

REVIEW ARTICLE

NEW WORK ON KANT'S *DOCTRINE OF RIGHT*

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Arthur Ripstein: *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009) pp. 399. \$49.95 (hb.). ISBN 978-0-674-03506-5.

B. Sharon Byrd and Joachim Hruschka: *Kant's Doctrine of Right: A Commentary* (Cambridge: Cambridge University Press, 2010) pp. 336. £65.00 (hb). ISBN: 978-0-521-19664-2.

Until relatively recently, *The Metaphysics of Morals*, Kant's final published work in practical philosophy, was pretty much unknown to English-language philosophers.¹ Concentration on Kant's practical philosophy was focused overwhelmingly on the *Groundwork for the Metaphysics of Morals* with little discussion of what it was that this work was providing the 'groundwork' for. In recent years there has been a welcome change in this regard with some attention finally beginning to be paid to the later work.² To have not one, but two, full-length detailed commentaries devoted to the first part of the *Metaphysics of Morals*, the *Doctrine of Right*, is, however, a sign that serious attention is at last being paid not just to the late work but to the specific part of it in which Kant gives his most detailed and mature views concerning law and politics.

The two works under review have quite different approaches to the *Doctrine of Right*. Ripstein largely abstains from sustained textual analysis, attempting instead an elaborate reconstruction of the arguments of the *Doctrine of Right*. Byrd and Hruschka, by contrast, pay detailed attention to specific passages and questions in the work with the aim of elaborating what they take to be its core argument. Another way of glossing this difference would be to say that Ripstein's work is intended to give an account of the import of the Doctrine of Right in such a way that the lay reader will grasp

¹There were always some exceptions to this, most notably Mary Gregor's pioneering *Laws of Freedom: A Study of Kant's Method of Applying the Categorical Imperative in the Metaphysik Der Sitten* (New York: Barnes & Noble, 1963), but few Anglo-American philosophers concerned themselves with her findings until very recently.

²For an example of some recent work on the general area, see Mark Timmons (ed.) *Kant's Metaphysics of Morals: Interpretative Essays* (Oxford and New York: Oxford University Press, 2002).

this while Byrd and Hruschka, by contrast, see their task as primarily lying within the area of legal scholarship.

Both works aim to provide comprehensive discussions of the *Doctrine of Right*. While it is arguable that neither succeeds in this, it is true that both works cover sufficient ground that it is necessary to be selective in responding to them. What I will content myself with doing here is contrasting the two discussions of the relationship between private right on the one hand and the reasons why there is a need to leave the state of nature on the other, topics that any serious reading of the *Doctrine of Right* would have to identify as key to their interpretation. The connection between the topics is that private right is the *only* form of right in the state of nature. In one sense, then, the question as to why more is needed than private right would be a significant question that Kant might be thought to answer.³ However, conversely, there is also a need to comprehend in what sense Kant views private right as actually being a form of *right* at all, something that clearly needs to be answered if Kant's philosophy of right is seen to include a sense of constraint on the possible actions of government and is not merely a form of 'positivism'.⁴ To some extent which of these is taken to be the greater danger motivates different interpretations of the treatment of private right and the need for public right.

Prior to entering into a detailed comparison of the treatments offered in the two works it is first worth pointing to an area that is only partially treated in one and avoided in the other. This is the question of the relationship between the *Doctrine of Right* and Kant's general practical philosophy. There are two distinct questions that have emerged in discussion of this relationship, only one of which is even partially addressed in the works under discussion. The first question, not seriously answered by either work, is the Rawlsian one concerning whether the *Doctrine of Right* offers a 'comprehensive' view – that is, whether it offers a free-standing and autonomous legal and political philosophy or whether it is, conversely, an application in some way of Kant's general practical philosophy.⁵ The second question, which has implications for one's view of the first question,

³When put like this, it becomes apparent that some might wish to turn to Kant to provide an answer to the Lockean view advanced by Robert Nozick, which arguably, gives no substantial account of public right. See Robert Nozick, *Anarchy, State, and Utopia* (Oxford and New York: Basil Blackwell, 1974).

⁴While it might be thought that there is little danger of such a reading of Kant, there is recent precedent for it. See, for example, Jeremy Waldron 'Kant's Legal Positivism', *Harvard Law Review*, 109 (1996): 1535–66.

