Innate Right in Kant – A Critical Reading (EJP 19-404. R1)

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Abstract:

A now influential reading of Kant's statement of innate right in the Doctrine of Right interprets it as affirming a basic right of each to freedom of choice and action. This reading treats the innate right as foundational to Kant's entire philosophy of right -- all other rights are said to be derived from the innate right. I call this the 'free choice' reading of innate right; while it enjoys considerable intuitive appeal, it is contestable on textual and systematic grounds. I show that the free choice reading i.) conflates Kantian external freedom with liberal negative freedom, and ii.) that its foundationalist assumptions about innate right conflict with Kant's critical method of justification. I go on to offer an alternative interpretation of innate right as conditionally affirming subjects' capacity for legal accountability, the real possibility of which depends on that of acquired right. Far from supplying the basis of acquired right, the possibility of innate right thus depends on that of acquired right. I close with some remarks on the merits of reading Kant's innate right critically and hence, counter-intuitively.

I. The Problem of Innate Right in the *Doctrine of Right*

Kant's statement of innate right in the *Doctrine of Right (DR),* Part I of the *Metaphysics of Morals (MM),* is deeply obscure.[i] The statement's odd placement 'in the prolegomena' (6:238), i.e., *after* the Introduction but *before* the main text, raises questions about its relation to the main text: is innate right part of the *Doctrine of Right* or does it stand in a more indirect relation to the text? This compositional unclarity is compounded by others. The very idea of 'innateness' sits uneasily with Kant's critical philosophy and rejection of innatism in favour of generative accounts of human knowledge and morality.[ii] Equally disconcerting are Kant's alternative references to the innate right as grounded in either 'nature' or 'humanity': while the first encourages a foundationalist reading of the innate right as 'held by nature', the second points to its critical grounding in our (noumenal) capacity for morality.[iii] Nor is the content of innate right easily discernible. Kant speaks of it as pertaining to 'inner mine' – this could include anything from a person's bodily (phenomenal) attributes to strictly moral (noumenal) ones.[iv] However, Kant also and indeed more usually speaks of the innate right as pertaining to 'inner mine or thine', thereby introducing an *interpersonal* dimension of which it is hard to see, on the face of it, in what sense it could be 'innate'. Indeed, Kant's more general distinction between 'inner' and 'outer' morality makes it difficult comfortably to classify the innate right within the framework of his more general division of morality into virtue and right. In the Introduction to *MM*, Kant suggests that everything that pertains to inner morality – maxims, autonomy of will, duties to self – falls within the domain of virtue. By contrast, everything that pertains to outer morality – power of choice, the coercibility of rightful actions, perfect duties to others – falls within the domain of right. (cf. 6: 218/9) If 'inner' is ethical and intrapersonal, and if 'right' is 'outer' and interpersonal, how can there be a *right* that is inner? Conversely, if innate right pertains to a 'mine or thine' *relation*, then given the interpersonal, i.e., 'outer' nature of such a relation, how can such a right be *inner*?[v]

These difficulties have traditionally led interpreters to give the innate right a wide berth and to focus on other, albeit typically no less obscure exegetical problems in *DR*.[vi] More recently, and at least within Anglo-American approaches to *DR*, the trend has been to set textual difficulties to one side and to read the innate right as affirming an equal right of each to freedom of choice and action. This freedom right is said to derive from our rational end-setting capacity, the supremacy of which in a relevantly assumed hierarchy of values is taken to explain Kant's reference to 'humanity' in that context.[vii] Indeed, the innate right is often assumed to have a *dual* foundational function in relation to the rest of the text: itself grounded in our morally supreme value or capacity for choice, it is in turn thought to provide the basis for the derivation of all other rights in *DR,* including the three classes of acquired right.[viii] According to this view, there are in fact two distinct types of rights in Kant – a foundational freedom right, which we have by virtue of our capacity for choice – i.e., innately – and derivative property rights (acquired rights) for which innate right provides the basis but which are practically possible only in the civil condition. I shall call this the 'free choice' reading of innate right; whilst it has some textual support, its chief appeal lies in the fact that it aligns Kant's political philosophy with current intuitions about rights and freedom.[ix]

My aim in what follows is to engage the innate right's textual obscurities philosophically. Whilst I cannot pretend to a comprehensive understanding of it, I do believe that, in circumventing the noted textual difficulties, the free choice reading ends up short-changing us with regard to the distinctiveness of Kant's rights conception. Substantively, Kant's discussion of innate right simply fails to engage the presumed *value* of (the capacity for) choice; methodologically, it is hard to see how the innate right can have a foundational status within the framework of Kant's critical philosophy. I shall move from substantive to methodological considerations. I shall argue, first, that the innate right does not pertain to the value of (capacity for) choice but to subjects' reciprocally valid claims to legal accountability

(sections II and III). I shall go on to show, second, that thus understood the innate right cannot have a foundational status relative to acquired right. To the contrary, innate and acquired right represent subjectively and objectively necessary features, respectively, of one and the same general concept of right (section IV). Finally, I shall suggest that, given the external nature of the morality of right, the vindication of the practical possibility of innate right depends on that of acquired right (sections V). I shall close with some remarks on why it matters to our assessment of its current relevance that we pay close attention to Kant's undoubtedly highly obscure treatment of innate right in *DR* (section VI).

II. Innate Right as a Foundational Freedom Right

Kant's sole and recently much quoted statement of innate right occurs in a section entitled 'Division of the Doctrine of Right'. This section is sandwiched between 'Introduction' and 'Part I' of *DR*. Kant here says that,

> There is only one innate right.
>
> Freedom (independence from being constrained by another's necessitating power of choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity. (6:237, translation amended)[x]

The free choice reading treats 'independence from another's necessitating power of choice' as substantively equivalent to the right of each to exercise his own power of choice. On this view, to affirm a person's right to independence from another's necessitating power of choice is equivalent to affirming that person's right to exercise his own power of choice.[xi] It is doubtful, however, that the two propositions are strictly equivalent. If I have a right to

independence from another's necessitating power of choice, I have a right to not being treated by him in certain (yet to be specified) ways. If, by contrast, I have a right to freedom of choice, I have a right to exercise a particular capacity of mine. The former formulation places the moral emphasis on others relating to me in particular kinds of ways; the latter singles out a particular capacity of mine as the basis of my innate right. One might contend that my right to not being treated by others in certain ways derives from my capacity to exercise my own power of choice – the two formulations might be said to be equivalent in the sense of the former being normatively reducible to the latter. But this would be to attribute no independent moral significance to my relating to others in particular ways, and this in turn raises the question as to why Kant nonetheless formulates the innate right interpersonally.

