Abstract
Kantian statists argue that property rights are required for us to stand in relations of justice with one another, and that the state is a conceptual pre-requisite for the acquisition of such rights. In this sense, the state constitutes justice, rather than merely protecting justice against those who might act contrary to it out of vice. In this paper I argue against this view by showing how property rights can be rendered conceptually robust through social convention in a state of nature. Arthur Ripstein argues that in a state of nature, acquired rights are afflicted by (1) indeterminacy; (2) unilateralism; (3) lack of assurance. Each of these areas highlight purportedly independent problems for justice, each of which require the state to overcome. However, these problems are not, in fact, independent of one another; rather, each is dependent on the one it follows. If, then, property rights can be shown to be determinate outside of the jurisdiction of a state, then their unilateralism ceases to be a problem, and assurance can be obtained. Through a more developed account of social convention, I argue that property rights can indeed be sufficiently determinate in a state of nature. The state is not, therefore, constitutive of justice, and Kantian statism – qua substantive position – is mistaken. I leave aside the question of what the role of the state in relation to justice actually is, or might be.

Introduction
Kantians believe that everyone has an innate right to equal freedom – the only justification for any restriction on freedom, then, is freedom itself. Most Kantians believe that the state is necessary for us to be free. However, there are two different understandings of the nature of that necessity. There are those that think it is an instrumental necessity and those who think it is a conceptual necessity.

Some Kantians think that the state is necessary because it is the best or only institutional fix to the fact of our limited virtue (Murphy, 1994; Kauffman; O’Neill, 2000; Pogge, 2002;
Williams, 2003). It just so happens that persons cannot be expected to act justly toward one another unless there is a state to coerce them into doing so. They might know what justice requires, but choose to act otherwise out of real or perceived self-interest. Or they might simply be mistaken about what justice requires, and hence fail to align their actions to it. Much like the Lockean claim that, without a state, there would be disputes over rights, and these disputes would need third party arbitration and ultimately enforcement (Locke, 1689, II.IX.124-II.IX.126).\(^1\) Under this view, it is conceptually possible for a just society to obtain without a state, albeit unlikely. For example, if it were the case that persons were endowed with tremendous virtue that they sufficiently complied with the demands of justice with the threat or execution of coercion, then a state would not be necessary. Equally, if there were a set of non-state institutions that could provide the robust security functions that are typically demanded of the state,\(^2\) then the state would no longer be necessary to secure compliance with justice. On this view, the state is not, therefore, a conceptual requirement, but merely an instrumental one. It is the facts of social science that determine whether justice requires a state or not.\(^3\)

Arthur Ripstein (2009), as well as other Kantians endorsing the position (Varden, 2008; Stilz, 2009; 2011; 2014; 2016),\(^4\) have recently pioneered the latter view. They argue that the state is conceptually constitutive of justice. The state therefore ought not be instituted for instrumental reasons – to check our propensity to act contrary to justice – but, rather, to make it possible that there be anything that counts as justice whatsoever.\(^5\) Outside of a state, it is not

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\(^1\) See Long (2008) for an argument against the idea that the need for third party arbitration requires a monopoly on arbitration.

\(^2\) Gustave de Molinari is the earliest writer to theorise the assurance of security in a stateless society (1849), followed by Murray Rothbard (1973, ch. 12), and David Friedman (1973). Roderick Long, however, argues that the law itself (and not merely its enforcement) could be provided within a stateless society (2008). More generally on the legal and institutional functioning of statelessness, see Leeson (2014) and Stringham (2015).

\(^3\) There is, of course, the widespread belief that whilst the state is only contingently necessary, that contingency does in fact obtain. Social contract theorists typically buy into Hobbes’s empirical assertion that without a state, we would be in a perpetual state of war (Hobbes, 1651). This empirical assumption is evidenced by political philosophers’ tendency to regard theorising justice as being little more than establishing desiderata for state policy (Byas & Christmas, forthcoming). See Widerquist & McCall (2015; 2017) for trenchant critique of social contract theorists’ tendency to presume the contingent conditions under which a state is necessary, are in fact met.

\(^4\) Anna Stilz has more recently re-articulated her Kantian account of the provisionality of property rights in a state of nature in using Hugo Grotius’s account of primitive property (2018). Elsewhere I have argued that this use of Grotius is mistaken (2016; forthcoming).

\(^5\) Jakob Huber refers to Arthur Ripstein, Louis-Philippe Hodgson, Jeremy Waldron, and Anna Stilz as Kantian statists in a different sense than that used here (2017). Statism, in Huber’s context, is the idea that special relations of justice pertain between subjects of the same state, in a categorically different way than they do between subjects of different respective states. A statist in this sense is to be contrasted with a cosmopolitan. In anarchist/libertarian discourse, “statist” is used to denote those who give the state inappropriate pride of place within the moral functioning of a social order. Indeed, the dictionary definition is closely aligned with this – and hence, one hopes, is ordinary usage. It is in this sense of “statist” that I propose a thesis against Kantian statists. That is, I do not intervene directly on any debate over the appropriate relationship between states, or between the subjects of
that there is a risk of persons unjustly violating each other’s rights, but that it is not clear that they even have rights in such a context. Rights are said to be merely provisional in this context – there is indeterminacy over their content and enforceability. Relations of justice are impossible where rights are provisional because persons cannot have knowledge of their interpersonal obligations, and therefore have no interpersonal obligations. All of course, apart from the obligation to exit this condition and create a state. For, whilst persons cannot be said to violate each other’s rights in a state of nature, by choosing to remain in that state, they ‘do wrong in the highest degree.’ (Kant 1779, VI.307)

In this paper I will not argue that the exegesis proposed by Ripstein and others is mistaken, I will only argue that the substantive argument it takes from Kant is mistaken. Therefore, if these scholars are mistaken in their interpretation of Kant, then all the better for Kant. This interpretation, however, is sufficiently influential that it is worth exposing it to substantive critique. When I argue against Kantian statism, then, I am arguing against a substantive position rather than an exegetical one.

Kantian statism promises to be original position that stakes out a third way between two distinct schools of thought on property and justice. On the one hand there is the Lockean/libertarian view: property rights are normatively pre-institutional, like rights over one’s own body, and therefore any state must respect these rights. Much of the literature on this approach focuses on the normative status of acts of original acquisition (Wheeler, 1980; Waldron, 1988; Fressola, 1989; Mack, 1990; 2010; Sanders, 2002; Feser, 2005; van der Vossen, 2009; 2015). On the other side of the conversation on property and justice is the view that property rights are an instrumental means to realising policy decisions. They are simply the substrata of how such collective decisions or macro level principles are realised. Under this different respective states. Rather, I intend to demonstrate the non-necessity of the state for property rights and hence justice from a broadly Kantian perspective.

