

# PERSONS AND BODIES

JAPA PALLIKKATHAYIL

On Kant's view, property rights in the state of nature involve certain defects and these defects render them merely provisional.<sup>1</sup> Conclusive property rights can only be established through political institutions and this consideration is the basis of the duty to establish those institutions. Property rights are thus politically constructed. Kant, however, treats one's right to one's body differently. He seems to move directly from the claim that we each have an innate right to freedom to the claim that we each have a right to our own bodies. He then proceeds as if bodily rights are largely immune to the problems faced by property rights in the state of nature. Arthur Ripstein's new interpretation of Kant's political philosophy affirms Kant's claims about bodily rights and attempts to motivate these claims far more explicitly than Kant himself does.<sup>2</sup> I will argue that, even with the help of Ripstein's reconstruction, Kant's treatment of bodily rights remains problematic. Our rights to our own bodies can be defective in many of the ways that our rights to property can be. These defects in our rights to our bodies would be sufficient to ground a duty to establish political institutions even in the absence of Kant's arguments regarding property. I will conclude, therefore, that Kant's political philosophy suggests an even deeper justification for the establishment of political institutions than Kant himself imagined. And this justification suggests a surprising conclusion: we are thoroughly political beings; even our rights to our own bodies are politically constructed.

In arguing for this view, I will *not* be arguing that our rights to our bodies just are property rights. Although I hold that Kant did not properly appreciate the similarities between bodily rights and property rights, I will argue that important differences remain between these two kinds of rights. Unlike property rights, bodily rights are not directly transferable.<sup>3</sup> This has important implications

for the possibility of selling or even donating parts of our bodies to others. I will explore these implications and argue that an attractive view of the complexity of bodily rights emerges from this investigation.

## I. Property and the State<sup>4</sup>

Kant's practical philosophy focuses on developing an account of how action can be free, i.e. self-directed. Kant uses the distinction between 'internal' and 'external' freedom to capture two respects in which action can be self-directed. The distinction between these two kinds of freedom can be best understood by considering the different threats to self-directed action to which they are meant to respond. Internal freedom, i.e. autonomy, consists in directing oneself rather than being directed by one's inclinations. External freedom, i.e. independence, consists in directing oneself rather than being directed by other agents.

While Kant's moral philosophy is largely occupied with the examination of internal freedom, Kant's political philosophy focuses on external freedom. The foundational claim of Kant's political philosophy is that we each have an innate right to freedom (*MM* 6:237). One is free in the relevant sense if one is one's own master, i.e. if one is independent from the constraint of others' choices. When does one count as independent in this sense? I take it that Kant eschews any attempt to develop a non-normative characterization of independence. Instead, Kant's view suggests that in order to make sense of being one's own master we must identify a domain that one has the right to control. The extent of this domain is only limited by the equal claim of others to be their own masters as well.

Which rights comprise the domain within which we are each our own masters? Most basically, one needs to be an individual who entitled to make one's own choices. In other words, one needs a right to oneself. As embodied beings, this seems to amount to a right to one's body.

Some kind of right to control over one's own body is thus a precondition for engaging independent action. This thought seems to underlie Kant's apparent assumption that the innate right to freedom necessarily involves a right to one's own body. Indeed the connection here is so close that, as Ripstein puts it, for Kant "your person is your body."<sup>5</sup>

Ultimately, I want to call into question Kant's assumption about the nature of bodily rights. But for now, I will begin by taking this view on board in order to lay out Kant's view on property rights. So, let us suppose that independence straightforwardly requires the right to control one's body. What about rights to control other parts of the world? Our rights to our bodies give us a derivative right to anything that cannot be moved without moving us. So, if I am holding an apple, my right to my body prevents you from snatching it from my hand. But this falls short of a property right in the apple. A property right includes the right to control the object even when one is not in physical possession of that object. Recall that the extent of the domain within which we are each entitled to be our own masters is limited only by the equal claim of others to be their own masters as well. The right to acquire property rights is one that we can all have. From this, Kant concludes that there can be no justification for restricting the possibility of acquiring property rights.<sup>6</sup>

Nonetheless, property rights suffer from three kinds of problems in the state of nature. First, consider the indeterminacy problem: there is indeterminacy regarding what one must do to acquire a property right and indeterminacy regarding what counts as an interference with a property right. As an example of the first kind of indeterminacy, consider the problem of specifying what kind of sign one must give to others that one is appropriating an object. As an example of the second kind of indeterminacy, consider the problem of specifying what counts as damaging another's property. May you, for example, set up a fan on your land that will blow over the daffodils I have planted on my land?<sup>7</sup>

However detailed the principles devised to resolve these indeterminacy problems, there will remain cases in which there may be reasonable disagreement about how these principles apply. This brings us to the second problem facing property rights in the state of nature: the problem of adjudication.<sup>8</sup> Third and finally, in order to be truly independent from the choices of others, one must be able to rely on one's rights. Now, of course, in the state of nature I can have very good reason to believe that you will not violate my rights. Perhaps I have ample evidence of your good will. Or perhaps I know that you are exceptionally prudent and that prudence dictates respecting my rights. But your unilateral will is the source of either of these kinds of assurance. As long as I can only rely on the unilateral will of others for the security of my rights, I am still dependent on their choices. Call this the problem of assurance.<sup>9</sup>

A unilateral right to settle the indeterminacy problems or to adjudicate disputes would give one person authority over all others. Hence such a right would be inconsistent with the equal freedom of all. The solution to these problems is the establishment of an impartial decision procedure for establishing laws and adjudicating disputes over rights. An institutional apparatus embodying such a decision procedure is able to resolve the indeterminacy and adjudication problems in a way that does not reflect any unilateral will. For this very reason, this institution is also able, and hence required, to solve the assurance problem. Since the institution has the right to determine the boundaries of individuals' rights, it has the right to compel individuals to respect that determination. The institution thereby has the right to enforce the rights of individuals. When it does so, people may be assured that their rights will be respected and this assurance does not reflect the unilateral will of any other person.