One likely reason for the free choice reading's elision of the difference between being independent from another's necessitating power of choice and being entitled to exercise one's own power of choice is Kant's late distinction between internal freedom and external freedom, including his partial gloss of external freedom in terms of the technical notion, 'power of choice' (*Willkür*). Internal freedom refers to a person's autonomy of will, i.e., to her independence from sensible inclination and her capacity to determine her maxims in accordance with the categorical imperative. By contrast, external freedom refers to a person's exercise of free power of choice (*freie Willkür*) in the context of her coexistence with others. Kant expressly denies that a person's external freedom is a function of her internal freedom: for an action to be right, hence externally free, it need not be based on a morally good maxim; mere outward conformity of action with universal law suffices. (6:218) Kant's separation of the rightness of an action from the goodness of its maxim has generated a large scholarly literature on the moral status of *DR*.[xii] More importantly here, it has also encouraged the perception among proponents of the free choice reading of the capacity for choice (*Willkür*) as that distinctive value which Kant's political philosophy is designed to

promote and protect. The intuitive thought appears to be that while *Wille* (construed as personal autonomy) pertains to ethics, *Willkür* (construed as freedom of choice and action) pertains to right.[xiii]

As noted, however, *Willkür* is a technical notion designed to distinguish between mere power of choice and free choice. 'Power of choice' – *Willkür* – references a being's capacity for self-directed action. The exercise of this capacity does not in itself amount to external freedom – it is simply doing as one wants or chooses. Higher-order animals, too, have mere power of choice (*arbitrium brutum*). Only *Wille* is the capacity for practical reason, so is the capacity to act from laws of reason (or freedom). The exercise of *free* choice (*arbitrium liberum, freie Willür*) is *Willkür* moderated by *Wille*: it is choice and action in accordance with relevant laws of practical reason. (6:218; 6:230; 6:231) This implies two things: first, *mere* power of choice is of no moral significance in itself; second, insofar as *free* choice is law-governed, the irrelevance of the categorical imperative to external freedom does not mean that the latter is not constitutively law-governed. Instead, the law of external freedom is the universal law of right; its chief distinguishing mark compared to the categorical imperative is that it is publicly legislated: in relation to right, the repository of *Wille* (as legislative reason) is the general united, public will, not each citizen's private will.[xiv] This is why, in contrast to the laws of internal freedom, the laws of external freedom are *only* externally enforceable: external freedom *requires* a public will. (6: 219; 6: 231; 6: 256).[xv]

The choice reading's elision of the distinction between *Willkür* and *freie Willkür* results in a further and final elision, namely, that of the difference between liberal negative freedom and Kantian external freedom. I just noted that, for Kant, freedom *in general* is law-governed; the difference is simply that laws of external freedom, which determine the compatibility of one's actions with the actions of everyone else, are publicly legislated, hence

coercible, whereas laws of internal freedom, which determine the goodness of one's proposed maxim of action, are self-legislated. The universal law of right enjoins agents to 'so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law'. This law 'does not at all expect, far less demand, that *I myself should* limit my freedom to those conditions just for the sake of this obligation; instead, reason says only that freedom *is* limited to those conditions and that it may also be actively limited by others.' (6:231) I need not *will* in accordance with the universal principle of right – I need merely *act* in accordance with it. Nonetheless, only *Willkür* in conjunction with *Wille* amounts to an exercise of external freedom.

Contrast Kantian law-governed external freedom with liberal negative freedom. According to the latter, a person is free when she is unobstructed by law to do as she chooses. Freedom here is *absence* of constraint by law.[xvi] It is of considerable importance to proponents of negative freedom that freedom be 'non-moralized', i.e., that a person be free to act on mere whim, including a- or irrational action and, crucially, acting in morally objectionable ways. This does not mean that proponents of negative freedom object to the imposition of lawful constraints on persons' freedom – to the contrary, Isaiah Berlin famously insists that restriction by law of persons' freedom is *prima facie* legitimate, his only caveat being that such restrictions should *not* be construed as freedom enhancing. Berlin believes proponents of positive freedom, among whom he lists Rousseau and Kant, to misconstrue the relation between law and freedom. Most current liberal philosophers follow Berlin in thinking of law as an independent if legitimate constraint on freedom.[xvii]

Given that, for Kant, freedom is constitutively law-governed in both its internal and its external senses (even though distinct laws of freedom apply), the elision of the difference between Kantian external freedom and liberal negative freedom is fateful. In his forthright defense of the innate right as a right to freedom of choice Louis-Philippe Hodgson claims that

'Kant's political philosophy rests on a highly contentious claim: that rational agents have a right to freedom, by which he means that their freedom can justifiably be restricted only for the sake of freedom itself.'[xviii] Hodgson here asserts that the right to freedom of each can justifiably be restricted by the equal right to freedom of everyone else. Kyla Ebels-Duggan similarly asserts that, 'each has an innate right to freedom. But it is possible to simultaneously honor everyone's right to freedom only under the rule of law.'[xix] Hodgson and Ebels-Duggan both slide into the language of negative freedom when they ascribe to Kant the view of law as an independent constraint on an antecedently affirmed freedom right. There is, however, a crucial difference between saying that no act of choice *is* free unless it is law-governed, and saying that acts of free choice can permissibly be *restricted* by law (for the sake of others' freedom or for any other eligible reasons). In the one case, we make its law-governed nature criterial for the act's being free; in the other case, we introduce law as an independent constraint on free choice.

To summarize, free choice readings of innate right typically commit three related elisions: the elision of the normative difference between being independent from another's power of choice and exercising one's own power of choice; the elision of Kant's formal distinction between *Willkür* (mere power of choice) and *freie Willkür* (law-governed choice); and the elision of the conceptual difference between Kantian law-governed external freedom and law-independent negative freedom. The resulting contrast with regard to the substantive interpretation of innate right is that, whereas under the law-governed account, we have the affirmation of a right to independence from others' necessitating power of choice subject to those others' equal rights *under* universal law, on the free choice reading, we have the affirmation of an independently ascribed right of each to freedom of choice that may permissibly be *restricted* by law for the sake of everyone's else's equal freedom right. On the law-governed account, the normative focus is on not being treated by others in particular (yet

to be specified) ways; on the free choice account, the normative focus is on each person exercising a morally supreme capacity of his. Notably, proponents of the free choice reading rely on Kant's summary statement of innate right exclusively; they ignore important surrounding textual passages.[xx] In the next section, I shall argue that once we take the surrounding text into account, a very different understanding of innate right becomes compelling.

III. Innate Right as Legal Accountability

I suggested that your right that others not exercise necessitating power of choice over you is normatively distinct from your right to exercise your own power of choice.[xxi] The former has to do with others desisting from controlling your actions through their power of choice. In speaking of another's *necessitating* power of choice, Kant assumes that when another does bring it about through his power of choice that you act in certain ways, your own power of choice is non-efficacious with regard to the action in question. You might be fully compliant – i.e., you might not resist the other's power of choice and might even welcome it. Even so, your power of choice does not contribute to *determining* (*necessitating*) your outward action: there is, for Kant, always only *one* determining cause. Hence, so long as you do as you are told, whether 'willingly' or otherwise, it is the other party who acts through you.[xxii]

It is tempting to see the wrongness of others' exercising necessitating power of choice over one as consisting in the suspension of one's own power of choice. In one sense, this is obviously right: when I decide in your behalf, I thereby suspend the efficacy of your power of choice in relation to the decision at hand. Nonetheless, there is a difference between locating the relevant *moral* wrong in your being prevented from exercising an intrinsically valued capacity of yours and locating it, alternatively, in my acting towards you in a particular way. Kant's actual formulation of the innate right – 'independence from another's necessitating

power of choice' – places the moral emphasis on our acting towards each other in certain kinds of way *given* each our power of choice (*Willkür*). *Willkür* is not a value to be promoted but is a capacity the moral salience of which consists in the fact that our exercise of it affects others.

