It is uncontroversial that the core of Kant’s argument in the *Doctrine of Right* [*DR*] for the legitimacy of political authority stems from his treatment of property rights. Less attention has been paid to the role of rights to one’s body in Kant’s account of the state. Today I argue that just as on the Kantian account property rights are not fully natural, but depend on a political order for their full realization, so too rights to our bodies. I explore what role the state plays in determining “who should give way when bodies collide,” to use an apt-phrase of Jeremy Waldron’s, and thus to the role of public law in determining the normative boundaries of the body.

My argument proceeds as follows. Section 1 canvasses some essentials of *DR* needed to bring the issue of bodily rights more clearly into view. Section 2 explains why, for Kant, we have rights to our body. Section 3 suggests that bodily rights share the indeterminacy of property rights. Section 4 addresses implications for the law of self-defense.

1. Right, Property, and Other Preliminaries

In *DR* Kant argues that political authority is legitimate because necessary to resolve a conceptual contradiction in natural property rights. In order to understand this claim, and see whether it extends to the body, we first need to get some preliminaries into view.

*DR* is an exploration of the morality of force. Its overarching point is that coercion, whether by private individuals or the state, is legitimate only when necessary to guarantee freedom as independence. Freedom as independence means independence from the will of another in setting and pursuing ends; it is secured when nobody gets to be the boss of anyone else. Slavery is the paradigm case of a threat to independence, since the slave can
only act by the leave of the master. For persons to independently move, act, and acquire amidst a plurality of other free beings in a bounded, spatially finite world, they must each be able to exercise their power of choice without interference by other choosers. Right, Kant teaches, is [Q1] “the totality of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom” (6:230). A doctrine of right shows what is necessary for joint realization of the power of choice.

In explicating the requirements for the compossibility of choice, Kant borrows the divisions of right from juridical practice. Private right refers to those rights that can be deduced simply from the nature of free, embodied agency and so are in that respect natural. Moreover, private right concerns what can be acquired—i.e., what could have been mine or yours but which turns out, because of something I did, to be mine and not yours. These include: a right against others to the use of a thing (property), a right to another’s performance (contract), and a limited right to another’s person (status, as in cases of parenthood or marriage). From this point onward I will only discuss property. Ultimately, the three domains of private right are themselves grounded in what Kant calls the innate right to freedom, which is just a way of restating the right of each to be independent from the will of another. Finally, public right refers to the network of laws and institutions necessary to protect, and as we will see just below, partially constitute individuals’ private rights. Under a regime of public right, state-based institutions act so as to correct the possibility of systemic dependencies latent in a regime of private rights—for example, the forms of domination that can arise through the accumulation of private property.

Taken on their own, the opening divisions of DR—innate and private right—might give the impression that Kant’s political philosophy is libertarian, as though individuals, qua free, simply have natural rights to body and property which the state is tasked with
protecting. On the other hand, taken on its own, the latter division of the work—the state and its public powers—might give the impression that Kant is ultimately a conventionalist, as though property and bodily rights have no independent content outside of whatever content public law bestows on them. But this interpretive oscillation—between a Lockean Kant and a Hobbesian Kant, as it were—is a product of not seeing the moments of the text as a sequential unfolding of a single, unified topic: Right, i.e., freedom of choice and action in its coercible aspect. For Kant private right stands to public right neither as a fully-given limit to state power, nor as a vanishing moment in an argument about the political nature of all rights, but rather as form to content.

Property provides the clearest illustration of this point. As a matter of private right Kant deduces from the bare requirements of embodied practical agency that individual discretionary ownership of things in the material world must be possible—that is, that ownership per se does not wrong another. But, he then goes on to show, actually claiming any such item involves the unilateral restriction by the putative owner of the actions of non-owners. If I declare a thing as mine, I declare it off-limits for your use. This unilateral act could never be consonant with the work’s starting point, the innate right to freedom, unless it were authorized by a shared or omnilateral will—the state. So if property ownership is to be rightful, declaring an object as mine must place me under a reciprocal nexus of legal obligations towards other owners, a nexus that could never be generated from individual acts of acquisition, or bi-lateral acts of contract, but only by a general will. A regime of purely private right is a conceptual aporia, in which a rightful capacity to acquire lacks the conditions of its actualization.

So when Kant suggests that property rights are merely “provisional” in the state of nature, he means to signal the incompleteness of a capacity—a capacity to acquire—without an
act by which it could rightfully actualize itself (i.e., a declaration, ‘this thing is mine’). That we have a *provisional* property right in the state of nature says only that although we have a right to property that is not itself the creation of public law, public law is necessary for that right to be claimable and thus to have content and actuality.¹

But this raises a parallel question about the work’s starting point: the innate right to freedom. Is this right provisional in the same way as property right? Is it part of a sequential unfolding of right, such that it also depends on the state for its full actuality, or is it a fixed anchor point from which the sequence then unfolds? Commentators tend to hold the latter. For example, Arthur Ripstein writes, “your right to your own person is not provisional” (FF, 177).