⁵John Rawls famously articulated the need for a political theory that was not 'comprehensive' in the sense of not requiring justification of any concepts that are not political in themselves after abandoning the position of 'Kantian constructivism' which produces the position in his late work known as 'political liberalism'. See John Rawls, *Political Liberalism* (Cambridge, Mass.: Harvard University Press, 1993). The application of this view to the analysis of the *Doctrine of Right* occurs in Thomas Pogge 'Is Kant's *Rechtslehre* a "Comprehensive Liberalism"?' in Timmons (ed.) (2002).

concerns the relationship between the universal principle of right and the categorical imperative.⁶

The second question is one that Ripstein undertakes to answer in an appendix to his book, not as part of the main argument of the work. This is unfortunate since it leads to a missing step in the general argument and also leaves the reader with the impression that this question is not one that Ripstein regards as particularly significant and, indeed, when he finally turns to addressing it he indicates that one of the main aims of his treatment has been to explain the normativity of right in Kantian terms *without* requiring any reference to Kant's broad project in practical philosophy.⁷ This is clearly meant to make the Kantian approach appealing to those not prepared to accept the broad outlines of Kant's practical philosophy, but also has the consequence of courting possible incoherence within the Kantian approach to practical questions.

When Ripstein does turn to this question, he correctly establishes that the reason why there is alleged to be a problem concerning the status of the *Doctrine of Right* turns, not on the universal principle of right directly, but rather upon the authorization to use coercion that Kant derives from it, an authorization not drawn from the categorical imperative in Kant's critical works of moral philosophy. The problem pointed out by the categorical imperative was merely one of showing the internal problems with adopting certain kinds of maxims. The problems in question emerge as *internal* to the adoption of such maxims. However, the reference to coercion in the discussion of right includes more elements than emerge from the categorical imperative alone as it builds in an essential reference to external freedom and, with external freedom, come questions that directly concern not merely the consistency of willing (however that is understood) but the relationship of such willing to the freedom of others. That is why the universal principle of right itself discusses the coexistence of everyone's freedom in accord with a universal law. Ripstein spends a lot of time, in his discussion of this question in the appendix to his book, on the role of postulates in Kant's

⁶Essentially, inasmuch as this question has been asked in the secondary literature to date, it has been with a negative. For the most influential such response, see Marcus Willaschek 'Why the *Doctrine of Right* does Not Belong in the Metaphysics of Morals: On Some Basic Distinctions in Kant's Moral Philosophy', *Jahrbuch für Recht und Ethik*, 5 (1997): 205–27 and Marcus Willaschek 'Right and Coercion: Can Kant's Conception of Right Be Derived from his Moral Theory?', *International Journal of Philosophical Studies*, 17 (2009) No. 1: 49–70.

⁷For an argument against this view, a view all too prominent in contemporary treatments of Kant's political philosophy, see Katrin Flikschuh, *Kant and Modern Political Philosophy* (Cambridge: Cambridge University Press, 2000). Flikschuh articulates her opposition to this approach in terms of a defence of the place of metaphysical arguments in political philosophy. Notably, however, her defence employs a conception of metaphysics that is not derived from Kant. For an alternative defence of the need to see the political philosophy within the project of the practical philosophy as a whole, see Gary Banham *Kant's Practical Philosophy: From Critique to Doctrine* (Basingstoke: Palgrave Macmillan, 2003), chapters 6–8.

practical philosophy but the authorization to use coercion on the basis of the universal principle of right does not refer, in the first instance, to any postulates. It simply relates the universal principle to the problem that a certain use of freedom could occur that is inconsistent with the universal conditions of freedom. The conceivability of this posits a self-contradiction of freedom and to cancel such a self-contradiction it becomes necessary to restrict freedom in order to realize it.⁸ Such a pattern of restriction and realization was already established in the *Groundwork* where, however, it was not fully worked out in inter-personal terms and these latter, involving, as they do, relations of persons towards each other in space, unavoidably require restraint. The suggestion that the categorical imperative is thereby distorted fails to incorporate the understanding of the difference it makes to take serious account of others.