The difference between valuing (capacity for) choice and viewing a particular kind of interpersonal relation as normatively significant has been emphasized in neo-Republican approaches to *DR*. Neo-Republican readings explicitly counter free choice readings when they interpret the independence formulation in terms of the notion of 'non-domination'; they correctly emphasize the choice-independent normative significance of not being treated by others in certain ways. However, Neo-Republicans tend to operate with a wide understanding of 'non-domination' according to which not just *express* acts of alien decision-making count as instances of domination but even another's bare capacity to engage in such acts.[xxiii] Thus, a bullish husband may be said to dominate his wife not just by what he actually does to her but also by what she knows he has the capacity to do to her should he so choose. Whatever the virtues of the Neo-Republican analysis of domination considered in its own right, its wide understanding of that notion is problematic when deployed in the context of *DR*. Given Kant's restriction of the morality of right to external action, inner maxims and intentions – including the bullish husband's mere awareness of his capacity to dominate his wife – are non-judiciable. Independence in the spirit of neo-Republican domination thus amounts to an over-interpretation of Kantian rights relations – it casts the net too wide by admitting elements of virtue into the domain of strictly external rights relations.[xxiv]

A more plausible because narrower interpretive candidate is the principle of legal accountability.[xxv] Its significance is best sketched by reference to its occasional suspension. The practice of another's legitimately exercising power of choice over a person, though an exception to the legal norm, is not unusual. Kant himself treats women, children, and servants

as paradigm examples of persons whose actions can permissibly be governed, in law, by another's power of choice.[xxvi] Except in extreme cases, a person's legally sanctioned exercise of power of choice over another is restricted to antecedently specified action-types. A husband's legally sanctioned exercise of power of choice over his wife would not have been comprehensive but would have left the wife with many legally irrelevant action-types with respect to which she would have been deemed capable of exercising her own power of choice – how to arrange flowers in a vase, say, or which linen to use on which beds. Nonetheless, given its *necessitating* character, another's legally sanctioned exercise of power of choice over a person entails his legal responsibility with regard to the relevant sub-set of a person's actions. Kant presumed male householders' legal guardianship over women and children justified on grounds of the latter's natural legal immaturity, and he presumed legal guardianship over (male) servants justified on grounds of their contingent legal incompetence, which these could in principle overcome. The merits of Kant's particular views on these matters are irrelevant here; the important point is that, when he speaks of an (adult male) person's innate right to independence from another's necessitating power of choice he has in mind others' presumption in favour of that person's legal majority, the suspension of which requires express justification. This is evident from the remarks immediately following the statement of innate right (now called the 'principle of innate freedom'):

> This principle of innate freedom already involves the following authorizations, which are not really distinct from it: innate equality, that is, independence from being bound by others to more than one can in turn bind them; hence a human being's quality of being his own master (*sui iuris*), as well as being a human being beyond reproach (*iusti*), since before he performs an action he has done no wrong to anyone; and finally,

> his being authorized to do to others anything that does not in itself diminish what is theirs, so long as they do not want to accept it – such things as merely communicating his thoughts to them, telling or promising them something, whether … true and sincere or untrue and insincere; for it is entirely up to them whether they want to believe him or not…. (6:238)

The first 'authorization' invokes a person's capacity to enter into reciprocally binding agreements with others; from it follows, secondly, the presumption in favour of his capacity to take legal responsibility for his actions (*sui iuris*), as well as, thirdly, the presumption in favour of his immunity from responsibility for actions which he did not himself commit (*iusti*). The laboriously formulated right to communicate to others anything, true or false, etc., so long as this 'does not diminish what is theirs', affirms immunity from liability for speech acts, directed at particular others, the veracity of which it is the other's responsibility to check, such as when, in the purchase of a house, the vendor reports the rotting roof as in good order to the prospective buyer who neglects to check the facts for himself.[xxvii]

Insofar as the listed 'authorizations' are 'not really distinct from' the right to independence, and insofar as having an 'authorization' implies a license relevantly to exercise one's own power of choice, the independence formulation and the choice formulation might be deemed to be co-extensive after all: to be independent from another's power of choice is to be authorized to exercise one's own power of choice in the relevantly specified ways. Granted. Note, however, that the issue is not the *value* of choice but one's legal responsibility for the choices one makes. This reading chimes with the earlier mentioned distinction between mere choice and free (law-governed) choice: to act in a manner that is externally free is to act in a legally responsible manner. It also chimes with

Kant's interpersonal specification of the general concept of right early on in the Introduction to *DR*, well before the introduction of innate right:

> The concept of right (…) has to do, first, only with the external and indeed practical relation of one person to another, insofar as their actions, as deeds, can have (direct or indirect) influence on each other. But second, it does not signify the relation of one's choice to the mere wish of the other (…) but only in relation to the other's choice. Third, in this reciprocal relation of choice, no account at all is taken of the matter of choice (…) all that is in question is the form in the relation of choice on the part of both. (6: 230)

Kant's specification makes no mention at all of the value of choice, or even of a right to choose. Instead, 'right' pertains to a strictly reciprocal relation between the power of choice (*Willkür*) of one and that of another. To have a right is to stand in a certain kind of relation to others – there is nothing that is of juridical significance over and above that relation. Of course, whether rights relations thus conceived are practically possible is a question yet to be determined; at this early stage in the text, Kant's specification of the general concept of right is analytic, hence both expositional and conditional. The point in the present context is merely to draw attention to the conceptual continuity between Kant's interpersonal rights specification in general and his subsequent specification of innate right as a relation in which persons reciprocally acknowledge each their legal responsibility for all and only all their own acts of choice. The presumed *value* of (power of) choice simply doesn't come into it.[xxviii]

IV. Innate Right as Subjective Condition of the Possibility of Rights in General

According to the above account, Kant's statement of innate right conditionally affirms an entitlement of each to being treated by all others as a legally accountable agent. There is admittedly something odd about a reciprocally acknowledged entitlement to legal accountability. The oddity is twofold. First, the innate right affirms, in effect, an 'entitlement' to being held accountable under law. This sounds counter-intuitive; we are much more used to thinking of a right as an entitlement that *exempts* us from obligation. However, being 'entitled' to be subject to law is in fact in keeping with Kantian law-governed freedom – any felt sense of oddity reflects the strong hold on us of liberal negative freedom.