Now, we are in a position to appreciate the overall structure of Kant's political philosophy. Kant's argument is that the innate right to freedom requires that we have rights to our bodies and the possibility of acquiring property rights. But at least the latter are merely provisional in the state

of nature. That is, although we can make claims on one another to abide by our respective rights, the definitive shape of these rights remains unsettled and the assurance that they will be respected is absent. Provisional rights can only be made conclusive through the establishment an institution that defines the scope of our rights and enforces those rights, in other words, the state (*MM* 6:255-256). Hence each of us has the right to have our interactions with others governed by a state.<sup>10</sup> Since, as Kant understands rights, having a right includes the authorization to enforce that right, each of us may compel others to enter into a state.

## II. Bodies and the State

Our rights to our own bodies seem to give rise to at least many of the same problems as our rights to property. Bodily rights clearly give rise to an indeterminacy problem about what counts as interference. Consider an example of Ripstein's: "If I shout loud enough to startle you when you stand on the edge of a cliff, but do not touch you, do I wrong you? This seems to be a question about our respective rights, which is not resolved by some factual consideration about the number of molecules that my shout displaced toward you."<sup>11</sup> What we need is a rule about whether shouting in this context constitutes assault. That is something that neither of us is unilaterally entitled to impose on the other. Next, notice that even if we had such a rule, there might yet arise a question about whether what I do in a particular case constitutes shouting in the relevant sense. Hence, bodily rights are also subject to the problem of adjudication.

Before turning to the assurance problem, notice that there are some problems involving enforcement are that are not properly regarded as instances of the assurance problem. As Ripstein helpfully points out, two people may have potentially conflicting rights of self-defense in the state of nature. Both may identify each other as an aggressor and so attack one another. Neither person is required to defer to the other's judgment about who is aggressing against whom. But this is really a

problem about indeterminacy or adjudication rather than a problem about assurance. The response to this problem consists in the establishment of a law or the issuing of a verdict that settles the boundaries of our respective bodily rights, thus settling who is aggressing against whom.

Let us turn, then, to the assurance problem. The assurance problem, as I have described it, seems to straightforwardly apply to our bodily rights. In the state of nature, my only assurance that you will respect my bodily rights depends on your unilateral choices. I am thus unable to rely on my rights in a way that leaves me truly independent of your will. Nonetheless, some aspects of Kant's view suggest that he does not recognize an assurance problem for bodily rights. In his interpretation of Kant, Ripstein explicitly denies that the assurance problem applies to bodily rights. I am going to spend some time examining Ripstein's argument for this conclusion because I think that the argument sheds considerable light on what is at stake in the assurance problem and illuminates an important difference between bodily rights and property rights. I will argue, however, that Ripstein's argument is ultimately unsuccessful.

Ripstein claims, and I agree, that the assurance problem would be a problem for property rights even if our property rights were determinate. So, imagine that we have somehow managed to establish determinate rights to property in the state of nature. That is, it is clear what belongs to whom and what counts as interfering with the property of others. With this in mind, consider Ripstein's description of the assurance problem with respect to property rights:

In this situation, without public enforcement, people lack the assurance that others will refrain from interfering with their property and, as a result, have no obligations refrain from interfering with the property of others. The basic thought is that without such a system, nobody has the right to use force (or call on others to do so) to exclude others from his or her property, so nobody has an enforceable obligation to refrain from interfering with the property of others.<sup>12</sup>

Here Ripstein is claiming that, in the absence of assurance, no one could rightfully defend his or her property rights. This claim should strike us as rather mysterious. After all, Kant insists that the authorization to defend one's rights is part of the very nature of having a right (*MM* 6:231). If we

imagine that we have established determinate property rights, how could the absence of assurance that others will not interfere with our property rights render us unable to legitimately defend those rights?

The answer must lie in some way of articulating a sense in which *determinate* rights can still fail to be *conclusive* rights. Ripstein attempts to articulate such a sense by pointing to a purported tension in our rights to property in the absence of public assurance. On the one hand, you must refrain from taking what is mine. But on the other hand, “[i]f you refrain from taking what is mine, without assurance that I will refrain from taking what is yours, then you are permitting me to treat what is yours, and so an aspect of your capacity to set and pursue purposes, as subject to my purposes.”<sup>13</sup> The same problem arises for me. And so, “if either of us refrains from taking what belongs to the other without assurance, we restrict our choice on the basis of the other’s particular choice, rather than in accordance with a universal law.”<sup>14</sup>

I think this account still leaves the purported tension rather mysterious. How can respecting your rights in the absence of assurance permit you to violate mine? Respecting your rights under those circumstances seems as though it might be imprudent. But why should doing so affect the normative force of my rights? In particular, why should I conceive of myself as permitting you to ignore my rights?

