

KANT'S JURISPRUDENCE:

Beyond Natural Law and Legal Positivism¹

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The notion of «private right» in the Kantian state of nature should be reconsidered². Instead of conceiving of it in terms of pre-institutional innate and acquired rights, the distinctively Kantian proto-legal normativity in the state of nature is constituted by «unconditional hypothetical principles» of the following form: «if and only if (and once) we find ourselves in a rightful condition, then we should establish a regime incorporating innate and acquired rights». These principles, as opposed to the particular private rights that they refer to in the consequent, normatively constrain the state of nature. A complication emerges towards the end of my paper: within a Kantian framework, these principles' shared antecedent expresses a practical necessity (the unconditional duty to enter a rightful condition). One objection to my proposal is that this necessity cannot be vindicated when *all* private rights (innate as well as acquired) are present in the state of nature merely in the hypothetical and conditional form that I introduce. Instead of seeking an alternative «Archimedean point» for establishing the practical unavoidability of having to enter a rightful condition, my response reinterprets the antecedent's inescapability along Axel Honneth's Hegel-inspired method of «normative reconstruction». Ultimately, the normative authority of the hypothetical principles' consequents (i.e., the specific private-right requirements à la Kant) is sourced *within* the institutions and practices of citizens who are always *already* entangled in the process of realizing a rightful condition.

¹ I am indebted to the audience at a conference at the University of Vienna dedicated to Axel Honneth's work. Moreover, I profited a lot from detailed conversations on earlier drafts with Alyssa Bernstein, Sorin Baiasu, and Herlinde Pauer-Studer. This project has received funding from the European Union's Horizon FP7 research and innovation programme under grant agreement No 249377.

² References to Kant's works will be given by the page numbers of the relevant volume of *Kants gesammelte Schriften*, which appear in the margins of most translations.

1. A Spectrum of Options and the Interpretive Landscape

We can conceive of the debates concerning the status of private right in Kant's jurisprudence along a spectrum. Close to one extreme end of this spectrum are Kantians like Sharon Byrd, Ernest Weinrib, and Hans Friedrich Fulda whose interpretations of the private right sections in the *Doctrine of Right* come close to endorsing an almost Lockean conception of property, contract, and status rights in the state of nature³. The qualifier «almost» is important because even the aforementioned interpreters acknowledge Kant's opaque contrast between provisionally- and conclusively-acquired rights; a contrast that rules out a straightforward natural rights reading of Kant. Towards the other extreme of the spectrum are scholars such as Arthur Ripstein, Jeremy Waldron, and Alan Brudner, who, again to varying degrees, present Kant's legal philosophy in an almost positivistic light⁴. However, even this second camp does not take the two radical steps that I want to investigate in this paper, namely, first, to incorporate the state of nature version of the innate right to freedom into provisional private right and, second, to do away with the notion of conclusive rights outside of the rightful condition altogether.

Let us begin with Sharon Byrd in order to render more concrete this contrast among Kant scholars. Byrd's theory of the acquisition of private property (but also her exposition of contractual and status obligations), i.e., objects of choice external to ourselves, illustrates well a commitment to robust pre-institutional acquired rights. Importantly, and this makes Byrd's account a paradigmatic representative of the first camp along the spectrum, private right does *not* exclude the possibility of imposing obligations on others, even if this imposition is initiated unilaterally and in the absence of shared public institutions of law-giving and law-administration⁵. At a crucial point she summarizes:

³ S. Byrd, «Intelligible Possession of Objects of Choice», in L. Denis (eds by), *Kant's Metaphysics of Morals. A Critical Guide*, Cambridge University Press, New York NY 2010, pp. 93-110; E. Weinrib, *The Idea of Private Law*, Harvard University Press, Cambridge MA 1995; H. F. Fulda, *Kants Postulat des öffentlichen Rechts* (RL § 42), in «Jahrbuch für Recht und Ethik», 5, 1997, pp. 267-290.

⁴ A. Ripstein, *Force and Freedom. Kant's Legal and Political Philosophy*, Harvard University Press, Cambridge MA 2009; J. Waldron, *Kant's Legal Positivism*, in «Harvard Law Review», 109(7), 1996, pp. 1535-66; A. Brudner, *Private Law and Kantian Right*, in «University of Toronto Law Journal», 61(2), 2011, pp. 279-311.

⁵ The details of Byrd's argument are complex and rely on an alternative interpretation of the «postulate of practical reason». Normally, interpreters have

Nothing in Kant's arguments for individual rights to have objects of choice as one's own depends on the existence of a state. Indeed Kant notes that without a right to property and other objects of our choice there would be no duty to move to the civil social order. Property rights therefore are rights we have in the state of nature. They do not depend on social approval any more than our [innate; C.H.] right to freedom of choice in general depends on social approval and recognition. The sole purpose of the state for Kant is securing rights we already have before leaving the state of nature and moving to the civil state. That state secures our right to freedom and our rights to external objects of our choice⁶.

Different from many other Kant scholars, Byrd neither regards the unilateral imposition of obligations (that is implied by declaring external objects mine⁷), nor the indeterminacy of the content of the provisionally acquired rights⁸ as rendering these rights unstable or incoherent in the state of nature. The problem of intelligible possession is exclusively one of security and enforcement, according to Byrd's interpretation. Echoing the Lockean proviso, Byrd claims that the unilateral imposition of obligations in the state of nature is permissible, «assuming I have the object within my power to possess and my taking of the object into my possession would not violate anyone else's freedom of choice»⁹. She also introduces a complex argument, that I cannot fully summarize here, according to which unilateral im-

read the postulate as providing a justification for doing something that would otherwise have been impermissible, i.e., taking something external exclusively for oneself. Rather, according to Byrd, the postulate should be interpreted as a «power conferring norm» that empowers every person to have external objects as their own, something that is not impermissible in the state of nature because each individual's unilateral taking expresses the united will of all (again, this is perfectly-well feasible in the state of nature already). See S. Byrd, «Intelligible Possession», cit., pp. 95-105.

⁶ Ivi, p. 94.

⁷ The problem of unilaterally imposing obligations is central to Ripstein's argument for why Kant regards a rightful condition as indispensable. A. Ripstein, *Force and Freedom. Kant's Legal and Political Philosophy*, Harvard University Press, Cambridge MA 2009, pp. 145-181.

⁸ The problem of the indeterminate content of provisional rights is central to Waldron's argument for why Kant regards the creation of a system of positive law (and courts conclusively interpreting it) as an unconditional normative demand. J. Waldron, *Kant's Legal Positivism*, in «Harvard Law Review», 109(7), 1996, pp. 1535-1566.