The second and for now more important oddity concerns the innate right's position in the overall sequence of Kant's argument. I just suggested that the innate right *conditionally* affirms persons' reciprocally valid claims to legal accountability: nothing is as yet proven. Contrary to the impression given by free choice readings, Kant's statement of innate right cannot then have a foundational status relative to the rest of the argument in *DR*. This should in fact be evident from the unusually substantial content of the Introduction to *DR* alone. The latter contains a preliminary analysis of the (above cited) moral concept of right; the derivation from it, first, of the universal principle and, second, of the (above cited) universal law of right; a short argument in support of the intrinsically coercive nature of rights; and a representation, 'in pure intuition a priori' of a system of strict right that assigns to each what is theirs with 'mathematical exactitude'. (6:233) In short, by the time we get to innate right, Kant's analytic exposition of the concept and principle of right is already quite advanced.[xxix] Nonetheless, relative to acquired right, innate right *is* discussed first, so might be thought of as foundational relative to the latter. If we read the innate right as affirming a basic right to freedom of choice grounded in the supreme value of (power of) choice, it makes intuitive sense to assign it a foundational role in relation to acquired right: the innate right to freedom of choice supplies the basis for the derivation of property rights and these, in turn, expand the

realm of choice. But if, guided by Kant's specifically mentioned 'authorizations' and the antecedently specified general concept of right, we instead interpret innate right as affirming the principle of legal accountability, attributing a foundational status to it is decidedly odd. The principle of legal accountability requires background conditions that are neither naturally nor rationally intuitive. The principle is highly contextual – it can have applicability only within established systems of positive law. This creates a puzzle: if innate right as legal accountability presupposes a functioning system of positive law, and assuming that the practical possibility of such a system is precisely what is at issue in *DR*, why does Kant state a principle the operational background conditions of which are yet to be established? Is this not to put the cart before the horse? I shall suggest that, to the contrary, the innate right's odd location points away from foundationalism to Kant's strategy of critical justification in *DR*.

In contrast to foundationalist arguments, Kant never begins from first principles or substantive value statements; he always starts instead with common experience. Consider Karl Ameriks' characterization of the first *Critique*'s transcendental deduction of the categories of the understanding as a 'regressive argument'. According to Ameriks, 'Kant moves from the assumption that there is empirical knowledge to a proof of the preconditions of that knowledge.'[xxx] That there is empirical knowledge is a datum of common experience – Kant's interest is with the possibility conditions of such experience. Ameriks contrasts the regressive strategy with what he calls the progressive strategy, which moves from identified a priority conditions – in the case at hand, the categories of the understanding – to a proof of the objective validity of subjective experience.[xxxi] Against this, Ameriks holds that 'what Kant has proved at most [in the transcendental deduction of the first *Critique*] is something of the logical form: A only if B, B. It would be uncharitable to assume that he took this to be an argument establishing the truth of A'.[xxxii] Importantly, Ameriks' regressive method does not seek to sidestep Kant's transcendental idealist commitments but accepts the shift from the

analytic to the synthetic mode of reasoning. Ameriks therefore rejects the progressivist's ambition to infer the truth of A from a vindication of the subjectively necessary conditions of experience of A.[xxxiii]

I believe that the regressive method which Ameriks attributes to CPR holds for Kant's works more generally.[xxxiv] Transcendentally regressive justification starts from subjectively affirmed experiential premises, which it accepts as given, and regresses from these to their subjectively necessary possibility conditions. The first *Critique* regresses from a subject's affirmed experience of an external world to the categories of the understanding as subjectively necessary conditions of the possibility of such experience. *Groundwork* similarly regresses from subjects' acknowledged consciousness of unconditional duty to the idea of freedom as the subjectively necessary condition of the possibility of consciousness of duty. What would it mean to interpret the argument for innate right in *DR* regressively? The regress would have to be *from* the experience of oneself as a raising rights claims against others *to* innate right as the subjectively necessary possibility condition of such claims. Applying Ameriks' schema – 'A only if B. B' -- yields: 'rights claims are possible only if subjects acknowledge each other's capacity for legal accountability.' Innate right would then be the object of a transcendental deduction that sought to demonstrate the practical reality (for subjects) of their capacity for legal accountability.

Can one plausibly reconstruct the argument for the innate right along regressive lines? Yes and no. It *is* plausible to interpret DR as moving from common experience of reciprocally claimed rights to these claims' a priori possibility conditions. To see this, return to the mentioned oddity of affirming an innate right to legal accountability *prior* to the vindication of a system of positive law within which such a right applies. It turns out that Kant does in fact assume the actual existence of systems of positive law from the outset. The Introduction to *DR* opens as follows:

> The sum of those laws for which an external lawgiving is possible is called the doctrine of right (*ius*). If there has actually been such lawgiving, it is the doctrine of positive right, and one versed in this, the jurist, is said to be experienced in the law, when he not only knows external laws but also knows them externally, that is, in their application to cases that come up in experience.' (6:229)

Kant clearly assumes his readers' experiential familiarity with existing of systems of positive law, including the existence of jurists who are versed in the laws of particular such systems. The establishment of a system of positive law – the classic move from the state of nature into the civil condition – cannot be what is at issue in *DR*: at the point of the text's opening paragraph, we are *already* in a civil condition. Kant's actual concern in *DR* is with the moral legitimacy conditions of actually existing systems of positive law. His question is not 'is a system of positive law possible?' – but 'how is positive law *morally* possible?' The Introduction continues:

> [A lawyer] can indeed state what is laid down as right (*quid sit iuris*), that is, what the laws in a certain time at a certain place have said. But whether what these laws prescribe is also right, and what the universal criterion is by which one could recognize right as well as wrong (*iustum et iniustum*), this would remain hidden from him unless he leaves those empirical principles behind for a while and seeks the sources of such judgments in reason alone.' (6:229/30)

DR regresses from our ordinary experience of established systems of positive law to their moral possibility conditions – from 'what is laid down as right' to 'judgments in reason

alone'. So far, then, it is plausible to suggest that innate right (the capacity for legal accountability) might function as a transcendentally necessary condition of the possibility of a *morally* legitimate system of positive law along the lines of Ameriks' regressive schema. The problem is that the actual vindication of the claimed possibility conditions is postponed until the argument for acquired right. It is only in the context of acquired right that Kant shifts from analytic to synthetic reasoning, there announcing a deduction of the concept of intelligible possession as 'a synthetic a priori proposition about rights'. (6: 249) While this does not invalidate a regressive reading of the innate right, it complicates it. Insofar as the deductive move is made in the context of acquired right, it is acquired right, not innate right, that carries the justificatory burden of the entire rights argument. We must therefore amend Ameriks' regressive argument as follows: 'A only if B. B only if C. C.' To wit: 'morally valid law only if innate right. Innate right only if acquired right. Acquired right.'

Setting out this regressive argument in full would require a detailed analysis of acquired right, including the announced deduction of the concept of merely intelligible possession in paragraph 6 of the main text, with all the obscurities of that particular portion of the text. Doing so is beyond the scope of this paper.[xxxv] In the remainder of the present section I shall confine myself to distinguishing between innate and acquired right as subjectively and objectively necessary components respectively of one and the same general concept of right.[xxxvi] We shall see that there are not two distinct kinds of right, with one serving as foundation to the other; instead there is only *one* concept of right, with innate and acquired right as its constitutive components. In section V I shall suggest that the analytic unity of innate and acquired right under the same general concept of right enables us to make some sense of the innate right's justificatory dependence on acquired right.

