Kant’s Hylomorphic Formulation of Right and the Necessity of the State

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*The Doctrine of Right*, published in 1797, marks the mature formulation of Kant’s theory of Right. In this work, Kant argues that we have a duty to exit the state of nature (*exeundum e statu naturali*) and enter into a civil condition. Therefore, the civil condition is necessary. Existing scholarship justifies the necessity of the state by referring to the provisional nature of private property rights. Generally, accounts that connect provisional property rights and the necessity of the state can be divided into strong and weak views of state necessity.[[1]](#footnote-1)

Interpreters defending weak views such as Paul Guyer, Byrd & Hruschka, and Reinhard Brandt place Kant into the Lockean tradition, which argues that the necessity of the state derives from the particular circumstances that make the maintenance of our property rights impossible in the state of nature.[[2]](#footnote-2) The claim is that private property rights are rightfully acquired in the state of nature and thus the state is required only to make these rightful claims enforceable and determinable by “surveying…boundaries and recording…deeds” (Guyer 2002, 62).[[3]](#footnote-3) Thus, the primary role of the state is *administrative*, to facilitate the coexistence of various private claims by alleviating empirical conditions that make this difficult. This account of state necessity can be called ‘weak’, because the civil condition is required *only* because the empirical conditions in the state of nature are not conducive to the continued possession of my antecedently rightful property rights. [[4]](#footnote-4)

On the other hand, interpreters that take a strong view of state necessity, such as Katrin Flikschuh and Alan Brudner[[5]](#footnote-5), align Kant more with the Hobbesian tradition. They suggest that the necessity of the state is required by the *normative* problem that property rights present. Property rights are not rightful or normatively binding in the state of nature and, as Flikschuh has argued, they are “strictly speaking prohibited” until the state constitutes the right to acquire (Flikschuh 2000, 140).[[6]](#footnote-6) The reason for this is that possessing external things is a particularly difficult normative problem that requires a specific solution. Thus, the necessity of the state is meant to resolve the difficult normative problem that property rights presents us with. The transition to the civil condition is envisioned as transition from a condition of the impossibility of property acquisition to the possibility of property acquisition under a relevant authority.

This paper will problematize a shared assumption of both positions: that the necessity of the state is an attempt to accommodate private property right.[[7]](#footnote-7) In contrast, I will suggest that the necessity of the civil condition does not arise out of contingent factors to do with the “durability” of property rights or a particular normative difficulty with acquiring external objects, but that the necessity of the civil condition arises out of Kant’s *concept of right* and is therefore justified by the normative structure of rights *in general*. Thus, the necessity of the state is a necessity *internal* to the concept of right. This differs from the weak view dramatically and the strong view less dramatically. The weak view would have to reject the notion that the necessity of the state is internal to the concept of right because it conceives of the state as merely remedial to the difficult circumstances in the state of nature. The strong view suggests that the state is not merely remedial but constitutive of property rights. However, the strong view denies that the state is internally necessary to the general concept of a right, but only that the state is needed to take account of the *particular* normative problems presented in the right of acquisition.[[8]](#footnote-8) Interpreters such as Arthur Ripstein suggest that the concept of right, and practical reason generally, must “extend itself” in order to take into account private property right (Ripstein 2009, 234). My disagreement with both the strong and weak view is their insistence that the necessity of the state is the result of justifying the particular case of private property rights.

In order to show that the necessity of the state is internal to the concept of right, I will argue that Kant conceives of the concept of right hylomorphically: having a formal and material aspect that are jointly constitutive of some third element, non-reducible to its formal or material aspect. Kant’s hylomorphic formulation will help illuminate how Kant sees the state as a direct consequence of the concept of right. This formulation is in line with Kant’s hylomorphic formulations in his theoretical and practical philosophy. It should be noted that the hylomorphic formulation *itself* is not meant to be justificatory of my conclusion but merely explanatory of the relationship that Kant sees between innate, private and public right.[[9]](#footnote-9)

This path has been missed because the hylomorphic formulation of *right* is not explicitly mentioned in the published *Rechtslehre*. However, if we look outside the published text, we find that Kant *did* think of Right hylomorphically. By rediscovering this, and acknowledging its implicit presence in the published work, we can come to understand the relationship between innate, private, and public right as a syllogism, where the formal, major premise (innate right) and the material, minor premise (private right) entail the conclusion in public right. This would suggest that the transition from the state of nature to the civil condition is necessitated by the concept of right itself (understood hylomorphically) and not by conditions (normative or empirical) in the state of nature.

Therefore, my aim in this paper is threefold. First, to establish a connection between Kant’s hylomorphic language and his theory of right. Second, to show that in light of hylomorphic formulations of right, we can interpret the three-fold structure of the *Rechtslehre* (innate, private, and public right) as a practical syllogism. Third, to show that the civil condition gains necessity from the internal structure of right and not the particular problems of private right. In part one, I will show Kant’s usage of hylomorphic language in contexts related to the realm of right, showing the basic components of the hylomorphic structure. In Part two, I will argue that the same language is applied explicitly to the theory of Right in the *Naturrecht Feyerabend* lectures and in drafts of *Metaphysics of Morals*, as well as argue for its implicit presence in the published *Rechtslehre*. This will establish Kant’s adoption of a hylomorphic formulation of Right analogous to his hylomorphic language in his accounts of cognition and ethics. In part three, I will revisit the positions of weak and strong state necessity*,* arguing that if we take into account Kant’s hylomorphic formulation of right, we can explain the necessity of the civil condition by appeal only to the syllogistic structure of the concept of right.

***I. Kant’s Hylomorphism***

In this first part, I will provide a brief argument for the ubiquity of the hylomorphic framework in Kant’s philosophy. I will not attempt to give a full account of Kant’s hylomorphism.[[10]](#footnote-10) Instead, I will aim to show Kant’s hylomorphic framework includes three elements: the formal aspect, the material aspect and the subsuming judgement. These three elements also have a particular relationship. The material and formal elements are *jointly constitutive* of a non-reducible *third element*: the judgement which subsumes the material under the formal aspect.[[11]](#footnote-11) In this sense, all the elements are necessary: the material aspect needs the formal, the formal needs the material, and the formal and the material aspect need to be “combined” in a subsuming judgement. Kant employs this framework to explain the structure of key concepts like cognition and morally good maxims. Thus, the hylomorphic framework is a way of showing the internally necessary elements of some concept.

The immediate goal will be to show that Kant uses the same hylomorphic formulation for the concept of right in the *Naturrecht Feyerabend* (1784). As a result, I will focus on texts that were written roughly around the time of the *Naturrecht Feyerabend*. Kant’s use of the hylomorphic framework in other contexts should shed light on what it implies in the context of right.

In Kant’s theory of cognition (*Erkenntnis)*, the hylomorphic framework is used extensively.[[12]](#footnote-12) For example, in the *Jäsche Logic* Kant maintains that in every cognition “we must distinguish *matter*, i.e., the object, and *form*, i.e., the way in which we cognize the object.” (JL, AA 09:33.15-16). Thus, every cognition must contain material and formal aspect, roughly understood as the given object and the manner in which the object is cognized. In the *Critique of Pure Reason* Kant identifies these aspects as intuitions and concepts: “Intuition and concepts … constitute the elements of all our cognition, so that neither concepts without intuition corresponding to them in some way nor intuition without concepts can yield a cognition.” (KrV, A 50/B 74). Intuitions are related *immediately* to some object and rely on given sensible matter (KrV, A 19/B 33) and concepts only mediately (KrV, A 320/ B 376-7). As intuitions rest on sensibility, so concepts on functions understood as “the unity of the action of ordering different representations under a common one” (KrV, A 320/B 377). This means that concepts are the manner in which I represent a given content, by unifying the content under different forms of the understanding (KrV, A 68/B 92-3). As forms of experience, concepts are the normative rule under which intuitions must be determined in order for perceptions to count as experience. In other words, the formal and material in cognition, under its most basic construction, can be understood as intuitions, characterized through their receptivity of material sense data and concepts, characterized by their function as the forms under which material in cognized.[[13]](#footnote-13) Thus, a cognition, if it is to be counted as experience, that is, objective cognition, must be a syntheses of material intuitions under a formal concept. This matter-form distinction is central to Kant’s understanding of cognition as at once reliant on given sense data, and also originating in the activity of our understanding.