Ripstein’s language suggests that in trying to respect your rights in the absence of assurance I somehow manage to undermine my own rights. But I suggest that it is not the attempt to respect your rights that generates the problem. Our rights in the absence of assurance are incomplete no matter how we try to respond to them. And this creates a problem for the possibility of rightful enforcement. To see the problem, let’s first take a look at why Kant holds that having a right necessarily involves the authorization to defend it. Kant claims that using force to defend a right is just ‘hindering a hindrance to freedom’. So, if I try to take your pen, I am interfering with your

right and so with your freedom. When you stop me, you simply prevent me from doing something I had no right to do. Thus, you preserve your freedom without interfering with mine.

Now recall that we are imagining a situation in which you have determinate property rights but do not have the assurance that they will be respected. As I argued earlier, in the absence of assurance, the rights cannot yet do the job of allowing us to be independent of the constraint of others choices. So, in this situation, our rights do not yet enable us to be free. Hence any force used in their defense still just mere force – it does not hinder a hindrance to freedom. For this reason, I cannot use force to defend even a determinate property right and hence you cannot have an enforceable obligation to leave my property alone, which, from the point of view of right, just amounts to your having no obligation to refrain from interfering.

Ripstein argues that this conclusion does not follow for bodily rights – one may rightfully enforce one’s bodily rights in the state of nature. By way of explanation, Ripstein argues, “Anyone who touches you without your authorization hinders your freedom; to repel the trespasser is to hinder his hindrance.”<sup>15</sup> Why does touching you necessarily hinder your freedom? Ripstein answers that “your person can never be physically separate from you.”<sup>16</sup> As I will argue in the next section, I do not think this is quite right. But something in the neighborhood is correct. Your body is what places you in the world, making you a potential participant in interactions. For this reason, some kind of control over your body is, as I put it earlier, a precondition for your freedom. This extra role of bodily rights marks a difference between how our bodily rights and our property rights are related to our freedom. So, suppose that you have determinate bodily rights but do not have assurance. In one way, the link between your bodily rights and your freedom is broken here just as it is in the case of property rights. But in another way your bodily rights continue to play a role in enabling you to be free, namely by satisfying the precondition on your freedom. Interfering with your body thus

hinders your freedom. Hence defending yourself hinders a hindrance to freedom and is therefore a rightful use of force.

Ripstein is thus correct to insist that bodily rights do not raise exactly the same kind of problem as property rights. If bodily rights were determinate in the state of nature, they could be rightfully defended. In contrast, if property rights were determinate in the state of nature, they could not be rightfully defended. Ripstein's argument goes wrong at the final step. The difference in the possibility of rightful enforcement indicates that the implications of the assurance problem differ for bodily rights and property rights. It does not indicate that there is no assurance problem for bodily rights.

The assurance problem is simply that, in the state of nature, one must rely on the unilateral choices of others for the security of one's rights. This problem remains even if I am permitted to defend myself. One might object that if I am permitted to defend myself, the security of my rights does not depend on the unilateral choices of others but instead on my own defensive choices. This objection misses the mark in two respects.

First, as Ripstein helpfully points out, the right to enforce one's bodily rights in the state of nature is incomplete. Since conclusive property rights are impossible in the state of nature "you can have no remedial right if someone commits a wrong against your person... Thus your right to defend yourself is genuine, but if you fail to hinder a hindrance to your own freedom, it cannot be hindered after the fact."<sup>17</sup> This suggests an interesting and powerful connection between bodily rights and property rights: even if we did not have an independent argument for the necessity of establishing property rights, the need to secure our bodily rights could provide such an argument. We need to be able to have property in order to be able to claim reparations for violations of bodily rights.

There is, however, a second and deeper reply to the argument that the permission to enforce one's bodily rights dissolves the assurance problem for those rights. Even if I may defend myself, my freedom is still constrained by your unilateral choices. If I must abandon my leisurely morning walk to run away from you or to stop and hurl rocks at you, I do not enjoy the discretionary space that my right entitles me to. In this way, even if I am able to thwart or deter any attempted aggression, I am still not able to rely on my rights. Instead, I rely on my power as measured against your unilateral choices. In order to be able to rely on my rights, they must somehow be enforced apart from the choices that either of us makes. This is precisely the condition that the state secures. The state's enforcement of rights makes rights exert physical force in the world apart from anyone's unilateral will. So, Ripstein is right to insist that, if one's bodily rights were determinate in the state of nature, one could rightfully defend one's bodily rights. But this feature of bodily rights does not yet overcome the assurance problem.

It is important to distinguish the version of the assurance problem that I am advocating from another that is closely related. One might think that one lacks independence just insofar as one's rights are not secure. There is something right about this, but this is not the most fundamental problem. Instead, I have suggested that one lacks independence when the security of one's rights depends on others' unilateral choices. This version of the assurance problem makes it evident why Kant thinks that the state solves the assurance problem: the state solves this problem by establishing an impartial enforcement mechanism so that the security of one's rights has a source beyond anyone's unilateral will. This impartial enforcement mechanism may be better or worse, depending on the state. An ideal state would have a perfect enforcement mechanism and so, in addition to changing the character of the security of our rights, such a state would make our rights completely secure. So, although this interpretation focuses on the source of our security as the basic problem, it provides a natural way of situating the problem posed by the extent of our security. In the state of

nature, we face a problem about the source of our security. The state solves this problem and its solution may be judged better or worse in terms of the extent of the security it provides.<sup>18</sup>