There is clearly a difficult substantive philosophical issue at stake here. Intuitions on the political nature of bodily rights run both ways. If bodily rights are less than fully natural, can they can be redistributed like property? Thinking of bodily rights as dependent for their content on public law appears also to open the door to historicist skepticism about bodily rights. Does this mean, for instance, that until there were laws on the books stating that a wife can be raped in marriage women had no right to protest against sexual violence by their husbands? Or that African-Americans did not have the right to move their bodies freely in public space until the law granted them such rights? Intuitions here support thinking of bodily rights are natural.

On the other hand, cases of bodily dispute, for examples, debates over vaccination, or the blocking of public roads as forms of protest, seem to be intrinsically undecidable outside of a legal determination. And the law of torts would be puzzling were it not the case

¹ Joel Feinberg writes, “The legal power to claim (performatively) one’s right or the things to which one has a right seems to be essential to the very notion of a right. A right to which one could not make claim (i.e. not even for recognition) would be a very “imperfect” right indeed!” “The Nature and Value of Rights,” 150. Kant’s concept of provisional right is his way of giving content to the notion of imperfection Feinberg signals.
that the boundaries of the body cannot be determined by the parties to a dispute, but require the a third, adjudicative element embodied in the figure of the judge.

2. The Body and the Power of Choice

Why assume that Kantian Recht demands that free individuals have rights to their bodies? In general, it would violate the methodology of Kant’s critical philosophy to dogmatically assume a set of natural rights. DR asserts a natural right to freedom, but reason must show what determinate shape this right takes under the pressure of necessary interaction with others. Prior to reason’s task of concretization and specification, all that is given to reason is the bare formal principle of the Universal Principle of Right, which states [Q2]: “Any action is right if it can coexist with everyone’s freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with universal law” (6:230).

Right must take root in both body and possession because of the nature of the capacity right both protects and constitutes: the capacity of choice (Willkür). In the Introduction to the Metaphysics of Morals, Kant defines a power of choice as [Q3] “the faculty of desire in accordance with concepts...so far as it is combined with the consciousness of the capacity of its action for the production of the object” (6:213).

For Kant actualizing one’s power of choice involves practical knowledge of what is within one’s power. This means that choice, unlike mere wish, is concerned with what I can actually do or achieve given the nature and scope of my powers and the means at my disposal. I can wish to fly, but I cannot choose to fly.

We can better understand the capacity by looking at its realized form: actually doing something in order to realize an end seen as good. To understand the power of choice is just to understand how human beings actually do things. And a natural enough thought is that
they do things with their bodies and they do things with things. In fact, it is incoherent to try to isolate one from the other, as though we simply move our bodies, with the transaction with the material world being only a contingent after-effect, something up to nature and not to us. Rather, humans do things with things by moving their bodies, and they move their bodies in order to transact with the world of things.

Once one recalls right’s foundation in the power of choice, one cannot think of innate and acquired right as fully isolatable from one another, as though there could be an intelligible regime of bodies *qua* agents outside of object use. And one thereby also sees why a doctrine of right must involve a regime of bodily protections. The body is the first means of action, but movement of the body is already transaction with the material world, and transaction with the material world already has consequences for others, at least given the fact that, as Kant points out, we are bound together on a finite globe. Thus, to think through the idea of a power of choice already implies the division of right into body, possession, and the public world.

In focusing on the requirements of a power choice, it is important not to obscure the relational form of right. A right is an intersubjective relation concerning what I am authorized to coerce others to do. A right to my body in not a one-place relation between my body and me, but a right *against others* with regard to my body. My body is under my control, not yours.

3. Bodies and Public Order

Attention to the relational form of right already intimates the necessity of the state. If bodily rights entitle me to coercively enforce the boundaries of my body, questions arise as to how to sort out the inevitable cases of conflict that come into view with the colliding of
bodies. As a matter of the private relationships in which individuals stand to one another, exactly who should give way when bodies collide has no determinate answer. Is leering at you in a public street an affront to your body? How close do I have to come to you to constitute a threat? What about cases where my putative right to do what I want with my body adversely affects your body? For instance, do I wrong you if I refuse to vaccinate myself?

Outside a public will, these disputes can never be settled in accordance with our independence, the right of each to be their own master.