Ripstein's response to the relationship between the universal principle of right and the categorical imperative, even if inadequate, does attempt to address part of the point of discussing whether the *Doctrine of Right* is part of a 'comprehensive' view of practical philosophy, but the broader question is not addressed by him. Ripstein's account begins from an examination not of the universal principle of right or the authorization of coercion but rather from what Kant claims is the 'one innate right', namely, the right to freedom or 'independence from being constrained by another's choice' (Ak. 6, 237). The point of beginning here, for Ripstein, is to emphasize the distinctiveness of Kant's conception of justice, a conception that is not, unlike contemporary ones, such as that of John Rawls, described in terms of amounts of certain benefits (such as 'primary goods') but instead focused on the ability of people, individually and collectively, to set their own purposes (33). Ripstein presents the 'innate right of humanity' as 'the individualization of the Universal Principle of Right' (35) but what is meant by this is not a commitment to a principle of *methodological* individualism but rather, Ripstein states, the exact reverse, since the core part of the principle for him is 'a model of interaction' (42) not a pure model of individuality.

The consequences of focusing on this notion of 'innate right' as the core element of right are manifold. Among the beneficial elements of such concentration is clear demarcation of the Kantian conception of right not merely from the Rawlsian emphasis on 'primary goods' but also from liberal focus on 'harm' as the primary locus of wrong action. What is wrong is not one thing, an outcome, produced by any number of other things that are, in themselves, potentially neutral. Rather, what is wrong is a violation of the conditions of independence, and it is so wrong regardless of whether any

⁸The authorization of coercion is a schematization of the universal principle in right in accord with Kant's general justification of practical schematism in the *Critique of Practical Reason*. All citations from Kant's works other than the First Critique are to the Prussian Academy of Sciences edition, *Kant's Gesammelte Schriften* published by Georg Reimer and Walter de Gruyter, abbreviated henceforth according to volume number and page. Here I am referring to Ak. 5, 67–71.

further 'harm' is produced or not. Wrong resides entirely in use of a person for purposes that are not those that the said person has adopted as their own. However, it is next necessary to move, as Ripstein does, from the area of 'innate right' to 'acquired' rights in order for private right to be fully articulated. Now, in order for there to be such a thing as private right it is necessary to be able to explain what the province is that we can term private or, in other words, to describe the possibility of something's being 'mine' as opposed to yours. This requires, on Kant's view, a postulate of practical reason with regard to rights (Ak. 6, 250). This postulate allows for a close relationship to be envisaged between the exercise of the independence specified in the 'innate principle' and things that are external to oneself. There are many problems in working out how it can be that there are rights to such things that are external to oneself, but the first point that is pretty obvious is that if conceptions of ownership are justified at all, such things could, in principle, belong to anyone, and so only contingently belong to me, if they do in fact belong to me. In this respect at least, acquired rights – if there are any such – are different from the innate right, for the point of the innate right is that it does not specify a relationship I contingently hold to anything since, without the innate right being given, I would have no rights to anything at all. Therefore, the innate right is the necessary condition of all acquired rights, and – unlike any given acquired right – is a necessary right.

Given that acquired rights relate to things that would, if granted, still only have a contingent relation to whoever has them, the key thing about them cannot concern the *actual* things given by them. In other words, it cannot be a material principle, but must rather be a formal one that guarantees not the specific thing had, but rather *the right* to the thing that is had.⁹ The formal principle in question will have to be consistent with the innate right previously specified, so what it will govern will be the system of reciprocal freedom. Therefore, if there are acquired rights, then the possession of such rights would have to fit the conditions of reciprocal freedom, which is as much as to say that possession of them cannot be grounded on depriving others of an element of their freedom. If there are things that exist external to us, then such things would be capable of being used by each of us in the context of pursuing our purposes, but if others were able to prevent us from using them, then they would create a circumstance in which the actualization of purposiveness would be prevented. Since it would be this, rather than the possession of acquired rights, that would violate the system of reciprocal freedom, it follows, on Kant's indirect argument, that there is nothing 'wrong' in the possession of acquired rights.

This generic argument for the existence of acquired rights allows the postulate to move us from the innate right to the area of 'private' right.

⁹In this respect, there is some congruence here between the Kantian approach and Bentham's suggestion that property rights govern not things held but *the rights* to the things held.