⁹ S. Byrd, «Intelligible Possession», cit., p. 105.

position of the obligations that flow from acquired rights is justified by Kant because «the will of the original community [of the earth; C.H.] is to divide the land and it is this will to divide that makes the individual's will to acquire a particular piece of land legislating for all others». And Byrd concludes: «The individual will to acquire a piece of land is contained in the original community's united will to divide the land»¹⁰. It is important to see that all this takes place in the state of nature. The united/omnilateral will, according to Byrd's reading, is not referring to the republican state and society approving of a particular distribution of property; all that is needed for property-related obligations to be imposed in a legitimate way is that the property acquisitions performed by individuals express the «possible united will» of the hypothetical original community of the earth.

Also the content of the acquired rights in question can be fully determined in the state of nature, according to Byrd. In order to set the boundary separating your property from mine and the specific normative incidents (duties, responsibilities...) that come with ownership of a particular object, omnilateral and institutional action is not necessary. With the exception of the capacity of securing these rights, that only the state can ensure, creating a rightful condition and public law does not make a normative difference. It is true that even Byrd's reconstruction of Kant's argument eventually needs to account for the need to move from provisional towards conclusive acquired rights. But the necessity of a republican state and constitution is purely empirical and concerned with securing fully-specified private rights that remain unaltered concerning their normative status and content. This certainly is a very condensed reconstruction of a contemporary, Kant-inspired, conception of private right. To my mind, Byrd's interpretation of the Kantian state of nature is the one that gets closest to natural law varieties of this thought experiment and the role it plays in vindicating legal normativity and juridified («verrechtlicht») institutions.

Let us move to the other extreme end of the spectrum of Kant interpretations, i.e., those philosophers who consider Kant's jurisprudence a close relative of legal positivism. Alan Brudner's main target is Ernest Weinrib's influential attempt to establish private law as a free-standing and autonomous legal enterprise, one that cannot be reduced to the status of a mere instrument for the realization of public

¹⁰ Ivi, p. 108.

and political goals. One of the two central components¹¹ of Weinrib's project of rescuing private law from this «functionalist» attack, which denies private right its sovereignty and independence from being subjected to non-private purposes, consists in an appeal to Kantian right. The latter is supposed to provide private law's "normative content" by means of supplying the aforementioned robust conceptions of innate and acquired rights, which, according to Weinrib (and Byrd), constitute a sphere of legal norms that is not dependent for its existence on institutions in charge of creating and administering positive law. The complexities of Weinrib's Aristotelian and Kantian conception of private law cannot be discussed here. The central feature of this conception that we need to keep in mind is that the autonomy of private law can only be rescued by taking on board Kantian right, according to Brudner. Only it provides sources of legal normativity that do not threaten to render private law into an instrument of the politics of distributive and consequentialist justice. Brudner summarizes Weinrib's conception succinctly: «We might say, if law (as Weinrib famously put it) is like love, then [Aristotelian; C.H.] corrective justice had to find its normative soulmate. It had to embrace a theory of substantive justice that uniquely filled the lacuna in its form, and whose longings for a suitable form of realization it could reciprocally fulfill»¹². And it is Kantian right, especially the idea of equal freedom amongst purpose-setting and purpose-pursuing agents who potentially have an impact on one another, that promises to fulfill these purposes, according to Weinrib.

Brudner dashes all these hopes. He claims that «with the exception of trespass to the person [i.e., innate right; C.H.], private law vanishes in Kantian Right. [T]here is no possibility for an autonomous private law in Kantian Right and there is, indeed, a logical progression from Kantian Right to the very functionalism that Weinrib decries»¹³. Brudner argues that in a fully-developed Kantian juridical regime private law becomes completely subservient to the supreme united and general will. The supposedly provisionally-acquired rights of the state

¹¹ The other component of Weinrib's conception of private law is an Aristotelian conception of corrective justice, which is supposed to provide private law's structure. A. Brudner, *Private Law and Kantian Right*, cit., pp. 281-283.

¹² *Ivi*, p. 283.

¹³ *Ivi*, p. 284. Brudner is not at all opposed to the idea that the kind of autonomous private right that Weinrib tries to defend in Kantian terms is possible. Brudner's is a Hegelian conception of private right. He concludes his essay: «For a bridegroom for corrective justice, one must look, not in Königsberg, but in Berlin». *Ivi*, p. 311.

of nature do *not* constitute any constraint whatsoever on the legislating, executing, and adjudicating institutions of the Kantian republic. It is not even the case that positive law merely *overrides*, for example, those property rights that had been provisionally-established in the state of nature; rather, once the civil condition is entered, «there is nothing constituted that could subsequently be overridden by public justice. [...] If a claim is rejected by the united will, its force is nullified, not defeated and preserved; if accepted, the property right is constituted by public justice, not protected as constituted beforehand». And Brudner concludes: «His [Kant's; C.H.] depreciation of private acquired rights is the obverse of his idolization of the general will»¹⁴.

One clarification is in order to avoid misunderstandings, on the one hand, and to prepare the grounds for my radicalization of Brudner's argument, on the other. Many passages in Brudner's critique of Kantian private right make it seem as if he rejects the idea of private law in all of its possible formulations. However, this impression is incorrect. First and foremost, it is not the case that private right is considered impossible qua element of a rightful condition. Property and contractual rights do of course play a central role in any legal structure worth that name. Even the functionalist targets of Weinrib's criticism acknowledge this fact. However, according to Brudner, Kantian right is incapable of providing a freestanding, i.e., non-instrumentalist and non-public, justification for these private law institutions and their specifics. Brudner allows private right to exist but only "post-institutionally", that is, *after* (conceptually speaking) this legal realm has been established and authorized by the omnilateral will. All legal normativity that private law can ever unfold is due to it being embedded within a comprehensive system of public law. Hence, the strict hierarchical supremacy of the latter over the former in Brudner's interpretation¹⁵.

Different from the view that I will develop in the next sections, Brudner allows one exception to his stark positivism, namely *innate* right ("trespass to the person"). Even though innate right too remains "unrealized" in the state of nature (in the sense that individuals cannot fully "enjoy" it due to the absence of positive law and the state), Brudner shrinks back from thereby putting it in the same private right

¹⁴ Ivi, p. 310.

¹⁵ I defend my own rendering of this idea in the form of the «Total Public Law Thesis» in C. Hanisch, *Why The Law Matters To You. Citizenship, Agency, and Public Identity*, De Gruyter, Boston MA 2013, pp. 168-180.

category as the three types of acquired rights that are merely provisional in the state of nature. Now echoing Byrd's argument, Brudner claims that even in the state of nature, the one innate right to freedom «has the *imprimatur* of an implicit omnilateral consent even prior to a civil condition. [It] will have no need of confirmation by a citizen legislature, once such a body comes into existence». And a bit later: «Innate right will require no approval from such a [legislative; C.H.] body because, as a universal right of humanity entailed by free will, it already has, a priori, all the approval it needs»¹⁶. Brudner correctly reminds us that the main reason for private acquired rights not having this privileged authorized status of being conclusively established in the state of nature is that they impose obligations on others and are therefore in need of omnilateral approval to do so legitimately. At least those private rights that are additionally labeled as “acquired” remain provisional normative entities, in Brudner's fairly strong sense of «provisional», unless they are taken up in the form of public right and positive law. The same is not true for innate right, which is conclusively set in the state of nature already, even according to Brudner's fairly positivistic interpretation of Kant's jurisprudence.