I have now shown how bodily rights face three of the problems that property rights face in the state of nature. Bodily rights raise an indeterminacy problem regarding what counts as interference, a problem of adjudication and a problem of assurance. This leaves only one problem that bodily rights do not seem to face: an indeterminacy problem about acquisition. In the next section, I will argue that bodily rights do actually face an analogue of this problem. But even without that analogue, the problems that bodily rights face would be sufficient to justify the establishment of the state. To appreciate this, notice that the solution to each of the three problems I have focused on with respect to bodily rights lies in a different branch of government. A public legislative authority solves the indeterminacy problem about interference. A public judiciary solves the problem of adjudication. And a public executive solves the problem of assurance. The need to solve these three problems can thus justify each aspect of the state's authority. I suggest, then, that careful consideration of the normative demands to which our bodily rights give rise can justify the establishment of the state.

There is a line of argument in Ripstein's discussion that might be thought to push against this conclusion. I have cast acquisition as raising only an indeterminacy problem that is exactly parallel to the indeterminacy problem regarding what counts as interference. For this reason, the fact that property rights must be acquired does no unique work in the argument for the establishment of the state. Ripstein, however, seems to suggest that acquisition raises a unique problem. What Ripstein calls the problem of unilateral choice focuses on how one person could choose to put others under obligation by acquiring property. Ripstein here correctly identifies a difference in the way my bodily rights and my acquired rights affect your obligations. As Ripstein puts it: "[I]f I move from one place to another, I occupy space which is not available for your

occupation while I am there. This change does not place you under a new obligation, but simply applies it to a different circumstance.”<sup>19</sup> In contrast, acquiring property does not simply pick a place for an existing obligation but rather brings a new obligation into existence.

Why should this difference raise a unique problem for acquired rights? Ripstein claims:

[A] ‘permissive law’ that entitles me to acquire things makes a merely permissible unilateral act have rightful consequences for others. However, it could only have this status provided that it is authorized by everyone, so that my unilateral act is also the exercise of a publicly conferred power. If the public authority is entitled to confer the power on me in the name of everyone, then my specific exercise of the power is also in everyone’s name.<sup>20</sup>

I cannot confer on myself the authority to unilaterally change your obligations. To the extent that that is all this passage is meant to indicate, the thought expressed is correct. But Ripstein seems to take it to mean something more. Not only can I not confer this power on myself, the only way this power could be conferred on me is via a public authority, where this means the established authority of the state. But notice that there is another option. If the permissive law to which Ripstein refers were itself justified by the requirements of freedom, the requirements of freedom would confer this authority on me. And as I argued in Section I, Kant does indeed regard equal freedom as requiring the possibility of property ownership. So, I do not need to stand on my own authority when I try to acquire property rights in the state of nature; I can instead stand on the authority of the requirements of freedom. The problem for my attempt to acquire property rights only emerges in light of the inability of the requirements of freedom alone to settle a determinate procedure for property acquisition.

Ripstein seems to explicate the problem of unilateral choice as if it were prior to and independent of problems associated with the indeterminacy of the rules surrounding the acquisition of property. But if there were determinate rules for property acquisition supplied by the requirements of freedom alone, my choice to acquire property would not interfere with your independence. The need for a public lawgiving authority is not generated by the need to confer

authority on us to acquire property but rather by the need to confer authority on the procedures that specify how property acquisition is to take place. I conclude, then, that property acquisition does not generate a unique problem that the state must solve. Property acquisition generates an indeterminacy problem. Bodily rights do that as well. Thus bodily rights can do the same work in justifying the establishment of the state.<sup>21</sup>

### III. The Boundaries of the Body

So far, I have argued that bodily rights share three of the problems faced by property rights in the state of nature. I have also argued that the existence of these three problems for bodily rights is sufficient to justify the establishment of the state. Thus, my main argument is secure even if only property rights suffer from an indeterminacy problem regarding acquisition. Nonetheless, I think that there is an analogue of this indeterminacy problem for bodily rights and that recognizing this analogue is important for understanding the nature of bodily rights.

The problem I have in mind is about how we should understand the boundaries of our bodies. As I mentioned above, Ripstein maintains that ‘your person can never be physically separate from you’ and that ‘your person is your body’. This seems to suggest that you can never be physically separate from your body. These claims make sense on a certain picture of the body, one that Ripstein is correct to attribute to Kant. I am going to suggest, however, that this view is problematic.

Recall the brief account of the grounds of bodily rights that I sketched above. Kant’s political philosophy is occupied with identifying the domain within which one is entitled to be independent, i.e. one’s own master. Kant holds that the innate right to freedom necessarily involves the right to one’s own body because some kind of control over one’s body is a precondition for independence. In other words, one needs some kind of foothold in the world as an agent in order

for the question of independence from other agents even to arise. It is not mysterious why Kant identifies this foothold with our bodies. Moreover, at least at first glance, Kant adopts a very intuitive understanding of bodies. Kant claims that our bodies involve an 'essential unity' (*MM* 6:278) and he makes it clear that he understands this unity in terms of our animal nature (*MM* 6:241). It seems then that identifying the boundaries of our bodies need involve nothing more than identifying the boundaries of the human animals that we are. And this, it seems, should simply require us to identify the physical material that is unified in the relevant way.

