

The Mirage of Kantian Human Rights

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Abstract

Contrary to a widespread view, I argue that the contemporary notion of “human rights” does not have a comfortable home in Kant’s legal philosophy. Even the one “innate right of humanity,” that many consider the pre-institutional Archimedean starting point of Kant’s argument, is a normative conception that is “juridified all the way down.” In the state of nature, *all* private rights (innate and acquired) are present only in the form of the consequents of conditional claims *about* legal rights of the form, “*If and only if* in a juridified realm, then X,” with “X” referring to the specificities of positive law within a juridified realm. One objection claims that this proposal undermines the idea that there are powerful individual rights (universal and inalienable) on a par with legal rights but pre-institutional. By means of responding to worries regarding stateless individuals and migrants, I show that even though human rights are foreign to a Kantian conception of legality, other resources in Kant’s practical philosophy stand ready to assuage the objection.

Keywords

State of nature, juridification, legal positivism, natural law, human rights

1. Introduction

The scholarship on Kant’s legal and political philosophy exhibits a stark contrast. There are those interpreters who emphasize the *Doctrine of Right’s* indebtedness to the natural law tradition. In sharp contrast, there are many readings that emphasize Kant’s role as a pioneering voice of what had later become legal positivism. In this paper’s first part (sections 2, 3, and 4), I show that both interpretations fail to recognize the uniqueness of Kant’s conception of “legality,” which only on the surface appears to be a merely-updated version of social contract theorizing à la Hobbes, Locke, and Rousseau. Different from these thinkers, Kant goes beyond the contemporary scheme of interpretations in that he

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employs the pre-juridified state of nature not as an Archimedean starting point for vindicating the modern state and the law.

Rather, Kant's account of "innate" and "acquired" state of nature (i.e., private) rights is the dialectical *end*-point of an account of legal personhood and law-governed relationships that always starts from *within* a juridified perspective. The state of nature is a deficient remainder of what is left in legal, as distinct from moral and prudential, normativity when the institutions of the rule of law were absent. Even Kant's, so-called, "innate right to external freedom" (the right to independence from others' choices) is, according to the defended interpretation, present in the state of nature merely in the form of a "conditional reasons claim" about legal norms. The contents of juridified innate and acquired rights "are there" in the pre-juridified state already; however, they are so merely as the consequents of untriggered conditional claims about legal rights (normative propositions that always already presuppose their consequents' constitutive role within a rightful realm). This aspect of the proposed interpretation is controversial, because the aforementioned contemporary perspectives (natural law, positivistic, and those in-between) all agree that at least the one innate right of humanity must be "conclusively" present in the state of nature already, first and foremost because only given that assumption it is possible to extract a powerful Kantian conception of pre-institutional human rights from the *Doctrine of Right*.

Amongst the objections to this proposal, the one that takes center stage in this paper's final two sections (5 and 6) is the worry that my rejection of a pre-legal (and conclusive) "innate right of humanity" undermines a feature of human rights that both contemporary theoreticians as well as the general public consider central, namely that these rights are independent from institutions of positive law. Satisfying this criterion is necessary, it is often argued, because human rights apply universally and equally to all human beings; and they do so inalienably without any institutional acknowledgment of their validity. I conclude with a number of observations that are primarily intended to alleviate that worry. Even if human rights, as understood in the contemporary discourse, do not at all find a comfortable home in Kant's institution-based jurisprudence (I will bite that bullet), this does not result in the embarrassing practical and political implications that a thoroughly-juridified conception of Kantian jurisprudence is seemingly committed to.

2. Some Conceptual Groundwork

Regarding Kant's *Doctrine of Right* there has been renewed interest in the status of private right and private law.² It is widely claimed that Kant's legal philosophy rests on a three-stage progression, beginning with every individual's innate right to freedom (understood as "independence from being constrained by another's choice" (6:237), private acquired rights (to property, contract, and status), and, eventually, public right in a rightful

² Despite some reservations I have about doing so, I will use the expressions "private right" and "private law" interchangeably.

condition, manifested in a system of positive law.³ At the end of the “Division of the Metaphysics of Morals as a Whole,” Kant states that “right in a state of nature is called private right” (6:242). The state of nature is the condition in which the institutions of positive public law are absent and it is the latter set of institutions that Kant refers to as the rightful condition and civil society. Kant famously claims that we all have an unconditional duty to bring about and maintain such a condition.

The status of innate right, the supposed Archimedean point in Kant’s complex system, will be the central issue discussed below. It is clear, according to the standard picture, that the border separating the state of nature from the rightful condition is overcome by a shift in the normative status of the three-partite realm of acquired (as distinct from innate) rights concerning property, contract, and status relationships.⁴ Exiting the state of nature and entering the rightful and juridified state consists in transforming these private acquired rights into a part of public law – thereby rendering them determinate, stable, and legitimately-enforceable entitlements of citizens. Kant’s arguments in support of the celebrated achievements of the modern rule of law, the nature and separation of the (three) state powers, and the idea of republican government are intimately connected with this need to render human affairs rightful and governed by law that is authorized by the “omnilateral will” of all who are subject to a particular set of shared coercive institutions. “Acquired rights” then is the label for a normative category that, according to Kant’s taxonomy, is to be distinguished from the aforementioned one of innate right, which consists in “*Freedom* (independence from being constrained by another’s choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, [...]” (6:237). This “innate right is that which belongs to everyone by nature, independently of any act that would establish a right; an acquired right is that for which such an act is required.” (6:237).

Given Kant’s way of setting up his rights-based conceptual scheme, it does not seem impermissible to combine the two contrasts (private right vs. public right, on the one hand, and innate right vs. acquired right(s), on the other) in the following way: private right, which after all comprises *all* right in the pre-institutional state of nature, consists of the three types of acquired rights, on the one hand, but also of the one innate right, on the other. Both types of rights are part of private right and both of them experience a qualitative transformation when they become incorporated into a rightful and juridified

³ 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.