Let us take stock. Despite all the disputes that we see between Brudner and Byrd, there is an important point of agreement between these two paradigmatic and “extreme” representatives along our spectrum of Kant interpretations. It is true that Brudner and Byrd sharply disagree when it comes to the robustness of the three types of *acquired* rights (property, contract, status) in the state of nature. Brudner often makes Kant sound like a democratic positivist, assigning the legislative will of a Kantian republic unlimited discretion regarding the specification of ownership and contractual institutions. Byrd, on the other hand, takes on a stance similar to Locke and regards the (democratic) republic as being merely in charge of securing acquired rights that are “there” in the state of nature already, because imposing obligations on others unilaterally is not a problematic feature of privately-acquired rights. Brudner rejects Byrd's perspective regarding rights in the pre-juridified condition. He does so, however, with the one exception of each person's *innate* right to freedom and its implications. That is the important agreement that all Kant interpreters, considered so far, share. I now turn to my critique of that agreement.

¹⁶ A. Brudner, *Private Law and Kantian Right*, cit., p. 287. That Brudner appeals to the ambiguous metaphysical notion of «free will» as the basis for *external* freedom's legality is a controversial formulation to use. I will not pursue this worry.

2. The Limits of Innate Right in the State of Nature

Recall that, despite all their differences on the status of private right, we identified one important smallest common denominator that unites even Byrd and Brudner, namely the conclusiveness of *innate* right in the state of nature. Underlying the above-summarized interpretive disputes, there remains a crucial question: *how much* do Kantians have to presume in terms of (legal) rights, in order to get the argument for entering the rightful condition off the ground? Even if, following Brudner, no private acquired rights can be presumed in the state of nature, he nevertheless claims that the one innate right to external freedom is present there (and it is the presence of innate right that seems to take over the job of accounting for the unconditional obligation to enter the rightful condition). His skepticism concerning the potency of Kantian private right in the state of nature notwithstanding, innate right in the form of rights to bodily integrity, etc. is *there* and puts constraints on the united law giving will of Kant's republic.

But is this status of innate right, understood as an independent and conclusively-established proto-legal norm, really that uncontroversial? The Kant interpreters along our spectrum seem to take the vindication of that one right to be an uncontroversial assumption. However, when we revisit Brudner's argument for why Kant declares the one innate right to freedom (as opposed to the other three varieties of private rights) as conclusively present in the state of nature, we can start developing the final negative component of this paper's argument, namely, that it is far from obvious that innate right is immune to *all* of the three defects that afflict rights in the Kantian state of nature (lack of enforceability; lack of determinateness; lack of legitimate imposition). One of Brudner's central claims is that acquired rights in the state of nature remain "unrealized" because they lack enforceability (the executive branch in the rightful condition remedies this) and, at this point differing from Byrd, determinateness (the juridical branch in the rightful condition takes care of this). In addition, acquired state of nature rights are problematic because they purport to impose, unilaterally, obligations on all others (the legislative branch in the rightful condition takes care of this). And it is this third defect that *innate* right in the state of nature does *not* exhibit, because it is authorized a priori by the omnilateral will and is not in need of being confirmed in the course of actual legislative activities, let alone established, by a state's positive-lawgiving institutions.

Brudner is actually getting close to seeing that this crucial claim concerning the third defect falls short of what it promises, namely to

establish innate right as a unique normative category of proto-legality. However, he shrinks back from endorsing this insight and rather takes refuge in the authority of Kantian pure practical reason's power to generate this one right in its conclusive form and independently of positive law-giving. However, the argument for why it is that innate right (and innate right only) does not fall prey to the problem of unilaterally-imposing obligations on others remains elusive. In short, it is not clear that innate right differs from acquired rights in the way that Brudner claims¹⁷.

That, in the case of innate right, the two other defects in the Kantian state of nature "team up" with the problem of unilateralism's illegitimacy becomes visible when one recalls that Brudner illustrates the indeterminacy defect of innate right with well-known worries concerning the justification of self-defense. Innate right too «requires specification by positive law before it can determine cases (When is an attack sufficiently 'imminent' to justify pre-emptive force? From whose viewpoint is 'necessary force' determined?)»¹⁸. Notice that by acknowledging that innate right runs into these problems, it is difficult to see that Brudner can avoid that the unilateralism worry becomes an issue regarding self-defense as well: part of the indeterminateness of innate right in the state of nature precisely concerns the *way* of determining individual spheres of sovereignty. It is not self-evident and uncontroversial, which aspects of the empirical world and of each agent's environment (and the body is part of that environment) are mine in the robust sense that conclusive innate right would have to presume in the state of nature. Regardless of how "close" (to my end-setting and purpose-pursuing volition) these external aspects appear to be to my agency, the line is drawn somewhere along a continuous spectrum and the question emerges how that can be done in a legitimate and morally non-arbitrary manner. My unilaterally postulating that all others must never, without my permission, cross exactly *that* very specific point along this spectrum is as illegitimate as is such

¹⁷ Brudner's argument for the «objective validity» of innate right in the state of nature is dispersed over his paper, but there are some passages that provide helpful illustrations of the argument's complexity. At one point Brudner writes: «No doubt, innate right bears the imperfection afflicting all rights (both innate and acquired) in a state of nature. However, that imperfection stems, not from unilaterally imposed obligations, but from unilaterally (inwardly) felt commitments to an omnilateral obligation and from unilateral interpretations of that obligation». A. Brudner, *Private Law and Kantian Right*, cit., p. 294.

¹⁸ Ivi, p. 290.

a postulation with respect to those objects of choice that Kant and Kantians commonly regard as “external”¹⁹.

Lea Ypi has recently expanded, pace Brudner, the third defect of rights in the state of nature (the lack of omnilateral authorization of the coercive exclusion of others) into the territory of innate right regarding the sovereignty over the parts of individual bodies²⁰. Her argument is similar to the one I developed in the previous three paragraphs: the idea of an innate right to freedom, according to Ypi, does not as self-evidently and swiftly translate into positive legal rights to non-interference, bodily integrity, self-defense, and so forth as is widely assumed by, among others, libertarian self-ownership theorists. This is so exactly because the impressive force of Kant’s very *own* reservations regarding unilaterally-imposing duties on others cannot be non-arbitrarily contained within the sphere of private acquired rights to external objects of choice (minus bodies). What Ypi refers to, again in a distinctively Kantian spirit, as «inter-subjective justifications of ownership claims within democratic legal institutions» is the positive proposal in response to this objection against the unilateral and, absent any such justification, arbitrary exclusion of others.