6 It is noteworthy that Helga Varden conflates the notion that the state is a ‘remedial’ institution – i.e., there to remedy the fact that persons will not always act justly – with the notion that justice is a remedial virtue. The conceptual entanglement of the state and justice is already there in her exegesis of rival positions. (2008, 1-4)


8 Stilz refers to it as a ‘hybrid view’ between the respective accounts of property as strictly natural or purely conventional (2018, 245).

9 John Locke famously said that, given basic control rights over one’s own body and capacities, one can acquire property rights through one’s interactions with the physical world, and that states ought only be instituted in order to protect these rights, and arbitrate disputes over them (1689, bk. II). Libertarians—speaking as broadly as possible so as to include the various different types of libertarian (cf. Brennan, van der Vossen, & Schmidt, 2018) – follow Locke in believing that property rights are on a moral par with the other personal rights that liberals generally agree are basic, and limit the legitimate power of the state (Brennan & Tomasi, 2012; Flanigan, 2017; Brennan & van der Vossen, 2018). For the argument that the right to acquire property is entailed by a right to non-interference in one’s personal activities, see Christmas (2017). For the argument that it is entailed by a right to use external resources, see Christmas (forthcoming).
view private law is just the servant of public law. Ripstein aptly refers to this view as the ‘public law in disguise’ view of property (2006, 1291; 2009, 86-90). For example, John Rawls argued that the normative status of private property, at least in the means of production, was entirely separate from the normative status of one’s basic right to liberty, which he took as having ultimate lexical priority. Rawls’s Liberty Principle stipulates that each ‘has an equal right to the most extensive liberty compatible with like liberty for all’ (1958, 165), which he later articulated as ‘each person has an equal claim to a fully adequate scheme of equal basic rights and liberties’ (1993, 5). However, the extent to which this principle is taken to justify private property as a basic right is very limited. In fact, if the Difference principle (which is supposed to be lexically posterior to the Liberty Principle) requires that there be no private ownership of productive property, this is legitimate and does not violate the liberty principle (Freeman, 2007, 45-51). Thomas Nagel and Liam Murphy likewise argue that one’s property entitlements are strictly lexically posterior to the policies that implement a property system under positive law, and the division of productive labour thereby engendered (2004). This view most clearly goes back at least as far as the legal conventionalism of Jeremy Bentham (1843, 309) and then Thomas Hobbes (1651, 171).

The Lockean/libertarian view is that property rights are normatively pre-legal; whilst the public-law-in-disguise view is that they are normatively post-legal. Kantian statism is subtly distinct from these two poles: property rights are real rights that legal and political institutions could violate (so, in that sense, normatively prior to the law), yet they are existentially dependent upon those legal and political institutions (so, in that sense, normatively posterior to the law). As Varden parses it, public law ‘concludes’ private law (2010). This view needs far more elucidation, which it will receive in the following section. For now though, we must just note that the success of my critique of the Kantian statist position will mean that it collapses into the Lockean/libertarian view. I will neutralise the arguments made against the determinacy of property rights in a state of nature, and hence that any political or legal arrangement will, morally speaking, have to respect those rights.

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10 One could analogously characterise the Lockean/libertarian view as being that public law is private law in disguise. Indeed, this is the basis of Samuel Freeman’s famous critique of libertarianism; that it reduces the public sphere to a mere function of the private (2010). See Boettke & Candela (2018), however, argue that an account can be given of libertarianism that places priority upon the social or public sphere.

11 The public-law-in-disguise account typically recognises broad discretionary power of the state to order to the distribution of property, whereas the Lockean/libertarian account places strong constraints on any such discretion. Rafeeq Hasan discusses the discretion the state has to order property distribution under the Kantian statist account (2018).
I believe that the Kantian statist position is philosophically mistaken. As I show here it is premised on a misunderstanding of the nature of conventions and their relation to rights. It also analytically impoverishes us in the face of morally evaluating non-state societies (cf. Scott, 2010), and forms of socioeconomic reproduction that lack central authority (Ostrom, 1990; Scott, 1998). However, I also think that its dissemination is politically worrying. Crediting the state with providing the conceptual pre-requisites for us to stand in social relations that can even count as just or unjust both dehumanises those communities that live (or lived) beyond or outside the purview of any Weberian nation state. To fail to even be subject to judgements of justice or injustice is to fail, in an important respect, to present as fully human. Regarding such societies as being provisional, waiting for a state to come along and make them fully civilised is a dangerous view to disseminate, given the state’s fragility with regard to its ability to merely administer justice, and not be a vehicle of proactive economic parasitism and social oppression.

Moreover, there is so much of value in Kant’s account of rights, and viewing these rights and duties only vicariously through the machinery of a state threatens a moral alienation. (cf. Long, 1995) It promotes the view that justice is not really about interpersonal relations, but merely about providing the tools for evaluating state policy. This overmoralises the state, and undermoralises our day-to-day interaction with fellow human beings, and the non-state ways of organising our social lives in ways that protect our freedom (Levy, 2017; cf. 2015).

A further point before we proceed into the substance of the paper is to clarify some terminology. Kantians refer to the institutional conditions necessary for a rightful condition as a civil condition. Civil condition just refers to a state of affairs wherein the necessary institutions for a rightful condition exist. The civil condition is institutional, and a rightful condition is moral, and the former is a necessary precursor to the latter. However, Kantians often define the civil condition as being mutually constitutive with the state – they speak as if they are just the same thing. This means that a state of nature – statelessness – is necessarily lacking a civil condition, and therefore contains no possibility for a rightful condition until it institutes a state and thereby abandons statelessness. If we decouple a civil condition from the definition of a state, it permits us to investigate the conceptual possibility of a state of nature permitting a civil condition without instituting a state. As long as we can show that persons’ rights can be determinate, without instituting a state, then we can show that a civil condition –

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12 Elsewhere I have argued that this pre-occupation with policy, rather than interpersonal relations, is both analytically impoverished and runs the risk of entrenching actually existing state injustice (Byas & Christmas, forthcoming). Also see Brennan (2017).
and hence a rightful condition – can be reached under stateless. This would mean that the state is not conceptually necessary for a just society.

