never in her power to transfer her right to herself.

How does marriage solve the problem? It’s a little murkier why Kant thinks that “lifelong possession” makes everything OK. Why isn’t his conclusion simply that sex for pleasure is always wrong? But in rough outline one has a sense of what Kant is getting at here. If the problem with sex is A’s being treated and regarded by B as a mere thing, and in the subordination of A to B that this involves, then perhaps it does something to address the problem that B is bound to recognize A has having equal, reciprocal rights over B in precisely the area where the issue of objectification and subordination arises. A mere thing can’t have rights at all, and a subordinate can’t have equal, reciprocal rights. Moreover, this equality must be secured by a public institution, an institution independent of the will of either of the parties

For Kant, such acquired rights are particularly puzzling, because they involve “intelligible,” as opposed to “empirical,” possession of X. The key difference is that one’s intelligible possession of X does not depend on how one is related to X in space or time.

Why the labels “intelligible” and “empirical”? For Kant, space and time are conditions of our *experience* of things, and so everything “empirical” is conditioned by space and time. But we can *think*—albeit not experience—things as independent of space and time, and so what is purely “intelligible” is not conditioned by space and time.

Kant sees no problem with how I could have a right to what I “empirically” possess: what I literally have in my grasp here and now. That just follows from innate right. If I am *here* on this seat *now*, then you can’t take it from me without affecting *my body* and so violating my innate right (which is to be the sole decider about what is done with my body so long as it does not violate anyone else’s innate right). But what if I am *not here* on this seat *now*? If your taking it from me (without my consent) violates my right, then I must have *intelligible* possession of it: a right that you might violate regardless of my spatial or temporal relation to it.

The difficulty is that if the most we could have was rightful empirical possession, then—considering just the case of property—we could have only certain *rights of use*. But our ordinary

conception of *property* includes much more than this. People aren't allowed to mess with our stuff even if we aren't there.

Postulate of practical reason with regard to rights: "It is possible for me to have any external object of my choice as mine, that is, a maxim by which, if it were to become a law, an object of choice would in itself have to belong to no one is contrary to rights."

What warrants the postulate?

It is much easier to see what the argument is NOT than what it IS. (In this case, it may even be *more important* to see what the argument is not than what it is.) It is not that rightful intelligible possession is dictated by God. It is not that rightful intelligible possession is efficient, beneficial, etc. Instead, any argument for intelligible possession has to proceed, roughly, from conceptual reflection on freedom itself.

However, the argument cannot proceed simply by unpacking what is already contained in the relevant concepts. A proposition about a right of *empirical* possession, Kant grants, is *analytic*: roughly, it is just contained in the concepts of "innate right" and "empirical possession." But, a proposition about a right of intelligible possession, Kant insists, is *synthetic* (not analytic), albeit a priori (not known through experience).

So what is the argument? Two gestures at what Kant's thinking may be here:

The first is that the alternative would represent an arbitrary limit to freedom. Suppose that there was no intelligible possession of anything: that I was never able to determine how something not in my possession was to be used. That would be a restriction on my freedom of choice. However, it is not as though, if I were able to determine how that thing was to be used, having come upon it first, that expansion of my freedom would infringe anyone else's rights. In other words, if there were no intelligible possession, there would be *a restriction on my freedom that did not have its source in freedom of anyone else*. Perhaps Kant's rhetorical question here is: How could that be? How could I be free, but restricted—by something other than the freedom of others?

The second is that practical reason somehow requires me to think of possession in a way that is abstracted from empirical conditions of space and time: that is, to think of possession as intelligible. Why? Perhaps because practical reason requires me to think of myself, for practical purposes, as free, and so as something merely intelligible (a "noumenon"), not empirical (a "phenomenon"). One worries that this is an answer that one has to be Kant to find satisfying; and yet many of his formulations suggest that this is what he has in mind.

How can I acquire an external thing?

1. Before I acquire anything I need to be able to *use* some land. I need to *be* somewhere before I can act at all, let alone acquire. Thus, the possibility of acquisition is based on the "original community of land in general."
2. Before I *acquire* anything other than land, I first have to acquire some land. Unless I own the land, others may *move* whatever I own, so as to get at the land underneath, without violating my rights. (Kant is very quick to see the loopholes people might exploit!)

3. What I acquire cannot already be anyone else's. Otherwise, it would be an infringement of their rights. The right of *first* possession is the only way that acquisition could be compatible with equal freedom. (It isn't justified by, say, its efficiency.)
4. I acquire something simply by putting it under my control: make it possible for myself to use it.
 - a. "Control" is the relevant condition, since what is linked *a priori* to the concept of choice.
 - b. I don't need to *labor* on it or *improve* it. Indeed, that could give me a claim to the thing only if I *already* had rights in what I labored on.