Ypi’s strong criticisms of simply presuming pre-institutionally justified entitlements, including those to parts of agents’ bodies, is related to what other critics of recent Kantian jurisprudence have in mind when they discuss the «material considerations» that are needed to render Kant’s abstract idea of *equal* external freedom normatively useful²¹: absent any substantive account of what purposes individuals actually regard as worth setting and pursuing (and for what reasons they

¹⁹ There is a curious corollary of the argument against conclusive innate right that I present in the text. Kant draws a distinction between «empirical» and «intelligible» possession (see AA VI, 248-9). I grab an apple and thereby possess it “empirically” and in a conclusive manner – even in the state of nature. Why? Because you taking the apple from me *necessarily* involves you wringing the fingers attaching to an arm that I consider *mine*. The conclusiveness of the empirical possession of the apple is an artifact of an actualization of innate right. If, however, as is argue in the text, the fingers in question are not conclusively *mine* in the state of nature, because I can only unilaterally impose the particular obligations of non-interference, my ownership claim regarding the fingers currently grappling the apple (and, hence, of the apple itself) too require omnilateral authorization.

²⁰ L. Ypi, *Self-Ownership and the State: A Democratic Critique*, in «Ratio», 24(1), 2011, pp. 91-106.

²¹ W.A. Edmundson, *Review: Ripstein, Force and Freedom*, in «Ethics», 120(4), 2010, pp. 869-873.

do so), unilaterally declaring that the agency implicated in innate right extends up to a specific point is normatively underspecified. We can actually easily imagine cases where people are drawing this line quite differently *on the grounds* of the specific purposes that they set and pursue. When a person says that she would «give her right arm» to realize a certain contingent aim and purpose because she values it more than anything else, then this way of talking appeals to one or the other of these material considerations that Kantians want to avoid in their *a priori* analysis of innate right and its content. An appeal to democratic institutions of legislation is unavoidable, even in the case of rights and liberties that have to do with ones agency and its external, bodily, manifestations. Different from Locke, who can straightforwardly appeal to absolute non-interference norms in terms of natural rights, Kant's premises commit him to endorse the same skepticism regarding the unilateral imposition of obligations in both cases, innate *as well as* acquired right.

Ypi therefore calls into question the Kantian assumption regarding innate right's status as the unquestionable and uncontroversial Archimedean point within a system of legal rights: given the impermissibility of introducing any non-formal and substantive components, nothing remains to draw unilaterally *and* conclusively the borders surrounding "my humanity" qua subject in the state of nature. I restrict all other agents' freedom of choice in an illegitimate way, when I declare a particular spatial region to be off-limits when those other agents set and pursue their purposes and ends. Again, and this project will be pursued below, there certainly are formidable reasons to normatively conceive of our "embodiment" and its normative status in some ways rather than others. And the same is true when the rightful condition positively sets the legally-binding obligations regarding our bodies in a specific manner; Kant's detailed arguments to that end are often persuasive. However, given Kant's overall argument, these specific obligations cannot be established on the slim and exclusive basis of the ideal of equal innate freedom. And pretending that one can, by means of imposing one particular conception of the boundaries of that right on other citizens (even if this conception is widely shared as a matter of socio-historic fact), constitutes the very same defect as an agent's pretense to impose such obligations with respect to other objects of external choice in the state of nature.

3. Rights vs. Unconditional Hypothetical Principles *About* Rights

In order to motivate and lay down the alternative picture of dealing with the conflict between natural rights vs. positivist accounts of

state-of-nature-rights, consider the following everyday type of normative structure: «Take two eggs. Mix them in a bowl and put them into a frying pan. Stir fry for three minutes». This recipe for preparing an omelet consists of rules and norms that instruct its addressee what to do. The content of the specific practical requirements in question is clearly specified (take two eggs, not twenty). However, detached from any additional information concerning the context of the addressee (and addresser, if there is any), the normative modality of the imperatives in question remains open. It is, in other words, not settled at this point whether the recipe's normative force "conclusively" applies to a particular agent or merely does so "provisionally". Two trivial things, for example, appear important to know in the case at hand: is the addressee in a kitchen and does she desire to eat an omelet? The quality of the answer that we give to these questions determines into what category of normative modality the recipe's rules actually belong. You find yourself in a kitchen and want to eat an omelet? *Then* break two eggs, put them in a bowl, etc. However, when you currently find yourself in a traffic jam and can't care less about having anything to eat right now? Do the specific normative requirements apply to you or not?

One might think that in this second set of circumstances the answer is straightforward: there is *no* normativity whatsoever associated with the recipe and its rules. After all, the addressee in question is in a position in which she neither wants nor can consider having an omelet here and now. So what are the rules, compliance with which is necessary for successfully preparing an omelet, to her? Not much, it seems. However, this impression prevails only as long as actualized normativity is the only normative modality that we pay attention to. This mode of being subject to normative requirements is the one that the hungry person in the kitchen is *prima facie* subject to. Once we allow hypothetical normativity to enter the picture, however, the truth of the proposition that the addressee in the traffic jam is under no omelet-recipe-related normative authority vanishes. We have to formulate the respective requirements in question differently, of course, and the principle would go something like this: "if and only if (and once) you are in a kitchen and are hungry for an omelet, then break two eggs, mix them in a bowl,..."

This hypothetical principle as a whole (not its consequent(s) in isolation!) does apply to the person in the traffic jam, and it does so *actu-*

ally and not merely hypothetically²². It is true that the specific rules and action-guiding norms listed in the principle's consequent do not constitute any actual demands on such an agent; but the actually applying hypothetical principles structure the agent's normative environment and they tell her what to *do* once she finds herself hungry for an omelet in the kitchen. She is subject to the normative authority of the hypothetical principle in question and many more.

One important objection to any conception of "hypothetical normativity" is that it seems to result in an overly demanding and inflationary picture of normativity²³. After all, our agent in the traffic jam is subject to (the same?) unlimited number of hypothetical principles as are all other agents, right? If our agent should find herself wanting to fly to Paris next week, then a set of *prima facie* normative requirements will apply to her, starting with booking the flight, packing her suitcase, rearranging her work schedule, and so forth. And, again, the many conditionals as a whole apply to her with force *now* and *actually* (while stuck in the traffic jam, any thoughts about traveling to Paris not in the least even crossing her mind). It is important, therefore, to emphasize that the view presented will very likely encounter objections from, among others, Williams-inspired internalists about reasons for action.