Return to the 'Division of the Doctrine of Right', the place of Kant's formal statement of innate right. As noted, this section comes *after* the Introduction but *before* the main text of

DR. We know that the Introduction itself is unusually substantial, containing both the specification of the general concept of right and the derivation from it of the universal law of right. We further know that the crucial synthetic move within Kant's regressive strategy occurs in the context of the argument for acquired right in Part I of the main text. Both the 'Division of the Doctrine of Right' and the Introduction should therefore be read as offering analytic, i.e., expositional and hence merely conditionally valid arguments. The 'Division of the Doctrine of Right' is itself sub-divided into a 'General Division of Duties of Right' and a 'General Division of Rights'. For reasons of space, I shall set the former aside.[xxxvii] With regard to the latter we are told that,

> The highest division of rights, as (moral) capacities for putting others under obligations (…), is the division into innate and acquired right. An 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)

Kant adds,

> What is innately mine or yours can also be called what is internally mine or yours (*meum vel tuum internal*); for what is externally mine or yours must always be acquired.

An innate right is 'innate' in the sense of being 'internal' to the subject. This does not render it self-evident – innateness, as inner, simply refers to something that is 'supplied by the subject', rather than being external to the subject.[xxxviii] At this point, it is left open how many innate rights – and how many acquired rights – there may be; Kant speaks in the plural about

‘rights as capacities to obligate others’ (and be obligated by them in turn). What is ‘internally mine or yours’ could amount to several distinct rights. But there then follows the formal statement of innate right as comprising ‘only one’:

> There is only one innate right.
> Freedom (independence from being constrained by another’s necessitating power of choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity. (6:237)

What is ‘internally mine or yours’ is my independence from being constrained by another’s necessitating choice and his independence from being so constrained by my power of choice (as implied by the reference to universal law). This is not a substantive right but refers to a formal relation between the power of choice of one and that of another. The immediately ensuing ‘authorizations’, discussed above, specify that relation in terms of the legal accountability of each vis-à-vis all others for the choices he makes. But Kant now abruptly concludes the section by announcing that,

> (w)ith regard to what is innately, hence internally, mine or yours, there are not several rights; there is only one innate right. Since this highest division consists of two members very unequal in content, it can be thrown into the prolegomena and the division of the doctrine of right can refer only to what is externally mine or yours. (6:238, translation amended)

Even though the innate right is part of the 'highest division of rights', it is excluded from the 'division of a doctrine of right' – indeed it is 'thrown' into the prolegomena as though it were of no importance. This unexpected exclusion of the innate right from what is in effect the main text[xxxix] is deeply perplexing. Does Kant introduce the innate right merely in order to diagnose its irrelevance to an *outer* rights morality? This is implausible. At least insofar as the innate right affirms an entitlement to legal accountability, the reason for its exclusion cannot be its irrelevance to (the division of) the *Doctrine of Right* but must be based on other considerations. Let us begin by considering the innate right's *inclusion* in the 'highest division of rights'. I suggested that innate and acquired right may not constitute two distinct kinds of right – foundational and derivative – so much as specifying the subjectively and objectively necessary components, respectively, of the general concept of right. If this is plausible, then the 'highest division of rights' is internal to the general concept of right. Recall Kant's specification of the latter in the Introduction:

> (T)he moral concept of right has to do, first, only with the external and indeed practical relation of one person to another insofar as their actions, as deeds, can have (direct or indirect) influence on each other. But second, it does not signify the relation of one's choice to the mere wish of the other, but only a relation to the other's choice. Third, in this reciprocal relation of choice no account at all is taken of the matter of choice. All that is in question is the form in the relation of choice on the part of both, insofar as choice is regarded as free. (6:230)

According to this specification, having a right is to stand in a particular kind of relation to another. If we assume that innate and acquired right specify jointly necessary constitutive features of the general concept of right, then every substantive instantiation of the concept –

i.e., every positively legislated rights relation – must exemplify both those features simultaneously. Otherwise put, any practically real rights relation must exemplify both subjectively and objectively necessary rights features. Kant's characterization of the innate right as 'inner' supports this interpretive suggestion. As previously noted, 'inner' refers to that which is 'supplied by the subject' or that which is 'subjectively given'. That which is subjectively supplied is that which inheres in subjects directly, such that it cannot be alienated or rendered into something 'outside' the subject. It follows that that which is subjectively supplied and therefore 'inner' cannot be 'outer'. If that which is 'inner' cannot be 'outer', it is incapable of empirical representation in space. Innate right as subjective rights component then constitutes a *qualitative* (non-material) component within any actual rights relation – it is the inner *quality* of legal accountability.

By contrast with 'inner', 'outer' is everything that is outside of the subject, hence not supplied by the subject. Everything that is outside the subject is given in space. In turn, everything that is given in space is material or, in Kant's terminology, 'empirically real'. In contrast to innate right, objects of acquired right are 'outer', hence distinct from the subject; moreover, these objects are empirically given in space. Acquired right thus supplies the objective (material) component in any given rights relation – it supplies the material by means of which a given rights relation, as a reciprocal choice relation, is capable of empirical representation in space. In sum, insofar as innate and acquired right constitute subjectively and objectively necessary constituents of one and the same general concept of right, both must be satisfied in any actual instantiation of the concept. Each actually legislated rights relation must satisfy both the subjective component – reciprocally acknowledged capacity for legal accountability – and the objective (material) component by means of which the rights relation is capable of representation in space.

But if any actually legislated right must satisfy both these conditions, why is the innate right nonetheless excluded from the 'division of the doctrine of right'? I believe that the answer to this latter question has to do with the external nature of a morality of rights. The 'division of the doctrine of right' refers, in effect, to the main text of *DR*. This is evident from Kant's characterization of a doctrine of right as 'the sum of laws for which an *external* lawgiving is possible'. (6:229, emphasis added) A *division* of a doctrine of right is then the classification into relevant legal sub-categories of all the laws for which an external lawgiving is possible: the right of the state (itself subdivided into private law and public law), the right of nations, cosmopolitan right. All laws for which an external lawgiving is possible must be capable of representation in space – this much simply follows from the external ('outer') nature of such a lawgiving. Yet we saw that innate right is internal, hence qualitative, so incapable of representation in space. As such, innate right cannot be an item in a 'division' that classifies only and all those laws that are capable of an external lawgiving. This does not render the innate right irrelevant to such a division – it simply means that as an inner rights quality the innate right cannot be a direct *object* of a division that concerns all those laws that are subject to an external lawgiving.

VI. Innate Right's Indirect Vindication through Acquired Right

I have argued that, insofar as we interpret the innate right as the subjectively necessary component of possible rights relations in general, it forms part of the highest division of rights. However, given its qualitative nature, it cannot itself be an object of external lawgiving, so cannot be part of a division that includes only all those laws for which an external lawgiving is possible. I want now briefly to indicate why its non-material nature renders the practical vindication of innate right dependent on that of acquired right.