Whilst we are removing one aspect of the Kantian definition of a state – a civil condition – we must leave in the rest so that the conversation had here does not talk past the Kantian one. It is necessary, however, that Kantians abandon the inclusion of a civil condition in the definition of the state, since a civil condition is already defined as that which is conceptually necessary for a rightful condition, and hence would beg the question in their favour. The residual definition of the state I will use here, then, is an uncontroversial one: the state is a territorial monopoly on the authorisation of the use of force (Weber, 1948, 78). This does not mean that a state must be the only agency that wields force, but rather, that any use of force must be authorised (either tacitly or expressly) by the state. This means that, if one wishes to challenge or resist the state’s use of force, one may only do so in the ways circumscribed by the state itself. It is not the case that states must be totalitarian: there can be any number of internal checks to its actions, decisions, and pronouncements. What is crucial though that there are no external checks. As a citizen of the United Kingdom, I cannot sue the British government in a French court for their actions towards me within British territory, nor could a United States citizen call the Thames Valley Police to defend themselves from an attack by the NYPD within New York City. Nor could one call upon any private agency whose procedures and use of force are unauthorised by the given state to defend you against that state’s use of force. If doing so were routinely possible, that state’s monopoly would be brought into question, and its jurisdiction would quickly follow. The state, then, is the final arbiter is all cases, even those brought against itself (Long, 2008).

This definition of the state leaves open the possibility that it could be illegitimate – a monopoly does not by itself demand allegiance (Ripstein, 2009, 337-338). But it leaves open the possibility that Kantian statism is correct because it might turn out from our discussion that a monopoly is necessary for a civil condition, though not sufficient. Loading the definition of the state with any more moralised content will risk begging the question (either in Kantian statism’s favour or my own), and/or will lead to the absurd conclusion that, given the fact of rampant state injustice, there in fact are no states in the world (cf. Kukathas, 2008).

The following section will elucidate the argument Kantian statists give for their view. I rely mostly on Ripstein as the standard-bearer for this view, but also discuss others, as well as giving textual support from Kant where it is relied upon in that secondary scholarship.

1. **Freedom, Property, and Original Acquisition: The Kantian Account**
Kant believed that each individual had an innate right to equal freedom, and understood freedom as independence from the choices of others (1779, VI.237; cf. Hodgson, 2010). Independence from the choices of others means that one needs to be able to act in accordance with one’s own choices. In order to act, one must interact with the spatio-temporal world. Acting means using external objects; changing them, moving them, creating new ones and taking up space with them, planning how to do all this over time, etc. Even if one chooses just to stand still, one still needs a patch of ground and pillar of space to do so in. In order to be able to act independently of the choices of others, then, one needs a sphere in which only one’s own choices take effect. In other words, freedom requires private property.\(^{13}\) If I own some land, then I may do with it whatever I happen to choose, and may stop anyone else from doing with it what they choose, and hence have a sphere of independence from their choices. Likewise, however, in order for you to be able to act independently of my choices, you must also have your own property in which only you choose what happens. Each person’s freedom may only be restricted by the freedom of others, and that means assigning each person a spatiotemporal sphere, the disposition of which is exclusively her own choice. In order to be free of each other’s choices and thereby stand in relations of justice, persons need property.

How is it that persons can *acquire* property from an initial propertyless state? This is not the question of how property can be acquired by one person from its previous owner, but the question of how objects that are not yet owned by anyone can come to be owned by someone. This is the question of *original acquisition*. When all objects are assigned as property to particular individuals, it is clear how relations of justice proceed: each person may act as they choose within the confines of her own property, order the physical properties of their property as they choose, as far as is consistent with the same in others.\(^{14}\) But how can we go from a state of affairs where there are no property rights, to rightful state in which each has property, without violating each other’s right to freedom?

There may be a temptation to think that the question of original acquisition can be side-stepped. As those endorsing the view of property as public law in disguise, property is simply distributed by the state, in accordance with the democratic will or a principle of distributive justice, or what have you (Ripstein, 2006, 1391; 2009, 86-90). However, this attempt at side-stepping original acquisition fails because it, in fact, merely presumes an answer to the question

\(^{13}\) For a sophisticated account of why rights to freedom are necessarily property rights, see Steiner (1977; 1994, 86-101)

\(^{14}\) They may also transfer that property to others, and enter into contracts with others, under the Kantian view, but I do not discuss these issues here.
of original acquisition: it presumes that the state or the demos already owns all the property, and may distribute it in accordance with distributive justice or democratically mandated policy goals. The notion of collective ownership stands in need of justification as much as the notion of private ownership (Nozick, 1974, 178; cf. Sanders, 2002).

Aside from the question-begging nature of this move, there is also a substantive, Kantian problem. If all objects start out collectively owned, then no one can be free because the actions that each person was free to take would be subject to the choices of every other member of the community (cf. Rothbard, 1998, ch. 8). Of course, if each person was initially independent of one another, and they unanimously decided to pool their property through contract, then the subsequent restrictions on each of their actions would have been chosen by each of them respectively, and they would not be subjected to one another in the problematic way, but rather freely contracting with one another. However, for them to freely make such a contract each person would have to have had their own private property to bring to the contract – so we still have to ask how private property can be acquired in the first instance. (Kant, 1779, VI.251; Ripstein, 2009, 89)

One’s private property is the sphere of things that are subject exclusively to one’s own choices. In order for a person, A, to make something her property she must bring that thing under her own control – subjecting it to her choices. She must also place others under an obligation to abstain from subjecting that thing to their choices. For while B’s particular choice regarding the disposition of the object may not undermine A’s using it for the particular ends she has chosen, she is now counterfactually barred from using it for those ends which are incompatible with the one’s B has deployed it in, and in this regard therefore, A has become subject to B’s choices. For an object to be A’s property – for it to constitute part of her sphere of freedom – no particular uses of it can be ruled out by the choices of another.

The creation of property therefore must take other form of bringing things that are subject to the choices of persons into the system of property. Original acquisition, therefore, takes places through an individual’s use of, or taking control of an object or space, or otherwise subjecting it to her choices. It is necessary that an appropriator actually take control of the object to be acquired, as opposed to merely forming a desire or private intention about the object, because the point of property is to serve as the substrata of one’s free choices. Choices, rather than mere desires or private intentions, presume that one has the relevant means to the chosen end. A human can desire to fly, but they cannot choose to fly without the control of functional wings or a jetpack, or some other means of flying. (Aristotle, 2009, 1111a 25; Kant, 1779, VI.213; Ripstein, 2009, 14) Moreover, a public sign must be given that one intends to
appropriate the relevant object, and hence that others abstain from it (Ripstein, 2009, 105). It must – at least in principle – be possible for B to comprehend A’s taking control of an object as acquisition. No one can be under an obligation that they are, in principle, not capable of knowing – as would be the case if A could acquire property by forming a desire or private intention. (Grotius, 1625, II.II.II.5; Barnett, 1986, 302) Her taking control of it is already public and not a mere fact of her private psychology. However, her intention to make the object her property, rather than to merely use it for this particular purpose and abstain from making any further claim, must be made public as a necessary condition for others to be bound into an obligation to respect it.