Private right can be characterized generally as the area of right that concerns relations between what is 'mine' and what is 'yours' without having to invoke directly the notion of a sovereign power.¹⁰ This characterization may suggest that it is entirely concerned with questions of property or ownership but, while there is a sense in which this is correct, it does not entirely capture what is at work for Kant in the area. For Kant, private right concerns 'acquired' rights; and what can be acquired, on his view, can be described as one of three types of thing: either objects, performances of deeds by others, or a relation to another that is in some sense akin to the relation to objects that have been acquired. These notions are specified by Kant as property right (right over an object), contract right (right over the deeds of another) or status right (right over another like that over an object).

Looking more closely at these three forms of private right, the first point that can be made is that they involve a notion of trespass as, if there is a right to things external to one, this right must be one that does not merely involve a coercive authorization, but this coercive authorization must be legitimated in such a way as to demarcate the regions that are under one's own control and from which one can legitimately exclude others. Trespasses will be the form of wrong in relation to such acquired rights, either in the form of damage to what one has acquired or in relation to violation of the conditions of one's legitimate authorization of exclusion of others. In either case, there will be a limitation set on others as without this limitation the ability to independently exercise one's purposes will be forfeited. As Ripstein rightly emphasizes, this authorization is not dependent on questions of scarcity or need but on 'the connection between having means and setting ends' (67).¹¹

There are two questions that emerge after the details of the discussion of acquired right. One concerns how it is that what is privately right can be right in a sense without requiring, for the ground of its right, some reference to a civil society. The other concerns what it is about the condition of the state of nature (within which private right prevails) that requires leaving it and entering the civil condition of public right. In response to the first question Ripstein has a general answer that I will not investigate further. This is simply that the form of interaction involved in private right does not

¹⁰This is my definition, not one given by Ripstein, who gives no parallel generic description of private right.

¹¹There are interesting questions about the relationship between the three forms of acquired right and, in particular, over the specific question of status right, since the latter includes the controversial area of marriage right. Ripstein attempts to deal with this latter in an extended footnote though his response to it is, in my view, somewhat inadequate. Suffice to say, however, Ripstein rightly emphasizes that the discussion of marriage right for Kant does not involve phenomenology but, rather, an account of the way in which objectified relations with others can be rightful. Why Kant includes teleology in this account, the sexual asymmetry in the relation, and the heterosexism involved, require lengthier discussion.

depend on positive law, as its 'structure' does not require the specific form of authorization that is involved in public right.¹²

The question concerning what it is that is faulty with the state of nature such that it is necessary to enter the civil condition receives a chapter-length discussion in Ripstein's work and is worth both pursuing in detail and contrasting with the alternative account given by Byrd and Hruschka. As follows from the account of the state of nature given thus far, Ripstein describes it as 'a pure system of private right' (146) so that the question of the authorization for civil society is equivalent to the one of asking why additional authorizations are required for social relations other than those given in such a private set of connections. The short version of Ripstein's general argument is that the state of nature is 'morally incoherent' as, on his view, you cannot acquire a right to anything in it. This first criticism of the state of nature is, in fact, the key one, but to it he adds two others, namely, that acquired rights cannot be enforced in the state of nature and that there are no objective standards in the state of nature enabling application of rights to particulars. The key point about these criticisms is that they do not reflect a view of the baseness of the people in such a state.

Since, on Ripstein's analysis, the problem with the state of nature is not, in the first instance, an anthropological one, it remains to ask what it is about it that does not enable acquisition to take place in it. The claim made here is that, although the *act* of taking possession of something has a form that does not require positive law and can thus be done unilaterally, the *power* to acquire something requires 'an omnilateral will to make the unilateral will binding on others' (150). A number of questions immediately arise concerning this claim. Since it invites us to view the need for reference to the 'omnilateral' will as required for something to be *binding* on others, it may appear to follow from this claim that there is no rightful relation in private right at all, despite Kant's apparent commitment to securing the rights in this domain as a form of constraint on political power.¹³ Part of Ripstein's answer to this focuses on the authorization of coercion that is connected to acquired right. This is, however, an odd route for his answer to take since the authorization of coercion is connected, on his own analysis, to the innate right to freedom and that innate right is the apparent

¹²Ripstein does not, however, derive from this point what I take to be its corollary, which is that there is a form of *right* in the state of nature as he assumes that civil society is equivalent to a rightful condition. Therefore, while the 'structure' of acquired right does not require reference to the specific authorizations of public right, it does, for Ripstein, in order truly to be justified as a form of *right*, require that there is a civil condition. Conversely, I assume that if the authorization of private right is one that does not require reference to the conditions of public right this is equivalent to saying that private right really is a form of *right* even outside the civil condition.