Recall my amended version of Ameriks' regressive schema: "A only if B. B only if C. C." In the present context, (A) stands for a morally valid system of positive law; (B) stands for innate right; (C) stands for acquired right. Hence: 'A morally valid system of positive law is practically possible only if innate right is practically possible. Innate right is practically possible only if acquired right is practically possible. Acquired right is practically possible'. By practical possibility I here mean 'empirically real' in the specific sense in which a system of external lawgiving is 'empirically real' – i.e., morally valid yet (also) capable of representation in time. (cf. 6:252/3) Why does acquired right carry the burden of proof? The short answer is: because of the external character of rights morality.[xl] One might ask, why is rights morality (necessarily) external? The short answer to this question is: because rights morality is necessarily coercive. Let me explain, albeit very summarily so.

Insofar as the concept of right pertains to a strictly *reciprocal* relation between the power of choice of one and that of another, such relations cannot be either established or maintained by anyone directly party to the relation; the requirement of strict reciprocity instead calls for third-party enforcement of rights relations. The practical possibility of rights relations thus depends on a public will capable of imposing reciprocally equal terms on all parties simultaneously. (6:256) This in turn renders rights relations necessarily coercive, i.e., the terms of those relations are imposed on all parties by the public will. Given that it is necessarily coercive, the public will is itself restricted to external law-making – it cannot legislate with respect to subjects' inner intentions but is restricted to ensuing rightness of outer *action*. But if rights relations are practically possible only insofar as they are externally enforceable, and if they are legitimately so enforceable only so long as the relevant laws are themselves strictly external, then rights relations between subjects can be secured only through the law-governed regulation of outer objects of choice with respect to which agents enter into reciprocal choice relations with one another. On this account, the justificatory

burden rests with acquired right because the morality of right is an externally enforced morality the legitimacy of which itself depends on its restriction to the external objects of choice – property rights – through the regulation of which strictly reciprocal rights relation between subjects are secured.

One might agree that an external morality which requires an external, hence coercive law-giving is therefore restricted to external objects of choice as the means through which rights relations between subjects are externally regulated. But how does the demonstration (via the idea of a public will) of the practically real possibility of acquired right also vindicate the real possibility of innate right? How is it that insofar as acquired right is practically possible, so is innate right? I think the most plausible response is: by virtue of the analytic unity of the general concept of right. Recall once more my interpretive suggestion that innate and acquired right form subjectively and objectively necessary constitutive features of the same general concept of right. I said that the analysis of the general concept of right offered by Kant in the Introduction and the 'division of rights' is conditional in the sense that the demonstration of the practical possibility of rights is postponed until the shift into a synthetic mode of reasoning in the context of the discussion of acquired right. The analytic exposition merely tells us what is 'contained in' the *concept* of right – it does not show this concept to be practically real. The analytic exposition does, however, tell us what is involved in invoking the very concept of a right – it does specify what we in fact commit to, conceptually, when invoking the concept. And here is it perhaps not insignificant that, in the order to analytic exposition innate right precedes acquired right. We said 'A only if B; B only if C. C'. While in the order of justification, C precedes or carries the weight of B, in the order of exposition it is possible that we could not even formulate the very notion of an external mine and thine (acquired right) unless we already presumed an internal mine and thine (innate right as legal accountability). If so, that is, if the notion of acquired right can be

coherently stated only under the presupposition of innate right, then any demonstration of the real possibility of acquired right as *right* must contain within it that of innate right. Otherwise put: a demonstration of the real possibility of acquired right (an empirically real system of law) carries within it the presumption of innate right (as subjects' capacity for legal accountability).

VI. Conclusion

At the outset of this paper I proposed to engage the textual obscurities surrounding Kant's statement of innate right philosophically. Something distinctive is going on in these passages. Kant is clearly struggling with the material – or at least *we* are, since these passages do strike us as obscure. This is no reason to set them aside. If we do and rely on pre-conceived freedom intuitions instead, it won't be surprising if we end up with an understanding of innate right that is close to what we already believe. But the intuitive approach also pushes us towards a foundationalist justification. This is a deeply un-Kantian way of proceeding. Our first thought should be that affirmation of a foundational freedom right cannot be what Kant took *himself* to be up to in *DR*.

I instead adopted a modified version of what Karl Ameriks has more generally characterized as Kant's 'regressive method'. This method begins from subjectively given experience, which it takes on trust, and regresses from there to its a priori (subjectively or 'transcendentally' necessary) possibility conditions. I suggested that *DR* as a whole can plausibly be approached from this perspective: Kant begins with our experience of legal obligation under established systems of positive law and regresses from there to the subjectively necessary possibility conditions of morally valid law. Rather than playing a foundational role, the innate right is one element in an extended analysis of right as a distinctly interpersonal concept the practical justification of which engages Kant in a

complex regress that culminates in the deduction of the concept of merely intelligible possession as a 'synthetic a priori proposition of right'. (6: 249) More specifically, I suggested that innate right and acquired right are best understood as constituting subjective and objective constitutive components, respectively, of the concept of right in general. Innate right specifies the capacity for legal accountability that must be predicated of anyone to whom we ascribe rights: this part of my argument was guided by what Kant says about innate right in the relevant portions of the text – specifically the listed 'authorizations' immediately following his statement of innate right.

I went on to argue that innate right cannot provide the foundational basis for the derivation of acquired right. Kant's crucial justificatory argument – the announced deduction of the concept of intelligible possession – occurs in the context of the argument for acquired right. I did not engage with the actual deduction in any detail – my chief concern was to draw attention to the fact that insofar as Kant's announcement of a deduction signals the shift from an analytic to a synthetic mode of reasoning, we must treat everything prior to the deduction as analytic and hence conditional in status, including the statement of innate right. It follows that, far from justifying acquired right, the justification of innate right depends on that of acquired right. I sketched a possible reason for this: as subjective rights condition, innate right is itself incapable of empirical representation. Yet the external morality of right must be capable of empirical representations. Acquired right is capable of objective representation so can demonstrate the conditions for the practical reality of strictly reciprocal rights relation. Yet although in the order of justification, acquired right precedes innate right, in the order of analytic exposition, innate right precedes acquired right. As subjectively necessary component of the concept of right in general, a demonstration of the real possibility of innate right is thus folded into that of acquired right.