Furthermore, Kant maintains that concepts, and intuitions by extension are useless without a judgement: “Now understanding can make no other use of these concepts except by judging by means of them” (KrV, A 68/ B93). For Kant the conceptual content of our understanding requires a judgement that subsumes some object under the concept. This is to say that our cognition is discursive: finite cognizers need the mediate representation in a judgement for concrete cognitions. Kant defines judgement as the mediate cognition of an object where “mediate cognition” means a certain intuition determined by means of a concept (KrV, A69/ B94). Just like intuitions are blind without the role of intuitional matter, concepts remain empty unless there is a subsuming judgement which determines some matter by means of a formal concept. In the introduction to the Analytic of Concepts Kant says:

Since no representation pertains to the object immediately except intuition alone, a concept is thus never immediately related to an object, but is always related to some other representation of it (whether that be an intuition or itself already a concept). Judgement is therefore the mediate cognition of an object, hence the representation of a representation of it. (KrV, A68/B93)

This is to say that some concept, which is by itself unrelated to an object, needs a judgement which determines some object by means of it in order to yield concrete cognitions.

Thus, Kant’s hylomorphic framework with respect to cognition can be understood in a tripartite formulation: the formal concept, the material, and the subsuming judgement. The judgements themselves consist of two aspects, a material and formal aspect, which are the passive, determinable and the active determining element respectively. It is also the case that these elements are necessary constituents of any judgement or cognition. By claiming that matter and form are essential constituents of judgement, Kant is also claiming that individually formal and material aspects are insufficient to constitute a judgement. As Kant famously claims in the *Critique of Pure Reason, “*thoughts without content are empty; intuitions without concepts are blind…Only from their union can cognition arise” (KrV, A 51/B 75).

Similarly, in the *Groundwork,* Kant distinguishes between hylomorphic aspects of maxims. Kant, relating the formulations of the categorical imperative, states that “all maxims contain 1) a form, which consists in universality…2) a matter, namely an end” and “3) a complete determination of maxims by means of that formula [the formula of universal law]” (GMS, AA 04:436.13-24).

Here, Kant distinguishes between formal and material aspects of the maxim as well as the determination of maxims under the universal law. Kant identifies the formal aspect of the maxim as its universality. The material aspect of the maxim is the *end* adopted in the maxim. The determination of the maxims under the idea of a possible kingdom of ends is then the subsumption of the material end under the formal insofar as the material end is harmonized with the demand of universality. Indeed, here Kant is speaking of a completely determined system, but nevertheless, he here identifies the third element as the determination of the material under the formal. Furthermore, Kant here points to the progression of these aspects through the categories of quantity: first, the unity in the universal, then the plurality of material ends, and finally, the totality of a determinate system of maxims. Therefore, the totality in the system of ends is the total *determination* of the ends under universal law.

Furthermore, Kant is clear that the practical laws, in order to be categorical, must abstract from any given end, and prescribe laws independent of empirically given ends (GMS, AA 04:415.28f)[[14]](#footnote-14). However, Kant still insists that we must have some determinable matter, which the form of a law “limits” (KpV, AA 05:34.32f). Indeed, to act at all, the agent must adopt some end. As we have seen, the material aspect of practical judgements are ends. We can have various and diverse ends, which, according to Kant, come down to the natural and necessary end of happiness (GMS, AA 04:442.01-05). In order for these ends to be judged as good, the ends must be pursued out of respect for the moral law. In other words, the moral law requires me to realize an end because it can be justified in light of competing ends and maxims of my own and others. The formal and material aspects in practical judgement are jointly constitutive insofar as the formal aspect (the practical law) needs the presentation of some object (an end) in order to articulate an object for which a will can reasonably strive. In this sense, the formal (moral) law is independently insufficient for moral judgement. Furthermore, the material aspect is independently insufficient for moral judgement because we need the formal aspect in order to validate the end as a permissible or necessary end. Therefore, in practical judgement, the formal and material aspects are independently insufficient and jointly constitutive of the moral judgement.

Furthermore, the formal and material aspects need a determination in a third element that is non-reducible to either the formal or material aspect. The material end must be determined by the formal law so that we can then yield a judgement that the material end is *possible* under the formal criterion. This judgement is the non-reducible third element of the hylomorphic structure.

Therefore, Kant’s use of the hylomorphic structure is generally defined as containing three elements: the formal aspect, the material aspect, and the judgement. The formal and the material aspect are only not independently, but only jointly constitutive of a judgement. The judgement is the necessary third element in Kant’s hylomorphic structure, which subsumes the material aspect under the formal. These can be generally stated as the ideas that, first, that the material and formal aspects are jointly constitutive of a third element, the judgement, which brings the material under the formal.

Furthermore, we should notice that the framework takes on the structure of a *syllogism* where we reason from the major formal rule to the minor, material condition and finally the conclusion which applies the rule to the condition. This structure is unsurprising given that Kant describes reason (*Vernunft)* as the faculty of “judging mediately (through the subsumption of a condition of a possible judgement under the condition of something given)” (KrV, A330/B387). For example, we reach the conclusion “Bodies are alterable” by starting with the formal concept “Every composite is alterable” and then moving to the material aspect, “Bodies are composite”, and finally to “third proposition, conjoining the more distant cognition (“alterable”) with the one lying before us” (KrV, A330-1/B387). The conclusion is “the actual judgement that expresses the assertion of the rule in the subsumed case” (KrV, A330/B387). We reason to a conclusion through a series of premises: a major (formal) premise and a minor (material) premise. Similarly, in the Vigilantius lectures on ethics, Kant suggests that in order to impute specific consequences to an actor we follow a syllogism where the major is the formal law, the minor is the *factum* or material deed of the agent (V-MS/Vigil, AA 27:562). The conclusion, then, is the determination of the consequences that are implied directly from the law and the given deed. The conclusion necessarily follows from the premises and is the assertion of the rule in a given condition.

Kant’s theory of syllogism has a few features that are important for our purposes that I would like to note here. First, the conclusion of the syllogism follows directly from the truth of the premises. Once the major and the minor are given the conclusion immediately and necessarily follows (Log, AA 09:121.12-13). Second, for a categorical syllogism, the major premise must be a universal proposition and the minor premise an affirmative, but not wholly particular proposition (Log, AA 09:124.01-04). By this Kant means that if the minor is a purely particular notion, nothing follows but a purely particular conclusion. Third, the conclusion follows the quality of the major premise and the quantity of the minor premise (Log, AA 09:124.13-15).

***II. Hylomorphic Right***

In the previous section I outlined some characteristics of Kant’s use of the hylomorphic framework. Kant used this language generally to distinguish between the formal aspect, the material aspect, and subsuming judgement. Kant’s hylomorphic framework took the formal and material aspects to be jointly constitutive of a third element: a judgement which subsumed the material under the formal aspect. Here, I will turn to Kant’s main *hylomorphic* formulation of the concept of right. The aim in this section will be to frame why Kant adopts hylomorphic language for the concept of right, and to argue that Kant understands a similar type of hylomorphic relationship to be present in the concept of right.