Original acquisition is a juridical power. A power is an ability to alter other person’s juridical incidents, such as their claim-rights and correlating duties. A’s power to create a duty in B (and hence, a correlating claim-right in all third parties) correlates with a liability in B with regards to such a duty (and hence, a liability in each third party with regards to the correlating claim-right). A lack of such power in A indicates a disability, which correlates with an immunity in B, with regard to the relevant juridical incidents. (Hohfeld, 1917) The exercise of a moral power can be exercised at will and thereby have implications in moral space. However, even if one is at liberty to exercise a particular moral power at will, such an exercise must be made public to those who are liable to one’s power for it to really count as having been exercised. To alter the obligations of others in a way that they are necessarily ignorant of (given that it is a private exercise of the will) defies the nature of juridical relations altogether. They are essential social.15 So the exercise of the power cannot count as taking place unless it is accompanied by a public sign (Grotius, 1625, II.II.II.5; Pufendorf, 1672, 390; Gibbard, 1976, 83; Attas, 2003, 344).

Property rights can protect two different types of possession: empirical possession and intelligible possession (Kant, 1779, VI.250; Varden, 2008, 6-8; Ripstein, 2009, 95-96; Stilz, 2009, 42). When something is in one’s empirical possession, it is under one’s physical control. This kind of possession is already publically apparent because physical control takes place in the external world, available for the apprehension of any other agent. When something is in one’s intelligible possession, however, it is not under one’s physical control, yet it is subsumed into one’s purposiveness in some other way. It is either involved in one’s ongoing activities in a way that does not require physical control, or it is not yet part of any project but is available

15 This also related to the fact that Kant conceives of justice ‘spatially’ (Ripstein, 2009, 95), and hence any alteration in the juridical structure of justice – such as the acquisition of property rights – must be accompanied by a physical, publically ascertainable sign as such
should one chose to make it part of one’s projects. Given that one’s property includes objects that are not necessarily under one’s physical control at any time – and hence, that particular public sign is not extant – some other public sign must be given to indicate the acquirer’s intention to exclude others. Merely taking control, without a public sign of appropriation, will mean that only one’s empirical possession of it protected, and only for the duration of one’s physical control of it, and not one’s intelligible possession.16 (Ripstein, 2009, 105)

It is in preponderance of the question of original acquisition within a state of nature that leads Kantian statists to conclude that the state is a pre-requisite for acquired rights, and therefore justice. Without a state, acquired rights are indeterminate; there is supposedly no objective criteria for what counts as one person’s rights versus another’s. Any attempt to provide criteria to vindicate a rights claim will be merely subjective. Therefore, any use of force in defence of such indeterminate rights will be unilateral – based on a subjective interpretation of justice which, as such, others are free to resist. Since everyone is free to resist the force executed by everyone else, there can be no assurance of rights. Even if everyone happens to have the same subjective interpretation of justice, any peace that ensues as a result thereof will be subject to change due to the arbitrary choice of any one person, in violation of everyone’s right to be free from the arbitrary choices of others.

These related problems in the state of nature are conceptual defects which render rights merely provisional. Such mere provisionally morally compels us to leave the state of nature and enter a condition where relations of justice are possible – a state. The state is not required to protect a vulnerable, but pre-existing set of rights, but rather to enable the conceptual possibility of rights. This is the Kantian statist view. In what follows I will show that the claim that without a state, property rights are necessarily indeterminate is mistaken (section 2). From there, the other two problems collapse in on themselves (sections 3 and 4). I will then argue that, if in fact rights were indeed indeterminate in a state of nature, no state could constitute a rightful condition because without any objective standard outside of the subjective interpretations of state agents, the state’s edicts could not latch onto any moral reality, but would be arbitrary edicts backed by force, and might would make right.

2. Indeterminacy

16 This is certainly the Kantian view, so for the sake of more important argument downstream I grant it here. I do, however, have serious doubts as to the plausibility of a categorical distinction between empirical and intelligible possession and the derivative divergence of the moral status of using versus taking. (Christmas, 2017; forthcoming).
Kantian statists accept that in a state of nature there could conceivably be conventions – of some kind – regarding property. They insist, however, that any convention will be indeterminate such that there can be no objective criteria for what counts as falling under our respective property rights. Without determinate answers as to what counts as mine and thine, there cannot truly be any such distinction. I argue, however, that the Kantian statists are too quick in their treatment of property conventions. They only consider deliberate convention as a device for giving determinacy to social rules, to the neglect of emergent convention. Moreover, they only consider conventions regarding regulative rules (such as the substantive property rules that govern a society) to the neglect of the constitutive rules that give content to the very social phenomena that instantiates compliance with the regulative rules. Sorting through these distinctions carefully will show that their scepticism about conventions in a state of nature is mistaken.

As noted, any acquisition of property must take the form of taking physical control of the property in some way, combined with a signal that one intends to acquire it as one’s property. The signal is essential. Our enquiry therefore hinges on how social conventions could generate a rule that a given sign is the sign of acquisition – how a particular action of range of actions could come to communicate one’s intention to take something into one’s intelligible possession. Once property is acquired, it casts a long shadow into the future, since the new owner is now entitled to use her property and exclude others from it until she chooses to transfer those rights to someone else. Then that new owner will have these rights until she, in turn chooses to transfer them. The transmissibility of property ownership, combined with the absence of term, and its residuary character (Honoré, 1961, 123-124) mean that if we see how the rights can be brought into to existence and be determinate in that, then no further question arises. It is the question of original acquisition that leads Kantian statists to conclude that the state is a conceptual requirement (Varden, 2008, 5).

Rules and Conventions
Let us begin by accounting for two different kinds of rules, and then the two different kinds of social convention that might underpin them. Firstly, there are regulative rules. These are the more familiar kind of rules, they place normative constraints on a pre-existing activity. For example, the rule that you do not stand too close to someone while you speak to them regulates conversation. One could break this rule, and yet still count as engaging in conversation. Morality, among other things, tells us which regulative rules we should have and, given the ones we in fact have, which one’s we should follow. For example, that one ought to abstain
from using objects without the consent of its acquirer is a demand of morality, and hence tells
us we ought to have such a regulative rule, and that when we do, we ought to follow it. One
can *in fact* use the property of others without their consent; so the activity is existentially
independent of the rule that regulates it, hence it is a merely regulative rule. Secondly, however,
there are *constitutive* rules. Constitutive rules not only regulate, but also *define* activities
(Searle, 1969, 33-42; 1995, ch. 2). One cannot separate a particular activity from its constitutive
rules. For example, the rules of chess govern play: if you break them you are sanctioned (in
accordance with the other rules regarding what happens when you break the primary ones), yet
if you continually and systematically break the rules, one gets to a point where you just are not
playing chess any more, but something else, or noting at all. If one moves all the pieces one
space diagonally, taking opponent’s pieces by jumping them, it is more true to say that one is
playing checkers with chess pieces, rather than playing chess wrong.17 The rules of chess define
what chess is, if one follows other rules, one thereby plays another game. Of course, if one
only modifies one of the rules, for example, allowing the King to move two spaces at a time
rather than only one, we might still refer to this as “chess being played differently” rather than
a slightly different game.18