¹³Another way of putting this point is that if acquired rights are normatively grounded only on the 'innate right', then they are forms of natural right, not something granted in the first instance by the social contract; but if that is correct, then how can the 'binding' force of them require reference to the act that establishes the social contract?

normative ground for acquired right. Since these points flow from Ripstein's own analysis, it is far from apparent how the authorization of coercion in relation to acquired right introduces a new factor that requires the invocation of a condition that effectively moves us to the need for a civil power. Ripstein's real claim here would appear to be that the authorization to coercion, if connected to a change in the status of objects external to oneself, creates a proto-social relation, since others are affected by it and if they have not authorized my acquisition, then coercive acts against them would be faulty. This is why there has to be a reference to what Kant terms a 'possible united *will*' (Ak. 6, 258). Note, however, that there is only a *possible* will here invoked, not an *actual* one, and similarly, just after making this point, Kant refers to 'the act of a general will (in Idea)' (Ak. 6, 259). Since it is a general will 'in Idea' and since ideas are not to be met with in experience, it is clear that this is *not* equivalent to saying that for the initial acquisition to be justified, there must be *existent* a civil condition, only that the room to one is left open.¹⁴

Ripstein's analysis requires that public authorization be deemed both actual and required for property (and hence, the other forms of private right) to be forms of right at all. This ensures that the only limitation on such authority that is produced by the form of private right is that acquired rights cannot be banned entirely by such an authority. This constraint is not an expansive one and effectively seems to collapse acquired right into 'innate right'. In any case Ripstein is explicit that on his view, 'Kant's argument shows that the private is only rightful in the context of the public' (156). This does not appear to me to be Kant's argument and, if it were, it would seem that Kant would lose any relation to the natural law tradition.

The other two reasons why Ripstein claims that the state of nature is faulty are, by contrast, ones that are explicitly stated by Kant in a form that is much like that given by Ripstein. First, there is a problem with how to *assure* rights in the state of nature. In the situation of being outside the civil condition there is no conclusive way of *enforcing* rights and, due to this, not only are my own rights not secure but I have little reason to treat the rights of others as secure. This point seems to require an invocation of the view of the baseness of human beings, and is so taken by, for example, Otfried

¹⁴See Elizabeth Ellis, *Kant's Politics: Provisional Theory for an Uncertain World* (New Haven, CT: Yale University Press, 2005), chapter 5, where she formulates a principle of provisional right that she claims involves leaving open the possibility of transition to a rightful condition. Notably, it does not involve us moving directly *to* a rightful condition, whereas Ripstein appears to move from the condition of private right directly to a principle that authorizes the existence of a civil and public right. For critical reflection on Ellis's account and on the general question of how it is that there is a form of right that is not directly public, see Gary Banham 'Publicity and Provisional Right', *Politics and Ethics Review*, 3 (2007) No. 1: 73–89.

Höffe.¹⁵ Ripstein denies this, despite the fact that Kant explicitly invokes the claim that the absence of enforceable rights in the state of nature entitles one to presume that others are evil (Ak. 6, 307). The reason why this is not taken to involve the anthropological assumption that Höffe invokes is because Ripstein understands this claim merely to involve the view that others will encroach on one (given mutual contact) and that there will be nothing to authorize the guarantee of one's rightful acquisition other than the 'common and powerful will' that could exist in a civil condition. Notably, this argument, unlike the one given in relation to the first condition, does directly invoke the will as the basis for *actualization* of the right by means of enforcement, not, however, as Ripstein's first argument sought to do, in terms of the conceptual possibility of the acquired right.