⁴ There is a complicating ambiguity that comes with Kant’s notion of “private right(s)” in the *Doctrine of Right*, notwithstanding its “official” definition mentioned in the text. Private right refers to *all* right in the pre-civil state of nature, i.e., innate *and* (provisional) acquired rights. (See, however, the upcoming discussion in the text regarding the question of whether innate right is part of private right or not.) However, and this gets us closer to the contemporary (narrower) definition, the term “private right” also refers to the aforementioned rights once they are embedded and taken up in a system of public right. See (Byrd and Hruschka 2010, pp. 28-33).

condition.⁵ Kantians regard this claim as unproblematic when it comes to the acquired rights regarding property, contract, and status. However, things become more controversial when innate right is conceived as a member of private and, once the state of nature is exited, public law.⁶

A third contrast must be introduced in order to see the potentially troubling nature of the conceptual configuration of the jurisprudential territory that was just introduced. This contrast is the one between provisional and conclusive rights that Kant introduces most prominently in §15 of the *Doctrine of Right*, tellingly entitled “*Something can be acquired conclusively only in a civil constitution; in a state of nature it can also be acquired, but only provisionally.*” (6:264) We cannot look into all the complex details concerning Kant’s theory of property rights but we need to keep in mind the fundamental claim that the provisionality of property acquisition in the state of nature is due to the unilateral, and hence normatively-deficient, nature of putting all others under a stringent obligation to refrain from interfering with my supposed possession of a specific external object. Since such intelligible (as opposed to mere empirical) possession must be possible for agents leading and planning purposeful lives, however, the step into a rightful condition, in which such possession is legitimately-secured in the name of the omnilateral will of all, takes on the form of an unconditional requirement. Only once intelligible possession is embedded in the context of legal institutions, do rights to property take on a conclusive form and become fully rightful.

In the case of property, contract, and status this argument for the transition from provisionally to conclusively established rights has met little controversy amongst Kantians. (We will, however, soon discuss a first installment of worries concerning the normative status of provisional acquired rights.) But what about innate right? Since we have categorized innate right as an element of private right in the state of nature, does not consistency require that we declare it too merely “provisional” and in need of omnilateral authorization in a rightful condition in the same way as acquired rights are? As we will discuss in the next section, even the strongest critics of the Kantian conception of private right, such as Alan Brudner, shrink back, however, from awarding the one innate right to freedom merely provisional status in the state of nature and as being in need of the omnilateral authorization in the form of positively established civil rights.

There seem to be at least three concerns in particular that account for the reluctance on the part of Kantians to consider the option of rendering more coherent Kant’s taxonomy of rights by incorporating innate right into private and provisional right. Firstly, it seems politically dangerous and highly problematic to regard the innate right to freedom as not “being there” in the robust sense that conclusive rights exhibit, unless a rightful condition

⁵ Also with respect to public right there is therefore an ambiguity involved that parallels the one regarding private right, mentioned in fn. 3. Public right in a contemporary narrow sense comprises only those (positive) legal norms that deal with the state and the other institutions that are only present once the state of nature is left. The German terms “Staatsrecht” and “Verfassungsrecht” capture this notion of public right well. However, Kant’s public law refers to much more than that, namely to *all* right in the rightful condition (private law included). The argument in the text uses public right in the second way.

⁶ For an opposing view regarding the one innate right and private rights, see (Ripstein 2017, p. 193).

omnilaterally legislates it into existence. What about, for example, stateless people(s) who are not members of any such rightful condition? How can we make sense of the wrongness and normative impermissibility of denying them those juridical protections that the right to freedom as independence singles out as *innate*, like the entitlement not to have one's bodily integrity infringed upon, the right to speak one's mind, and "the right to be one's own master"? This is the objection that constitutes the topic of the concluding two sections. However, the next two criticisms are inescapably and closely related to the first.

Secondly, if innate right too requires for its conclusive establishment its incorporation into a legislated set of positive legal norms then how can this right be employed to normatively constrain the state, the paradigmatic agent of the rightful condition? We seem to need at least this one pre-institutional, but at the same time conclusive, right in the state of nature already in order to have a freestanding standard for evaluating and judging what is going on "post-institutionally" and in the context of institutions that incorporate and express the omnilateral will.

Related to the second point is a third one: the dialectic of the Kantian argument concerning right(s) and especially the argument for the unconditional duty to enter the rightful condition seem to require that the one innate right is conclusively established in the state of nature. Only if the latter is the case, it seems, we can declare problematic the inconclusive limbo concerning property, contract, and status in the state of nature. That state of limbo violates the innate right, which has to be present there in conclusive form to be "violatable." Only this actual threat to a conclusively-established state-of-nature-right can generate the normative pressure to transform the three types of acquired rights into conclusive ones. Provisional property rights in the state of nature are unacceptable because their being provisional undermines the setting of ends and purposes which in turn constitutes the impossibility of individual agents to realize their innate external freedom to which they have a right.

In response to the persisting puzzles concerning the Kantian taxonomy I suggest a radical redrawing of this entire landscape without thereby running into embarrassing answers indicated by the three concerns just mentioned. Not only should we call into question the idea that there is such a thing as a coherent state-of-nature notion of private acquired rights – not even in their "provisional" mode. The following sections try to defend the claim that the wholesale re-conceiving of the Kantian notion of private rights is indicated, including innate right. The provisional character of all private right (innate as well as acquired) suggests that we part company with Kant and exorcise the notion of quasi-legal rights from the state of nature altogether. At the same time, getting rid of private right in the state of nature will not leave us with a normatively-void conception of this pre-legal condition.

3. No Conclusive Innate Right of Humanity

On the basis of the above conceptual distinctions and normative ideas, contemporary Kant scholars have pursued two very different interpretive strategies.⁷ In short, there are those Kantians who interpret *The Doctrine of Right* in an (almost) natural law spirit, resembling Locke's view that in the state of nature there are robust and fully-developed ("conclusive") rights; even those regarding property in external objects, for example. On the other hand, there are those interpretations that consider Kant (almost) to be a prime example of what should later become legal positivism, leaving (almost) unrestricted legislative and rights-determining authority to the omnilateral will of the ideal republic.⁸ There is, then, a spectrum of Kant interpretations that is delimited by two extreme end points and populated by many intermediate positions.

On the one end there is Sharon Byrd, representative of the natural law camp, who nicely sums up her position when she says,

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; author] 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 choice. (Byrd 2010, p. 94).