Leaving the state of nature:

Kant's view of our exit from state of nature is quite different from that of his predecessors.

First, they often see leaving the state of nature as necessary, or recommended, for our *survival*, for our *well-being* (e.g., to avoid the "inconveniences"), or for the *protection* or *expansion* of a *kind* of freedom that *already exists* in the state of nature. For Kant, it is necessary for us to have a *kind of freedom that would otherwise not be possible*. We could not have "conclusive" rights of external possession in a state of nature.

Second, they often suggest that any requirement to leave the state of nature is at best merely a *prudential* requirement. For Kant, it is a *moral* requirement: indeed a duty of right.

Finally, they often suggest that others *may not be coerced* to leave the state of nature; it has to be left to their free choice. For Kant, we are *permitted to coerce others* to leave the state of nature. (This just follows from their having a *duty of right* to leave it.)

This duty follows from his "general division of duties of right":

1. Duty of "rightful honor": assert one's worth as a human being in relation to others.
2. Do not wrong anyone, "even if, to avoid doing so, you should have to stop associating with others and shun all society."
3. "(If you cannot help associating with others), enter into a society with them in which... what belongs to each can be secured to him against everyone else."

3 follows from 1 and 2. Note that *without 1*, you could satisfy 2 merely by entering into a society with others in which what belongs to others can be secured to them *without what belongs to oneself* being secured. But 1 requires that you stand on your own rights.

Why is there "conclusive" external possession only in the state?

The difference between the "provisional" rights that we have in the state of nature and the "conclusive" rights that we have only by leaving it is admittedly elusive. But two important features about provisional possession are:

- while provisional possession will be superseded by whatever conclusive possession is ultimately established by public law, it at least establishes a "rightful presumption that it will be made into rightful possession... and in anticipation of this holds comparatively as rightful possession," so it is the closest thing to rightful possession in a state of nature, and

- “if external objects were not even provisionally mine or yours in the state of nature, there would also be no duties of right with regard to them and therefore no command to leave the state of nature,” our provisional possession somehow grounds our duty to establish conclusive possession.

In any event, we can ask what external possession is lacking in the state of nature. There seem to be three problems.

First, when I acquire something, I, by a mere act, put everyone else under a coercively enforceable obligation (to refrain from using it) that did not already apply to them. In effect, I make my own little political law, which I am now entitled to use force to have obeyed. But—one might ask—who did and made me king? How is it compatible with the equal freedom of others that I can unilaterally make a law backed by legitimate force? The only way for it to be compatible with the equal freedom of others would be if we *all* somehow collectively, “omnilaterally,” authorized my possession: i.e., an enforceable obligation on others to refrain from using it. But for that we need suitably public laws.

Second, in the state of nature, there is no assurance that others will respect my rights, even if I respect theirs. One might expect Kant to say here that because I don’t have assurance that *my rights will be respected*, my duty of rightful honor requires that I establish an order that could ensure that my rights are respected. But Kant goes a step further. Because I don’t have assurance that my rights will be respected, I have *no duty to respect your rights*, and vice-versa. Perhaps the worry is again one of rightful honor: that if I respect your stuff, without any assurance that you will do the same, then I am in effect subordinating myself to you. In a state of nature, we have rights (or rather quasi-rights) that, paradoxically, we do not have a duty to one another to respect. *Question*: Why does this apply only to external possessions? Doesn’t the argument apply to others’ persons as well?

Third, in a state of nature, our external possessions are indeterminate. This indeterminacy can only be resolved by an independent judge. Not because this is cheaper, more efficient than fighting it out. Not because the judge might know better, be more impartial. The point is rather that any resolution of the disagreement that one of us might enforce over the other of us would amount to the kind of superiority of one over the other incompatible with our equal freedom.

Review Questions:

1. What does Kant mean by “Right and the authorization to use coercion therefore mean one and the same thing.” What is his argument for it?
2. “Kant’s argument for rightful intelligible possession is simple. If we were limited to rightful empirical possession, we couldn’t execute complex, long-term plans, which require, at a minimum, sometimes letting go of physical objects. There wouldn’t be any appreciable agriculture, manufacturing, commerce, etc., and everyone would be pretty badly off.” Is this description of Kant’s argument accurate?
3. What follows from Kant’s claim that “a unilateral will cannot put others under an obligation they would not otherwise have”?