The third problem that Ripstein identifies with the state of nature concerns a claim about the indeterminacy of the general rules that are expressed in the form of private right. Application of such general rules to particulars is impossible, so it is suggested, without some guidance. This guidance is understood to be *normative*, not empirical or descriptive. To apply the general rules to particulars requires *judgement* and if this judgement devolves only to private parties without reference to an agreed common arbiter there is no way that the result reached can be said to follow authoritatively from the application of the general principle. In order for an objective result to be given there needs to be something that can finally determine what the basis of such a result is. This would be the public authority, but this authority has first to be *established*.¹⁶

There are problems with the ways in which Ripstein's account justifies the move from private right to public right and a number of these are brought out by a lengthy passage from the *Doctrine of Right* that is given in the first chapter of Byrd and Hruschka's study. In this passage, Kant affirms a number of points that certainly do not receive emphasis or get given clear explanations by Ripstein. First, Kant stresses here that two of the three powers of the 'juridical state' are 'states of *private law*' (Ak. 6, 305), second, that public law contains 'no additional or different duties' to private law and third that 'the substance of private law is the same in both' (Ak. 6, 305). These three points amount to three types of objection to Ripstein. First, if the justification that can be given of two of the three forms of power are able to grant us only a notion of private law and it is only with the third (the judicial power itself) that we justify the civil condition, then how can his

¹⁵See Otfried Höffe *Kant's Cosmopolitan Theory of Law and Peace* (Cambridge: Cambridge University Press, 2006).

¹⁶Interestingly, in pointing out this matter, Kant directly connects the question of the state of nature to problems of relations between states, which, without an agreed authority standing over them, are in a state of nature with regard to each other (Ak. 6, 266). The relationship of the general argument concerning the state of nature to questions of international right was explored in some detail in Banham (2007) but is also a question returned to in Byrd and Hruschka, chapter 9. Considerations of space prevent further discussion of this here.

argument essentially suggest that there is only really right as such in the civil condition? Second, if public law contains no additional or different duties to private law, then how can the justification of public law be given through authorization to coercion that does not exist for private law? Third, if the substance of private law is the same in both, then how can be it correct to claim that private law does not really justify acquisition at all without reference to an actual rather than merely possible omnilateral will?

If there are legitimate questions for Ripstein's account in this citation and if Byrd and Hruschka's work begins with it, then it would be reasonable to assume that the latter's book will include a discussion of private right's basis and insufficiency that would be distinct from that of Ripstein. Like Ripstein, however, Byrd and Hruschka start from the innate right to freedom. So too, as does Ripstein, they stress that private right is a form of right which can be derived a priori from reason but about which there is constant conflict in terms of application. Therefore, in response to the claim that the 'substance' of private right is the same both in the state of nature and in the civil condition, Byrd and Hruschka emphasize the problem of indeterminacy in the state of nature. However, unlike Ripstein, Byrd and Hruschka emphasize both that there are states 'in accord with right' (such as patriarchal societies) without being states *of* right, and that we have rights prior to entering a judicial state which ensures that they do recognize that there are *rights* in the state of nature, rights that constrain the actions of the juridical state in a more than liminal sense. Similarly, following the passage from the *Doctrine of Right* with which their work opens, Byrd and Hruschka emphasize the distinction between the justification of the judicial power (as what *establishes* right) and the justifications of the other two powers (which latter can, alone, form *private* law). Following from this emphasis – and in accord with the point that two powers that belong within the civil condition are powers that also belong to private law – Byrd and Hruschka distinguish, in a way that Ripstein does not, between two models of the state of nature in the *Doctrine of Right*.

In making this distinction between two models of the state of nature in the *Doctrine of Right* Byrd and Hruschka emphasize first Kant's references to a number of things as original concepts, including innate right. All the concepts so described are grouped together by the authors into a picture of the original state. By contrast to this original state model of the state of nature, they set up also a notion of a contingent state of nature. The original state of nature is composed, according to the model developed by Byrd and Hruschka, of the *lex iusti* which is 'the law of what is externally right' (52). In the original state such a law is composed of natural law. By contrast, the contingent state of nature is composed of the *lex iuridica* which describes the juridical nature of a concrete situation. The first describes the *form* of what is right while the second describes the *substance* of what is right (and hence it is to this latter that Kant is referring when he claims the 'substance' of private law is the same both in the state of nature and in the civil condition).

They are both distinct from the *lex iustitiae distributivae* which is essential to public right and in no way part of private right. The *lex iusti* is what establishes that right is, as such, *possible* through the exposition of the original concepts that are required to comprehend it. The *lex iuridica*, by contrast, represents the acts and circumstances that are relevant when acts are committed while it is only the *lex iustitiae distributivae* which shows that the rights we have are held *necessarily* by inserting them into a juridical order.