I must postpone developing a response to this group of objections. The argument in this essay relies on the intuitive force of the view that the plethora of hypothetical principles applies to all agents simultaneously, without that implying the manifestation of any action-guiding/motivating force in any particular agent. In short, the kind of hypothetical normative authority at issue can well co-exist without anyone actually exhibiting the mental states/states of affairs identified in the hypothetical principles' antecedents; that is exactly the point of referring to this mode of normativity as "hypothetical" and, in Kantian lingo, "provisional". As paradoxical as it might sound at first, it is a mode of normativity that characterizes principles, norms, and reasons that exert binding force and, at the same time, fail to do so. Let us

²² I further develop this aspect of the argument from hypothetical normativity into a slightly different direction elsewhere. There I draw on recent work by David Enoch who refers to the phenomenon in question as "conditional normativity". C. Hanisch, «Provisional and Private Legality in Kant», in A. Pinheiro Walla and R. M. Demiray (eds. by), *Reason, Normativity and the Law. New Essays in Kantian Philosophy*, University of Wales Press, Cardiff 2018 (forthcoming).

²³ K.M. Ehrenberg, *The Functions of Law*, Oxford University Press, New York NY 2016, Chapter 7.

continue the application of hypothetical normativity to Kantian jurisprudence in order to see that this seeming paradox is actually a productive and useful interpretive device.

In what way does this argument from traffic jams and omelets help us to shed new light on Kantian private right? The main idea of the analogy is that, instead of awarding full (i.e., actual) normative authority to innate and acquired private rights in the state of nature, we pack the normative substance of these supposed pre-institutional rights into the consequent of hypothetical principles. In the state of nature, just like in the traffic jam, normative principles *actually* apply in the sense of subjecting their addressees to universally valid requirements regarding their legal rights and obligations *within* a rightful condition. And the content of these requirements is well-specified in all the detailed arguments that Kant so impressively develops throughout the *Doctrine of Right's* sections regarding bodily integrity and security, the diverse ways of acquisition and possession of material objects, and the different ways in which individuals can commit themselves and others in contractual arrangements. *These* specifics and their persuasiveness do not need to concern us, though. It is their normative status that has to be reconsidered. Whether or not Kant's particular doctrine of «adverse possession», for example, is correct or not does not have to concern us here; rather, the issue that concerns us is whether these specifics must take on the form of actually subsisting rights in the state of nature.

The suggestion submitted here is that all these specifics find a much more comfortable home in the consequents of hypothetically normative principles. In the Kantian state of nature the contents of private rights do indeed prevail; they do so, however, “only” hypothetically and conditionally. The entire principles apply to *all* members of such a pre-juridified form of life, but their consequents do so under the condition of having actually entered the rightful condition, in which positive law is set and administered. The specific rights of Kantian private right provide an answer to the question of what we ought to do (with respect to our status as agents, possession regarding external things, etc.) if and only if (and once) we enter a condition in which our normative environment is in fact structured publicly and in accordance with public laws enforced by monopolized, but mutually-separated, legislative, executive, and juridical powers within a geographically determined republic. If and only if (and once) these monopolizing and coercive institutions are in place the material that is expressed in the hypothetical principles' consequents unfolds its normative force. The rights of private right now fully apply. “Before” having entered the rightful condition (conceptually speaking, of

course), these rights and their normative force and authority were there embryonically, embedded in the consequents of the hypothetical principles that all share the same antecedents: *«if and only if you enter the rightful condition*, then set positive law securing individual spheres of bodily integrity and independence, continued possession of ‘external things,’ and so forth».

This analogy must come with a unique and important qualification that concerns the hypothetical principles’ antecedent. The driver in the traffic jam is actually subject to a hypothetical principle, the antecedent of which in and of itself is, however, merely normatively optional. Entering a kitchen and forming the intention to prepare an omelet are, according to our assumptions, necessary and sufficient conditions for the rules of omelet making to actually apply to the agent. Failing to enter the kitchen or failing to acknowledge one’s longing for an omelet suffice for the specific rules of omelet making *not* to constitute normative demands that the agent is actually subject to. The same is true of the hypothetical principles that apply to agents in Kant’s pre-institutional state of nature: as long as we do not “enter” the rightful condition, the specific rights that are embedded in the principles’ consequents won’t materialize.

However, Kantian legality does, of course, add its unique element at this point, namely, to put in the terms employed here, that the antecedent (*«if and only if (and once) you enter the rightful condition»*) itself expresses an inescapable and non-optional form of normativity. Different from the antecedent of the hypothetical principle that our driver is subject to, the antecedent relevant to the inhabitants of the state of nature amounts to an unconditional command to bring about that very condition that actualizes the (other, subservient) normative authority of the demands of private right. Recall that as soon as you find yourself in a rightful condition, the normative requirements incorporated in the hypothetical principles’ consequents apply. Since, however, bringing about these principles’ common antecedent is an unconditional requirement from the beginning, the normative status of private rights is, in paradoxically sounding fashion, both things at the same time, namely unconditional and hypothetical. Private rights remain an instance of hypothetical and conditional normativity because they ultimately depend for their realization on a rightful condition having been instantiated; however, such an instantiation is, according to the Kantian paradigm, at the same time non-optional and, hence, the antecedent constitutes a normative necessity. This in turn renders the particular private right requirements expressed in the hypothetical principles’ consequents unconditionally authoritative, but only derivatively so and not in the form of specific actualized “natu-

ral” rights. I come back to this paradoxically-sounding feature of unconditionality below, when responding to a main objection. First, however, let us at least scratch the surface of some of Kant’s central statements to see if the conception of hypothetical normativity is a fitting paradigm for interpreting the *Doctrine of Right*.

Kant comes quite close to endorsing hypothetical normativity in private right. In § 9 of the *Doctrine of Right*, in which he presents the conception of provisional possession in the state of nature, Kant introduces a normative connection between state of nature and rightful condition that echoes the way of conceiving of this relationship just presented. There he says that,

[p]ossession in anticipation of and preparation for the civil condition, which can be based only on a law of a common will, possession which therefore accords with the *possibility* of such a condition, is *provisionally rightful* possession, whereas possession found in an *actual* civil condition would be *conclusive* possession²⁴.

Of course, passages like these continue to be used to vindicate *actual* possession of external things in the state of nature – exactly the kind of claim that my argument from hypothetical private-law principles denies. However, they establish a necessary conceptual link between the non-juridified “rightfulness” of such possession, on the one hand, and the as-of-yet-unrealized actuality of a rightful condition, on the other. The currently-discussed passage at least introduces as a necessary condition for state-of-nature-rightfulness that the supposed possessor publicly and sincerely takes possession under the self-imposed condition that this possession eventually has to be “taken up” in a rightful condition as soon as this is feasible. At least this condition that aims at establishing a rightful condition has to be actually present for acts of taking possession to be permissible. Crucially, this dialectical primacy of the rightful condition (over the state of nature) that I see implied in § 9 will be important for the response to the objection presented in this paper’s final section.