Contrast Byrd's reading of Kant's private rights with the position I have labelled "positivist" and which I see paradigmatically represented by Alan Brudner. Brudner claims that with regard to, for example, supposed property rights in the state of nature, "there is nothing constituted that could subsequently be overridden by public justice. [...] If a claim is rejected by the united will [in the rightful condition; author], its force is nullified, not defeated and preserved; if accepted, the property right is constituted by public justice, not protected as constituted beforehand." (Brudner 2011, p. 310). And Brudner dramatically concludes: "His [Kant's; author] depreciation of private acquired rights is the obverse of his idolization of the general will." (Brudner 2011, p. 310).

However, despite all their disagreements on the status of private right(s), we can identify one important smallest-common denominator that unites even Byrd and Brudner, namely the conclusiveness of innate right in the state of nature. And this common ground between these otherwise strongly opposed camps, has its origin in a shared appreciation of the one innate right to freedom as the pre-institutional and "natural" anchor within Kant's complex legal theory. Even if, according to Brudner's disagreement with Byrd, private acquired rights cannot be presumed to be conclusive in the state of nature, he nevertheless agrees with her that innate right *is* present there. It *must* be, because innate right (in a

⁷ This is a summary of a much larger comparative study that I did elsewhere, in which the contemporary literature is examined along the interpretive spectrum delimited by natural law and legal positivism. There I also provide a bibliography regarding the two interpretive strands. (Hanisch forthcoming b).

⁸ The qualifier "almost" is important because not even Byrd and Brudner let Kant's jurisprudence entirely collapse into natural law and legal positivism respectively.

Lockean spirit) takes on the job of normatively grounding the obligation to enter the rightful condition in the first place. Brudner's 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 pre-institutional (and pre-legal) constraints on the united law giving will of Kant's republic. Kantians need the rock-bottom conclusiveness of innate right, firstly, because this Archimedean (starting) point is necessary for obliging the inhabitants of the state of nature to enter the rightful condition. Furthermore, as much of the literature on Kant and human rights illustrates, innate right is unquestionably-presupposed also because it seems too much of a bullet to bite to argue that innate right is not available in a conclusive form in the state of nature. Below we will investigate the second worry in particular and show that human rights (understood as "aspects" of innate right) are indeed problematic if we develop Brudner's rationale into its compelling conclusion.

Our first critical question therefore is, whether the status of innate right really is that uncontroversial as the above spectrum of contemporary interpretations suggests? When we have a closer look at, for example, Brudner's argument for why Kant declares the innate right (as opposed to the other group of private rights) as conclusively present in the state of nature we can start developing the negative part of this paper's line of argument, i.e., that it is far from obvious that innate right does not suffer *all* of the three defects that afflict rights in the Kantian state of nature. Central is Brudner's claim that acquired rights in the state of nature remain "unrealized" because they, first, lack enforceability (the executive branch in the rightful condition remedies this) and, second, lack determinateness regarding their content (the juridical branch in the rightful condition takes care of this). In addition, third, acquired rights are problematic and illegitimate because they purport to impose, unilaterally, obligations on all others without their consent in the form of republican law-giving. According to Brudner, innate right has the special status it has because it does not exhibit the third defect in particular. Innate right *is* authorized *a priori* by the omnilateral will and not in need of being confirmed empirically, let alone established, by any state's positive lawgiving institutions. At a crucial juncture Brudner summarizes: "[t]hough unrealized in a state of nature, [only innate right] is already objectively valid there; and so a public authority instituted for the purpose of securing rights has a duty to respect and enforce this state-of-nature right undiminished." (Brudner 2011, p. 294).

Brudner is getting close to seeing that this claim concerning the third defect falls short of what it promises, but 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 in the state of nature already. The argument for why innate right does not fall prey to the problem of unilaterally-imposing obligations on others remains elusive (and the same is, to a less-urgent degree, true of the other two defects and how they

affect innate right).⁹ Two sets of arguments should be introduced now. They are intended to further motivate the above doubts concerning the conclusive nature of innate right in the state of nature. The first one is due to William Edmundson and is directed at the Kantian account of innate right; the second is based on Lea Ypi's discussion of self-ownership.

Edmundson (2010), in his review of Arthur Ripstein's *Force and Freedom*, criticizes the axiomatic and purely formal nature of the foundational building blocks of Kantian jurisprudence, especially the idea of equal freedom and the right to it. According to Edmundson, one problem with Kantian right is that it remains so abstract that it fails to provide any evaluative standards for differentiating systems of equal freedom from one another. Relevant for our discussion of the status of innate right (and Brudner's definition of it) is Edmundson's observation that the demand for equal freedom is equally well satisfied in a "system in which individual sovereignty extends no farther than one's body" as it is in a system in which this kind of sovereignty "extends no farther than one's central nervous system, leaving perhaps pounds of unwired flesh available as means for others to use in pursuing purposes they have set freely for themselves." (Edmundson 2010, p. 873). An unlimited number of other, more attractive, systems of equal freedom will include spheres of sovereignty that extend wider (spatially) and comprise richer sets of desired goods, rights, etc. Importantly, according to Edmundson, the attractiveness of one of these systems over the others cannot be "equated to its securing greater equal freedom, for whatever means are secured to an individual enhances her freedom only insofar as the freedom of all others is coordinately diminished." (Edmundson 2010, p. 873).

Edmundson blames the characteristically-Kantian reluctance to admit any "material considerations" (e.g., the significance for particular individuals of the purposes that these individuals set for themselves) for this problem and for overlooking it. Kant's formal and geometrical theory of equal external freedom cannot meaningfully differentiate between competing systems of equal freedom, because the particular boundaries of individual sovereignty that Kantians must presume in the form of innate right cannot be spelled out in a non-arbitrary way merely on the grounds that individuals should be equally free to set and pursue ends. Postulating a highly abstract right to external freedom fails to settle the contested issue of whether or not my unilateral imposition of a specific obligation on all others is legitimately authorized (e.g., an obligation not to use an arm that occupies a specific spatial location). That such a normative feat can be completed *a priori* was Brudner's and, even more so, Byrd's seemingly trivial move when they declared innate right (and all that comes with it) to be unquestionably settled in the state of nature. Edmundson, on the other hand, highlights that the problem of innate right's "indeterminate" nature (acknowledged by Brudner) "teams up" with the problem of unilaterally imposing obligations at this point. Brudner believed that he can keep separated

⁹ Brudner's argument for the "objective validity" of innate right in the state of nature is dispersed over his paper, but there are some culminating 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." (Brudner 2011, p. 294).