There are, however, cases in which this view runs into difficulty. Suppose that a falling tree limb hits you and slices off one of your fingers. That finger is now separate from the matter that is unified as an animal. This suggests a conclusion that is, in one way, very intuitive: the finger is no longer part of your body. The trouble, however, emerges when we consider whether the finger is still *yours*. Many people would be, I think, inclined to say that it is and that that explains why you have a right to reattach it if you can. Perhaps the thought here is that, although your finger is no longer part of your body, it is your property. I think, however, that a story on which that is true is rather difficult to tell on the Kantian view.

If the finger is your property, either it was your property before it was severed or only became your property after it was severed. The former possibility is difficult to maintain on the Kantian view for two related reasons. First, property rights are acquired rights. Some affirmative act is required to acquire property. So, if it were possible to acquire a property right in your body, you would need to do something to accomplish that. If you happen to sever your finger before you have done this, it seems that you have no recourse. Second, notice that, if it is possible for you to acquire a property right in your body, it must be in principle possible for someone else to do so as well. Otherwise, your right to acquire a property right in your body could not be consistent with the equal freedom of others. But another person's property right in your body would be inconsistent

with the bodily rights you have via the innate right to freedom. So, as long as you have the bodily rights that the innate right to freedom grounds, no one can have a property right in your body. Hence you cannot have a property right to your finger while it is still attached.

Could you acquire a property right to your finger once it is severed? If we accept the view on which the finger is no longer part of your body, your bodily rights no longer stand in the way of acquiring a property right to the finger. But as we saw above it must be possible in principle for someone else to acquire that property right. If so, then even if you desperately want the finger back so as to have a chance of reattaching it, you would have no unique claim to it. While you lie on the ground reeling from your encounter with the tree branch, I may come along and grab the finger. You would have no more complaint against me than if I had grabbed an apple that you had been holding but dropped. Of course, if I want more than mere possession of the finger – if I want a property right to it – I must enter into a state with you, just as would be the case with the apple. But on this view, the finger raises no special problem simply in virtue of having once been a part of your body.

So, there are resources in the Kantian view to support the claim that it is possible to acquire a property right in your finger once it is severed. But this possibility does not vindicate the thought that you had a right to the finger all along. Perhaps that thought was misguided from the start – a confusion about the source of our rights analogous to the Lockean error of thinking that laboring on an object generates a property right. If so, then we must simply accept that the severed finger is now an unowned object in the world, one that potentially anyone could claim as property.

It is worth, however, considering what motivates the intuition that you still have some kind of claim to the finger even after it has been severed. We constantly lose hair and skin cells, but we are not generally concerned to defend our rights to them. The mere fact that an object was once a part of our bodies does not, then, seem to be the motivating factor. The prospect of reattachment

in this case seems to matter. That is not simply because reattachment involves the repair of damage. Suppose we both lose our fingers to wayward tree branches. If my finger is too damaged to reattach, I might be able to use yours to repair my hand. But while you seem to have a claim to the severed finger that was once a part of your body, I seem to lack that claim. Here the sense that you have a claim to your severed finger seems to reflect the thought that, although the unity of your body has been disrupted, that disruption is not insurmountable.

This is not the only kind of case in which many people regard themselves as having a claim to a body part even after it has been detached. Consider the case of Henrietta Lacks, an African-American woman who died of cervical cancer in 1951.<sup>22</sup> Without the knowledge or consent of Lacks or her relatives, her doctors gave samples of her tumor to a researcher who was trying to find cells that would live indefinitely in culture. Lacks's tumor cells fit the bill. They multiplied and never died, allowing researchers to use them as a staple in their experiments. Among their many contributions, the cells were used to develop the first Polio vaccine. While the initial researcher did not profit from the cells, they were eventually commodified and now generate a considerable profit.

There are two issues here: the fact that the cells are still multiplying and being used and the fact that they are being treated as a commodity. Certainly, the later consideration does some work in explaining the thought that Lacks was cheated, deprived of something to which she had a right. This is a complicated issue, and one that I will consider in the next section. Here, however, I want to suggest that even if the cells had never been commodified, there would still be some sense that Lacks's rights were bypassed. This sense is certainly not tracking the possibility of reunifying her with the cells. Instead, I suggest this sense reflects a way in which her bodily powers are still being put to work even in her absence. I take it that this sense might also reflect part of what would be objectionable if one's detached cells were used to clone one or to procreate without one's consent. In these cases, one's detached parts are still functioning, in some sense, in the way that bodies do

even though they are detached. And this is what makes it seem that one can have a claim to those parts.

I want to note in passing one further interesting feature of the Lacks case. The cells in question were cancer cells. So, they were not playing a role in maintaining the unity of Lacks's body. Instead, they were impairing that unity. This may be an important consideration for some kinds of ethical questions. Kant, for example, holds that removing diseased parts of one's body is consistent with one's duties of virtue to oneself, whereas removing healthy parts may raise problems (*MM* 6:423). But the distinction between healthy and diseased in Lacks's case does not seem to bear much weight in our sense that she had a claim to the cells. Reflection on this might, I think, reveal a further sense in which we need a more expansive conception of the role of bodily unity in determining the boundaries of our bodily rights. One continues to have a claim even to the perverted expression of one's bodily powers.