The view from unconditionally hypothetical principles outlined above suggests that without a conception of the rightful condition already in place in the state of nature, not even the idea of provisionally, let alone conclusively, rightful possession is conceivable. When we remember Sharon Byrd’s interpretation, on the other hand, we recall that she deemed Kant’s argument compatible with an almost Lockean

²⁴ AA VI, 257.

interpretation of private right(s). According to that reading, the actual (!) presence of innate and acquired rights in the state of nature is compatible with their provisional status. The reason for this might be that Kant's reference to the rightful condition in the above passage remains one regarding a mere *conceptual* demand only. In other words, Kant merely acknowledges that rightfully possessing an external object in the state of nature must presume that we can bring about a condition in which this possession can take place under universal and omnilateral laws. This possibility suffices to generate actual (but at the same time merely provisional) possession in the state of nature. My view, on the other hand, rejects this Lockean interpretation of the above quoted passage. We need an actually subsisting rightful condition in order to generate any form of *actual* possession in accordance with the private-right standards that Kant develops and that he sees at work in the state of nature already.

4. Does the Argument Go Too Far?

As was already mentioned above, there is a central objection to the argument from hypothetical normativity and principles that was used to support the alternative account of the role of private rights in Kant. After all, the objector claims, private rights (especially the one innate right) must be postulated in the state of nature already in order to motivate Kant's famous "*exeundum* claim", i.e., the normative inescapability of having to enter the rightful condition. The acquired rights in the state of nature must be transformed into elements of a rightful condition under positive law *because* advancing these rights in the former condition inevitably collides with the demands of the one innate right to be independent from others' unilateral choices²⁵.

²⁵ There has been an intense debate amongst Kantians whether or not *acquired* rights in the state of nature (especially those concerning property) must be presumed for establishing Kant's unconditional duty to enter a rightful condition. Rainer Friedrich summarizes these intricate debates well. He and others disagree with Byrd who, as was extensively reconstructed above, assigns provisional property rights the central role in the argument for the *exeundum* claim. For Friedrich, on the other hand, it is innate right only (plus the three duties of (innate) right derived from it) that provides a sufficient and freestanding basis for identifying the state of nature as a morally unacceptable state of affairs that must be exited; property rights are *not* at all needed to arrive at that conclusion. I am more sympathetic with the Friedrich camp because the "moral outrage" of not being able to enjoy one's property rights in the state of nature, can be *reduced* to undermining the presuppositions of individual agency. For the purposes of

The alternative conception of private right defended in this paper seems to run into an insurmountable problem at this point. Since the argument wants to vindicate the specific demands of private right as Kant conceives it, but wants to do so without thereby committing itself to the conclusive status of any rights in the state of nature, the argument from unconditional (!) hypothetical principles seems to have gone too far. It seems to cut off its own feet, so to speak, when it denies even innate private right the stringency (“conclusiveness”) to provide the normative Archimedean starting point, required for the whole argument to get going in the first place. After all, the “unconditional” aspect that the above argument has endorsed (that is, the one shared antecedent that incorporates the unconditional nature of the requirement to enter the rightful condition) needs to be accounted for in one way or the other and this seems hardly feasible, unless one allows at least the one innate right to *actually* be present in the state of nature already. Its “presence” in the form of a mere consequent of hypothetical normative principles fails to be powerful enough to motivate the exit-the-state-of-nature-requirement in the way Kant’s architectonic needs it.

Instead of further developing a constitutivist approach to vindicating the normative inescapability of the hypothetical principles’ antecedent (a strategy that I develop elsewhere²⁶), I conclude by exploring one promising way of identifying this antecedent as possessing “unconditional” bindingness. Keep in mind that up to this point our discussion has tried to find an alternative Archimedean point that sufficiently resembles Kant’s argument from innate right²⁷. The unconditional duty to leave the state of nature has been threatened by the absence of (conclusive) rights in the state of nature and we have so far tried to discover an alternative normative supplement and substitute on a par with Kant’s innate right to external freedom. But maybe this is a mistaken strategy to begin with. The alternative argument below

my discussion of the current objection these debates are secondary, however, since the argument from unconditionally hypothetical principles needs to find a way to vindicate the unconditionality-feature neither in terms of acquired rights, nor in terms of the one innate right. R. Friedrich, *Eigentum und Staatsbegründung in Kants “Metaphysik der Sitten”*, De Gruyter, Berlin 2004, pp. 157-181.

²⁶ C. Hanisch, *The Legality of Self-Constitution*, in «Ratio Juris», 28(4), 2015, pp. 452-469.

²⁷ It is again Sharon Byrd’s interpretation of Kant’s account of private right that most clearly incorporates the idea that innate and property rights are necessary to normatively motivate the transition into the rightful condition. S. Byrd, «Intelligible Possession», cit., p. 94.

will eventually lead us to an Hegel-inspired account of how the unconditional nature of the duty to leave the state of nature finds itself in a dynamic relationship with the specific private right claims of the hypothetical principles.

Let us begin by having a closer look at the antecedent that all hypothetical principles share, to wit, «if and only if in a rightful condition». Notice that there is an ambiguity that comes with this proposition that we have not yet discussed. Does finding oneself *in* a rightful condition refer to a state of affairs in which a perfectly just and legitimate rightful condition has been established? That can hardly be the correct interpretation, given Kant's dispersed but well-known remarks on our political obligations under non-ideal conditions and in situations in which we move closer (but remain far from achieving) the ideal republic. More plausible is the view that the shared antecedent applies as soon as the path towards the ideal Kantian state is walked along. Notice how this latter reading of the antecedent can now be further developed into the surprising (given what was said above) twist that the hypothetical private law principles that apply in the Kantian state of nature turn out to be unconditional ones after all. If the condition of the private right principles is always already satisfied, because we *are* always somewhere along the process of realizing a rightful condition, then the specific to-be-juridified requirements incorporated in the principles' consequents are actually-triggered ones all along.

For many a Kantian this outcome would not be unwelcome news, of course, because it would re-establish innate right and the acquired private rights as unconditionally binding norms, applying in all actual circumstances, exactly in the way that Kant himself seems to suggest in many passages. It would achieve this simply by declaring any *pre*-juridified realm to be an ultimately incoherent notion because any social arrangement whatsoever can be re-interpreted as being a step along the complex path toward a rightful condition. However, apart from this suggestion having the air of trivializing the Kantian notion of a rightful condition²⁸, a more pressing worry with this response is that the unconditionality in question now amounts to a purely non-normative (social and historical) inescapability, unfit in principle to

²⁸ Why, for example, should not we rather introduce a specific threshold limit of juridification that applies to all interpersonal arrangements and below which a particular arrangement (even if it is somewhat directed towards turning itself into a rightful condition) counts as a state of nature?

answer the question of why we *should* have a rightful condition in the first place.