*2.1 Hylomorphic Right prior to the Rechtslehre*

Three years after the publication of the first version of the first *Critique*, and roughly simultaneous to the writing of the *Groundwork*, Kant’s lectures on Natural Right were recorded in the manuscript known as *Naturrecht Feyerabend*.[[15]](#footnote-15) This text provides the first insight into Kant’s concept of right and, in many ways, lays the foundation for the culmination of his theory of right in the *Rechtslehre* twelve years later.[[16]](#footnote-16) Kant’s lectures follow a textbook written by Gottfried Achenwall entitled *Ius Naturae*. Kant’s text functions as a critical commentary on Achenwall’s text, often taking Achenwall’s views as a springboard to express his own views. Kant first complains that Achenwall’s principle of right, the agreement of laws with the divine will, requires too much knowledge of us and underdetermines our duty. Kant continues:

For us the principle is that if any action can exist together with the freedom of all in accordance with the universal law this action is allowed and we have authorization. I have a right when I have a reason to necessitate the wills of others. That is right considered *materialiter*, what I can compel another to do. Right *formaliter* is what is not wrong. I cannot act wrongly without being subject to coercion, in the latter case right is considered *adjective* and can only be taken *singulariter* in the former it is *substansive* and is taken *pluraliter*. So I have a right when I can coerce someone. An action is right if it can be made into a universal law without doing harm to universal freedom, that is adjective. For that a human being needs only to avoid doing wrong to another, but if I have a right then I can compel him to something that really, directly limits the freedom of another (V-NR/Feyerabend, AA 27:1332.35-1333.04)

After giving his own principle of right, Kant is, at this stage, offering his own concept of right in the place of Achenwall’s more traditional version. Kant refers to both material and formal as *Recht*, signaling that these are both aspects of right more generally. Furthermore, Kant is here imitating a distinction made in Achenwall between right taken subjectively and right taken objectively (IN I §36-7). It is significant that instead of adopting Achenwall’s language, Kant formulates the concept of right as *hylomorphic*, consisting in a formal and material aspect. This terminology parallels the formulation of Kant’s theory of cognition developed previous to the *Feyerabend* lectures. In fact, in the Blomberg Logic, thought to be based on lectures given in the 1770’s, uses the exact same Latin terminology (*formaliter/materialiter*) to distinguish the material and formal components of cognition (V-Lo/Blomberg 103).[[17]](#footnote-17) Thus, this terminology was already well-placed within Kant’s system and, therefore, it is significant that Kant chooses to invoke this framework at the point where he is introducing his concept of right. Indeed, it appears as though Kant is intentionally adopting the hylomorphic structure to distinguish a formal and material aspect, as he did in the theoretical and ethical contexts shown above.

Kant’s writings on legal and political philosophy, after his lectures on natural right in the 1780’s, consist of mainly short-form essays until the publication of the *Rechtslehre* in 1797.[[18]](#footnote-18) Despite the lack of an explicit hylomorphic formulation of right in the published work, Kant clearly had the formulation in mind while drafting the *Rechtslehre*. Indeed, in the drafts for the *Rechtslehre* we do find an explicit instance of the same hylomorphic language in the *Feyerabend*. Under the heading “Right” Kant includes right considered *formaliter* as “the relation of one person to an action” (HN, AA 23:276.32-33). Right can also be regarded *materialiter* which is the “relation of one person to an object of that person’s power of choice” (HN, AA 23:277.01-02). This distinction follows the hylomorphic formulation from *Feyerabend,* both terminologically and conceptually: the relation of a person to an action defines whether the action is right (possible under the principle of right) while the relation to an object of an individual’s power of choice (*Willkür)* are the material actions that claim rights. The formal right is the rightness or wrongness of actions generally and material right is the specific claim to a right. In other words, here again right consists of both what is right and what it is to have a right. This distinction gets put in a tripartite formulation in one of Kant’s notes written while preparing *Metaphysik der Sitten*. On the back of a letter dated June 12th 1795 Kant distinguishes, under the concept of right, three points that follow the three categories of modality, which very often signals a syllogism:

1. **Being right** (regula justi) the **possibility** of action in accordance with laws of freedom-the formula of justice (*Justitia)* as such. 2. **To have a right** (of which there can be several) is the **actuality** of private right of each individual in relation to others as outer right, hence justice in *status naturalis* (*lex juridica)*. 3. **To be in a rightful condition** *lex justitiae distributivae*, right of acquisition, right of possession, the **necessity** to the use of right through the universal will *lex justitiae distributivae*. (HN, AA 23:281.07-15)

Though Kant here does not use the explicit hylomorphic language, his formulation nevertheless follows his previous formulations of the concept of right. Being right, is a standard of justice which is a formal, procedural standard which defines the possibility of rightful actions. To *have* a right is to actually, materially claim a right. To be in a rightful condition is to enter a state that makes possible the judgement through which my actual claim (material right) is given necessity by being subsumed under the standards of justice (formal right). As in the *Naturrecht Feyerabend*, the subsumption of the material claims under the formal is identified as the rightful condition where one can make use of the right through a universal will. Kant’s formulation here, two years before the publication of the *Rechtslehre*, identifies a formal and material aspect in the concept of right along with a concluding judgement in the rightful condition. Therefore, Kant maintains the hylomorphic formulation of the concept of right through the time when he is actively working on his published metaphysics of right. Moreover, Kant identifies the threefold formulation with the three aspects of right that appear in the *Rechtslehre*: innate right (natural right), private right, and public right. Next, I will turn to the Doctrine of Right where I will show why Kant’s hylomorphic formulation can help us see why the necessity of the state is not justified by the particular difficulties of private right but by the structure of the concept of right.

As I have shown in the first section, this hylomorphic structure is meant to express a certain kind of relation between its aspects. In this section, I will elucidate three implications for Kant’s concept of right suggested by his adoption of hylomorphic language.

First, the formal aspect of right is the formal coordinating law through which the material aspect of right is determined. Thus, Kant distinguishes between two distinct aspects as he does in his theory of cognition and moral judgement. The formal aspect is the standard by which we determine what is rightful or wrongful, or what is just and unjust. This is the formal a priori concept of right, that gives us the formal rule for unifying some matter. It has the role of *determining* the matter according to a certain standard. The material aspect is the various claims that one makes based on his ability to coerce others. Kant suggests that I have a right materially when I have the capability to coerce another. This means that my material right is simply my subjective ability to coerce others into respecting my right by force. The claims that I make about rights, the specific abilities I take myself to have, are various and often contradictory in the state of nature. As Kant says, “For I judge what is right, others could judge otherwise, and they do not act in accordance with my judgement” (V-NR/Feyerabend, AA 27:1337.14-15). My subjective judgements about what is in fact right, or whether I have a ground to coerce others, are various, contradictory and underdetermined. Thus, in the concept of right, as he does elsewhere, Kant distinguishes between an a priori formal standard that determines an undetermined matter.

Second, like formal and material aspects of cognition, and formal and material aspects of moral judgement, formal and material right are jointly constitutive and therefore both independently insufficient to constitute a right[[19]](#footnote-19). Material rights are insufficient insofar as they lack the universality and necessity in the formal aspect of right, they are only subjective and so admit of incompatible claims. They have yet to be determined by a universally authoritative standard which Kant insists can only be found in formal right. Kant gives the example of the hunter who shoots an animal that runs onto the land of another (V-NR/Feyerabend, AA 27:1337.38-40). Both parties assert that they have a right to the deer, and indeed both have reasonable claims. Yet, there is no conclusive criterion or necessity that can resolve the dispute. This is also true of formal right. Kant adopts his own principle of right: “if an action can exist together with the freedom of all in accordance with a universal law this action is allowed” (V-NR/Feyerabend, AA 27:1332.35-6). However, this formal standard cannot independently ground concrete rights. In order to give us necessary judgements of rightness and wrongness, there must be some set of objects which the standard can apply over. This does not mean that it cannot rule out certain forms of action without looking at every specific instance. Rather, it means that we must articulate some sort of object to which we apply the formal standard.[[20]](#footnote-20) Thus, the formal aspect of the concept of right is independently insufficient without the material aspect. Therefore, in his hylomorphic concept of right, Kant also accepts that the formal and material aspects of right are jointly constitutive and independently insufficient.