Such cases of dispute motivate the idea that just as property rights are provisional, so too are bodily rights. But, on a Kantian framework, there are at least two differences between bodily and property rights. To see the first, recall the key move in establishing the provisionality of property rights: absent a general will, the act of claiming an object as mine unilaterally restricts the freedom of others. But for Kant one does not claim one’s body; one simply is one’s body. The body is the necessary condition for any claim-making activity. Second and relatedly, acquired rights could have been mine or yours. But it is unintelligible to think that my body could have been yours.

We can put these points together as follows. What the universal principle of right demands is symmetry—an action is right just so long as it can coexist with the freedom of others. Property claims introduce an asymmetry, since in having an object as mine I restrict what others might do with it. This asymmetry must be rendered symmetrical through the general will and its regime of property law. But my bodily right introduces no asymmetry. If the fundamental idea of independence is that nobody is the boss of anybody else, it certainly makes sense to ask, ‘who made you king with respect to that object?’, but it makes no sense to ask, ‘who made you the king of your body?’ The very notion of being in charge of oneself requires that there be some material stuff that can execute the in-charge of relation. Having
my body does not do anything to do, because the having of my body in no way restricts the having of your body. So why insist that bodily right are provisional too?

The answer is that while bodily rights do not depend on acquisitive acts, they do depend for their actuality on judgment. Equal freedom necessitates a public determination of rights not only in those cases where people impose new obligations on others, but, more generally, whenever a formal principles of right, such as a right to one’s body, must be specified and made concrete. If we have a right to defend ourselves against the reasonable perception of attack, we must decide at what distance such perception is reasonable. What gives you the right to decide that at six inches of distance, my presence on the street constitutes a threat to you rather than just the harmless movement of a passerby? Any unilateral specification of an a priori principle of right will count for others as a form of positive, quasi-legal determination that can only be made rightful, i.e., consistent with the freedom of all, through the authorizations of the general will.

Ultimately then, bodily rights are “provisional” not in the sense that we don’t fully have them without the state, but in the sense that there is no way to determine what exactly they entitle us to absent public law. And if bodily rights are provisional in this sense, one could just as well generate an argument for the basis of public coercive authority from the pure collision of bodies—that is, even in the imagined case where individuals simply move about in a finite space and do not acquire anything. What light do these abstract speculations shed on contemporary juridical understandings of the right to use lethal force?

4. Theory into Practice: Stand Your Ground Laws

The English common law of self-defense stated that “a man may protect himself from an assault, or the like, in the course of a sudden brawl or quarrel, by killing him who
assaults him."xiv But it also required that before a person could legitimately kill in self-defense
one must attempt to retreat ‘to the wall at one’s back’ or avoid the encounter.xv An early US
challenge to the common law duty to retreat held that [Q4] "when a person, being without
fault and in a place where he has a right to be, is violently assaulted, he may, without
retreating, repel force by force, and if, in the reasonable exercise of his right of self-defence
[sic], his assailant is killed, he is justifiable."xvi The first Supreme Court decision on this
matter agreed that when attacked a person [Q5] “was not obliged to retreat, nor to consider
whether he could safely retreat, but was entitled to stand his ground, and meet any attack
made upon him with a deadly weapon, in such way and with such force as …he …honestly
believed, and had reasonable grounds to believe, were necessary to save his own life.”xvii

Although these rulings applied to wherever the individual has ‘a right to be,’ they
were tempered by the centuries old Castle Doctrine—following from the idea that one’s
home is one’s castle. This limited the exemption from the ‘to the wall’ doctrine to one’s
home.xviii However, recent Stand Your Ground Laws, such as those passed in Florida in 2005
and since adopted by more than 30 states, extend the no-retreat doctrine to vehicles and
public places.

Stand Your Ground was not used as an official defense in the trial of George
Zimmerman, an adult accused of shooting Trayvon Martin, an unarmed 17-year old African-
American child who was walking back to his father’s home from a trip to a convenience
store.xix But the Judge’s official instructions to the jury stated: (Q6) “If George Zimmerman
was not engaged in an unlawful activity and was attacked in any place where he had a right to
be, he had no duty to retreat and had the right to stand his ground and meet force with
force, including deadly force if he reasonably believed that it was necessary to do so to
prevent death or great bodily harm to himself or another or to prevent the commission of a
forcible felony.” Zimmerman was acquitted.

The facts are these. Zimmerman served as neighborhood watch captain for the gated townhome community where Martin was visiting his father. While patrolling, Zimmerman saw Martin and concluded that he was suspicious—citing Martin’s hoodie and his seemingly relaxed pace while walking through the heavy rain that was falling. He began following Martin, despite the fact that the 911 dispatcher whom Zimmerman had called to report suspicious activity, asked him not to do so. Martin, acting under the assumption that he was being followed by someone who intended to do him harm, confronted Zimmerman and asked why he was following him. In the ensuing altercation Martin was shot dead. Notably, the police initially refused to arrest Zimmerman, citing Stand Your Ground Laws.