One promising option to overcome these kinds of objections (and to protect my proposal from the criticism that it cannot account for the non-optionality of overcoming the state of nature), is to look more closely into recent “Hegelianized” interpretations and criticisms of Kant’s legal and political theory²⁹. These proposals might constitute the normative justification of the path towards a fully realized rightful condition. If such an interpretation turns out to be successful, then yes, the above worry would be assuaged because our path towards realizing a (fully) rightful condition would not just be a contingent historical process but would itself incorporate its own vindication, thereby making the inevitable satisfaction of the antecedent of the hypothetical principles inescapable in the right way, namely normatively. For this kind of argument to be successful, however, we would need to engage in quite speculative reflections on the purposiveness and reason-guidedness of human history that many will consider foreign to a contemporary and analytic Kantian framework. Axel Honneth has recently developed an account in this direction that tries to avoid the worries just mentioned³⁰. Honneth presents his reflections in the context of a thorough critique of Kant’s (and Rawls’s *et al.*) theories of justice³¹. I endorse part of Honneth’s methodology but do not share his negative conclusions regarding individual rights and positive law. On the contrary, I conclude by showing that Honneth’s method promises to provide the missing component that we

²⁹ See in particular, A. Honneth, *Freedom’s Right. The Social Foundations of Democratic Life*, Columbia University Press, New York NY 2015. See also, M. Stone, «Kant’s Apparent Positivism», in S. Kisilevsky and M. Stone (eds by), *Freedom and Force. Essays on Kant’s Legal Philosophy*, Hart Publishing, Oxford 2017, pp. 171-9.

³⁰ A normative reading of history is still noticeable at many points of Honneth’s interpretation of Hegel. However, given the historical experience of the twentieth century, Honneth only reluctantly accepts this feature of Hegel’s theory (but he does): «Only because he is convinced of such inevitable historical progress can Hegel be so sure that *he will in fact find institutions in society* that provide a space and a foundation for a social, developed form of freedom. [...] The *fact* that subjects actively preserve and reproduce free institutions is theoretical evidence of their historical *values*». A. Honneth, *Freedom’s Right*, cit., p. 59, emphasizes, C.H. As I argue in the text, I am not convinced that Honneth’s Hegel ever fully overcomes the highlighted fact-value gap.

³¹ A. Honneth, *Freedom’s Right*, cit., pp. 6 and p. 55.

need in order to complete the interpretation of Kantian private right in the light of hypothetical normativity.

Very similar to what was done in the stage-setting sections of this essay, Honneth's Hegel criticizes the natural law reading of Kant's state of nature. Honneth is critical of Kantian («proceduralist») theories of justice, in particular of the idea of pre-institutional freedom and rights³². The main problem is, according to this line of criticism, that resembles communitarian attacks on liberalism, that «such theories are caught in a vicious circle: Their proceduralist standpoint presupposes an entire culture of freedom, yet they cannot regard such institutional and habitual conditions as having been justified». And Honneth concludes that «[w]hile these theories add contents or material substance as mere external aspects that can only be the result of such a procedure, in fact these external, social circumstances are necessary to carry out the procedure in the first place»³³.

Honneth's positive proposal, again modeled along Hegel's thought, consists in what he calls a «normative reconstruction» of individual freedom that must be executed through an analysis of its enabling social, political, and legal institutions. Honneth believes that this methodological shift towards a normatively-informed, but at the same time social scientific, investigation of actually existing institutional arrangements overcomes the shortcomings of the overly abstract principles of justice that Kantian proceduralism seems to both presuppose and generate. Honneth's alternative Hegelian method suggests a «procedure in which institutional structures of individual freedom are included in the understanding of individual freedom itself»³⁴. Central to this method is that shared practices, self-understandings, and institutions provide the starting point for this «immanent» analysis of normative concepts, such as individual rights in both their negative and positive varieties. This is the feature of Honneth's and Hegel's criticism of Kant that is, to some extent, also present in my proposal that has emphasized that the institutions of

³² Honneth does not discuss innate and private right explicitly. However, his (communitarian) critique of Kant, Rawls, and individualistic social contract accounts more generally clearly focuses on the pre-institutional conception of freedom and right in the state of nature. It is that conception that Honneth's Hegel regards as incoherent.

³³ A. Honneth, *Freedom's Right*, cit., p. 55. As mentioned in the text, my reconstruction of Honneth's Hegelian critique of proceduralism is very sketchy and, among other things, I ignore his account of Hegel's attack on the Kantian conception of «reflexive freedom».

³⁴ A. Honneth, *Freedom's Right*, cit., p. 55.

positive law take conceptual priority over the a priori deliverances of pure practical reason that natural lawyers put at the forefront of Kant's (and Locke's) legal thought. However, my agreement with Honneth and Hegel only goes so far.

To see these limits of the consensus notice, first, that one corollary of my main suggestion is that Kant's account of legality, if interpreted along the proposal from hypothetical normativity, is well-compatible with the main motivation underlying Honneth's method of «normative reconstruction», that is, to develop a conception of freedom-enabling norms from *within* the perspective of its participants and their shared self-understanding. Notice that my proposal suggests that Kant's theory of law is thoroughly (“all the way down”) jurisprudential and institutional and differs from classical natural law accounts of legality in precisely that respect. Using a famous line by Lincoln, Kantian jurisprudence (including its accounts of innate and private right(s)) is a theory of legality «of legal subjects, by legal subjects, and for legal subjects». This point about innate and private right being a reconstructive projection from within thoroughly juridified relationships (back into a fictive state of nature) is the point that Honneth's program of normative reconstruction gets right. Like in Honneth's Hegel, Kantian principles of right always already incorporate the *fact* that they are instantiated as constitutive elements of legal orders and systems of positive law-giving and law-administration.

On the other hand, however, even my revisionary Kantian account continues to differ from Honneth's Hegelianism in that it does not insist on taking any *specific* instantiation of legality (i.e., any particular historical manifestation of the rule of law) as a necessary starting point for a meaningful engagement in the exercise of normatively reconstructing innate and private right as they present themselves in the state of nature. My proposal remains on the conceptual (as opposed to empirical) level of analysis and, hence, shares at least some of «proceduralism's abstractness» that Honneth is so critical of and seeks to leave behind in its entirety.

In order to strengthen this claim recall a well-trodden path of response to Hegel (and Honneth), namely that taking currently existing legal institutions as the starting point for a *normative* reconstruction privileges the status quo in a problematic manner; Honneth is well-aware of this pitfall and tries to avoid it. To my mind he is not successful³⁵. Since his Hegelian (supposedly) normative reconstruction

³⁵ Two good examples of the ways in which Honneth struggles with the question of how to reconcile Hegel's “immanent method” and its conservative

entirely rejects «abstract principles» (of justice and law) together with the Kantian, a priori, method of vindicating law from any «external» standpoint whatsoever, his attempts remain restricted to those normative resources that are («in fact») extractable from the particular socio-historical constellation within which the normative reconstruction takes place. This runs into the well-known worries concerning the is-ought gap. The argument from hypothetical normativity is not subject to that kind of worries. Endorsing the method of normative reconstruction on the formal, abstract, and structural level does not imply that Kant's account of legality collapses into Hegel's. It is true that I presented Kant as being engaged in an *immanent* normative reconstruction of the *conception* of innate and acquired private right from within positive law and its legal institutions (and from within those normative conceptions that members of a rightful condition have at their disposal, such as, “citizenship” and “legal subject”). However, this reconstruction remains independent of particular and empirically-contingent instantiations of positive law.