Third, Kant also accepts that there must be a subsuming judgement for hylomorphic right, as he does for his theory of cognition and moral judgement. Recall that the formal and material aspect of right need a non-reducible third element that subsumes the material aspect under the formal. Kant, in the passage quoted above, does not explicitly mention a third element in addition to the formal and material aspects of the concept of right. However, after his hylomorphic formulation of right, Kant says that natural law has “*principia* ofdijudication not of execution. Law must have authority and the authority of whose will is at the same time a law is legitimate authority” (V-NR/Feyerabend, AA 27:1337.36-7). The notion that natural law is only a *principium dijudicationis* and not *executionis* is to suggest that the formal law is merely a standard for appraisal and not yet able to give judgements about specific claims to right: “Natural right alone is insufficient for execution” (V-NR/Feyerabend AA, 27:1338.01).[[21]](#footnote-21) The needed execution, it seems, is precisely the determination of material claims to right under the standard for appraisal given in the principle of right. What is needed is the *subsumption* of the material claims to right under the formal, and its resulting judgement. Without it, the formal standard and material claims on external rights remain unable to obligate anyone to anything.

Thus, as we saw above, there is a (implied) syllogistic relationship between the formal and material aspect and the subsumption of material under the formal:

(Major): If any Y can exist together with the freedom of all in accordance with the universal law then that Y is allowed.

(Minor): John has a (material) right to some Y.

(Conclusion): John’s right to Y can exist together with the freedom of all in accordance with the universal law and therefore John has a *conclusive* right to Y.

Here, the formal aspect of right is the major premise and the material aspect of right is the minor premise and the conclusion is the civil condition in which the material is subsumed or determined under the formal rule. Thus, the third element, the civil condition, is the *conclusion* of syllogism. Furthermore, this means that the civil condition is implied directly from the major and minor premises. The civil condition is immediately and necessarily entailed by the major and minor premises. Kant’s hylomorphic framework in right implies the necessity of the civil condition as the result of a syllogistic deduction, by the force of logical entailment, from the formal and material aspects of right.

Now that we have sketched what this might look like, I will turn to the *Rechtslehre* directly and show how this reading can make sense of the relation between the three aspects of right (innate, private and public right) and the necessity of the state.

2.2 *Private Right as Material Right*

In the Doctrine of Right, Kant’s hylomorphic formulation of right does not explicitly appear. In fact, Kant divides the *Rechtslehre* into only two parts: Private Right and Public Right. Innate or natural right is only discussed briefly in the introduction. Thus, interpreters have focused on the relationship between private right and public right. The strategy here will be to argue against the idea that Kant argues from private right to the necessity of the state and instead that we should understand private right as *material* right within Kant’s hylomorphic framework. This will place private right into a hylomorphic syllogism in which innate right is the major, private right is the minor and public right is the conclusion.

Most interpreters of private right focus on three passages. The first is the declaration of the postulate of private right in §6, second, the antinomy of possession passage in §7-8 and third, the discussion of the transition to the state in §41-42 at the end of the private right section. Here I will discuss these three passages and offer a reading of them in light of the structure of the hylomorphic concept of right discussed above. I will suggest that the passages can be better interpreted if we understand private right as material right, and the concept of right as having a hylomorphic structure.

2.2.1 *The Postulate of Private Right*

While the focus of the standard interpretation, that the necessity of the state is consequence of private right, mainly focuses on the antinomy of possession and provisionality covered in the following section, we need here to address the way that Kant motivates this through the introduction of the postulate of private right. The main concern here is the way in which Kant introduces the postulate of private right as,

a permissive law *(lex permissiva)* of practical reason, which gives us an authorization that could not be got from

mere concepts of right as such, namely to put all others under an obligation, which they would not otherwise have, to refrain from using certain objects of our choice because we have been the first to take them into our

possession. Reason wills that this hold as a principle, and it does this as *practical* reason, which extends itself a priori by this postulate of reason. (MS, AA 06:247.1-8)

This seems to be clear textual evidence that the postulate of private right is an *addition* to the concept of right, which is to obligate everyone under universal law. A bit later in the section, however, Kant frames this in hylomorphic terms:

…since pure practical reason lays down only ***formal*** laws as the basis for using choice and thus abstracts from its ***matter***, that is, from other properties of the object *provided only that it is an object of choice,* it can

contain no absolute prohibition against using such an object, since this would be a contradiction of outer freedom with itself. - But an object of my *choice* is that which I have the physical capacity to use as I please, that whose use lies within *my power (potentia).* (MS, AA 06:246.19-27; emphasis mine)

In other words, Kant distinguishes the formal laws of right, or the formal aspect of right, which specifies the principle for using the power of choice, from the matter, which specifies the properties of the object of my choice, particularly, whether someone possesses that thing or not. Kant’s point is that we need to add, to the formal standard of what is rightful, the concept of what it is to *have a right to something*, i.e. to possess something. This *material* aspect of right is the idea of intellectual possession: to have a right to something is just to have intellectual possession of it (MS, AA 06:249.23-26). Indeed, in response to Bouterwek, who in his well-known review asked if the concept of “wrong” presupposes a concept of mine and yours, Kant responds by distinguishing “the formal principle of action” which belongs to the will (*Wille)* and “what is mine and yours [as] the matter, the object (*Object)* of the power of choice (*Willkür)”*. Thus, Bouterwek’s question should be whether my control (*Gewalt)* of an object is in contradiction with the formal law (HN, AA 20:449-450).

This framework is reminiscent of Kant’s investigation in *KrV,* to which he makes several references in the first six sections on Private Right. Indeed, they are almost all clarifications of the differences between the investigation here and theoretical deduction, however, Kant’s continual clarifications point to the fact that the investigations mirror each other. For instance, Kant references the Transcendental Analytic (TA) after clarifying that in this investigation, the object in question is not a phenomenal appearance, as in the *KrV*, but rather the thing-in-itself because right is concerned with the “practical determination of choice under laws of freedom” (MS AA 06:249.19-20). In the TA, Kant argues against the idea that we can gain knowledge of “objects-in-general” because the application of concept is limited to appearances. In the practical case, we are not so limited because we *can* investigate the object as a thing-in-itself. However, Kant’s reference to the TA and his insistence on the insufficiency of formal principles of right suggests that he also wants to refer to the idea, explicit in the theoretical philosophy, that formal and material aspects of cognition are independently insufficient to ground cognition: the insufficiency of concepts to ground knowledge without intuition (KrV, B 146). Indeed, the object of right *cannot* correspond to what the object did in the TA because of the practical nature of right. This is precisely Kant’s point in his other explicit reference to the TA right after stating the postulate of private right. Kant says,

In an a priori *theoretical* principle, namely, an a priori intuition would have to underlie the given concept (as was established in the *Critique of Pure Reason);* and so something would have to be *added to* the concept of possession of an object. But with this practical principle the opposite procedure is followed and all conditions of intuition which establish empirical possession must be *removed* (disregarded), in order to *extend* the

concept of possession beyond empirical possession and to be able to say: it is possible for any external object of my choice to be reckoned as rightfully mine if I have control of it (and only insofar as I have control of it) without being in possession of it. (MS, AA 06:251.37-252.10)

The passage here cannot mean that the *formal* concepts of right are sufficient or that nothing is subsumed under the formal principles, as we will see in the next section. Rather, Kant here insists that the concept of possession of an object, which is itself the *material* aspect of right, cannot be gained simply by adding an empirical intuition (empirical possession) to the formal concept of right, but we need to have a concept of possession that is a noumenal object (intelligible possession), which is an object-in-general. This is done by *removing* from empirical intuition, rather than *adding* to the rational concept in the theoretical case.

We will talk more about intellectual possession in the next section, but the point here is that the postulate of private right is a postulate for the possibility of possession of objects. The concept of possession, to have a right to something, is the *material* concept of right which is the object to which the formal concept of right is applied. Though Kant specifies this as distinct from the principle of right, he means that this material concept of right is distinct from its formal concept. Kant’s introduction of private right is concerned precisely about the specification of the material aspect of right.