To return to my main suggestion, there are many reasons for denying that we automatically lose our rights to body parts when they become detached. Property rights cannot, on the Kantian view, do justice to this thought. That leaves only the possibility of recognizing our bodily rights as potentially extending to objects that are physically separate. If so, then we need some way of determining when a detached body part is subject to these rights and when it is not. That is, we need determinate rules governing the boundaries of our bodies. These are rules that none of us can unilaterally impose. But it does seem as though these rules will authorize us, in effect, to choose to alienate parts of our bodies. Perhaps, for example, if I leave my severed finger in the forest, I will count as abandoning it and so lose my bodily right to it. Bodies thus pose the reverse of the problem posed by property. We need rules for property acquisition, which involve acquiring a right and hence imposing obligations on others, and we need rules for bodily alienation, which involve renouncing a right and hence relieving others of obligations.

In fact, once we recognize the possibility of bodily rights to physically separate objects, we can identify an even closer analogue to the problem posed by property acquisition. Consider the status of artificial body parts. Even on the original Kantian view, some artificial body parts seem appropriately included under the scope of one's bodily rights. An artificial heart, for example, plays the kind of role in the unity of one's body that might make it seem appropriate to think of it as a part of one's body rather than simply property that happens to be in constant physical contact with one's body. But what should we say about a prosthetic leg that one removes at the end of the day? The answer to this question is, I think, not obvious. Moreover, the answer has important legal ramifications in at least two areas. First, while it might seem natural to think that someone who takes your reading glasses has engaged in theft, there is at least something to be said for the thought that someone who takes your prosthetic leg has engaged in assault. In this way, the proper classification of certain crimes depends on settling the nature of the rights in question. Second, notice that certain considerations bearing on the design of public spaces depend in part on how we conceive of the boundaries of people's bodily rights. Accommodating a wheelchair is not on a par with accommodating a mode of transportation, like a bicycle, but instead has the character of accommodating the person herself. One way of making sense of this involves taking a person's rights to her wheelchair to be bodily rights rather than property rights.

To be clear, I am not defending a particular view on how we should regard rights to prosthetic limbs and wheelchairs. Here I am only suggesting that there are meaningful questions to be asked in this area and we need authoritative answers to those questions. Just as we need to settle when we retain bodily rights to body parts that are now physically separate, we need to settle when we gain bodily rights to objects that were once not a part of our bodies. That is, just as we need rules for bodily alienation, we need rules for bodily incorporation.

This brings us very close to the problem of acquisition posed by property rights. Acquiring

a property right places others under a new obligation and, likewise, so does incorporating a body part. I argued in Section II that, even if the indeterminacy problem regarding acquisition does not apply to bodily rights, our bodily rights are defective in a way that justifies the establishment of the state. The conclusion of this section is that bodily rights are in fact subject to an analogue of the indeterminacy problem regarding acquisition, namely, an indeterminacy problem posed by the possibility of bodily alienation and incorporation. Thus the extent of the parallel between bodily rights and property rights is even stronger than it might have initially seemed.

Although I have argued for important similarities between bodily rights and property rights, as I noted at the outset significant differences between these two kinds of rights remain. I am going to examine one such difference in the next section. But before turning to that discussion, I want to pause here to consider a potential objection. I have argued that bodily unity plays a more nuanced role in determining the boundaries of bodily rights than may at first be apparent. But one might start to wonder why bodily unity should be significant at all. As I noted above, the right to some kind of control over one's own body is a precondition for engaging in independent action. But why should that control extend to *all* of what we intuitively think of as our bodies?<sup>23</sup> Why, for example, do we automatically have a right to both of our kidneys? In the same way that recognizing the indeterminacy problem regarding the boundaries of our bodies opens the door to more extensive bodily rights, it also seems to open the door to less extensive bodily rights.

To respond to this objection, let me first say a bit more about the sense in which having the right to some kind of control over one's body is a precondition for independence. I want to contrast two ways in which having a right to control over one's body might be a precondition for independence. First, consider the 'body as means' interpretation. To the extent that one lacks control over one's body, one is unable to act at all. In this way, control over one's body is a necessary means for one's activity in the world and hence one's independence. While there is

something intuitive about this picture, it does not capture our unique relationship with our bodies, for there are other means that are necessary in this sense. We need, for example, air to breathe, food to eat and water to drink in order to function as agents.<sup>24</sup> One might attempt to argue that the innate right to freedom grounds some kind of right to all these things insofar as they are needed for our agency. But I want to set that possibility aside here because I think there is a more direct and unique sense in which the right to some kind of control over our bodies is a precondition for independence.

Let us turn, then, to the second interpretation, the ‘body as identity’ interpretation. This interpretation is suggested by the comments of Ripstein’s that I noted earlier. On this interpretation, the sense in which some kind of control over one’s body is a precondition for independence is cashed out in terms of the need to identify one as an agent with whom interaction is possible. As I put it earlier, you need some kind of foothold in the world in order for the question of independence from other agents even to arise. Attributing to agents rights to their bodies addresses the need to identify agents as separate beings.