these two problems and thereby protect innate right from the problem of the illegitimacy of unilateralism. But one cannot.¹⁰

That the indeterminacy problem teams up with the defect of unilateralism becomes noticeable when one sees that Brudner restricts the indeterminacy defect of innate right in the state of nature to traditional worries concerning the justification of self-defense, for example. 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?).” (Brudner 2011, p. 290). But this train of thought must be extended in the very direction that Edmundson’s argument suggests: part of the indeterminateness of innate right in the state of nature precisely concerns the very determination of individual spheres of sovereignty itself. It is not self-evident and uncontroversial which aspects of the world and of the agential environment are mine in the robust and conclusive sense that Kantian innate right simply presumes. Regardless of how “close” (to my end-setting and purpose-pursuing will) these external aspects appear to be to my agency, the line is drawn somewhere along a spectrum. 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 a postulation with respect to those objects of choice that Kant and Kantians regard as “external.”¹¹

Lea Ypi (2011) too presents an argument that calls into question the ease with which Kantian and non-Kantians alike presume conclusive sovereignty over one’s body as a pre-institutional and fully-established normative conception.¹² Ypi’s positive proposal, which is very much inspired by Kant’s own idea of the need for democratic authorization regarding acquired rights, need not be discussed here.¹³ Instead, it is one of the central features of her negative argument against, what she calls, the “libertarian self-ownership thesis” that lends additional support to this paper’s view that not even the Kantian innate to freedom can be asserted unilaterally in a state of nature system of only private right(s).

Importantly, Ypi’s target is Lockean varieties of the self-ownership thesis and the latter’s central claim that extending natural self-ownership rights to rights over external goods and interests vindicates the claim that coercive redistribution by the state is *prima*

¹⁰ The third defect of rights in the state of nature, lack of enforceability, does not need to concern us as much as the other two. As spelled out above, Byrd and Brudner agree that lack of enforceability characterizes private acquired and, though that remains unclear in Byrd, innate rights in the state of nature (and accounts for their “provisional” status there).

¹¹ There is a curious corollary of the argument against innate right that I present in the text. Kant draws a distinction between “empirical” and “intelligible” possession. See (6:248-9). 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 argued with Edmundson, 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 set of fingers currently grabbing the apple (and, hence, of the apple itself) too require omnilateral authorization.

¹² My discussion of Ypi is an expanded version of a shorter version. See (Hanisch forthcoming b).

¹³ I spell out the relationship between the idea of democracy (as distinct from republicanism) and Kant’s innate right in (Hanisch 2016).

facie unjustified. The differences between the Lockean right to self-ownership and the Kantian innate right to freedom as independence must not be forgotten here. For example, Kant does not regard as permissible libertarian talk of human beings “owning themselves” in the strong sense of authorizing the destruction of oneself (were it not for God prohibiting such acts, in Locke’s theory). Still, as highlighted above, there is a robust common core that unites Lockeans and Kantians concerning, what one might call, the issue of sovereignty over one’s body and over things that one immediately controls. For both, this shared normative idea takes on the form of a conclusive right that is pre-institutionally (naturally) vindicated, and not in need of any form of collective authorization. Ypi’s attack on the Lockean variety of this thesis can therefore be used (within limits) to attack the parallel Kantian one.

The core of Ypi’s negative argument is that,

[s]tarting with a no-ownership assumption implies that just as we cannot assume that any object of the world is owned either individually or collectively, we can also not assume that any part of the individual human body is owned by anyone. And the reasons for which we cannot assume that people own parts of their body (rather than simply holding them as they go) are similar to the reasons for which we cannot assume either common ownership or private ownership of the world. Either assumption requires engaging with the preliminary question that we are raising at this point: what turns something that we hold into something that we own. (Ypi 2011, pp. 97-8).

Ypi extends the demand for the collective authorization of the imposition of ownership-related duties to those external things that “are with agents” most of the time and that are often quite essential to pursuing many of their ends, namely, body parts. And in exactly the way that Kantians have acknowledged the complex issues in the case of acquired rights to things that they consider “external,” unilaterally-advanced ownership claims over body parts too impose duties on others in an illegitimate way in so far as these claims are presented as binding in the state of nature, according to Ypi’s approach.¹⁴

In short, then, Ypi’s strategy consists in expanding, contra Brudner, also the third defect of rights in the state of nature (the lack of omniateral authorization of the coercive exclusion of others) into the territory of innate right regarding the sovereignty over the parts of individual bodies. The idea of an innate right to freedom as independence, therefore, does not as self-evidently and automatically translate itself into rights to non-interference, bodily integrity. This is so exactly because the impressive force of Kant’s reservations regarding unilaterally imposing duties on other wills cannot be contained within the sphere of private acquired rights to external objects of choice (minus body

¹⁴ Ypi bravely bites the bullet (and I join her in that) when she considers the open nature of the question of whether or not body parts, such as eyes, can be the object of state-organized redistributive policies. In the *Doctrine of Virtue*, Kant objects not merely to the proposal Ypi considers. See (6:423). He objects to individuals *freely* disposing of organs, in his example one’s teeth and in the example of self-castration, because doing so amounts to “partially murdering oneself.” He also differentiates between organs, on the one hand, and things that are merely “part of the body,” on the other. That this curious debate takes place in the sphere of duties of virtue, as opposed to the realm of external freedom and right, must of course not be overlooked at this point. But these remarks about the limits of what is meant by the “humanity in each person” are very important for the line of argument in the text: they indicate that Kant’s innate right of humanity (plus its presumptions concerning this right’s extension towards individual bodies and beyond) shares enough substance with modern conceptions of self-ownership, even if many secular versions of the latter authorize, for example, the deliberate destruction of one’s body, something that Kant rejects.

parts). What Ypi refers to, again in a quite Kantian spirit, as inter-subjective justifications of ownership claims within democratic legal institutions is the positive pendant to this objection against the unilateral and, absent any such justification, arbitrary exclusion of others.

Ypi's criticism of simply presuming pre-institutionally justified entitlements, including those to parts of agents' bodies and their parts, is nicely related to what Edmundson has had in mind when he discussed the "material considerations" that would be needed to render Kant's abstract idea of equal external freedom normatively useful: absent a richer account of what purposes individuals regard as worth setting and pursuing (and for what reasons they do so), unilaterally declaring that the "I" in innate right extends up to a specific point (and no other) is arbitrary. 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, even if only meant metaphorically in many cases, appeals to one *or* the other of these material considerations that Kantians want to exclude from within their *a priori* stance.