In conclusion, the conception of conceiving of Kant's state of nature in the form of hypothetical principles about positive legality, defended in this essay, is sympathetic to Honneth's method of normatively reconstructing the notion of private right, innate right included. However, accepting this methodological proposal is readily-compatible with the other side of the above interpretation of Kant, namely that an account of hypothetical normativity is not necessarily dependent on historical and empirical contingencies. Of course, this fine line of what to accept and what to reject in Honneth and Hegel would need much more analysis than I provide here. My motive for introducing Honneth was to show that also with regard to this Hegelian attack on Kant, my suggested interpretation of Kant hopes to present a fruitful reconciliation of views that have often been deemed to be sharply opposed to each other.

Let us now briefly return to the objection to my proposal that motivated the introduction of the conception of normative reconstruction in the first place. Honneth is right that any conception of pre-institutional state of nature rights, if justified at all, is the *end* rather than the starting point of a theory of legal institutions and personhood. I endorse this important conclusion. These reflections on the

tendencies, on the one hand, with a reformist stance towards those institutions and social realities within which one conducts a normative reconstruction, on the other, are the following: A. Honneth, *Freedom's Right*, cit., pp. 8-11 and 58-62.

nature of the internal dynamic of Kant's arguments pertaining to private right then further support that the *Doctrine of Right* incorporates an account of public legality and legal personhood that is jurisprudential all the way down. The worry that such a thorough juridification of even innate right leads to a collapse of the Kantian argument for the non-optionality of the rule of law is not as pressing as it initially seemed, once one makes room for a "non-linear" interpretation of these very arguments. Kant's jurisprudence is much more an account of juridified individual agency than it is a social contract account of justifying state authority and political obligation in the face of certain extra-legal normative constraints. This, I think, is an outcome that is substantiated by what Kant says, especially regarding the specific aspects of the innate right of humanity. According to my suggestion, the latter too is merely present in the form of a set of hypothetical, though warranted, principles for and against specific actions in the state of nature. That peculiar innate right too, that figures so prominently in the prolegomena of the *Doctrine* and lies at the heart of much contemporary literature on Kant, is an institutional notion, introduced to illustrate what would be missing if a rightful condition were institutionalized *without* at the same time acknowledging the normative limits of such a juridification that Kant so masterfully spells out under the label of innate and acquired private rights.

Unfortunately, I cannot engage in any additional Kant exegesis in the light of my proposal (and what the latter means for the competing interpretations presented by Byrd, Brudner, and others). After carefully examining the relevant passages in the *Doctrine of Right*, I can here only conclude by dogmatically asserting that even those passages that appear to be most difficult to reconcile with my thesis concerning the dialectical primacy of the rightful condition (e.g., AA VI, 312-3) turn out to be very much so reconcilable. Other passages that were already mentioned (i.e., AA VI, 257) clearly strengthen my interpretive punch line, namely, that Kantian private right is a backwards projection into the state of nature from within an already-juridified point of view (with all its normative categories and conceptions). These passages highlight that Kant's insightful jurisprudence leaves behind the conflict between natural rights theory and legal positivism regarding law's normative nature and authority. However, fully analyzing the *Doctrine of Right* (and other works by Kant) in this spirit requires a separate and (very) comprehensive treatment³⁶.

³⁶ I undertake part of this exercise in C. Hanisch, *Provisional and Private Legality in Kant*, cit.

La concezione kantiana del diritto privato dovrebbe essere compresa in modo da andare oltre le alternative contemporanee tra positivismo legale e teoria della legge naturale. Invece di concepire il diritto provato in termini di diritti pre-istituzionali (naturali), la normatività proto-legale dello stato di natura, tipicamente kantiana, è costituita da principi ipotetici incondizionati con questa forma: se e se soltanto se (e una volta che) ci troviamo in una condizione legittima di legge positiva, allora dobbiamo stabilire un regime che incorpori i diritti innati e quelli acquisiti. Questi principi, a differenza delle rivendicazioni di particolari diritti privati cui fanno riferimento nelle loro conseguenze, “limitano” normativamente le interazioni nello stato di natura. Un’obiezione alla mia proposta è che la necessità di uscire dallo stato di natura non può essere rivendicata quando *tutti* i diritti privati (innati e acquisiti) sono presenti nello stato di natura in forma soltanto ipotetica e condizionale. Invece di cercare un punto archimedeo alternativo per stabilire la non opzionalità dell’ingresso in una condizione di diritto, la mia risposta a questa obiezione reinterpreta la inevitabilità dell’antecedente sulla linea del metodo, di ascendenza hegeliana, di “ricostruzione normativa” elaborato da Axel Honneth. In ultima analisi, l’autorità normativa delle conseguenze dei principi ipotetici (ossia dei requisiti specifici per il diritto privato secondo Kant), ha origine *all’interno* delle istituzioni e delle pratiche dei cittadini che sono sempre *già* coinvolti nel processo di realizzazione di una condizione di diritto.

Parole chiave: positivismo giuridico, Kant, diritto naturale, stato di natura, diritti

Kant’s conception of private right should be categorized in ways that go beyond the contemporary alternatives of legal positivism and natural law theory. Instead of conceiving of private right in terms of pre-institutional (natural) rights, the distinctively Kantian proto-legal normativity in the state of nature is constituted by unconditional hypothetical principles of the following form: If and only if (and once) we find ourselves in a rightful condition of positive law, then we should establish a regime incorporating innate and acquired rights. These principles, as opposed to the particular private-rights-claims that they refer to in their consequents, normatively “constrain” interaction in the state of nature. One objection to my proposal is that the necessity to exit the state of nature cannot be vindicated when all private rights (innate as well as acquired) are present in the state of nature merely in a hypothetical and conditional form. Instead of seeking an alternative Archimedeo point for establishing the non-optionality of entering a rightful condition, my response to this objection reinterprets the antecedent’s inescapability along Axel Honneth’s Hegel-inspired method of “normative reconstruction”. Ultimately, the normative authority of the hypothetical principles’ consequents (i.e., the specific private-right-requirements à la Kant) is sourced within the institutions and practices of citizens who are always already entangled in the process of realizing a rightful condition.

Keywords: Legal Positivism, Kant, Natural Law, State of Nature, Rights