After clarifying these points initially, Byrd and Hruschka turn to developing the area of private right, beginning, as did Ripstein, with a discussion of innate right. However, while Ripstein presents 'innate right' through the prism of independence, Byrd and Hruschka emphasize that Kant discusses two forms of external freedom with independence only being the 'negative' form and they identify this construal of independence with the condition of acting in accord with the universal principle of right. A positive conception of external freedom, by contrast, is given in the notion of dependence on laws of reason, though this tends to get assimilated rather quickly by Byrd and Hruschka to the existence of public laws in a juridical state. Moving from innate right to external freedom, Byrd and Hruschka again move to the notion of acquired right, as did Ripstein. However, unlike Ripstein, Byrd and Hruschka emphasize that the basis of acquired rights is a 'permissive law' (Ak. 6: 247) which gives an authorization which could not be got from mere concepts of right as such. This notion of permissive law is one that Byrd and Hruschka are careful to distinguish from the more famous idea used in *Perpetual Peace*. The notion of permissive law in *Perpetual Peace* essentially authorizes something that would not otherwise be permissible while the idea in the *Doctrine of Right*, by contrast, is rendered equivalent to the notion of a 'power-conferring norm'. The point of emphasizing the notion of permissive law, however, is that it leads Byrd and Hruschka correctly to emphasize that acquired rights are authorized by laws of reason, not by the sovereign or any specific concepts of public right. In fact, this permissive law produces a *requirement* that the state, if it is truly in accord with right, must fulfil and is not something that the state rightfully first creates.

Byrd and Hruschka do not provide the same detailed discussion of acquired right in relation to its specific elements as is given by Ripstein. They do, however, include an account of the relationship of the justification of acquired right to the notion that there is an original right to a place on the earth, a point that brings out more closely than Ripstein's analysis, the relationship between the innate right to freedom and the general basis of acquired right. It is in relation to this sense of an original right to a place on earth that the argument is first made by Kant for thinking that there is an omnilateral will and noting this makes clear that the conception of this will is not merely *a priori* but, also, as original, is tied to the justification of private right in general and hence cannot be sufficient to move us to the

notion of public right. Instead, what does lead to the notion of public right is the contradiction in conception that arises when we try to conceive of willing to be in a state that inherently lacks security. In other words, it is by testing the conception of the state of nature in relation to the categorical imperative that we arrive at a demand for public right.¹⁷ However, if that is correct, then one thing is needed which neither of the books under review provide in sufficient detail, namely, an account of the systemic relationship between the categorical imperative and the conditions for the application of the principles of right.

The notion of the omnilateral will is, considered in relation to the *lex iusti*, only an *idea* and not an invocation of anything other than what is *possible*. This is sufficient to explicate what, in the state of public right, appears as public lawgiving in the form of specific positive laws, laws grounded in their reference to this idea of the omnilateral will and its *possible* consent. By contrast, the justice of the marketplace, understood as justice that covers exchanges, is one that requires the *reality* of possessed objects and this covers laws of property and contract law, completing thereby the circuit of private law. Even this element of public right is essentially not distinct in nature, however, from what is justified purely privately, so that Byrd and Hruschka, in a way quite distinct from Ripstein, make manifest that the real specificity of public right resides in the presence of what Kant terms 'distributive justice' which is the establishment of publicity as the basis of law through the institution of a law-governed situation. This institution addresses the problems specified in the state of nature by Ripstein and it is this element of public right that is truly what is responsible for the form specifically of *public* right, the form, namely, of publicity itself.

There is a great deal more than I have thus far suggested covered in both these books. In addition to the topics discussed above, Ripstein's book also contains five chapters dealing with public right. Both works also consider questions of international and cosmopolitan law, while Byrd and Hruschka also give an extensive account of the different views offered by Kant in the development of his philosophy of right. Byrd and Hruschka also provide a detailed discussion of Kant's table of contracts and appendices on the nature of the logic of 'ought' implies 'can' and a discussion of the system of rules of imputation. In different ways, both these works are essential reading for anyone who has serious interest in Kant's philosophy of right.

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¹⁷Ripstein's suggestion that there is something conceptually problematic about the state of nature is thus correct in a certain sense but, since Ripstein does not clearly define this sense, his view is still problematic in the ways earlier suggested.