2.2.2 *The Antinomy of Possession*

In §7 Kant suggests that “Rightful practical reason is forced into a critique of itself in the concept of something external which is mine or yours, and this by an antinomy of propositions concerning the possibility of such a concept” (MS, AA 06:254.33-36). On the one hand it must be possible to possess something without holding it, and on the other it seems impossible to possess something unless you are holding it. This antinomy is solved by Kant’s distinction between empirical possession (holding) and intelligible possession (having) “in which abstraction is made from all spatial and temporal conditions and the object is thought of only as under my control (*in potestate mea positum esse)”* (MS, AA 06:253.8-11). Kant suggests that in the move from empirical to intelligible possession “practical reason extends itself without intuitions…merely by leaving out empirical conditions…in this way it can lay down *synthetic* a priori propositions about right…” (MS, AA 06:255.16-21). Kant then immediately moves, in §8 to arguing that “only in the civil condition can something be externally mine or yours” (MS, AA 06:256.16-17). Commentators have taken this to mean that because intellectual possession must be possible, and intellectual possession is only possible in the civil condition, and therefore, the civil condition is necessary. The civil condition is thus an extension to account for intellectual possession. This interpretation maintains that the necessity of the state is derived from the conditions for the possibility of the possession of external objects.

However, this interpretation misses two aspects of Kant’s argument. First, Kant justifies the need to distinguish empirical and intellectual possession through the *prior necessity to subsume* something under the rational concept of right. Kant says,

“Now, practical reason requires me, by its law of right, to apply mine or yours to objects not in accordance with sensible conditions but in abstraction from them, since it has to do with determination of choice in accordance with laws of freedom, and it also requires me to think of possession of them in this way, *since only a concept of understanding can be subsumed under concepts of right*.” (MS, AA 06:253.15-20)

 Kant here suggests that the “extension of reason” (which is really only an abstraction) is necessary just because the law of right, which is the formal principle of right, needs to be applied to some object. We must distinguish between empirical and intellectual possession in order to make the subsumption under the formal concept of right possible. In contrast to the common view, the possibility of intellectual possession is premised on the need to define some class of objects that *can* be subsumed under formal principles of right. If the concept of right has a formal and material aspect, then we need both the formal and material aspect to constitute a conclusive judgement. In other words, the formal aspect of right needs an object. Kant’s aim here, and indeed in the entire private right section, is to identify a class of objects, material rights of possession, that can be determined by the principle of right. The second problem with the common reading is that it ignores the direction of necessitating force in §8. Here it is common to understand Kant as saying that *because* intellectual possession requires that I obligate others to abide by my possession (for normative or empirical reasons) and this is possible only in the case of intellectual possession under a civil condition and *therefore* the civil condition is necessary. Yet, Kant’s point here is not to suggest that the civil condition is necessary *because* intellectual possession must be *possible.* Rather, Kant is interested in the *rightfulness* of the external obligation *in general*. Kant’s point is that to have a right, that is to possess a right, requires that I obligate others to refrain from violating that right and am in turn obligated to recognize other’s external rights (MS, AA 06:255.26-28). This can only be done through a universal rule. Kant claims that the need for universal and reciprocal obligation is not a product of possession of external objects in particular, but “is already contained in the concept of obligation corresponding to an external right…” (MS, AA 06:256.2-3). Thus, the necessity of the civil condition does not arise directly from the antinomy of possession but rather from the formal standards for external obligation *in general*. In other words, the necessity for the civil condition is a necessity at a higher level. The civil condition alone can bring material rights under the formal standards of rightfulness as defined in innate right.

Therefore, the civil condition is necessary if external rights are to become *conclusively* rightful. I say conclusively because Kant makes his well-known distinction between provisional and conclusive rights in §9.[[22]](#footnote-22) Again, what concerns Kant is not the general possibility of intellectual possession. Kant has already dealt with their possibility in §7. In suggesting that we can have provisional external rights, Kant claims that external claims to right are possible “prior to a civil condition (or in abstraction from it)” (MS, AA 06:256.31-32). What Kant aims to make clear in the distinction between provisional and conclusive rights is that external possession, having a right, is only *made valid*  under a civil condition where it is subsumed under the formal concept of right. Provisional rights are material rights that need to be given necessity by a determining judgement.[[23]](#footnote-23) If we have Kant’s hylomorphic formulation of right in the background, it is clear that Kant is thinking here in terms of the necessary third element in the hylomorphic framework. In order for there to be external rights, there needs a material aspect (objects and possessions: private right) subsumed under a formal aspect (the principle of right) by a determining judgement possible in a civil condition. Thus, Kant is following a syllogistic formula to conclude in necessary external rights by the “derivation of the latter [material right] from the principle of the former [formal right] by subsumption” (MS, AA 06:237.11-12, parentheses added). The civil condition is not a contingent addition to the concept of right in order to take account of private property rights, but structurally necessary for rights in general.

2.2.3 *The Transition to the Civil Condition*

In the note quoted in the previous sub-section, Kant connects the three categories of modality with three laws: *lex justitia, lex juridica, and lex justitiae distributivae*. In the published text of the *Rechtslehre* we find his discussion of these three *leges* in §41. Here we find elements of previous formulations of the concept of right applied to the transition from a state of private right to the rightful condition generally. Here Kant suggests that a rightful condition is the “relation of human beings among one another that contains the conditions under which alone everyone is able to claim his rights (*unter denen allein jeder seines Rechts teilhaftig werden kann)*” (MS, AA 06:305.34-306.1).[[24]](#footnote-24) Thus the rightful condition is the condition (*Zustand)* under which participation in rights is alone possible. Kant then goes on to give an account of what public justice requires. He does so by invoking a hylomorphic formulation in the structure of a syllogism. First, the law must say what “conduct is intrinsically right in terms of its *form* (*lex iusti)”*, second “what objects are capable of being covered by external law in terms of their *matter,* that is, what way of being in possession is rightful (*lex iuridica)*” and third, the *judgement* where an object is subsumed under a law, that is, “what is laid down as right (*lex iustitiae)* (MS, AA 06:306.5-15). In the background of this formulation is the hylomorphic formulation of right which suggests that the concept of right has jointly constitutive parts (formal and material) that must be brought together in a judgement.[[25]](#footnote-25) Realizing that Kant has in mind previous formulations of a hylomorphic right, it is no surprise that he describes public law in these hylomorphic terms. These elements (formal, material aspects and a subsuming judgement) are those elements necessary for persons to participate (*Teilhaftig)* in their rights, i.e. to have valid rights. Kant’s return to hylomorphic language in §41, where Kant aims to explain the transition from the state of nature to the civil condition, suggests that necessity of the state is part of the hylomorphic structure of right. Rights, having a formal and material part, need a constitutive judgement in order to give us necessitating external rights through the civil condition. The transition from the state of nature to the civil condition is *internally* necessary to the concept of right. Indeed this structure can be seen as the *Rechtlehre* as a whole where innate right is the formal aspect that defines the right conduct generally, private right is the definition of possible objects of possession in general and public right is the subsuming judgement which concerns the “rightful form” (MS 6:306), that is, the validity of material rights under the conditions of formal right.