Edmundson's and Ypi's arguments therefore call into question the Kantian assumption regarding innate right's status as unquestionable and uncontroversial Archimedean point of a system of legal rights: given the impermissibility of introducing any non-formal and substantive determinants, nothing remains to unilaterally (and at the same time conclusively) draw the border surrounding "my humanity" qua proto-legal subject in the state of nature. I restrict all other agents' freedom of choice in an illegitimate way when I declare a particular set of spatial regions to be off-limits for those other agents when they set and pursue their purposes and ends. Keep in mind though, and this project will be pursued in the remainder of this paper, there *are* formidable reasons to normatively conceive of our "embodiment" in some ways rather than others; however, these conceptions cannot be established on the basis of the ideal of equal innate freedom (alone) and pretending that one can, by means of imposing one particular conception of the limits of that right on other agents (even if this empirical is fairly widely shared as a matter of contingent fact), constitutes the very same "defect" as when an agent assumes to impose such obligations with respect to other objects of external choice.

4. Conditional Normativity in the State of Nature

The investigation of the secondary literature on Kantian right has left us with a quite radical negative conclusion. With the assistance of Edmundson and Ypi, our argument currently consists in the rejection of innate right in the state of nature, in so far as this pre-institutional right is postulated in the form of a legitimate, in principle (though not empirically) enforceable, and fully-specified external constraint that has priority over any positively established rightful condition (the latter then often gets downgraded to a mere

instrument to service that natural innate right).¹⁵ According to the above critique, however, this supposed proto-legal norm does *not* differ from its acquired cousins (private property, contract, and status rights) and, hence, cannot function as the foundational starting point for erecting the Kantian edifice of a law-governed rightful realm. We have seen how this suggestion differs from the mainstream interpretations: Regardless of natural law or legal positivist varieties of Kant exegesis, when it comes to the one right to external freedom all agree that this right must constitute the fundamental common ground. Otherwise, the state of nature presents itself as a normative black hole; a realm of anarchy that fails to account for our strong pre-theoretical commitments to human rights and their distinct role in theoretical and practical contexts.

Before we return to this objection in the final two sections, let me first present the positive part of this paper's proposal; an exercise that should already assuage the current state of incredulosity that readers might likely experience, given the rejection of Kant's idea of innate right.¹⁶ When I have emphasized that private right(s), both innate and acquired, are absent from the state of nature this is meant to indicate the absence of a certain normative *mode* in which rights apply. Kantian state-of-nature rights are not actualized and, *pace* the current mainstream interpretation, this actualization affects even innate right. However, we should ask next, is this actualized normative mode, in which rights are legitimate, enforceable, and clearly-determined entities, their only conceivable manifestation? I suggest that it is not and that an alternative mode is available. I refer to this mode as "conditional legal normativity" and it describes, in Kant's conception of the apparently pre-legal realm, hypothetical normative *legal* facts that would apply to agents *if* they were in the rightful, juridified, realm as understood by Kant. Let me introduce the abstract proposal first, before moving on to illuminating it with the help of an analogy.

Given the negative conclusion that was established above, it certainly comes as a surprise that the Kantian state of nature turns out to *be*, in the following mode, a "legal realm" after all. Before exiting, the pre-juridified realm consists of a large set of distinct conditional claims about particular legal norms (spelled out in these conditionals' consequents), all of which share the same antecedent: "*If and only if* in a juridified realm, then X." The "X" refers to the different contents of the specific private rights (innate and acquired). These contents might well be exactly as Kant describes them in his elaborate reflections on what is going on, in terms of positive rights and law, within the rightful condition and under public institutions. I do not take a stance on these jurisprudential details, however, and, as is acknowledged in the secondary literature, a lot of what Kant says in spelling out the specific rights in question must be rejected. (Just think of what

¹⁵ Here I find myself in agreement with Ariel Zylberman, who is similarly critical of the idea that Kant was an instrumentalist about the state and the rule of law. See (Zylberman 2014).

¹⁶ What follows is my account of "conditional legal normativity" that I develop in two other independent ways in recent essays. In (Hanisch forthcoming b) I pursue an intuitive case for what it means for an agent to be subject to conditional legal requirements; in (Hanisch forthcoming a) I establish the same conclusion but in a formal argument based on insights by David Enoch. The following, third, attempt is an independent argument from analogy. The hope is that these three strategies taken together make a strong case for the conclusion that Kantian state-of-nature-rights are best interpreted as conditional claims about legal rights in the rightful realm.

Kant says about race, sex, and criminal punishment.) My point is formal, structural and abstract; it is one about the way in which contentful claims *about* rights present themselves normatively *in* the Kantian state of nature already.

Notice, furthermore, the “if and only if” in the above construction. In order to properly illustrate the normative mode that reigns in the state of nature, my interpretation of Kant’s jurisprudential arguments endorses a strong version of conditional reasons claims, namely one that regards their common antecedent (“when in a juridified realm”) as both a necessary as well as a sufficient condition for the actualization of the private law contents in the consequents. Hence, the “if and only if” in the text as opposed to a mere “if” or an “only if.” These “biconditional reasons” capture the idea that being in a civil realm not only suffices to render the actualization of these rights normatively non-optional, but, at the same time, draws out that these positive rights are unique in that they are *constituting* a juridified realm and, therefore, only apply therein. The specific rights to property in external objects, for example, are therefore *there* in the Kantian state of nature. However, they are there in a “merely” conditioned way, namely as the unactualized consequents of bi-conditional propositions about positive legal norms.¹⁷

Lastly, one other (ontological) worry that should be tamed at this point already is that conceiving of state of nature normativity as a form of “proto-legality,” expressed in conditional reasons, renders Kantian jurisprudence incompatible with its distinctively transcendental and non-empirical method. One might worry that the above suggestion that positive law, so to speak, comes “first” renders the entire proposal into an account of the nature of law that is contingent on what particular historical and empirical omnilateral wills deliver in terms of actual law giving, its interpretation and its administration. What happened to Kant’s *a priori* analysis of law’s *nature* that he so obviously insists upon in the *Doctrine of Right*?¹⁸