The rule that one can acquire private property is a regulative rule, but the rule that a
particular action is what counts as an act of acquisition is a constitutive rule. Given that
acquisition is fundamentally communicative — since it must be publically understandable as an
act of acquisition in order to actually acquire — there is no question of *how one ought to acquire.*
One either acquires by effectively signally that one is acquiring, or else one fails to acquire.
There can be no wrongful acquisition of property: if one uses the wrong sign, and hence violates
the constitutive rules of acquisition, then one fails to acquire. Of course, one can take the
property of another, or exclude others from property one has not acquired, and this would but
wrongful. In both cases, however, one does not in fact *acquire* the property, so it is not
acquisition that done incorrectly or wrongfully (Feser, 2005). A taking is not necessarily an
acquisition – rights follow acquisitions but not necessarily takings

Likewise, the rule that one only use or acquire the property of another by her consent
is a regulative rule, but the rule that determines what counts as giving consent is a constitutive
rule. Our question, then, is not whether the regulative rules of property (acquisition, transfer,
etc.) can be yielded by convention. Those rules are given by theory, and this is readily

17 Hence D’Angelo Barksdale was wrong when he said ‘you can’t play checkers on no
chess-board.’ (Simon, 2002).
18 Daniel Dennet calls this ‘chmess’ (2006).
acknowledged by Kantian statists: ‘Property… is a structure of rightful relations between private persons, the form of which can be understood without reference to the state…. the structure of property rights… can be explicated fully in terms of a state of nature.’ (Ripstein, 2009, 86-89)\textsuperscript{19} It is the application of these abstract principles in real social institutions, via an account of the rules that constitute that actions referred to by the regulative rules, that is problematized (Kant, 1779, VI.217; Wood, 2008, 58; 61). We do not need conventional, regulative rules regarding a given kind of activity in order to know what counts as that kind of activity.\textsuperscript{20} It is constitutive rules that tell us what counts as that activity, regulative rules tell us when and how we can and cannot engage in it.

Regulative rules are straightforwardly normative. The regulative rules that morality demands we adopt are categorically imperative: we ought to comply with them.\textsuperscript{21} Constitutive rules are not normative in this way, since they do not regulate activities that are existentially independent of them. Constitutive rules are conditionally imperative: they tell us that if you want to do $x$, you must do $y$, because $x$ just is how you do $y$. If you want to play the game, you need to play by the rules. Ignoring the rules constitutes a failure to play the game. If you want to acquire property, you need to signal that you are taking it into your intelligible possession. Failing to so signal constitutes failure to acquire. It is not that one ought to acquire this way, but one can only acquire this way.

How could a constitutive rule determining what counts as acquisition come about conventionally? Very broadly speaking, there are two kinds of social convention, both of which refer to an artificial regularity, not found in physical or perhaps even human nature, but rather in the social world. Though it might go against the grain of empirical nature – its artificiality – it does consist in a grain to be followed – its regularity (Goodman, 1989, 80). The first kind of convention might be called a \textit{deliberate convention}. It presupposes that it has been \textit{convened} by one or more willing agents. For example, a community might meet together, and discuss how they will organise local resources. They all agree on some set of rules, and they are thereby adopted. In this sense, a convention occurs as the product of the \textit{will} of the acting agents.

\textsuperscript{19} Indeed Ripstein himself does a good job of explicating the a priori structure of property rights (2009, ch. 4). Also see Steiner (1977).
\textsuperscript{20} Hence, I think Carmen Pavel’s criticism of libertarian approaches to pollution – that polluting activities that constitute aggression against other persons or their property should be enjoined – are mistaken. She premises her legal conventionalist approach to pollution on the notion that, outside of rules regulating aggression, we do not know what counts as aggression. (2016, 346-349) As I say above in the text, this is an error.
\textsuperscript{21} Cristina Bicchieri’s account of social norms shows that de fact regularities of behavior produce expectations not only that others \textit{will} comply, but the belief that they \textit{ought} to comply. We all commit the naturalistic fallacy of making the normal normative (2006). This is a social psychological point, however, not a moral one.
It is not clear what it would mean for contracting parties to will into existence a constitutive rule for what counts as taking something into our intelligible possession. For one thing, constitutive rules are not existentially independent from the activities they regulate because they simultaneously define them. Therefore, if parties are deliberating over how they are going to define what it means to take something into one’s intelligible possession, as if such a thing were a pre-existing activity, then the definition already exists.

There is however, another sense of social convention that does not lead us to a chicken-or-egg style paradox, and offers a good explanation of constitutive rules. The other sense of social convention refers to a regularity that is not convened by anyone, but is rather emergent. Rather than a result of deliberate, wilful, human design, a convention can emerge as the result of human interaction, where individuals severally converge on a certain way of doing things. Indeed the most interesting and complex social phenomena are usually, to use Adam Ferguson’s famous phrase, ‘the result of human action, but not the execution of any human design.’ (1782, III.II) No one invented or designed the English language, it emerged and evolved without any individual mind willing it. The particular rules that emerge that govern verbal and written communication are not chosen by anyone, but rather acquiesced to and thereby perpetuated. The peculiar history of any particular rule is irrelevant to its status as a rule. What is necessary, however, is that the particular rule was followed in a particular way, and because of its effectiveness for communication when followed in that way, it continued to be followed that way. Constant and ongoing acquiescence is a necessary part, but deliberate consent at some primordial stage is not. When a certain sign is used by a social group over time, that historical usage endows it with meaning, and once it has that meaning, it has it – it cannot be taken away at will. Of course, people can deliberately stop, for example, using certain words, but the change in meaning is not a result mere of their dissent, but from their abstention from using the words resulting in a general breakdown of usage, and hence meaning.

When one utters, “I promise to…” one in fact performs the act of promising, due to the historical and social development of what those sounds mean. If it is the case that one has a prima facie duty to keep all your promises, then this utterance binds one to a duty to perform

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22 There is equivocation in the historical literature over the two senses of convention. Hugo Grotius (1625, II.II.II.5), Samuel Pufendorf (1672, 384), and Adam Smith (1763, 109) all seem to use “agreement” to mean both consent to a deliberate convention, and mere acquiescence to, or convergence upon, a spontaneous convention. I am grateful to Mario Rizzo for useful discussion of this ambiguity in these authors, as well as his drawing my attention to it in Smith.