With the ‘body as identity’ interpretation in mind, let us return to the objection. The objection suggests that we could draw the boundaries of people’s bodily rights more narrowly. In other words, we could identify agents with less than their whole bodies. We could, for example, identify agents with their brains (or better, perhaps, their heads, so as to ensure the possibility of interaction with others). Notice that no one would be tempted to identify you with your left foot. The objection gets its plausibility from the thought that agency is possible with much less than your whole body. But this involves slipping back into thinking of the body as a means. When we focus on identifying you with some part of your body, like your brain, things are a bit trickier. Your brain is only a brain, not a mere lump of squishy stuff, insofar as it is a part of a system. And no one is tempted to identify you with the mere lump of brain matter. If we tried to identify you with your brain, we would have in mind a living, active brain and that involves smuggling in the system in

which that brain is operating. So, the answer to the question of identification cannot really be less than one's whole body. For this reason, I do not think that ignoring bodily unity altogether is a viable strategy. So, although I believe our bodily rights are indeterminate in the ways I have described, this indeterminacy is not as radical as the above objection suggests.

This means that we need not worry that the state's authority to resolve the indeterminacy problem for our bodily rights could result in the legitimate imposition of a system of compulsory kidney donation while we are living. As long as our kidneys remain physically united with us, the indeterminacy problem regarding bodily alienation and incorporation does not arise. It is worth noticing, though, that this issue becomes more nuanced once we are dead. On the view that I am advocating, it is entirely appropriate for the state to determine when we count as abandoning our body parts and death raises this very question. So, for example, the state might legitimately choose between an opt-in and an opt-out system for posthumous organ donation. My view thus provides a helpful framework for understanding the proper scope of the state's involvement in determining our bodily rights.

#### IV. Transferring Body Parts

As I indicated, I want to close by considering an important difference between property rights and bodily rights. Your bodily rights have their justification in the innate right to freedom. Although we need rules determining the boundaries of our bodies, it remains the case that bodily rights are not acquired but instead rights that we have simply in virtue of our status as free beings. For this reason, bodily rights are not transferable. This means that you have no direct right to sell your body parts. You may be able to make some parts of your body cease to be parts of your body, thus alienating those parts. But as we saw in the previous section, once you cease to have bodily rights to that part, no property right automatically emerges in its place. So, you may not be the

owner of the part you want to sell.

Perhaps more surprisingly, the fact that bodily rights are not transferable also means it is impossible to directly donate your body parts to others.<sup>25</sup> This is, I think, a rather counterintuitive result. To take a commonplace example, if I want to donate my blood or my hair, surely I should be able to.

There are ways to get around this prohibition that allow something that looks very much like sale or donation. First, perhaps I may alienate part of my body in a way that makes me very likely to be able to claim the part as my property. Suppose, for example, that I cut off my own hair, while holding it in my hand the whole time. Although in principle anyone could now acquire a property right to the hair, since I maintain control over the hair, I never give anyone else an opportunity to claim it as property. Now I may sell or donate the hair as I see fit.

Second, perhaps I may alienate the part in a way that makes you very likely to be able to claim the part as property. Suppose, for example, that I allow you to cut off my hair and you hold it as you do that. Since you have control over the hair at the moment that I alienate it, you never give anyone else an opportunity to claim it as property. I may agree to let you touch my hair in this way only on the condition that you pay me. So, although I cannot sell you the right to my hair directly, I can sell you the right to do something that practically ensures that you will be able to acquire a right to the hair.

More complicated cases may involve more intermediary contracts, but have essentially the same form. If I want to give you my kidney, I may need to contract with the doctors and nurses to allow them to remove it only on the condition that they then place it in you. And I may need to give you the right to keep it until my bodily right ceases and yours begins.

Given that we can circuitously accomplish the sale or donation of our body parts, what is the point of making us jump through these hoops? Doesn't the seemingly needless complexity of the

system tell against it? I do not think that it does when you recall the alternatives. The view on which our rights to our bodies are property rights leaves it mysterious why we happen to own our bodies. This is not merely a worry that we might be able to sell our bodies and hence ourselves into slavery. That worry already presupposes an answer to the prior question of why we are the first owners of our bodies and so in a position to sell our bodies. Why, for example, do our parents not own our bodies? It seems clear, then, that our rights to our bodies must be innate rather than acquired. Once we observe that these two very different kinds of rights are possible, we should not be surprised by the complexity of their interaction. To put the same point differently, once we observe that our bodies cannot be mere objects in the world available for anyone's potential use, we should not be surprised that it is difficult to treat them as if they were. So, while the complexity of bodily rights may initially seem counterintuitive, this complexity is needed to capture the special status of bodily rights.

## VI. Conclusion

I hope to have shown that on a Kantian view our bodily rights are both more and less like property rights than it may first appear. Bodily rights are more like property rights in that they involve similar defects in the state of nature and can therefore do the same work in justifying the establishment of the state. They are less like property rights in that they cannot be transferred. These two conclusions suggest a unique conception of bodily rights, one on which our bodily rights are politically constructed and yet have a form that is determined by the requirements of our freedom.

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<sup>1</sup> Kant develops this view in *The Metaphysics of Morals*. I abbreviate this text *MM*. For all citations of Kant's work, I give the page numbers of the relevant volumes of *Kants gesammelte Schriften* (published by the *Preussische Akademie der Wissenschaften*, Berlin), which appear in the margins of most translations. All quotations from Kant's work are taken from Immanuel Kant, *Practical Philosophy*, ed. and trans. Mary J. Gregor (Cambridge: Cambridge University Press, 1996).

<sup>2</sup> Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge: Cambridge University Press, 2009).