Notice that the hylomorphic reconstruction does not simply imply the necessity of a civil condition in general, but rather that necessity of a state *with rightful form*. Like in all Kant’s syllogistic formulations, the formal/major premise dictates the normative criterion that the conclusion has to take on in its subsumption. In the case of right, it is no different. The formal aspect of right gives us the rule through which we can subsume the material under it. Therefore, the hylomorphic formulation implies the necessity of a system of rights *with rightful form*.[[26]](#footnote-26)

Additionally, Kant’s insistence in §42 that “From private right in the state of nature there proceeds the postulate of public right” to “proceed with them into a rightful condition, that is, a condition of distributive justice” (MS, AA 06:307.8-11) has been taken as a clear indication that the necessity of the civil condition proceeds from the impossibility of private right. However, Kant goes on say that “the ground of this postulate can be explicated *analytically* *from the concept of right*” (MS, AA 06:307.12). So, the obligation to enter a civil condition both proceeds from private right and is grounded analytically in the concept of right. This makes sense if we again recall Kant’s hylomorphic formulation of the concept of right. The necessity to enter into a civil condition indeed proceeds through private right, insofar as there must be some object to subsume in a judgement. Yet, the formal and the material aspect, and the concluding judgement, plus their syllogistic relationship, are all part of the concept of right generally. Kant hints at such a conclusion when he suggests, in a footnote at the end of §42, that by not entering into the civil condition one does what is *formally* wrong but does no *material* wrong. Kant gives the example of a general who, violating a surrender agreement, mistreats his opponents as they try to leave a garrison. The general, Kant says, cannot complain about being wronged by his opponent pulling the same trick when he has the chance. However, the opponent is formally wrong because he “takes away any validity from the concept of right…and so subverts the right of human beings as such” (MS, AA 06:308.5-6).[[27]](#footnote-27)

The duty to enter a civil condition, therefore, is not a protection against material wrongs, or an attempt to take into account a specific instance of private property right, but necessary for the validity of the concept of right. In order for rights to be valid, that is, valid conclusions of a derivation, we must create the civil condition. We do wrong, Kant says, “in the highest degree” if we do not enter into the civil condition because to do so would jeopardize the validity of rights *in general*. This suggests that the necessity originates not from the material conditions surrounding private property right, nor the particular difficulty of understand private rights, but something closer to logical entailment from the concept of right itself.

***III. The Necessity of the State***

In this final section, I will briefly revisit the weak and strong views of necessity in order to distinguish my view from them.

The weak view of state necessity suggested that the civil condition is necessary in order to secure private property rights from material conditions. As Paul Guyer points out, the problem with the state of nature is that rights are unreliable and confused in the state of nature (Guyer 2018, 601). Thus, the necessity of the state is justified by empirical difficulties in the state of nature. The strong view of state necessity suggests that Kant justifies the necessity of the state by the need to take account of the particular normative problem that private property right presents. These positions differ in their characterization of the problem that private right presents. Yet, *both* accept the notion that the state is made necessary by the confrontation with private right. Therefore, both positions see the necessity of the state as external to the concept of right. This means that the state is needed as a remedy for a particularly difficult case of rights.

In contrast to this, my view suggests that the necessity of the state is internal to the concept of right. This means that the civil condition is necessitated by the structure of right in general. In order to see this, we must understand that the concept of right is hylomorphic in structure: containing a formal aspect (innate right), a material aspect (private right) and a concluding judgement (public right). The concept of right is hylomorphic, in the same sense that the concept of a moral maxim or the concept of cognition is hylomorphic: they all can be understood through this framework. Once we understand this in the context of right, we can see the way in which the concept of right must “contain” all three necessary elements of the hylomorphic structure. Thus, the movement to the civil condition is not premised on a movement through particularly difficult empirical or normative conditions. Both competing views add an external premise based on conditions external to the concept of right in order to explain the necessity of the civil condition. Rather, the movement to the civil condition is a logical movement where the formal and material conceptually entail the civil condition. It sees the structure of the *Rechtslehre*, therefore, as a syllogism where the major premise is the innate (formal) right, the minor premise is the private (material) right, and the conclusion is public right (subsuming judgement). Both interpretations in literature fail to see that the civil condition is an internal and conceptual necessity of the concept of right.

This view has some implications that further distinguish it from common interpretations.

First, provisional rights, under this view, are not independently valid rights in need of enforcement (weak view) or wrongful possessions (strong view). Notice that on the view given above, the formal and material aspects of right “are there” prior to the civil condition. The problem is conceptual incompleteness. Therefore, as Kant says, I can understand rightful possession “in abstraction” from the civil condition, but the possession remains conceptually incomplete until its inclusion in the civil condition.[[28]](#footnote-28) On the one hand, because we can conceptualize formal and material right separately, we can think of rightful claims independent of the civil condition. On the other, these claims remain conceptually incomplete (and so merely subjectively valid) until their conclusion in the civil condition. This gives an account of provisional right that does not fall into the natural law tendencies of the weak view or the legal positivist tendencies of the strong view.

Second, the view above makes *both* innate and acquired right provisional in the above sense. Innate rights, under almost all the interpretations in the literature, do not have this provisional status. Many may worry about the implications of insisting on the provisional status of, for instance, my right to bodily integrity. While a full discussion goes beyond this paper, the worry seems to be alleviated by the definition of ‘provisionally’ provided above. Provisionally means that a right is incomplete though conceptually possible. The right to bodily integrity can be understood and appealed to independently of the state, just as the category of causality, for instance, can be understood and appealed to separate from a judgement of experience. There is a sense in which the right to bodily integrity *does* follow directly from the innate right to freedom, and yet this right, though normatively more fundamental, remains provisional in the state of nature.

Third, Kant’s philosophy of right, under my interpretation, separates him from his predecessors in the history of political philosophy. Kant leaves behind the idea that the state is a remedy for the difficulty of implementing or maintaining pre-defined rights. Instead, he is committed to the idea that the necessity of the state is implied by the structure of right itself. Furthermore, the hylomorphic formulation is a highly original formulation of the concept of right in the history of political thought. Opposed to the tendency of other interpreters, Kant should not be lumped in with other systems of political thought, such as Locke and Hobbes. Rather, Kant’s political philosophy presents a unique justification of the state that should be treated as a distinct contribution.

**III. Conclusion**

In this paper, I traced Kant’s adoption of hylomorphic language in his formulation of right in the Feyerabend lectures to the published work of the *Rechtslehre*. Kant took right to consist in a formal and material aspect that are independently insufficient and need to be related through a constitutive judgement. Kant maintained this formulation of right to the unpublished drafts of the Doctrine of Right. This pointed to a reading of the *Rechtslehre* where laws follow the syllogistic formula of unifying formal right and material right through an authoritative and legitimate judgement. This allows us to understand the whole of the deduction of right as a syllogism: the innate (formal) right as the major, the private (material) right as the minor, and public right as the concluding judgement. Thus, opposed to the accepted reading, the necessity of the civil condition is justified because of the hylomorphic structure of the concept of right and not contingent conditions of the state of nature.

Works Cited

Achenwall, Gottfried (2020). Natural Law: A Translation of the Textbook for Kant's Lectures on Legal and Political Philosophy. Edited by Pauline Kleingeld and Translated by Corinna Vermeulen. London: Bloomsbury.

Brandt, Reinhard (1999). Person und Sache. Hobbes „jus omnium in omnia et omnes” und Kants Theorie des Besitzes der Willkur einer anderen Person im Vertrag. *Deutsche Zeitschrift für Philosophie* 47 (6):887-910.

­\_\_\_\_\_(1990) Die politische Institution bei Kant. In: Göhler G., Lenk K., Münkler H.,Walther M. (eds) *Politische Institutionen im gesellschaftlichen Umbruch*. VS Verlag für Sozialwissenschaften.

\_\_\_\_\_ (1974). *Eigentumstheorien von Grotius Bis Kant.* Stuttgart/Bad Cannstatt:Frommann- Holzboog.

Brudner, Alan. (2011). Private Law and Kantian Right. *University of Toronto Law Journal*. 61 (2): 279-311.

Byrd, B. Sharon & Hruschka, Joachim (2010). *Kant's Doctrine of Right: A Commentary*. Cambridge University Press.

Demiray, Mehmet Ruhi (2020). Kant’s Idea of Law and Human Rights. In Alice Pinierho Walla & Mehmet Ruhi Demiray (eds.) *Reason, Normativity and Law: New Essays in Kantian Philosophy*. University of Wales Press. 170-86

Flikschuh, Katrin (2021). Innate Right in Kant-A Critical Reading. *European Journal of Philosophy.* 1-17

\_\_\_\_\_(2015). Human Rights in a Kantian Mode: A Sketch. In Rowan Cruft, S. Matthew Liao and Massimo Renzo (eds.), *Philosophical Foundations of Human Rights.* Oxford. Oxford University Press. 653-70

\_\_\_\_\_ (2012). Elusive Unity: The General Will in Hobbes and Kant. *Hobbes Studies* 25 (1):21-42.