23 This mantle was of course taken up by F. A. Hayek in his discussions of the evolution of law and the market (1948; 1982).

24 Though the history could have been otherwise, and is in that sense, arbitrary, the ends of that rule will most likely be highly practical (Lewis, 1969, 36-42; Bicchieri, 2006, 34-32).
whatever deed followed the utterance of “I promise to…” One does not have the freedom to dissent from the rule that uttering “I promise to…” counts as promising. (Though one is free to dissent from the rule that one ought to keep one’s promises). Saying “I promise to…” does a promise (Austin, 1955).

A promise is a form of communicative behaviour, if one attempts to use it to communicate something other than it in fact communicates, one has failed to communicate at all. Alternatively, if one does some other action, whose historical and social use does not give it the meaning of a promise, one does not thereby promise. We cannot choose what our actions mean or do, we can only choose how to act. Consent, then, is entirely orthogonal to both the historical development of spontaneous norms, and to their ongoing status.

There is no reason why, in a state of nature, an convention could emerge for what kinds of actions count as, mean, or communicate, bringing something into one’s intelligible possession, and hence the intention to exclude others. Say, being physically present upon the land and placing a physical perimeter around it such as a fence, or a stamped out track. This is a simple way of identifying what which is being acquired, combined with the requirement that it be a physical act done in person, and not in absentia, so that the acquirer herself can also be identified. Of course, this statement of the rule does not exhaustively determine every possible application of it. No such statement ever could. Nonetheless, this refers to a rule that could determine what counts as acquisition, and persons would be capable of making objective judgements about what does and does not count as a correct application of it, in light of its social and historical practice. There is no reason why a state would be required for such a convention to emerge, not least because such conventions manifestly have emerged prior to states even being an extant form of social organisation. Indeed, possession evolved as the root of ownership under common law before any state positively decreed it so (Epstein, 1979; Rose, 1985).

What might the Kantian statists’ response to this be? Since they only seem to level objections against the possibility of deliberate convention upon regulative property rules, I will try to put their best foot forward from what they say in that area.

The Supposed Problem
There are two subtly different possible responses I find in the Kantian statists’ writing. Although they do not directly aim them at the notion of emergent conventions determining what counts as acquisition, I will see how these responses fare against them. What is common to both these responses is that they deny that there can be any objective criteria for what counts
as a correct application of the rule that determines which actions count as acquisition. What is required, is a single agent with authority to choose which applications of the rules are correct and incorrect. Since there can, on their view, be no objective criteria for what counts as correct application of a rule, a state is required to coercively decide which will and will not be taken as correct. Only a state is authorised to engage in such coercion. We will look at the Kantian statists’ arguments for this indeterminacy, and find them lacking. There are standards of correctness for the application of constitutive rules without having a legal monopoly on their application.

After considering a community that converges on a set of rules regulating property, Ripstein then say that even if this happened in a state of nature, there is indeterminacy over the application of those rules.


The indeterminacy over what follows from the rule in a state of nature is supposedly ‘formal rather than empirical’ (Ripstein 2009, 170). In other words, it is not merely that people could disagree with one another over what the truth is, it is that there are no criteria for what counts as the truth. There are multiple equally reasonable applications of the rule, and that is all. (Cf. Varden, 2008, 15-16) What reasons are there to think that there is indeterminacy over the application of a rule, such as one assigning meaning to certain interactions with physical objects as a signal of taking it into one’s intelligible possession?

On the one hand, a rule cannot have written into it univocal instructions determining its correct application in every instance. On the other hand, however, it cannot defer application to another rule that determines it. If the rule at the first level cannot determine its own application, then the rule at the second level, cannot in turn determine its own application (even assuming it could determine the application of the first rule). So another level of rules would
be needed, and we have an infinite regress where application is infinitely delegated to a still higher set of rules. (Cf. Wood, 2008, 68;) The correct application then cannot come from any essential empirical content of the rule itself: the correctness of any application ‘hangs in the air’ with the rule that it (attempts to) apply (Wittgenstein, 1958, §198). Given that no rule can contain exhaustive instructions for its application across contexts, potentially any application can conceivably be regarded as correct. Kantian statists take this to mean that there is indeterminacy over what a correct application of a given rule could look like. When a rule for acquisition emerges, there are any number of ways in which it could reasonably be taken to proceed. There are no objective criteria for whether an application is correct or not, all we have are our subjective interpretations (Ripstein, 2009, 171).

Stilz comes to the same conclusion, through a somewhat different route. She says that ultimately, the standard for whether or not one followed a particular rule when acting is whether one had the subjective intention to do so (2009, 48-50). Since the ultimate arbiter as to what subjective state one is in is necessarily oneself, then individuals’ private subjective states are the standard of correctness. However, if one thinks one is in a particular subjective state, then one is in that state, at least, if we are talking about purely private, subjective states, as Stilz is. So merely intending to follow a rule and actually following a rule converge, meaning that rules are entirely indeterminate.

Now suppose some dispute arises between us over whether your property right has in fact been infringed. Perhaps I have built a huge garage in my area, which blocks the sunlight to your property and makes your garden unusable. Any number of examples are possible; what unites them all is that they represent new contingencies, the disposition of which is going to be indefinite enough according to whatever original criterion of appropriation we are working with to make it likely parties acting in good faith might disagree. In our state-of-nature system, however, the interpretation of what right actually requires in this contingency is left up to you, along with the choice of whether or not to exercise your coercive rights to redress any (perceived) violation.

So let’s say that you decide my garage is a violation of your acquired rights, since it makes your entire garden unusable, and so you cross our boundary in order to prevent me from blocking the light and to exact compensation from me. If I do not agree with your interpretation of your rights, I am under no obligation to submit to you: I am an equally authoritative interpreter of justice. I may object to the rightfulness of your
boundary-crossing in this case, or, even if I concede that you had a right to exact punishment, I may (in all good faith) think that you have exceeded the bounds of the compensation you are entitled to. So I may struggle against you, and regard myself as doing so rightfully. In this situation we both regard ourselves as having a claim of justice, and since we both act in good faith, we act with full subjective right. But in our state of nature, the only thing that can decide the matter between us is a contest of strength, since both sides are equally right from their point of view. (Stilz, 2009, 48-49, emphases added)

Both the Ripstein-Varden account and the Stilz account come to the same thing: it is not really possible to be mistaken about the correct application of the rule, because there simply is no one correct application of the rule, only people’s subjective beliefs thereof.25