I (2018a) undertake a more comprehensive response to this worry elsewhere, but the short version observes that the argument of this section does not in itself imply that the current worry is warranted. First, as already mentioned, the contents of the consequents of the specific conditional reasons claims is the subject of another, lower level, investigation. It deals with the important philosophical task of spelling out the details of particular laws and requirements. Second, more important is the methodological point that each of the conditional claims taken as a unit (i.e., the antecedent and its distinct consequent) appear well-accessible in an *a priori* and non-empirical mode of theorizing. Keep in mind that the abstract level of analysis that we are engaged in attempts to vindicate “merely” the *conceptual* and dialectical priority of the *idea* of positive law (and its institutions) over the pre-juridified, but still legally-significant, principles and norms that reign in the Kantian

¹⁷ In (Hanisch forthcoming a), I elaborate in more detail on how some of Kant’s original remarks lend much support to my account that all contents of the bi-conditional claims in the state of nature are always already formulated under the presumption that they will be constitutive elements of a legal order. Among many others, the legal issue of “prolonged possession” nicely illustrates how the specific Kantian juridified requirements presuppose the existence of a regime of positive law and its institutions.

¹⁸ See (6:237).

state of nature. Needless to say, insisting on this conceptual priority is not tantamount to any kind of historical primacy of the Weberian state. Of course, legal institutions in Kant's sense are a relatively recent and distinctively modern phenomenon. The submitted proposal, therefore, does not at all take actually-existing positive law and its institutional manifestations as a (determining) starting point for jurisprudential reflections on the nature of law.¹⁹ The conceptual (and normative) priority that underlies the account from conditional legal norms highlights that the formulation of Kant's acquired and innate rights necessarily incorporates these rights' destiny as the constitutive elements of an abstractly-conceived juridified condition. This way of spelling out what is going on in the state of nature is perfectly-well compatible with a Kantian methodology. Interesting as they are, I must put aside these complex issues for now.

Next, in order to illustrate this alternative account of legal normativity in the state of nature, on the one hand, and to further strengthen the case for the suggested reinterpretation of Kant in the face of the above (and the other, forthcoming) objections, on the other, let us introduce an analogy. The two controversial claims that must be clarified more with the analogy's help are, first, that legal normativity is absent in any actualized and valid form unless there is positive law and its institutions; and, second, notwithstanding the truth of the first claim, there are entities of legal normativity in the state of nature that, in addition, always already incorporate in their formulation the final purpose of them constituting a juridified realm.

Take a familiar situation. You are at the local grocery store. Diligently working off your shopping list, you put a box of your favorite chocolates in the cart. It turns out it has been the last box available and, somewhat happy that you secured it for yourself, you turn to the pasta section. As you scan through the many available options there you notice that another shopper is taking the box of chocolates out of your shopping cart and puts it into hers. You are startled and it takes you a couple of seconds to express your bamboozlement about this surprising turn of events.

From the point of view of the different normative modes and concepts at work in the above interpretation of Kant, what is going on here? More precisely, what kind of normative complaints appear a fitting response on your part? One might think that this is a clear cut case of violating a strong property right. "I have spotted the last box of chocolates first and put it into *my* cart!", you might claim, reproachfully gazing the other shopper in her eyes. However, might not the other shopper (it turns out she too is a Kantian legal theorist), with some justification, reply that the box of chocolates was at best provisionally "yours," that remaining the case until the cashier scans the box at the check out and you complete your transaction and thereby buy the box. "C'mon! You wanna call the police over this?", she adds. And indeed, reflecting a little bit on the circumstances, you begin to realize that there is something puzzling about your intuitively-plausible "juridified"

¹⁹ Axel Honneth (2015) gets close to this kind of picture when he proposes the Hegelian method of "normative reconstruction" in order to explain and to vindicate (but also to criticize) modern legality. I (2018b) critically discuss this proposal in the light of my alternative method that claims to remain compatible with Kant's transcendental and ahistorical approach to jurisprudence.

response that had appealed to a robust, legally-established, entitlement to the box of chocolates (without, of course, communicating your acknowledgment of this philosophical complication to the other shopper).

In analogy with this paper's main proposal, the suggestion is that the property principle at work in the supermarket is of the same kind, and exhibits the same normative features, that the Kantian state of nature captures. First, nothing in the proposal rules out that other normative categories *do* apply and vindicate your outrage. What the other shopper did was, first and foremost, rude and impolite. She, at least, violated some norms of etiquette. Moreover, you reasonably complain about her action and resent her for it in the same way in which you utter a loud "Hey!" in case she barges her cart into your shin. As will be especially crucial in the final two sections below, norms of social and interpersonal *morality* are alive and well in the supermarket (pre-check-out), as the shin example illustrates. Utilitarians, virtue ethicists, and last but not least Kantian ethical theorist will all agree that certain moral duties have been violated in the scenario at hand.

Second, however, these other normative realms and conceptions fail to establish any legal requirements in a conclusive manner, as the shopper's remark about the police rightly draws out. Of course, you might call the store manager and she will likely appeal to the aforementioned prudential and moral resources in order to "settle" the dispute. However, it would be a grave misconception of the manager's authority and status, if she were to threaten, let alone, execute bodily force in order to put the chocolate box back into your cart. All this is, of course, changes dramatically (in normative terms) if the very same thing were to happen *after* the check-out. It would still be wrong for the store manager to forcefully intervene but now the appeal to an established legal right will correctly and efficaciously underly your (or the manger's) calling of the police.

Thirdly, returning to the pre-check-out scenario that arguably resembles Kant's state of nature, it is nevertheless incorrect to insist that *no* legal normativity whatsoever is present in the relationship between me and the other shopper. True, there is no enforceable legal obligation at play here. However, there is a particular proto-legal principle present: "If and only if in the realm of enforceable legal rights and duties (i.e., post-check-out), a piece of external possession belongs, all other things equal, to the person who picks it up first."²⁰ Notice two important things: *This* conditional principle applies with full force in the supermarket and it appears to account for your intuitively-plausible but ultimately defeated complaint regarding the other shopper's behavior. It is defeated only in terms of legal normativity, leaving space for other sources of practical requirements. More significantly, at the same time, the principle in question already and essentially incorporates the idea that the purchase in question ultimately is going to result in a fully-juridified arrangement between you, the store, *and* all the other shopper(s). This is the way in which distinctively legal conditional norms always incorporate (like a recipe or set of instructions) their ultimate purpose into the formulation of these norms' specific contents.