\_\_\_\_\_ (2000). *Kant and Modern Political Philosophy*. Cambridge: Cambridge

 University Press.

Friedrich, Rainer (2004) *Eigentum und Staatsbegründung in Kants “Metaphysik der Sitten”*, De Gruyter, Berlin.

Guyer, Paul (2001). The Form and Matter of the Categorical Imperative. In Ralph Schumacher, Rolf-Peter Horstmann & Volker Gerhardt (eds.), *Kant Und Die Berliner Aufklärung: Akten des Ix. Internationalen Kant-Kongresses. Bd. I: Hauptvorträge. Bd. Ii: Sektionen I-V. Bd. Iii: Sektionen Vi-X: Bd. Iv: Sektionen Xi-Xiv. Bd. V: Sektionen Xv-Xviii*. De Gruyter. pp. 131-150.

­­­\_\_\_\_\_ (2002). Kant’s Deductions of the Principles of Right. In *Kant’s Metaphysics of*

 *Morals: Interpretive Essays*, edited by Mark Timmons. Oxford: Oxford University Press. 23–64.

\_\_\_\_\_ (2018). Principles of Justice, Primary Goods and Categories of Right: Rawls and Kant. *Kantian Review* 23, 4, 581-613.

Hanisch, Christoph (2018). Kant’s Jurisprudence: Beyond Natural Law and Legal Positivism. *Pólemos: Materials of Philosophy and Social Criticism*

\_\_\_\_\_\_\_ (2020). Provisional and Private Legality in Kant. In *Reason, Normativity and Law: New Essays in Kantian Philosophy*, edited by Alice Pinierho Walla & Mehmet Ruhi Demiray. University of Wales Press. 126-45

Hasan, Rafeeq (2018). The Provisionality of Property Rights in Kant’s Doctrine of Right. *Canadian Journal of Philosophy* 48:6 850-876.

Hirsch, Philipp-Alexander 2012. *Kants Einleitung in die Rechtslehre von 1784: Immanuel Kants Rechtsbegriff in der Moralvorlesung “Mrongovius II” und der Naturrechtsvorlesung “Feyerabend” von 1784 sowie in der “Metaphysik der Sitten” von 1797*. Göttingen: Universitätsverlag Göttingen

Hodgson, Louis-Philippe (2010). Kant on Property Rights and the State. *Kantian*

 *Review* 15 (1): 58–87.

Holtman, Sarah Williams (2009). Autonomy and the Kingdom of Ends. In Thomas E. Hill (ed.), *The Blackwell Guide to Kant's Ethics*. Wiley-Blackwell.

Messina, J.P. (2019). Kant’s Provisionality Thesis. *Kantian Review*. 24 (3): 439-63.

Rauscher, Frederick. (2016). Editor’s Introduction. In *Lectures and Drafts on Political Philosophy*, edited by Frederick Rauscher. Cambridge. Cambridge University Press. pp.75-80.

Ripstein, Arthur (2009). *Force and Freedom: Kant's Legal and Political Philosophy*. Harvard University Press.

­\_\_\_\_\_\_ (2012). Kant and the Circumstances of Justice. In *Kant’s Political Theory: Interpretations and Applications*, edited by Elisabeth Ellis. Penn State University Press.

Pollok, Konstantin (2017). Kant's Theory of Normativity: Exploring the Space of Reason. Cambridge. Cambridge University Press.

Sangiovanni, Andrea (2012). Can the Innate Right to Freedom Alone Ground a System of Public and Private Rights? *European Journal of Philosophy* 20 (3):460-469.

Tierney, Brian (2001a) *The Idea of Natural Rights: Studies of Natural Rights, Natural Law, and Church Law*. Grand Rapids, MI. William B. Eerdmans Publishing Company.

­­\_\_\_\_\_\_\_ (2001). Kant on Property: The Problem of Permissive Law. *Journal of the History of Ideas* 62 (2):301-312.

\_\_\_\_\_\_\_ (2014). *Liberty and Law: The Idea of Permissive Natural Law, 1100-1800*. Washington, D.C. The Catholic University of America Press.

Timmermann, J. (2018). Emerging Autonomy: Dealing with the Inadequacies of the “Canon” of the Critique of Pure Reason (1781). In S. Bacin & O. Sensen (Eds.), *The Emergence of Autonomy in Kant's Moral Philosophy* (pp. 102-121). Cambridge: Cambridge University Press.

Varden, Helga (2010). Kant's Non-Absolutist Conception of Political Legitimacy –– How Public Right ‘‘Concludes’’ Private Right in the ““Doctrine of Right””. Kant-Studien 101 (3):331-351.

Walla, Alice Pinheiro (2014). Human Nature and the Right to Coerce in Kant’s Doctrine of Right. *Archiv für Geschichte der Philosophie* 96 (1):126–139.

Weinrib, Ernst (2003). Poverty and Property in Kant’s System of Rights. *Notre Dame Law*

 *Review* 78 (3): 795–828.

Williams, Howard (2012). Natural Right in Hobbes and Kant. *Hobbes Studies* 25 (1):66-90

Young, Michael J. (1992) Translators Introduction. In J. Michael Young (ed), *Lectures on Logic.* Cambridge. Cambridge University Press.

Zöller, Günter (2015). “Without hope and fear”: Kant’s Naturrecht Feyerabend on Bindingness and Obligation. In Robert R. Clewis (ed.), *Reading Kant's Lectures*. De Gruyter. pp. 346-362.

1. This distinction is derived directly from Rafeeq Hasan’s distinction between strong and weak provisionality. See Hasan 2018. See also Messina 2019, 440-3 for a helpful characterization of the standard views toward provisional right. [↑](#footnote-ref-1)
2. See Brandt 1974, 1990 and 1999 p. 907; Byrd and Hruschka 2010 [↑](#footnote-ref-2)
3. More recently, Guyer says, “The necessity of establishing an omnilateral will for any acquired right follows from the innate right of each to the greatest freedom consistent with the equal freedom of all” (Guyer 2018, 599) and that both innate and private right need to be concluded in the civil condition (611 n.16). However, Guyer seems to suggest that the conclusion of rights in the civil condition has only to do with the obligations to respect the rights and not the rights themselves. So, despite appearances the state is still necessary only as a result of the difficulty of keeping obligations in the state of nature. See Guyer 2018, 596-7 and 600-602. [↑](#footnote-ref-3)
4. See also Byrd and Hruscka 2010, 101-2. Hasan defines weak provisionality as accepting some or all of these claims: “(1) Agents in the state of nature are authorized to use force to protect their property, just as long as that force takes the form of coercing others to join a state with them. (2) State of nature property claims lack the fullest possible legitimacy because, in the absence of a state, boundary disputes cannot be settled in accordance with the freedom of all. As a matter of empirical fact, any resolution of these disputes will likely amount to the subjection of some wills to the private wills of others. (3) The role of the state is essentially to ratify pre-existing