Critics of Stand Your Ground laws hold that such laws destroy civil order and habits of obedience to the law, promoting vigilantism. Defenders cite the deterrent effect on criminals and even the requirements of manliness. However, if one wishes to say that Zimmerman directly wronged Martin, or that the state failed to uphold a regime of right in enacting such laws, then, from a Kantian perspective, the utilitarian language will not do. Can the work of the previous sections right shed any light here?

Public roads and sidewalks—even the sidewalks of a gated community—are the creation of the state acting through its public mandate. They are the physical expression of the requirement on the state to ensure the free movement of individuals. Were all space privately owned, I could only move by leave of the owner. My right to my body depends on my being able to move in spaces where other private individuals cannot unilaterally assess the threat posed by my very being. In this respect, Stand Your Ground Laws represent devolution of public powers onto private individuals. They give back to the individual what is specifically the state’s mandate. When the public, acting through its legislature, decides that
the individual alone can decide the normative boundaries of their bodies, it has made a conceptual error. Its decision is not consonant with the reciprocal form of right, since it leaves me prey to the private judgments of others. Such an account might lead to a general Kantian critique of the privatization of state functions, but I leave this question for another time.
E.g., Flikschuh 2000; Weinrib 2003, 808-810; Pippin 2006; Byrd and Hruschka 2006, 2010; Ripstein 2009, 148-159; Hodgson, 2010; and [redacted]. For a broader approach that treats not just property but also contract (e.g., right to the use of another’s agency) and status (e.g., limited right to control over another person), see Varden 2010.

ii A notable exception is Pallikkathayil 2016. Accordingly, I will discuss her approach in some detail below. For brief remarks on body Byrd and Hruschka 266 and n 243, Ripstein 161-62, 176-80. Guyer 45-46.


iv Kant 1996a: 6:255-257. References to the Doctrine of Right [Hereafter DR] are to the Prussian Academy pagination appearing in the margins. Technically speaking, rights to the acquisition of external things only become property rights in and through a regime of public law. However, for ease of expression I let this inaccuracy stand.

v For a sophisticated reading of this sort see Byrd and Hruschka.

vi Flikschuh; Waldron

vii Kant signals this entire progression of argument with the claim that while “It is possible to have something external as one’s own only in a rightful condition, under an authority giving laws publically, that is, in a civil condition” (6:255), it is nevertheless the case that “In a state of nature something external can actually be mine or yours but only provisionally” (6:256; all emphases in original). In [reference omitted] and [reference omitted] I treat this argument in great detail.

viii While Kant’s moral philosophy underscores the threat to rational freedom posed by desires and sensible inclinations, Kant’s political philosophy underscores the threat to freedom posed by other people.

ix Translation amended in accordance with Stephen Engstrom’s The Form of Practical Knowledge (Cambridge: Harvard University Press, 2009), 28. Gregor has “insofar as it is joined with one’s consciousness of the ability to bring about its object by one’s action it is called choice.”

x As Kant writes, “a unilateral will cannot serve as a coercive law for everyone with regard to possession that is external and therefore contingent” (6:256).

xi I owe this way of putting the point to Martin Stone.

xii Thus Ripstein concludes: “Your right to your own person is not provisional, because of…two differences…[1] your right to your own person does not require an affirmative act to establish it, and [2] your person can never be physically separated from you” (FF, 177).

xiii Cf. Ripstein, “[T]here is no direct argument from the innate right to humanity to the creation of a civil condition” (FF, 180).

xiv Cited in Bobo, 341.

xv Bobo, 342.

xvi Runyan v. State, 57 Ind. 80. 84 (1877)

xvii Beard v. United States (1895)

xviii Judge Cardozo reasoned, “[i]t is not now and never has been the law that a man assailed in his own dwelling is bound to retreat. If assailed there, he may stand his ground and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home…. Flight is for sanctuary and shelter, and shelter, if not sanctuary, is in the home.”

xix This is because Zimmerman’s lawyers claim that since he was pinned to the ground by Martin there was no meaningful option to retreat.


xxi Just last month a similar event took place in Florida. A white man, Michael Drejka, and Brittany Jacobs, the wife of a black man Markeis McGlockton, got into a dispute about a parking spot outside a convenience store. When McGlockton rushed outside the store to confront the man, he was shot dead by Drejka.

xxii Nor will the Kantian rights-based approach seek to focus primarily on the racist effects of such laws in a society in which black men are perceived as a menacing threat simply by their very presence—though the Kantian state could demand programs aimed at seeking racial inequality so as to ensure the well-functioning of the system of rights.

xxiii See Ripstein.