This argument proceeds too quickly. Stilz is too quick to jump from factual disagreement to ontological indeterminacy, whilst Ripstein and Varden simply assert the latter. It is clear that disagreement can arise, and people can make mistaken interpretations even in good faith. However, to say that there just is no standard of correctness is to altogether deny that rules can even guide action, and to deny that they guide action is to deny that they are rules at all. As Ripstein himself notes,26 rules do not need recourse to further rules in order to have application: ‘If rules can be applied to particulars, then, it must simply be possible to apply them, without recourse to further rules.’ (2009, 168-169). Indeed, the knowledge required to follow rules in practical, rather than propositional. Hence an actor need not be able to articulate precisely how a rule is to be followed in any given circumstance in order to be able to follow the rule when in fact presented with those circumstance. (Winch, 1990, ch.3) Therefore, the lack of an inner exhaustive formula for application is not a problem, because no such formula is required. The fact that there is disagreement over the application of a given rule shows that there is a rule to disagree over, rather than just two persons having different subjective mental states. To think that one is following a rule is not to thereby follow a rule (Wittgenstein, 1958, §202).

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25 They seem to embrace a Kripkensteinian nihilism about rules (at least, with regards to property rights): as Wittgenstein put it, that ‘no course of action could be determined by a rule, because every course of action can be made out to accord with the rule.’ (1958, §201) However, Wittgenstein was not, of course skeptical of rule following (Baker & Hacker, 1984), despite claims to the contrary (Kripke, 1982). Despite the possibility of plural interpretation of rules, we are still able to identify correct application of the rules.

26 Citing support from Kant (1779, VI.217; 1781, A133/B172; A137/B176ff).
Rules have a history, and a community of practitioners. The criteria for whether a given application of a rule is correct subsists how the rule is in fact applied across the practising community. The standards one points to when attempting to vindicate a given application might be historical exemplars that share particular, relevant features with the one under question, it might be to point to a written codification of the rules, or it might simply be to see other applications of the rule and realise that either one has gone wrong, or one has gotten it right. These things are public, and they can be submitted as reasons for why a given application was right or wrong, and those who are mistaken can be shown as such. The fact that persons themselves can recognise that they have gone wrong in their application of a rule, shows that there is an objective reality to that rule that acts as an external standard of correctness.

Just because one cannot ascertain every possible application from viewing one application in isolation (and indeed, one could draw any number of conclusions from just a single or even a few applications in isolation) does not mean that the rule that was therein applied has no standard of correctness. To search for a self-applying rule is to misunderstand what a rule is.

I hope to have shown that the claim that property rights, or the rules for the acquisition therefore, are indeterminate in a state of nature are misguided. The Kantian statistss say that since a rule cannot be given determinate application by itself nor a regression of other rules, that it can have no determinate application (in the case of Rispeint and Varden). They say that what counts as following a rule is subjectively taking oneself to be following a rule, only to find that under this view rules collapse in on themselves (in the case of Stilz). Rule just are objective standards against which we act, to deny that rules can have standards of correctness is to deny that there can be rules.

Given that original acquisition can indeed have determinate application in a state of nature, we will now see how the other two problems identified in a state of nature by Ripstein et al become merely apparent but not real.

3. Unilaterality

The second problem was that of unilaterality. Specifically, the problem of individuals unilaterally imposing their unilateral understanding of acquired rights on other rightholders. There are a number of different issues raised by Kantian statistss when they discuss the problem of unilaterality so it is important to pin down precisely what we are talking about.

Imposing Duties
One problem Kantian statists raise is that in a state of nature, original acquisition constitutes a power to impose obligations on third parties, namely, to abstain from violating their new property rights (Varden, 2008, 13; Ripstein, 2009, 150, Stilz, 2009, 42-44; cf. Waldron, 1988, 253). The idea is that unilaterally acquiring property imposes new duties on other by one’s own choice. The subjection of the freedom of third parties to one’s own unilateral choices – in lieu of their own consent – violates their right to freedom. As Samuel Pufendorf said,

we cannot apprehend how a bare corporal Act, such as Seizure is, should be able to prejudice the Right and Power of others, unless their Consent be added to confirm it; that is, unless a Covenant intervene. (1672, §IV.V.4)

However, since Kantians already affirm both the right to freedom and the claim that property is essential to freedom, it is truer to say that the acquisition of property particularises one’s right to freedom, rather than violates it. The right to freedom needs a property system in order for it to have application, and that is why Kant affirmed that persons have the power to acquire property in a state of nature (1779, VI.251). As Bas van der Vossen (2015) has parsed it, acquiring property is not the activation – and hence imposition – of a new duty upon others, but rather the alteration of an existing duty – to respect each other’s freedom (cf. Simmons, 2001, 220). Indeed, when we do something as menial as grow our hair, we alter the content of the existing duties others have to abstain from interfering with our bodies (and hair), but this does not count as a violation of the freedom of others simply because I did not get their consent first.

It is very strange, then, that immediately after a sophisticated and detailed account of why the right to freedom requires property, Kantian statists then go onto detail how acquiring property, where there already is none, somehow violates freedom. Given that this particular problem with regard to unilaterality has been so well put to bed by van der Vossen, I will not rehearse the debate here any further. The problem I am primarily concerned with in relation to unilateralism is that of imposing not duties per se, but of imposing one’s own subjective interpretation of duties.

**Unilateral Interpretation**

Kantian statists argue that in a state of nature, those acting in good faith can do no better than to act on their own subjective judgement of what their rights are. Even if one removes their unjustified concern about the imposing nature of acquisition, there is still the concern that
whenever a person acts on their understanding of settled acquired rights, they are only acting on their own subjective interpretation thereof. Subjecting others to one’s own subjective and unilateral interpretation of justice violates their right to freedom since they are being coerced in accordance with the subjective judgements of another person, rather than in accordance with natural Right. People are obligated to act in accordance with the actual demands of justice, not merely the best understanding thereof.