²⁰ Keep in mind that justifying the details of this conditional principle (i.e., the material in the consequent) is not my concern. It is, of course, an important task of Kantian jurisprudence.

The first-come-first-serve conception of initial acquisition is the fitting conception *under* the coercive but legitimate institutions of the modern state. That this norm remains legally impotent in its pre-check-out mode does not change any of this.

This short analogy hopefully summarizes the solution to the central apparent puzzle that conditional principles of legal normativity will likely engender, namely that the many norms they incorporate are present *as well as* absent in the state of nature (and supermarkets), depending on what mode of normativity we are considering. Let us now move on to an important objection to this proposal that might remain, even if the analogy is accepted as a helpful illustrative device for clarifying the unorthodox reinterpretation of Kant's legal theory.

5. Human Rights Without Conclusive Innate Rights?

There are many implications and objections that will follow from the above proposal and that are at the same time of broader relevance with regard to debates on Kant's legal and political philosophy. One central set of worries concerns the prospects of the above account of state of nature normativity as an interpretation of Kant's writings. Does the textual evidence support such a quite radical re-interpretation of private law? (The short answer is, yes and no.) Moreover, since the above argument defends the conclusion that even the one innate right to freedom gets thoroughly-juridified, isn't there an internal (to Kant's theory) objection arising? This objection observes that the presented juridification of the *Doctrine of Right's* central normative principles threatens to "cut off" its own Kantian legs, so to speak, because what used to be the external Archimedean anchor for establishing the duty to enter a rightful realm in the first place has now been replaced by a set of conditional reasons claims *about* such fundamental rights; rights, all of which are ultimately understood as to-be-established legal rights under public law. These and other objections are addressed elsewhere.²¹

This paper's concluding sections focus on more "practical" and political worries that emerge. Still, these worries are not unrelated to the just mentioned "theoretical" objections concerning the new understanding of innate and acquired right in the state of nature. For example, when one revisits the thriving literature on Kant's legal theory, there appears an almost universal consensus that innate right plays a special, foundational, role within Kant's complex edifice. As was thoroughly-analyzed in section two, the axiom-like stipulation of a right to external freedom, that we are all born with and that each of us inalienably possesses appears to underly all the subsequent steps in Kant's argument for the modern republic. The language that Kant uses to describe the innate (!) right has led many contemporary authors to interpret the *Doctrine* as a powerful early expression of today's (i.e., post-1945) notion of "human rights."²² Human rights are considered inalienable, quasi-legal (as distinct from "moral"), normative devices that are, at the same time,

²¹ See the two concluding sections in (Hanisch forthcoming a) and (Hanisch forthcoming b).

²² An excellent overview of the contemporary Kantian theorizing on human rights is (Follesdal and Malik 2014).

distinctively non-institutional. The latter in particular is considered a critical property because only these rights' independence from positive law seems enable them to protect individuals from arbitrary state-backed violence.

My account, with its insistence that Kant's innate right remains un-actualized in the pre-juridified condition appears to undercut exactly that political desideratum of contemporary human rights conceptions. We should therefore turn our attention to the question of what this paper's argument suggests with regard to the normative standing of, among others, refugees and stateless individuals. The focus on these unfortunate groups is especially apt, because they appear to be the prime candidates of persons who end up not being covered by the (post-)institutional understanding of an innate right to freedom. What about the urgent worry that stateless individuals, migrants, and refugees end up in a complete normative vacuum, if, outside of any juridified arrangements, people have legal rights only in the form of conditional claims about legal reasons that constitutively incorporate the idea of positive legal normativity from the beginning? Defending the above reflections against this important objection will also help to add the final touches to the reinterpretation of Kantian right in the state of nature.

6. Human Rights and Kantian Legality

The worry we are now focusing on is that the defended juridification of Kant's notion of innate right threatens to undermine its status as a pre-institutional corner-stone of a contemporary account of human rights. In response, there are two points in particular that I want to reflect upon. First, it turns out advantageous that my proposal endorses a very decisive and stark view with regard to the age-old interpretive dispute of how ethics and right are related in Kant.²³ The suggested reading sides with those scholars, who claim that there is *not* much of a connection between ethics and jurisprudence in Kant. Without establishing in the remaining space a fully-considered exegetical position on this issue, I am confident that the above argument sufficiently supports the claim that Kant's account of right establishes the trio of innate, private, and public right as a freestanding normative sphere (with its own, distinctively jurisprudential, conceptions of individual agency, freedom, rights, duties, and so forth). Indisputably, Kant's account of legality shares important formal and structural features with other realms of practical rationality and normativity, first and foremost with morality and prudence. Among those the most important ones are the idea that practical norms must satisfy standards of universalizability, on the one hand, and a conception of rational agency, the nature of humans as end-setting individuals who are capable of following such norms in the pursuit of their ends, on the other. From this shared slim starting point, however, Kantian normativity splits itself up into robustly-independent realms. Far from legality being constituted by a set of principles and conceptions that are "derived" from Kant's diverse

²³ For an excellent overview of the current status of this debate and the relevant bibliographical references, see (Kisilevsky and Stone 2017). Another high mark regarding this debate continues to be (Timmons 2002).

formulations of the categorical and hypothetical imperatives, the *Doctrine of Right's* edifice, its unique innate right of humanity included, presents itself as a freestanding conceptual sphere, with its own distinct conceptions of obligations, rights, and practical authority.

Instead of dedicating the remainder of this paper to this well-established discourse on “law vs. ethics” in Kant, I continue under the assumption of right’s thorough independence in the way suggested. Let us take the rejoinder’s next steps because, more relevant with regard to the objection, is one implication that this strict independence of Kantian right comes with, namely a particular advantage regarding the status of human rights: The mirror image of a conception of legality’s normative self-sufficiency is that morality is now *freer* than ever to play the role of a powerful and independent source of regulating interpersonal affairs.²⁴ The absence of any conclusive, pre-juridified, rights outside of a rightful realm therefore neither necessarily implies that all Hobbesian hell breaks loose amongst individual agents, on the one hand, nor that all interpersonal normativity collapses between such (stateless) persons *and* already existing rightful realms, on the other.