I cannot claim that the proposed reading of innate right is comprehensive or that it accurately captures Kant's own intentions. What I will claim is that the proposed reading explicitly orients itself by what Kant says in the text; moreover, it seeks to make sense of those passages in terms of Kant's own distinctive method of philosophical vindication. On both these counts I believe the proposed reading to have the advantage over the free choice reading. This raises the question as to why the choice reading is nonetheless currently so dominant. I said at the outset that in bringing the innate right closer to currently popular intuitions about freedom and rights, the choice reading secures the perception of the abiding relevance of the *Doctrine of Right* to contemporary political concerns. While this is a very sound philosophical motivation, it is not obvious that the concern to demonstrate a past work's abiding normative relevance warrants avoidance of detailed textual engagement. Often the relevance of a given philosophical position – past or present – lies in the ways in which it *challenges* our erstwhile intuitions. Consider, in this light, Kant's enumeration in *Groundwork* II of diverse theoretical justifications of morality that appeal to its conduciveness to happiness or to its utility or to its supposed fit with our emotional needs. (G 4: iv-xi) Kant rejects all these justifications as *popularphilosopische* distractions: our actual moral practice is premised, he claims, on the concept of duty as that supreme moral principle which reflects our acknowledgement of morality's unconditional validity for us. It is the ground of morality's implicitly acknowledged unconditional validity for us that is the object of transcendental inquiry in *Groundwork*. Kant does not claim to offer us a new moral theory – instead he claims to show us the moral commitments presupposed by our moral practices yet routinely overlooked by popular moral theories of the day. *DR* may well proceed similarly: Kant's starting point is actual legal practice, including, more specifically, our experience of obligation under the law. His specification of the general concept of right conceives of it

as a formal, strictly reciprocal, external relation between the power of choice of one and that of another. This specification is currently widely celebrated as a 'relational' rights conception – a purportedly 'novel' theory of rights. At the same time, the simultaneous grounding of innate right in the supreme value of each our capacity for choice will not yield a relational understanding of rights. To the contrary, it directly conflicts with it. To that extent, current readings that celebrate Kantian 'relationalism' whilst affirming an innate right of each to freedom of choice are confused. But the deeper costs, it seems to me, is that reliance on pre-conceived intuitions in favour of admittedly arduous textual analysis amounts to a missed opportunity in terms of critical insight. As with *Groundwork*, it seems to me that *DR* is best read in the spirit of Kantian critique: while we may think that the morality of rights is all about the supreme value of individual freedom of choice, our actual rights practices suggest that what truly is moral about rights is our capacity to relate to each other in strictly reciprocal terms even despite our natural proclivity, given each our power of choice, to 'seek to lord it over each other.' (6:307)[xli]

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[i] The following analysis is based on Bernd Ludwig's revised edition of Kant's *Rechtslehre* (1986). Mary Gregor's 1996 translation follows that edition in some but not all respects. Unless otherwise indicated, citations in English are taken from Gregor's translation, occasional amendments are my own. Although the *Doctrine of Right* (*DR*) forms part of the

Metaphysics of Morals (*MM*), I here follow established scholarly practice in distinguishing between them. All in-text page references, to *DR*, *MM*, and *Groundwork* (G) are to the Prussian Academy Edition of Kant's collected works.

[ii] Cf. Zoeller (1989); Ameriks (2000).

[iii] By 'foundationalism' I here mean arguments that proceed from presumptively self-evident first principles that serve as justificatory basis for the derivation of further principles. By a 'critical' justification I mean the eschewal of foundationalist premises in favour of arguments that regress from common experiences to their (mind-dependently) necessary possibility conditions. I say more about the difference between foundationalist and critical justification below.

[iv] For early discussion of the admixture of 'anthropological' and 'a prioristic' elements in *DR*, see Höffe (1994), chapter 4.

[v] For a detailed analysis of the inner and outer distinction in the *Metaphysics of Morals*, see Ludwig (2013).

[vi] Prior to recent growth of interest in Kant's innate right, the scholarly literature has tended treat Kant's argument in behalf of acquired right as at the heart of *DR*. Especially influential in this regard is Brandt (1982).

[vii] Christine Korsgaard's influential interpretation of *Groundwork's* 'humanity formula' of the categorical imperative constitutes an important precursor to the free choice reading of innate right. Korsgaard regresses from agents' choices to the value of their rational capacity for choice in general as the ground of agents' status as 'ends in themselves' (see Korsgaard 1996). While Korsgaard's analytic regress affords a determinate answer to the 'value' of each our humanity it also, in so doing, blurs the distinction between conditional and unconditional value in Kant. For critical rebuttals of Korsgaard's analytic regress, see Timmermann (2006); also Langton (2007).

[viii] In their respective analyses of the innate right, Ebels-Duggan (2012), Hodgson (2010), and Pallikkathayil (2010) all follow Korsgaard in identifying agents' capacity for choice as ground of their 'humanity'.

[ix] Whilst indirectly indebted to Korsgaard's reading of *Groundwork's* 'humanity formula', the free choice reading has also been associated with Arthur Ripstein (2009), though perhaps more so in early receptions of *Force and Freedom*. More recently, Ripstein has been associated with the contrasting neo-Republican reading of innate right (more on the latter below). There is, in fact, considerably ambiguity in Ripstein's account of the innate right. Overall, Ripstein emphasizes what he calls the 'relational' character of innate right, by which he means that we hold this right strictly against each other: absent human co-existence, rights talk would be redundant. Despite this overall 'relational' characterization, Ripstein substantively grounds the innate right partly in what he refers to as individual persons' capacity for purposiveness (Ripstein 2009, at 31) and partly in a reciprocally held basic entitlement of each to bodily integrity (Ripstein 2009, at 44/5). Conceived as an 'end-setting capacity', the 'capacity for purposiveness' is broadly equivalent to the capacity for reasoned choice, though in contrast to the choice reading, Ripstein emphasizes the claim to bodily integrity as a condition of the unhindered exercise of choice. Justificatorily, Ripstein holds that the innate right provides the 'basis of all others rights' (Ripstein 2009, at 31), implying its foundational status relative to acquired rights. In contrast to free choice readings, however, Ripstein acknowledges the constitutively law-governed character of Kantian external freedom. This latter aspect of his account puts his account in the proximity of neo-Republican approaches. I discuss Ripstein's position on innate right in detail in Flikschuh (2010a, 2017), including responses by Ripstein. My current target are free choice readings which, whilst inspired by Ripstein's work, are distinct from it. Prominent proponents of the free choice reading include Guyer (2018), Hodgson (2010), Pallikkathayil (2010), Ebels-Duggan (2012);

however, the trend is much more general and perhaps especially influential in so-called 'Kantian' liberalism, which tends not to take its orientation from primary Kant sources.

[x] Curiously, the 1996 Gregor translation omits 'necessitating' (nötigend) from Kant's statement of innate right.

[xi] One influential source of the equivalence claim is Ripstein (2009): 'Your sovereignty, which Kant also characterizes as your quality of 'being your own master (sui juris)' has as its starting point your right to your own person, which Kant characterizes as innate. (…) The innate right to freedom is then each person's entitlement to exercise his or her own freedom, restricted only by the rights of all others to do the same under universal law. (…) Innate right is 'explicitly contrastive and interpersonal: to be your own master is to have no other master. (at 36) There is in fact much that I agree with in Ripstein's exposition of innate right, especially his concern to formulate the innate right in interpersonal terms. However, there is also systematic ambiguity in Ripstein's account: he tends to move from the affirmation of an innate right to freedom (which comprises both bodily integrity and purposiveness), to the qualification of that right as subject to universal law. At times it appears as though the innate right precedes universal law, at other times Ripstein insists that right is a function of its consistency with universal law. This ambiguity seems to me to result from Ripstein's insistence that my right to exercise my power of choice is equivalent to others no-right to exercise their power of choice over me. For more detailed discussion, see Flikschuh (2010a).