Objective standards are required because a subjective standard would entitle one person to unilaterally determine the limits of another person’s rights. If I could avoid liability by trying my best, your right to my forbearance would depend on my abilities and judgments, and so be inconsistent with a system of equal freedom. If my contractual obligations reaches only as far as I thought they did, your rights would depend on my judgment in a similar way. The point of objective standards in these contexts is not epistemic – it is not that our respective rights are fully determinate, but we have no way to discover them. Nor is it strategic: the risk of opportunistic behavior is secondary. Instead, objective standards of conduct are required by a system of equal freedom, in which no person’s entitlements are dependent on the choices of others. (Ripstein, 2009; 171; cf. Stilz, 2009, 47-51; Varden, 2008, 15-16)

As may be becoming clear, when one removes the claim that there are no objective criteria for vindicating rights claims in a state of nature. Where there are determinate standards for what counts as a person’s right, the fact that people have to act on their own subjective interpretations thereof does not present a formal problem in the state of nature. Of course, it means that persons may often get it wrong, but that is not what Kantian statists argue grounds the need for a state. Their claim is that any action that is based upon a unilateral interpretation of justice necessarily violates the right to equal freedom of others, because they are subjecting them to their own arbitrary will, rather than justice. However, where rights are indeed determinate, persons can in principle correctly apply justice and thereby act justly – subjecting others to real justice and not merely their best interpretation thereof. Subjecting someone to your subjective interpretation of justice is not problematic when it happens to be correct. The alignment of persons’ actions with correct justice is possible when we remove the claim that there are no objective criteria for indicating rights claim in a state of nature. After all, even with a state, persons still have to act on their own interpretations of the law. (Kant R7680; Bader, 2016)
The problem of unilateral interpretation, as articulated by Kantian statists, then disappears when the assumption of indeterminacy is removed. However, it is heavily interlinked with the final problem the raise for the state of nature: the necessary lack of assurance.

4. Assurance
Kantian statists do not believe the state is required because people might tend to act in bad faith, or even because even when they act in good faith, they might get it wrong. Rather, they say that there is no entitlement to compel compliance with rights in a state of nature. Even if everyone happens to have the same interpretation of rights, and in fact comply with them, this compliance is premised on a mere subjective interpretation which could change at any time, and no one is obliged to comply with the another person’s subjective interpretation of rights, and everyone is entitled to resist force wielded in their name. Because everyone’s compliance with our rights is contingent upon their happening to have the appropriate subjective interpretation thereof, we can never be assured that they will in fact respect our rights. This means that everyone is a threat, and we are thereby permitted to use force against them. (Ripstein, 2009, 157-170; Stilz, 2009, 51-52; cf. Waldron, 1996, 1540)

This worry is not chiefly about the institutional means for enforcing rights, in lieu of a monopoly on enforcement.\(^{27}\) The worry is not a technical one but a conceptual one: in a state of nature, any peace that is arrived at will be purely contingent upon the respective private interpretations of justice made by society’s members aligning. Whilst their virtue or their incentives may ensure that peace is sustained, it is not the case that anyone is obliged to continue to comply with it.

This claim, however, depends upon the prior claim that there are not objective standards of correctness for the application of rights in a state of nature. The indeterminacy of rights means that when persons enforce their private judgements thereof, others are free to resist due to their own different private judgement. When we remove the assumption of indeterminacy, however, persons are in fact duty-bound to comply with judgements of others where those judgements align with actual justice. Since there can indeed be objective criteria for what counts as a rights violation in a state of nature, it is possible to sort all the unilateral acts of enforcement into ones that are just and unjust. Everyone is required to comply with the ones that are just, but not the ones that are unjust. So whatever institution might be used to enforce

\(^{27}\) However, Varden voices such concerns too (2008, 11). See Long (2008) for why these concerns are misguided.
rights in a state of nature, so long as it enforced rights in accordance with the objective criteria for what counts as one person’s right versus another’s, we are morally obliged to comply.

5. Problems in a State of Nature are Problems in a State
The Kantian statists' claims about the indeterminacy of rules are not well-founded. Once you remove them, the problems of unilaterality and assurance disappear with them. Unilateral interpretation and execution of justice raises no conceptual problems where there are indeed objective criteria for which ones are correct and incorrect.

It bares noting that the Kantian statists’ solution to their own scepticism about the state of nature, in fact, is no solution at all. If property rights are indeterminate in a state of nature, then a state cannot make them determinate. Ripstein says that in the face of indeterminacy over how to apply acquired rights, the state has ‘public authorization to decide for everyone’ which applications will be acceptable and which not (2009, 172). If the problem really is one of ontological indeterminacy, rather than mere disagreement between persons, then the state’s decision will itself just be another subjective interpretation. It will not be coercing them into complying with acquired rights because they have no determinate application, it will merely be coercing them in accordance with the subjective judgements of its agents, who are themselves fallible human beings (Kant R7680; Bader, 2016). Since those subjective judgements can only, under this view, be made out to cohere with the rule according to the subjective judgements themselves, then there is no actual regularity being enforced, just arbitrary edicts that are backed by coercion. Unless there are determinate rules prior to the state, there can be no enforcement of determinate rules by the state. There is no ontological reality for the state to latch onto.

If Ripstein is right, therefore, that there can be no objective criteria for what counts as original acquisition in a state of nature, since the interpretation of any rule hangs in the air with it, then there will likewise be no objective criteria after a state is instituted. If rules have indeterminate application, it does not matter what pronouncements a state makes, or how codified it makes its edicts, all rules are open to interpretation, and if there are no criteria for which interpretations are correct, any use of coercion will be mere might, and not Right. (Bader, 2016)

Perhaps the Kantian statists will argue that, if the state is omnilaterally authorised, then it will have public authorisation to coerce, and hence this will be Right and not mere might. Even granting this, however, the role of natural rights goes entirely out the window (save, the natural right to be represented in any public authorisation of force). If there is no objective
criteria for what counts as an acquired right, but that the state is simply authorised to arbitrarily apply acquired rights in whatever way it’s agent subjectively deem correct, then acquired rights are doing no work at all. If the state has authorisation to interpret justice however it in fact does, then justice becomes entirely irrelevant. Whilst the exercise of might could be in some way legitimate, it would not be orderly because there can be no rule of law where there is no external standard of correctness to the state’s application of law. Without recognising the possibility of acquired rights having determinate application prior to the institution of the state, there is no possibility for states enforcing acquired rights, and Kantian Right becomes a radically democratic theory, with individual rights going straight out the window.

Conclusion
In this paper I have attempted to show that the Kantian argument that the state is a conceptual pre-requisite for a civil condition is wrong, and the conditions for a civil condition can, in principle, be met in a stateless society. Though Ripstein claims to illuminate three independent problems with achieving justice in a state of nature, they all in fact reduce to one. One doubt over the determinacy of rights claims in a state of nature are removed, as I have attempted here, the problem that any interpretation and execution of justice will be unilateral and subjective raises no conceptual problems for justice. Of course, these raise empirical problems that we hope institutions will do well in remedying. Perhaps that state could be one of those institutions. But that is not the argument but forth in the state’s favour by Kantian statists.

Given that constitutive rules that define activities such as taking intelligible possession can emerge outside of a legal monopoly, then there can be objective criteria for what counts as justice in such a context. If rights can have application then they can be enforced, and a civil condition is thereby possible in a stateless society. A state is not necessary of a civil condition.

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