Let me be clear, this is *not* at all meant to belittle the dramatic deficits that are summarized in the Kantian state of nature; remaining therein remains a “wrong in the highest [judicatory; author] degree.” (6:308). Exiting such a “state of externally lawless freedom” (6:307) remains non-optional and obligatory. The point rather is to highlight that Kant’s normative system exhibits multiple dimensions and layers and that the strict separation of law from ethics that my proposal supports, does not result in the unpalatable position that governments and other institutional agents are utterly unconstrained vis-à-vis, for example, refugees and other stateless groups of individuals.²⁵ Kant himself, in his reflections on cosmopolitanism, leaves plenty of room for non-legal but nevertheless interpersonal *moral* devices and instruments. As provocatively argued above, however, unless these devices get incorporated into positively-set legal frameworks (in the form of civil rights within a rightful realm), they fall short of providing the distinctively legal mode of public action guidance and policy constraints.

The problem with contemporary conceptions of “human rights” that I currently criticize, precisely is that they often swiftly assume that this distinctively *legal* aspect of enforceability and legitimate authority is automatically built into such rights because of, for example, the urgency of the individual interests and goals that they claim to protect. And this swiftness, in turn, is exactly the problem with accounts that regard Kant’s innate right in the Lockean spirit described earlier. The skewed result of the attempt to assimilate the idea of human rights into the framework of Kantian jurisprudence is a conception of

²⁴ Crucially, Kant himself does not describe the state of nature in Hobbesian terms but, all its legal deficiencies notwithstanding, as a condition of (limited) sociality. For an exegesis of Kant’s remarks in this context (and of how they differ from the other influential social contract theories), see (Byrd and Hruschka 2010, pp. 44-70).

²⁵ See the famous remarks on “universal hospitality.” (8:357-60).

“rights” that rests uncomfortably somewhere between the realms of moral rights²⁶, on the one hand, and positive civil rights, on the other. Human rights, as contemporarily conceived, are neither fish nor fowl, at least when looked at from within a Kantian perspective. If, on the other hand, contemporary approaches were to be satisfied with such rights as elements of a cosmopolitan morality, the proposal defended here would not object in the slightest.

Further reflecting the issue of the status of refugees and global migrants leads to the second point in response to the current worry. Even if the idea of law-like but proto-legal human rights is called into question, this does not at all suggest that, in actually existing real-world circumstances, refugees are entirely without any normative. On the one hand, as mentioned in the previous paragraphs, these individuals might well have moral rights based on the deliverances of cosmopolitan ethical reasoning. Even if these rights are not juridified ones they nevertheless put (nonenforceable!) normative limits on what other individuals and governments can do to refugees, for example. Moreover, even if we (reasonably) remain worried about this absence of legality and “human/natural rights law,” notice that the stateless individuals under consideration are not finding themselves in an *unmitigated* state of nature.

Rather, they are *stateless* exactly because many other members of humanity have organized themselves into rightful political units. The question, for example, of how refugees ought to be treated (and now the ‘ought’ in question is a partly-juridified one), poses itself in a mixed circumstance, i.e., a global landscape in which rightful realms enter into relations not only with other (more or less) rightful realms but with individuals who seek admittance into a (any) juridified realm qua rule-of-law governed arrangement.²⁷ As such, the relations in question *are*, at least partly, amounting to the satisfaction of the shared antecedent (‘If and only if in a juridified realm...’) of the private right conditionals. And, as was argued in this paper, once this antecedent stands (however shaky) and the sufficient condition it incorporates applies (however weakly), so does the legal material incorporated into the conditionals’ consequents. It follows that refugees, even if currently residing outside of any *particular* rightful realm and rule of law, are not in the kind of state of nature that many Kant interpretations envision, because they presume the Hobbesian conception and superimpose it on the *Doctrine of Right*. Due to other rightful agents (i.e., states and federations of states such as the EU) populating the world, some juridification of the global order has already been taking place and thereby transforms a stateless individual’s normative standing into a partly juridified one.²⁸

²⁶ I have, so far, avoided the notion of “moral rights” in order to avoid confusion. At this point, however, I hope it is clear that my argument does not object to that notion because it should by now be transparent that such rights belong to the distinct normative sphere of (cosmopolitan) morality and are *not* the proper subject of Kant’s legal philosophy.

²⁷ See (Kukathas 2003).

²⁸ One immediate objection is that the argument in the text shows too much. Thinking of refugees as already being *fully* incorporated into rightful relationships, simply in virtue of the fact that there are some rightful realms present in the world, might be understood as triggering *all* of the legal consequents that the conditional reasons claims about law incorporate. My argument needs to be refined then in order to allow

Again, also with regard to this second suggestion, it is not denied here at all that Hannah Arendt was absolutely right when she considered it a wrong in the highest degree when stateless individuals and refugees are denied their “right to have [juridified] rights.”²⁹ My suggestion in this paper exactly was that in order to make sense of this powerful observation (and timely critique of the past and contemporary global order) one does not have to postulate innate and acquired rights along the lines that Lockean suggest, that is, as fully law-like, but at the same time pre-institutional, enforceable entitlements that are conclusively activated in respect to all of their normative force, even in the absence of any acts of omnilateral willing and authorization (on the part of those who would be constrained by such a unilaterally declared right).

On the other hand, as was hopefully clarified in response to the current objection, I am not committed to claiming that labelling Kant’s right of humanity (as presented in the *Doctrine of Right*) an “innate” normative property of *all* human agents is unqualifiedly misguided. My claim was that though innate, it remains at the same time an exclusively *legal* right: The conditional reasons claims about legal rights that reign in the state of nature, including those that constitute one’s juridified personhood, do apply to all human beings at all times and everywhere. They are in this way features of all of us, they belong “to everyone by nature, independently of any act that would establish a right.” (6:237). These innate features refer to us as understood as potential legal personalities and juridified agents, whose legal rights’ actualisation *is* conditional on the united will of all engaging in the bringing about of a rightful realm and in maintaining the rule of positive law.³⁰

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degrees of membership in particular juridified realms (understood as self-governing political communities). For a number of plausible reasons, full-fledged active and passive democratic participation rights, for example, are not granted to refugees and migrants immediately upon admittance into a specific state. Acknowledging and concretizing the latter qualification must be an important part of the comprehensive development of my theory.

²⁹ See (Benhabib 2004, pp. 49-70).

³⁰ Acknowledgments.

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