[xii] Most notably, Willaschek (1997); contrast Ludwig (2000). See also Höffe (1994)

[xiii] For early scholarly analysis of the relation between Wille and Willkür, see Beck (1960), also Potter (1978).

[xiv] For a systematic recent treatment of the relation between private and public willing in *DR*, see Romero (2020).

[xv] Kant's account of external freedom as free choice under a *publicly* legislating coercive will may seem difficult to square with his conception of internal freedom as a form of self-legislation. Yet the coercive nature of external freedom is in fact consistent with self-legislated internal freedom. In ethics, I consider whether my *maxim* is consistent with universal law – only I can make the relevant introspective judgement. In law (*Recht*), the issue is whether my *action* is compatible with the agency of all others under universal law. I cannot myself be the judge of this; if I were, I would prescribe law to others. See Flikschuh (2010b). Contrast Ben Laurence, 'Kant on Strict Right'

[xvi] This conception of freedom as absence of constraint by law runs from Hobbes to Locke and JS Mill to Isaiah Berlin. Recent proponents include Steiner (1996), Carter (1999), Kramer (2003)

[xvii] Both Sangiovanni (2012) and Valentini (2012) conflate Kant's account of external freedom with liberal negative freedom in their respective critical discussions of Ripstein (2009).

[xviii] Hodgson (2010), at 791.

[xix] Ebels-Duggan (2012), at 896.

[xx] Apart from Kant's formal statement of the innate right, the most frequently cited textual passage in support of the free choice reading occurs in the context of Kant's argument for acquired right. Kant there says that one who wrests an apple, which I am holding, from my hand, 'would indeed wrong me with regard to what is internally mine (freedom)'. However, this person 'would not wrong me with regard to what is externally mine unless I could assert that I am in possession of the object without holding it' (6:248). At issue is the distinction between physical possession and intelligible possession. According to Kant, the former is insufficient for a claim to rightful possession; only intelligible possession qualifies as rightful. Kant's reference in the passage to 'what is internally mine (freedom)' and to

someone's illicitly 'wresting' something from my hand is often taken to confirm a reading of the innate right in terms of either a basic right to freedom of choice or a basic right to bodily integrity, or both. Yet the reference to 'wresting' simply illuminates the insufficiency of physical possession as a form of rightful possession, whilst one's interpretation of the meaning of 'internally mine' in the passage *depends* on one's reading of the innate right, so offers no independent confirmation of one's reading. Oddly, Kant's clarificatory comments immediately following his formal statement of innate right and discussed below are rarely referenced by proponents of the free choice reading. Contrast Byrd and Hruschka (2010); Ripstein (2009) also discusses innate right's 'authorizations' but treats them more tangentially, and most notably refers to them as 'other authorizations' (at 50-51), whereas Kant thinks them 'not really distinct from innate right' (6:237).

[xxi] You may have a liberty right to exercise your power of choice without therefore having a claim right that others desist from exercising power of choice over you. Hobbes' 'right of nature' has that structure.

[xxii] Cf. 6: 227: 'Imputation (*imputatio*) in the moral sense is the *judgement* by which someone is regarded as the author (*causa libera*) of an action, which is then called a deed (*factum*) and stands under laws.'

[xxiii] Cf. Hasan (2018) who explicitly criticizes Ripstein for his insufficiently 'capacious understanding of dependence' (at 914).

[xxiv] Thanks to the anonymous referee for pressing me to clarify my view of neo-Republican readings of Kantian external freedom.

[xxv] Cf. Byrd and Hruschka (2010), 62-7.

[xxvi] Kant therefore treats these classes of persons as 'passive' citizens.

[xxvii] Contrast Niesen (2005), according to whom the innate right affirms a general right to free speech.

[xxviii] Barbara Herman has suggested to me that the innate right might be taken to reference legal personality rather than (just) legal accountability. The notion of legal personality includes but is broader than that of legal accountability. If I understand her correctly, Herman sees Kant's philosophy of right as intended to draw out and develop our legal personality as distinct from (though complimentary to) our capacity for virtue. Though I cannot here consider it further, I think this a highly plausible reading which is continuous with the one presented here.

[xxix] Byrd and Hruschka (2010), refer to the innate right as the 'axiom of external freedom' and treat it as the logical starting point of *DR*. They offer no justification for this claim. Similarly, Ripstein (2009) begins is normative exposition of *DR* with an analysis of innate right which he treats as 'the basis of any further rights' (at 31). This tendency to treat the innate right as foundational ignores the considerable conceptual work undertaken in the Introduction regarding the concept and law of right. On the latter, see Wood (2000).

[xxx] Ameriks (2003), at 51.

[xxxi] A major proponent of the progressive view is Strawson (1966).

[xxxii] Ameriks (2003), at 53.

[xxxiii] Ameriks' regressive strategy thus differs from the Korsgaardian analytic regress according to which we can regress from common experience to determinate first principles or foundational values. On Ameriks' account, the regress is to subjectively necessary presuppositional commitments whose objective validity lies beyond possible proof.

[xxxiv] This is not to deny important differences between the justification of practical as opposed to theoretical propositions in Kant. My point here is simply that the general proof structure is similar. Cf. Förster (1989).

[xxxv] Although Kant announces the 'deduction of the concept of merely right [intelligible] possession' in the heading of §6, successive generations of commentators have had trouble

identifying the actual argument. This is not surprising, given the generally 'spoilt' nature of the originally published edition. More recently, Ludwig (1986) has shifted the so-called 'lex permissiva' into §6 in lieu of the 'missing' deduction. The move remains controversial but has been incorporated into the Gregor (1996) translation; oddly, other aspects of Ludwig's edition have been ignored. For fuller discussion of the relation between deduction and lex permissiva, see Flikschuh 2000.

[xxxvi] By 'subjective' I here mean 'that which is contributed by the subject'; by 'objective' I mean 'that which is contributed from outside the subject. I discuss this further, below. See also Ludwig (2013).

[xxxvii] For discussion of duties of right, see Byrd and Hruschka (2010), 62-7. It is somewhat unfortunate that, for reasons of space, I cannot here consider that division: the fact that Kant discusses rights *duties* before he turns to the division of rights strongly suggest that rights are grounded in duties, not *vice versa*.

[xxxviii] Cf. Ludwig (2013). When I say that innate right should be thought of as 'supplied by the subject', I do not thereby mean that it is within subjects' power either to supply or to withhold the relevant power or capacity. 'Supplied by the subject' here simply means 'subjectively supplied' in the sense in which, according to *CPR*, the categories of the understanding are 'supplied by the subject' – i.e., internally, not externally given. Thanks to Tom Bailey for pressing me for clarification.

[xxxix] The 'division of the doctrine of right' refers to the material division in the main text of (public) right into several distinct if related domains of law. Ludwig's amended edition, places the 'Table of Context', originally at (6:210) in the section under discussion, thereby making is clear that the 'division of the doctrine of right' refers to the divisions of the main text. Cf Ludwig (1986). This is one of the changes made by Ludwig which the Gregor (1996) translation does not adopt.

[xl] Cf. Flikschuh (2000, 2010b). See also Ludwig (2000). Contrast Laurence (2018), Ebels-Duggan (2012).

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