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<sup>3</sup> While I will argue that bodily rights cannot be directly transferred, I will not argue that property rights must be essentially transferrable. It is sufficient for my purposes to claim that a property right is the sort of right that the state may in principal make transferrable, though it may not do so in all cases. I am indebted to Seana Shiffrin for pointing out this distinction. Furthermore, if the innate right to freedom were to ground inalienable rights to external objects in the world (a possibility I describe on p. 20) like, for example, air, these rights would represent a new category of rights in the Kantian scheme and would not be best understood as property rights. I am indebted to Seana Shiffrin for also prompting me to consider this possibility.

<sup>4</sup> In this section, I draw on my work in Japa Pallikkathayil, “Deriving Morality from Politics: Rethinking the Formula of Humanity,” *Ethics*, Vol. 121, No. 1 (October 2010), pp. 116-147. There I develop an account of the relationship between Kant’s moral and political philosophies.

<sup>5</sup> Ripstein, 177.

<sup>6</sup> This step in the argument is more difficult than I have indicated. Indeed, I worry that Kant’s argument here may not work. But if my arguments regarding bodily rights succeed, we may be able to sidestep Kant’s focus on property rights in his justification of the establishment of the state.

<sup>7</sup> Ripstein seems to argue that this problem is at least somewhat more tractable than I am indicating here. Ripstein gives the following pair of examples. Suppose that I grow porcini mushrooms on my land in the shade of the garage that you have put up on your land. If you take down your garage, my mushrooms will die. But I have no claim that you give my mushrooms the shade that they need. Likewise, if I am growing sunflowers and you decide to build a garage that will block their access to the sunlight, I have no claim against you because “all you have done is fail to use your land in a way that provides me with something I need” (Ripstein, 78). A further gloss on this point: others “have no right to a path across your land” (Ripstein, 78). These cases are, I think, more difficult than Ripstein acknowledges. The case of the fan and the daffodils I give above makes the difficulty more transparent. Perhaps this is simply a case in which you block my access to the peaceful, undisturbed air on the other side of your property. But perhaps we should understand this as a case in which you force the wind that you have created on me. Or suppose you spray poison gas in the air; do you merely block my access to clean air or assault my land with poison? With these cases in mind, return to Ripstein’s case of erecting the garage. Does the garage merely block my access to sunlight or force the darkness you have created on me? Similar reasoning can make the case of tearing down the garage problematic as well. Suppose you have built a dam that keeps water from reaching my land. You decide to tear it down, and doing so will cause my land to flood. Are you assaulting my land with water?

<sup>8</sup> In “Deriving Morality from Politics: Rethinking the Formula of Humanity,” I treated what I am calling here the problem of adjudication as an indeterminacy problem. Although these problems have much in common, it is useful to keep them separated because they have solutions in different branches of the government. I am indebted to Arthur Ripstein for helping me to appreciate this point. See Ripstein, 173.

<sup>9</sup> In “Deriving Morality from Politics: Rethinking the Formula of Humanity,” I used the term ‘enforcement problem’ to refer to what I am here labeling the ‘assurance problem’. As I discuss in the next section and as Ripstein helpfully emphasizes, not all problems regarding enforcement are properly regarded as instances of the assurance problem, making this label more precise.

<sup>10</sup> As it stands, this is an argument for a very minimal state, lacking many of the features and powers we typically attribute to states. I am indebted to Larry Temkin for reminding me of this limitation of the argument. Ripstein offers some arguments directed at showing how further elements of the state might be defended. See, for example, Ripstein’s argument for public roads, Ripstein, 182-231.

<sup>11</sup> Ripstein, 176-177.

<sup>12</sup> Ripstein, 159.

<sup>13</sup> Ripstein, 162.

<sup>14</sup> Ripstein, 162.

<sup>15</sup> Ripstein, 177.

<sup>16</sup> Ripstein, 177.

<sup>17</sup> Ripstein, 180.

<sup>18</sup> I am indebted to Arudra Burra and Anil Gupta for prompting me to think through these issues further.

<sup>19</sup> Ripstein, 151.

<sup>20</sup> Ripstein, 154.

<sup>21</sup> Ripstein’s understanding of bodily rights has implications for other aspects of his view. Ripstein interprets Kant as understanding a state’s relationship to its territory on the model of a person’s relationship to her body rather than to her property. Since bodies do not raise all of the relevant problems, this explains why Kant does not endorse the establishment of a global state (Ripstein, 225-230). I agree with Ripstein’s assessment of how Kant views the state’s

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relationship to its territory. But since I hold that bodily rights can justify the establishment of the state, I maintain that Kant's rejection of the need for a global state was a mistake.

<sup>22</sup> Denise Grady, "A Lasting Gift to Medicine that Wasn't Really a Gift" *New York Times*, February 1, 2010.

<sup>23</sup> I am indebted to A.J. Julius for raising a similar question in his "Neither Mine nor Yours."

<sup>24</sup> I am indebted to Anja Jauernig for pressing me on this point.

<sup>25</sup> Notice that this marks a difference between the problem I am focusing on and the more standard objection to commodifying an object. That objection focuses on distinguishing objects that may be properly bought and sold from those that should only be given as gifts. See, for example, Elizabeth Anderson, "The Ethical Limitations of the Market," *Economics and Philosophy* 6 (1990), 179-205. I am arguing against the possibility of any kind of direct transfer of bodily rights, including gift giving. But since I argue that it is possible to indirectly transfer bodily rights, the question of whether there is an ethical objection to selling rather than giving those rights can be resituated, and here I leave open the answer to that question.