property claims, just so long as these claims did not involve interference with another’s person or (provisional) possessions.” (Hasan 2018, 3) [↑](#footnote-ref-4)
5. See Flikschuh 2000, 136 and 140, Flikschuh 2012, and Brudner 2011. [↑](#footnote-ref-5)
6. Hasan defines strong provisionality as accepting one or all of the claims that “(1) In the absence of a state one cannot claim ownership of an object without wronging others. That is, the state of nature lacks the conceptual conditions under which a ‘claim’ to property-rights is anything other than an unjustified application of force. Using force to protect my ‘right’ to external objects is an unjustified (though perhaps prudentially rational) wrong that entrance into the public condition corrects, (2) The reason property is provisional in the state of nature is not primarily because boundary disputes cannot be settled in a way consonant with the freedom of all (though, as a matter of fact, such disputes may happen). Rather, the problem is that no agent could be rightfully authorized to unilaterally impose his will on another. (3) State of nature property norms are completely formal – specifying only that the state must make some consistent legal determination of ‘mine and thine’ – which implies that the state can specify any regime of property rights consistent with the equal freedom of all, even if this involves massive redistribution of individuals’ holdings.” (Hasan 2018, 3-4). For other views of strong state necessity see Ripstein 2009, 165 and Weinrib 2003. [↑](#footnote-ref-6)
7. For an exception to this rule, see Friedrich 2004. Though my own view differs from Friedrich in the sense that the civil condition, for Friedrich, is directly implied by innate right while I understand the civil condition as the conclusion of a syllogistic deduction. Of course, Friedrich’s point is that the standards of innate right can only be satisfied under a civil state and so immediately imply the necessity to leave the state of nature. This is equally true of my own view, since the *formal* right (innate right) is the source of the normative force in the necessity to enter a civil condition. Therefore, the two views might be compatible. [↑](#footnote-ref-7)
8. Ripstein argues, for instance, that the necessity of the state is “non-remedial” and that Kant ought not to be seen as making an argument from the particular circumstances in the state of the nature (Ripstein 2012) but then suggests that the necessity of the state is only required after we introduce possible objects *because then innate right must take account of them* (39). This suggests that the particular problem of private property right gives rise to the necessity of the state. [↑](#footnote-ref-8)
9. In other words, Kant uses the hylomorphic language, as do I here, only to illuminate a certain relation between aspects of a judgement, or even to represent the judgement itself. It is not meant, either in Kant’s work or in my paper, to have the conclusion rest directly on the hylomorphic formulation. [↑](#footnote-ref-9)
10. For a thorough and carefully argued account of Kant’s hylomorphism as it relates to other versions of hylomorphism see Pollok, 2017 pp. 121-195. Here it is important to note that Kant’s hylomorphism is not a metaphysical or ontological claim. Rather, it is, what Pollok calls, a “transcendental hylomorphism”. [↑](#footnote-ref-10)
11. Again note that calling this a “third element” does not mean that it is metaphysically distinct but only that it is non-reducible to its formal and material aspects. It is a third element *of the concept of right itself*. [↑](#footnote-ref-11)
12. See Pollok 2017 143-96. [↑](#footnote-ref-12)
13. This is not to say that intuitions are *only* sense data, Kant is quite clear that intuitions also contain a formal and material parts where the material is sensible appearances and the formal is the pure intuitions of space and time. See AA 2:393. Furthermore, I take the distinction between formal concept and material intuition to be only the most simplistic application of the hylomorphic framework. As Pollok points out, ““The basic idea is that Kant takes these common epistemic unities to have the following nested structure. Sensation[matter]→[form]intuition[matter]→[form]concept[matter] → [form]judgment[matter] → [form]inference[matter] →[form]system of cognition, such that, e.g., judgments provide certain forms for the

connection of concepts and the matter for inferences.” (Pollok 2017, 143). [↑](#footnote-ref-13)
14. See also KpV, AA 05:92, 130. [↑](#footnote-ref-14)
15. See Fred Rauscher’s introduction to his translation for the dating of the Feyerabend lectures and the timing relative to Kant’s other works around this time. (Rauscher 2016) [↑](#footnote-ref-15)
16. For more on the similarities between Kant’s concept of right in 1784 and 1797 see Hirsch 2012. [↑](#footnote-ref-16)
17. See J. Michael Young’s “Translator’s Introduction” in the Cambridge edition *Lectures on Logic.* [↑](#footnote-ref-17)
18. This is not to say, of course, that the political and ethical works between 1785 and 1797 are not important points of development for Kant’s political theory. One significant example is Kant’s requirement for a Republican form of government in the first definitive article of *Zum Ewigen Frieden.* However, the publication of *Metaphysik der Sitten* marks the first time that Kant attempts to give a metaphysical system of right. [↑](#footnote-ref-18)
19. The fact that material rights are independently insufficient is the case even though Kant does indeed say that material right involves direct coercion. Material rights are just those things that I acquire and claim for myself in the state of nature. However, to say I have material rights is just to say that I am actually coercing people and not that this coercion is indeed rightful. The claim of rightfulness requires a judgement, and for this we need the civil condition. This is not to say that there cannot be “provisionally rightful” acquisitions in the state of nature. My private judgement about the compatibility of my acquisition with the standards of justice might be correct, and there is a sense in which I can “forsee” the justice of my acquisition. However, insofar as this judgement is private it is therefore insufficient to conclude rights omnilaterally. See Ripstein 2009, Hodgson 2010. See Hasan 2018 for an account of provisional rights as anticipatory in this sense. [↑](#footnote-ref-19)
20. Flickschuh 2015 and 2021 has argued that the innate right (formal right) is formally empty. Here I insist that there is a sense in which the formal right is “empty” but this doesn’t mean that it cannot rule out certain norms from the beginning. Demiray has helpfully articulated the innate right as a “grammar” which, though a formal standard, rules out legal norms which *a priori* cannot be coherent under the “grammar”. See Demiray 2020, 183. Furthermore, Flikschuh, in her more recent paper, suggests that innate and acquired right are distinct kinds of rights that clarify the objective and subjective conditions of right in general (Flikschuh 2021, 10). This comes close to the conclusion in this paper that innate and private right are constitutive elements of the conclusion of the concept of right in public right. However, Flikschuh grossly misrepresents the relation between formal and material/ objective and subjective which Kant maintains throughout his work. Flikschuh seems to formal with the subjective and the material with the objective. However, as we have seen, this characterization does not fit the way that Kant employed these terms in the rest of his philosophy. Thus, while I am sympathetic to the way Flikschuh reads the relation between innate and private right as components of a general concept of right, the hylomorphic formulation makes clear that the objective components of right are meant to be specified by innate right and that material right cannot, by definition, independently establish objective components of the concept of right. [↑](#footnote-ref-20)
21. This distinction is well defined in the Mrongovius lectures V-Mo/Mron, AA 27:274ff; 27:1422ff from the same period (1784/85). Here Kant uses the terms to distinguish between a principle of appraisal (what is good or not) and a motivating ground (what compels me to live in conformity with the law). See Mohr 2018, 75-77 and Timmerman 2018, 108. [↑](#footnote-ref-21)
22. Kant’s distinction between provisional and conclusive rights is between property rights abstracted from the civil condition and property rights in the civil condition. The former are merely provisional, meaning that they are material claims to rights that are not yet, or considered separately from, the conclusive judgement in the civil condition. Thus, provisional rights, because of their subjective nature, remain underdetermined while conclusive rights are the result of an objective judgement and so give the provisional property rights, and rights generally, necessity. See RL §9, Hasan 2018. [↑](#footnote-ref-22)
23. Staying at this level of abstraction also suggests that much of the discussion over the actuality of provisional rights misdirected. Kant is only suggesting that material rights can be thought of independent to a civil condition and in some cases might be “provisionally rightful”. [↑](#footnote-ref-23)
24. Here Mary Gregor translates *Teilhaftig* as “enjoy” instead of “partake”. However, the English “enjoy” suggests a modification on the kind of possession we have of our rights (we might possess them begrudgingly or half-heartedly for instance). However, Kant here means somethings stronger. The rightful condition allows us to partake in our rights, to have *access* to them where before this was impossible. [↑](#footnote-ref-24)
25. This is not to say that the judicial branch of the government legislates but that public legislation in the civil condition is a type of judgement. The syllogistic form then repeats itself inside the civil condition where the judiciary engages in lower level judgements about whether particular cases fall under given public laws. [↑](#footnote-ref-25)
26. I take this to be why, ideally, the civil condition that the hylomorphic construction makes necessary is a *republican* state, since this is the only way in which the requirements of the formal right are preserved fully. See Varden 2010. [↑](#footnote-ref-26)
27. See Walla 2014 [↑](#footnote-ref-27)
28. Christoph Hanisch, using Enoch’s taxonomy of reasons, advances a similar view where we can have conditional reasons (i.e. “if we are in the civil condition then this apple is mine”) that remain “normatively inert” until triggered by the civil condition. Though Hanisch’s focus on reasons is different from my conceptual take, the accounts may be compatible. See Hanisch 2020 and Hanisch 2018. [↑](#footnote-ref-28)